

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

**2024 MTWCC 4**

**WCC Nos. 2023-6389 & 2023-00010**

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**JORDAN PEREA**

**Petitioner**

**vs.**

**AMTRUST INS. CO.**

**Respondent/Insurer.**

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**ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION**

**Summary:** Petitioner moves for reconsideration of this Court's Order Denying Parties' Cross-Motions for Summary Judgment and Denying Petitioner's Motion for Summary Judgment on Additional Issues, and Establishing Applicable Compensation Rates. Petitioner asserts that this Court overlooked the fact that Petitioner worked at Life in Bloom until just before his surgery to treat his industrial injury. Petitioner supports his assertion by supplying this Court with Petitioner's discovery responses and accompanying pay stubs. Petitioner argues that the day he stopped working at Life in Bloom, and the fact that he left to have surgery related to his industrial injury, affect this Court's analysis and calculation of benefits. Respondent agrees with Petitioner as to the date and reason Petitioner stopped working at Life in Bloom. Respondent acknowledges, however, that Petitioner should have brought the discrepancy to this Court's attention when this Court circulated its Order Issuing Preliminary Opinion, which invited the parties to request oral argument within 5 business days.

**Held:** Petitioner's Motion for Reconsideration is denied. This Court did not overlook the fact that Petitioner worked at Life in Bloom until just before his surgery to treat his industrial injury. This fact was simply not alleged or supported until Petitioner moved for reconsideration. Moreover, the parties had multiple timely opportunities to present a correct version of the facts in this matter and failed to do so.

¶ 1 Petitioner<sup>1</sup> and Respondent<sup>2</sup> cross-moved for summary judgment, asserting that their methods of calculating Petitioner's wage-loss benefit rates were correct.

¶ 2 Petitioner also moved for summary judgment on the grounds that Insurer's incorrect calculation and recalculation of his wage-loss benefits throughout the adjustment of his claim was unreasonable, entitling him to attorney fees and a penalty, and that § 39-71-712(2), MCA, unconstitutionally violated his entitlements to equal protection and substantive due process.<sup>3</sup>

¶ 3 In connection with their respective filings, the parties each filed a statement of undisputed facts.

¶ 4 Petitioner<sup>4</sup> and Respondent<sup>5</sup> both filed a reply brief, as well.

¶ 5 After reviewing the parties' submissions, this Court ordered the parties to file a joint statement of agreed facts – because “not all of the material facts ha[d] been presented or clearly presented to this Court” – as well as supplemental briefs.<sup>6</sup>

¶ 6 The parties filed the requested materials shortly thereafter.<sup>7</sup>

¶ 7 This Court then issued a preliminary opinion on the Parties' Cross-Motions for Summary Judgment and Petitioner's Motion for Summary Judgment on Additional Issues.

¶ 8 The Order Issuing Preliminary Opinion<sup>8</sup> explained that if neither party requested oral argument within 5 business days, this Court would issue the opinion as final.

¶ 9 Hearing nothing from the parties within that timeframe, this Court published its Order Denying Parties' Cross-Motions for Summary Judgment and Denying Petitioner's

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<sup>1</sup> Petitioner's Motion for Summary Judgment, Docket Item No. 9.

<sup>2</sup> Respondent's Cross Motion for Summary Judgment, Docket Item No. 13; Respondent's Response to Petitioner's Motion for Summary Judgment/Brief in Support of Cross Motion for Summary Judgment, Docket Item No. 12.

<sup>3</sup> Petitioner's Motion for Summary Judgment.

<sup>4</sup> Petitioner's Reply to Petitioner's Motion for Summary Judgment and Respondent's Cross Motion for Summary Judgment, Docket Item No. 14.

<sup>5</sup> Respondent's Reply Brief in Support of Cross Motion for Summary Judgment, Docket Item No. 15.

<sup>6</sup> Request to Submit Additional Materials, Docket Item No. 17; Clarification of the Court, Docket Item No. 19.

<sup>7</sup> Joint Statement of Facts, Docket Item No. 20; Respondent's Brief Re: Request to Submit Additional Materials, Docket Item No. 21; Petitioner's Supplemental Brief, Docket Item No. 22.

