IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 14

WCC No. 2016-3730

JULIA DARLENE HEGG

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 10/28/16
ORDER (Dismissed Pursuant to Stipulation) – 03/16/17

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

Summary: Petitioner became a beneficiary when her husband died from an occupational disease. Her husband worked sporadically and, during the year prior to his death, his average weekly wage was $79.71. Thus, Respondent moved for summary judgment on the grounds that it correctly calculated Petitioner's benefit rate to be $79.71 under § 39-71-721(2), MCA, which states, in relevant part, "The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death." Petitioner argues that this statute is ambiguous and that her benefit rate is $354, which was 50% of the state's average weekly wage for her husband's date of death. Alternatively, Petitioner argues that if her rate is $79.71, then § 39-71-721(2), MCA, violates her right to substantive due process under Article II, § 17 of the Montana Constitution, and is therefore insufficient to uphold the quid pro quo on which the Workers' Compensation Act is based. She argues that the remedy for this alleged constitutional violation is for this Court to increase her benefit rate to $354, an amount she argues is sufficient to uphold the quid pro quo.

Held: This Court granted Respondent's motion, and denied in part Petitioner's cross-motion for summary judgment because Respondent correctly calculated Petitioner's rate

under the plain language of § 39-71-721(2), MCA. This Court declined to rule on Petitioner's constitutional challenge, and denied that part of Petitioner's cross-motion for summary judgment, because this Court cannot grant her the relief she seeks.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-721, MCA. Resort to legislative history is unnecessary as the Legislature's intent is clear from the plain language of § 39-71-721(2), MCA: the "minimum" weekly compensation benefit rate applies when 66 2/3% of the decedent's wage is less than 50% of the state's average weekly wage unless the decedent's actual wages were less than 50% of the state's average weekly wage, in which case the rate is the decedent's actual wages.

Statutes and Statutory Interpretation: Plain Meaning. Resort to legislative history is unnecessary as the Legislature's intent is clear from the plain language of § 39-71-721(2), MCA: the "minimum" weekly compensation benefit rate applies when 66 2/3% of the decedent's wage is less than 50% of the state's average weekly wage unless the decedent's actual wages were less than 50% of the state's average weekly wage, in which case the rate is the decedent's actual wages.

Benefits: Death Benefits: Generally. Under the plain language of § 39-71-721(2), MCA: the "minimum" weekly compensation benefit rate applies when 66 2/3% of the decedent's wage is less than 50% of the state's average weekly wage unless the decedent's actual wages were less than 50% of the state's average weekly wage, in which case the rate is the decedent's actual wages.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-721, MCA. Section 39-71-721(2), MCA, is not ambiguous simply because it sets a "minimum" weekly compensation benefit rate and then has a clause under which the rate can be less than the "minimum." Statutes setting forth how to calculate benefit rates are frequently written as rules of law with exceptions; where both can be given effect, there is no ambiguity.

Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, section 17. The remedy in a case in which workers' compensation benefits are insufficient to uphold the quid pro quo

is to strike the employer's exclusive remedy defense and allow the employee to proceed with a tort claim – a decision that is solely within the province of the district court in a civil action against the employer. Where this Court cannot grant the claimant the remedy she seeks – i.e., to increase the amount of her benefits to an amount that would be sufficient – it will not rule on the claimant's substantive due process challenge against § 39-71-721(2), MCA.

Constitutional Law: Due Process: Substantive Due Process. The remedy in a case in which workers' compensation benefits are insufficient to uphold the quid pro quo is to strike the employer's exclusive remedy defense and allow the employee to proceed with a tort claim – a decision that is solely within the province of the district court in a civil action against the employer. Where this Court cannot grant the claimant the remedy she seeks – i.e., to increase the amount of her benefits to an amount that would be sufficient – it will not rule on the claimant's substantive due process challenge against § 39-71-721(2), MCA.

