IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 17

WCC No. 2015-3667

JOSE "LEO" JIMENEZ

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

EMPLOYMENT RELATIONS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY

Intervenor.

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION TO DISMISS

Summary: Respondent moved to dismiss Petitioner's Petition for Hearing, wherein Petitioner asks this Court to award him a lump sum of his PTD, medical, and domiciliary care benefits, the total of which is approximately $3.5 million. Respondent argued that the Workers' Compensation Act does not allow for a lump-sum conversion of medical and domiciliary care benefits on a claimant's demand, and Petitioner failed to adequately plead the statutory requirements for a lump-sum conversion of PTD benefits.

Held: The Workers' Compensation Act does not allow this Court to grant Petitioner a lump-sum conversion of his medical and domiciliary care benefits on his demand and those claims are dismissed. However, Petitioner sufficiently pleaded his demand for a lump-sum conversion of his PTD benefits, which the Workers' Compensation Act allows under certain circumstances. Respondent's Motion to Dismiss is therefore granted in part and denied in part.

¶ 1 Respondent Liberty Northwest Insurance Corporation (Liberty) moves to dismiss the Petition for Hearing, in which Petitioner Jose "Leo" Jimenez seeks a lump sum of his medical, domiciliary care, and permanent total disability (PTD) benefits under § 39-71-741, MCA (2003). Liberty contends that the Petition for Hearing fails to state a claim upon which relief may be granted because § 39-71-741, MCA (2003), does not allow a claimant

to obtain a lump sum conversion of medical and domiciliary care benefits on his demand, and because Jimenez did not adequately plead the facts under which he claims entitlement to a lump sum of his PTD benefits. Jimenez opposes Liberty's motion, arguing that § 39-71-741, MCA (2003), allows him to obtain a lump sum of all benefits on his demand and that his Petition for Hearing gives Liberty sufficient notice of his claims. Jimenez also argues that if he can obtain a lump sum of his medical and domiciliary care benefits only with Liberty's agreement, then § 39-71-741, MCA (2003), contains an unconstitutional delegation of legislative authority. The Department of Labor and Industry (DLI) has intervened regarding Jimenez' constitutional claims.

STATEMENT OF FACTS

¶ 2 Because this case is before this Court on a motion to dismiss for failure to state a claim upon which relief may be granted, this Court accepts the allegations in Jimenez' Petition for Hearing, including the documents incorporated, as true.[1] As alleged in Jimenez' Petition for Hearing, the facts are as follows:

¶ 3 On December 10, 2003, Jimenez suffered an industrial injury. Although Liberty accepted liability for his claim, they have had several disputes over the last 13 years.

¶ 4 By letter dated September 15, 2015, Jimenez demanded that Liberty pay his PTD, medical, and domiciliary care benefits in a lump sum, pursuant to § 39-71-741, MCA (2003). Jimenez maintains that it is in his best interest to convert his benefits to a lump sum because Liberty has harmed him by treating him "arbitrarily and unfairly." Liberty denied Jimenez' demand for a lump-sum payment.

¶ 5 Jimenez calculated the present value of his PTD benefits to be $188,462.02, the present value of his medical benefits to be $465,366.48, and the present value of his domiciliary care benefits to be $2,930,428.64. Thus, he seeks a total award of approximately $3.5 million.

LAW AND ANALYSIS

¶ 6 A motion to dismiss for failure to state a claim upon which relief may be granted requires this Court to determine whether a claim has been adequately stated in the Petition for Hearing.[2] This Court may consider only the Petition for Hearing and the documents it incorporates by reference.[3] All a petitioner need show to survive a motion

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[1] *Glaude v. State Comp. Ins. Fund*, 271 Mont. 136, 138, 894 P.2d 940, 941 (1995) (citation omitted).

[2] *See Woods v. Shannon*, 2015 MT 76, ¶ 9, 378 Mont. 365, 344 P.3d 413 (citation omitted).

