

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2005 MTWCC 54**

**WCC No. 2005-1326**

---

**GALE MILLER**

**Petitioner**

**vs.**

**SEARS, the parent Sears Holdings Corporation, subsidiaries and affiliates Kmart,  
the parent Sears Holdings Corporation, subsidiaries and affiliates**

**Respondent/Insurer.**

---

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** The petitioner petitioned for a lump-sum conversion of his lifetime expectancy of permanent total disability benefits.

**Held:** Conversion of lifetime permanent total disability benefits to a lump sum is granted. The petitioner demonstrated financial need that relates to the necessities of life. The petitioner and his wife provide a home for themselves, two of their adult children, and his elderly, disabled mother. The petitioner and his family currently reside in a multilevel rental home that is difficult for both the petitioner and his mother to navigate because of the stairs. The petitioner and his wife demonstrated that a lump sum would enable them to build or buy and modify a home which would accommodate the petitioner's and his mother's disabilities. The petitioner, with the assistance of his wife, is competent to handle his financial affairs. The petitioner and his wife have thus far managed their financial affairs with limited resources and setbacks beyond their control. However, it is apparent from the testimony that the petitioner and his wife's ability to manage their resources is being heavily taxed by their need to borrow against the petitioner's wife's retirement plan and that their ability to continue to borrow against this retirement plan is nearly exhausted. Although the Court might not otherwise exercise jurisdiction over a dispute regarding the total conversion of permanent total disability benefits pursuant to section 39-71-741(2)(d), MCA (1989), the parties in this case have agreed that this Court may properly exercise jurisdiction over this dispute pursuant to section 39-71-2905, MCA (1989).

## **Topics:**

**Benefits: Lump Sums: Generally.** Where the petitioner and his wife testified that they had been drawing on the petitioner's wife's retirement to make ends meet and that the petitioner and his disabled mother were finding it increasingly difficult to live in the rental house which did not accommodate their disabilities, the petitioner demonstrated that a lump-sum conversion of his PTD benefits was in his best interests.

**Attorney Fees: Unreasonable Denial of Benefits.** Pursuant to the fourth factor set forth in section 39-71-612, MCA (1989), a petitioner must demonstrate that the award from the Workers' Compensation Court exceeded the offer made to him pretrial in order to recover attorney fees. When the record does not establish the value of the settlement offer, the Court cannot speculate as to whether the pretrial offer exceeded the award in making its determination as to whether an award of attorney fees is appropriate pursuant to section 39-71-612, MCA (1989).

¶1 The trial in this matter was held on September 29, 2005, in Missoula, Montana. The petitioner, Gale Miller, was present and represented by Mr. David W. Lauridsen. The respondent was represented by Mr. Michael P. Heringer.

¶2 Exhibits: Exhibits 1 through 7 and Miller Deposition Exhibits 1 through 11 were admitted without objection.

¶3 Witnesses and Depositions: The deposition of Gale Miller was taken and submitted to the Court. Gale Miller and Bette Miller were sworn and testified at trial.

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

¶4a Whether the petitioner is entitled to a lump-sum settlement of all his future permanent total disability benefits pursuant to section 39-71-741, MCA (1989).

¶4b Whether the petitioner is entitled to costs and attorney's fees, pursuant to section 39-71-612, MCA (1989).

(Pretrial Order at 2-3.)

## FINDINGS OF FACT

¶5 The petitioner, Gale Miller, is 51 years old. He resides in Missoula, Montana, with his spouse, Bette Miller. He is the father of four adult children, ages, 18, 20, 25, and 27. Two of the adult children continue to reside in the family home. (Miller Dep. at 6-7.)

¶6 Although the petitioner has attended college and technical school for several years, he does not have a degree. (*Id.* at 11-12.)

