IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 5

WCC No. 2009-2376

ROBERT McCRARY

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE CO.

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 03/30/2018
DISMISSED – 07/16/2018

DECISION ON STIPULATED FACTS AND JUDGMENT

Summary: Petitioner suffered an industrial injury to his low back in 1977. His PTD rate for this injury is $174, which would be payable for his lifetime under the 1977 WCA. Petitioner subsequently worked in a "sheltered" position with his time-of-injury employer and suffered an industrial injury to his knee in 1983. His PTD rate for this injury is $277, which would be payable until his receipt of Social Security retirement under the 1983 WCA. He returned to work, but his time-of-injury employer went out of business in 1996, and he has not worked since. From 1997 to 2009, Petitioner: asserted that the combination of his back and knee injuries rendered him permanently totally disabled; demanded PTD benefits under his 1983 claim at the rate of $277; acknowledged that such benefits would terminate on his receipt of Social Security retirement benefits; obtained PTD benefits at the $277 rate; obtained attorney fees calculated on a percentage of the PTD benefits he received; and then, after a dispute arose over periods in which Respondent had not paid PTD benefits, obtained a judgment from this Court pursuant to which Respondent was legally obligated to pay PTD at the $277 rate and attorney fees calculated on the amount of PTD benefits awarded. Petitioner and Respondent stipulate that Respondent "has not paid any benefit to which [Petitioner] is not entitled." However, Petitioner now argues that his back injury was the "actual cause" of his permanent total disability and, therefore, that Respondent should have paid him PTD benefits under his 1977 claim, and that he is now entitled to PTD benefits under his 1977 claim. Respondent argues that Petitioner is estopped from claiming, and waived his asserted right to, PTD benefits for his 1977 claim.

Held: Petitioner waived his claimed right to PTD benefits under his 1977 claim. Petitioner arguably had the right to PTD benefits under his 1977 claim because he thereafter worked in a sheltered job, which is not to be considered when determining whether a claimant is PTD. However, by his express declarations and his course of conduct, Petitioner intentionally and voluntarily acted inconsistently with his asserted right to PTD benefits under his 1977 claim. And, although the parties have agreed that if Petitioner prevails, Respondent would be entitled to a credit in the amount of what would then be deemed an overpayment of PTD benefits, prejudice to Respondent would result if Petitioner was now allowed to obtain PTD benefits under his 1977 claim because Petitioner has not agreed to reimburse Respondent for the attorney fees calculated on the higher rate, nor to provide any compensation to Respondent for the time-value-of money.

¶ 1 Issues Presented: The parties presented two stipulated issues[1] for determination, which the Court restates as follows:

> Issue One: Does McCrary satisfy the applicable criteria for entitlement to PTD benefits after the age of retirement as the result of his October 17, 1977, industrial injury to his back?
>
> Issue Two: Do equitable doctrines of estoppel and/or waiver bar McCrary from receiving PTD benefits after the age of retirement for his October 17, 1977, industrial injury to his back?

¶ 2 Because this Court's resolution of Issue Two is dispositive of McCrary's entitlement to permanent total disability (PTD) benefits, Issue One is not addressed.

STIPULATED FACTS[2]

¶ 3 On October 17, 1977, Petitioner Robert McCrary sustained an industrial injury to his back in the course and scope of his employment at Missoula White Pine Sash Company (White Pine). McCrary was working at the trim saw "pulling green chain" when he was hit on the right side of his back with a board. His position was a heavy duty position.

¶ 4 At the time of the 1977 back injury, White Pine was enrolled in Compensation Plan Number II under the Workers' Compensation Act (WCA) and its insurer was Liberty Mutual Fire Insurance Company (Liberty).

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[1] *See* Statement of Issues and Stipulated Briefing Schedule, Docket Item No. 43.

[2] The parties drafted the following stipulated facts, as set forth in their Stipulated Facts, Docket Item No. 44. This Court omitted facts it deemed irrelevant to the issues to be decided.

¶ 5 Liberty accepted liability for McCrary's October 17, 1977, back injury.

¶ 6 At the time of his October 17, 1977, injury, McCrary earned $7.02 per hour and his temporary total disability (TTD) and PTD rate were $174 per week.

¶ 7 In 1977, Dr. N.S. Green diagnosed a lumbosacral strain after x-rays of McCrary's lumbar spine were taken.

¶ 8 Following the 1977 injury, McCrary returned to work at White Pine. However, as a result of the injury, he was unable to perform his time-of-injury position, and as a consequence suffered actual wage loss and actual loss of earning capacity. Liberty ultimately paid McCrary the maximum permanent partial disability (PPD) award for this injury.

¶ 9 White Pine provided McCrary with a "sheltered" work environment. This employment did not reflect McCrary's ability to hold a job in the normal open labor market at any time after his back injury precluded him from all but sedentary to light-lifting job duties.

¶ 10 McCrary alleges that because of physical limitations caused by his back injury, he was unable to return to his job of injury and had no prospect of finding regular employment of any kind in the normal open labor market.

¶ 11 Since the 1977 back injury, no doctor has released McCrary to return to work at regular employment in the normal open labor market.

¶ 12 Liberty has never identified regular employment of any kind in the normal open labor market which McCrary could perform after his 1977 back injury.