[3] *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6 (citation omitted).

for judgment for failure to state a claim is that a set of facts exists under which he could recover.[4]

Preliminary Issues

¶ 7 On January 15, 2016, Jimenez filed a Notice of Constitutional Challenge to a Statute regarding § 39-71-741, MCA (2003). The DLI subsequently intervened on behalf of the Montana Attorney General. The parties thereafter briefed the issue of the constitutionality of § 39-71-741, MCA (2003). The DLI raised two arguments that the parties did not raise in their initial briefing on Liberty's Motion to Dismiss that this Court must address at the outset.

¶ 8 First, the DLI argues that the parties are applying the wrong version of § 39-71-741, MCA. Since Jimenez' industrial accident occurred on December 10, 2003, his case would typically be governed by the 2003 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of his industrial accident.[5] However, the DLI contends that the 2011 version of § 39-71-741, MCA, applies in this matter because the 2011 Legislature amended this statute and expressly declared the amendments to be retroactive.[6] Jimenez maintains that the 2011 amendments are not retroactive, arguing that the language purporting to apply the amendments retroactively was not part of the statute, and further arguing that retroactive applicability violates the rule that the statutes in effect on the date of injury control in workers' compensation cases. Liberty has not taken a position on this issue.

¶ 9 Notwithstanding, this Court need not resolve the dispute over the applicable statute because it would reach the same result regardless of which version of the statute applies. The 2011 Legislature made only one substantive change to the statute: it added subsections allowing a claimant and an insurer to agree to settle medical benefits on an accepted claim when the "settlement is in the best interest of the parties."[7] However, Jimenez is not seeking a settlement and does not contend that these additions allow him to obtain a lump sum of his medical benefits on his demand. The 2011 Legislature's other amendments to § 39-71-741, MCA, were minor stylistic changes that do not affect its meaning. Thus, the 2003 subsections on which Jimenez relies to support his argument

[4] *Glaude*, 271 Mont. at 139, 894 P.2d at 942 (citation omitted).

[5] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687(citation omitted); § 1-2-201, MCA.

[6] 2011 Mont. Laws, ch. 167, §§ 14 and 35 (H.B. 334).

[7] § 39-71-741(2)(f), (3), and (8), MCA (2011).

that a claimant can obtain a lump-sum conversion of all benefits on his demand are indistinguishable from the 2011 subsections.[8]

¶ 10 Second, the DLI argues that this Court need not address Jimenez' argument that § 39-71-741, MCA (2003), is unconstitutional because Jimenez cannot obtain his domiciliary care benefits in a lump sum due to a settlement agreement he reached with Liberty in 2006. However, neither Liberty nor Jimenez interpret the 2006 agreement as precluding Jimenez from seeking a lump sum of his domiciliary care benefits. Furthermore, the 2006 agreement is silent as to whether Jimenez could obtain a lump sum of his domiciliary care benefits, and when a settlement of workers' compensation benefits is silent on a point, the agreement incorporates the applicable provisions of the WCA.[9] Thus, this Court must determine whether Jimenez can lump sum his domiciliary care benefits under the WCA.

Jimenez' Claims for a Lump-Sum Conversion of his Medical and Domiciliary Care Benefits

¶ 11 The WCA favors the periodic payments of benefits.[10] However, § 39-71-741, MCA (2003), states that the DLI may approve a lump-sum payment of benefits, and this Court may award a lump sum, in delineated circumstances. That statute states, in relevant part:

> (1) By written agreement filed with the department, benefits under this chapter may be converted in whole or in part into a lump sum. An agreement is subject to department approval. If the department fails to approve or disapprove the agreement in writing within 14 days of the filing with the department, the agreement is approved. The department shall directly notify a claimant of a department order approving or disapproving a claimant's compromise or lump-sum payment. Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department. The department may approve an agreement to convert the following benefits to a lump sum only under the following conditions:
>
> (a) all benefits if a claimant and an insurer dispute the initial compensability of an injury and there is a reasonable dispute over compensability;

[8] *Compare* § 39-71-741(1) *and* (4), MCA (2003), *with* § 39-71-741(1) *and* (6), MCA (2011).

