

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 9

WCC No. 2012-2904

LYNN GERBER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

APPEALED TO MONTANA SUPREME COURT – 04/26/13
AFFIRMED – 04/15/14

Summary: Petitioner moves for summary judgment, alleging that since Respondent accepted liability for his injury, he was entitled to additional benefits under § 39-71-703, MCA, notwithstanding his incarceration for more than 30 days. Petitioner further alleges that Respondent's interpretation of § 39-71-744, MCA, in denying him additional permanent partial disability benefits is in error and if not, then the statute is unconstitutional for violating his equal protection and due process rights. Respondent's Cross-Motion for Summary Judgment counters that § 39-71-744, MCA, is plain and unambiguous and is intended to deny disability benefits to any injured worker who is incarcerated for more than 30 days, and that the statute has been previously found to be rationally related to a legitimate governmental purpose.

Held: Section 39-71-744, MCA, is plain and unambiguous and is clearly intended to deny disability benefits, including permanent partial disability benefits, to an injured worker during the period of the worker's incarceration of more than 30 days. This Court found previously in *Wimberley* and *McCuin* that § 39-71-744, MCA, was constitutional, and the statute is also rationally related to the legislated objectives of the Workers' Compensation Act. Petitioner fails to make a compelling argument that this Court's earlier decisions were wrong and should be revisited.

Topics:

Statutes and Statutory Interpretation: Plain Meaning. The plain meaning of § 39-71-744(1), MCA, is that the time limits on the payment of disability and rehabilitation benefits are not “extended” by a worker’s incarceration, Petitioner’s arguments notwithstanding.

Statutes and Statutory Interpretation: Inserting or Removing Items. Petitioner’s argument that § 39-71-744(1), MCA, should be read so that the “time limit” referred to therein is for the presentment of a claim must fail, as it is not this Court’s duty to insert that which the legislature has omitted.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. The declared legislative objectives of the WCA of providing wage-loss benefits that bear a relationship to actual wages lost and returning a worker to work as soon as possible after the worker has suffered a work-related injury or disease (§§ 39-71-105(1)&(2), MCA) are thwarted by Petitioner’s interpretation of § 39-71-744(1), MCA: that the legislature intended for him to receive wage-loss benefits while incarcerated, incapable of earning a wage, and incapable of returning to work.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-744. The declared legislative objectives of the WCA of providing wage-loss benefits that bear a relationship to actual wages lost and returning a worker to work as soon as possible after the worker has suffered a work-related injury or disease (§§ 39-71-105(1)&(2), MCA) are thwarted by Petitioner’s interpretation of § 39-71-744(1), MCA: that the legislature intended him to receive wage-loss benefits while incarcerated, incapable of earning a wage, and incapable of returning to work.

Constitutional Law: Standing. During oral argument Petitioner moved for the inclusion of an additional set of similarly situated classes of workers: (1) those incarcerated for greater than 30 days, who have a permanent impairment after reaching MMI and choose to receive their impairment award in a lump sum; and (2) those with the same criteria who choose to receive their impairment award in biweekly payments. The usual standing requirement is that a party must allege past, present or threatened injury to property or to a civil right distinguishable from an

injury to the general public. Petitioner cannot allege an injury as a result of being a member of one of these two similarly situated classes, since regardless of whether his impairment award was paid biweekly or in a lump sum, it was fully paid to him months before he was incarcerated and he therefore lacks standing to raise the issue.

Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, Section 17. Section 39-71-744(1), MCA, does not violate Petitioner's right to substantive due process, for the statute bears a rational relationship to the express legislative purpose of providing wage-loss benefits in a reasonable relationship to actual wages lost, and of returning a worker to work as quickly as possible after the worker has suffered an on-the-job injury or disease. An incarcerated worker has voluntarily removed himself from the competitive labor market by committing a crime; he is not losing wages due to his injury, and he cannot return to work until released from jail or prison.

Constitutional Law: Due Process: Substantive Due Process. Section 39-71-744(1), MCA, does not violate Petitioner's right to substantive due process, for the statute bears a rational relationship to the express legislative purpose of providing wage-loss benefits in a reasonable relationship to actual wages lost, and of returning a worker to work as quickly as possible after the worker has suffered an on-the-job injury or disease. An incarcerated worker has voluntarily removed himself from the competitive labor market by committing a crime; he is not losing wages due to his injury, and he cannot return to work until released from jail or prison.

Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, Section 17. Section 39-71-744(1), MCA, does not violate Petitioner's right to substantive due process for failing to satisfy the *quid pro quo* principle behind the WCA - the surrendering of the injured workers' right to sue his employer in tort in exchange for disability benefits - since the Petitioner here received sufficiently significant benefits, in the form of temporary total disability prior to his incarceration and remains eligible for medical benefits, so as to satisfy the *quid pro quo* doctrine.

Constitutional Law: Due Process: Substantive Due Process: Section 39-71-744(1), MCA, does not violate Petitioner's right to substantive due

process for failing to satisfy the *quid pro quo* principle behind the WCA - the surrendering of the injured workers' right to sue his employer in tort in exchange for disability benefits - since the Petitioner here received sufficiently significant benefits, in the form of temporary total disability prior to his incarceration and remains eligible for medical benefits, so as to satisfy the *quid pro quo* doctrine.

Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, Section 22. Petitioner argues that the effect of § 39-71-744, MCA, is the imposition of an excessive fine in violation of Article II, § 22 of the Montana Constitution, since it deprives him of PPD benefits. Assuming *arguendo* that Petitioner's argument had merit, the forum in which to challenge the imposition of this "excessive fine" would be the court that actually imposed the sentence, not the Workers' Compensation Court.

¶ 1 Petitioner Lynn Gerber filed a petition with this Court, alleging that Respondent Montana State Fund (State Fund) wrongfully withheld the remainder of his permanent partial disability (PPD) benefits under § 39-71-703, MCA, on the grounds that, pursuant to § 39-71-744, MCA, he was incarcerated for more than 30 days and therefore is not eligible to receive disability benefits during the period of his imprisonment.

¶ 2 Gerber moves for summary judgment in his favor based on a joint statement of Stipulated Facts.

¶ 3 State Fund opposes Gerber's motion and files its own Cross-Motion for Summary Judgment based on the parties' Stipulated Facts.

¶ 4 For the reasons set forth below, Gerber's motion is denied and State Fund's motion is granted.

STIPULATED FACTS¹

¶ 5 On August 21, 2008, Gerber injured his right shoulder while in the course and scope of his employment with Vann's, Inc., in Missoula County, Montana.²

¹ The Stipulated Facts referenced in this decision are a summary and restatement of those stipulated facts pertinent to this decision which are contained in the parties' joint statement of Stipulated Facts (Stipulated Facts), Docket Item No. 28.

² Stipulated Facts, Ex. 1.

¶ 6 At the time of his injury, Gerber's employer was enrolled under Compensation Plan 3 of the Workers' Compensation Act and its insurer was State Fund.

¶ 7 State Fund accepted liability for Gerber's claim and has paid indemnity and medical benefits. Liability for the claim has never been in dispute.

¶ 8 On April 9, 2010, State Fund notified Gerber that he was entitled to an impairment award based on a 3 percent impairment rating equal to 11.25 weeks pursuant to § 39-71-703, MCA. Because 7 weeks had already passed since Gerber reached maximum medical improvement (MMI), the letter indicated he was due \$1,947.12. The remaining 4.25 weeks could either be paid in biweekly payments until May 11, 2010, or he could request a lump sum payment reduced to present value.³

¶ 9 By letter dated May 21, 2010, State Fund notified Gerber that his 3 percent impairment award had been paid in full, and he was entitled to an additional 48.75 weeks of PPD benefits as of May 12, 2010, due to the other factors enumerated in § 39-71-703, MCA. The letter offered Gerber the option of settling his claim and receiving the remaining weeks in a lump sum, discounted to present value, or having them paid biweekly.⁴

¶ 10 By letter dated January 12, 2011, State Fund notified Gerber that his PPD benefits would be terminated pursuant to § 39-71-744, MCA, as of December 28, 2010, because of Gerber's December 8, 2010, incarceration, and that State Fund would take credit for PPD benefits payable through "April 17, 2010" (sic).⁵

¶ 11 As a result of the application of § 39-71-744, MCA, to Gerber's PPD benefits, State Fund did not pay Gerber his final 15.75 weeks of PPD benefits, which amounts to \$4,381.02.⁶

¶ 12 On September 22, 2010, Gerber pled guilty to the offense of theft by embezzlement in *State v. Lynn Dean Gerber*, Cause No. DC-32-2009-480-IN, Montana Fourth Judicial District Court, Missoula County. On December 8, 2010, Gerber was sentenced in that case to financial assessments, fees, and fines.

¶ 13 On September 22, 2010, Gerber pled guilty to two felony offenses in *State v. Lynn Dean Gerber*, Cause No. DC-32-2009-80-IN, Montana Fourth Judicial District

³ Stipulated Facts, Ex. 2.

