

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 47

WCC No. 2006-1587

MONTANA MUNICIPAL INSURANCE AUTHORITY

Petitioner

vs.

JOHN E. ROCHE, JR.

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

***Appealed to the Montana Supreme Court 01/15/08
Affirmed 06/10/09 - 2009 MT 205N***

Summary: Petitioner alleges that Respondent received a "wage" from a business which he ran as a sole proprietor during the time that Respondent received TTD benefits from Petitioner, and that Respondent did not have Petitioner's consent to do so as required by § 39-71-701, MCA. Respondent denies that he received a "wage" from his business because he asserts that the business is not profitable and does not generate an income.

Held: Respondent received a wage from his business because he used business assets for personal use and wrote checks from his business account to pay personal loans. The fact that the business is not profitable according to Respondent's income tax returns has no bearing on whether Respondent himself received a "wage" from the business as that term is defined in § 39-71-123, MCA. Therefore, Respondent was not entitled to the TTD benefits he received and must repay those benefits to Petitioner.

Topics:

Jurisdiction: Subject Matter Jurisdiction. While Respondent argues that the Court has no authority to order him to repay any TTD benefits he received to which he may not have been entitled, in *Reil v. State Comp. Mut. Ins. Fund*, 254 Mont. 274, 837 P.2d 1334 (1992), the Montana Supreme Court concluded that restitution is within the remedies available in this Court, and that the exclusivity of the Workers' Compensation Act does not preclude restitution of benefits to which a worker was not entitled. Therefore, this Court has jurisdiction to order restitution in the present case.

Remedies: Restitution. While Respondent argues that the Court has no authority to order him to repay any TTD benefits he received to which he may not have been entitled, in *Reil v. State Comp. Mut. Ins. Fund*, 254 Mont. 274, 837 P.2d 1334 (1992), the Montana Supreme Court concluded that restitution is within the remedies available in this Court, and that the exclusivity of the Workers' Compensation Act does not preclude restitution of benefits to which a worker was not entitled. Therefore, this Court has jurisdiction to order restitution in the present case.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Whether or not a business is profitable has no bearing on whether the proprietor received a wage from the business. What determines "wages" is not whether something was treated as income for federal tax purposes. The determining fact is whether the recipient experienced real economic gain. In the present case, the claimant paid for his personal automobile insurance, a cell phone he uses for both business and personal use, and made payments on personal loans using the business' checking account. This constitutes a wage as defined in § 39-71-123(1)(d), MCA.

Wages: Wages Defined. Whether or not a business is profitable has no bearing on whether the proprietor received a wage from the business. What determines "wages" is not whether something was treated as income for federal tax purposes. The determining fact is whether the recipient experienced real economic gain. In the present case, the claimant paid for his personal automobile insurance, a cell phone he uses for both business and personal use, and made payments on personal loans using the business' checking account. This constitutes a wage as defined in § 39-71-123(1)(d), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. Where Respondent was found to receive a "wage" from a business he ran as a sole proprietor while receiving TTD benefits and without the written consent of the insurer, Respondent violated § 39-71-701(7), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. Respondent received \$45,272.86 in TTD benefits during the same time period as he received a wage from a business he operated without the written consent of the insurer, and thus Respondent violated § 39-71-701, MCA. The language of the statute leaves no room for apportionment and plainly states that a worker may not receive both wages and TTD benefits without the written consent of the insurer. Accordingly, Respondent must repay the benefits to which he was not entitled pursuant to the statute.

Remedies: Restitution. Respondent received \$45,272.86 in TTD benefits during the same time period as he received a wage from a business he operated without the written consent of the insurer, and thus Respondent violated § 39-71-701, MCA. The language of the statute leaves no room for apportionment and plainly states that a worker may not receive both wages and TTD benefits without the written consent of the insurer. Accordingly, Respondent must repay the benefits to which he was not entitled pursuant to the statute.

¶ 1 The trial in this matter was held on April 10, 2007, in Helena, Montana. Petitioner Montana Municipal Insurance Authority (MMIA) was represented by Oliver H. Goe and Chad E. Adams. Respondent John E. Roche, Jr., was represented by Bernard J. Everett.

¶ 2 Exhibits: Exhibits 1 through 15 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Respondent, John J. Corrigan, CPA, and Teri Reardon were submitted to the Court and can be considered part of the record. Respondent, Kim O'Brien, and David K. Johnson were sworn and testified at trial.

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

¶ 4a Did Respondent receive a wage from his business M&N Sports while receiving temporary total disability benefits?

¶ 4b What is the amount, if any, of the overpayment the Petitioner is entitled to recover from the Respondent resulting from Respondent's receipt of wages while receiving temporary total disability benefits?

¶ 4c Does the [Workers' Compensation] Court have subject matter jurisdiction [over these issues]?

