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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CATHERINE E. SATTERLEE, et al.

Petitioners,

v.

LUMBERMAN'S MUTUAL CASUALTY
COMPANY, et al.

Respondents/Insurers.

WCC No. 2003-0840

**STATE FUND'S OPPOSITION TO
PETITIONERS' MOTION FOR
RECONSIDERATION**

The Montana State Fund ("State Fund") objects to Petitioners' Request for Reconsideration. In support of such objection, the State Fund states as follows:

DOCKET ITEM NO. 292

1. Overview of Objection

This Court considered very extensive briefing and oral argument and correctly concluded that Montana Code Annotated § 39-71-710, survived constitutional scrutiny. The decision was based upon several sound legal considerations, including settled principles indicating the constitutionality of a statute is presumed, the party challenging the statute bears a heavy burden of proof and where there is doubt the issue must be resolved in favor of constitutionality. Ultimately, it was clear that Petitioners failed to meet their clear burden.

In its decision, the Court closely analyzed the several arguments of the parties, intervenors and amici. The ultimate decision was broad based, specifically noting the legislature's clear intent not to create a lifetime total disability benefit tantamount to a pension entitlement, the legal and factual distinction between permanent partial and permanent total disability benefits and the holding in *Reesor v. Montana State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019. The Court also considered the legislative intent and legitimate governmental interest that comprehensive workers' compensation benefits be provided to claimants during their work life while maintaining an affordable rate structure.

The Petitioners initially filed this matter in July of 2003. Since that time they have steadfastly taken the position that they were entitled to summary judgment as a matter of law and that no material facts were at issue. Their Motion for Summary Judgment reaffirmed this position. The State Fund concurred.

As agreed by the parties, the State Fund presented affidavits of experienced claims, systems and actuarial employees as a portion of its opposition to the motion. The Petitioners filed an affidavit of a Certified Public Accountant with no apparent claim handling or actuarial experience. The foundation for his challenge to the filings of the State Fund was the product of this lack of such experience, having missed the basic calculation which, when made, supported the very State Fund conclusions he sought to undercut.

Having taken the hard line that no material facts were at issue during the entire course of the proceeding and making a tactical decision not to engage in discovery or provide competent affidavits of its own, Petitioners changed course only after their legal arguments were rejected (modifying their position that "there are no consequential facts which are in dispute and this matter is ripe for summary judgment"¹ to "[b]ecause there

¹ Petitioners' Motion for Partial Summary Judgment and Brief in Support 5 (Feb. 18, 2005).

are controverted facts on material issues” this matter is [not] (sic) ripe for final certification for purposes of appeal).² In addition to presenting too little too late, the basis of Petitioners’ present request is without merit.

The foundation of the present Motion to reopen the record and conduct discovery is that the Court incorrectly determined that the “financial viability of the workers’ compensation system” was at stake, and that the “workers’ compensation system will become incapable of working successfully” if the Court found in favor of Petitioners.³ A review of the decision proves otherwise. The Court did consider that modifying the permanent total disability benefit scheme to allow for lifetime permanent total disability benefits would be expensive. It noted the legislative intent that comprehensive benefits be provided to claimants with the consideration of reasonable premium rates. Nowhere in the decision does the Court indicate that its reasoned and broad based decision hinged on a finding that the system would be bankrupt if it found for the Petitioners. In fact, there is not even a specific reference to the State Fund data which appears to be the sole target of the present request.

Most importantly, the apparent financial considerations properly taken into account by the Court were the obvious ones, not dependant upon any expert or technical assistance. Simply stated, a dismantling of the present total disability benefit scheme allowing lifetime permanent total disability benefits for the periods requested by the Petitioners would be very expensive with unquestioned financial detriment and unanticipated cost. Further discovery of any kind is incapable of modifying this obvious fact. It is the obvious detriment to the *entire workers’ compensation system* caused by Petitioners’ requested relief regardless of the exact quantification that was properly considered by the Court.

Finally, the present request is procedurally deficient.