⁴ Stipulated Facts, Ex. 3.

⁵ Stipulated Facts, Ex. 4.

⁶ Stipulated Facts, Ex. 5.

Court, Missoula County. On December 8, 2010, Gerber was sentenced by the Hon. John Warner in that case to imprisonment for 20 years with 10 years suspended, together with financial assessments, fees, and fines.

¶ 14 Transcripts of the aforementioned sentencing hearings and judgments in the criminal cases involving Gerber do not contain any notification to Gerber that his workers' compensation indemnity benefits would be adversely affected by the imposition of sentences.

ANALYSIS AND DECISION

¶ 15 Summary judgment is appropriate "when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."⁷ The material facts necessary for disposition of this case are not in dispute. Therefore, this case is appropriate for summary disposition.

¶ 16 This case is governed by the 2007 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Gerber's injury.⁸

¶ 17 Gerber maintains that he is entitled to the remaining, unpaid PPD benefits, specifically, 15.75 weeks amounting to \$4,381.02; State Fund counters that Gerber is not entitled to further PPD benefits since he has been incarcerated for more than 30 days and in accordance with § 39-71-744, MCA, he is ineligible to receive disability benefits while imprisoned.

¶ 18 Permanent partial disability is defined in § 39-71-116(24), MCA:

(24) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;

(b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury.

¶ 19 The benefits payable for PPD are defined by § 39-71-703, MCA, which reads, in pertinent part:

⁷ *Lewis v. Nine Mile Mines, Inc.*, 268 Mont. 336, 340, 886 P.2d 912, 914 (1994); ARM 24.5.329(2).

⁸ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986); § 1-2-201, MCA.

(1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

- (a) has an actual wage loss as a result of the injury; and
- (b) has a permanent impairment rating that:
 - (i) is not based exclusively on complaints of pain;
 - (ii) is established by objective medical findings; and
 - (iii) is more than zero as determined by the latest edition of the

American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 375 weeks.

¶ 20 The statute that is at the center of this dispute, § 39-71-744, MCA, reads in pertinent part:

(1) Except as provided in subsection (2), a claimant is not eligible for disability or rehabilitation compensation benefits while the claimant is incarcerated for a period exceeding 30 days in a correctional institution or jail as the result of conviction of a felony or a misdemeanor. The insurer remains liable for medical benefits. A time limit on benefits otherwise provided in this chapter is not extended due to a period of incarceration.

¶ 21 There is no dispute that Gerber was given a permanent impairment and reached MMI prior to his incarceration. Gerber concedes his eligibility for PPD benefits began when he reached MMI,⁹ and in fact, his impairment award was paid out by State Fund prior to his imprisonment.¹⁰ Gerber contends, however, that State Fund misconstrues § 39-71-744, MCA, as allowing it to deduct from his remaining PPD benefits one week of benefits for each week of incarceration, effectively drawing down his remaining benefits to zero. Gerber argues that the “time limit on benefits” language in § 39-71-744, MCA, should be read as referring to the statute of limitations contained in §§ 39-

⁹ Petitioner’s Brief in Support of Motion for Summary Judgment (Petitioner’s Brief) at 8, Docket Item No. 33.

¹⁰ Stipulated Facts, Ex.’s 2 and 3.

71-601 through 603, MCA, and not to the payment of his PPD benefits to which he would otherwise be entitled but for his incarceration.¹¹

¶ 22 Gerber admits his interpretation of the statutory language in § 39-71-744, MCA, is at odds with this Court's decisions in *Wimberley v. State Compensation Insurance Fund*,¹² and *McCuin v. Montana State Fund*.¹³ Gerber urges the Court to revisit these two earlier decisions and reverse them.

¶ 23 State Fund counters that pursuant to the plain language of § 39-71-744, MCA, Gerber was no longer eligible for PPD benefits when he became incarcerated in excess of 30 days and the time for which he would have otherwise received those benefits was not extended during his incarceration. Citing to this Court's holding in *Wimberley, supra*, State Fund notes that a claimant's right to PPD benefits was a qualified one, limited by § 39-71-744, MCA.¹⁴

¶ 24 Gerber's argument would have this Court separate the last sentence of § 39-71-744(1), MCA, which references a "time limit on benefits otherwise provided," and instead of reading it as applying to the very statute of which it is a part, – i.e., the ineligibility to receive benefits during a period of incarceration – apply it instead to those statutes which deal with the statute of limitations pertaining to the presentment of a claim for benefits (§§ 39-71-601 through 603, MCA). In essence, Gerber would insert words in the last sentence of § 39-71-744(1), MCA, so that it would read: "[a] time limit on **presentment of a claim for** benefits" When construing a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."¹⁵ A basic tenet of statutory construction is that "the intent of the legislature must first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further and apply any other means of interpretation."¹⁶ In this instance, the legislature's intent is clear. Gerber's argument in this regard must fail.

