

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 7

WCC No. 2016-3783

---

JANIE L. ROBINSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

---

ORDER AND JUDGMENT GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO PETITIONER'S OFFSET CLAIM, DENYING PETITIONER'S CROSS MOTION FOR SUMMARY JUDGMENT AS TO PETITIONER'S OFFSET CLAIM, AND DISMISSING PETITIONER'S DUE PROCESS CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION

**Summary:** Respondent moved for summary judgment on Petitioner's two causes of action. First, Respondent argues it can take the Social Security offset from Petitioner's PTD benefits under § 39-71-702(4), MCA, because Petitioner is receiving PTD benefits and SSDI benefits because of her two industrial injuries. Second, Respondent argues it did not violate Petitioner's due process rights when it took the offset and began recouping an alleged overpayment before she had the opportunity for a hearing. Petitioner cross-moved for summary judgment. First, she argues that Respondent cannot take the offset because the statute states that the insurer can take the offset only when SSDI benefits are awarded "because of the injury," which Petitioner interprets as applying only when the claimant has one industrial injury. Second, Petitioner argues that Respondent violated her right to due process by taking the offset and recouping an overpayment before she had the opportunity for a hearing and that she is entitled to "such damages as are just for the violation of her right to due process."

**Held:** Respondent is entitled to summary judgment on Petitioner's offset claim. Section 39-71-702(4), MCA, covers situations in which a claimant is receiving PTD benefits and SSDI benefits because of two industrial injuries under the rule of statutory construction providing that the "singular includes the plural." This interpretation also upholds the legislative intent of the offset statute. Petitioner's due process claim, in which the only

remedy she seeks is damages, is dismissed because this Court does not have subject matter jurisdiction over tort claims.

¶ 1 Petitioner Janie L. Robinson petitioned this Court for a ruling that Respondent Montana State Fund (State Fund) is not entitled to take the Social Security offset from her permanent total disability (PTD) benefits under § 39-71-702(4), MCA. Robinson also alleges that State Fund violated her right to due process when it took the offset and reduced her PTD benefits by \$40 per week to recoup an alleged overpayment before she had the opportunity for a hearing and asks this Court to award her damages. State Fund moved for summary judgment, arguing it is entitled to take the offset and it did not violate Robinson's right to due process. Robinson opposes State Fund's motion and has cross-moved for summary judgment.

### ISSUES

¶ 2 The following issues are before this Court:

Issue One: Is State Fund entitled to take the Social Security offset from Robinson's PTD benefits under § 39-71-702(4), MCA?

Issue Two: By offsetting Robinson's PTD benefits before Robinson had the opportunity for a hearing, did State Fund violate her right to due process under Article II, Section 17 of the Montana Constitution, thereby entitling her to damages?

### UNDISPUTED FACTS

¶ 3 Robinson suffered two industrial accidents while working for South Peak Angus Ranch, which State Fund insured at all times relevant to this case. On July 4, 1996, Robinson suffered a brain injury due to heat stroke. As a result of this injury, Robinson has been treated for cognitive difficulties, depression, anxiety, panic disorder, post-traumatic stress disorder, and chronic migraine headaches. On March 19, 2004, Robinson suffered a low-back injury.

¶ 4 State Fund accepted liability for both injuries.

¶ 5 On March 29, 2006, State Fund determined that Robinson was permanently totally disabled and began paying her PTD benefits.

¶ 6 On December 28, 2011, Robinson applied for Social Security benefits, asserting that she had been unable to work since March 19, 2004, the date of her low-back injury.

