IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 41

WCC No. 2005-1504

BRIAN McCUIN

Petitioner

vs.

MONTANA STATE FUND

Respondent.

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

Summary: Petitioner moved for summary judgment arguing that his permanent partial disability benefits did not lapse during the time he was incarcerated.

Held: While Petitioner would otherwise have been entitled to permanent partial disability benefits pursuant to § 39-71-703, MCA, he was ineligible for such benefits during the time he was incarcerated pursuant to § 39-71-744, MCA. Although Petitioner would have been entitled to any such benefits which remained subsequent to his release from prison, due to an overpayment of his temporary total disability benefits, any amount which would otherwise have been due was offset by the amount overpaid.

¶ 1 Petitioner moved this Court for summary judgment pursuant to ARM 24.5.329(2) asserting that, no material facts being in dispute, he is entitled to summary judgment as a matter of law.[1]

---

[1] Petitioner's Motion for Summary Judgment.

UNDISPUTED FACTS

¶ 2 From the pleadings and briefs, the following facts are established:

¶ 2a On July 7, 2001, Petitioner suffered an industrial injury arising out of the course and scope of his employment with Alternatives, Inc., in Yellowstone County.[2]

¶ 2b Petitioner had concurrent employment as a roofer and his average weekly wage was based upon his roofing earnings.[3]

¶ 2c Petitioner was assigned a 14% whole body impairment by his treating physician on July 9, 2002.[4]

¶ 2d Petitioner was incarcerated from November 2002 until late 2003.[5]

¶ 2e Respondent has paid Petitioner's impairment valuation.[6]

¶ 2f As a result of the industrial injury, Petitioner has suffered a wage loss of greater than $2.00 per hour.[7]

¶ 2g Petitioner's temporary total disability benefits were overpaid in the amount of $7,014.00.[8]

---

[2] Petition for Hearing, ¶ 1; Response to Petition for Hearing, ¶ 1.

[3] Petition for Hearing, ¶ 2; Response to Petition for Hearing, ¶ 2.

[4] Petition for Hearing, ¶ 5; Response to Petition for Hearing, ¶ 5.

[5] Petition for Hearing, ¶ 7; Response to Petition for Hearing, ¶ 7.

[6] Petition for Hearing, ¶ 6; Response to Petition for Hearing, ¶ 6.

[7] Petition for Hearing, ¶ 8; Response to Petition for Hearing, ¶ 8.

[8] Response to Petition for Hearing at 3; Petitioner's Brief in Support of Motion for Summary Judgment, ¶ 7.

SUMMARY JUDGMENT ISSUES

¶ 3 The following issues are presented for summary judgment:

¶ 3a Whether § 39-71-744, MCA (2001), provides for or contemplates the lapsing of wage-loss benefits payable to claimants who go through a period of incarceration;[9] and

¶ 3b If § 39-71-744, MCA (2001), does allow for the lapsing of wage-loss benefits payable to claimants who go through a period of incarceration, whether § 39-71-744, MCA (2001), denies equal protection to incarcerated individuals and is thus unconstitutional.[10]

ANALYSIS AND DECISION

¶ 4 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.[11]

¶ 5 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[12]

¶ 6 At issue is whether Petitioner is entitled to permanent partial disability (PPD) benefits pursuant to § 39-71-703, MCA, following his release from incarceration. Petitioner asserts that he is entitled to have his PPD benefits commence from the date he was released from prison.[13] Respondent argues that under § 39-71-744, MCA, Petitioner is not entitled to these benefits because the time for payment of these benefits began running and eventually expired during his incarceration.[14]

---

[9] Petitioner's Brief in Support of Motion for Summary Judgment at 2.

[10] *Id*. at 5.

[11] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[12] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[13] Petitioner's Brief in Support of Motion for Summary Judgment at 3.

[14] Response to Motion for Summary Judgment at 1-2.

¶ 7 Under § 39-71-703(1), MCA, 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 PPD award if the worker has a permanent impairment rating and has an actual wage loss as a result of the injury. It is undisputed that Petitioner has a permanent impairment rating and suffered a wage loss of greater than $2.00 per hour.[15] Therefore, under the language of the statute, he is eligible for PPD benefits. However, § 39-71-744, MCA, provides an exception, stating that 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 a result of conviction of a felony or misdemeanor. It is undisputed that Petitioner was incarcerated as a result of a conviction for more than 30 days.[16]

¶ 8 Petitioner agrees that during the time he was incarcerated, he could not have received PPD benefits. However, he argues that his time for receiving those benefits did not run, but rather those benefits sat in abeyance until his incarceration ended.[17] Petitioner points to § 39-71-116(1), MCA, which defines "actual wage loss" as wages that a worker earns or is qualified to earn after the worker reaches maximum healing which are less than the actual wages the worker received at the time of the injury. Petitioner argues that he was not "qualified to earn" wages while incarcerated and thus he did not suffer an "actual wage loss" as defined by statute until ***after*** he was released.[18] Petitioner further argues that to deny these benefits would be to economically punish convicted criminals, and that the state legislature would not have intended to do so.[19]

¶ 9 Respondent argues that the language and meaning of § 39-71-744, MCA, is clear and that if the legislature intended workers' compensation benefit payments to be held in abeyance while an injured worker was incarcerated, the statute would say so.[20]

¶ 10 In *Wimberley v. State Comp. Ins. Fund*,[21] this Court addressed whether a claimant who was incarcerated during the weeks he would have otherwise been eligible for benefits

---

[15] *See* ¶¶ 2c, 2f, above.