¹¹ Petitioner's Brief at 9.

¹² 1994 MTWCC 52.

¹³ 2006 MTWCC 41.

¹⁴ Respondent's Response Brief in Opposition to Petitioner's Motion for Summary Judgment at 6-7, Docket Item No. 35.

¹⁵ § 1-2-101, MCA.

¹⁶ *Auchenbach v. Uninsured Employers' Fund*, 2006 MTWCC 13, ¶ 4 (citing *Montana Ass'n of Underwriters v. State*, 172 Mont. 211, 215, 563 P.2d 577, 579-80 (1977)).

¶ 25 The plain meaning of § 39-71-744(1), MCA, is that the time limits on the payment of disability and rehabilitation benefits are not “extended” by a worker’s incarceration. In this case, it is undisputed that Gerber was incarcerated for longer than 30 days.¹⁷ He was not eligible to receive his PPD benefits during his incarceration. The time limit on those benefits was not extended during his incarceration. The benefits were therefore depleted as of April 17, 2011.¹⁸

¶ 26 Gerber makes much of the fact that he was injured before he was incarcerated; however, so too were the claimants in *Wimberley* and *McCuin*, cases which Gerber asks this Court to “revisit”. Yet Gerber fails to show how his case is distinctive from those earlier holdings. Both prior decisions upheld the principle that the running of the time for the payment of PPD benefits was not tolled during the claimants’ incarceration. Moreover, Gerber fails to address my analysis in *McCuin* that, while incarcerated, McCuin could not have suffered an “actual wage loss” under § 39-71-116(1), MCA, because he absented himself from the labor market by committing a crime resulting in incarceration.¹⁹

¶ 27 One of the declared legislative objectives of the WCA is to provide wage-loss benefits which bear a reasonable relationship to actual wages lost.²⁰ Another is “to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.”²¹ Both objectives are thwarted by Gerber’s interpretation of § 39-71-744(1), MCA: that the legislature intended him to receive wage-loss benefits while incarcerated, incapable of earning a wage, and incapable of returning to work. The obvious conclusion is that § 39-71-744(1), MCA, does not permit the payment of PPD benefits to Gerber while he is in prison and does not permit the tolling of his benefits while there. Nothing put forth by Gerber in either his brief or oral argument persuades me that this Court’s prior decisions in *Wimberley* and *McCuin* misconstrued the intent and interpretation of § 39-71-744(1), MCA.

EQUAL PROTECTION

¶ 28 Gerber next advances the argument that, if § 39-71-744(1), MCA, is found to deny him the remainder of his PPD benefits, then it denies him equal protection under the law in contravention of Article II, § 4 of the Montana Constitution.

¹⁷ See ¶ 13, above.

¹⁸ See ¶ 10, above.

¹⁹ *McCuin*, *supra*, ¶ 14.

²⁰ § 39-71-105(1), MCA.

²¹ § 39-71-105(3), MCA.

¶ 29 When analyzing an equal protection challenge, the Court follows a three-step process: (1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute.

¶ 30 Gerber submits that the similarly situated classes in this case are: (1) those workers who have reached MMI following a work-related injury or occupational disease which resulted in permanent impairments and PPD benefits and are not incarcerated; and (2) those workers with the same criteria who are incarcerated for a period in excess of 30 days.²²

¶ 31 In *State v. Renee*,²³ the Montana Supreme Court addressed the issue of whether a defendant's right to equal protection was violated when he pled guilty to three misdemeanor counts in exchange for the reduction of his two felony charges to misdemeanors. Because non-violent felony offenders were provided more latitude in sentencing than misdemeanants, Renee challenged the difference in sentencing structures for non-violent felony versus misdemeanor offenders. The Montana Supreme Court held that those convicted of misdemeanor offenses were not similarly situated to those convicted of felonies:

[M]isdemeanor and felony offenders are not similarly situated because of differences in the quality and duration of punishment, as well as the long-term effects on an individual's liberty interest brought about by a felony conviction as compared to that for a misdemeanor conviction:

When a misdemeanant has finished serving his [or her] sentence, he [or she] leaves with neither further obligation nor disability. The conviction for a misdemeanor involves no further loss of civil rights. Not so for the typical felon: he [or she] will generally spend [a period of time following release from prison] in the "constructive" custody of the Department of Corrections and may be reimprisoned were he [or she] to violate the terms of parole.