FINDINGS OF FACT

¶ 5 Respondent suffered a work-related injury to his right knee on November 14, 2002, while working as a police officer in Anaconda, Montana. Petitioner accepted liability for Respondent's injury and paid temporary total disability (TTD) benefits from November 20, 2002, until December 30, 2004. Respondent received \$45,272.86 in TTD benefits from Petitioner. Petitioner also paid medical benefits.¹

¹ Pretrial Order, Statement [of] Uncontested Facts at 1-2.

¶ 6 Respondent's treating physician released him to return to his time-of-injury job without restriction on December 14, 2004. Respondent returned to work shortly thereafter.²

¶ 7 In addition to his job as a police officer, Respondent also owns a business in Anaconda called M&N Sports. Respondent has operated this business as a sole proprietor since approximately 1989, and he continued to operate the business during the time he was receiving TTD benefits for his knee injury.³

¶ 8 At issue in the case before this Court is whether Respondent received a "wage" from M&N Sports as that term is defined in § 39-71-123(1)(d), MCA, from November 20, 2002, until December 30, 2004, while he received TTD benefits from Petitioner. Petitioner argues that Respondent received a "wage" from M&N Sports during this time period. Petitioner further argues that pursuant to § 39-71-701, MCA, a claimant is precluded from receiving TTD benefits and wages concurrently without the written consent of the insurer and Respondent did not obtain Petitioner's written consent. Respondent denies that he received a "wage" from M&N Sports because the business is not profitable and does not generate an income.

¶ 9 Through M&N Sports, Respondent sells motorcycles, snowmobiles, and ATVs, as well as parts and accessories. He also performs repairs on these types of vehicles. Respondent testified that M&N Sports has never generated a net profit. He further testified that he intends to operate the business at a profit, but he simply has not done so yet.⁴

¶ 10 Based on the record before me, the conflicting testimony between Respondent and the other witnesses in this case, and having had the opportunity to observe Respondent's demeanor and testimony at trial, I am not persuaded that Respondent is a credible witness. In particular—as will be discussed more fully below—I do not find credible Respondent's assertion that he does not recall telling Petitioner's claims examiner that he had no knowledge of the existence of M&N Sports. Nor do I believe Respondent's testimony that he has run this business for nearly 20 years with a virtually nonexistent markup on the goods and services he sells. Moreover, I did not find Respondent's testimony credible when he testified that he believed attending motocross events in other states, with his sole advertising being a sign on his trailer, generates substantial business for his Anaconda shop. Although these latter facts do not bear directly on the specific issue of whether Respondent received a "wage" from M&N Sports during the years in question, they nonetheless cause me to seriously question the credibility of Respondent's testimony.

² Pretrial Order, Statement [of] Uncontested Facts at 2.

³ Trial Test.

⁴ Trial Test.

¶ 11 M&N Sports is usually open for business four or five days a week⁵ for four or five hours at a time.⁶ Respondent rents the location of the business.⁷ Respondent keeps track of his sales by recording each sale in a ledger, although he sometimes forgets to write things down. Since he relies on the ledger for his tax returns each year, he admits that the reported income from the business may be a bit lower than the actual income since he may forget to record some items. He does not have a standard markup, but rather charges whatever he thinks is a fair price for the goods and services he sells.⁸ He also does not have a customary charge for his labor, but charges whatever he thinks a job is worth.⁹ Respondent does not have a cash register, and he only writes a receipt if someone asks for one.¹⁰ He estimates that he only issues about ten receipts each year.¹¹

¶ 12 Respondent's son Nick has occasionally been an employee of M&N Sports, and Respondent recalled that he briefly had an employee ten to twelve years ago, but the remainder of the time he has been the only person working at M&N Sports.¹² Throughout the time period at issue in this case, Respondent handled the financial necessities for M&N Sports; although, after each of his two surgeries, he was unable to physically manage the business for periods of time and he relied on Nick to spend some time in the business.¹³ Respondent did not recall how long it was following each surgery until he returned to his usual duties at M&N Sports.¹⁴ Although he was not always able to perform repairs, he continued to handle the financial portion of the business and he continued to sell parts and accessories.¹⁵

¶ 13 Respondent's two sons participate in motocross racing and attend about 25 events each year, with their vehicles, equipment, entry fees, and travel expenses paid for by M&N

⁵ Roche Dep. 25:5-21.

⁶ Trial Test.

⁷ Roche Dep. 49:1-3.

⁸ Trial Test.

⁹ Roche Dep. 35:23-24.

¹⁰ Trial Test.

¹¹ Roche Dep. 32:2-4.

¹² Roche Dep. 9:13-25.

¹³ Roche Dep. 18:19 - 20:5.

¹⁴ Roche Dep. 21:25 - 22:7; 23:8-10.

¹⁵ Roche Dep. 23:16 - 24:4.