[9] *Wiard v. Liberty Northwest Ins. Corp.*, 2003 MT 295, ¶¶ 20-25, 318 Mont. 132, 79 P.3d 281.

[10] *Sullivan v. Aetna Life & Cas.*, 271 Mont. 12, 16, 894 P.2d 278, 280 (1995) (citations omitted).

(b) permanent partial disability benefits if an insurer has accepted initial liability for an injury. The total of any permanent partial lump-sum conversion in part that is awarded to a claimant prior to the claimant's final award may not exceed the anticipated award under 39-71-703. The department may disapprove an agreement under this subsection (1)(b) only if the department determines that the lump-sum conversion amount is inadequate.

(c) permanent total disability benefits if the total of all lump-sum conversions in part that are awarded to a claimant do not exceed $20,000. The approval or award of a lump-sum permanent total disability payment in whole or in part by the department or court must be the exception. It may be given only if the worker has demonstrated financial need that:

(i) relates to:

(A) the necessities of life;

(B) an accumulation of debt incurred prior to the injury;

or

(C) a self-employment venture that is considered feasible under criteria set forth by the department; or

(ii) arises subsequent to the date of injury or arises because of reduced income as a result of the injury; or

(d) except as otherwise provided in this chapter, all other compromise settlements and lump-sum payments agreed to by a claimant and insurer.

. . . .

(4) A dispute between a claimant and an insurer regarding the conversion of biweekly payments into a lump-sum is considered a dispute for which a mediator and the workers' compensation court have jurisdiction to make a determination. If an insurer and a claimant agree to a compromise and release settlement or a lump-sum payment but the department disapproves the agreement, the parties may request the workers' compensation court to review the department's decision.

¶ 12 Jimenez argues that this statute provides that all workers' compensation benefits can be converted to a lump sum on a claimant's demand. Citing cases dating back to 1929, Jimenez argues that a claimant can obtain a lump sum of any benefit by proving that it is in his "best interest" to receive a lump sum.[11]

[11] *See, e.g., Barnard v. Liberty Northwest Ins. Corp*., 2008 MT 254, ¶ 22, 345 Mont. 81, 189 P.3d 1196 (citation omitted) (stating, "To determine whether a lump sum should be awarded, the primary factor courts must consider is the claimant's best interest.").

¶ 13 Liberty argues that this Court must dismiss Jimenez' claims to lump sum his medical and domiciliary care benefits because neither medical nor domiciliary care benefits can be converted to a lump sum on a claimant's demand since neither is specifically listed in § 39-71-741(1)(a)-(d), MCA (2003).[12] Liberty notes that none of the case law on which Jimenez relies held that a claimant could obtain a lump sum of medical or domiciliary care benefits on demand.[13]

¶ 14 Under the plain language of this statute, Liberty is correct that a claimant cannot obtain a lump sum of every type of workers' compensation benefit on his demand. The Montana Supreme Court recognized this in *Martin v. The Hartford*, explaining, "Montana's statutory scheme does not allow lump sums to be awarded on demand. This is clearly evidenced by § 39-71-741, MCA, which sets forth a limited set of circumstances wherein a claimant is eligible to receive a lump sum distribution."[14]

¶ 15 Likewise, this Court has explained that a claimant is eligible to receive benefits in a lump sum only in a limited set of circumstances. In *Liberty Mutual Fire Ins. Co. v. Warner*, this Court pointed out that § 39-71-741, MCA (2003), is the only section in the WCA which provides for a method of payment other than biweekly payments.[15] This Court ruled that the only circumstances in which a claimant is eligible for a lump sum are set forth in § 39-71-741(1), MCA (2003), and explained, "The degree of regulation set out in the section indicates it was intended by the legislature to be exclusive with respect to lump summing. 'In determining legislative intent, an express mention of a certain power or authority implies the exclusion of nondescribed powers.' "[16]

¶ 16 When § 39-71-741, MCA (2003), is read under the rule of statutory construction requiring this Court to "read and construe each statute as a whole" to "give effect to the

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[12] Renumbered as § 39-71-741(2)(a)-(d), MCA (2011).

