IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 4

WCC No. 2019-4816

TAMARA BARNHART

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Summary: Respondent moves this Court to reconsider its grant of summary judgment to Petitioner. For the first time in this case, Respondent cites § 39-71-739, MCA, and argues that it supports its position that it lawfully recalculated Petitioner's wages under § 39-71-123(4)(c), MCA, when she reached MMI because she was released to return to work at one of her concurrent employments and was therefore no longer disabled from that employment. Based on its recalculation of Petitioner's wages when she reached MMI, Respondent asserts that it lawfully reduced her PPD rate for some parts of her PPD award.

Held: This Court denied Respondent's motion because this Court has long held that, unless there is a compelling reason, a party cannot raise a legal argument or theory for the first time in a motion for reconsideration. Respondent has not presented a compelling reason for its failure to cite § 39-71-739, MCA, in its summary judgment brief or at the hearing. Its argument that it "did not have the opportunity to brief the applicability of § 39-71-739, MCA" is baseless.

¶ 1 Respondent Montana State Fund (State Fund) moves this Court to reconsider its grant of summary judgment to Petitioner Tamara Barnhart.[1] This Court ruled that, under § 39-71-123(4)(c), MCA, Barnhart's wages for her claim are the aggregate of her average

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[1] *Barnhart v. Mont. State Fund*, 2022 MTWCC 1.

wages from her concurrent employments at the time of her injury.[2] In turn, this Court ruled that, under § 39-71-703(6), MCA, which provides that a claimant's rate for permanent partial disability (PPD) benefits is to be based on the "wages received at the time of injury," Barnhart's PPD rate is to be based on the calculation of her wages under § 39-71-123(4)(c), MCA.[3]

¶ 2 Citing ARM 24.5.337(1)(c), which provides that a party can move for reconsideration when this Court's decision "conflicts with a statute or controlling decision not addressed by the court," State Fund asks this Court to reconsider its decision. For the first time in this case, State Fund cites § 39-71-739, MCA, which states:

> If aggravation, diminution, or termination of disability takes place or is discovered after the rate of compensation is established or compensation is terminated in any case where the maximum payments for disabilities as provided in this chapter are not reached, adjustments may be made to meet such changed conditions by increasing, diminishing, or terminating compensation payments in accordance with the provisions of this chapter.

State Fund takes issue with this Court's explanation that, "Barnhart is correct that the phrase 'from which the employee is disabled by the injury incurred' in § 39-71-123(4)(c), MCA, is assessed at the time of injury and means that, for a claimant with concurrent employments, the earnings from the employments from which the claimant is disabled at the time of injury are to be included in the calculation of her 'wages.' "[4] State Fund argues that § 39-71-739, MCA, supports its argument that, when Barnhart reached maximum medical improvement (MMI), it lawfully recalculated her wages under § 39-71-123(4)(c), MCA, and, in turn, reduced her PPD rate for some parts of her PPD award, because she was no longer disabled from one of her concurrent employments. State Fund asks this Court to "grant its motion for reconsideration and enter judgment in its favor."

¶ 3 ARM 24.5.337(2) states:

> A party shall file any motion for reconsideration of a decision within the time set forth in ARM 24.5.320. The court reviews the motion before any other party responds. The court denies those motions it determines have no merit and orders the other party or parties to respond to those motions it determines may have merit. If the court orders a response, it deems the motion submitted for decision upon receipt of the response or the expiration of the time for the response unless the court requests oral argument. The court does not consider reply briefs from moving parties.

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[2] *Id.*, ¶ 21.

[3] *Id.*

[4] *Id.*

¶ 4 Pursuant to this rule, this Court reviewed State Fund's Motion for Reconsideration and determined that it is without merit because State Fund's argument that § 39-71-739, MCA, supports its position is not properly before this Court. Thus, Barnhart does not need to file a response.

¶ 5 This Court has long held that, absent a compelling reason, a party may not raise a legal argument or theory for the first time in a motion for reconsideration.[5] Like other rules that require litigants to present their legal arguments and theories before the trial court issues its decision, this Court's longstanding rule is based on ensuring the fairness of the judicial process.[6]

¶ 6 Here, State Fund has not established a compelling reason for its failure to cite § 39-71-739, MCA, during the summary judgment stage of this case. State Fund asserts that Barnhart argued for the first time in her summary judgment reply brief that, for purposes of calculating a claimant's wages under § 39-71-123(4)(a), MCA, disability is assessed only at the time of injury. Therefore, State Fund argues that it "did not have the opportunity to brief the applicability of § 39-71-739, MCA." However, State Fund's argument is baseless. The record shows that it has always been Barnhart's position that, under § 39-71-123(4)(c), MCA, her wages were set at the time of her injury. In her Petition for Hearing, Barnhart contended that § 39-71-123(4)(c), MCA, provides that her wages are to be calculated on the aggregate average wages from her concurrent employments