¶ 13 On November 29, 1983, McCrary suffered a work-related injury when he slipped and fell on an icy road and sustained a right patellar fracture. At that time, McCrary worked for White Pine as a night driver.

¶ 14 Liberty accepted liability for the November 29, 1983, right knee injury.

¶ 15 At the time of the 1983 injury, McCrary earned $10.43 per hour. McCrary's 1983 TTD and PTD total rate were $277 per week.

¶ 16 After both the 1977 and 1983 industrial injuries, McCrary continued his employment with White Pine.

¶ 17 At some point in the 1980s, Liberty began adjusting McCrary's claim for his 1977 back injury and his 1983 knee injury out of the same file.

¶ 18 On May 11, 1984, Dr. Sterling noted that there was "no evidence per permanent partial impairment" concerning McCrary's knee.

¶ 19 By 1989, McCrary's patellar fracture had healed.

¶ 20 On November 12, 1996, McCrary's employment with White Pine ended because White Pine ceased operations and terminated all employees. This was McCrary's last day of employment of any kind.

¶ 21 After White Pine ceased operation, McCrary stated in response to discovery requests:

> Missoula White Pine Sash terminated its operations in Missoula on or about November 12, 1996. Irrespective of the plant closure, Petitioner had (prior to closure) undertaken treatment for his back and knee condition and could not have continued this work in any event due to his back and knee symptoms and limitations. Petitioner could not have continued to tolerate the standing, walking, lifting, turning and other physical requirements of his job.

Within those discovery responses, McCrary asserted that he considered his back or knee symptoms and limitations a reason for his permanent total disability.

¶ 22 McCrary has borderline intellectual functioning, performing better than 4% of the general population on standardized testing. He also suffers from an anxious adjustment disorder and chronic avoidant personality disorder together with stuttering and speech articulation problems which profoundly interfere with his ability to interact with others.

¶ 23 McCrary is only able to read single words and short phrases. He has difficulty: reading anything involving sentences or paragraphs; performing arithmetic involving fractions, decimals or percentages; following verbal instructions; performing tasks with problem solving; and learning a more complex task. He has a slow work speed; he is slow to learn a new task and is anxious and fearful when confronted with a new task.

¶ 24 McCrary also has difficulty hearing, and difficulty tolerating sitting and standing. He can lift only in the sedentary to light physical demand level with limited endurance and stamina.

¶ 25 On July 22, 1997, McCrary requested that Liberty pay PTD benefits retroactive to November 13, 1996. He alleged that he had not worked since November 12, 1996, and that he was unable to work. Specifically, McCrary's attorney wrote:

> As you are aware, Mr. McCrary suffered knee and back injuries while employed by White Pine Sash Company. Dr. Robins has reported that knee symptoms aggravate Mr. McCrary's back. Mr. McCrary has not worked since November 12, 1996, and is currently unable to work. We believe he suffers permanent total disability. In any event, he is entitled to permanent partial disability benefits since the date of injury. We believe this entitlement

> is the maximum permissible and that it is presently past due and payable. Please acknowledge and pay permanent total disability benefits retroactive to and including November 13, 1996.

¶ 26 On July 28, 1997, McCrary filed a Petition for Hearing[3] regarding his October 17,[4] 1977, back injury and November 29, 1983, right knee injury. McCrary contended: "due to the above described industrial injuries, he became permanently totally disabled as of November 13, 1996." In his prayer for relief, McCrary sought, "[a]n Order stating the nature and extent of Petitioner's disability and entitlement through the time of hearing on this petition," and his attorney fees and costs.

¶ 27 In its Response to the July 28, 1997, Petition for Hearing, Liberty contended that McCrary was not permanently totally disabled as a result of any work-related injuries, and that he was not entitled to any PTD or PPD benefits. Liberty also raised the affirmative defenses of laches and equitable estoppel.

¶ 28 In the fall of 1997, before any hearing on the Petition, Liberty agreed to pay McCrary TTD benefits under a reservation of rights while awaiting the result of McCrary's claim for Social Security disability benefits. Thereafter, on October 15, 1997, McCrary's attorney Rex Palmer wrote to Liberty's attorney, Larry Jones, stating: "[McCrary's] wages at the time of his injury were $10.43 per hour, 40 hours per week. Sixty-six percent of this exceeds the $277 per week total disability rate."

¶ 29 On December 12, 1997, Dr. Sterling assessed McCrary at his attorney's request. Dr. Sterling restricted McCrary from frequent kneeling, squatting, heavy lifting, and carrying. He restricted lifting to 10 pounds infrequently and carrying to 20 pounds occasionally. Dr. Sterling also rated McCrary's impairment:

> It is considered that the patient has 5% permanent partial impairment of the lower extremity which is equivalent to 3% permanent partial impairment of the whole person as regards his patella fracture and his early patellofemoral arthritis. Patient has had a documented lumbar strain as evidence by his injury reports. There would not appear to be any impairment related to such injury. It is felt that he has DRE impairment category II as regards his multilevel degenerative disc disease of the lumbar spine which qualifies for 5% permanent partial impairment of the whole person. There is not a clear cut connection in the clinical record to connect this to a work injury per se. I have listed . . . additional restrictions as regards climbing and jumping and repetitive carrying as regards his work restrictions over and above the functional capacities evaluation at the work center.

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[3] WCC No. 9707-7791.