<sup>8</sup> Order Issuing Preliminary Opinion, Docket Item No. 23.

Motion for Summary Judgment on Additional Issues, and Establishing Applicable Compensation Rates.<sup>9</sup>

¶ 10 Two days after this Court published its opinion as final, Petitioner filed a Motion for Reconsideration<sup>10</sup> pursuant to ARM 24.5.337, which states, in pertinent part:

(1) A party may move for reconsideration of any decision of the Workers' Compensation Court only upon the following three grounds:

(a) that the court **overlooked some fact** material to the decision;

(b) that the court overlooked some issue presented by the party that would have proven decisive to the case; or

(c) that the court's decision conflicts with a statute or controlling decision not addressed by the court.<sup>11</sup>

¶ 11 Notwithstanding that the table the parties submitted in their Joint Statement of Facts included no earnings from Life in Bloom beyond January 20, 2023, Petitioner's Motion for Reconsideration states that Petitioner actually worked at Life in Bloom until March 4, 2023, and left to have surgery as a result of his industrial injury. In support of the allegations raised in Petitioner's Motion for Reconsideration, Petitioner attached new materials, including Petitioner's discovery responses with accompanying pay stubs. Petitioner indicates that these facts necessarily affect the analysis and calculation of benefits that this Court published as final.

¶ 12 ARM 24.5.337 also states, in pertinent part:

(2) A party shall file any motion for reconsideration of a decision within the time set forth in ARM 24.5.320. **The court reviews the motion before any other party responds. The court denies those motions it determines have no merit and orders the other party or parties to respond to those motions it determines may have merit.** If the court orders a response, it deems the motion submitted for decision upon receipt of the response or the expiration of the time for the response unless the court requests oral argument. The court does not consider reply briefs from moving parties.<sup>12</sup>

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<sup>9</sup> *Perea v. AmTrust Ins. Co.*, 2024 MTWCC 2.

<sup>10</sup> Petitioner's Motion for Reconsideration and Brief in Support (Petitioner's Motion for Reconsideration), Docket Item No. 25.

<sup>11</sup> Emphases added.

<sup>12</sup> Emphases added.

¶ 13 Nevertheless, the day after Petitioner filed Petitioner's Motion for Reconsideration, and before this Court had completed its review or decided whether to order Insurer to respond, Respondent filed its Response, agreeing with Petitioner that Petitioner actually worked at Life in Bloom until March 4, 2023, and left to have surgery as a result of his industrial injury.

¶ 14 Even though Respondent's Response was out of order, this Court treated the Response as a Motion to File a Response<sup>13</sup> and granted the motion<sup>14</sup> several days later.

¶ 15 Thereafter, this Court issued an Order Setting Hearing<sup>15</sup> in Helena for the purpose of receiving the parties' oral arguments on Petitioner's Motion for Reconsideration.

¶ 16 At the hearing, for which Respondent's counsel appeared in person and Petitioner's counsel appeared via Zoom, both parties presented oral arguments.<sup>16</sup>

¶ 17 After considering the arguments of the parties, Petitioner's Motion for Reconsideration is **denied** for the following reasons.

¶ 18 First, Petitioner failed to establish that any of the grounds for reconsideration set forth in ARM 24.5.337(1)(a)-(c) exist. Petitioner argues that this Court overlooked a material fact under ARM 24.3.337(1)(a). However, this is unpersuasive. For this Court to have "overlooked" the fact that Perea worked at Life in Bloom until just before his surgery,<sup>17</sup> the parties would have had to introduce that fact in the Joint Statement of Facts with proper citation to the record before the parties' motions for summary judgment were submitted for decision. This they did not do.<sup>18</sup>

¶ 19 Petitioner states: "Petitioner recognizes the Court referenced a table submitted that showed earnings through January 20, 2023, at Life in Bloom; however, that table did not reflect all earnings as evidenced by the pay stubs attached to Petitioner's discovery

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<sup>13</sup> Respondent's Response to Petitioner's Motion for Reconsideration, Docket Item No. 27.

<sup>14</sup> Order Granting Respondent's Request to File a Response Brief, Docket Item No. 26.

<sup>15</sup> Order Setting Hearing, Docket Item No. 31.

