IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 2

WCC No. 2006-1703

CARL "CHRIS" YOUNG

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

DECISION AND JUDGMENT

Summary: On August 15, 2005, Petitioner sent a demand letter to Respondent, requesting payment of a permanent partial disability (PPD) award pursuant to *Reesor v. Montana State Fund*.[1] The following day, the Montana Supreme Court ruled in *Otteson v. Montana State Fund*[2] that PPD awards were not payable to permanently totally disabled claimants and thus Petitioner was not entitled to receive the PPD benefits paid by Respondent. Respondent nonetheless paid Petitioner a PPD award on August 22, 2005. Respondent requested return of these funds on November 21, 2005. Petitioner refused, and Respondent began recouping the PPD award by reducing Petitioner's biweekly benefits by $23.78. Petitioner argues that for equitable reasons, Respondent is not entitled to the return of the PPD award.

Held: Insofar as Petitioner changed his position for the worse based upon his belief that Respondent had paid him a PPD award and would not request its return, Respondent is equitably estopped from recouping that portion of the erroneous payment from Petitioner. Therefore, of the $16,625 Respondent erroneously paid to Petitioner, Respondent is entitled to reduce Petitioner's biweekly benefits to recoup a total of $10,529.

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[1] *Reesor,* 2003 MTWCC 51.

[2] *Otteson,* 2005 MT 198, 328 Mont. 174, 119 P.3d 1188.

¶ 1 Petitioner Carl "Chris" Young petitions this Court for resolution of the legal question set forth below. The parties have agreed to submit this case for decision by this Court based on stipulated facts which are as follows:

STIPULATED FACTS[3]

¶ 2 Petitioner was a full-time employee of Pro-Craft on April 24, 1996, when he sustained an industrial injury to his back and neck.

¶ 3 The claim occurred in Cascade County, Montana.

¶ 4 Pro-Craft was insured under Plan No. 3 of the Workers' Compensation Act (WCA), and its insurer on the date of injury was Respondent Montana State Fund.

¶ 5 The claim was accepted and Respondent, which has paid indemnity and medical benefits on the claim, has agreed that Petitioner is permanently totally disabled (PTD).

¶ 6 Respondent paid Petitioner temporary total disability (TTD) benefits continuously until those benefits were converted to PTD benefits.

¶ 7 On August 15, 2005, Petitioner requested payment of a permanent partial disability (PPD) award based on *Reesor v. Montana State Fund*[4] and his injury.

¶ 8 On August 16, 2005, the Montana Supreme Court ruled in *Otteson v. Montana State Fund*[5] that PPD awards were not payable to PTD claimants and thus Petitioner was not entitled to receive the PPD benefits paid by Respondent.

¶ 9 On August 17, 2005, in response to the request by Petitioner's counsel, Respondent agreed to pay the PPD award to Petitioner and later paid those benefits in the amount of $16,625 on August 22, 2005.

¶ 10 At the time of the approval of payment of the PPD award, the adjuster was unaware of *Otteson* and misunderstood the effect of *Reesor*.

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[3] Except as otherwise noted, all stipulated facts originate in the Stipulated Facts filed on June 19, 2007, Docket Item Nos. 29 and 30.

[4] *Reesor,* 2003 MTWCC 51.

[5] *Otteson,* 2005 MT 198, 328 Mont. 174, 119 P.3d 1188.

¶ 11 Petitioner used such funds to pay attorney fees related to the receipt of the PPD award and accumulated debt as follows:

Date	Amount	Payment
8/24/05	$3,500.00	Savings Account
8/24/05	$466.76	Overdraft Loan
8/24/05	$498.00	Car Payment
8/24/05	$153.00	Chase
8/24/05	$279.00	Citi
8/24/05	$551.00	Benefis
8/24/05	$1,019.00	Wells Fargo Loan
8/24/05	$1,337.00	Sears Credit Card
8/24/05	$689.00	Home Depot Bill
8/24/05	$57.00	NW Physicians
8/24/05	$50.00	Radiology
8/24/05	$296.00	Sears
8/24/05	$194.00	NW Energy
8/24/05	$276.00	Progressive
9/6/05	$175.00	Verizon
9/6/05	$498.00	Car Payment
9/6/05	$339.00	Progressive
9/6/05	$150.00	Home Depot
9/6/05	$3,325.00	Attorney Fees
9/8/05	$1,064.00	House Payment
9/20/05	$1,341.00	Computer
9/20/05	$295.00	Trailer Repair

9/20/05	$1,064.00	House Payment
Total	$17,616.76	

¶ 12 Respondent informally requested repayment of the PPD award on November 21, 2005. Petitioner declined.