¶ 7 On January 30, 2014, the Social Security Administration determined that Robinson was disabled and entitled to Social Security Disability Insurance (SSDI) benefits, effective December 1, 2010. The Administrative Law Judge cited the effects of both Robinson's brain injury and her low-back injury as the disabling conditions. The Decision from the Social Security Administration states, in relevant part:

3. The medical evidence in the record establishes that the claimant has the following medically determinable severe impairments: a history of a traumatic brain injury resulting in a cognitive disorder NOS and a post-traumatic stress disorder; a mood disorder due to general medical condition; a panic disorder with agoraphobia; a depressive disorder NOS; an anxiety disorder NOS; and pain disorder with both psychological factors and medical condition. The claimant also has a combination of physical impairments that have affected her ability to work since her alleged onset date, including chronic migraine headaches and a degenerative back impairment with chronic low back pain.<sup>1</sup>

¶ 8 On July 17, 2014, State Fund learned that the Social Security Administration had determined that Robinson was disabled and entitled to SSDI benefits.

¶ 9 On July 31, 2014, State Fund notified Robinson that it was entitled to take the offset from her PTD benefits in the amount of \$65.13 per week and that, starting July 29, 2014, it would take the offset. State Fund also advised Robinson that because it had been entitled to take the offset from her PTD benefits paid since December 1, 2010, it had overpaid her PTD benefits, and asserted that it was entitled to recoup the overpayment.

¶ 10 On August 29, 2014, Robinson asserted that State Fund was not entitled to take the offset under § 39-71-702(4), MCA. In a letter to the claims examiner, Robinson's attorney stated:

Ms. Robinson has suffered two workers<sup>[1]</sup> compensation injuries, not one. Both of those injuries combined to render her totally disabled for Social Security purposes. However, the statute refers to "the injury." How in your calculations do you, if at all, accommodate the fact that this offset statute may not apply to Ms. Robinson because of the fact that she suffered two workers<sup>[1]</sup> compensation injuries, not one?

---

<sup>1</sup> Emphasis removed.

¶ 11 In response, State Fund reaffirmed its position that it was entitled to take the offset and recoup the overpayment. In a letter to Robinson's attorney dated October 2, 2014, one of its attorneys explained, in relevant part:

I concur with you that there are two separate workers' compensation claims that have been filed by Ms. Robinson. The Montana State Fund was aware of both and ultimately arrived at the conclusion that it was the cumulative effect of both accepted injuries that resulted in her being declared permanently totally disabled. Her benefits were paid out under the second claim because it was the most recent in time and her benefits were higher, but the fact is that both claims were considered in awarding the benefits she now receives. Accordingly, State Fund is entitled to the offset provided under section 702 [of] the Act.

¶ 12 On February 24, 2016, State Fund began withholding an additional \$40 per week from Robinson's PTD benefits to recoup the alleged overpayment of PTD benefits.

¶ 13 In Cause of Action No. 1 in her Petition for Trial, Robinson alleges:

It is clear from the [Decision from the Social Security Administration] that the injuries from which Petitioner suffers that qualify her for Social Security disability benefits arise both from the 1996 industrial accident and the 2004 industrial accident.

Robinson emphasizes that § 39-71-702(4), MCA — the statute providing that an insurer can take an offset when the claimant receives SSDI benefits — states that an insurer is entitled to the offset only if she is receiving SSDI benefits "because of the injury" and asserts that it does not apply when a claimant has two industrial injuries.

¶ 14 In Cause of Action No. 2, Robinson alleges that State Fund has violated her due process rights by taking the offset before she had the opportunity for a hearing and, "As a result of Respondent State Fund's unlawful action, Petitioner has suffered damages."

¶ 15 In her Prayer for Relief, Robinson asks this Court to: (1) rule that State Fund is not entitled to take the offset under § 39-71-702(4), MCA; (2) order State Fund to provide her with an accounting and to reimburse her for the amounts it has taken as the offset; (3) award her "such damages as are just for the violation of her right to due process"; (4) assess a penalty against State Fund; (5) award her attorney fees; (6) award her interest; and (7) award her costs.