[4] The Petition for Hearing mistakenly asserts the date of injury as October 31, 1977, instead of October 17, 1977.

At all times since McCrary's 1977 back injury, Liberty has accepted liability for and paid for all the medical care for McCrary's back including his ongoing multilevel degenerative disk disease and related chronic pain.

¶ 30 On December 19, 1997, Margot Hart, Rehabilitation Consultant, asked Dr. Sterling whether McCrary was permanently and totally disabled from gainful employment of any kind due to his physical condition. Dr. Sterling wrote, "No-[b]ut, considering all conditions, the answer would be yes." Hart also asked Dr. Sterling whether McCrary's back condition was related to his knee condition. Dr. Sterling wrote, "Yes, insofar as knee pain & resulting limp has the potential to aggravate a back problem."

¶ 31 On October 9, 1998, Dr. Sterling opined that McCrary was not employable.

¶ 32 On June 29, 1999, Psychologist Patricia L. Webber, PhD, completed a psychological evaluation of McCrary. In her Evaluation Summary, Dr. Webber stated:

> Work activities will be limited to simple, routine tasks. He would not be expected to comprehend and follow through on complex, detailed, or abstract instructions. He would not be expected to be able for [sic] understand complex social situations and therefore be limited in his ability to interact with co-workers and supervisors. He requires simplified verbal instructions and longer than average amount of time to process information.

¶ 33 On August 11, 1999, McCrary returned to Dr. Sterling for a check-up. Dr. Sterling's impressions were: "healed patella fracture right knee with patellofemoral arthritis; bipartite patella."

¶ 34 McCrary filed for Social Security disability benefits and alleged he was entitled to SSDI benefits as a result of both his back and knee injuries. On September 20, 1999, McCrary was found to be disabled pursuant to Social Security rules retroactive to February 28, 1998. His benefit rate was $1,079.50 per month.

¶ 35 Until October 12, 1999, Liberty paid McCrary's TTD benefits under a reservation of rights. Effective October 13, 1999, Liberty withdrew its reservation of rights and continued to pay McCrary TTD benefits.

¶ 36 On October 13, 1999, Liberty's attorney wrote to McCrary's attorney concerning the Social Security benefits awarded the previous month. The purpose was to clarify whether McCrary disputed Liberty's entitlement to an offset as the result of the Social Security award. Specifically, Liberty would be entitled to an offset only if the award was based on either McCrary's knee injury or his back injury, or both. Liberty's letter references McCrary's claim WC687-00704, which is the claim file within which Liberty adjusted and continues to adjust McCrary's claims for both his back and knee.

¶ 37 Effective September 27, 2000, Liberty began to pay McCrary PTD benefits at the rate of $277 per week.

¶ 38 On September 19, 2001, McCrary began treatment with Dr. James R. Burton, an orthopedic surgeon, for low-back problems. On February 14, 2005, in response to written questions by Liberty, Dr. Burton wrote that McCrary: suffers from "[s]ignificant" degenerative disk disease at multiple levels, spondylolisthesis and chronic pain; should see his doctor every 6 months for life; may require surgery although it is not expected; requires pain medication for his back (Hydrocodone and Bextra), muscle spasm medication (Flurazepan), and sleep medication (Dalmane) for life; TENS Unit permanently; and a back brace for the rest of his life.

¶ 39 On July 10, 2006, McCrary filed a Petition for Hearing.[5] McCrary contended that the parties resolved their dispute over his PTD status and that he was now entitled to his attorney fees on those benefits paid and to be paid in the future pursuant to *Madill v. State Comp. Ins. Fund*.[6] Specifically, McCrary stated:

> [T]he parties resolved that particular controversy (re: Petitioner's status as PTD) and Respondent has paid Petitioner total disability benefits continuously since that time. As a result of settling this controversy, Petitioner is entitled to his attorney fees on those benefits paid and to be paid in the future.

In his prayer for relief, McCrary sought his attorney fees on his benefits, and his attorney fees incurred in obtaining his attorney fees.

¶ 40 In its Response to the July 10, 2006, Petition for Hearing, Liberty contended that McCrary was not entitled to attorney fees on benefits paid to date nor in the future, and that he was not entitled to attorney fees or costs for the present petition.

¶ 41 In early 2007, a question arose about various gaps during which Liberty had not paid McCrary total disability benefits while the evidence demonstrated that McCrary had been unemployed and totally disabled. On February 8, 2007, Palmer wrote Jones a letter identifying the gaps and applying the weekly rate of $277 which Liberty had been paying to McCrary since before it withdrew its reservation of rights effective October 13, 1999. Concerning the first "gap," November 13, 1996, through October 5, 1997, Palmer's letter states that the rate for PTD was $277 per week because Social Security did not begin until August 1998. The total amount of PTD requested was then $13,333.70. The associated attorney fees were said to be $3,333.70 pursuant to *Madill*, and associated costs with the underlying claim were about $1,500.

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[5] WCC No. 2006-1666.

[6] 280 Mont. 450, 930 P.2d 665 (1997) (holding that, under the plain language of § 39-71-612, MCA (1979), a claimant who recovered more than the insurer payed or offered to pay was entitled to reasonable attorney fees, even if the benefits were recovered by settlement).

¶ 42 Liberty paid PTD benefits at the rate of $277 per week, less SSDI offset, until McCrary reached his age of retirement.