¶ 13 On January 14, 2006, Respondent began reducing Petitioner's biweekly benefits by $23.78 per biweekly check to recoup its erroneously paid benefits. Respondent also recouped a lump sum of $3,990 on January 10, 2006, from Petitioner's impairment award.

¶ 14 Respondent is not charging Petitioner any interest on the PPD award.[6]

ISSUE

¶ 15 Whether Respondent is entitled to reduce Petitioner's benefits to recoup its erroneous payment of a PPD award.

DISCUSSION

¶ 16 This case is governed by the 1995 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Petitioner's injury.[7]

¶ 17 Petitioner argues that Respondent cannot demand repayment of the PPD award, either because it waived its right to rely on *Otteson*, because it is barred by the doctrine of laches, or because it is equitably estopped from reducing Petitioner's biweekly benefits. Each of Petitioner's arguments will be addressed in turn.[8]

Issue One. Whether Respondent waived its right to rely on the *Otteson* decision.

¶ 18 Petitioner argues that Respondent is not entitled to recoup the PPD award on the grounds that it waived its right to rely on *Otteson.* Noting that Respondent was also the Respondent in *Otteson*, Petitioner contends Respondent obviously was aware that *Otteson* was on appeal. Therefore, Petitioner argues that Respondent could have either paid Petitioner under a reservation of rights or informed Petitioner that it was waiting on a

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[6] Response at 7. The Court deems this a stipulated fact as Petitioner has not objected to its correctness.

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

[8] Petitioner's Initial Brief, Docket Item No. 28.

decision in *Otteson* before deciding whether to pay Petitioner. By failing to do so, Petitioner argues that Respondent waived its right to demand repayment of the PPD award.

¶ 19 Respondent responds that it did not waive its right to rely on *Otteson* because *Otteson* was not yet final at the time the PPD award was paid to Petitioner. Respondent further argues that it was because Petitioner incorrectly represented that he was entitled to a PPD payment pursuant to *Reesor v. Montana State Fund*[9] that Respondent paid the award, only to later discover that *Reesor* is not applicable to Petitioner's claim because Petitioner is not of retirement age.[10] Respondent argues that the PPD award was paid based on a mutual mistake of law premised on *Reesor*, and therefore it did not waive its right to rely upon *Otteson* as authority for recouping the erroneously paid award.

¶ 20 Waiver is an affirmative defense.[11] The burden of proof for an affirmative defense is on the party asserting it.[12] In this case, it is Petitioner's burden to prove that Respondent waived its right to rely on *Otteson*. Section 28-2-410(1), MCA, states that a mutual mistake of law only constitutes a mistake when it arises from "a misapprehension of the law by all parties, all supposing that they knew and understood it and all making substantially the same mistake as to the law. . . ."[13] Petitioner and Respondent both apparently mistakenly believed at the time that Petitioner tendered his demand letter that *Reesor* applied to Petitioner's case. From the evidence before me, I conclude Petitioner has not met his burden of proving that Respondent waived its right to rely on *Otteson*.

Issue Two. Whether Respondent is barred by laches from reducing Petitioner's benefits.

¶ 21 Petitioner argues in the alternative that Respondent is barred by laches from reducing his benefits because Petitioner used the PPD award to make lump-sum payments on his outstanding debts. Petitioner asserts that if he had known Respondent would demand repayment of the PPD award, he could have reserved those funds. Petitioner argues that Respondent, as a party in the *Otteson* case, should have been aware of the Montana Supreme Court's ruling and its effect on Petitioner's entitlement to the PPD

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[9] *Reesor,* 2003 MTWCC 51.

[10] Response at 5-6.

[11] Mont. R. Civ. P. 8(c).

[12] *Preston v. Transp. Ins. Co.*, 2002 MTWCC 23, ¶ 30.