[16] *See* ¶ 2d, above.

[17] Petitioner's Brief in Support of Motion for Summary Judgment at 3-4.

[18] *Id*. at 3.

[19] *Id*. at 4.

[20] Response to Motion for Summary Judgment at 3.

[21] 1994 MTWCC 52.

was entitled to have his payments begin after his incarceration ended. The Court concluded that the claimant's entitlement lapsed while the claimant was incarcerated, reasoning:

> Claimant's release from prison does not make him eligible for the remaining weeks which would have been due him had he not been incarcerated. Section 39-71-703(1)[22] specifies the weeks during which impairment benefits are payable. Subsection (1)(a)(ii) provides that the benefits commence upon the date the claimant reaches maximum healing: "Impairment benefits are payable beginning the date of maximum healing." . . . Thus the statute fixes a specific time period for payment of indemnity benefits; the period commences upon maximum healing and ends the number of weeks later which equals five times the impairment rating. There is no authority for the Court to change the time specified by the statute, or for it to toll that time during claimant's incarceration. Since the period for indemnity benefits expired during claimant's incarceration, he is not entitled to further indemnity benefits.[23]

¶ 11 Petitioner argues that *Wimberley* was wrongly decided and that the Supreme Court erred in holding benefits may lapse while a claimant is incarcerated. Petitioner argues that benefits do not have a time limit, but rather a "time commencement," and, in his case, that commencement began when he was released.[24] Petitioner argues that a worker is not qualified to earn wages while incarcerated, and points to § 39-71-744(2), MCA, which states in part, "This subsection does not prohibit the reinstatement of other benefits upon release from incarceration." Petitioner argues that either reinstatement or commencement of the wage-loss payments should therefore occur.[25]

¶ 12 Respondent asserts that Petitioner's entitlement to PPD benefits accrued on July 2, 2003. By that date, Petitioner's treating physician had placed him at maximum medical improvement, calculated an impairment rating, and approved job analyses, and a claims examiner sent Petitioner a letter detailing his benefits under § 39-71-703, MCA. On that date, Respondent argues, the clock began to run on Petitioner's entitlement, and so long

---

[22] *Wimberley* applied the 1989 version of the applicable statutes. The difference in year does not affect its applicability to Petitioner's case.

[23] *Wimberley* at 4.

[24] Hearing Test.

[25] Petitioner's Brief in Support of Motion for Summary Judgment at 3.

as he remained incarcerated from July 2, 2003, forward, § 39-71-744, MCA, precluded this entitlement.[26]

¶ 13 The provision for post-injury wages based on what a claimant is "qualified to earn" takes into account the possibility that the claimant may not return to work immediately after reaching maximum healing or may be underemployed.[27] What a claimant is "qualified to earn" is determined by actual job opportunities.[28] "Qualified to earn" means that a claimant must be employable in fact, not only in theory.[29]

¶ 14 Petitioner argues he was not "qualified to earn" any wages for the duration of his incarceration.[30] As this Court explained in *Masters*, however, a claimant may be "qualified to work," and yet may be unemployed or underemployed. Respondent argues that Petitioner voluntarily removed himself from the workforce by committing a crime which resulted in incarceration.[31] In *Bratcher v. Liberty Northwest Ins. Corp.*, this Court determined a claimant who did not diligently seek employment and who was underemployed did not meet the criteria for the then-applicable wage-loss provision because she was qualified to earn more than she was earning.[32] Likewise, in the present case, Petitioner was qualified to earn more than he was earning. He was unemployed because he absented himself from the job market by committing a crime which resulted in incarceration.

¶ 15 While Petitioner argues that *Wimberley* was incorrectly decided, Petitioner gives no basis for this argument beyond urging the Court to accept his interpretation of the statutes in place of the Court's interpretation in *Wimberley*. Therefore, the Court concludes that Petitioner's entitlement to benefits pursuant to § 39-71-703, MCA, accrued on July 2, 2003, and Petitioner was not entitled to those benefits during the time of his incarceration, pursuant to § 39-71-744, MCA.

---

[26] Response to Motion for Summary Judgment at 2-3.