Exclusive Remedy. The remedy in a case in which workers' compensation benefits are insufficient to uphold the quid pro quo is to strike the employer's exclusive remedy defense and allow the employee to proceed with a tort claim – a decision that is solely within the province of the district court in a civil action against the employer. Where this Court cannot grant the claimant the remedy she seeks – i.e., to increase the amount of her benefits to an amount that would be sufficient – it will not rule on the claimant's substantive due process challenge against § 39-71-721(2), MCA.

Remedies: Generally. The remedy in a case in which workers' compensation benefits are insufficient to uphold the quid pro quo is to strike the employer's exclusive remedy defense and allow the employee to proceed with a tort claim – a decision that is solely within the province of the district court in a civil action against the employer. Where this Court cannot grant the claimant the remedy she seeks – i.e., to increase the amount of her benefits to an amount that would be sufficient – it will not rule on the claimant's substantive due process challenge against § 39-71-721(2), MCA.

¶ 1 Respondent Montana State Fund (State Fund) moves for summary judgment, arguing it correctly calculated Petitioner Julia Hegg's (Julia) death benefit rate to be $79.71 under §§ 39-71-123(3) and -721(2), MCA. Julia agrees that State Fund correctly determined that the decedent's wages were $79.71 under § 39-71-123(3), MCA, but argues she is entitled to benefits at the rate of $354 under § 39-71-721(2), MCA.

Alternatively, Julia argues that if her rate is $79.71, her rate is so minimal that it violates her right to substantive due process under Article II, § 17 of the Montana Constitution, and argues that the remedy is for this Court to increase her rate to $354 — the amount she claims is sufficient.

¶ 2 This Court held a hearing on May 18, 2016. Lucas J. Foust represented Julia. Thomas E. Martello represented State Fund. The parties agreed at the hearing that this Court should consider Julia's response brief as a brief in support of a cross-motion for summary judgment.

ISSUES

¶ 3 There are two issues before this Court:

Issue One: Did State Fund correctly calculate Julia's benefit rate to be $79.71?

Issue Two: Is Julia's rate sufficient to uphold the quid pro quo on which the Workers' Compensation Act is based?

FACTS

¶ 4 Thomas Hegg, an employee of Oak Creations, Inc. (Oak Creations), died from an occupational disease on January 13, 2015. Mr. Hegg was a part-time employee of Oak Creations at the time of his death; however, he had worked full-time 13 out of the 15 years he was employed with Oak Creations.

¶ 5 Julia was married to Mr. Hegg at the time of his death and presented a Beneficiaries Claim for Compensation to State Fund.

¶ 6 State Fund accepted liability for Julia's claim.

¶ 7 In accordance with § 39-71-123(3)(a), MCA, Amanda Krissovich, a claims examiner for State Fund, initially calculated the death benefit rate using the average actual earnings for the four pay periods immediately preceding Mr. Hegg's death, which resulted in an average weekly wage of $53.52. However, given the sporadic nature of Mr. Hegg's work in 2014, Krissovich determined that the four pay periods immediately preceding his death did not accurately reflect his wages. Thus, under § 39-71-123(3)(b), MCA, Krissovich calculated his earnings over the entire year preceding his death, which resulted in an average weekly wage of $79.71.

¶ 8 At the time of Mr. Hegg's death, 50% of the State's average weekly wage was $354.

¶ 9 State Fund determined that Julia's rate for death benefits is $79.71 under § 39-71-721(2), MCA, which states, in relevant part, "The minimum weekly compensation benefit

is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death."

¶ 10 State Fund is paying death benefits to Julia at the rate of $79.71.

¶ 11 The Estate of Thomas Hegg has filed a tort claim against Oak Creations in the Stillwater County District Court.[1] The Estate of Thomas Hegg alleges, *inter alia*, that Oak Creations may not rely on the exclusive remedy of the Workers' Compensation Act (WCA) as an affirmative defense because the workers' compensation benefits payable as a result of Mr. Hegg's death are insufficient to uphold the quid pro quo underlying the WCA.[2]

LAW AND ANALYSIS

¶ 12 This case is governed by the 2013 version of the WCA because that was the law in effect at the time of Mr. Hegg's last injurious exposure.[3]

¶ 13 This Court renders summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[4]

Issue One: Did State Fund correctly calculate Julia's benefit rate to be $79.71?