[13] *See Benhart v. Liberty Northwest Ins. Co.*, 2008 MTWCC 6 (lump-sum conversion of PTD benefits denied); *Barnard v. Liberty Northwest*, 2006 MTWCC 35 (*aff'd* 2008 MT 254) (lump-sum conversion of PTD benefits granted); *Liberty Mut. Fire Ins. Co. v. Warner*, 2004 MTWCC 24 (Court declared that the impairment award of a permanently totally disabled worker may be converted to a lump sum); *Sullivan v. Aetna Life & Cas.*, 271 Mont. 12, 894 P.2d 278 (1995) (lump-sum advance against PPD benefits denied); *Ingraham v. Champion Int'l*, 243 Mont. 42, 793 P.2d 769 (1990) (court held certain parts of § 39-71-741, MCA (1987), dealing with lump-sum conversion of PPD benefits unconstitutional); *Polich v. Whalen's O. K. Tire Warehouse*, 194 Mont. 167, 634 P.2d 1162 (1981) (lump-sum conversion of PTD benefits granted); *Utick v. Utick*, 181 Mont. 351, 593 P.2d 739 (1979) (lump-sum conversion of PTD benefits granted); *Martin v. The Hartford*, 2004 MT 57, 320 Mont. 206, 86 P.3d 569 (lump-sum conversion of PTD benefits denied); *Schumacher v. Empire Steel Mfg. Co.*, 175 Mont. 411, 574 P.2d 987 (1977) (court noted in dicta that a lump-sum conversion of PPD benefits would allow the claimant to put this matter behind him); *Legowik v. Montgomery Ward & Co.*, 157 Mont. 436, 486 P.2d 867 (1971) (lump-sum conversion of PTD benefits granted); *Landeen v. Toole Cnty. Ref. Co.* 85 Mont. 41, 277 P. 615 (1929) (lump-sum conversion of survivor's benefits granted).

[14] *Martin*, ¶ 6.

[15] *Warner*, ¶ 19.

[16] *Warner*, ¶ 20 (quoting *State ex rel Jones v. Giles*, 168 Mont 130, 133, 541 P.2d 355, 357 (1975)).

purpose of the statute,"[17] there are only four circumstances in which a claimant is eligible to receive a lump sum: (1) where the insurer disputes the initial compensability of the industrial injury and the claimant and insurer reach a settlement;[18] (2) where the claimant is entitled to permanent partial disability (PPD) benefits;[19] (3) where the claimant is entitled to PTD benefits and can prove "financial need" under the terms of the statute;[20] and (4) where the claimant and insurer have a dispute over benefits and enter into a compromise settlement or otherwise agree to a lump-sum payment.[21] By providing an exclusive list of the circumstances in which a claimant is eligible for a lump sum, the Legislature excluded all other circumstances pursuant to the canon *expressio unius est exclusio alterius* (the expression of one is the exclusion of others).[22] It is evident that the Legislature did not intend for a claimant to obtain medical and domiciliary benefits in a lump sum on his demand.

¶ 17 Jimenez, however, maintains that § 39-71-741, MCA (2003), does not contain an exclusive list and contends that a claimant can obtain a lump sum of all workers' compensation benefits on his demand. Jimenez makes four arguments in support of his position, but none hold water.

¶ 18 First, Jimenez focuses on the first sentence of § 39-71-741(1), MCA (2003) — which states, "benefits under this chapter may be converted in whole or in part into a lump sum" — and argues that all workers' compensation benefits can be converted to a lump sum on a claimant's demand. Jimenez, however, isolates one phrase in the statute and takes it out of context, thereby contravening the rules of statutory construction.[23] The second sentence of § 39-71-741(1), MCA (2003), states that the DLI must approve the agreement, and the sixth sentence states that the DLI may approve a lump sum "only" under the circumstances set forth in subsections (1)(a) through (d). When read as a whole, as the Montana Supreme Court did in *Martin* and as this Court did in *Warner*, § 39-

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[17] *State v. Triplett*, 208 MT 360, ¶ 25, 346 Mont. 383, 195 P.3d 819 (internal quotation marks omitted).