[27] *Masters v. Liberty Northwest Ins. Corp.*, 2000 MTWCC 1, ¶ 37, citing § 39-71-703(5)(c), MCA (1997).

[28] *Masters*, ¶ 38.

[29] *Siegler v. Liberty Ins. Corp.*, 2001 MTWCC 35, ¶ 3.

[30] Hearing Test.

[31] Response to Motion for Summary Judgment at 4.

[32] *Bratcher v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 57.

¶ 16 Petitioner argues, however, that if this Court interprets § 39-71-744, MCA, as lapsing his PPD benefits, this Court should declare § 39-71-744, MCA, unconstitutional for violating equal protection. Petitioner argues that § 39-71-744, MCA, on its face sets up two classifications by separating incarcerated individuals from the rest of the claimant population with regard to payment of disability benefits. Petitioner asserts that such disparate treatment can only pass constitutional muster if a rational basis exists for it.[33] Petitioner asserts that he can find no rational basis for precluding an individual who is incarcerated from demonstrating a wage loss after he has been released.[34]

¶ 17 Respondent argues that the workers' compensation system is designed so that the cost of an on-the-job injury is not borne by the injured worker, but by his employer and indirectly by the public via the increased cost of production.[35] When a person is incarcerated, Respondent argues, the public bears the cost of the incarceration. Were that person also to receive workers' compensation benefits, the public would bear the cost of that person's maintenance twice. Respondent adds that Petitioner voluntarily and intentionally removed himself from the labor market by committing a crime.[36]

¶ 18 In analyzing an equal protection challenge to a workers' compensation statute, the Montana Supreme Court has held:

> Both the Fourteenth Amendment to the United States Constitution and Article II, section 4, of the Montana Constitution provide that no person shall be denied the equal protection of the laws. The principal purpose of Montana's Equal Protection Clause is to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action. When analyzing workers' compensation statutes, we use the rational basis test because the right to receive Workers' Compensation benefits is not a fundamental right nor does the Act infringe upon the rights of a suspect class. Under the rational basis test, the question becomes whether a legitimate governmental

---

[33] Petitioner's Brief in Support of Motion for Summary Judgment at 5, citing *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 29, 294 Mont. 449, 982 P.2d 456.

[34] Petitioner's Brief in Support of Motion for Summary Judgment at 5.

[35] Response to Motion for Summary Judgment at 3-4, citing *Montana v. Indus. Accident Bd.*, 130 Mont. 272, 277, 301 P.2d 954, 957 (1956).

[36] Hearing Test.; Response to Motion for Summary Judgment at 4.

> objective bears some identifiable rational relationship to a discriminatory classification.[37]

¶ 19 Furthermore, in examining the relationship between legislation and its purposes, the Court is not limited to justifications reflected in legislative history. The Court must consider every conceivable basis which might support the statute.[38] In that regard, Respondent's arguments are well-taken and the Court concludes that a rational basis exists for the legislature's treatment of incarcerated individuals under § 39-71-744, MCA.

¶ 20 In Petitioner's case, but for the $7,014.00 overpayment of his TTD benefits, he would have had some weeks of PPD benefits remaining upon his release. At oral argument before this Court, Respondent asserted that it would have paid those remaining weeks were it not for the offset of the overpayment.[39] Because the overpayment of TTD benefits to Petitioner offsets the remainder of PPD benefits Petitioner would have otherwise been entitled to receive after his release from incarceration, Petitioner is not entitled to any further PPD benefits.

¶ 21 Although Respondent did not file a cross-motion for summary judgment, this Court has held that, where the moving party has had ample opportunity to identify disputed facts and the material facts are undisputed, summary judgment may be rendered in favor of the opposing party even though it has not made a formal cross-motion.[40] Such is the situation in the case at hand. The Court therefore grants summary judgment in favor of Respondent.

ORDER

¶ 22 Petitioner's motion for summary judgment is **DENIED**.

¶ 23 Summary judgment is **GRANTED** in favor of Respondent.

¶ 24 A rational basis exists for the classifications set forth in § 39-71-744, MCA (2001).

¶ 25 This **ORDER** is **FINAL** for purposes of appeal.

---

[37] *Bustell v. AIG Claims Serv., Inc.*, 2004 MT 362, ¶ 19, 324 Mont. 478, 105 P.3d 286 (citations omitted).

[38] *Killion v. State Comp. Ins. Fund*, 1999 MTWCC 30, ¶ 47.

[39] The parties agreed to conduct oral argument without benefit of a court reporter and thus no record of the argument exists outside of this Court's minute entry, Docket Item No. 17.

[40] *In the Matter of Mollie R. Telles*, 2005 MTWCC 21, ¶ 6.

¶ 26 Any party to this dispute may have twenty days in which to request reconsideration from this Order Granting Summary Judgment.

DATED in Helena, Montana, this 21st day of December, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Paul E. Toennis
Ben Jones for David A. Hawkins
Submitted: April 18, 2006