IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 9

WCC No. 2006-1526

DONALD WILKES

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

APPEALED TO SUPREME COURT MARCH 23, 2007
AFFIRMED FEBRUARY 5, 2008

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moved for summary judgment, arguing that § 39-71-703, MCA (2001), is unconstitutional to the extent that it denies permanent partial disability benefits for age, education, and lifting to claimants who do not suffer a wage loss. Respondent also moved for summary judgment, arguing that § 39-71-703, MCA, is constitutional.

Held: Petitioner's motion for summary judgment is denied. Respondent's motion for summary judgment is granted. In 1995, the Legislature codified benefits based on age, lifting, and education for permanent partial disability claimants who suffered a wage loss after returning to work while providing no additional benefits based on age, education, and lifting to those claimants who received an impairment award but suffered no wage loss after returning to work. Because these two classes are not similarly situated, the Court concludes there is no violation of Petitioner's equal protection rights.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-703 (2001). Petitioner contends that the wage-loss requirement that a claimant must meet to receive PPD benefits for age, education, and lifting, as set forth in § 39-71-703, MCA, violates his equal

protection rights. The first prerequisite to any equal protection analysis is a showing that the classes at issue are similarly situated. The two classes at issue in this case are (1) PPD claimants; and (2) claimants who, after reaching maximum medical healing, receive an impairment rating, but return to work and do not suffer an actual wage loss. The classes are not similarly situated. One class – PPD claimants – has suffered a wage loss. The other class of claimants has not. In light of the express public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost, this is a fundamental distinction in ascertaining the similarity of the classes. Section 39-71-703, MCA, is not unconstitutional to the extent it denies PPD benefits for age, education, and lifting to claimants that do not suffer a wage loss.

Constitutional Law: Equal Protection. Petitioner contends that the wage-loss requirement that a claimant must meet to receive PPD benefits for age, education, and lifting, as set forth in § 39-71-703, MCA, violates his equal protection rights. The first prerequisite to any equal protection analysis is a showing that the classes at issue are similarly situated. The two classes at issue in this case are (1) PPD claimants; and (2) claimants who, after reaching maximum medical healing, receive an impairment rating, but return to work and do not suffer an actual wage loss. The classes are not similarly situated. One class – PPD claimants – has suffered a wage loss. The other class of claimants has not. In light of the express public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost, this is a fundamental distinction in ascertaining the similarity of the classes. Section 39-71-703, MCA, is not unconstitutional to the extent it denies PPD benefits for age, education, and lifting to claimants that do not suffer a wage loss.

Benefits: Permanent Partial Disability: Wage Loss. Petitioner contends that the wage-loss requirement that a claimant must meet to receive PPD benefits for age, education, and lifting, as set forth in § 39-71-703, MCA, violates his equal protection rights. The first prerequisite to any equal protection analysis is a showing that the classes at issue are similarly situated. The two classes at issue in this case are (1) PPD claimants; and (2) claimants who, after reaching maximum medical healing, receive an impairment rating, but return to work and do not suffer an actual wage loss. The classes are not similarly situated. One class – PPD claimants – has suffered a wage loss. The other class of claimants has not. In light of the express public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost, this is a fundamental distinction in ascertaining the similarity of the classes. Section 39-71-703, MCA, is not

unconstitutional to the extent it denies PPD benefits for age, education, and lifting to claimants that do not suffer a wage loss.

¶ 1 Petitioner moves for summary judgment, arguing that § 39-71-703, MCA (2001),[1] is unconstitutional. Respondent also moves for summary judgment, arguing that § 39-71-703, MCA, is constitutional.

STIPULATED FACTS[2]

¶ 2 On March 26, 2002, Petitioner was seriously injured in the course and scope of his employment as a school bus driver, sustaining a permanent injury to his neck. Petitioner is a resident of Phillips County.

¶ 3 At the time of the injury, Petitioner's employer was enrolled under Compensation Plan 3 pursuant to the Workers' Compensation Act, and its insurer was Respondent.

¶ 4 Respondent accepted liability for the claim and paid medical benefits and temporary total disability benefits for a period of time.

¶ 5 At the time of the injury, Petitioner's principal employment was as a farmer. Petitioner performed heavy labor in his farming operation. After the injury, Petitioner was forced to lease out his farming operation because he is now only able to perform light-duty work.

¶ 6 Petitioner operated his farm as a sole proprietor and did not elect to be covered under a workers' compensation plan for this employment.

¶ 7 Petitioner was able to return to his part-time bus driving job. It is a light-duty job and, although Petitioner is able to perform it, he does so with pain and discomfort. He continues to make the same wage at this job as he did before his injury.

