

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 6

WCC No. 2007-1908

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ROBERT BENHART

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANY

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner petitioned the Court to order Respondent to convert his PTD benefits to a lump sum.

**Held:** Petitioner's petition is denied. He has not demonstrated that he is entitled to a lump-sum conversion pursuant to § 39-71-741, MCA.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-741.** Where Petitioner's debts consist of monthly payments on a truck, boat, and 4-wheeler which were all purchased subsequent to his industrial injury, and where the monthly payment on the boat alone exceeds his household budget's monthly shortfall, Petitioner does not meet the statutory criteria of § 39-71-741(1)(c), MCA, which would entitle him to convert his PTD benefits to a lump-sum payment.

**Benefits: Lump Sums: Generally.** Where Petitioner's debts consist of monthly payments on a truck, boat, and 4-wheeler which were all purchased subsequent to his industrial injury, and where the monthly payment on the boat alone exceeds his household budget's monthly shortfall, Petitioner does not meet the statutory criteria of § 39-71-741(1)(c), MCA, which would entitle him to convert his PTD benefits to a lump-sum payment.

**Benefits: Lump Sums: Best Interests.** Where Petitioner's debts consist of monthly payments on a truck, boat, and 4-wheeler which were all purchased subsequent to his industrial injury, and where the monthly payment on the boat alone exceeds his household budget's monthly shortfall, Petitioner does not meet the statutory criteria of § 39-71-741(1)(c), MCA, which would entitle him to convert his PTD benefits to a lump-sum payment.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-741.** Although Petitioner asserted that a lump-sum payment of his PTD benefits would be in his best interests because the rental property where he resides has changed ownership and may be sold, the new property owner testified that he has no immediate plans to sell the property. Where Petitioner's search for a suitable home to purchase consisted only of looking through real estate flyers at the urging of his counsel, the Court was unconvinced that Petitioner would actually purchase a home with a lump-sum payment if one were granted.

**Benefits: Lump Sums: Best Interests.** Although Petitioner asserted that a lump-sum payment of his PTD benefits would be in his best interests because the rental property where he resides has changed ownership and may be sold, the new property owner testified that he has no immediate plans to sell the property. Where Petitioner's search for a suitable home to purchase consisted only of looking through real estate flyers at the urging of his counsel, the Court was unconvinced that Petitioner would actually purchase a home with a lump-sum payment if one were granted.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-741.** While the "necessities of life" may include more than mere food and shelter, Petitioner did not demonstrate a financial need relating to the necessities of life where Petitioner's monthly payments for the purchase of a recreational boat and 4-wheeler exceeded his monthly household shortfall.

¶ 1 The trial in this matter was held on Thursday, November 15, 2007, in Helena, Montana. Petitioner Robert Benhart was present and represented by J. Kim Schulke. Respondent was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1-7, 9-26, 31, and 34 were admitted without objection. Exhibit numbers 27-30, 32, or 33 were not submitted. Respondent objected to Exhibit 8 on the grounds of hearsay. I admitted it as an exception under Mont. R. Evid. 803(17).

¶ 3 Respondent's counsel further brought my attention to an objection which he put on the record during Gary Holt's (Holt) deposition, objecting pursuant to Mont. R. Evid. 408 to a line of questioning by Petitioner's counsel. Holt is a claims adjuster for Respondent. The testimony in question pertains solely to Petitioner's entitlement to attorney fees and a penalty. Since I have concluded Petitioner is not entitled to the relief he seeks in this case, he is not entitled to attorney fees and a penalty. Therefore, Respondent's objection to the line of questioning at Holt's deposition is moot and I do not reach the merits of it.

¶ 4 Witnesses and Depositions: The depositions of Petitioner, Kathy Benhart, Dr. Raymond A. Geyer, Gary Holt, and Stephen Keaster were taken and submitted to the Court. Petitioner and Kathy Benhart were sworn and testified at trial.

¶ 5 Issues Presented: The Pretrial Order states the following contested issues of law:

¶ 5a Whether Petitioner is entitled to a lump sum conversion of his permanent total disability benefits.

¶ 5b Whether Petitioner has demonstrated financial need that relates to either the necessities of life or an accumulation of debt incurred prior to the injury.

¶ 5c Whether Petitioner has demonstrated financial need that arose either subsequent to the date of injury or because of reduced income as a result of the injury.

¶ 5d What is Petitioner's current financial condition?

¶ 5e What would Petitioner's financial condition be under the lump sum conversion proposal?