¶7 The petitioner was hired by Sears, the parent Sears Holdings Corporation, subsidiaries and affiliates, Kmart, the parent Sears Holdings Corporation, subsidiaries and affiliates (“respondent” or “SHC”) in 1974 working as a cashier, stocker, assistant manager, and advertising specialist. On May 23, 1990, in Missoula, Missoula County, Montana, he suffered an industrial injury arising out of and in the course of his employment with SHC. He was injured when he slipped and fell on a wet floor. (*Id.* at 15 and Pretrial Order at 2.)

¶8 The petitioner had surgery for his injury but continued his employment with SHC. He was transferred to Hawaii and then to Idaho, ultimately advancing to the position of store manager. His employment with SHC terminated in January 2000. (Miller Dep. at 19-21.)

¶9 Subsequent to his employment with SHC, the petitioner worked as the store manager for Big Lots in Missoula. At the recommendation of his treating physician, he terminated that position in June 2003. (*Id.* at 23.)

¶10 At the time of the injury in 1990, SHC was enrolled under Compensation Plan No. I of the Workers’ Compensation Act, and was self-insured. (Pretrial Order at 2.)

¶11 SHC accepted liability for the petitioner’s industrial injury and paid temporary total disability, permanent partial disability, permanent total disability, and medical benefits. SHC has agreed that the petitioner has sustained a permanent total disability and those benefits are currently being paid on a biweekly basis. (*Id.* at 2.)

¶12 The petitioner is currently receiving permanent total disability (PTD) benefits in the amount of \$605.25 per month plus social security disability benefits in the amount of \$1,715 per month. (Ex. 2.)

¶13 Given his age, the petitioner would be entitled to PTD benefits until age 66, including cost-of-living increases. The present value of the petitioner’s future PTD benefits is \$98,718.47 as of September 13, 2005. (Ex. 5 and Claimant’s Proposed Findings of Fact, Conclusions of Law and Judgment at 2.)

¶14 The petitioner was a credible witness and the Court finds his testimony at trial credible.

¶15 Bette Miller was a credible witness and the Court finds her testimony at trial credible.

¶16 The petitioner testified that he had been advised of the case of *Satterlee v. Lumberman's Mut. Casualty Co.*, WCC No. 2003-0840, which is currently pending before the Workers' Compensation Court. The petitioner further testified that he is aware of the possible implications the *Satterlee* ruling may have on his continued benefits if he were to continue receiving biweekly benefits. (Trial Test.)

¶17 The petitioner's mother is in ill health. As of September 30, 2005, she has relocated to live with the petitioner and his family. Because of their respective health problems, both the petitioner's mother and the petitioner have difficulty navigating the stairs in the two-story rental home the petitioner and his family now occupy. (Trial Test.)

¶18 The petitioner has demonstrated financial need that relates to the necessities of life. The testimony demonstrated that the petitioner, with the assistance of his wife, is competent to handle his financial affairs. The testimony at trial demonstrated to this Court that the petitioner's current financial situation is not due to any mismanagement. Rather, the testimony revealed that the petitioner and his wife have managed their financial affairs admirably with limited resources and setbacks beyond their control. However, it is likewise apparent from the testimony that the petitioner and his wife's ability to manage is being heavily taxed by their need to borrow against Bette Miller's retirement plan. Their ability to continue to borrow against Bette Miller's retirement plan is nearly exhausted. (Trial Test.)

¶19 Within the week before trial, the respondent offered a settlement to the petitioner of approximately the same present value of the lump-sum conversion. The petitioner declined this offer, however, because it was contingent on his agreement to close his medical benefits. The petitioner is permanently totally disabled and requires ongoing medical care.

#### CONCLUSIONS OF LAW

¶20 The parties have agreed that this Court has jurisdiction in this matter pursuant to section 39-71-2905, MCA (1989). Further, this Court has jurisdiction to interpret section 39-71-741, MCA (1989), and to award lump-sum payments. *Ingraham v. Champion Int'l*, 243 Mont. 42, 793 P.2d 769 (1990).