---

[1] This case is governed by the 2001 statutes since that was the law in effect at the time of Petitioner's injury. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[2] The "Stipulated Facts" are a restatement of the "Stipulated Facts" found in Respondent's Motion for Summary Judgment and Brief in Support and Response Brief in Opposition to Petitioner's Motion for Summary Judgment at 2. In [Petitioner's] Response/Reply to Parties' Motions for Summary Judgment and Brief in Support at 1, Petitioner agrees with the facts but argues that [¶ 9] is irrelevant. Additionally, Petitioner argues that a sentence was left out of Respondent's "Stipulated Facts." The sentence, set forth at the end of [¶ 5], reads: "After the injury, Mr. Wilkes was forced to lease out his farming operation because he is now only able to perform light duty work." Respondent disputes that this fact was agreed to, but does not object to the Court considering it in its ruling, to the extent the Court deems it relevant. Since the parties have stipulated to these facts, the Court sets them forth in their entirety.

¶ 8 When Petitioner reached maximum medical improvement and returned to his bus driving job, Respondent paid an impairment award pursuant to § 39-71-703(2), MCA, but denied additional permanent partial disability (PPD) benefits available under § 39-71-703(5), MCA, because Petitioner had no actual wage loss from his bus driving job.

¶ 9 Petitioner pursued a third-party claim which has settled and Respondent waived any claimed subrogation interest in this settlement.

SUMMARY JUDGMENT

¶ 10 In a motion for summary judgment, the moving party must establish that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.[3]

CONSTITUTIONAL ANALYSIS

¶ 11 The party challenging the constitutionality of a statute bears the heavy burden of proving the statute unconstitutional beyond a reasonable doubt.[4]

> The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.[5]

¶ 12 Petitioner argues that § 39-71-703, MCA, violates the equal protection provisions of both Article II, Section 4, of the Montana Constitution and the Fourteenth Amendment to the United States Constitution. Section 39-71-703, MCA, reads, in relevant part:

> (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
>
> (a) has an actual wage loss as a result of the injury; and

---

[3] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton,* 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[4] *Henry v. State Compensation Ins. Fund,* 1999 MT 126, ¶ 11, 294 Mont. 449, 982 P.2d 456.

[5] *Stratemeyer v. Lincoln County,* 259 Mont. 147, 150, 855 P.2d 506, 508-09 (1993), citing *Fallon County v. State,* 231 Mont. 443, 445-46, 753 P.2d 338, 339-40 (1988).

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

¶ 13 Petitioner contends that the wage-loss requirement that a claimant must meet to receive PPD benefits for age, education, and lifting, as set forth in § 39-71-703, MCA, violates his equal protection rights. Specifically, Petitioner argues that the wage-loss requirement affects low wage earners that suffer an on-the-job injury because it fails to provide benefits for age, education, and lifting that were previously compensated for in the 1991 and 1993 versions of the Workers' Compensation Act (WCA).[6] Petitioner further questions the Legislature's right to arbitrarily tie the elimination of these particular benefits to "actual wage loss" and argues that the change unconstitutionally affects low wage earners simply because these workers were earning a low hourly wage at the time of their injury.[7]

¶ 14 Equal protection analysis involves identifying the classes at issue, determining whether they are similarly situated, and then using the appropriate level of scrutiny to determine if the statute is constitutional.[8] When analyzing equal protection challenges to workers' compensation statutes, the rational basis test is utilized.[9] Both parties agree the rational basis test applies in the present case. Under the rational basis test, the question is whether a legitimate governmental objective bears a rational relationship to a discriminatory classification.[10]

¶ 15 Before proceeding with an analysis of the statute under the rational basis test, the first prerequisite to any equal protection analysis is a showing that the classes at issue are similarly situated. The equal protection clause does not preclude different treatment of

---

[6] *See* § 39-71-703, MCA (1991).

[7] Wilkes' Response/Reply to Parties' Motions for Summary Judgment and Brief in Support (Wilkes' Response/Reply) at 2.

[8] *Bustell v. AIG Claims Service, Inc.*, 2004 MT 362, ¶ 20, 324 Mont. 478, 105 P.3d 286 (citing *Henry*, ¶¶ 7-29).

[9] *Bustell*, ¶ 19 (citing *Henry*, ¶ 29).