[18] § 39-71-741(1)(a), MCA (2003).

[19] § 39-71-741(1)(b), MCA (2003).

[20] § 39-71-741(1)(c), MCA (2003).

[21] § 39-71-741(1)(d), MCA (2003). *See also Warner*, ¶ 21 (although this Court overlooked subsection (1)(d), it explained that the limited circumstances in which a claimant is eligible for a lump sum are listed in subsection (1)).

[22] *See Dukes v. City of Missoula,* 2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61 (citations omitted) (holding that under the canon *expressio unius est exclusio alterius*, a city could not be liable under the Scaffold Act because it provided that the only three parties who are potentially liable were a contractor, a subcontractor, and a builder and explaining: "Clearly, the Legislature did not intend to impose liability on any 'county, city, town, or village,' under the Scaffold Act, or it would have listed those parties along with contractors, subcontractors, and builders.").

[23] *Triplett*, ¶ 25 (quoting *Montana Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003) (stating that courts construe a statute by "reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.' ").

71-741, MCA (2003), does not provide for the lump-sum conversion of all benefits on a claimant's demand, but instead provides a limited set of circumstances under which a claimant is eligible for a lump sum.

¶ 19 Second, Jimenez focuses on § 39-71-741(4), MCA (2003) — which states that this Court has jurisdiction over a dispute "regarding the conversion of biweekly payments into a lump sum" — and argues that all benefits can be lump summed on a claimant's demand, since § 39-71-740, MCA, states that "[a]ll payments of compensation" are to be paid biweekly. Jimenez, however, reads more into subsection (4) than is there. Subsection (4) gives this Court jurisdiction, but subsection (1) is the specific subsection which lists the circumstances under which a claimant is eligible for a lump sum. As this Court stated in a similar situation, "As the more specific statute, it, rather than the general jurisdictional provision, is controlling."[24] Moreover, if the Legislature intended claimants to obtain lump-sum conversions of medical and domiciliary care benefits on demand, it would not have been so indirect; rather, the Legislature would have used definite language, as it did with regard to PPD and PTD benefits in subsections (1)(b) and (c).

¶ 20 Third, Jimenez argues that Liberty's interpretation of § 39-71-741, MCA (2003), "would – as a practical matter – preclude settlement of all workers' compensation claims concerning medical and domiciliary care benefits, which is something that happens weekly, if not daily, in Montana." This argument is without merit because, while the plain language of the statute does not allow a claimant to obtain a lump sum of his medical and domiciliary care benefits on his demand, the plain language allows a claimant and an insurer to enter into settlements under which the insurer pays a lump sum. Subsection (1)(a) allows for a lump sum of "all benefits" when a claimant and an insurer settle a dispute over initial compensability. And subsection (1)(d) allows a lump sum of benefits when a claimant and an insurer have disputes and agree to a settlement, which may include settlements of medical and domiciliary care benefits.[25]

¶ 21 Finally, Jimenez points to the phrase in § 39-71-741(1)(d), MCA (2003) — which allows "lump sum payments agreed to by a claimant and an insurer" — and argues that

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[24] *Washington v. State Comp. Ins. Fund*, 1999 MTWCC 17, ¶ 17 (citations omitted). *See also* § 1-2-102, MCA ("In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.").

[25] *Warner*, ¶ 13 (explaining that this Court can approve settlements under which the insurer pays a lump sum that this Court could not award under § 39-71-741, MCA, because: "Settlements in disputed cases are encouraged, and once a petition is filed, the Court has jurisdiction to approve settlements which may fashion remedies the Court might not be able to otherwise impose under existing law. While statutes and case law may limit the remedies a court may impose, they do not limit the parties in fashioning their own solution to their dispute. Indeed, the remedies the parties fashion among themselves may in fact be superior to the remedies a court is required to impose if the matter is litigated to finality.").

if the statute does not permit him to obtain his medical and domiciliary care benefits in a lump sum without Liberty's agreement, then the statute contains an unconstitutional delegation of legislative authority under *Ingraham v. Champion International*.[26] Jimenez maintains that the way to remedy the alleged unconstitutional delegation is to grant claimants the authority to obtain a lump sum of all benefits on their demand.

