

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 40

WCC No. 2006-1715

DEVON C. NEGETHON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner was receiving unemployment benefits when he accepted a job as a day laborer. Approximately four hours into his first shift, he suffered an industrial injury. Respondent calculated Petitioner's TTD benefits by basing his average weekly wage on one day's employment. Petitioner disputes this calculation method.

Held: Petitioner was hired for a single day's work, and his unemployment benefits are not "wages" for the purposes of calculating his average weekly wage pursuant to § 39-71-123, MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Petitioner's unemployment benefits cannot be considered wages under § 39-71-123, MCA, and therefore cannot be used in calculating his average weekly wage for purposes of workers' compensation benefits.

Wages: Average Weekly Wage. Petitioner's unemployment benefits cannot be considered wages under § 39-71-123, MCA, and therefore cannot be used in calculating his average weekly wage for purposes of workers' compensation benefits.

Wages: Wages Defined. Petitioner's unemployment benefits cannot be considered wages under § 39-71-123, MCA, and therefore cannot be used

in calculating his average weekly wage for purposes of workers' compensation benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Petitioner's constitutional challenge of § 39-71-123, MCA, on the grounds that the statute violates his right to substantive due process when he lost his full-time unemployment benefits in exchange for reduced workers' compensation benefits, failed because Petitioner did not convince the Court beyond a reasonable doubt that the statute was unconstitutional.

Constitutional Law: Due Process: Substantive Due Process. Petitioner's constitutional challenge of § 39-71-123, MCA, on the grounds that the statute violates his right to substantive due process when he lost his full-time unemployment benefits in exchange for reduced workers' compensation benefits, failed because Petitioner did not convince the Court beyond a reasonable doubt that the statute was unconstitutional.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. This statute provides that benefits bear a reasonable relationship to actual wages lost. Since unemployment benefits are a benefit and not a wage, Petitioner traded one set of benefits for another and, as in a previous case, the Court held that unemployment benefits cannot be considered wages.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-105. Workers' compensation benefits are not intended to make an injured worker whole, but are intended to assist a worker at a reasonable cost to the employer. While Petitioner asserts that \$66.67 per week in benefits does not constitute "assistance," he ignores the medical benefits he has received, as well as potential future benefits he may receive should he be given an impairment rating.

¶ 1 The trial in this matter was held on Thursday, November 16, 2006, at the Workers' Compensation Court, Helena, Montana. The trial reconvened for a bench ruling, pursuant to ARM 24.5.335, on December 7, 2006. Petitioner Devon C. Negethon was present and represented by Howard Toole. Respondent Montana State Fund was represented by William Dean Blackaby.

¶ 2 Exhibits and Depositions: Exhibits 2 through 4, and Exhibit 7 were admitted without objection. Exhibit 1 was admitted over Petitioner's objection under the best evidence rule. Exhibits 5 and 6 were admitted over Respondent's relevancy objections, except page 14

of Exhibit 5, which is a medical record regarding a different claimant, and was removed from the exhibit binder and destroyed. The Court noted Respondent has a standing objection to the relevancy of the medical evidence and anticipated testimony on this matter.

¶ 3 Witnesses and Depositions: The deposition of Keith Adams was made part of the record. Petitioner's deposition was received by the Court under seal on November 15, 2006, from the court reporter. Petitioner's deposition was unsealed at the time of trial upon agreement of counsel and can be considered part of the record. However, Petitioner had not had the opportunity to review his deposition, and the Court allowed him one week to review, sign, and notify the Court as to any corrections. The Court was not notified as to any corrections by November 23, 2006, and therefore the deposition was deemed admitted as submitted. Petitioner, Stacey Negethon, Dean Fontaine, Keith Adams, and Kathy Strobel were sworn and testified at trial.