2. Procedural Matters

a. Motion For Reconsideration

The title of the present Motion belies its substantive position. It does not seek material reconsideration of any part of the extensive record but a vacation of the product of far reaching proceedings, briefing and argument in favor of a return to square one in order that a different tactical approach may be utilized. If analyzed carefully the only reconsideration the Motion requests relates to the certification of the matter for appeal.

² Petitioners’ Motion for Reconsideration 3 (Jan. 3, 2006).

³ Petitioners’ Motion for Reconsideration 2.

Such a request is without any proper basis and should be denied. The “good cause” required to preclude the certification of a decision for appeal is totally absent, and the request is untimely. Admin. R. Mont. 24.5.348(4)(a) (A party must request that a decision not be certified as final “prior to the issuance of the decision” and the “request must include a showing of the good cause upon which the request is based”). The disguised motion to reopen the record is untimely and “disingenuous” under the circumstances. See *Wiard v. Liberty Nw. Ins. Corp.*, 2001 MTWCC 31A, ¶ 2.

This Court’s rule regarding summary judgment indicates that the process is disfavored given the fact that cases on its docket are heard on an expedited basis and the time involved in the preparation and presentation of summary judgment motions, briefing and argument may be greater than the time necessary for trial. Admin. R. Mont. 24.5.329(1)(a). Petitioners, certifying that the matter was most appropriately determined on summary judgment for over two years simply changed course after their legal arguments were rejected,⁴ failing to formally object to the submission as required by Court Rule. Admin. R. Mont. 24.5.329(1)(c).

b. Discovery and Summary Judgment

As noted, the present motion, although styled as a Motion for Reconsideration, is more accurately described as an untimely motion to withdraw certification and a motion to engage in discovery post decision. As such, the motion is more accurately characterized as one presented under Administrative Rules of Montana 24.5.329(8), which is identical to Montana Rules of Civil Procedure 56(f).

⁴ In their Reply Brief in Support of Motion for Partial Summary Judgment, Petitioners attempted to have the best of both worlds. On the one hand, they argued (*six weeks after the State Fund factual affidavits were filed*) that there were no material facts at issue and summary judgment was proper as a matter of law. To cover the bases, they also argued that the factual information contained in the State Fund affidavits should be ignored as a matter of law. Failing that, they asserted that the information was not competent because, apparently, the State Fund employees with significant experience and qualification were not able to present facts within the clear purview of their positions. Their support for this argument was ostensibly found in the affidavit of a CPA without any workers’ compensation claim or underwriting qualification. Finally, as a last resort, Petitioners argued that a safety net should be erected to allow them to conduct discovery if their legal and factual position was insufficient. Petitioners did not, however, seek any stay in the consideration of the cross-motions nor did they follow court rules designed to formally call the Court and opposing counsel’s attention to an objection to the matter proceeding to decision. Admin. R. Mont. 24.5.329(1)(c).

The rule provides a mechanism by which the party opposing summary judgment may petition the Court to hold a summary judgment motion in abeyance because she cannot overcome summary judgment without conducting further discovery. Specifically, the rule states that the Court may refuse to consider a summary judgment motion when the opposing party requests that discovery be allowed because "the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. . . ." Admin. R. Mont. 24.5.329(8); Mont. R. Civ. P. 56(f) (2005).

By the terms and intent of the Rule, the motion and required verification must be filed prior to the submission of and decision on a Motion for Summary Judgment. As such, in the first instance, the request is untimely and not properly supported.

Even if subject to consideration after the fact, it is noted that the filing of a Rule 56(f) motion does not create an automatic right to a stay and the initiation of discovery. As succinctly stated by the Montana Supreme Court in *Environmental Contractors, LLC v. Moon*, 1999 MT 178, ¶ 19, 295 Mont. 268, ¶ 19, 983 P.2d 390, ¶ 19.⁵

District courts have inherent discretionary power to control discovery. *J.L. v. Kienerberger* (1993), 257 Mont. 113, 119, 848 P.2d 472, 476. This discretionary power extends to deciding whether to deny or to continue a motion for summary judgment pursuant to Rule 56(f), M. R. of Civ. P. *Howell v. Glacier General Assur. Co.* (1989), 240 Mont. 383, 386, 785 P.2d 1018, 1019. A district court does not abuse its discretion in denying a Rule 56(f), M. R. Civ. P., motion where the party opposing a motion for summary judgment does not establish how the proposed discovery could preclude summary judgment. *Howell*, 240 Mont. at 386, 785 P.2d at 1020.