## LAW AND ANALYSIS

¶ 16 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>2</sup> The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 17 This case is governed by the 1995 and 2003 versions of the Montana Workers' Compensation Act (WCA) since those were the laws in effect on the dates of Robinson's two industrial accidents.<sup>3</sup>

### **Issue One: Is State Fund entitled to take the Social Security offset from Robinson's PTD benefits under § 39-71-702(4), MCA?**

¶ 18 Section 39-71-702(1) and (2), MCA, provides that a permanently totally disabled claimant is entitled to weekly benefits, which are 66 2/3% of the claimant's time-of-injury wages, with a maximum benefit set at Montana's average weekly wage. However, subsection (4) allows insurers to take an offset when the claimant receives SSDI benefits "because of the injury." It states:

In cases in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week, which amount is to be calculated from the date of the disability social security entitlement.

¶ 19 Robinson points to the phrase, "because of the injury," and argues that under the plain language of this statute, an insurer can take the offset only when the claimant has one workers' compensation injury. She argues: "This statutory language clearly ties itself to a single workers' compensation injury, not multiple workers' compensation injuries."

¶ 20 State Fund argues that Robinson's reading of the statute is too narrow, and in contravention of the legislative intent. State Fund argues it is entitled to take the offset from Robinson's PTD benefits under § 39-71-702(4), MCA, because she is receiving both PTD benefits and SSDI benefits because of her industrial injuries. State Fund also argues

---

<sup>2</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

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

it has the statutory right to recoup the overpayment by withholding an additional \$40 per week under § 39-71-702(7), MCA, which states:

If the claimant is awarded social security benefits, the insurer may, upon notification of the claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to recover any resulting overpayment of benefits. This subsection does not prevent a claimant and insurer from agreeing to a repayment plan.

¶ 21 This Court agrees with State Fund that Robinson's reading of § 39-71-702(4), MCA, is too narrow. While the rules of statutory construction provide that this Court is "not to insert what has been omitted,"<sup>4</sup> they also provide that "[t]he singular includes the plural."<sup>5</sup> Thus, while § 39-71-702(4), allows an insurer to take the offset only if the claimant's entitlement to SSDI benefits is "because of the injury," it applies when the claimant's entitlement to SSDI benefits is because of two workers' compensation injuries, as well. In short, the statute does not contain a loophole.

¶ 22 Moreover, this Court agrees with State Fund that Robinson's reading is contrary to the legislative intent of § 39-71-702(4), MCA. Section 1-2-102, MCA, provides, in relevant part, "[i]n the construction of a statute, the intention of the legislature is to be pursued if possible." The Montana Supreme Court has explained the purpose of § 39-71-702(4), MCA, as follows: "The legislative intent behind the workers' compensation statutes is to replace income to injured workers. The purpose behind the state offset statute is to prevent 'over replacement' or duplication of disability pay."<sup>6</sup> The legislative intent of the offset statute would be contravened if State Fund was not allowed to take the Social Security offset.

¶ 23 Despite Robinson's claim to the contrary, *MACo Workers' Compensation Trust v. Klinkam*,<sup>7</sup> does not support her position. In *Klinkam*, this Court did not rule that an insurer cannot take the offset in every claim in which the claimant's entitlement to SSDI benefits is because of multiple injuries. Rather, because *Klinkam*'s work-related knee injury "was just one of eleven 'severe' physical and mental impairments that . . . contributed to her

---

<sup>4</sup> § 1-2-101, MCA.

<sup>5</sup> § 1-2-105(3), MCA.

<sup>6</sup> *Watson v. Seekins*, 234 Mont. 309, 314-15, 763 P.2d 328, 332 (1988); see also *McClanathan v. Smith*, 186 Mont. 56, 64-68, 606 P.2d 507, 512-13 (1980) (holding that Social Security offset provision in § 39-71-702, MCA, did not violate claimant's right to equal protection because it was rationally related to the legitimate governmental interest of avoiding duplication and overlapping of disability benefits).

<sup>7</sup> 2011 MTWCC 26.

entitlement to social security disability,” this Court ruled MACo could not take the Social Security offset, reasoning that she did not receive SSDI benefits “because of the injury” for which MACo was liable.<sup>8</sup> In contrast, Robinson’s entitlement to SSDI benefits is solely because of the injuries for which State Fund is liable. Thus, State Fund is entitled to take the offset.