Sports.¹⁶ M&N Sports also pays for his sons' racing clothing and boots and any other racing-related expenses which they may have.¹⁷ Respondent travels to these events with his sons, and his travel expenses are also covered by the business.¹⁸ These expenses include meals and lodging while attending racing events.¹⁹ Some events are in Montana and others are out of state.²⁰ Respondent testified that the racing events he attends are a father-son activity which allows him to spend time with his sons.²¹

¶ 14 Respondent accompanies his sons to all of their racing events. He tows a trailer to these events which carries his sons' motorcycles and his tools. At competitions, Respondent fixes his sons' motorcycles as well as other competitors' motorcycles. Respondent occasionally loans motorcycles to other competitors. Respondent testified that this has helped his business immensely because many of these competitors then become customers, and a large percentage of his customers come to M&N Sports through racing. However, many of these events are out of state or a significant distance from his shop in Anaconda. Respondent admitted that he does not keep track in his ledger of who he sells parts and accessories to, and he does not actually know where many of his customers are from. Respondent further testified that his sons bring in business from Anaconda, Deer Lodge, and Butte because of their racing.²²

¶ 15 Respondent keeps track of the mileage he uses his vehicles for business by recording the miles in a memo pad. Aside from traveling to events, he travels from Anaconda to Butte several times each week to pick up parts. During the time period at issue in this case, his primary vehicle was a 2001 Dodge truck, which he insured through M&N Sports and which he used for both business and personal use.²³

¶ 16 Respondent contributed \$550 of his personal funds to M&N Sports in 2003.²⁴ M&N Sports showed \$750 in inventory on Respondent's 2003 tax return. Respondent testified that the \$750 in inventory was parts and accessories, but did not include any motorcycles or snow machines. Respondent testified that when he sells new motorcycles and snow

¹⁶ Trial Test.

¹⁷ Roche Dep. 41:8-13.

¹⁸ Trial Test.

¹⁹ Roche Dep. 16:20-22.

²⁰ Roche Dep. 17:13-15.

²¹ Trial Test.

²² Trial Test.

²³ Trial Test.

²⁴ Trial Test.

machines, he does not make more than \$200 profit in order to keep his prices competitive with other businesses.²⁵

¶ 17 Kim O'Brien (O'Brien) is a workers' compensation claims examiner for Petitioner. I find O'Brien to be a credible witness.

¶ 18 O'Brien was not the initial claims examiner involved with Respondent's claim, but she became responsible for adjusting the claim during the time in which Respondent was receiving TTD benefits. O'Brien stated that based upon Respondent's wages as a police officer at the time of his injury, Respondent received the maximum rate for TTD benefits.²⁶

¶ 19 In May 2004, while Respondent was receiving TTD benefits, the Anaconda city attorney contacted O'Brien and advised her that Respondent's coworkers at the police department notified the city attorney that Respondent was working at M&N Sports. O'Brien also learned that Respondent allegedly owned M&N Sports.²⁷

¶ 20 O'Brien immediately contacted Respondent to investigate the claim because Respondent's alleged employment could affect his eligibility for TTD benefits. When O'Brien spoke to Respondent, he denied owning M&N Sports, and denied that he worked there. O'Brien then called the county to inquire about the ownership of M&N Sports, and she learned that it was owned by Respondent.²⁸ During his deposition, Respondent testified that he recalls speaking to O'Brien, but that he has no recollection of ever speaking to her about M&N Sports.²⁹

¶ 21 Although O'Brien believed at that time that Respondent might not be eligible for TTD benefits, she did not terminate those benefits because she did not know whether he was receiving a wage from M&N Sports. Petitioner's counsel sent letters to Respondent trying to determine whether Respondent was receiving a wage from M&N Sports, but Respondent did not supply the financial information they requested.³⁰

¶ 22 Respondent has used Certified Public Accountant John Joseph Corrigan (Corrigan) to prepare M&N Sports' tax returns since he opened the business in 1989.³¹ In preparing his taxes each year, Respondent calculates the total funds M&N Sports brought in that year

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Trial Test.

²⁸ Trial Test.

²⁹ Roche Dep. 84:3 - 85:9.

³⁰ Trial Test.; See Exs. 2 and 7.

³¹ Roche Dep. 11:1-7.

and how much the business paid out for parts, motocross racing, and travel expenses. He then gives those numbers to Corrigan.³² Respondent calculates M&N Sports' income by reviewing his ledger and his bank deposits. He calculates the business expenses by reviewing receipts and his checkbook.³³

¶ 23 Corrigan's business is located in Anaconda, Montana.³⁴ He has prepared Respondent's tax returns since 1983.³⁵ Corrigan testified that when Respondent brings in his documents for tax preparation each year, Respondent provides Corrigan with summaries of his business income and expenses, but does not provide individual invoices, bank statements, and similar original documents.³⁶ Corrigan further testified that he determines what percentage of a vehicle's use is for business by asking the owner to estimate the percentage.³⁷ Although Respondent is supposed to maintain a mileage log, Corrigan is unaware whether he does or not.³⁸ Corrigan further testified that Respondent's attendance at his sons' racing events is considered business-related because his trailer displays "M&N Sports" on the side, which advertises the business, and Respondent meets people who may later purchase items from the business.³⁹ Corrigan testified that for 2002, 2003, and 2004, Respondent reported gross income from M&N Sports, but no profit.⁴⁰