²² Petitioner's Brief at 10.

²³ 1999 MT 135, 294 Mont. 527, 983 P.2d 893.

A felon is uniquely burdened by a diverse collection of statutorily imposed disabilities long after his [or her] release from prison. For example, [a felon] is denied the right to vote during the period of his [or her] parole. Moreover, a felon may not "... engage in certain business; must register with local law enforcement authorities if his [or her] offense related to certain sex charges; loses the right to possess arms; and, if he [or she] testifies in court, may be impeached on the basis of his [or her] prior felony conviction"²⁴

¶ 32 It is difficult to imagine a greater disparity in classes than those of law abiding injured workers with their liberty intact, versus those injured workers who have been convicted of offenses which resulted in their incarceration for more than 30 days. Non-incarcerated workers can demonstrate their partial disability under § 39-71-116(24), MCA, by returning to work in some capacity and establishing an actual wage loss; incarcerated workers cannot. Non-incarcerated injured workers rely on their benefits to provide the necessities of life for themselves and their families. Incarcerated workers are provided the necessities of life (food and shelter) due to their incarceration. Likewise, one of the results of their incarceration is that they cannot provide for their families irrespective of whether they had suffered an industrial injury.

¶ 33 I conclude that the classes framed in Gerber's brief are not similarly situated. Therefore, Gerber's equal protection challenge must fail. "If the classes at issue are not similarly situated, then the first criteria for proving an equal protection violation is not met and we need look no further."²⁵

¶ 34 During oral argument on the parties' motions, Gerber moved for the inclusion of an additional set of similarly situated classes of injured workers: (1) those incarcerated for greater than 30 days, who have a permanent impairment after reaching MMI and choose to receive their impairment award in a lump sum; and (2) those with the same criteria who choose to receive their impairment award in biweekly payments.

¶ 35 State Fund objected to the inclusion of these new classes on the grounds of lack of notice and lack of standing. The usual standing requirement is that "a party must clearly allege past, present or threatened injury to property or to a civil right, and the alleged injury must be distinguishable from the injury to the public generally."²⁶ Gerber cannot show an injury as a result of these two similarly situated classes, since

²⁴ *Id.*, ¶ 32 (citations omitted).

²⁵ *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877.

²⁶ *State v. Ellis*, 2007 MT 210, ¶ 8, 339 Mont. 14, 167 P.3d 896.

regardless of whether his impairment award was paid biweekly or in a lump sum, it was fully paid to him by May 11, 2010, months before he was incarcerated.²⁷ He therefore lacks standing to raise these additional classifications.

SUBSTANTIVE DUE PROCESS

¶ 36 Gerber next argues that the denial of his § 39-71-703, MCA, benefits is not a permissive legislative act and deprives him of PPD benefits without due process.

¶ 37 A “[s]ubstantive due process analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation.”²⁸ In *Satterlee v. Lumberman's Mut. Cas. Co.*, the Montana Supreme Court noted that the legislature has always had the power to fix the manner, method, and amount of workers' compensation benefits. By denying permanent total disability (PTD) benefits to those eligible to receive social security retirement insurance (SSRI) benefits, the *Satterlee* court found that it was not irrational to permit the most vulnerable of claimants - those not qualifying for SSRI - to continue to receive PTD benefits:

That the legislature did not enunciate this specific purpose does not mean that it should not be considered. As we have stated “[t]he purpose of the legislation does not have to appear on the face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive.” *Stratemeyer I*, 259 Mont. at 152, 855 P.2d at 510-11. Our role is not to second guess the prudence of a legislative decision. As such we cannot strike down § 39-71-710, MCA, as a violation of substantive due process simply because we may not agree with the legislature's policy decisions. That we have identified at least one “possible legitimate purpose” is enough in this instance for us to conclude that affirming the WCC will not result in an absurdity.²⁹

¶ 38 In *McCuin*, I found that a rational basis for § 39-71-744, MCA, lay in the idea that to allow the payment of benefits to an incarcerated individual would essentially mean the public would bear the cost of an incarcerated individual twice: first, through the payment of benefits; and second, through the cost of McCuin's room and board while in prison. Moreover, § 39-71-744, MCA, bears a rational relationship to the express legislative purpose of the WCA of providing wage-loss benefits in a reasonable

²⁷ Stipulated Facts, Ex.'s 2 and 3.