¶ 22 In *Ingraham*, the Montana Supreme Court considered a constitutional challenge to the 1987 version of § 39-71-741, MCA. Subsections (2)(a) and (3)(a) of that version expressly stated claimants could convert their PPD and PTD benefits into a lump sum, but subsections (2)(b) and (3)(b) stated that the conversion could be made "only upon agreement between a claimant and an insurer." Thus, the court explained that the Legislature delegated to the insurer the "absolute discretion" as to whether to allow a lump sum of PPD and PTD benefits.[27] The court also considered a constitutional challenge to § 39-71-741(2)(d) and (3)(d), MCA (1987), both of which stated, "The parties' failure to reach agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction."

¶ 23 The court first held that granting the insurer the "absolute discretion" as to whether to convert PPD and PTD benefits into a lump sum was an unconstitutional delegation of legislative power.[28] The court explained:

> The legislature has improperly and unconstitutionally delegated its authority to private parties as to what terms, and under what circumstances, and in what amounts, a lump-sum conversion can occur. The power of the legislature to prescribe the amounts, time and manner of payment of workers' compensation benefits . . . has been delegated in subdivision (2), sec. 39-71-741, MCA, to others. This the legislature may not do.[29]

The court then held that subsections (2)(d) and (3)(d) of the 1987 statute were unconstitutional under Mont. Const. art. II, § 16 — which guarantees that courts of justice shall be open to every person — because the provisions "deprive the worker or the insurer of any right of access to the judicial department of this state, if the insurer and the worker do not agree."[30] To remedy these constitutional violations, the court struck only the subsections stating that the insurer had to agree to a lump sum of PPD and PTD benefits, and the subsections stating that this Court did not have jurisdiction to decide disputes

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[26] 243 Mont. 42, 793 P.2d 769 (1990).

[27] *Ingraham*, 243 Mont. at 48, 793 P.2d at 772.

[28] *Id.*

[29] *Id.*

[30] *Ingraham*, 243 Mont. at 49, 793 P.2d at 773.

regarding the lump summing of PPD and PTD benefits.[31] Thus, a claimant was eligible to obtain a lump sum of his PPD and PTD benefits because the part of the statute stating that a claimant was eligible to convert those benefits to a lump sum remained, and this Court had jurisdiction to resolve disputes "as to the propriety of a lump-sum settlement upon which [the claimant and insurer] cannot agree."[32]

¶ 24 Despite Jimenez' claim, the provision in § 39-71-741(1)(d), MCA (2003),[33] allowing a claimant and an insurer to agree to a lump sum does not constitute an unconstitutional delegation of legislative authority under *Ingraham*. The problem with the 1987 statute was not that it allowed a claimant and an insurer to reach an agreement under which the insurer paid benefits in a lump sum, and the *Ingraham* court did not strike the provision in the 1987 statute allowing the parties to agree to a lump-sum conversion.[34] The problem with the 1987 statute was that it expressly stated that claimants were eligible to convert their PPD and PTD benefits into a lump sum but then, by stating that the "conversion may be made only upon agreement," granted the insurers the absolute discretion to determine whether to permit a lump-sum conversion of those benefits. This problem does not exist with medical or domiciliary care benefits under § 39-71-741, MCA (2003), because it does not expressly state that a claimant is eligible for a lump-sum conversion of medical or domiciliary care benefits on his demand. As Liberty and the DLI point out, the *Ingraham* court explained that the Legislature has the power to determine which benefits a claimant is eligible to convert into a lump sum on his demand. The court stated:

> The power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted. The legislature could, we think, deny completely any authority to an insurer, a worker, or the department to apply for or to allow lump-sum conversion of workers' benefits.[35]

Unlike the provisions at issue in *Ingraham*, the provision in § 39-71-741(1)(d), MCA (2003),[36] allowing a claimant and an insurer to agree to a lump sum does not grant the insurer absolute discretion whether to award a lump-sum conversion for which the claimant is expressly eligible; the provision just makes explicit that the parties have the right to exercise their freedom to contract to agree to a lump sum of benefits beyond what

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[31] *Ingraham*, 243 Mont. at 49-50, 793 P.2d at 773-74 (striking § 39-71-741(2)(b) and (2)(d), MCA (1987)).