¶ 14 Under the WCA, two factors are used to calculate a claimant's benefit rate. The first factor is the employee's wages. Section 39-71-123, MCA — the statute that defines "wages" — states in relevant part:

> (3)(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.
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> (b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number

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[1] Complaint and Demand for Jury Trial, *Estate of Thomas Hegg v. Oak Creations, Inc.*, No. DV 16-15 (Stillwater Cnty. Dist. Court, February 18, 2016).

[2] *Id.*, ¶¶ 14-20.

[3] *Hardgrove v. Transp. Ins. Co*., 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citation omitted); *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 33, 342 Mont. 371, 181 P.3d 619.

[4] ARM 24.5.329(2).

> of weeks in that period, including periods of idleness or seasonal fluctuations.

¶ 15 The second factor is the state's average weekly wage for the fiscal year in which the injury occurred.[5]

¶ 16 These factors are then used to calculate the claimant's rate for the particular benefit at issue. For death benefits, § 39-71-721(2), MCA, states:

> (2) To beneficiaries as defined in 39-71-116(4)(a) through (4)(d), weekly compensation benefits for an injury causing death are 66 2/3% of the decedent's wages. The maximum weekly compensation benefit may not exceed the state's average weekly wage at the time of injury. *The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death.*[6]

¶ 17 Julia argues that the last sentence of this subsection is ambiguous; while the first clause provides a "minimum" for benefits of 50% of the state's average weekly wage, the second clause allows for a rate that can be less than the "minimum." She maintains that these clauses are irreconcilable and that it is therefore unclear whether she is entitled to the "minimum," which is $354 for Mr. Hegg's date of death, or to Mr. Hegg's actual wages, which she concedes are $79.71. Relying upon legislative history from the 1973 Legislature, Julia argues that the Legislature's intent was to provide the "minimum" to the beneficiaries of all workers who die in the course of their employment. Thus, she argues that her rate under § 39-71-721(2), MCA, is $354.

¶ 18 State Fund argues that this statute is unambiguous. State Fund maintains that the first clause of the last sentence of § 39-71-721(2), MCA, sets forth a rule of law, while the second clause sets forth an exception. State Fund argues that the only way to interpret the statute as Julia does is to strike the phrase "but in no event may it exceed the decedent's actual wages at the time of death." Because State Fund maintains that the statute is unambiguous, it argues that it is unnecessary to resort to legislative history. However, State Fund points out that the 1973 Legislature enacted the phrase stating that the rate cannot be higher than the decedent's actual wages and that it has been a part of

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[5] *See* § 39-71-116(36), MCA (defining "State's average weekly wage" as "the mean weekly earnings of all employees under covered employment, as defined and established annually by the department before July 1 and rounded to the nearest whole dollar number"). The Department of Labor & Industry publishes a table of the compensation rates for dates of injury at: http://erd.dli.mt.gov/Portals/54/Documents/Work-Comp-Claims/dli-erd-wcc032.pdf?ver=2016-05-25-095256-187.

[6] Emphasis added.

the WCA since then.[7] Thus, State Fund maintains that the 1973 Legislature did not intend for death benefits to be greater than the decedent's actual wages. State Fund maintains that it correctly calculated Julia's rate to be $79.71.

¶ 19 The "primary goal in interpreting a statute is to give effect to the legislative intent."[8] If the legislative intent can be determined from the plain language of the statute, no further means of interpretation may be applied.[9] To that end, § 1-2-101, MCA, states:

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

This Court will not resort to legislative history unless the legislative intent cannot be determined from the plain language of the statute.[10]

¶ 20 Under these rules of statutory construction, it is unnecessary to resort to legislative history because the Legislature's intent is clear from the plain language of § 39-71-721(2), MCA. The plain language of this statute states that the "minimum" rate applies when 66 2/3% of the decedent's wage is less than 50% of the state's average weekly wage unless the decedent's actual wages were less than 50% of the state's average weekly wage, in which case the rate is the decedent's actual wages. It is evident that the Legislature did not intend for a beneficiary's rate to be greater than the decedent's actual wages. State Fund is correct that the statute sets forth a rule of law and then an exception, and that Julia's rate would be $354 under § 39-71-721(2), MCA, only if this Court omitted the clause stating, "but in no event may [the compensation benefit] exceed the decedent's actual wages at the time of death."