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[5] *See, e.g.*, *Fleming v. Int'l Paper Co*., 2005 MTWCC 57, ¶¶ 5, 8 (noting that this Court had denied Petitioner's first motion for reconsideration because he had raised legal arguments for the first time and ruling that another legal issue was not properly before this Court on a second motion for reconsideration "because it is being raised for the first time in Petitioner's second motion for reconsideration. Assuming the merits of this argument, Petitioner has offered no compelling reason why it was not raised either in response to International Paper's motion to dismiss, by way of Petitioner's own motion before International Paper was dismissed from this suit, or in Petitioner's first motion for reconsideration. Absent such a compelling reason, the Court will not consider an issue that has not been raised previously despite ample opportunity to do so.") *rev'd on other grounds*, 2008 MT 327, 346 Mont. 141, 194 P.3d 77, *abrogated by Murphy v. Westrock Co*., 2018 MT 54, 390 Mont. 394, 414 P.3d 276; *Bauer v. C.N.A. Commercial Ins.*, 2002 MTWCC 2A, ¶¶ 3-4 (ruling that a motion for reconsideration was without merit because "a party cannot hold back evidence in the face of a motion and then request reconsideration based upon a subsequent tender of the evidence" and because the new legal issues that were made in the motion for reconsideration "were not raised in the pleadings or in briefs leading up to the summary judgment, [and, therefore,] they cannot be considered on a motion to reconsider."); *Wiard v. Liberty Nw. Ins. Corp*., 2001 MTWCC 31A, ¶ 2 (ruling that motion for reconsideration in which the claimant asked this Court to consider depositions was without merit because "claimant did not cite them in his response to the motion and did not request the Court to wait for them. The facts he offered in response to the motion were fully considered by the Court. He cannot hold back facts or evidence and then tender them after the motion was decided."); *Hiett v. Mont. Sch. Grp. Ins. Auth*., 2001 MTWCC 66, ¶ 9 (denying the claimant's motion for reconsideration on the grounds that this Court's decision deprived her of her constitutional rights because, "The argument is belated. It was never raised in the pleadings, Pretrial Order, or prior arguments.").

[6] *See Day v. Payne*, 280 Mont. 273, 276–77, 929 P.2d 864, 866 (1996) (explaining, "In Montana, the general rule is that '[a]n issue which is presented for the first time to the Supreme Court is untimely and cannot be considered on appeal.' The rule applies to both substantive and procedural matters, as well as to a change in a party's theory of the case. It is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable." (alteration in original) (citations omitted)).

at the time of her injury and, in turn, that her PPD rate is to be based on that calculation.[7] In her summary judgment brief, Barnhart argued that § 39-71-123(4)(c), MCA, provides that her wages are to be calculated on her aggregate actual earnings at the time of her injury, that her PPD rate was to be based on that calculation, and that there was "no statutory basis" for State Fund's argument that it could recalculate her wages and PPD rate when she reached MMI.[8] Obviously, State Fund had the opportunity to counter Barnhart's arguments by citing § 39-71-739, MCA, and arguing that it was the statutory basis for its position that it could recalculate her wages under § 39-71-123(4)(c), MCA, when she reached MMI because she was no longer disabled from one of her concurrent employments. Moreover, in her reply brief, Barnhart countered State Fund's argument that it could lawfully recalculate her wages when she reached MMI under § 39-71-123(4)(c), MCA, by arguing that, "There is absolutely no support in the statute or elsewhere for [State Fund's] necessary presumption that the 'from which the employee is disabled by the injury' language is assessed after MMI and not at the time of injury when the calculation of 'wages' is addressed."[9] This Court then held a hearing, at which State Fund again had the opportunity to cite § 39-71-739, MCA, and argue that it supported its position. It is evident to this Court that State Fund did not cite § 39-71-739, MCA, at the summary judgment stage of this case because it either did not adequately research the Workers' Compensation Act or because it did not think that § 39-71-739, MCA, supported its position. Regardless of the reason, State Fund had the opportunity to cite § 39-71-739, MCA.[10]

¶ 7 To be sure, if State Fund had cited § 39-71-739, MCA, in its summary judgment brief or at the hearing, and this Court did not address it in its decision, then this Court would grant its Motion for Reconsideration under ARM 24.5.337(1)(c) because, while not dispositive of the issue in this case,[11] § 39-71-739, MCA, arguably lends some support to State Fund's position. However, because State Fund had ample opportunity to cite § 39-71-739, MCA, during the summary judgment stage of this case, it cannot get a second

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[7] *See* Pet. For Hearing, ¶¶ 11, 19-20 (alleging that Petitioner's average weekly wage from her concurrent employments at the time of her injury was $869.31, that her PPD rate was therefore $384, and stating, "Petitioner respectfully submits that there can be only one PPD rate used to calculate the impairment award and permanent partial disability benefits. . . . The appropriate PPD rate should be $384/week and calculated from the actual combined wages of $869.31 that Petitioner earned at the time of injury.").

[8] Pet.'s Br. in Supp. of Mot. for Summ. J., p. 5.

[9] Pet.'s Reply Br. in Supp. of Mot. for Summ. J., p. 3.

[10] This Court notes that, while preparing for the hearing and while drafting its decision, it wondered whether § 39-71-739, MCA, was applicable to the issue in this case. However, this Court did not conduct any research into § 39-71-739, MCA, because, as stated by the Montana Supreme Court, "the courts do not owe a duty 'to a party to conduct legal research on his behalf, to guess as to his precise position, or to develop legal analysis that may lend support to that position.' " *Jacky v. Avitus Grp.*, 2013 MT 296, ¶ 25, 372 Mont. 134, 311 P.3d 423 (citations omitted).

[11] Under the rules of statutory construction, Barnhart would have several reasonable arguments that § 39-71-739, MCA, does not allow State Fund to recalculate a claimant's wages and PPD rate when she reaches MMI; e.g., Barnhart would surely argue that § 39-71-703(6), MCA, a specific statute which provides that a claimant's PPD rate is to be based on the "wages received at the time of injury," controls over § 39-71-739, MCA, a general statute.

bite at the apple by citing it for the first time in its Motion for Reconsideration. Accordingly, this Court enters the following:

ORDER

¶ 8 State Fund's Motion for Reconsideration is **denied**.

DATED this 11th day of February, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Paul D. Odegaard and Lucas A. Wallace
Nick Mazanec