[10] *Bustell*, ¶ 19 (citing *Powell v. State Compensation Ins. Fund,* 2000 MT 321, ¶ 21, 302 Mont. 518, 15 P.3d 877).

different groups or classes so long as all persons within a group or class are treated the same.[11] If the classes are not similarly situated, the Court need look no further and the constitutional challenge fails.[12]

¶ 16 Petitioner defines the classes in this case as permanently partially disabled claimants who have experienced a wage loss as defined by the WCA and permanently partially disabled claimants who have not experienced a wage loss as defined by the WCA. Respondent argues that both classes do not contain permanently partially disabled claimants because the 1995 amendments to the WCA define permanently partially disabled as:

> (22) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:
>
> (a) has a permanent impairment established by objective medical findings;
>
> (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and
>
> (c) has an actual wage loss as a result of the injury.[13]

Section 39-71-116(1), MCA, defines "[a]ctual wage loss" to mean "that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury."

¶ 17 Respondent's argument is well taken. In identifying the classes, Petitioner cannot rely on the WCA definition of wage loss for one aspect of the class and then ignore the WCA's definition of permanent partial disability in the next. Accordingly, the Court defines the two classes at issue in this case as (1) permanently partially disabled claimants; and (2) claimants who, after reaching maximum medical healing, receive an impairment rating, but return to work in some capacity and do not suffer an actual wage loss.

¶ 18 The Court next turns to whether the two classes are similarly situated. In arguing that the two classes are similarly situated, Petitioner states that these classes both consist of claimants who:

1. have suffered work-related injuries;

---

[11] *Powell v. State Compensation Ins. Fund,* 2000 MT 321, ¶ 22, 302 Mont. 518, 15 P.3d 877.

[12] *Id.*

[13] § 39-71-116(22), MCA (1995) (emphasis added).

2. have reached maximum medical improvement;
3. have permanent physical impairment ratings;
4. have suffered a lost earning capacity; and
5. must rely on § 39-71-703, MCA, as their exclusive remedy under Montana law.[14]

¶ 19 Respondent concedes that the classes at issue in this case are similar with respect to the first three of Petitioner's identified criteria set forth above. However, Respondent disagrees that the classes are similarly situated.

¶ 20 The Court finds some guidance on the issue of whether the classes at issue are similarly situated in *Powell v. State Compensation Insurance Fund.*[15] In *Powell*, the petitioner (Powell) argued that the limitation on benefits for 24-hour care found in § 39-71-1107(3), MCA, violated his right to equal protection because his wife, who provided care to him at home, received less compensation than a skilled nursing home would receive for providing similar care to Powell. The Montana Supreme Court identified the *Powell* classes as: (1) family member caregivers who are subject to the limitation on compensation; and (2) non-family member caregivers who are not subject to the limitation on compensation.[16] In distinguishing the differences between these two classes, the Supreme Court noted that family member caregivers reside with the claimant and perform duties that may have been provided to the claimant prior to any accident, such as meal preparation, shopping, and cleaning. Additionally, the Supreme Court noted that family member caregivers often provided passive supervision and were free to pursue other interests while providing care that was provided on a skill level much lower than provided at a professional licensed nursing facility.[17] Conversely, non-family member caregivers provide care as a full-time job, work away from home, and have the sole task of caring for claimants. The Supreme Court found these differences justified treating family member caregivers differently than non-family member caregivers, and therefore, the Supreme Court determined that the classes were not similarly situated.

¶ 21 Applying this reasoning to the present case, the Court notes that the declaration of public policy set forth in § 39-71-105(1), MCA, states:

---

[14] In Wilkes' Response/Reply at 2, Petitioner concedes that proof of "lost earning capacity" has not been needed since 1991.

[15] *Powell, supra.*

[16] *Powell* at ¶ 23.

[17] *Powell* at ¶ 24.

> It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. ***Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.***[18]

¶ 22 The foregoing leads this Court to conclude that the classes identified in this case are not similarly situated. One class of claimants – PPD claimants – has suffered a wage loss. The other class of claimants has not. In light of the express public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost, this is a fundamental distinction in ascertaining the similarity of the classes. Having found that the classes are not similarly situated, the Court concludes § 39-71-703, MCA, is not unconstitutional to the extent it denies PPD benefits for age, education, and lifting to claimants that do not suffer a wage loss.

ORDER

¶ 23 The Court concludes § 39-71-703, MCA, is not unconstitutional for the reasons set forth above.

¶ 24 Petitioner's Motion for Summary Judgment is **DENIED**.

¶ 25 Respondent's Motion for Summary Judgment is **GRANTED**.

¶ 26 This ORDER is certified as final for purposes of appeal.

¶ 27 Any party to this dispute may have twenty days in which to request reconsideration of this ORDER.

DATED in Helena, Montana, this 22nd day of February, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

[18] § 39-71-105(1), MCA (emphasis added).

c: Daniel B. Bidegaray
Daniel B. McGregor
Submitted: April 28, 2006