¶ 21 Despite Julia's claim, § 39-71-721(2), MCA, is not ambiguous because it sets a "minimum" and then has a clause under which the rate can be less than the "minimum." When each provision can be given effect, a statute that sets forth a rule of law and then an exception is not ambiguous.[11] Section 39-71-721(2), MCA, does not contain two

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[7] *Compare* § 92-704.1, RCM (1973) (stating, "The minimum weekly compensation for death shall be fifty per cent (50%) of the state's average weekly wage, but in no event shall it exceed the decedent's actual wages at the time of his death.") *with* § 39-71-721(2), MCA (1978-2015).

[8] *Grenz v. Montana Dept. of Natural Res. and Conservation*, 2011 MT 17, ¶ 28, 359 Mont. 154, 248 P.3d 785 (citations omitted).

[9] *Moreau v. Transp. Ins. Co.,* 2015 MT 5, ¶ 13, 378 Mont. 10, 342 P.3d 3 (citation omitted).

[10] *Clapham v. Twin City Fire Ins. Co.*, 2012 MTWCC 27, ¶ 17 (citation omitted).

[11] *See Trustees, Carbon Cnty. Sch. Dist. No. 28 v. Spivey*, 247 Mont. 33, 35-37, 805 P.2d 61, 63-64 (1991) (holding that a 60-day statute of limitation to petition for judicial review of a decision by the Superintendent of Public Instruction was not irreconcilable with a 30-day statute of limitation in the Montana Administrative Procedures Act to

clauses that are "diametrically opposed to one another" or irreconcilable, as Julia argues, because the phrase "but in no event" is a common phrase used to introduce an exception to a rule.[12] Indeed, the other statutes setting forth how to calculate rates are written similarly, including § 39-71-703(6), MCA, which states, in pertinent part, "The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage."[13] These statutes, which are applied in most workers' compensation claims, have withstood the test of time, which indicates that they are not ambiguous.

¶ 22 Further, State Fund did not acknowledge that death benefits cannot be less than the "minimum" in its amicus curiae brief in *Walters v. Flathead Concrete Products, Inc*.[14] In a section of its amicus curiae brief in which State Fund gave a broad overview of death benefits, State Fund noted the "minimum" and explained that it was unique to death benefits.[15] Because State Fund did not mention the actual wages exception, Julia reads this passage as an acknowledgment that one way to read the statute is that death benefits cannot be less than the "minimum." Nevertheless, this Court does not interpret State Fund's amicus curiae brief as an acknowledgment that the statute is ambiguous because State Fund's statement was merely incomplete and not contrary to nor incompatible with the position it takes in this case.

¶ 23 Finally, Julia has not shown that State Fund's interpretation of § 39-71-721(2), MCA, could lead to an absurd result. Julia presents a hypothetical in which a worker making minimum wage dies in the course of his first day of work. Julia claims that under State Fund's interpretation, his beneficiary's rate would be less than $2.00 per week because the wages the decedent earned that day would be averaged per week for the year prior to his death under § 39-71-123(3)(b), MCA. Nevertheless, as State Fund argued at the hearing, if an employee dies on his first day of work, his wages would not be averaged per week for the year prior to his death under § 39-71-123(3)(***b***), MCA,

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petition for judicial review because the 60-day statute of limitation was an exception that was specific to the type of contested case at issue and "simply carves out a specific limited procedural variation to the general rule . . . ").

[12] *See, e.g.*, *Assoc. of Unit Owners of Deer Lodge Condo. v. Big Sky of Montana, Inc.*, 245 Mont. 64, 80, 798 P.2d 1018, 1028 (1990) (emphasis added) (explaining that § 27–2–208, MCA, is a statute of repose because it provides, in the words of the Montana Supreme Court, "any other applicable statutes of limitation still remains applicable *but in no event* shall any cause be commenced more than ten years after the completion of the improvement").