[13] In *Brown v. Richard A. Murphy, Inc.*, 261 Mont. 275, 280-81, 862 P.2d 406, 409-10 (1993), the Montana Supreme Court applied this definition in a workers' compensation case.

award. Therefore, Petitioner argues that Respondent slept on its rights by paying Petitioner and then not demanding the return of the funds until months later.[14]

¶ 22 Respondent responds that it requested Petitioner return the PPD award on November 21, 2005, approximately three months after the payment was made. It then began offsetting Petitioner's biweekly benefits on January 14, 2006. Respondent argues that this time span is insufficient to prove that it slept on its rights. Respondent argues that since its request for repayment was well within any applicable statute of limitations, Petitioner bears the burden of establishing that "extraordinary circumstances exist which require the application of laches."[15] Finally, Respondent argues that Petitioner was not prejudiced by the passage of time and, in fact, reaped a benefit because he used the money to pay off credit cards and other accumulated debt, thereby avoiding interest payments.[16]

¶ 23 A defense of laches may be raised in a workers' compensation case.[17] The nature and essential elements of the doctrine of laches was set forth in *Cole v. State ex rel. Brown,*[18] and were adopted by this Court in *UEF v. Hume*,[19] in which this Court held:

> Laches is a concept of equity that can apply when a person is negligent in asserting a right. Laches exists "where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable, and is appropriate when a party is actually or presumptively aware of his rights but fails to act." . . .
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> . . . [I]n order to apply the doctrine of laches, a showing must be made that the passage of time has prejudiced the party asserting laches or has rendered the enforcement of a right inequitable. Laches is not a mere matter of elapsed time, but rather, it is principally a question of the inequity of permitting a claim to be enforced. . . .[20]

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[14] Petitioner's Initial Brief at 5-6.

[15] *State Comp. Ins. Fund v. McMillan*, 1999 MTWCC 64, ¶ 34.

[16] Response at 7.

[17] *Klimek v. State Comp. Ins. Fund*, 1996 MTWCC 62.

[18] *Cole,* 2002 MT 32, ¶¶ 24-25, 308 Mont. 265, 42 P.3d 760.

[19] *Hume,* 2004 MTWCC 1.

[20] *Hume,* 2004 MTWCC 1, ¶ 33.

¶ 24 Recently, the Montana Supreme Court reiterated, "[F]or laches to apply, the court must find lack of diligence by the party against whom the defense is asserted *and* prejudice to the party asserting the defense."[20] The Supreme Court further noted that because laches is an affirmative defense, the party asserting the defense bears the burden of proof.[21]

¶ 25 Although Respondent asserts that it asked Petitioner to return the PPD award on November 21, 2005, Respondent has not explained why it took three months from the time Petitioner received the award until Respondent asked for its return. While this unexplained delay in asserting its right to reimbursement tends to favor Petitioner's argument, I am not convinced that ordering Petitioner to return the award to Respondent in its entirety is properly characterized as "inequitable." Although Respondent may have been less than diligent in requesting return of the PPD award, laches further requires Petitioner to have been prejudiced by this delay. Most of the actions taken by Petitioner, such as putting $3,500 in his savings account and paying his bills, cannot be characterized as prejudicial. Therefore, I conclude that Respondent is not barred by laches from reducing Petitioner's benefits.

Issue Three. Whether Respondent is equitably estopped from reducing Petitioner's biweekly benefits.

¶ 26 Petitioner further argues that Respondent is equitably estopped from reducing Petitioner's biweekly payments. Petitioner asserts that the six elements of equitable estoppel are met in this case.

¶ 27 Respondent responds that the elements of equitable estoppel are not met because Petitioner was not harmed by having use of the money which Respondent seeks to recoup. Respondent further argues that its erroneous payment was made due to Petitioner's demand letter incorrectly asserting that he was entitled to a PPD award pursuant to *Reesor*, and that for a party to obtain equitable relief, it must come into court with "clean hands."[22] Respondent argues that since Petitioner requested the PPD payment on erroneous grounds, Petitioner cannot resort to equitable relief to keep the funds.[23]

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[20] *Anderson v. Stokes*, 2007 MT 166, ¶ 19, 338 Mont. 118, 163 P.3d 1273. (Emphasis in original.) (Citations omitted.)

[21] *Id.*

[22] *In re Marriage of Burner*, 246 Mont. 394, 397, 803 P.2d 1099, 1100 (1991).

[23] Response at 8.

