IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 52

WCC No. 9312-6958

ROGER WIMBERLEY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

SUPER 1 FOODS

Employer.

ORDER GRANTING SUMMARY JUDGMENT

Claimant brought this action for payment of the balance of a 22 percent impairment award. The State Fund refuses to pay the balance because of claimant's incarceration in the Montana State Prison, citing section 39-71-744, MCA (1989) as authority for its refusal.

Both parties seek summary judgment. Neither has presented affidavits, discovery or other sworn evidence in support of the motions. However, in its Response to Petition the State Fund admits the allegations essential to summary judgment.

As in prior cases, this Court will look to the Montana Rules of Civil Procedure for guidance in procedural matters when the Court's own rules are silent. ***Murer v. Montana State Compensation Mutual Ins. Fund,*** *257 Mont. 434, 436, 849 P.2d 1036 (1993)*. This Court's procedural rules recognize motions "for summary ruling" but provide no additional guidance. ARM 24.5.316 (1). In previous cases we have applied Rule 56, Mont.R.Civ.P, to motions for summary judgment, and we will do so in this case.

Rule 56 (a), Mont.R.Civ.P. provides that summary judgment may be entered with or without supporting affidavits. Subsection (c) states:

> The judgment sought shall be rendered forthwith if the **pleadings**, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Thus, if the pleadings establish uncontroverted facts which entitle the moving party to judgment as a matter of law, summary judgment is appropriate.

From the pleadings, the following facts are established:

> 1) On July 28, 1989, the claimant injured his back in the course and scope of his employment with Super 1 Foods.
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> 2) The State Fund insured Super 1 Foods at the time of the injury and accepted liability for the injury.
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> 3) As a result of his injury claimant underwent back surgery.
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> 4) On February 14, 1990, claimant's treating physician gave claimant a 22% impairment rating.
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> 5) On August 24, 1990, the claimant was incarcerated at the Montana State Prison, where he remained until his release from prison on March 24, 1993.
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> 6) On April 22, 1992, while claimant was still incarcerated, a claims examiner for the State Fund wrote to claimant, advising him that he was entitled to an impairment award of $3,874.49, representing accrued impairment benefits from February 14, 1990 until August 24, 1990. A draft for the amount of the accrued benefits was enclosed. The letter further advised claimant that the "remainder of your impairment benefits will be payable either on a bi-weekly basis or in a lump sum once you are no longer incarcerated."
>
> 7) Shortly after claimant's release from prison he retained an attorney who wrote to the State Fund and demanded the balance of the impairment award.
>
> 8) The State Fund has refused to pay any additional impairment benefits.

From these basic facts, certain other factual conclusions can be drawn. First, it is apparent that the parties agree that claimant reached maximum healing on February 14, 1990; impairment ratings are not ordinarily given prior to maximum healing and the State Fund concedes that claimant's entitlement began on February 14, 1990.[(1)] Second, a twenty-two percent impairment rating represents 110 weeks of benefits since "each percentage point of impairment is compensated in an amount equal to 5 weeks times 66% of the wages received at the time of the injury, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury." Section 39-71-703 (1)(a)(i), MCA (1989). Third, 110 weeks after he became eligible for indemnity benefits the claimant was still incarcerated at the Montana State Prison.

Claimant received, or at least was tendered, 27.286 weeks of benefits[(2)]. Despite his incarceration claimant argues that he is entitled to a full 110 weeks of benefits, which amounts to an additional 82.714 weeks. He asserts that his right to 110 weeks of benefits "vested" at the time the impairment rating was rendered, and that if he had been promptly informed of the impairment rating he would have elected to receive the award in a lump sum as permitted by section 39-71-703 (1)(a)(iii), MCA.

At the time of his injury, section 39-71-744, MCA provided:

> **39-71-744. Benefits not due while claimant is incarcerated.** A claimant is not eligible for any disability or rehabilitation compensation benefits while the claimant is incarcerated as the result of conviction of a felony. The insurer remains liable for medical benefits. No time limit on benefits otherwise provided in this chapter is extended due to a period of incarceration.

