

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 72

WCC No. 9401-6986

STEVE WOOD

Petitioner

vs.

MONTANA SCHOOL GROUPS INSURANCE AUTHORITY

Respondent/Insurer for

BIG SKY SCHOOL

Employer.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This matter is before the Court on a motion for summary ruling filed by the respondent, Montana School Groups Insurance Authority (MSGIA). Petitioner, Steve Wood (Wood), agrees that the issues raised by the MSGIA's motion are appropriate ones for summary judgment but argues that they should be resolved in his favor.⁽¹⁾ However, he also contends that after resolving those issues, others still remain for trial. Neither party has requested oral argument.

Summary Judgment Standard

The rules of this Court recognize motions for summary rulings, ARM 24.5.316, but provide no further guidance with respect to such motions. It has therefore been the practice of the Court in recent decisions to treat motions for summary rulings as motions for summary judgment and to apply Rule 56, Mont.R.Civ.P. E.g., ***State Compensation Ins. Fund v. Frank Richter***, WCC. No. 9308-6367, *Order Denying Summary Judgment* (March 4, 1994). Rule 56 (c), Mont.R.Civ.P., provides that summary judgment "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 material fact and that the moving party is entitled to a judgment as a matter of law." See also ***First Security Bank v. Vander Pas***, 250 Mont. 148, 152, 818 P.2d 384 (1991). The rule also contemplates partial summary judgment where uncontroverted facts permit resolution of some but not all issues presented in the case. Rule 56 (d), Mont.R.Civ.P. The issues presented by MSGIA's motion are essentially legal in nature, so there is no need for an extended discussion of the required factual basis for summary judgment.

Discussion

Mr. Wood suffered an industrial accident on November 8, 1990, while employed as a maintenance engineer at Big Sky High School in Missoula. MSGIA accepted liability for the claim and paid temporary total disability benefits and medical expenses. The first controversy in this case is over the computation of Wood's actual wages for purposes of determining the amount of temporary total disability benefits and wage supplement benefits. The second controversy is over Wood's entitlement to wage supplement benefits.

I. Computation Of Wages

In addition to his employment at Big Sky High School, Wood operated his own excavation business and also worked as a ditch rider for Big Flat Irrigation District, a job that was seasonal. In computing "the wages received at the time of the injury," § 39-79-701, 702 and 703, MCA (1989),⁽²⁾ MSGIA has refused to include wages from either employment on the ground that those employments were not "concurrent." It also refuses to include any amounts from self-employment because claimant elected not to obtain workers' compensation insurance coverage for his own business.

Section 39-71-123, MCA (1989) defines "wages" for purposes of the Workers' Compensation Act. It therefore defines "wages" for purposes of calculating temporary total disability benefits (§ 39-71-701 (3), MCA (1989)) and wage supplement benefits (§ 39-71-703 (b)(i), MCA (1989)). The section requires inclusion of wages from concurrent employments in computing wages, but specifically excludes wages from self-employment where the self-employed worker elects not to be covered by workers' compensation insurance. Section 39-71-123 (4)(c), MCA provides:

(c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments, *except self-employment as a sole proprietor or partner who elected not to be covered*, from which the employee is disabled by the injury incurred. [Italic added.]

Wood testified in his deposition that he operated his excavation business as a sole proprietor and was not covered by workers' compensation insurance. (Wood Dep. at 16, 20.) Therefore, Wood's earnings from his excavation business have been properly excluded by MSGIA in computing his time-of-injury wages.⁽³⁾

MSGIA argues that the claimant's wages from employment as a ditch rider should also be excluded in the wage calculation because that employment was not "concurrent" within the meaning of the statute. The facts concerning the employment are not in dispute. Claimant had worked for several years for the irrigation district. His employment was seasonal, running from April to October of each year. In 1990 he worked until mid-October, approximately three weeks prior to his November 8, 1990 injury. He planned on continuing as a ditch rider the next spring and the irrigation district considered his employment to be continuous. He was free to seek other employment and "would have taken a better job if one had been offered." (Wood Affidavit.) However, he would have given the irrigation district at least two weeks notice had he accepted another job.

In ***Lamping v. State Compensation Ins. Fund.***, WCC No. 9303-6738 (August 25, 1993), this Court held that a school bus driver's wages were from concurrent employment even though the driver was injured on a summer job and did not drive for the school district during the summer months. The claimant in ***Lamping*** was injured on July 19, 1988, while working for Helena Sand and Gravel. During the school year he was employed as a school bus driver. The prior school year had ended, and he had not driven for the school district since June, 1988. However, he had signed a contract to drive a bus during the upcoming school year. MSGIA argues that ***Lamping*** was wrongly decided and that in any event the written contract in ***Lamping*** distinguishes it from this case.