¶ 28 Petitioner replies that at the time he requested payment of the PPD award, the Montana Supreme Court had not yet issued *Otteson*, and therefore his request was properly made under what was then the state of the law. Petitioner further argues that in order for Respondent to benefit from the "clean hands" doctrine, there must be some evidence that Petitioner engaged in wrong-doing, such as fraud,[24] and that he did not do so.[25]

¶ 29 The six elements of equitable estoppel as set forth in *Hiett v. MSGIA* are:

> 1. There must be conduct amounting to a representation or a concealment of material facts;
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> 2. These facts must be known to the party estopped at the time of the conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;
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> 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him;
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> 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon;
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> 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it;
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> 6. He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reasons of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.[26]

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[24] *See Cowan v. Cowan*, 2004 MT 97, ¶ 16, 321 Mont. 13, 89 P.3d 6.

[25] Petitioner's Reply to State Fund's Brief in Response to Petitioner's Initial Brief ("Reply") at 3.

[26] *Hiett,* 2001 MTWCC 52, ¶ 55.

¶ 30 Petitioner further relies upon *Filcher v. National Union Fire Ins. Co.*,[27] in which this Court held that an insurer who paid benefits to a claimant without taking the statutorily-permitted social security offset was equitably estopped from recouping the offset. Most pertinent to the case at hand, this Court noted in *Filcher*:

> Claimant, who was unrepresented by an attorney until his benefits were cut off, relied on his workers' compensation and social security benefits to meet his expenses. He did not provide a detailed explanation demonstrating that he spent more than he would have spent had he known that a cutoff was coming; however, individuals and families generally adjust their expenditures in rough tandem to their incomes. While their adjustments may not perfectly track changes in income, reductions in income generally compel reductions in expenditures. Claimant's testimony, as general as it was, is sufficient to establish that while receiving workers' compensation benefits he spent more than he would have had he known he was facing a benefit cut-off. . . . I do not doubt that he would have saved something for that rainy day.[28]

¶ 31 The parallels of Petitioner's case to *Filcher* cut both ways with respect to Petitioner's argument. In *Filcher*, this Court found that the claimant's testimony established that he had changed his position for the worse by relying on his benefit payments with the understanding that he was entitled to them without offset. In the present case, however, Petitioner presented evidence as to how he spent the PPD award and, as will be explained more fully below, I do not find that the sixth element of estoppel is met as to the entirety of the $16,625 Respondent paid to Petitioner.

¶ 32 Petitioner has set forth a detailed accounting as to how he spent the PPD award.[29] Respondent does not dispute Petitioner's accounting. In its Response, Respondent does not disagree with Petitioner's assertions regarding the first five elements of estoppel. Respondent argues only that Petitioner has not satisfied the sixth element. I, therefore, focus only on whether Petitioner has satisfied this element since it is the only element in dispute.

¶ 33 Respondent asserts that the sixth element is not met because Petitioner was not harmed by having use of the erroneously-paid PPD award. Respondent further argues that because Petitioner's counsel requested the PPD award payment pursuant to *Reesor*,

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[27] *Filcher,* 1996 MTWCC 30.

[28] *Id.* at 5.

[29] Petitioner's Initial Brief, ¶ 10.

Petitioner is not entitled to equitable relief because he does not come to court with "clean hands." I am not persuaded by Respondent's argument that Petitioner's hands are unclean. Respondent does not allege that Petitioner engaged in any wrongdoing such as fraud, but asserts that Petitioner's misplaced reliance on *Reesor* – which Respondent acknowledges was a mutual mistake of law – should now cause Petitioner to forego any equitable relief. I do not find that the parties' mutually misplaced reliance on *Reesor* to be an action which caused Petitioner to lose the right to equitable relief.

¶ 34 However, specific to Petitioner's argument that he meets the six elements necessary for equitable estoppel, I note that $3,500 of the award was not "spent," but rather placed into a savings account. Therefore, specifically regarding the $3,500 Petitioner placed in a savings account, I find that Petitioner has failed to satisfy the sixth element of estoppel.

¶ 35 As noted above, the sixth element requires a party to suffer a loss if he were ordered to repay the funds. In reviewing Petitioner's accounting as to how the PPD award was disbursed, I find that many of the items which Petitioner paid out of the award are items which Petitioner owed regardless. For example, Petitioner would have had to make his car payments, medical bill payments, insurance payments, and house payments regardless of whether he received the PPD award. Furthermore, since Respondent is not charging interest on Petitioner's repayment of the PPD award and since Respondent is recouping that money in small increments over time, Petitioner's use of the money to pay down credit card debt was actually a benefit. Essentially, Petitioner received an interest-free loan. However, I find that a few items on Petitioner's list were purchases that he may not otherwise have made if Respondent had not erroneously given him the PPD award. Therefore, regarding those particular expenditures, I conclude that Petitioner has satisfied the sixth element of estoppel and Respondent is equitably estopped from asserting repayment. Specifically, those items are the purchases made from Home Depot and Sears, the new computer purchase, and the trailer repairs. These items total $2,771.[30]

¶ 36 Additionally, attorney fees of $3,325 were taken out of Petitioner's PPD award. Therefore, this is money which Petitioner himself never received. The sole issue before me is what amount, if any, ***Petitioner*** is required to repay. In that regard, I do not find it equitable to order Petitioner to repay money he never received.