¶ 4 Issues Presented: The contested issues of law are restated as found in the Pretrial Order as follows:

¶ 4a Whether Petitioner's temporary total disability rate and average weekly wage have been incorrectly established for purposes of this claim, either as a matter of statutory construction or because § 39-71-123, MCA, is unconstitutional as applied to Petitioner;

¶ 4b Whether Petitioner is entitled to attorney fees and a penalty pursuant to §§ 39-71-611, -612, and -2907, MCA; and

¶ 4c What duration was Petitioner hired to work?¹

¶ 5 At the close of arguments, the Court announced it would subsequently issue a bench ruling pursuant to ARM 24.5.335, at a time and date to be determined. The following findings and conclusions are in accordance with that ruling, which came on December 7, 2006.

FINDINGS OF FACT

¶ 6 On January 24, 2006, Petitioner was injured in the course and scope of his employment with Mountain View Construction in Missoula, Missoula County, Montana.²

¹ Pretrial Order at 2.

² *Id.*

¶ 7 At the time of his injury, Petitioner's employer was enrolled under compensation Plan III of the Montana Workers' Compensation Act, with Montana State Fund as its insurer.³

¶ 8 Respondent Montana State Fund accepted liability for this claim.⁴

¶ 9 Petitioner resides in Alberton, Montana. He is a member of the Laborers' Union.⁵

¶ 10 In December 2005, Petitioner was laid off from the job he was working through the Union and began receiving unemployment benefits. He did not actively seek new employment because he believed he would get work through the Union in a few months. However, he had no specific knowledge of any particular jobs that may become available in the future.⁶

¶ 11 On the evening of January 23, 2006, Keith Adams called Petitioner and asked him if he would like to work the following day for Fontaine Enterprises, formerly known as Mountain View Construction, for whom Adams was a foreman. Adams and Petitioner were friends, and Adams knew Petitioner was currently unemployed. Petitioner accepted, and the following day Adams picked him up and drove him to the job site.⁷

¶ 12 According to Petitioner, he and Adams did not discuss how much he would get paid or how long he would work. He knew that he was being hired to pull concrete forms on a particular job site, and he believed that task would last a day or two. Petitioner admits he had no expectations of how long the employment would last, but he hoped to make a good impression on Dean Fontaine, the company president, and be offered more work. However, Petitioner was not guaranteed any work beyond that day.⁸

¶ 13 Prior to the industrial accident, Adams was the only person Petitioner spoke with about the job.⁹ Petitioner knew that Adams worked for Fontaine Enterprises and that Fontaine made all the hiring and firing decisions.¹⁰ Petitioner was not looking for full-time

³ *Id.*

⁴ *Id.*

⁵ Trial Test.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Negethon Dep. 33:14-17.

¹⁰ Negethon Dep. 37:9-15.

employment at the time because he expected to be called back to work by the Union, and he understood that Adams was not offering him full-time employment because Fontaine Enterprises only needed certain day labor jobs filled.¹¹ Petitioner understood that he was being hired on a day-to-day basis and he did not expect to work the entire week.¹² However, Petitioner believed Adams would call him when he needed him.¹³

¶ 14 Approximately four hours after he reported to work that morning, Petitioner fell into a hole and injured his knee. Shortly thereafter, Fontaine arrived at the job site. He paid Petitioner \$100 and told Petitioner that he would report the accident to his workers' compensation insurer. Petitioner then went to the emergency room for treatment.¹⁴

¶ 15 At the time of his industrial injury, Petitioner had been receiving unemployment benefits. On the advice of legal counsel, he ceased filing for unemployment benefits when he made the workers' compensation claim.¹⁵

¶ 16 On February 12, 2006, Petitioner was arrested in Utah and ultimately was convicted of a drug offense for which he was incarcerated from February 12 to July 1, 2006, in Beaver, Utah.¹⁶ Petitioner has not worked since he was released on probation.¹⁷

¶ 17 Fontaine testified that he is the person who makes all the hiring decisions for Fontaine Enterprises, and he is the person who sets the rate of pay. On the day of Petitioner's accident, Fontaine had two crews working for him, both on the same job site. Fontaine explained that on occasion, he uses day labor when he has a labor-intensive task such as stripping concrete forms. He believes in 2005, he probably hired day labor three or four times at most, and none of those workers worked for him for more than a day. Since January 24, 2006, he has not hired any day labor, and he did not hire a day laborer to replace Petitioner after he was injured.¹⁸

¹¹ Negethon Dep. 38:6-10.