In denying the proposed additional discovery and stay on consideration of the pending Motion for Summary Judgment, the *Environmental Contractors* court considered an affidavit from counsel that listed the name of several individuals that counsel felt needed to be deposed in order to respond to the arguments made in the

⁵ The Montana Supreme Court indicated in *Murer v. Montana State Compen. Mut. Ins. Fund* (1993), 257 Mont. 434, 849 P.2d 1036, 1037 and *Moen v. Peter Kiewit & Sons Co.* (1982), 201 Mont. 425, 434, 655 P.2d 482, 486, that it approved of the Workers' Compensation Court seeking guidance from the Montana Rules of Civil Procedure.

motion. In affirming the District Court's rejection of the request for stay and discovery, the Supreme Court noted:

Neither Moon's briefs nor the supporting affidavit of counsel establish how the proposed discovery could preclude summary judgment. It was Moon's burden to explain what new facts could have been obtained through further discovery which could defeat Environmental's motion, and this he failed to do. We hold therefore that the District Court did not abuse its discretion in conducting the summary judgment hearing and ruling on Environmental's motion without allowing Moon the opportunity to conduct further discovery.

Environmental Contractors, ¶ 21. A similar result was reached in *Stanley v. Holms*, 1999 MT 41, ¶¶ 19-21, 293 Mont. 343, ¶¶ 19-21, 975 P.2d 1242, ¶¶ 19-21. In that action the party seeking the stay set out several items of discovery that he felt were necessary prior to consideration of the Motion for Summary Judgment but did not properly articulate why:

Although Holms has detailed the sequence of events in this case and vigorously argues that more time was needed to obtain documents and take depositions, neither Holms' briefs nor the supporting affidavits in the District Court establish how the proposed discovery could preclude summary judgment.

Stanley, ¶ 20. See also *Howell v. Glacier Gen. Assurance Co.* (1989), 240 Mont. 383, 386, 785 P.2d 1018, 1019-1020. Petitioners have provided no affidavits or other indication how any of the claimed necessary after-the-fact discovery would compel a modification of the Court's previous ruling. As discussed herein, under any circumstances the requested discovery would not be sufficient to negate the basis for and reasoning of this Court's decision.

c. Acquiescence

The parties initially attempted to work out a factual stipulation. As the Court is aware, this process was utilized in other common fund summary judgment situations. (See *Stavenjord v. Montana State Fund*, WCC No. 2000-0207 and *Schmill v. Liberty Nw. Ins. Corp*, WCC No. 2001-0300). See also Response to Amended Petition for Hearing (Aug. 19, 2003). As indicated early on by Petitioners:

The parties have agreed in previous proceedings that the facts are not in dispute.

Motion for Briefing Schedule 2 (Oct. 6, 2003). The parties' effort to present a stipulation of fact was sidetracked when Petitioners indicated they would present the report of their CPA/economist. Status Report (June 9, 2004). Petitioners continued to represent to the Court that "no consequential facts" were "in dispute." Petitioners' Motion for Partial Summary Judgment and Brief in Support 5. They did not object to the State Fund's stated intention to file factual affidavits with its briefing. See Transcr. Proc. 137-138 (July 14, 2005). At the hearing of the matter, Petitioners argued that "this is all about money and economics" (Transcr. Proc. 21 (Oct. 7, 2005)) but, confident in their legal position and accepting the process of both parties presenting factual information by affidavit, did not pursue the tact presented in their Motion for Reconsideration.

Petitioners have always taken the position that the issues raised in their Amended Petitions were properly determined on summary judgment. They acquiesced in the long process leading up to the submission of cross motions. They should not now be granted the right to change course and move this matter back to the starting line. Had they been successful on their Motion for Summary Judgment they surely would have been comfortable that the record was complete.