<sup>16</sup> Hearing in Helena/Zoom – Minute Book Hearing No. 5056, Docket Item No. 32.

<sup>17</sup> The Joint Statement of Facts states at page 7, ¶ 28, "Petitioner underwent surgery March 5, 2023." Petitioner's Motion for Reconsideration states at page 2, first paragraph, "Petitioner left Life in Bloom because he was having surgery on March 6, 2023." If Petitioner's surgery did indeed take place on March 6, 2023, then Petitioner should have notified this Court of the parties' error in the Joint Statement of Facts.

<sup>18</sup> See *Bauer v. CNA Commercial Ins.*, 2002 MTWCC 2A, ¶ 3 (ruling that a motion for reconsideration was without merit because Petitioner offered no evidence that the additional facts set out in the affidavit were unknown to him and could not have been submitted before); *Wiard v. Liberty Nw. Ins. Corp.*, 2001 MTWCC 31A, ¶ 2 (ruling that motion for reconsideration in which Claimant asked this Court to consider depositions was without merit because a party "cannot hold back facts or evidence and then tender them after the motion was decided"). See also *Thompson v. State of Mont.*, 2006 MTWCC 1, ¶ 4 (denying intervenor's request to present testimony at oral argument because "if additional facts beyond those to which the parties agreed in submitting this matter should be considered, the Court sees no compelling reason why they were not presented previously.").

responses.”<sup>19</sup> Petitioner is correct that this Court referenced a table – the table that Petitioner provided. And while Petitioner’s discovery responses may contain evidence supporting Petitioner’s factual contention, Petitioner did not admit into evidence nor supply these responses to this Court prior to its decision. Thus, what Petitioner is really asking this Court to do is reconsider Petitioner’s failure to provide material evidence to this Court at the proper time.

¶ 20 Second, the parties had multiple timely opportunities to present a correct version of the facts in this matter and failed to do so. Each party filed a motion with supporting brief, a reply brief, and a supplemental brief. Each party filed its own statement of undisputed facts and contributed to the Joint Statement of Facts. Finally, each party was invited to request oral argument on the facts or analysis in this Court’s preliminary order. In sum, that is 3 briefs, 2 statements of facts, and 1 invitation to request oral argument **each**. In addition, this Court reviewed 190 pages of supporting documents. Nowhere in this stack of paperwork is the clear factual assertion that Petitioner’s last day of employment with Life in Bloom was March 4, 2023, and that he left to have surgery as a result of his industrial injury. The closest either party got to making such assertion was when Respondent stated, with no citation to the record, that, following Petitioner’s surgery, “the lost wages from Life in Bloom would be included in the TTD calculation because he suffered a wage loss there due to injury.”<sup>20</sup>

¶ 21 This Court is not in a position to locate record support for uncited factual assertions in the parties’ briefs nor to look for and keep track of facts that are not set forth in the parties’ Joint Statement of Facts. This Court relied on the facts supplied by the parties and issued a preliminary decision, the purpose of which was to give the parties an opportunity to correct any factual or legal issues prior to this Court issuing its final decision. Petitioner’s failure to bring an omission to this Court’s attention when review of the preliminary decision was requested make this request to insert new facts into the analysis untimely.

¶ 22 In the interest of justice and timely resolving matters before the Court, there must come a time for closure in the factual presentation so that this Court can apply the law and issue a decision. This point was reached when the parties submitted the Joint Statement of Facts, and the time to correct this Court’s interpretation of those agreed facts was when the preliminary decision was circulated for consideration. No objection was received to that preliminary order, no oral argument was requested, and no extension to respond was received.

¶ 23 For all of the foregoing reasons, Petitioner’s Motion for Reconsideration is **denied**.

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<sup>19</sup> Petitioner’s Motion for Reconsideration, at page 2.

<sup>20</sup> Respondent’s Response to Petitioner’s Motion for Summary Judgment/Brief in Support of Cross Motion for Summary Judgment, at page 8, first full ¶.

DATED this 13<sup>th</sup> day of March, 2024.

(SEAL)

/s/ Lee Bruner  
Judge Lee Bruner

c: Stacy Tempel-St. John  
Steven W. Jennings

Submitted: March 11, 2024