¶ 24 Respondent maintains both business and personal accounts at Southwest Montana Community Federal Credit Union (SMCFCU).⁴¹ These include a savings and checking account for M&N Sports and several personal loan accounts. Respondent admits that he has written checks on M&N Sports' account to make payments on his personal loan accounts. Respondent noted, however, that two of these loans are for a 2001 Honda motorcycle and a Polaris snowmobile which are vehicles used by his sons for racing, although Respondent conceded that he also rides the Polaris recreationally. Additionally, Respondent has a personal secured loan, a home equity line of credit, and a loan for a recreational camp trailer, all of which have had payments made on them from M&N Sports'

³² Roche Dep. 38:4-14.

³³ Roche Dep. 38:15 - 39:9.

³⁴ Corrigan Dep. 4:24 - 5:6.

³⁵ Corrigan Dep. 6:16-18.

³⁶ Corrigan Dep. 10:9-18.

³⁷ Corrigan Dep. 20:9-20.

³⁸ Corrigan Dep. 21:8-9.

³⁹ Corrigan Dep. 33:21 - 34:4.

⁴⁰ Corrigan Dep. 51:2-13.

⁴¹ Trial Test.

checking account.⁴² M&N Sports also pays for accident insurance for Respondent's sons' racing activities, and Respondent pays for automobile insurance on personal use vehicles using M&N Sports' account.⁴³ M&N Sports also pays for a cell phone that Respondent uses for both business and personal use.⁴⁴

¶ 25 Teri Reardon (Reardon) is the Vice President of Accounting at SMCFCU.⁴⁵ Reardon testified that both Respondent and M&N Sports have accounts at SMCFCU.⁴⁶ M&N Sports has a business account with savings and checking subaccounts.⁴⁷ Respondent has a personal account with savings and checking subaccounts as well as several loan accounts.⁴⁸ These loan accounts include two share secured loans, a home equity line of credit, and loans for a 2001 Honda [motorcycle], a 2003 Polaris [snowmobile], and a 2001 Jayco [trailer].⁴⁹

¶ 26 Pursuant to subpoena, Reardon attempted to track, and ultimately found, checks written on M&N Sports' account that were deposited in other accounts maintained by Respondent.⁵⁰ Reardon produced documentation of all the loan payments she found which were made from M&N Sports' account.⁵¹ Reardon found one payment from M&N Sports' checking account to the Honda loan account.⁵² She also found a payment from M&N Sports' checking account to the Polaris loan account.⁵³ Reardon testified that a check was written on M&N Sports' checking account to pay \$170 on one of the share secured loans.⁵⁴ Reardon testified that on February 17, 2004, Respondent made payments on several loans,

⁴² Trial Test.

⁴³ Trial Test.

⁴⁴ Roche Dep. 68:3-10.

⁴⁵ Reardon Dep. 4:8-10.

⁴⁶ Reardon Dep. 4:17-20.

⁴⁷ Reardon Dep. 6:5-14.

⁴⁸ Reardon Dep. 7:3-13.

⁴⁹ Reardon Dep. 8:9 - 9:25.

⁵⁰ Reardon Dep. 11:6 - 12:1.

⁵¹ Reardon Dep. 14:1-3; Ex. 3 to Reardon Dep.

⁵² Reardon Dep. 12:23 - 13:2.

⁵³ Reardon Dep. 14:20-25.

⁵⁴ Reardon Dep. 23:5-13.

including on the Polaris and Jayco loans, from M&N Sports' checking account.⁵⁵ Reardon further testified that many loan payments were made in cash by Respondent, and she would have no way of knowing whether that cash originated from M&N Sports.⁵⁶

¶ 27 Reardon testified that SMCFCU's records reflect that in September 2004, Respondent wrote a check for \$400 from M&N Sports' account that he deposited in his personal account. In October 2004, Respondent again deposited a \$400 check from M&N Sports' account into his personal account.⁵⁷ On December 3, 2004, a \$400 check written on M&N Sports' account was applied to one of Respondent's share secured loans.⁵⁸ A similar payment was made on February 14, 2003, from M&N Sports' account to one of the share secured loans.⁵⁹

¶ 28 Reardon provided a Statement of Account for Respondent's loan payments from January through December 2003.⁶⁰ She also provided a Loan History statement for January 1, 2003, through December 31, 2004.⁶¹ On these deposition exhibits, Reardon highlighted payments made by checks from M&N Sports' account.⁶² The exhibits reflect that, from M&N Sports' account, Respondent made payments on his share secured loans, the 2001 Honda, the 2003 Polaris, and the 2001 Jayco.⁶³ Reardon also confirmed that Respondent's son Nick received payments from M&N Sports.⁶⁴

¶ 29 David K. Johnson (Johnson) is a CPA with the firm of Anderson ZurMuehlen & Co., P.C., in Helena, Montana, for whom he performs forensic accounting services. He has worked for this firm since 1974. For the last 15 to 20 years, Johnson's responsibilities have involved mostly legal work including business evaluations, economic damage issues, and liability issues.⁶⁵ I find Johnson to be a credible witness.