¶ 5f Whether Petitioner is entitled to a penalty, attorney's fees and costs.<sup>1</sup>

¶ 6 At the close of arguments, I issued a bench ruling pursuant to ARM 24.5.335 following a brief recess. The following findings and conclusions are in accordance with that ruling.

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<sup>1</sup> Pretrial Order at 2.

## FINDINGS OF FACT

¶ 7 Petitioner was injured on January 15, 2003, while performing his duties as a truck driver for Lumber Yard Supply Company of Great Falls, Montana. Respondent accepted liability for the injury.<sup>2</sup>

¶ 8 Petitioner lives in Belt, Montana, with his wife Kathy Benhart (Kathy). Kathy handles the family's finances.<sup>3</sup>

¶ 9 The workers' compensation claim that is the subject of the present case occurred in January 2003. In previous litigation, this Court concluded that Petitioner is permanently totally disabled (PTD) as a result of his work-related injury.<sup>4</sup>

¶ 10 Petitioner was first diagnosed with Hepatitis C in 1999. The cause of his condition is unknown and is not work related. Petitioner eventually received a liver transplant. Petitioner incurred significant medical bills, travel expenses, and other expenses as a result of his liver problems.<sup>5</sup>

¶ 11 Most or all of Petitioner's later treatment for his liver problems, including his liver transplant, occurred in Salt Lake City. In March 2005, Petitioner leased a half-ton Dodge pick-up truck to use as transportation for getting to and from follow-up medical care in Salt Lake City. Prior to leasing the truck, Petitioner had a small car with over 100,000 miles on it, which Petitioner testified was difficult to use for the trip to Salt Lake City because he was unable to lie down in it when he was not feeling well.<sup>6</sup>

¶ 12 Petitioner has also had multiple surgeries for a hernia which resulted from his work-related injury. The most recent of those surgeries was also performed in Salt Lake City and required him to travel there for follow-up care. Petitioner testified that he now receives all of his medical care in Great Falls and it is currently not necessary for him to travel to Salt Lake City.<sup>7</sup>

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<sup>2</sup> Pretrial Order at 1-2.

<sup>3</sup> Trial Test.

<sup>4</sup> For Petitioner's underlying claim, see *Benhart v. Liberty Northwest*, 2007 MTWCC 3.

<sup>5</sup> Trial Test.

<sup>6</sup> Trial Test.

<sup>7</sup> Trial Test.

¶ 13 The lease on Petitioner's pick-up truck expires August 16, 2008.<sup>8</sup> He does not have a written agreement to purchase the truck at the time the lease expires. The monthly payment on the leased pick-up truck is \$362.46.<sup>9</sup> Petitioner points out that when the lease expires, this will not actually add to his disposable income because he will have to purchase or lease another vehicle.<sup>10</sup>

¶ 14 Petitioner and his wife also own a 2000 or 2001 Pontiac Grand Am and a 1975 Dodge pick-up truck. Petitioner testified that he purchased the 1975 truck about three years ago. It was in running condition at that time but it broke down about six months prior to trial and he has not fixed it.<sup>11</sup>

¶ 15 On April 3, 2006, Petitioner received a lump-sum payment of \$16,876.46.<sup>12</sup> This money was spent within six months. Much of it went to dental expenses, travel expenses associated with Petitioner's ongoing medical care, and other medical-related expenses.<sup>13</sup> Out of the lump sum, \$3,114.19 went toward paying off Kathy's car.<sup>14</sup>

¶ 16 Petitioner's household income includes his workers' compensation benefits, Social Security benefits, and his wife's income from her job.<sup>15</sup> Kathy is an insurance processor for the Great Falls Clinic. Her take-home pay is \$501.54 every two weeks.<sup>16</sup> This amount does not include six percent of her wages, which she has put directly into a retirement account.<sup>17</sup> Petitioner receives \$1,120.00 in monthly Social Security disability benefits.<sup>18</sup>

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<sup>8</sup> Trial Test.

<sup>9</sup> Ex. 34 at 37.

<sup>10</sup> Trial Test.

<sup>11</sup> Trial Test.

<sup>12</sup> Ex. 34 at 23.

<sup>13</sup> Trial Test.

<sup>14</sup> Petitioner's Dep. 22:20-24.

<sup>15</sup> Trial Test.

<sup>16</sup> Ex. 34 at 33; Trial Test.

<sup>17</sup> Trial Test.

<sup>18</sup> Ex. 34 at 29.