¶ 43 On March 23, 2007, Palmer wrote to Debbie Daniels at Liberty regarding the PTD payments. The letter provides, in part, as follows:

> Dear Debbie:
>
> I am writing to follow up on your recent discussions. Since we spoke, I have received your payment of $13,334 to Mr. McCrary and $3,333 to myself. As you know, this covers permanent total disability benefits between November 12, 1996, and October 15, 1997, a total of 48 weeks. Thank you for your assistance on this portion of the adjustments required by *Madill* (1997).
>
> . . . .
>
> Next, Liberty has not paid fees on the benefits which it paid (and will pay) on total disability benefits from October 15, 1997, through retirement age of age 66 which is June 17, 2009. This can be broken down into two time frames:
>
> I. $11,476.11 From 10/15/97 until 8/1/98 @ $277/week when the social security offset began (a total of 41.43 weeks). [Referring to the weekly rate of $277 which Liberty had been paying to Petitioner for years.]
>
> II. $86,631.93 From 8/1/98 until retirement age of 66 on 6/17/09 @ $152.79/week.
>
> Fees on the total of $98,107.93 @ 25% are $24,526.98.
>
> . . . .
>
> Future permanent total disability benefits total about $18,072 (118.28 weeks @$152.79/ week.).
>
> Based on all the above, Mr. McCrary is entitled to permanent total disability benefits, fees and costs through retirement in the amount of $46,404.49.
> . . . .

¶ 44 On May 23, 2007, Dr. Burton noted McCrary suffered from a complete collapse of the L5-S1 vertebrae and would need to use pain medications for the rest of his life.

¶ 45 In June 2007, the parties reached an agreement on the attorney fees dispute and some of the other issues which had been unresolved between them. The parties entered into a Stipulation for Entry of Judgment requiring payments and adjustments as follows:

$ 1,106.32	*Madill* costs
$24,526.98	*Madill* fees on previously paid PTD benefits
$ 1,769.13	*Flynn/Miller* common fund entitlement
$ 442.28	*Madill* fees on the *Flynn/Miller* benefits
$18,072.00	PTD benefits accrued or to be accrued between 2/7/07-6/17/09
($30,000.00)	Credit to Liberty for advance previously paid Petitioner
($1,323.00)	Credit to Liberty for erroneously paid cost-of-living rate increase
($7,754.25)	Credit to Liberty for recoupment of Social Security offset

¶ 46 The Stipulation for Entry of Judgment stated that all "benefits not expressly closed shall remain open" and "all other entitlements not expressly addressed herein are unaffected by this stipulation."

¶ 47 On July 11, 2007, the Workers' Compensation Court signed an Order Dismissing with Prejudice based upon the parties' stipulation, WCC No. 2006-1666.

¶ 48 On July 12, 2007, the Workers' Compensation Court approved and adopted the stipulation. Concerning the potential entitlements not addressed in the stipulation, the Court's Order states:

> The parties recognize and acknowledge that Claimant contends that he is entitled to additional benefits and fees not specified above and agree that claimant reserves from this stipulation these benefits and any related fees, costs and awards as may be allowed by law.

¶ 49 On August 6, 2007, Palmer wrote to Daniels at Liberty and requested that McCrary be paid PPD benefits for his back injury. The letter further states that the 1983 knee injury entitles McCrary to $138.50 per week for 500 weeks: a total of $69,250. Palmer alleged that the payments were past due and therefore payable in lump sum plus attorney fees per *Madill* (1997).

¶ 50 On August 21, 2007, Palmer again wrote to Daniels. He stated:

> I am writing to follow up on our conversation this morning. When we spoke, I explained that we recently received a check from Liberty in the amount of $305.58. The check was designated as PTD. I further explained to you that I was holding the check until I could clarify with you the correct designation and get your approval to negotiate the funds. You told me that the PTD designation was merely an oversight, that you intended the payment to be PPD benefits and that we can negotiate the funds. I understand that you intend to continue making biweekly PPD payments to

> Mr. McCrary as we continue our discussions about our claim that his PPD benefits are accrued and therefore payable in a lump sum.

¶ 51 The August 21, 2007, letter stated, "[t]he weekly PPD rate for Mr. McCrary's 1983 injury is $138.50. This results in a biweekly benefit of $277.00 plus *Madill* fees of (25%) of $69.25 for a biweekly total of $346.25. Consequently the payment by Liberty is short by $40.67."

¶ 52 On September 6, 2007, Jones wrote to Palmer, stating, "[t]his is to follow-up our telephone conversation of September 5, 2007, during which I told you Liberty would agree to pay the 500 weeks of PPD benefits, less those previously paid, in a lump sum and the *Madill* fees of (25%)."

¶ 53 In September 2007, the parties agreed to settle McCrary's right knee injury claim in its entirety, reserving only medical and hospital benefits. The parties submitted a Petition for Settlement to the Department of Labor & Industry whereby Liberty agreed to pay $69,250 to McCrary and *Madill* fees of $17,312.50 to McCrary's counsel. The Department approved the Petition. The basis of the $69,250 payment was 500 weeks at $138.50/week, i.e., the fully accrued PPD benefits.