3. Court Decision and Basis for Reconsideration

Clearly, the two requests of the Petitioners are untimely and procedurally deficient. Either provides a proper basis for denial. This matter should be allowed to move forward as everyone intended, to the Supreme Court for a consideration of what is purely a legal determination with, as Petitioners noted prior to decision, "no consequential facts . . . in dispute." This is the direction chosen by Petitioners themselves when, at the very outset of the proceeding, they announced that the matter should be submitted on an expedited basis for a determination on summary judgment.

Considering the substantive request in the hybrid motion leads to the same result. There simply is no need for discovery nor would discovery provide fodder for a renewed argument for reversal of the Court's decision and a finding in favor of Petitioners.

By agreement, the parties presented affidavits to support their position. The record indicates Petitioners considered and chose an expert to provide facts they felt were material to the promised motion in early 2004. They were fully aware and approving of the State Fund's intent to present facts concerning implementation and cost by way of affidavit and presented no objections. The format of the expected filings

was foreshadowed for Petitioners with the State Fund's filings in *Stavenjord* and *Schmill*.

The State Fund affidavits were provided by long time claims, systems and actuary personnel. The pre-decision critique of the cost analysis of one affidavit prepared by Petitioners' CPA was dealt with by counter affidavit and underscored the "experts" lack of understanding of the review process and calculations of the State Fund actuary. Second Aff. Daniel Gengler (Oct. 5, 2005). The process was not significant enough to Petitioners, pre-decision, to present a request to engage in discovery pursuant to the rules of the Court or even to provide competent affidavits per rule.

Now, with the decision in hand, there is a claimed need to gather evidence "necessary to show the real financial impact" of the decision because Petitioners read this Court's holding as depending upon a finding "that the financial viability of the workers' compensation system is "at stake" and that "the workers' compensation system will become incapable of working successfully" if Petitioners' motion was granted. Petitioners' Motion for Reconsideration 2.

It is true that the State Fund's analysis of the cost of lifetime permanent total benefits for the period requested by Petitioners indicates that the Old and New Fund will suffer very significant financial consequences. The cost estimate range was set for the Old Fund at \$93-\$116 million. It was noted that at the end of fiscal year 2004 the Old Fund was unfunded to the tune of \$7,442,792. The estimated cost to the New Fund was set in a range of \$135-186 million. These figures are considered in light of the State Fund's surplus of \$127.5 million at the end of fiscal year 2004. Aff. Daniel Gengler ¶ 16 (Aug. 8, 2005).

Premium rates would have to be adjusted to cover the significant past and future benefit increases requested by Petitioners. In terms of past benefits, no premium was collected to cover the lifetime permanent total disability benefits. Therefore, future premiums would have to be increased to fund retroactive changes as well as increased future entitlements. The necessity of increased premium is compounded by any impairment of surplus because of the need to operate the State Fund on a fiscally sound basis. Obviously, the State Fund would have to significantly increase its rates to pay for retroactive and future increases in benefits. The same is true of all carriers and self-insureds.⁶ After discounting, the review and calculation approach of the State

⁶ Mr. Gengler indicated that Montana employers statewide would pay approximately \$60 million more per year for their workers' compensation insurance if the relief requested by Petitioners was granted. Aff. Gengler ¶ 15(a).

Fund's actuary was consistent with the independent analysis of the National Counsel on Compensation Insurance ("NCCI"). Aff. Gengler ¶ 15(c).

The affidavits of the State Fund do nothing more than support the obvious conclusion. If the challenged statute's limit on permanent total disability benefits was negated and lifetime benefits were available retroactive to its passage in 1981 there would be a significant cost. The cost would arise from past and future lifetime entitlements. The exact calculation of the cost is not as important as the obvious effect.

Petitioners seek discovery to "show the real financial impact" and to verify that a decision in their favor will not "bankrupt the State Fund or the system." Petitioners' Motion for Reconsideration 2. This is apparently in reaction to the Court's considering the legislative intent and governmental purpose that injured workers receive comprehensive benefits at a reasonable cost to the employer. Order Denying Motion for Partial Summary Judgment 6, 11 (Dec. 12, 2005); Mont. Code Ann. § 39-71-105(1). Under the circumstances presented, nothing in any discovery seeking to challenge the State Fund's review and estimates could destroy the obvious conclusion that the lifetime retroactive and future benefits requested would be very costly to the system.