¶21 The best interests of the petitioner, the petitioner's family, and the general public are the primary factors to be considered when evaluating lump-sum settlements. *Sullivan v. Aetna Life & Casualty*, 271 Mont. 12, 894 P.2d 278 (1995).

¶22 Wide discretion will be afforded the Workers' Compensation Court determination regarding lump-sum settlements, and the decision will not be interfered with by the Supreme Court unless there is an abuse of discretion. *Hock v. Lienco Cedar Products*, 194 Mont. 131, 634 P.2d 1174 (1981).

¶23 The evidence in this case indicates that a total lump-sum conversion of biweekly benefits should be awarded to the petitioner. The petitioner has demonstrated a financial need that relates to the necessities of life as required by section 39-71-741(4)(a), MCA (1989). Specifically, the petitioner presented uncontroverted testimony that a lump-sum conversion will enable him and his wife to purchase and build equity in a home, rather than continuing to rent. The petitioner's current rental is a multistory home which is increasingly difficult for the petitioner and his mother to live in. Upon the purchase of their own home, the petitioner and his wife testified credibly that they intend to either have a new home constructed which accommodates the petitioner's and his mother's physical limitations or would otherwise modify the home to accommodate the physical limitations of himself and his mother.

¶24 Pursuant to section 39-71-612, MCA (1989), attorney fees may be assessed against an insurer by the Workers' Compensation Judge if it is determined that the actions of the insurer were unreasonable. The following circumstances must also be present: 1) there is a payment or written offer of payment; 2) there is a controversy relating to the amount of compensation due; 3) the claim is brought before the Court for adjudication; and 4) the Judge's award is greater than that offered by the insurer. *S.L.H. v. State Compensation Mut. Ins. Fund*, 2000 MT 362, ¶ 51, 303 Mont. 364, 376, 15 P.3d 948, 957.

¶25 The insurer's conduct at issue in this matter involves an offer by the insurer, the week before trial, to pay lump-sum benefits to the petitioner, but contingent upon his agreement to close out his medical benefits, while taking the position at trial that a lump-sum conversion was not in the petitioner's best interests. Although the Court questions the respondent's actions in this regard, the Court does not reach the issue of whether this conduct may be considered unreasonable because the four factors required by section 39-71-612, MCA, are not met.

¶26 In the present case, the petitioner testified that the settlement offer made to him the week before trial was "approximately the present value of this case." (Trial Test.) Beyond this testimony, the Court was not presented with any evidence as to the specific amount of the settlement offer, although the suggestion was made by the petitioner's counsel in closing arguments that the settlement offer was, actually, "slightly in excess" of the present

value. Based on the evidence in the record, therefore, the Court cannot conclude that its award of the lump sum to the petitioner is greater than that offered by the insurer. The Court recognizes that this award does not require the petitioner to close out his medical benefits as the respondent's settlement offer would have required. The petitioner's medical benefits obviously have a value which may well exceed the amount in excess of the present value offered to him in settlement by the respondent. However, the Court cannot speculate as to what those amounts may be in making its determination as to whether an award of attorney fees is appropriate pursuant to section 39-71-612, MCA (1989).

### JUDGMENT

¶27 This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA (1989), and agreement of the parties.

¶28 The petitioner is awarded \$98,718.47, less any biweekly benefits paid after September 13, 2005, payable in a lump sum, to purchase a home and to eliminate pressing debts as outlined in his Statement of Financial Condition. (Ex. 2.)

¶29 The Court cannot make a finding that the petitioner is entitled to an award of reasonable costs and attorney fees based on the evidence presented in the record.

¶30 This JUDGMENT is certified as final for purposes of appeal.

¶31 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 12<sup>th</sup> day of December, 2005.

(SEAL)

James Jeremiah Shea  
JUDGE

c: Mr. David W. Lauridsen  
Mr. Michael P. Heringer  
Submitted: September 29, 2005