[13] *See also* § 39-71-701(3), MCA (stating, in relevant part, "Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury."); § 39-71-702(3), MCA (stating, "Weekly compensation benefits for an injury resulting in permanent total disability are 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury."); § 39-71-721(2), MCA (stating, in relevant part, "weekly compensation benefits for an injury causing death are 66 2/3% of the decedent's wages. The maximum weekly compensation benefit may not exceed the state's average weekly wage at the time of injury.").

[14] 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

[15] Brief of Amicus Curiae Montana State Fund at 10-11, *Walters*, 2011 MT 45 (No. DA 10-0185).

because that subsection applies only to employees who have worked at least four pay periods. Rather, if an employee dies on his first day of work, his wages would be determined under § 39-71-123(3)(***a***), MCA, which states, in relevant part, "if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work." Thus, if an employee was hired to work 40 hours per week at the state's minimum wage in effect at the time of Mr. Hegg's death — $8.05 per hour — the hypothetical worker's wages would be $322, which would also be his beneficiary's rate under the exception which states that the rate cannot be greater than the decedent's actual wages.

¶ 24 This Court agrees with the Montana Supreme Court's sentiments that "[w]ork-related death is traumatic, final, and adversely impacts a family forever."[16] This Court is also sympathetic to Julia for Mr. Hegg's death. However, the issue before this Court is one of statutory construction and this Court's task is limited to determining the benefits to which Julia is entitled under the WCA. It is uncontroverted that Mr. Hegg's wages under § 39-71-123(3), MCA, were $79.71, placing Julia's benefit rate under the exception of § 39-71-721(2), MCA, which states that the rate cannot be greater than the decedent's actual wages. Accordingly, State Fund correctly calculated Julia's rate to be $79.71, and it is entitled to judgment as a matter of law on this issue.

Issue Two: Is Julia's rate sufficient to uphold the quid pro quo on which the Workers' Compensation Act is based?

¶ 25 The WCA is based upon a quid pro quo exchange of rights and remedies, which is the result of a compromise between labor and industry.[17] Under the quid pro quo, employers receive immunity from negligence litigation by an employee who is injured in the course of employment pursuant to the exclusive remedy provision of the WCA, which is codified at § 39-71-411, MCA.[18] In return, employees are assured of compensation for their industrial injuries and occupational diseases.[19]

¶ 26 Although the Montana Constitution guarantees the right of full legal redress, it contains an exception that "sets forth the basis for the workers' compensation exclusive remedy provision."[20] Article II, § 16 of the Montana Constitution states:

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[16] *Walters*, ¶ 33.

[17] *Buerkley v. Aspen Meadows Ltd. P'ship*, 1999 MT 97, ¶ 16, 294 Mont. 263, 980 P.2d 1046.

[18] *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶ 13, 353 Mont. 173, 219 P.3d 1249 (citations omitted).

[19] *Id*. (citations omitted).

[20] *Walters*, ¶ 11 (citation omitted).

> **The administration of justice.** Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. *No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.* Right and justice shall be administered without sale, denial, or delay.[21]

¶ 27 In *Walters*, the Montana Supreme Court addressed a challenge to the exclusive remedy under Article II, § 16 of the Montana Constitution, on the grounds that the amount of workers' compensation benefits was insufficient to uphold the quid pro quo. Walters' son died from injuries suffered in the course of his employment with Flathead Concrete Products (Flathead Concrete).[22] He did not have any dependents.[23] Flathead Concrete's workers' compensation insurer paid medical benefits, burial expenses, and $3,000 to Walters, as that is the only benefit available to a non-dependent parent under § 39-71-721(4), MCA.[24] Walters filed tort claims against Flathead Concrete, arguing that it could not rely upon the exclusive remedy as an affirmative defense because the amount she received in benefits, which did not include wage-loss benefits, was "not fair and balanced,"[25] and therefore, the "quid pro quo bargain upon which the exclusive remedy is premised [did] not exist."[26]