¶ 54 On September 19, 2007, Palmer wrote a letter to the Employment Relations Division, which stated, in part:

> The injury which is the subject of the Petition occurred November 19, 1983.
>
> . . . .
>
> Previous to the mill closure, however, Mr. McCrary's loss of earning capacity continued for about 13 years. As a consequence, his entire permanent partial disability entitlement is fully accrued. In fact, it was fully accrued in less than 10 years after his injury, over 3 years before the mill closed. Consequently, this is not a lump sum conversion of future benefits.
>
> . . . .
>
> The parties have agreed to settle for the maximum PPD award of $69,250 plus attorneys' fees of $17,312.50 pursuant to *Madill*[.] [T]he fee, which will be paid entirely by Liberty, is 25% of the settlement because Liberty accepted liability during the course of litigation.

¶ 55 Within the Petition for Settlement, signed by McCrary on September 17, 2007, and signed by Liberty on September 18, 2007, the parties agreed that the settlement concerned only the November 29, 1983, knee injury and that both parties "agree to assume the risk that the condition of the claimant [McCrary], as indicated by reasonable investigation to date, may be other than it appears or may change in the future."

¶ 56 On July 8, 2009, Palmer wrote Trisha Bowman of Liberty. That letter stated:

> I am writing to follow up on the telephone conversation which we had on April 24, 2009. At that time I reminded you that on June 17, 2009, Mr. McCrary would be 66 years old, that this is his retirement age, and that he becomes immediately entitled to 500 weeks of PPD benefits plus the associated attorney fees. Please promptly initiate these benefits and fees retroactive to that date.

¶ 57 On August 7, 2009, Palmer sent a follow-up to his July 8, 2009, letter. The August 7, 2009, letter sought PPD benefits and attorney fees for the back injury Mr. McCrary suffered on October 17, 1977. It stated, "[y]our letter is correct that on October 24, 2007, Mr. McCrary settled his claim for the knee injury he suffered. My letter does not concern the knee claim." The August 7, 2009, letter further stated: "Mr. McCrary's PPD rate for his 1977 back injury is $87.00 per week. This rate is [sic] multiplied by the 500 week entitlement results in a total of $43,500.00. The 25% fee on this sum is $10,875.00."

¶ 58 In its letter to McCrary of September 25, 2009, Liberty wrote:

> I have tried to set forth the facts reflected in our file and our legal analysis under the "Old Law" which leads to a conclusion that there is no liability for an additional 500 weeks of PPD on the 1977 back claim absent evidence that your client [Petitioner] was PTD based on the back claim which is not reflected in our records or in our pleadings.

¶ 59 On October 19, 2009, McCrary filed a Petition for Hearing[7] which stated in part:

> Petitioner contends he is entitled [to] wage loss benefits after his retirement age and that he is entitled to his attorney fees on those benefits paid and to be paid in the future. See *Madill v. State Fund*, 280 Mont. 450, 930 P.2d 665 (1997). Petitioner has advised Respondent of its obligation to pay the requested benefits and attorney's fees. Liberty disputes Petitioner's entitlement to the requested benefits and attorney fees.

In his prayer for relief, McCrary sought: wage-loss benefits, attorney fees, and costs.

¶ 60 On November 12, 2009, Liberty's Response to the Petition requesting PTD benefits as a result of the 1977 injury denies liability for the following reasons:

[7] WCC No. 2009-2376.

1. Res Judicata
    (i) Petitioner filed a Petition for Hearing on July 28, 1997, claiming he suffered a back injury on October 31, 1977 and a right knee injury on November 29, 1983.
    (ii) At ¶ 3 of the Petition Claimant alleged "Petitioner contends that due to the above described industrial injuries, he became permanently totally disabled as of November 13, 1996. Petitioner also contends that due to each industrial injury he suffered, he has accrued entitlement to 500 weeks of Partial Disability benefits at the maximum rate."
    (iii) Petitioner in his Responses to Respondents First and Second Discovery Requests in his answer to Interrogatory No. 1 claims permanent partial disability benefits accrued from the date of injury through the date of hearing for both the October 17, 1977, back injury and the November 29, 1983, knee injury. Petitioner contends that as the result of each injury he suffered at least permanent partial disability from and after the date of each injury and that by November 13, 1996, he became permanently totally disabled, due in part to either or both injuries.
    (iv) On July 12, 2007, in the first case this Court signed [its] Order Dismissing with Prejudice.
    (v) The Employment Relations Division approved a Petition for Settlement on claim number 2-84-04774-3, on November 29, 1983, knee claim, in the amount of $69,250 by an order dated September 27, 2007.
    (vi) The amount of the settlement represents 500 weeks of permanent partial disability benefits.
    (vii) In a letter from Liberty to Petitioner's attorney dated September 13, 1999, referencing claim number WC687-007043, the knee claim, Liberty acknowledged Petitioner's receipt of SSDI.
    (viii) Petitioner was rendered PTD based on his 1983 claim and 500 weeks of PTD benefits have been paid based on that claim under the law governing that claim.
    (ix) The petition combined with the settlement and the ERD petition make the current claim for additional PPD benefits *res judicata.*

[2]. Payment
    (i) Liberty incorporates by reference the above allegations under the defense of *res judicata*.

[3]. Release
    (i) Liberty incorporates by reference the above allegations under the defense of *res judicata*.