In ***Lamping*** the insurer argued that the claimant's employment as a bus driver during the school year was not "concurrent employment" because he was not actually employed at that job at the time of his injury. My predecessor in office, Judge Timothy W. Reardon, disagreed. While observing that the "at the time of injury" language in sections 39-71-701 and 702, MCA "suggests that claimant's bus driving wage *perhaps* should not be included," he concluded that prior precedents of the Montana Supreme Court mandated the inclusion of the bus driving wages in computing benefits. (***Lamping*** at 10; *italics added.*)

I have on previous occasions overruled prior legal precedents of this Court, but I have done so only when I have reached a firm and reasoned conviction that the original decision was erroneous as a matter of law. However I might have decided the issue if presented as a matter of first impression, I view the issue as a difficult one and conclude that even if further analysis caused me to reach a contrary conclusion, I would be unable to reach a level of conviction which would permit me to overrule ***Lamping***. As Judge Reardon noted, there is precedent for consideration of seasonal fluctuations in employment when determining wages. E.g., ***Sandahl v. James A. Slack, Inc.***, 225 Mont. 208, 732 P.2d 831 (1987). After *Lamping's* injury the 1989 Legislature added a specific provision concerning concurrent injuries. §39-71-123 (4), MCA (enacted by 1989 Montana Laws, ch. 333, § 12.) That provision, however, does not define "concurrent" and expressly ties the method of calculating concurrent wages to the method for calculating the wages of the time-of-injury job. Section 39-71-123 (4) (a), MCA provides:

For the purpose of calculating compensation benefits for an employee working concurrent employments, the average actual wages must be calculated as provided in subsection (3).

Subsection (3) in turn provides that:

(3) For compensation benefit purposes, the average actual wages four pay periods immediately preceding the injury are the employee's wages, except if:

...

(b) *for good cause shown by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods. [Italics added.]*

The highlighted language expressly countenances the use of other wage periods where the wages of the four weeks preceding the injury do not "accurately reflect the claimant's employment history." The 1989 amendment is certainly no clear repealer of prior precedents concerning seasonal variations. I therefore find that the decision in **Lamping** is controlling precedent.

Wood's employment as a ditch rider has no different status than Lamping's as a school bus driver. While Lamping's continued employment for the upcoming year was by written contract, the uncontroverted facts in this case show that claimant's employment was continuous pursuant to an oral agreement. The Workers' Compensation Act does not have a statute of frauds and does not distinguish employment which is performed pursuant to written contract from employment performed under an oral understanding. Therefore, Wood's wages from his employment as a ditch rider should be included in computing temporary total and wage supplement benefits. As in **Lamping**, however, the claimant's earnings as a ditch rider shall be used only in computing benefits for those months he was customarily employed as a ditch rider.

II. Wage Loss Benefits Dispute

At the time of Wood's injury in November 1990, procedures enacted by the 1987 Legislature and codified under part 10 of chap. 71, Title 39, governed disputes concerning an injured worker's ability to return to work. Under those provisions the insurer must initially designate a rehabilitation provider. § 39-71-1014 (a), MCA (1989). The designated provider determines the first appropriate rehabilitation option for the injured worker. § 39-71-1015 (a), MCA (1989). Those options, in order, are:

- (a) return to the same position;
- (b) return to a modified position;
- (c) return to a related occupation suited to the claimant's education and marketable skills;
- (d) on-the-job training;
- (e) short-term retraining program (less than 24 months);
- (f) long-term retraining program (48 months maximum); or
- (g) self-employment.

§ 39-71-1012 (2), MCA (1989). Where the worker in fact does not return to work, the Department of Labor and Industry (DLI) is required to designate a rehabilitation panel to evaluate the worker and recommend a first appropriate rehabilitation option. § 39-71-1017, MCA (1989). Following the issuance of the panel's report, the DLI must consider the report and issue its own "initial order of determination" specifying the first appropriate option for the worker. § 39-71-1018 (1), MCA (1989). The initial order triggers the right to a hearing before the DLI. § 39-71-1018 (2), MCA (1989). After a hearing the DLI is required to issue a "final order." § 39-71-1018 (2), MCA (1989). Where neither party requests a hearing "the initial order becomes the final order of determination and must be issued by the department." § 39-71-1018 (3), MCA (1989). The final order triggers the right of appeal to this Court. § 39-71-1018 (3), (4), MCA (1989).