⁵⁵ Reardon Dep. 23:14-21.

⁵⁶ Reardon Dep. 15:20 - 16:14.

⁵⁷ Reardon Dep. 24:6-20.

⁵⁸ Reardon Dep. 24:21-25.

⁵⁹ Reardon Dep. 25:7-10.

⁶⁰ Ex. 6 to Reardon Dep.

⁶¹ Ex. 5 to Reardon Dep.

⁶² Reardon Dep. 27:15 - 28:19.

⁶³ See Exs. 5-6 to Reardon Dep.

⁶⁴ Reardon Dep. 34:13-15.

⁶⁵ Trial Test.

¶ 30 Johnson and his colleague, Patrick D. Ford (Ford), prepared a report summarizing their investigation and providing their opinions about whether Respondent received a “wage” from M&N Sports. The initial report was generated on January 4, 2007. A supplemental summary of additional opinions, generated on February 21, 2007, incorporated additional financial information received by Johnson and Ford after the completion of their initial report.⁶⁶

¶ 31 Johnson examined Respondent’s business records to determine whether Respondent received a “wage” from M&N Sports. To assist his investigation, Petitioner’s counsel provided Johnson with the definition of “wage” as set forth in § 39-71-123, MCA. The documentation Johnson reviewed included Respondent’s tax returns, the depositions and attached exhibits of Respondent, Reardon, and Corrigan, receipts for purchases made by M&N Sports, other business records which Petitioner received during discovery, and documentation of M&N Sports’ sales revenue.⁶⁷ From his review of the materials, Johnson formed the opinion that Respondent earned a “wage” as defined by § 39-71-123, MCA, from M&N Sports for reasons which will be discussed below.⁶⁸

¶ 32 Johnson concluded that Respondent’s business generated a positive cash flow even though losses were reported on his income tax returns. Johnson explained that once depreciation, which is a non-cash expense, was added back to the figures reported on Respondent’s income tax returns, M&N Sports had a positive cash flow during 2002, 2003, and 2004.⁶⁹

¶ 33 Respondent’s 2002 tax return shows that M&N Sports had a gross income of \$8,273 and a net loss of \$6,336.⁷⁰ In 2003, the tax return showed that M&N Sports had a gross income of \$8,377 and a net loss of \$6,735.⁷¹ In 2004, the gross income for M&N Sports was reported to be \$12,585 with a net loss of \$1,416.⁷² Respondent argues that M&N Sports’ lack of profitability demonstrates that he was not earning a “wage” within the meaning of § 39-71-123, MCA. However, as Johnson pointed out in his testimony, a sole proprietor can still make draws from a business regardless of whether it is operating at a

⁶⁶ Ex. 15.

⁶⁷ Trial Test.

⁶⁸ Trial Test.

⁶⁹ Trial Test.

⁷⁰ Ex. 2 to Roche Dep. at 5.

⁷¹ Ex. 4 to Roche Dep. at 3.

⁷² Ex. 5 to Roche Dep. at 4.

profit. Furthermore, Respondent's net loss is only a "paper loss" when depreciation is added back.⁷³

¶ 34 Johnson and Ford formed three opinions as a result of their initial investigation:

1. Mr. Roche's business has paid for non-business expenses resulting in constructive draws to Mr. Roche.
2. Mr. Roche's business generated positive cash flow even though losses were reported on the income tax returns.
3. Mr. Roche's cost of goods sold appears to be overstated resulting in an understatement of reported income.⁷⁴

¶ 35 Johnson and Ford set forth several reasons supporting their conclusions. Among other factors, they noted that although Respondent's income tax returns indicate a loss in 2002, 2003, and 2004, when depreciation is added back, M&N Sports experienced a positive cash flow in each of these years. They further concluded that Respondent's deductions of his sons' motocross racing expenses on the business income tax returns—including meals, travel, motel, entry fees, clothing, boots, and parts—were questionable. Johnson and Ford explained:

For an expense to be considered business related, it must be incurred for a reasonable business purpose. In this case, the justification for incurring and deducting the expense was that it [was for] advertising or promotion. The theoretical business justification would be that individuals encountered at the race locations would come to Anaconda to buy their parts and have their repair work done. The reasoning for the tax deduction was that the trailer had an M&N Sports sign on it. We examined motel charges incurred in Cooke City, West Yellowstone and Hungry Horse paid for by the business. It is our opinion that the probability of Mr. Roche recovering in revenue the costs incurred for these outings is extremely remote. As such, the expenses would be deemed personal and represent monies that he withdrew from the business. Another indication that these were personal expenses was Mr. Roche's testimony that these trips offered him a time to bond with his kids in a father-son relationship. During 2002-2004, Mr. Roche reported travel and meal costs of \$3,548 on his tax returns.⁷⁵

⁷³ Trial Test.