[4]. Laches

(i) Liberty's laches defense is based on *Young v. State Fund*, 2008 MTWCC [sic].

¶ 61 McCrary alleged that the PTD issue needs adjudication:

> [T]he pending petition for hearing concerns Petitioner's benefit entitlement after his retirement age. More specifically, June 17, 2009, which is Petitioner's 66th birthday. Petitioner claims entitlement to PPD and PTD benefits after his 66th birthday. Petitioner's entitlement includes lifetime permanent total disability benefits for his 1977 back injury. In addition, Petitioner's entitlement includes 500 weeks of PPD benefits for any period of time after his 66th birthday that the Court does not award PTD benefits, if any. Part or all of the PPD benefits for Petitioner's 1977 back injury accrued prior to November, 1997, which is the date he was deemed to have become PTD, i.e. over a decade prior to his 66th birthday. PPD benefits prior to Petitioner's 66th birthday are not at issue in this petition. Likewise, PPD benefits after Petitioner's 66th birthday are not at issue in this petition unless the court determines that Petitioner is not entitled to PTD benefits for some space of time after Petitioner's 66th birthday.

¶ 62 On January 29, 2010, Palmer wrote a letter to Jones. Referring to the 1977 back claim, Palmer stated:

> I am writing to follow up on our conversation of last week. At that time you asked that I propose a settlement based upon Mr. McCrary's life expectancy.
>
> Mr. McCrary's PPD benefits are accrued and therefore not contingent on his life expectancy. As we discussed, the accrual of his PPD benefits is based upon the Taylor, Sedlack and Beck line of cases. As the result of his back injury in October, 1977, Mr. McCrary lost earning capacity in the open labor market in excess of the statutory cap of $87.00 a week for 500 weeks. Because of the cap, his PPD entitlement is $43,500. As we agreed years ago, the law in effect at the time of Mr. McCrary's injury requires Liberty to pay Mr. McCrary's attorney fees associated with his claim. The Department of Labor has approved my fee agreement of 25% if we can resolve this soon. Otherwise the approved fee increases to 33% at some point prior to trial. A 25% fee is $10,875.
>
> Mr. McCrary's PTD benefits for this date of injury continue for his lifetime. This benefit begins with his 66th birthday on June 17, 2009, and continues for his life expectancy of 15.5 years. The benefit rate is $174.00 per week. 15.5 years multiplied by 52.14 weeks per year is 808.17 weeks. This

> calculates to a total of $140,621.58 PTD benefits. Attorney's fees are $35,155.40.
>
> The total of benefits and fees is $230,151.98. Mr. McCrary would settle his entire remaining indemnity entitlement for this sum with [the] understanding that his medical benefits remain open.

¶ 63 On June 23, 2010, the parties agreed on a Stipulation for Partial Entry of Judgment and Partial Dismissal with Prejudice. In pertinent part, the stipulation provides as follows:

> 3. That Liberty has agreed to pay Petitioner and his attorney $54,250 in PPD benefits based on the 1977 claim representing 500 weeks of PPD benefits totaling $43,500 and $10,750 in *Madill* attorney fees.
>
> 4. That the above sums are paid on a disputed liability basis.
>
> 5. That the parties recognize and acknowledge that Petitioner contends he is entitled to additional benefits and fees not specified above and agree Petitioner reserves from this Stipulation any other claim for benefits and any related fees, costs, and awards as may be allowed by law.
>
> . . . .
>
> 7. That any claim for PPD benefits, attorney fees and costs based on the 1977 claim be dismissed with prejudice but that the current petition remain on the Court's docket regarding any other claims [as] may be allowed by law.

¶ 64 On June 25, 2010, the parties filed a Stipulation for Partial Entry of Judgment and Partial Dismissal with Prejudice. This Court dismissed with prejudice all claims for PPD benefits, together with related attorney fees and costs based on McCrary's 1977 claim. McCrary reserved any claims for additional benefits and fees not specified in the Stipulation for Partial Entry of Judgment and Dismissal with Prejudice as may be allowed by law.[8]

¶ 65 On June 25, 2010, the Workers' Compensation Court entered its Order, Partial Entry of Judgment and Partial Dismissal with Prejudice. The Order states:

> That Petitioner reserves from this partial entry of judgment any claims for any additional benefits and fees not specified in the Stipulation for Partial Entry of Judgment and Dismissal with Prejudice as may be allowed by law.

[8] WCC No. 2009-2376.

IT IS HEREBY ORDERED the case is partially settled under the terms and conditions of the filed stipulation, that each party is responsible for his/its attorney fees and costs, and that the 1977 claim for PPD benefits is dismissed with prejudice.

¶ 66 To date, Liberty has not paid any benefit to which McCrary is not entitled.

¶ 67 At all times since November 12, 1996, McCrary has been and remains permanently totally disabled. McCrary's 1977 back injury is a significant contributing factor of this PTD, although Liberty contends that McCrary is equitably estopped from receiving PTD benefits as the result of his 1977 back injury.

¶ 68 McCrary alleges, subject to Liberty's affirmative defense of estoppel, pursuant to the law in effect at the time of McCrary's back injury, McCrary is entitled to PTD benefits after retirement age if his back injury is a cause of PTD. Specifically, the law in effect at the time of McCrary's back injury provides that "[t]otal permanent disability benefits shall be paid for the duration of the workers' total permanent disability."[9] If McCrary prevails in this action, Liberty will be entitled to a credit of $52,233 for all of the PTD benefits, as opposed to benefits which it did not designate PTD when paid, which it paid McCrary at the knee rate from November 13, 1996, to June 17, 2009.