¶ 28 The Montana Supreme Court recognized the amount of workers' compensation benefits to which Walters was entitled was "minimal."[27] Nevertheless, it held that the amount was sufficient to sustain the quid pro quo because the death benefits for non-dependents satisfies guarantees of substantive due process[28] under Article II, § 17 of the Montana Constitution, which the court held is the standard to apply to determine if the amount is sufficient.[29] The court emphasized that Walters was not a dependent and held that it was reasonable for the Legislature to require that wage-loss benefits be paid only

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[21] Emphasis added.

[22] *Walters*, ¶ 4.

[23] *Walters*, ¶ 5.

[24] *Walters*, ¶ 6.

[25] *Walters*, ¶¶ 7, 10.

[26] *Walters*, ¶ 13.

[27] *Walters*, ¶ 30.

[28] *Walters*, ¶ 34.

[29] *See Walters*, ¶ 17 (citation omitted) ("Walters' argument that the quid pro quo is unfair and unreasonable is properly considered as part of her substantive due process challenge, which tests 'the reasonableness of a statute in relation to the State's power to enact such legislation.' ").

to dependents and to require only a small payment to non-dependents.[30] Thus, the court held that the exclusive remedy barred Walters' tort claims.[31]

¶ 29 The concurring and dissenting Justices pointed out that there is a point at which benefits are insufficient to uphold the quid pro quo.[32] Justice Nelson explained:

> This exception [in Article II, Section 16 allowing for the exclusive remedy] is premised on the existence of a real, bona fide, quid pro quo. And when the quid pro quo ceases to exist as a practical matter — that is, when it no longer fairly balances what employers and injured workers are getting for what they are giving up — the Workers' Compensation Act exception to Article II, Section 16 is no longer met. While the Legislature has the power to determine and adjust the specifics of the quid pro quo from time to time, that body does not have the power to effectively abrogate it without destroying the constitutional exception itself.[33]

¶ 30 Like the plaintiff in *Walters*, Julia argues her rate of $79.71 is so paltry that it violates her right to substantive due process and is therefore insufficient to uphold the quid pro quo. However, in this case, Julia does ***not*** seek the same remedy as the plaintiff in *Walters*; i.e., she does not seek a ruling that the exclusive remedy does not bar the tort claims against Oak Creations in the pending civil action. Instead, Julia argues that the remedy is for this Court to increase her benefit rate to $354, an amount she contends is sufficient to uphold the quid pro quo.

¶ 31 State Fund counters that Julia's rate is sufficient to uphold the quid pro quo under *Walters* because her benefit rate is the same amount Mr. Hegg had contributed to the family in wages. State Fund also cites § 39-71-105(1), MCA, which provides, in relevant part, that a public policy of the WCA is to provide wage-loss benefits to an injured worker at a reasonable cost to the employer, and argues that the policy would be subverted if an insurer was required to pay wage-loss benefits at a rate that is 4½ times greater than the decedent's actual wages. State Fund urges this Court to rule that § 39-71-721(2), MCA, comports with due process.

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[30] *Walters*, ¶¶ 30, 34.

[31] *Walters*, ¶¶ 7, 34.

[32] *Walters*, ¶ 38 (Cotter, J., concurring) ("Justice Nelson may well be correct in observing that we will someday be presented with a case establishing that the quid pro quo no longer exists. In my judgment, this is not that case."); ¶¶ 40-44 (Wheat, J., dissenting); ¶¶ 45-48 (Nelson, J., dissenting).

[33] *Walters*, ¶ 46 (Nelson, J., dissenting). *See also New York Cent. R.R. Co. v. White*, 243 U.S. 188, 205-06, 37 S.Ct. 247, 253-54 (1917*)* (holding that workers' compensation system under which employees are assured of compensation while employers are immune from negligence claims is constitutional under Due Process clause of the United States Constitution because it is a "just settlement of a difficult problem," and neither arbitrary nor unreasonable, but explaining: "This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.").