²⁸ *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 33, 353 Mont. 265, 222 P.3d 566 (citations omitted).

²⁹ *Id.*, ¶ 34.

relationship to actual wages lost, and of returning a worker to work as quickly as possible after the worker has suffered an on-the-job injury or disease.³⁰ A worker who has been incarcerated has removed himself from the competitive labor market by committing a crime; he is therefore not losing wages due to his injury. Similarly, he cannot return to work until released from jail or prison.

¶ 39 Gerber further argues that the *quid pro quo* trade-off between his giving up his right to sue his employer in tort in exchange for the receipt of disability benefits under the WCA is lost when he is denied PPD benefits due him pursuant to the effect of § 39-71-744, MCA.³¹ This argument is without merit. As I noted above, Gerber was not losing wages during the period of his incarceration. His PPD benefits are only denied to him during that period of incarceration. By committing a crime resulting in his incarceration, Gerber reduced the value of the *quid*. It stands to reason that the value of the *quo* would be adjusted accordingly. Moreover, Gerber ignores the fact that he has already received most of the PPD benefits due him, and he continues to be eligible for medical benefits for his injury. Gerber has been and is still eligible for benefits “of sufficient significance to satisfy the *quid pro quo* principle.”³²

PROCEDURAL DUE PROCESS

¶ 40 Next, Gerber maintains that his procedural due process rights under Article II, § 17 of the Montana Constitution were violated because the sentencing judge failed to inform him that he would lose his eligibility for PPD benefits if he was incarcerated for more than 30 days. I fail to see any merit in this argument. If Gerber assigns error to his sentencing hearing, his remedy was in that forum, not here.

¶ 41 The Montana Supreme Court rejected a similar argument in *Wiard v. Liberty Northwest Ins. Corp.* that a claimant’s right to due process was violated by a failure of the Department of Labor and Industry to inform him, or have the insurer inform him, of the statute of repose regarding his medical benefits:

The fact that Wiard had no knowledge of the 60-month limitation upon his medical benefits does not alter the operation of the statute in this case. As the Workers’ Compensation Court noted:

[Wiard’s] ignorance of the law was no excuse. If ignorance of the law were an excuse, laws would be applied willy-nilly depending upon the individual’s legal knowledge; the result

³⁰ § 39-71-105(1) & (3), MCA.

³¹ Petitioner’s Brief at 14.

³² *Satterlee*, ¶ 38.

would be legal chaos and there would be no rule of law at all.³³

EXCESSIVE FINES

¶ 42 Finally, Gerber argues that the effect of § 39-71-744, MCA, is the imposition of an excessive fine in violation of Article II, § 22 of the Montana Constitution, since it deprives him of \$4,381.02 in PPD benefits. In *State v. Good*,³⁴ the Montana Supreme Court considered whether the restitution the trial court ordered a defendant to pay to a crime victim was subject to the excessive fines clause of the Montana Constitution. In concluding that it was, the Court noted, among other things, that “restitution is not separate from the offender’s punishment but is an aspect of it.”³⁵ Such is not the case with the loss of PPD benefits due to § 39-71-744, MCA. Although, the loss of PPD benefits may have been a consequence of Gerber’s conviction and incarceration, it was not an aspect of his punishment. Following Gerber’s reasoning, his ineligibility for certain types of employment because of his criminal conviction would likewise constitute an excessive fine. Moreover, assuming *arguendo* that Gerber’s argument had merit, the forum in which he should have challenged the imposition of this “excessive fine” would be the court that actually imposed the sentence. The Workers’ Compensation Court is a court of limited jurisdiction. I am quite confident that among those limits is included a limit on this Court’s ability to review criminal sentences imposed by the Montana Fourth Judicial District Court.

JUDGMENT

¶ 43 Petitioner’s motion for summary judgment is DENIED.

¶ 44 Respondent’s motion for summary judgment is GRANTED.

¶ 45 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.

³³ 2003 MT 295, ¶ 32, 318 Mont. 132, 79 P.3d 281 (internal citations omitted) (*affirming Wiard v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 31).

³⁴ 2004 MT 296, 323 Mont. 378, 100 P.3d 644.

³⁵ *Id.*, ¶ 22.

DATED in Helena, Montana, this 28th day of March, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Eric Rasmusson
Daniel B. McGregor
Submitted: November 27, 2012