¶ 24 Since Robinson’s entitlement to PTD benefits and SSDI benefits are because of the industrial injuries for which State Fund is liable, State Fund can take the offset from her PTD benefits under § 39-71-702(4), MCA, and may continue to recoup the overpayment at the rate of \$40 per week under § 39-71-702(7), MCA. Accordingly, State Fund is entitled to judgment as a matter of law on Robinson’s offset claim.<sup>9</sup>

**Issue Two: By offsetting Robinson’s PTD benefits before Robinson had the opportunity for a hearing, did State Fund violate her right to due process under Article II, Section 17 of the Montana Constitution, thereby entitling her to damages?**

¶ 25 Robinson argues that State Fund violated her right to due process because it began taking the offset and recouping the overpayment from her PTD benefits before she could have a hearing. In support of her argument, Robinson cites cases holding that when a person has a property interest, there must be the opportunity for a hearing before the property is taken.<sup>10</sup> The only remedy she seeks is an award of damages.

¶ 26 State Fund responds that it did not violate Robinson’s right to due process because its decision to take the offset is subject to judicial review. In support of its argument, State Fund primarily relies on *Grooms v. Ponderosa Inn*, where the Montana Supreme Court

---

<sup>8</sup> *Klinkam*, ¶¶ 21-23.

<sup>9</sup> Since Robinson is not the prevailing party, she is not entitled to her costs, attorney fees, or a penalty under §§ 39-71-611, and -2907, MCA. Likewise, she is not entitled to any interest. Finally, as for Robinson’s claim for an accounting, State Fund provided Robinson with its payment ledgers for both of her claims in Montana State Fund’s Responses to Petitioner’s First Requests for Production to Montana State Fund. If Robinson requests updated payment ledgers, State Fund has a duty to produce them under § 39-71-107(2)(c), MCA (1995) and § 39-71-107(3), MCA (2001-current). See also § 39-71-107(4)(c), MCA (2003).

<sup>10</sup> See, e.g., *Boddie v. Conn.*, 401 U.S. 371, 378-79, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (citations omitted) (explaining that due process mandates that “an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event”); see also *Mont. Media, Inc. v. Flathead Cnty.*, 2003 MT 23, ¶ 66, 314 Mont. 121, 63 P.3d 1129 (citations omitted) (“Procedural Due Process requires that some form of hearing be available that provides a meaningful and timely opportunity to be heard before property is taken.”).

held that since there is a statutory right to have this Court decide disputes over benefits, claimants have an opportunity to be heard, thereby satisfying due process.<sup>11</sup>

¶ 27 State Fund does not challenge this Court's subject matter jurisdiction over Robinson's due process claim. However, this Court has an independent duty to determine whether subject matter jurisdiction exists, even in the absence of a challenge from any party.<sup>12</sup> To determine if this Court has subject matter jurisdiction, it must "determine whether the [Petition for Trial] states facts that, if true, would vest the court with subject matter jurisdiction."<sup>13</sup>

¶ 28 Section 39-71-2905, MCA, gives this Court exclusive jurisdiction to decide disputes concerning "any benefits" under the Workers' Compensation Act.<sup>14</sup> Although this Court "has broad jurisdictional powers over disputes under the Act,"<sup>15</sup> and can make constitutional rulings when the ruling is necessary to decide an issue concerning benefits,<sup>16</sup> this Court does not have subject matter jurisdiction over a tort claim for damages, even if the conduct giving rise to the tort claim occurs in a workers' compensation claim.<sup>17</sup>

---

<sup>11</sup> 283 Mont. 459, 463-64, 942 P.2d 699, 701-02 (1997); see also *Williams Insulation Co. v. Dep't of Labor and Indus.*, 2003 MT 72, ¶ 22, 314 Mont. 523, 67 P.3d 262 (citation omitted) ("Where judicial review is accorded to a particular order made or agreed upon by an administrative agency, such as the DOL, there is no denial of due process. . . . The availability of judicial review of the UEF's conclusion of law, not only by the WCC, but by this Court, mandates our determination that Williams has not been denied due process.").