⁷⁴ Ex. 15 at 1.

⁷⁵ Ex. 15 at 3 (internal footnotes omitted).

¶ 36 Johnson and Ford further noted that Respondent reported 21,227 business miles traveled in 2003 and 2004. Assuming 250 working days per year, they calculated that his claimed mileage averaged 42 miles per working day.⁷⁶ At trial, Johnson testified that the amount of mileage Respondent claims as a business expense seemed excessive in light of the size of Anaconda. Johnson pointed out that Respondent claimed multiple trips to Butte and back each week, and sometimes each day, to get parts, but stated that making multiple round trips of 50 to 60 miles in a day or week makes no sense for a business which generated only \$330 in gross income in a year.⁷⁷ “This level of travel appears unusually high for what is essentially a one-person shop located in a town that is three miles long,” Johnson and Ford commented in their report. They further pointed out that Mr. Roche’s income tax returns incorrectly indicated that this vehicle was not available for off-duty hours and that it was not used by a 5% or more owner of the business. They then characterized any overstatement of business mileage by Respondent to be a monetary draw from M&N Sports.⁷⁸

¶ 37 Johnson testified that he further questioned the legitimacy of both Respondent’s motocross racing expenses and his mileage as business expenses. He stated that Respondent’s business does not seem to gain any tangible benefits from the money it spends on racing sponsorship, and that if Respondent’s intent in sponsoring the motocross racing is to spend quality time with his sons, it is a personal and not a business expense and should not be deducted as one. Johnson further testified that generally, if such expenses have a mixed purpose of both business advancement and personal enjoyment, the expenses should be apportioned on the tax returns and not wholly deducted as business expenses.⁷⁹

¶ 38 Using industry data published by Risk Management Associates, Johnson and Ford compared Respondent’s sales, expenses, and profit to that reported by other small repair and maintenance shops. Johnson and Ford concluded that while small repair and maintenance shops overall reported profit in 2002, 2003, and 2004, M&N Sports did not. They further noted that Respondent’s reported markup on parts of 3-4% is significantly less than the typical markup of 30-50% or more. Ultimately, they concluded that Respondent had overstated the cost of sales because of lack of expected profit and Respondent’s

⁷⁶ Ex. 15 at 3.

⁷⁷ Trial Test.

⁷⁸ Ex. 15 at 3. During his deposition, Corrigan admitted that Respondent’s 2002 income tax return incorrectly stated that Respondent’s vehicle was only used for business purposes because of a typographic error. Corrigan Dep. 26:14-22.

⁷⁹ Trial Test.

failure to provide documents that support the cost of goods sold as reported on his income tax returns.⁸⁰

¶ 39 Johnson testified regarding his concerns with the accuracy of Respondent's tax returns. He noted that in 2003, a tax preparation sheet which Respondent provided to Corrigan indicated that M&N Sports had \$750 of inventory on hand, yet Respondent's tax return reflects that M&N Sports had \$17,500 in inventory. Johnson found no documentation to support the \$17,500 figure. Johnson noted that items which are used in the business operation such as the trailer and motorcycles used for motocross racing, are considered fixed assets and are not included in inventory calculations. Johnson also noted that Respondent's reported gross markup on parts was extremely low. Johnson testified that in automotive or repair businesses, the markup on parts is 30-50% or higher, while Respondent reported markups of 3.6% in 2002, 3.14% in 2003, and 0.45% in 2004. In 2004, Respondent reported a \$330 total markup on sales totaling \$72,000. From his investigation, Johnson concluded that Respondent is either under-reporting his sales, or over-reporting his costs of sales.⁸¹

¶ 40 In their supplemental summary of additional opinions of February 21, 2007, Johnson and Ford offered three new opinions based on information which they received subsequent to the issuance of the January 4, 2007, report. They stated:

1. In our original report we opined that Mr. Roche's gross margin appeared to be overstated resulting in an understatement of net income. Subsequent to the issuance of our original report, we have examined additional documents that buttress our original opinion.
2. For the year 2003, the written information Mr. Roche provided to his income tax return preparer for M&N Sports differs materially from the information reported on Mr. Roche's tax return. As a result, we question whether the taxable income (or loss) reported on the income tax return is reliable.
3. Monies from the M&N Sales checking account were used to pay on personal loans of John Roche indicating that Mr. Roche received constructive draws from the business.⁸²

¶ 41 Johnson and Ford explained that their bases for these additional opinions included a 2004 "revenue detail" from M&N Sports which showed that during that year, virtually no gross margin was shown on the sales of parts and accessories. They concluded that the

⁸⁰ Ex. 15 at 4.