Kathy testified that Petitioner receives \$181.01 every two weeks in workers' compensation benefits.<sup>19</sup>

¶ 17 The Benharts have two sons, ages 21 and 24. The younger son lives with Petitioner and his wife, although he is employed full time. Petitioner's financial records indicate that he and his wife are also paying automobile insurance on one son's vehicle, but Petitioner explained that they write the check and their son pays them in cash. Kathy testified that until recently, her son did not have a checking account. He would give her cash and she would write checks to cover his expenses. Kathy stated that her son also gives her cash to help out with utilities and groceries.<sup>20</sup>

¶ 18 Petitioner testified that if he receives a lump sum settlement of his PTD benefits, he would like to buy a house and pay off his existing bills, which consist of credit card debt and loans for a boat and a four-wheeler.<sup>21</sup>

¶ 19 Petitioner purchased the four-wheeler in May 2007. Petitioner testified that he does not know how much money he had in his checking and savings accounts at the time he bought it. Petitioner traded in a 2004 or 2005 four-wheeler for his new one. Kathy testified that their payments on the older four-wheeler were \$99.00 per month. The older four-wheeler was smaller with a 500-cc engine and did not have as much power as the new one, which has an 800-cc engine.<sup>22</sup> The minimum monthly payment on the new four-wheeler is \$119.00. As of September 1, 2007, the balance remaining was \$10,387.75.<sup>23</sup>

¶ 20 Kathy testified that Petitioner discussed purchasing a new four-wheeler with her prior to making the purchase. She stated that he bought it because he "[j]ust wanted it."<sup>24</sup> Kathy explained that they did not have a budgeting plan for making the payment on their fixed income but they would just find a way to do it.<sup>25</sup>

¶ 21 Petitioner and his family use the four-wheeler for fishing, hunting, and recreation. Petitioner enjoys shooting coyotes for recreation and uses his four-wheeler to hunt them

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<sup>19</sup> Trial Test.

<sup>20</sup> Trial Test.

<sup>21</sup> Trial Test.

<sup>22</sup> Trial Test.

<sup>23</sup> Ex. 34 at 483.

<sup>24</sup> K. Benhart Dep. 22:5-10.

<sup>25</sup> K. Benhart Dep. 24:3-8.

three or four times a week. Petitioner stated that he does not hunt as frequently as he used to and he is unable to hunt on foot.<sup>26</sup> Petitioner also uses the four-wheeler for driving around the yard.<sup>27</sup>

¶ 22 Petitioner also has a snowplow attachment for the new four-wheeler. He testified that he uses it for plowing snow at his home. Petitioner did not have a snowplow attachment for the old four-wheeler, but he believes he could have purchased one. Petitioner initially testified that he did not purchase the four-wheeler only for recreation but also because he was no longer physically able to shovel snow. However, upon questioning by the Court, he admitted that prior to getting the plow blade, his wife and son shoveled the snow, that he did not do so, and that he does not do so now.<sup>28</sup>

¶ 23 Petitioner also purchased a boat in April 2007.<sup>29</sup> The monthly payment on the boat is \$211.07. As of August 31, 2007, the remaining balance was \$19,122.34.<sup>30</sup> Prior to purchasing this boat, he owned an older boat of the same size. The older boat was paid off at the time Petitioner bought the new boat. When he purchased the new boat, he sold the old one to his son for \$1,800.00.<sup>31</sup> Petitioner testified that when he decided to purchase the boat, he did not look at his finances first.<sup>32</sup>

¶ 24 Kathy testified that Petitioner consulted with her prior to purchasing the new boat. As with the four-wheeler, Kathy explained that the family did not create a budgeting plan for making the monthly payments on the boat, but that they would just pay it.<sup>33</sup>

¶ 25 Petitioner has used the boat four or five times since he purchased it. Petitioner has only had the boat out a few times because of the weather and the cost of fuel. Petitioner testified that when he goes fishing, his wife or son always go with him, and he never fishes by himself. He said that he could have chosen to fish from shore instead of purchasing the

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<sup>26</sup> Trial Test.

<sup>27</sup> Petitioner's Dep. 18:5-6.

<sup>28</sup> Trial Test.

<sup>29</sup> Trial Test.

<sup>30</sup> Ex. 34 at 36.

<sup>31</sup> Trial Test.

<sup>32</sup> Petitioner's Dep. 35:22-25.