The procedure outlined above was followed in this case. On July 21, 1993, a Rehabilitation Panel appointed by the DLI issued a report, signed by all three panel members, "recommending option (c), return to a related occupation suited to the claimant's education and marketable skills, as the first appropriate return to work option." (Ex. A to Respondent's Brief in Support of Motion for Summary Ruling.⁽⁴⁾) The report identified three positions -- fuel oil truck driver, forklift driver and fireman (boiler operator) as typically available and within Wood's physical abilities, education and marketable skills. Based on the panel report, on July 30, 1993, the DLI issued an *Initial Order of Determination* designating option (c) as the most appropriate rehabilitation option. The *Order* notified Wood that "[i]f no party submits an exception or requests a hearing within ten (10) working days, the initial order of determination becomes the final order of determination and must be issued by the Employment Relations Division." Wood did not appeal and on August 17, 1993, the Department issued the *Final Order of Determination* upholding the designation of option (c).

The foregoing history is important to the resolution of this case because Mr. Wood requests this Court to review the rehabilitation evidence and determine whether claimant is employable, and, if so, in which positions. As fully framed by the complaint, the issue Wood submits for adjudication is:

With regard to his wage supplement rate, is there enough rehabilitation evidence on file to determine Claimant's employability? And, if so, for which positions can Claimant reasonably compete based on his age, education, experience and disability? What do those positions pay for purposes of establishing his wage supplement rate? What is Claimant's wage supplement rate?

(Petition for Hearing, ¶ 5(a).) MSGIA argues that Wood is collaterally estopped from litigating this issue, citing the DLI's final determination and ***Martelli v. Anaconda-Deer Lodge County***, 258 Mont. 168, 852 P.2d 579 (1993). In ***Martelli*** the Supreme Court held that the claimant in that case was collaterally estopped from litigating a claim that he was permanently totally disabled where he failed to appeal a DLI final order determining that option (c) was the most appropriate rehabilitation option.

In ***Martelli*** the claimant requested and received a contested case hearing following the issuance of the initial order. Wood argues that since he did not receive a hearing before the DLI his case is different. The decision in ***Martelli***, however, specifically states that the final order issued by the DLI was a final judgment for purposes of applying the doctrine of collateral estoppel. Wood had an opportunity to request a contested case hearing before the DLI, and the statute required him to do so if he wished to litigate the appropriateness of the option set forth in the DLI's initial order. He cannot deliberately bypass the statutory procedures governing appeals of DLI rehabilitation determinations. The final order of the DLI is no less a final judgment just because he attempted to do so. He is, therefore, collaterally estopped from relitigating issues which were determined by the DLI in its final order, as well as any other issue which is "so intertwined that to decide the issue before it, the Workers' Compensation Court would have to rehear the precise issue previously decided by the Division [Department]." ***Martelli***, 258 Mont. at 169.

As applied in the present case, the Court is precluded from reviewing the sufficiency of the rehabilitation evidence or the finding that option (c) is the first appropriate return to work option. Since the DLI's option (c) determination was premised on its determination that claimant is capable of performing three jobs typically available in the labor market, the Court is similarly precluded from redetermining the positions for which Wood can reasonably compete.

The only wage supplement issue remaining is the amount of wage supplement, if any, due Mr. Wood. That matter, including the determination of "the wages the worker is qualified to earn in the worker's job pool," § 39-71-703 (b)(i), MCA (1989), is within this Court's jurisdiction. While the Rehabilitation Panel described a range of wages for the various positions it identified, neither it nor the DLI set a specific amount as that which Wood is qualified to earn. Moreover, that issue is not one of the matters delegated to the DLI for determination. The scope of its jurisdiction extends only to identification of the first appropriate rehabilitation option. A determination concerning specific earning capacity is not essential to its decision, and is therefore not entitled to preclusive effect since the doctrine of collateral estoppel extends only to the identical issue or "precise question" litigated in the prior proceeding, **Anderson v. State**, 250 Mont. 18, 817 P.2d 699 (1991) (*holding that judicial review of drivers license suspension was not entitled to preclusive effect in a separate damages action alleging that the suspension was wrongful since none of the three underlying issues to be determined in the judicial review were identical to the issue raised in the civil action*).

Wood also argues that the collateral estoppel doctrine is inapplicable because the rehabilitation panel procedures were repealed effective July 1, 1991,⁽⁵⁾ and cannot be applied to disputes which are litigated after that date. He contends that he "was under no obligation to comply with the cited provisions, as they are clearly procedural in nature and have no lasting affect beyond the point of their repeal." (Petitioner's brief at 3.)