[32] *Ingraham*, 243 Mont. at 49-50, 793 P.2d at 773-74.

[33] Renumbered as § 39-71-741(2)(d), MCA (2011).

[34] § 39-71-741(1)(a)(ii), MCA (1987) ("Benefits may be converted in whole to a lump sum . . . if the claimant and insurer agree to a settlement.").

[35] *Ingraham*, 243 Mont. at 48, 793 P.2d at 772.

[36] Renumbered as § 39-71-741(2)(d), MCA (2011).

the statute allows.[37] In short, the Legislature cannot delegate to the insurer the absolute discretion to decide whether it will pay a lump sum for which the claimant is expressly eligible under the statute; however, the Legislature can give claimants and insurers the freedom to enter into agreements under which the insurer pays a lump sum. Thus, § 39-71-741(1)(d), MCA (2003), does not constitute an unconstitutional delegation of legislative authority.

¶ 25 Moreover, even if this Court held unconstitutional the part of § 39-71-741(1)(d), MCA (2003),[38] that allows a claimant and an insurer to agree to a lump-sum payment, Jimenez would not obtain the remedy he seeks. This Court has explained that, under *Ingraham*, "the relief granted as a result of the declaration of unconstitutionality was not a right, upon demand, to a lump sum."[39] To remedy the unconstitutional delegation in *Ingraham*, the court struck the subsections stating that the insurer had to agree to a lump sum of PPD and PTD benefits, and left the subsections stating that a claimant could obtain a lump sum of these benefits. The court also struck the subsections stating that this Court did not have jurisdiction to decide disputes regarding the lump summing of PPD and PTD benefits.[40] Thus, if the phrase that allows claimants and insurers to agree to a lump sum is unconstitutional, the remedy would be to strike the phrase "and lump-sum payments agreed to by a claimant and insurer." Since no provision allows a claimant to convert medical or domiciliary benefits to a lump sum on demand, this remedy would eliminate the ability of the DLI or this Court to approve a lump-sum payment in cases where the claimant and insurer agree to a lump sum beyond what § 39-71-741, MCA (2003), allows. The remedy would not, as Jimenez argues, give claimants the right to a lump-sum conversion of all benefits on demand.

¶ 26 In conclusion, § 39-71-741, MCA (2003), does not allow a claimant to convert his medical and domiciliary care benefits into a lump sum on demand. Since there is no legal basis to award Jimenez a lump-sum conversion of his medical and domiciliary care benefits, he cannot prove any set of facts that would allow for that relief. Accordingly, Liberty's Motion to Dismiss is **granted** as to those claims.

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[37] *See Warner*, ¶ 13. *See also Newlon v. Teck American, Inc*., 2015 MT 317, ¶¶ 15-18, 381 Mont. 378, 360 P.3d 1134 (holding that an insurer could agree to provide more benefits than is provided in a statute because "parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws.").

[38] Renumbered as § 39-71-741(2)(d), MCA (2011).

[39] *Kemp v. Montana Contractor Comp. Fund*, 1998 MTWCC 46, ¶ 7.

[40] *See* ¶ 23, above.

Jimenez' Claim for a Lump-Sum Conversion of his PTD Benefits

¶ 27 Liberty does not dispute that a claimant can obtain a lump sum of his PTD benefits under § 39-71-741(1)(c), MCA (2003). However, Liberty argues that Jimenez failed to adequately plead his claim for the lump-sum conversion of his PTD benefits because he did not plead any facts to satisfy the criteria for obtaining a lump sum under § 39-71-741(1)(c), MCA (2003), or ARM 24.29.1202. Liberty argues that Jimenez' proffered reason — that Liberty has treated him "arbitrarily and unfairly" — is insufficient grounds to award a lump sum of his PTD benefits.