<sup>12</sup> See *Alto Jake Holdings, LLC v. Donham*, 2017 MT 297, ¶ 28, 389 Mont. 435, 406 P.3d 937 (citations omitted) (explaining that subject matter jurisdiction cannot be waived, can be raised at any stage of judicial proceeding, and that trial courts have an independent duty to determine *sua sponte* whether subject matter jurisdiction exists).

<sup>13</sup> *Liberty Northwest Ins. Corp. v. State Comp. Ins. Fund*, 1998 MT 169, ¶ 7, 289 Mont. 475, 962 P.2d 1167 (citation omitted).

<sup>14</sup> See, e.g., *Moreau v. Transp. Ins. Co.*, 2015 MT 5, ¶ 10, 378 Mont. 10, 342 P.3d 3 (citation omitted).

<sup>15</sup> *Liberty Northwest Ins. Corp.*, ¶ 10 (citations omitted).

<sup>16</sup> See, e.g., *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, 353 Mont. 265, 222 P.3d 566 (affirming Workers' Compensation Court's decision that § 39-71-710, MCA, the statute providing that PTD and permanent partial disability (PPD) benefits terminate upon receipt of Social Security retirement benefits, or eligibility for full Social Security retirement benefits, was constitutional when applied to claimants receiving PTD benefits); *Reesor v. Mont. State Fund*, 2004 MT 370, 325 Mont. 1, 103 P.3d 1019 (reversing Workers' Compensation Court's decision that § 39-71-710, MCA, was constitutional for PPD claimants and remanding for a re-determination of the amount of PPD benefits due); *Miller v. Liberty Mut. Fire Ins. Corp.*, 2008 MTWCC 18 (ruling that WCC had jurisdiction to hear a constitutional challenge to an administrative rule where a dispute over benefits existed).

<sup>17</sup> *Liberty Northwest Ins. Corp.*, ¶¶ 10-12 (holding that this Court did not have subject matter jurisdiction over case in which a Plan 2 insurer brought a tort claim against State Fund and sought damages in the amount of workers' compensation benefits the Plan 2 insurer paid in the underlying workers' compensation claim).



¶ 29 This Court does not have subject matter jurisdiction over Robinson's due process claim because it sounds in tort. In her Petition for Trial, the only remedy Robinson seeks for the alleged violation of her due process rights is an award of damages; i.e., Robinson makes a constitutional tort claim. While Montana recognizes constitutional tort claims for violations of the right to due process,<sup>18</sup> such claims must be brought in Montana's district courts, even if the tort claim is against State Fund and the conduct giving rise to the tort claim occurs in a workers' compensation claim.<sup>19</sup> Accordingly, this Court does not have subject matter jurisdiction over Robinson's due process claim; consequently, this Court dismisses it.

### ORDER AND JUDGMENT

¶ 30 Respondent's motion for summary judgment is **granted** as to Petitioner's offset claim.

¶ 31 Petitioner's cross-motion for summary judgment is **denied** as to Petitioner's offset claim.

¶ 32 Petitioner's due process claim is **dismissed** for lack of subject matter jurisdiction.

¶ 33 Pursuant to ARM 24.5.348(2), this Order and Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in this 6<sup>th</sup> day of April, 2018.

(SEAL)

/s/ DAVID M. SANDLER  
\_\_\_\_\_  
JUDGE

c: Lawrence A. Anderson  
Stephanie A. Hollar

Submitted: October 21, 2016

---

<sup>18</sup> *Dorwart v. Caraway*, 2002 MT 240, ¶ 48, 312 Mont. 1, 58 P.3d 128 (holding that direct cause of action for money damages is available for violations of due process rights under Mont. Const. art. II, § 17).

<sup>19</sup> *See Liberty Northwest Ins. Corp.*, ¶ 11 (holding that under Mont. Const. art. VII, § 4, Montana district courts, and not this Court, have subject matter jurisdiction over tort cases).