<sup>33</sup> K. Benhart Dep. 24:17 - 25:20.

boat, but that he would rather have the boat. He admitted that he is physically able to fish from shore.<sup>34</sup>

¶ 26 At the time of trial, Kathy testified that the balance on the credit card is approximately \$5,100. Kathy cut up the credit card in early 2007 because she decided she did not want to use it any more. She testified that their bills are current and they have not missed any payments on the boat, pick-up truck, or four-wheeler. She stated that if the Court awards Petitioner the lump sum he is requesting, she would use the funds to pay off the boat, the four-wheeler, and her credit card and then use the remainder to buy a home.<sup>35</sup>

¶ 27 Petitioner also contends that he needs a lump-sum conversion of his benefits because he will have to vacate the rental property where he lives.<sup>36</sup> He testified that he would like to purchase a home instead of finding another place to rent. Petitioner's rent is \$500 per month.<sup>37</sup> The rented house sits on five acres and has two bedrooms, one bathroom, and a two-car garage. The property was sold approximately a year and a half ago, while Petitioner and his family resided there. However, Petitioner and his family continue to rent the property from the new owner.<sup>38</sup>

¶ 28 Stephen Keaster (Keaster) is Petitioner's current landlord.<sup>39</sup> Petitioner believes Keaster plans to fix up and sell the property, although Keaster has not set a timeline for doing so.<sup>40</sup> Kathy stated that when Keaster purchased the property, he informed her that he would continue to rent the property to them for a little while.<sup>41</sup> Since then, Keaster has told the Benharts that he has no immediate plans to sell the property.<sup>42</sup>

¶ 29 Keaster testified that the property needs some repairs, including new windows and siding on the residence.<sup>43</sup> Keaster is a residential contractor and he said it is possible that,

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<sup>34</sup> Trial Test.

<sup>35</sup> Trial Test.

<sup>36</sup> Petition for Trial and Request for Special Setting, Docket Item No. 1at 1-2.

<sup>37</sup> Keaster Dep. 5:19-21.

<sup>38</sup> Trial Test.

<sup>39</sup> Keaster Dep. 5:17-18.

<sup>40</sup> Trial Test.

<sup>41</sup> K. Benhart Dep. 10:23 - 11:1.

<sup>42</sup> K. Benhart Dep. 11:10-14.

<sup>43</sup> Keaster Dep. 5:22 - 6:1.

if he has time at some point, he might fix up the property, and then he might put it up for sale.<sup>44</sup> Keaster stated that he is currently very busy and has no plans to work on the property.<sup>45</sup> Keaster testified that he has not had any discussion with the Benharts about evicting them from the property.<sup>46</sup> Keaster further testified that he does not have any financial reason to sell the property.<sup>47</sup>

¶ 30 Petitioner testified that he has looked for a similar place to rent, but his search has so far been unsuccessful. Petitioner has also searched for a home to purchase that is similar to the property he now rents. Petitioner has located similar properties for sale in the \$100,000 to \$150,000 price range. Petitioner identified potential properties by looking through real estate flyers at the request of his counsel. Petitioner has not investigated any of these properties beyond looking at the flyers. Petitioner has not visited any of the properties and he does not know where most of them are located or if any of them are still on the market. Petitioner has not hired a real estate agent to assist in locating a home to purchase.<sup>48</sup> Petitioner has not gone to a bank to see if he would currently qualify for a loan because he says he does not have the money to submit an application and he has no down payment.<sup>49</sup>

¶ 31 Petitioner has never owned a home. He testified that he traveled frequently and planned to buy a home after he retired. He further testified that he has never had the money for a down payment.<sup>50</sup> Kathy says there is no particular reason why the family has never owned a home.<sup>51</sup> Based on their testimony at trial, I do not find either Petitioner or Kathy to be motivated to own a home. They have made no real effort to locate a property to purchase, nor have they made any attempts to save for a down payment or secure bank financing. Their only attempt to locate a home – by looking through real estate flyers – was done at their counsel’s request. Furthermore, Keaster testified that he is in no hurry to fix up and sell the property the Benharts currently rent. Even if Petitioner received a lump-sum settlement of his benefits, I question whether he would apply this money towards the

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<sup>44</sup> Keaster Dep. 7:13-19.

<sup>45</sup> Keaster Dep. 7:20 - 8:19.

<sup>46</sup> Keaster Dep. 7:3-6.

<sup>47</sup> Keaster Dep. 9:21-25.

<sup>48</sup> Trial Test.

<sup>49</sup> Petitioner’s Dep. 53:4-12.

<sup>50</sup> Trial Test.

<sup>51</sup> K. Benhart Dep. 12:1-4.

purchase of a home as long as the rental property where he currently lives remains available to him.