¶ 28 Jimenez argues that § 39-71-741(1)(c), MCA (2003), provides this Court with the authority to resolve disputes over the lump-sum conversion of PTD benefits. Jimenez argues that in *Utick v. Utick*,[41] the Montana Supreme Court held that, even though the claimant had no pressing financial need, it was in his best interest to convert his PTD benefits to a lump sum because the insurer had treated him "arbitrarily and unfairly." Thus, Jimenez maintains that he has pleaded a claim upon which relief may be granted.

¶ 29 In *McKinnon v. Western Sugar Cooperative Corp*., the Montana Supreme Court held that it is reversible error for a district court to dismiss a claim under M.R.Civ.P. 12(b)(6) on the grounds that the party did not set forth all of the facts underlying its claim.[42] There, the plaintiff alleged that the defendant's conduct "met the statutory exception to Workers' Compensation exclusivity," but did not set forth the defendant's alleged intentional and deliberate acts.[43] The court reasoned that since Montana is a notice pleading state, the plaintiff's allegation was sufficient and the plaintiff could "develop the record through discovery to attempt to show intentional and deliberate action on the part of Western Sugar."[44] The court further explained that it " 'does not favor the short circuiting of litigation at the initial pleading stage unless a complaint does not state a cause of action under any set of facts.' "[45]

¶ 30 Under this standard, this Court cannot dismiss Jimenez' claim to lump sum his PTD benefits. ARM 24.5.301(1)(c), only requires "a short, plain statement of the petitioner's contentions." Nothing in the applicable statutes or rules holds Jimenez to a heightened pleading standard because his claim implicates § 39-71-741, MCA. Jimenez' Petition for Hearing gives Liberty adequate notice as to his claim, and he could prove facts that would entitle him to a lump-sum conversion of his PTD benefits. Although this

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[41] 181 Mont. 351, 593 P.2d 739 (1979).

[42] 2010 MT 24, 355 Mont. 120, 225 P.3d 1221.

[43] *McKinnon*, ¶¶ 6, 8.

[44] *McKinnon*, ¶ 20.

[45] *McKinnon*, ¶ 17 (citations omitted).

Court agrees with Liberty that a claimant must prove more than arbitrary and unfair treatment to obtain a lump sum of his PTD benefits, both because § 39-71-741(1)(c), MCA (2003), requires more, and because arbitrary and unfair treatment was not the only basis for awarding a lump sum in *Utick*,[46] this Court must allow Jimenez to develop the record, as the Supreme Court allowed in *McKinnon*. If, after discovery, Jimenez fails to produce admissible evidence that would allow him to obtain a lump sum of his PTD benefits under § 39-71-741(1)(c), MCA (2003), and applicable case law, Liberty may move for summary judgment,[47] or it may argue at trial that Jimenez failed to produce sufficient evidence to prove his claim. However, at this stage, Jimenez has set forth a claim upon which relief may be granted and Liberty's Motion to Dismiss Jimenez' claim for a lump-sum award of his PTD benefits is therefore **denied**.

ORDER

¶ 31 Liberty's Motion to Dismiss is **granted in part** and **denied in part.**

DATED this 22nd day of December, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Sydney E. McKenna and Justin Starin
Mary K. Starin
Leo S. Ward
Judy Bovington and Quinlan O'Connor

Submitted: April 26, 2016

[46] *See Utick*, 181 Mont. at 353-54, 356, 593 P.2d at 740-42 (explaining that the claimant intended to use the lump sum to invest in commercial real estate which would result in yearly lease payments that would more than double the amount he would receive in biweekly PTD benefits, which the court determined was in his best interest from a financial perspective).

[47] *See Blacktail Mountain Ranch, Co., LLC v. State, Dept. of Natural Res. and Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 338 (citation omitted) ("Summary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof at trial.").