¹² Negethon Dep. 38:17-23.

¹³ Negethon Dep. 41:24-25.

¹⁴ Trial Test.

¹⁵ *Id.*

¹⁶ Negethon Dep. 15:18 - 16:1.

¹⁷ Negethon Dep. 17:10-14.

¹⁸ Trial Test.

¶ 18 Fontaine explained that in Petitioner's case, Adams had called him on January 23, and asked if he wanted a day laborer for the following day. Fontaine agreed, and Adams offered the job to Petitioner. Fontaine anticipated that Petitioner would work for seven or eight hours for one day. Fontaine did not expect to hire Petitioner for more than one day, and he never offered Petitioner additional work.¹⁹

¶ 19 Fontaine testified that when he arrived on the job site on January 24, he learned that Petitioner had been injured. He gave Petitioner \$100 because he felt badly that Petitioner had been injured. Fontaine said he typically pays day laborers \$9 to \$10 per hour.²⁰

¶ 20 Adams testified that Fontaine makes the hiring and firing decisions for Fontaine Enterprises. After Fontaine told him that they could use an extra laborer for January 24, Adams contacted Petitioner and offered him the job. Adams thinks he explicitly told Petitioner the job was for one day only, and he is certain that he did not offer Petitioner any work beyond that day. Adams stated that after Petitioner was injured, no one was hired to replace him on the job site, and he is not aware of any day laborer hired by Fontaine Enterprises since that time.²¹ Adams is unaware of any instances in which a day laborer has become a regular crew member at Fontaine Enterprises.²² Adams stated that Fontaine does all the long-term hiring, and that when day labor is hired, Adams clears it through Fontaine first.²³

¶ 21 Kathy Strobel is the claims examiner for Respondent who has handled Petitioner's claim since March 2006. When she first received Petitioner's claim, she reviewed the entire file, including the "notepads," which are a computerized note-taking system used by Respondent in recording information about claims.²⁴

¶ 22 Strobel determined that the compensability of Petitioner's claim was still under investigation. She concluded that the major item the claim needed was a statement from Petitioner, and then statements from his employer or witnesses, as necessary. However, it was not until July 2006 that she was able to obtain Petitioner's statement.²⁵ Petitioner

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Adams Dep. 27:21-24.

²³ Adams Dep. 36:1-7.

²⁴ Trial Test.; see Exhibit 1.

²⁵ Trial Test.

was unavailable because of his incarceration.²⁶ In March 2006, Strobel decided to pay Petitioner's medical benefits under a reservation of rights until the investigation could be completed. She further noted that Petitioner would not be entitled to wage-loss benefits at that time because of his incarceration.²⁷

¶ 23 It is Strobel's practice to set up an appointment time for taking the statement, and when conducting the statement, to ask specific questions while following a structured interview format. In Petitioner's case, Strobel testified that although there were no problems with the statement itself, Respondent's recording equipment failed and she did not obtain a recording of the statement. However, she was taking notes during the statement and those notes were preserved.²⁸

¶ 24 According to Strobel's notes, Petitioner told her it was his first day on the job, that he was collecting unemployment from his full-time job, and that he had agreed to help Adams out. Petitioner further informed her that there had been no agreement as to how much he would be paid or how many hours he would work.²⁹

¶ 25 Strobel found it significant that Petitioner was injured on his first day on the job because she would need to discover how much Petitioner was hired to earn in order to determine his average weekly wage and calculate his benefits. Strobel contacted Fontaine Enterprises and learned that a wage had not been discussed with Petitioner, but that Fontaine had paid him \$100. She used that figure in her calculations.³⁰

¶ 26 Strobel knew that Petitioner's average weekly wage would be an issue because it was very low. She explained that since Petitioner had been hired for only one day, she based his average weekly wage on working one day a week, which worked out to approximately \$66 per week.³¹ However, she did not identify any other wages which she could use in the calculation. She testified that she could not use Petitioner's unemployment benefits in her calculations because unemployment benefits are not identified as wages under the workers' compensation statutes.³²

²⁶ Ex. 1 at 3.

²⁷ Ex. 1 at 5.

²⁸ Trial Test.