The same contention was rejected by this Court in **Downam v. State Compensation Mutual Insurance Fund**, WCC No. 9112-6342 (May 1, 1992):

. . . The claimant alleges that the statutory amendment in 1991, which took effect July 1, 1991, was procedural in nature and therefore the repealer made the July panel report and subsequent August 22, 1991 order without effect.

The insurer and the intervenor argue that even though the cited provisions of the rehabilitation sections of the Act were repealed in 1991, they are substantive in nature and hence remain viable since the contractual rights of the parties at the time of the injury may not be retroactively impaired. (See Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 730 P.2d 380 (1986).)

The Court agrees with the intervenor and the insurer on this issue. We note initially that the 1991 amendments do not contain an expression by the legislature as to their retroactive effect. Secondly, the Court believes that the 1991 amendments are substantive in nature.

Again, it must be noted that workers' compensation is governed in large part by contract principles. Kienas v. Peterson, 191 Mont. 325, 624 P.2d 1 (1980). The

date of injury fixes the rights and obligations of both claimants and insurers. Buckman, supra. Those rights and obligations include the provisions relative to rehabilitation. To hold otherwise would mean that the statutory maximum of 26 weeks of "total rehabilitation benefits" provided for in section 39-71-1023, MCA, could be repealed for injuries obligated to a maximum of 104 week of rehabilitation benefits as provided in section 39-71-1004, MCA. Clearly, that is a substantive change.

(Id. at 6.) While this decision was issued by my predecessor in office, I concur in the holding. One of the obvious purposes of the provision for twenty-six weeks of total rehabilitation benefits, § 39-71-1023, MCA (1989), is to provide the disabled worker with compensation during the rehabilitation panel process. Indeed the benefits are triggered by the Department's designation of a rehabilitation provider:

Eligibility for total rehabilitation benefits begins on the date of maximum healing and continues for a period not to exceed 26 weeks *after the date notice is given to the department by the insurer that a rehabilitation provider has been designated*.

§ 39-71-1023 (2), MCA (1989). In turn, the designation of the rehabilitation provider sets in motion the remaining procedures for determining the first appropriate rehabilitation option. If some of those procedures are abandoned then the wheels come off of the entire statutory scheme. As did Judge Reardon, I hold that the rehabilitation panel procedures enacted in 1987, and codified at section 39-71-1012 et seq., MCA (1987), are applicable to injuries occurring between the effective date of the procedures and the date of their repeal. The petitioner in this case ignored the provisions at his own risk and is precluded from collaterally attacking the final DLI decision.

ORDER

For the reasons set forth in the foregoing discussion, the Court makes the following determinations:

1. Earnings from petitioner's excavation business are not includable in computing petitioner's time-of-injury wages.
2. Petitioner's earnings as a ditch rider are includible in computing petitioner's time of injury wages but shall be used only in computing compensation during those months he was customarily employed as a ditch rider.
3. Petitioner is collaterally estopped from relitigating the first appropriate rehabilitation option designated in the Department of Labor and Industry's August 17, 1993, *Final Order of Determination*. His is similarly estopped from relitigating the Department's designation of jobs as within petitioner's capabilities and as generally available in the labor market.
4. Pursuant to section 39-71-703 (b)(i), MCA, this Court has jurisdiction to determine the petitioner's entitlement to wage loss benefits based on his ability to return to the jobs designated in the Department of Labor and Industry's August 17, 1993, *Final Order of*

Determination. The parties have not presented sufficient uncontroverted facts to allow the Court to enter summary judgment with respect to the amount due petitioner.

5. The amounts due petitioner, if any, in additional temporary total disability benefits and for wage supplement benefits shall be determined after trial.

6. Also remaining for determination are petitioner's request for a lump sum payment of any wage supplement benefits, a penalty and attorney fees.

DATED in Helena, Montana, this 12th day of August, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Kristine L. Foot
Mr. Leo S. Ward

1. Petitioner's Brief in Opposition to Respondent's Motion for Summary Ruling. After arguing that the issues raised by MSGIA should be considered and resolved in his favor, Wood states: "For all of the above reasons, Petitioner argues that the Court can appropriately consider the Motion for Summary Ruling, joining Petitioner as a co-movant." *Id. at 12.*

2. Since the law in effect on the date of injury governs Mr. Wood's entitlement to benefits, ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986), the 1989 version of the law is applied in this case.

3. In his brief Wood resists exclusion of self-employment wages. However, he altogether ignores the express exclusion of the statute.

4. While DLI documents referred to in this Order are not certified or otherwise authenticated, Wood does not dispute their authenticity or the procedural history which appears from the documents.

5. 1991 Laws of Montana, ch. 574, § 14.