¶ 69 Liberty disputes McCrary's entitlement to PTD benefits and further contends that McCrary is estopped on equitable grounds from receiving PTD benefits as the result of his 1977 back injury.

ANALYSIS AND DECISION

¶ 70 This case is governed by the 1977 and 1983 versions of the WCA since those were the laws in effect at the time of McCrary's injuries.[10]

¶ 71 Under the 1977 WCA — the law applicable to McCrary's 1977 back injury — PTD benefits were potentially payable for life. As § 92-702.1 R.C.M. 1947 (1977) states, "[t]otal permanent disability benefits shall be paid for the duration of the worker's total permanent disability."[11]

¶ 72 In 1981, the Montana Legislature changed this law. Under § 39-71-710, MCA (1983) — the law applicable to McCrary's knee injury — PTD benefits terminated upon a claimant's receipt of Social Security retirement benefits.

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[9] § 92-702.1 R.C.M. 1947 (1977) (later recodified at § 39-71-702(1), MCA (1979)).

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

[11] This provision was later recodified at § 39-71-702(1), MCA (1979).

¶ 73 McCrary argues that Liberty should have paid him PTD benefits under his 1977 claim and that he is now entitled to PTD benefits under his 1977 claim. He points to the fact that his "1977 back injury is a significant contributing factor of this PTD." He thus maintains that his back injury is the "actual cause" of his PTD under *Larson v. Cigna Ins. Co.*[12] He also points to the fact that he worked sheltered employment until his employer went out of business, and argues he is entitled to PTD benefits under his 1977 claim under *Dilling v. Buttrey Foods*, where the Montana Supreme Court held that sheltered work is not to be considered when determining whether a claimant is permanently totally disabled because it does not reflect actual earning capacity in the competitive job market.[13]

¶ 74 Liberty argues that McCrary is estopped from claiming, and waived his asserted right to, PTD benefits under his 1977 claim when he asserted he was totally disabled as a combination of both his back and knee injuries, demanded PTD benefits at the rate for his 1983 knee claim, acknowledged his PTD benefits would terminate on Social Security retirement, entered into a Stipulation for Entry of Judgment pursuant to which this Court entered judgment awarding him PTD benefits and his attorney fees at the rate for his 1983 knee claim, and accepted PTD benefits at that rate for nearly 13 years. Liberty maintains that since 1996, McCrary had several opportunities to ask for his PTD payments to be made at the rate applicable to the 1977 claim but did not do so. Because it paid all PTD benefits to which McCrary was entitled under his 1983 claim, Liberty argues it would be inequitable to allow McCrary to now change his position.

¶ 75 This Court has inherent equitable powers.[14] Such powers include the authority to consider and invoke equitable doctrines in awarding or denying a party's requested relief.[15] While equitable doctrines are often applied at the request of a claimant to bar an insurer's position regarding injury or benefits, they are also available to an insurer as a defense.[16]

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[12] 271 Mont. 98, 103, 894 P.2d 327, 330 (1995) (quoting *Shea v. Dep't of Labor & Indus.*, 529 P.2d 1131, 1134 (Wash. Ct. Appeals 1974) (stating, albeit in a different context than the case at bar, "When a significantly contributing cause of that inability [to work] is an industrial injury or disease, the workman is entitled to receive total disability benefits under the workmen's compensation act, regardless of the fact that other circumstances and conditions may also be considered contributing causes of that inability.").

[13] 251 Mont. 286, 291, 825 P.2d 1193, 1195 (1991) (quoting Larson's Workers' Compensation Desk Edition, Section 57.34 (1989)).

[14] *State Comp. Ins. Fund v. Chapman*, 267 Mont. 484, 489-90, 885 P.2d 407, 411 (1994) (recognizing the Workers' Compensation Court's "inherent equitable power" under certain circumstances).

[15] *See, e.g.*, *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 32, 359 Mont. 77, 246 P.3d 704, (equitable tolling); *Selley v. Liberty Northwest Ins. Corp*., 2000 MT 76, ¶¶ 9-29, 299 Mont. 127, 998 P.2d 156 (equitable estoppel); *Rasmussen v. Heebs Food Ctr*., 270 Mont. 492, 497, 893 P.2d 337, 340 (1995) (judicial admission/estoppel); *In re Workers' Comp. Death Benefits of Gaither*, 244 Mont. 383, 391, 797 P.2d 208, 213 (1990) (waiver).

[16] *See, e.g.*, *Sampson v. Broadway Yellow Cab Co*., 226 Mont. 273, 735 P.2d 298 (1987).