¶ 32 Notwithstanding the parties' positions, this Court will not rule on Julia's constitutional challenge because this Court cannot grant Julia the remedy she seeks. Unlike an equal protection violation, where the remedy is to increase the benefits of the disadvantaged class to make them equal to the benefits of the other class,[34] the remedy in a case in which workers' compensation benefits are insufficient to uphold the quid pro quo is to strike the employer's exclusive remedy defense and allow the employee to proceed with a tort claim,[35] a decision that, in the first instance, is solely within the province of the district court in the civil action against the employer.[36] In *Stratemeyer v. Lincoln County*, the court succinctly stated, "Absent the quid pro quo, the exclusive remedy cannot stand, and the employer is thus exposed to potential tort liability."[37]

¶ 33 Thus, if Julia proves that her rate of $79.71 violates her right to substantive due process and is therefore insufficient to uphold the quid pro quo, her remedy will be that Oak Creations will not be able to rely on the exclusive remedy as an affirmative defense in *Estate of Hegg v. Oak Creations*. Julia cites no authority in support of her position that an alternative remedy is for this Court to increase the benefits the Legislature has set to the amount that would be sufficient. Accordingly, because this Court cannot grant Julia the remedy she seeks, Julia is not entitled to judgment as a matter of law on this issue and this Court therefore denies her cross-motion for summary judgment.

ORDER

¶ 34 Respondent's motion for summary judgment is **granted.**

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[34] *See, e.g.*, *Stavenjord v. Montana State Fund*, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 (holding that statutes which provided less in permanent partial disability benefits to claimants under the Occupational Disease Act than to claimants under the WCA violated the Equal Protection Clause in Article II, § 4 of the Montana Constitution and affirming this Court's decision that the remedy was to award occupational disease claimants the same amount they would have under the WCA). *See also Schmill v. Liberty Northwest Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290 (holding that the statute allowing for apportionment only in occupational disease claims violated the Equal Protection Clause and affirming this Court's decision that the remedy was to provide claimant with the same benefits she would have received under the WCA).

[35] *Stratemeyer v. Lincoln Cnty. (Stratemeyer II),* 276 Mont. 67, 79, 915 P.2d 175, 182 (1996) (explaining, "The exclusion of Stratemeyer's 'mental-mental' injury leaves him without workers' compensation coverage and likewise removes Lincoln County's shield from a tort claim. Thus, in keeping with the quid pro quo of the [WCA], we hold that Stratemeyer is allowed to proceed in tort against his employer."). *See also Kleinhesselink v. Chevron, U.S.A.*, 277 Mont. 158, 920 P.2d 108 (1996) (holding that plaintiff who sustained both physical and mental injuries arising from emotional or mental stress could proceed with a tort claim for his injuries because they were not compensable under the WCA); *Maney v. Louisiana Pac. Corp.*, 2000 MT 366, ¶ 16, 303 Mont. 398, 15 P.3d 962 (stating, "If an employee's injury is not compensable under the [WCA], the exclusive remedy provision does not preclude a tort action against the employer.").

[36] *Hardgrove v. Transp. Ins. Co.*, 2003 MTWCC 57, ¶¶ 19, 20 (refusing to rule upon whether the exclusive remedy is unconstitutional in a case in which a claimant was ineligible for occupational disease benefits because the Workers' Compensation Court "has no jurisdiction to consider the constitutionality of the exclusive remedy provision since that provision can only be invoked in a district court proceeding"), *aff'*d, 2004 MT 340, ¶ 27, 324 Mont. 238, 103 P.3d 999 (citation omitted) ("Since this appeal comes from the Workers' Compensation Court, the question whether Hardgrove has a tort remedy is not properly before us so we cannot decide the [exclusive remedy] issues.").

[37] 276 Mont. at 76, 915 P.2d at 180 (citations omitted).

¶ 35 Petitioner's cross-motion for summary judgment is **denied**.

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

DATED this 10th day of October, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Lucas J. Foust
Thomas E. Martello
Submitted: May 18, 2016