¶ 37 I therefore conclude that Respondent is entitled to recoup the PPD award it erroneously paid to Petitioner minus the $3,325 in attorney fees and the $2,771 in expenditures which I find Respondent to be equitably estopped from recouping. Respondent is therefore entitled to repayment of $10,529.

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[30] Specifically, the parties stipulated that Petitioner spent $689 at Home Depot and $296 at Sears on August 24, 2005; $150 at Home Depot on September 6, 2005; and $1,341 on a computer and $295 on a trailer repair on September 20, 2005. *See* ¶ 11, above.

Issue Four. Whether Petitioner's receipt of the PPD award gave rise to a constructive trust.

¶ 38 Respondent argues that Petitioner does not have legal entitlement to the PPD award payment and that he should not be entitled to keep the funds paid under any doctrine of equity because Petitioner would be unjustly enriched if allowed to keep the funds and therefore a constructive trust was formed upon their receipt.[31] Respondent notes that in *State Comp. Ins. Fund v. Richter*,[32] this Court recognized the equitable concepts of "constructive trust" and "unjust enrichment" in the workers' compensation setting.

¶ 39 Petitioner replies that the *Richter* case upon which Respondent relies in making its constructive trust argument is substantially dissimilar from the case at hand.[33]

¶ 40 In *Richter*, Respondent Frank Richter was an attorney who negotiated a settlement for a claimant. Richter was paid $9,862.50 out of the settlement proceeds for his services. The claimant whom Richter represented was subsequently prosecuted and convicted for conspiracy to commit felony theft when it was determined that the claim underlying the settlement Richter negotiated was fraudulent. Although no allegations were made that Richter was a party to the claimant's fraudulent actions, Petitioner State Compensation Insurance Fund demanded return of the monies paid to Richter, arguing that he was unjustly enriched. This Court denied the petitioner's motion for summary judgment on this issue on the grounds that it failed to establish whether Richter's services were rendered under a contingent fee agreement, and whether if the fee agreement was contingent, Richter had out-of-pocket costs which were non-contingent.[34]

¶ 41 Section 72-33-219, MCA, defines a constructive trust as that which arises when a person holding title to property is subject to an equitable duty to convey it to another on the ground that the person holding title would be unjustly enriched if he were permitted to keep it. In *Richter*, this Court adopted the definition of "unjust enrichment" from *Black's Law Dictionary*, 1377 (5th ed. 1979):

> **Unjust enrichment, doctrine of.** General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should

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[31] Response at 4-5.

[32] *Richter,* 1994 MTWCC 20 at 9.

[33] Reply at 2.

[34] *Richter,* 1994 MTWCC 20.

> be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. . . . (Citations omitted.)

¶ 42 Under the definition of unjust enrichment adopted by this Court in *Richter*, it specifically notes that requiring a party to make restitution should occur when "it is just and equitable that such restitution be made." For the same reasons as set forth in the discussion of equitable estoppel above, I find that it is only just and equitable to order restitution on a certain portion of the PPD award since Petitioner in this case relied upon the funds and would change his position for the worse if complete restitution were ordered. Therefore, Respondent is only entitled to recoup that portion of the PPD award which was neither paid to Petitioner's attorney nor spent by Petitioner on purchases he otherwise would not have had to make, as set forth above.

ORDER AND JUDGMENT

¶ 43 Respondent is entitled to reduce Petitioner's benefits to recoup a total of $10,529 of its erroneous payment of a PPD award.

¶ 44 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348(2), and shall be considered as a notice of entry of judgment.

¶ 45 Any party to this dispute may have twenty days in which to request reconsideration from this DECISION AND JUDGMENT.

DATED in Helena, Montana, this 8th day of January, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Sara R. Sexe
Kevin Braun
Submitted: August 10, 2007