Where a statute is plain on its face it must be construed as written ***State ex rel. Neuhausen v. Nachtsheim, 253 Mont. 296, 299, 833 P.2d 201 (1992).*** An impairment award is a form of "disability compensation benefits." Section 39-71-703, MCA (1989), provides: "The **benefits** available **for permanent partial disability** are **impairment awards** and wage supplements." The impairment award provisions must be coordinated and harmonized with other sections of the Workers' Compensation Act, ***Dale v. Trade Street, Inc.,*** *258 Mont. 349, 357, 854 P.2d 828 (1993) (courts must "construe the several provisions of a statute to give effect to all, if possible.),* including section 39-71-744, MCA. Thus, claimant's "vested right" to impairment benefits was a qualified one and limited by section 39-71-744, MCA, which rendered him ineligible for impairment benefits during his incarceration.

Claimant's release from prison does not make him eligible for the remaining weeks which would have been due him had he not been incarcerated. Section 39-71-703 (1) specifies the weeks during which impairment benefits are payable. Subsection (1)(a)(ii) provides that the benefits commence upon the date the claimant reaches maximum healing: "Impairment benefits are payable beginning the date of maximum healing." Subsection (1)(a)(iii) specifies that the benefits may be paid biweekly or, at claimant's option, in a lump sum. However, if converted to a lump sum, the subsection requires that the lump sum amount be reduced to present value, showing the biweekly nature of the benefits. Thus, the statute fixes a specific time period for payment of indemnity benefits; the period commences upon maximum healing and ends the number of weeks later which equals five times the impairment rating. There is no authority for the Court to change the time specified by the statute, or for it to toll that time during claimant's incarceration. Since the period for indemnity benefits expired during claimant's incarceration, he is not entitled to further indemnity benefits.

Claimant urges that section 39-71-744, MCA cannot be applied in this case because he did not receive notice of his entitlement to indemnity benefits prior to his incarceration. He states that had he known that the benefits were available he would have elected to receive them in a lump sum. The State Fund argues that his allegations are speculative and that even if he had received a lump sum prior to his incarceration he would have had to pay back any portion which was attributable to periods of incarceration. Claimant rejoins that there is no statutory authority for the State Fund's pay-back argument.

Initially, the claimant's contention that he did not receive timely notice concerning indemnity benefits is a contested matter. The State Fund did not admit this allegation when responding to the petition.(3) Assuming it to be true, however, no lump sum was ever paid; thus, there is no repayment issue. The sole issue presented by the petition is whether the claimant is presently entitled to an additional 87 weeks and 3 days of indemnity benefits. Since neither section 39-71-744 nor section 39-71-703(1) authorize an extension of the benefit period beyond April 11, 1992, and since neither section tolls the payment period during incarceration, claimant is not entitled to additional benefits.

JUDGMENT

1. The Court has jurisdiction of this matter pursuant to section 39-71-2905, MCA.

2. Claimant is not entitled to further indemnity benefits.

3. Claimant is not entitled to a penalty, attorney fees or costs.

4. The petition in this matter is dismissed with prejudice.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 2nd day of June, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. William P. Joyce
Ms. Ann E. Clark

1. Section 39-71-703 (1)(a)(ii), MCA (1989), provides that "impairment benefits are payable beginning the date of maximum healing."

2. There were twenty-seven weeks and two days between February 14 and August 24, 1994, not counting the day of August 24.

In cases where the parties are unable to agree on an impairment rating, section 39-71-711, MCA (1989) provides for an independent impairment evaluation. After the evaluation the insurer is required to commence paying impairment benefits within 30 days unless there is a request for additional evaluations. § 39-71-711(1)(b), MCA (1989).

3. Assuming that claimant in fact did not receive notice of his entitlement prior to his incarceration, there is also no indication as to why the claimant was not notified at an earlier time or whether the State Fund received the impairment rating prior to the incarceration.