²⁹ *Id.*

³⁰ *Id.*

³¹ Respondent's Statement of Benefit Calculation places Petitioner's TTD benefit at \$66.67 per week. See Exhibit 3 at 17.

³² Trial Test.

¶ 27 Strobel testified that it is a fairly common occurrence that workers' compensation claimants suffer financial hardship because of the reduction in their incomes, and that she is limited in what she can do to alleviate that hardship because the benefits are statutorily constrained to a formula based on a claimant's average weekly wage. She stated that one of the tools she can use is to give claimants a partial lump-sum advance against future benefits, and that this was done in Petitioner's case.³³ Petitioner was advanced \$2,500.³⁴

¶ 28 There is simply no evidence upon which this Court could find Petitioner was hired for more than one day of work. Petitioner, Adams, and Fontaine were all credible witnesses. All three men testified that Petitioner was hired as day labor for a single day's work. Adams and Fontaine both testified that no one was hired to replace Petitioner after his injury and no day laborer has been hired for any job since, which strongly suggests that Petitioner's services would no longer have been needed after that day. Both Adams and Fontaine further testified that Fontaine Enterprises hires day laborers three or four times a year, and that none of their previous day laborers ever became full-time, regular crew members. While Petitioner had hoped to impress Fontaine by doing a good job to possibly get called back to work in the future, Petitioner admitted that he had been hired to perform a single task and he had not been given any guarantees of future employment. The Court therefore finds that Petitioner was hired to work for one day.

¶ 29 Strobel was also a very credible witness for Respondent. She investigated the claim and calculated Petitioner's benefits according to the wages he received from Fontaine Enterprises. She explained that she did not include Petitioner's unemployment benefits in her calculations because those benefits are not "wages" under § 39-71-123, MCA. Petitioner does not allege that there are any other sums, outside of his day's work for Fontaine Enterprises and his unemployment benefits, which Strobel should have used in her calculations. When Strobel could not complete her investigation due to Petitioner's incarceration, she arranged for Petitioner's medical bills to be paid under a reservation of rights. After liability was accepted, she further arranged for Petitioner to receive a lump-sum advance to help alleviate his financial difficulties. The Court finds her adjusting of the claim to be reasonable.

¶ 30 The Court recognizes that Petitioner is caught in an unfortunate and difficult situation. He accepted a single day's work, sustained an industrial injury, and ultimately lost his unemployment benefits while being physically unable to work. Petitioner's workers' compensation benefits, while covering the medical costs which stem from his industrial injury, result in significantly lower weekly benefit payments. Although the results are harsh, the law is clear.

³³ *Id.*

³⁴ Ex. 7.

CONCLUSIONS OF LAW

¶ 31 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.³⁵

¶ 32 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.³⁶

¶ 33 The Court has found that Petitioner was hired by Fontaine Enterprises to work for one day. In light of that finding, at issue is whether Petitioner's temporary total disability rate and average weekly wage have been incorrectly established for purposes of this claim, either as a matter of statutory construction or because § 39-71-123, MCA, is unconstitutional as applied to Petitioner.

¶ 34 This Court has previously held that unemployment benefits are social benefits and not compensation for work, and therefore cannot be considered "wages" under § 39-71-123, MCA.³⁷ In *Lugo*, the Court looked to the statutory language which defined "wages" and reasoned that it must give the words of the statute their plain meaning. Noting that unemployment benefits cannot be considered compensation "for services rendered by an employee," the Court concluded that unemployment benefits are social benefits and not compensation for work. Therefore, they cannot be used in calculating a claimant's average weekly wage. *Lugo* is on point with the present case. Petitioner's unemployment benefits cannot be considered wages under § 39-71-123, MCA, and they therefore cannot be used in calculating his average weekly wage for purposes of workers' compensation benefits.

¶ 35 Petitioner argues that if the Court does not determine that his benefits were incorrectly calculated, in the alternative it should determine that § 39-71-123, MCA, is unconstitutional, either as a matter of statutory construction or as applied to Petitioner.