¶ 32 When Petitioner petitioned this Court in the present case, he asserted, “Petitioner is experiencing significant financial distress. He and his family have been advised they will have to vacate the rental home in which they are living because it has been sold.”<sup>52</sup> In fact, the home in which Petitioner resides was sold over a year before Petitioner filed his petition. Moreover, Petitioner spent his lump-sum advance and purchased both the four-wheeler and boat *after* Keaster bought the property and informed the Benharts that he might someday fix it up and sell it. In light of Petitioner’s substantial expenditures subsequent to Keaster’s purchase of the property, I do not find that Petitioner sincerely believes he will have to vacate his home in the foreseeable future.

¶ 33 Petitioner’s counsel prepared a Lump Sum Justification (“Justification”) which set forth Petitioner’s income, debts, and other financial obligations. The most current version of this was updated as of November 7, 2007, and was attached as Exhibit 2 to Kathy’s deposition.<sup>53</sup> The Justification reflects that under his current budget, Petitioner’s household income has a monthly shortfall of \$87.39. Kathy pointed out at trial that while the Justification reflects Petitioner’s biweekly PTD benefits to be \$226.26, that once attorney fees were accounted for, Petitioner actually receives biweekly PTD benefits in the amount of \$181.01.<sup>54</sup> Adjusting the amounts reflected in the Justification to account for this difference, I find that under his current budget, Petitioner’s monthly household income shortfall is \$177.89.<sup>55</sup> This amount is less than Petitioner’s monthly boat payment of \$211.07. Although there may in fact be other areas in which Petitioner could tighten his budget, I need look no further than the boat payment alone in reaching my conclusions below.

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<sup>52</sup> Petition for Trial and Request for Special Setting, Docket Item No. 1, at 1-2.

<sup>53</sup> Since this version contains the most current information available as of the time of trial, this is the only version of the Justification referred to in these Findings.

<sup>54</sup> Trial Test.

<sup>55</sup>  $\$226.26 - \$181.01 = \$45.25$ .  $\$45.25 \times 2 = \$90.50$ .  $\$87.39 + 90.50 = \$177.89$ .

## CONCLUSIONS OF LAW

¶ 34 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.<sup>56</sup>

¶ 35 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>57</sup>

¶ 36 Under § 39-71-741(1)(c), MCA, a lump-sum conversion of a PTD claim must be the exception and may be approved only if the worker has demonstrated financial need that relates to the necessities of life, an accumulation of debt incurred prior to the injury, a feasible self-employment venture, or financial need which arises subsequent to the date of injury because of reduced income as a result of the injury. Petitioner meets none of these criteria.

¶ 37 Although set forth as issues in the Pretrial Order, Petitioner has not presented any evidence of an accumulation of debt incurred prior to the injury or financial need arising subsequent to the date of injury because of reduced income as a result of the injury. Petitioner alleges only that he has demonstrated financial need that relates to the necessities of life in that he desires to purchase a home and that, as his counsel argued at trial, the necessities of life include more than just a bare minimum of food and shelter.

¶ 38 I agree that the "necessities of life" may include more than mere food and shelter. However, I find it difficult to conclude in this case that a new four-wheeler and fishing boat qualify as "necessities of life." Although Petitioner has incurred significant expenses relating to nonwork-related medical issues, his current monthly obligations derive, not from those expenses, but from the discretionary purchases of recreational vehicles. Specifically, as I noted above, Petitioner's monthly payment on his boat alone exceeds his monthly shortfall. Therefore, I must conclude that Petitioner has not demonstrated a financial need relating to the necessities of life. To conclude otherwise would effectively be a finding that a claimant could leverage himself into a lump-sum conversion by making discretionary purchases after being declared PTD. I do not believe this is what the Legislature had in mind when it enacted § 39-71-741(1)(c), MCA.

¶ 39 The parties further set forth as issues, "What is Petitioner's current financial condition?" and "What would Petitioner's financial condition be under the lump sum

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<sup>56</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>57</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

conversion proposal?"<sup>58</sup> I find Petitioner's current financial situation to be as set forth in his Justification. As far as what Petitioner's financial condition would be under the proposed lump-sum conversion, I need not reach this issue since I have concluded that Petitioner is not entitled to a lump-sum conversion.

¶ 40 Because Petitioner is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

### JUDGMENT

¶ 41 Petitioner is not entitled to a lump-sum conversion of his PTD benefits.

¶ 42 Petitioner is not entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 43 Petitioner is not entitled to his attorney fees or costs.

¶ 44 Pursuant to ARM 24.5.348(2), this JUDGMENT is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

¶ 45 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 25th day of January, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: J. Kim Schulke  
Larry W. Jones  
Submitted: November 21, 2007

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<sup>58</sup> See ¶¶ 5d-5e, above.