⁸¹ Trial Test.

⁸² Ex. 15 at 15.

reported gross margin was not reasonable and therefore was likely understated by M&N Sports. Johnson and Ford also reviewed Respondent's 2003 tax return and compared it to the documentation he provided to Corrigan for its preparation. Material discrepancies between Respondent's documents and his tax return, plus M&N Sports' reported lack of gross margins, led them to conclude that the taxable income reported on Respondent's income tax returns was not reliable.⁸³

¶ 42 More pertinent to the issue in this case, Johnson's and Ford's review of Reardon's deposition and the financial records from SMCFCU, along with Respondent's business records, revealed that the 2001 Honda motorcycle and the 2001 Jayco trailer, both of which had payments on their respective loans made out of M&N Sports' checking account, were not listed as business assets on M&N Sports' depreciation schedules and were therefore considered to be personal assets of Respondent. Johnson and Ford further determined that since the last asset addition to Respondent's depreciation schedule occurred in 2002, the 2003 Polaris must also be a personal asset. Johnson and Ford pointed out that by definition, the home equity line of credit and the share loan are Respondent's personal liabilities. They concluded that the payments on these loans made from M&N Sports' checking account were constructive draws by Respondent.⁸⁴ Johnson testified that, in addition to Reardon's testimony regarding the payments, Johnson personally traced a representative sample of these payments for his own satisfaction. Johnson testified that § 39-71-123, MCA, discusses a draw as being a "wage," and that a draw is a removal of money from a proprietorship for personal use. Since, in Respondent's case, money was drawn from M&N Sports to pay on personal loans, Johnson opined that would constitute a "wage" under the definition found in § 39-71-123, MCA.⁸⁵

CONCLUSIONS OF LAW

¶ 43 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 the claimant's injury.⁸⁶

Issue One: Whether the Workers' Compensation Court has subject matter jurisdiction over these issues.

⁸³ Ex. 15 at 16.

⁸⁴ Ex. 15 at 17.

⁸⁵ Trial Test.

⁸⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 44 Because the issue of subject matter jurisdiction takes precedence over the substantive issues in this case, I will address this issue at the outset. I have concluded that this Court has subject matter jurisdiction over the issues presented in this case.

¶ 45 Respondent asserts that pursuant to § 39-71-701(7), MCA, the only remedy available if Respondent received both wages and TTD benefits without the consent of the insurer is criminal prosecution pursuant to § 45-6-301, MCA. Since this Court does not have subject matter jurisdiction over criminal matters, Respondent therefore reasons it does not have jurisdiction to decide this case. Petitioner argues that § 39-71-701(7), MCA, simply enunciates that Respondent *may* be criminally prosecuted for theft, but it does not state that this is the only remedy available. Petitioner further argues that this Court has subject matter jurisdiction in this matter pursuant to § 39-71-2905, MCA, which provides that the workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under Chapter 71, with certain exceptions not applicable here. Petitioner asserts that the issue at hand is a dispute concerning benefits under Chapter 71 and is therefore properly before this Court.

¶ 46 Unquestionably, this Court has the subject matter jurisdiction to determine a claimant's entitlement to benefits.⁸⁷ The Court therefore has the jurisdiction to determine whether Respondent was entitled to the TTD benefits he received from Petitioner. What is disputed is whether this Court has the authority to order Respondent to repay any TTD benefits he received to which he may not have been entitled.

¶ 47 It has been established that in cases involving fraud, this Court has the jurisdiction to order repayment of fraudulently obtained benefits.⁸⁸ In this case, however, fraud has not been alleged. Rather, Petitioner has alleged that it paid benefits to Respondent to which, upon further investigation, it determined Respondent was not entitled. It now seeks the return of the unentitled benefits. Respondent argues that he was entitled to the benefits paid, but further argues that even if this Court determines otherwise, it lacks the jurisdiction to order the return of those benefits.

¶ 48 This Court has previously ordered a claimant to repay benefits which she received but was not entitled to. In *Cary v. Lumbermens Mutual Cas. Co.*,⁸⁹ the insurer sought repayment of rehabilitation benefits which it paid to the claimant after the claimant had ceased to participate in the agreed-upon rehabilitation plan. This Court determined that the claimant had received benefits to which she was not entitled and ordered the claimant to repay those benefits to the insurer.

⁸⁷ § 39-71-2905, MCA.

⁸⁸ See, e.g., *Taylor v. State Comp. Ins. Fund*, 1995 MTWCC 61 (aff'd 275 Mont. 432, 913 P.2d 1242 (1996)).

⁸⁹ *Cary*, 1995 MTWCC 56.