¶ 36 The constitutionality of a statute is presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. Every possible presumption must be indulged in favor of the constitutionality of a statute, and the party challenging the statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt.³⁸

³⁵ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

³⁶ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

³⁷ *Lugo v. Montana Hosp. Assoc./Workers' Compensation Trust*, 1995 MTWCC 86.

³⁸ *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877.

¶ 37 Petitioner challenges the constitutionality of § 39-71-123, MCA, arguing that it violates his right to substantive due process. He asserts that it is unreasonable for him to lose his full-time unemployment benefits in exchange for reduced workers' compensation benefits. He argues that an unemployed person has the right to become employed on an occasional basis without giving up his unemployment benefits, and that if such a person becomes injured on the job, it is unfair to have his average weekly wage calculated based on a single day's work. Petitioner further points to § 39-71-105, MCA, which states, in part, that wage-loss benefits are not intended to make an injured worker whole, but are intended to assist a worker at a reasonable cost to the employer. In the situation at hand, Petitioner argues, his wage-loss benefits are not assisting him.

¶ 38 In *Powell*, the Montana Supreme Court explained:

Both the Fourteenth Amendment to the United States Constitution and Article II, section 17 of the Montana Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.

The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them Even though a plaintiff may have no property or liberty interest grounded in state law which is protected from arbitrary government action, such action still may be subject to review under substantive due process. Substantive due process primarily examines the underlying substantive rights and remedies to determine whether restrictions ... are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute.³⁹

Substantive due process analysis requires a test of the reasonableness of a statute in relation to the state's power to enact legislation. A statute must be reasonably related to a permissible legislative objective.⁴⁰ As was further noted by the Court in *Powell*, cost containment alone cannot justify disparate treatment.⁴¹

³⁹ *Powell*, ¶ 28 (citations omitted).

⁴⁰ *Powell*, ¶ 29.

⁴¹ *Powell*, ¶ 30.

¶ 39 Respondent argues that § 39-71-105(1), MCA, provides the required reasonable relationship. The statute states that wage-loss benefits “should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.”⁴²

¶ 40 To prove that a legislative enactment is unconstitutional, Petitioner has a very high burden to meet. Petitioner has not convinced the Court beyond a reasonable doubt that § 39-71-123, MCA, is unconstitutional.

¶ 41 Section 39-71-105(1), MCA, provides that benefits bear a reasonable relationship to actual wages lost, and § 39-71-123, MCA, defines wages. As was pointed out by this Court in *Lugo*, unemployment benefits are a benefit and not a wage. In the situation at hand, Petitioner traded one set of benefits for another. Petitioner’s dilemma, framed another way, is not that his workers’ compensation benefits are inadequate; it is that his unemployment benefits were terminated. While Petitioner points to his financial hardship as evidence that his benefit allotment is unfair, the Court is mindful of the fact that Petitioner was incarcerated for a significant amount of the time period at issue, during which time he would not have been eligible for either type of benefits.

¶ 42 As explained in § 39-71-105(1), MCA, workers’ compensation benefits are not intended to make an injured worker whole, but are intended to assist a worker at a reasonable cost to the employer. While Petitioner asserts that \$66.67 per week does not constitute “assistance,” Petitioner ignores the medical benefits he has received, as well as potential future benefits he will be entitled to receive should he be given an impairment rating.

¶ 43 As stated above, while the Court recognizes Petitioner’s dilemma, Petitioner has not convinced the Court beyond a reasonable doubt that § 39-71-123, MCA, is unconstitutional. His claim is therefore denied.

¶ 44 Because Petitioner has not prevailed, he is not entitled to his costs, attorney fees, or a penalty, pursuant to §§ 39-71-611, -612, -2907, MCA.

JUDGMENT

¶ 45 Petitioner was hired to work for one day.

¶ 46 Petitioner’s claim that his workers’ compensation benefits have been incorrectly calculated is **DENIED**.

¶ 47 The Court does not hold § 39-71-123, MCA, to be unconstitutional.

⁴² § 39-71-105(1), MCA.

¶ 48 Petitioner's claim for costs, attorney fees, and a penalty is **DENIED**.

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

¶ 50 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 14th day of December, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Howard Toole
William Dean Blackaby
Submitted: November 23, 2006