The State Fund is confident of the accuracy of its cost estimate ranges. However, even if the actual cost and premium increases were less than estimated they would be significant and detrimentally affect the cost of the program across all three statutory plans.

Just as importantly, the premise from which Petitioners seek relief is inaccurate. The Court did not base its decision solely on the specific dollar estimates of cost of the State Fund or any finding that the relief sought would bankrupt the system. The Court's analysis was broad based and it was only necessary to consider the obvious conclusion, accepted by all, that negating the limiting effect of § 710 would be expensive with inevitable material consequences to the system. The exact quantification was and remains secondary.

In terms of cost, this Court properly cited to guidelines on the topic outlined by the Supreme Court. Among the cases reviewed was *Stratemeyer v. Lincoln County* (1993), 259 Mont. 147, 855 P.2d 506. The decision verified the very significant burden imposed on a claimant attempting to negate a provision of the Workers' Compensation Act on constitutional grounds and the prerogative of the legislature in setting benefit entitlements like those at issue here.⁷ That decision supports the viability of workers'

⁷ Interestingly, the Supreme Court reversed this Court because "[t]he Workers' Compensation Court did not presume the statute to be constitutional and look to any

compensation statutes passed by the legislature in an attempt "to improve the financial viability of the system." *Stratemeyer*, 855 P.2d at 511. The *Stratemeyer* court was even more direct in relation to the considerations before the Court at this time:

Even a cursory glance at the legislative history and statute indicates a concern over the high cost of the Workers' Compensation program to the State of Montana and the employers involved in the program. It is evident that this was the primary purpose for the legislative changes in the Workers' Compensation Act. "[P]romoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal." *Meech v. Hillhaven West, Inc.* (1989), 238 Mont. 21, 48, 776 P.2d 488, 504. (Citation omitted.) A purpose would be to provide for injured workers at a reasonable cost.

Stratemeyer, 855 P.2d at 510. This Court considered the specific legislative history of § 710, standards for judicial review and constitutional analysis and the inescapable fact that the relief requested by Petitioners would have an inescapable negative financial impact on the workers' compensation system. It did not and need not go further. As such, the claimed basis for the decision giving rise to the need to reopen the record at this late date is without foundation.

The discovery requested is not necessary, regardless of outcome, and would not be material to any argument in support of modifying the proper analysis and determination made by this Court.

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possible legitimate purpose for the legislation" and because "[t]he legislature is simply in a better position to develop the direction of economic regulation, social and health issues." *Stratemeyer*, 855 P.2d at 510. This is consistent with the holding of *Ingraham v. Champion Intl.* (1990), 243 Mont. 42, 48, 793 P.2d 769, 772 (in Montana, "[t]he power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted."); *Cunningham v. Nw. Improvement Co.* (1911), 44 Mont. 180, 119 P. 554 (the legislature has the right to regulate and provide for benefits in cases of injury or death).

4. Conclusion

Petitioners sought a dramatic change in the workers' compensation benefit scheme. The Court reviewed the factual and legal input of many parties with various interests and perspectives and soundly reasoned that there were several independent bases to support the viability of the challenged statute. Among other things, the Court considered the legislative prerogative to establish benefits, the legislative history of the statute in question, the purpose and design of workers' compensation benefits and statements of legislative intent along with the proper standards of constitutional review.

The significant cost to employers of revamping total disability benefit entitlement is obvious to all involved and was also properly considered. Under any circumstances the cost of lifetime permanent total disability benefits would have a detrimental financial impact on the system. That inescapable consideration *and several others* led to the decision of this Court on cross-motions for summary judgment. The broad foundation for the Court's decision will not be modified by discovery seeking further detail regarding exact financial estimates.

Petitioners' request is untimely, procedurally deficient and substantively lacking.

The decision of this Court is properly certified for appeal.

DATED this 13th day of January, 2006.

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By


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CERTIFICATE OF MAILING

I, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer, Montana State Fund, hereby certify that on this 13th day of January 2006, I mailed a copy of the foregoing **STATE FUND'S OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION**, postage prepaid, to the following persons:


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