¶ 49 It does not appear that the jurisdiction of this Court to order repayment of benefits was challenged in *Cary*. However, in *Reil v. State Comp. Mut. Ins. Fund*,⁹⁰ this Court's jurisdiction to order repayment of benefits as a remedy was challenged and the Montana Supreme Court concluded that restitution is within the remedies available in the Workers' Compensation Court. The Court held in *Reil* that the exclusivity provisions of the Workers' Compensation Act do not preclude restitution of benefits to which a worker was not entitled.⁹¹ In so holding, the Court specifically rejected case law from other jurisdictions which precluded the recoupment of benefits erroneously paid to an injured worker.⁹² Therefore, I conclude that this Court has jurisdiction to order restitution in the present case.

⁹⁰ *Reil*, 254 Mont. 274, 837 P.2d 1334 (1992).

⁹¹ *Reil*, 254 Mont. at 277, 837 P.2d at 1336.

⁹² *Reil*, 254 Mont. at 279, 837 P.2d at 1337.

Issue Two: Whether Respondent received a wage from his business M&N Sports while receiving temporary total disability benefits.

¶ 50 Section 39-71-701(7), MCA, provides that a worker may not receive both wages and TTD benefits without the written consent of the insurer. “Wages” is defined in § 39-71-123, MCA, which states, in pertinent part:

(1) “Wages” means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:

. . . .

(d) income or payment in the form of a draw, wage, net profit, or substitute for money received or taken by a sole proprietor or partner, regardless of whether the sole proprietor or partner has performed work or provided services for that remuneration

¶ 51 In the present case, ample evidence shows that Respondent received a “wage,” as defined in § 39-71-123(1)(d), MCA, from M&N Sports. While Respondent attempts to argue that M&N Sports is not a profitable enterprise, whether or not the business is profitable has no bearing on whether Respondent received a wage from the business. This Court has previously held, and the Montana Supreme Court affirmed, that for purposes of workers’ compensation benefits, what determines “wages” is not whether something was treated as income for federal tax purposes. Rather, the determining fact is whether the recipient experienced real economic gain.⁹³ It is abundantly clear to me from the evidence presented in this case that Respondent experienced real economic gain from M&N Sports in various forms, and that he did so during 2002, 2003, and 2004, while he received TTD benefits from Petitioner. Furthermore, it is undisputed that he did not have Petitioner’s written consent to do so.

¶ 52 Respondent admits that the business pays for his personal automobile insurance and the cell phone he uses for both business and personal use. The evidence further demonstrated that Respondent has used M&N Sports’ checking account to make payments on his personal loans on numerous occasions. I find the testimony of Reardon and Johnson on this matter to be credible and persuasive. Furthermore, while Respondent maintains that M&N Sports’ sponsorship of his sons’ motocross activities is for advertising purposes, Respondent admitted that he does not actually know where his customers are from. While I do find it believable that Respondent’s sons bring local business into M&N Sports because of their motocross racing, I am incredulous that Respondent’s “advertising”

⁹³ *Scyphers v. H&H Lumber*, 237 Mont. 424, 426-27, 774 P.2d 393, 394 (1989).

in the form of a logo on his trailer legitimately draws business to M&N Sports in Anaconda from out-of-state motocross events. And as Respondent readily admits, the motocross racing is also a way for him to spend quality time with his sons which, while a laudable purpose, is nonetheless not a business purpose. Therefore, I conclude that Respondent received a “wage” from M&N Sports without the written consent of and while receiving TTD benefits from Petitioner, in violation of § 39-71-701(7), MCA.

Issue Three: The amount, if any, of the overpayment Petitioner is entitled to recover from Respondent resulting from Respondent’s receipt of wages while receiving temporary total disability benefits.

¶ 53 The parties agree that the amount of TTD benefits Respondent received from November 20, 2002, until December 30, 2004, totaled \$45,272.86. I have found that during this time period, Respondent continued to operate M&N Sports as a sole proprietor, and have concluded that Respondent received a wage from that business without Petitioner’s written consent.

¶ 54 Section 39-71-701(7), MCA, states, “A worker may not receive both wages and temporary total disability benefits without the written consent of the insurer. A worker who receives both wages and temporary total disability benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.” The language of the statute leaves no room for apportionment. It states plainly and simply that a worker **may not** receive both wages and TTD benefits. This is precisely the situation with which I am confronted. Accordingly, Respondent must repay the benefits to which he was not entitled pursuant to the statute.

JUDGMENT

¶ 55 This Court has subject matter jurisdiction to order a worker to repay benefits received to which he was not entitled.

¶ 56 Respondent received both wages from M&N Sports and TTD benefits from Petitioner without Petitioner’s written consent in violation of § 39-71-701, MCA. Therefore, Respondent was not entitled to receipt of those benefits.

¶ 57 Respondent is ordered to repay those TTD benefits he received in the amount of \$45,272.86 to Petitioner.

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

¶ 59 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 November, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Oliver H. Goe
Chad E. Adams
Bernard J. Everett
Submitted: April 10, 2007