¶ 76 Waiver is an equitable doctrine which estops a party from asserting a strict legal right based on the party's representations or conduct. It applies when there is an intentional or voluntary relinquishment of a known right, claim, or privilege, which can be communicated through express declarations or through a course of conduct which manifests the intention to forego the benefit.[17] To establish waiver, the party asserting waiver must establish three elements: 1) that the other party knew of the existing right; 2) that the other party acted inconsistently with that right; and 3) that the party asserting waiver would suffer prejudice if the other party was nonetheless allowed to assert the existing right.[18]

¶ 77 The first element is met because the law on which McCrary relies was settled in November 1996, the time he now alleges he became permanently totally disabled. Because McCrary worked sheltered employment following his 1977 back injury to 1996, he arguably had the right under *Dilling* to PTD benefits under his 1977 claim at the rate of $174, which would have continued for his lifetime, per the parties' stipulation that McCrary continues to have a permanent total disability. McCrary, who at all times has been represented by an experienced workers' compensation attorney, is deemed to have known his rights under *Dilling* when his employment ended in 1996, as the Supreme Court decided *Dilling* in 1991.[19] He is also deemed to have known that he would have been entitled to PTD benefits for the duration of his permanent disability under his 1977 claim, which could be for life, but only until the receipt of Social Security retirement benefits under his 1983 claim.

¶ 78 Notwithstanding, the facts show that McCrary acted inconsistently with his current asserted right to PTD benefits under his 1977 claim in three ways. First, McCrary acted inconsistently by repeatedly demanding that Liberty pay PTD benefits under his 1983 claim and acknowledging that his PTD benefits would terminate at his receipt of Social Security retirement. In *Swartz v. State Compensation Ins. Fund*,[20] this Court ruled that a party can waive its rights under the WCA by taking an unequivocal position regarding the benefits at issue. In a letter, State Fund unequivocally told Swartz, who was permanently totally disabled, that she was entitled to an impairment award and paid her a $4,000 advance against it.[21] However, after this Court ruled in a different case that a permanently totally disabled claimant was not entitled to an impairment award under the law applicable

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[17] *Collection Bureau Servs., Inc. v. Morrow*, 2004 MT 84, ¶¶ 9-11, 320 Mont. 478, 87 P.3d 1024; *Sperry v. Mont. State Univ.*, 239 Mont. 25, 30, 778 P.2d 895, 898 (1989) (citations omitted); *Peters v. Am. Zurich Ins. Co.*, 2013 MTWCC 16, ¶ 23.

[18] *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 28, 353 Mont. 471, 221 P.3d 1184; *Peters*, ¶ 23.

[19] *See Wiard v. Liberty Northwest Ins. Corp*., 2003 MT 295, ¶¶ 20-25, 32, 318 Mont. 132, 79 P.3d 281 (holding that pro sé claimant who settled his claim with medicals open, but did not know of 60-month limitation in § 39-71-704(1)(d), MCA (1991), was not entitled to medical benefits because he was "presumed" to know the laws existing at the time he entered into the contract, which were part of the settlement, and because his ignorance of the law was no excuse).

[20] 2001 MTWCC 50.

[21] *Swartz*, ¶ 2.

to Swartz's claim, State Fund refused to pay Swartz an impairment award.[22] This Court concluded that State Fund had waived its right to contest payment of an impairment award, reasoning as follows:

> At the time of the letter the State Fund was aware that claimant was permanently totally disabled. Its statement that she was nonetheless entitled to an impairment award was unequivocal. It had the right to contest claimant's entitlement if it believed there was any possible ground to do so, or even to reserve judgment on the matter. It was apparently confident in its reading and did neither.[23]

¶ 79 This Court's reasoning in *Swartz* applies in the case at bar. When McCrary's sheltered job ended in 1996, McCrary could have relied upon *Dilling* and demanded PTD benefits under his 1977 claim. However, presumably because the rate for his 1983 claim was $103 per week higher, McCrary made several demands for PTD benefits under his 1983 claim. Each demand was inconsistent with his asserted right to have his PTD benefits calculated under 1977 law. And each was unequivocal. In 1987, McCrary's attorney asserted in letters to Liberty's attorney that McCrary was permanently totally disabled as a result of his injuries, that his knee injury aggravated his back, and that his "total disability rate" was $277. Likewise, in early 2007, McCrary's attorney wrote to Liberty's attorney asserting a payment gap between November 13, 1996 — the day after McCrary's employment ended — and October 5, 1997, and demanded PTD benefits and attorney fees based on a PTD rate of $277. McCrary also acknowledged that his PTD benefits would terminate upon receipt of Social Security retirement benefits. In a letter to Liberty dated March 23, 2007, McCrary's attorney asserted that McCrary was entitled to PTD benefits at the rate of $277 a week "through retirement age of age 66 which is June 17, 2009."

¶ 80 Second, McCrary acted inconsistently with his asserted right to PTD benefits under his 1977 claim by asserting in litigation before this Court that he was totally disabled due to a combination of his back and knee injuries and by asserting that his PTD rate was $277. In Montana, a party is estopped from taking a position in an action or proceeding that is inconsistent with the party's previous judicial declarations.[24] In *Birch v. Liberty Mutual Fire Ins. Co.*, this Court ruled that a claimant was estopped from seeking workers' compensation benefits, i.e., claiming she was an employee, where she had previously succeeded in resisting summary judgment in a tort case by asserting she was an independent contractor.[25]

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[22] *See Swartz*, ¶¶ 3-4.

[23] *Swartz*, ¶ 13.

[24] *Vogel v. Intercontinental Truck Body, Inc.*, 2006 MT 131, ¶ 10, 332 Mont. 322, 137 P.3d 573 (citing *Fiedler v. Fiedler*, 266 Mont. 133, 139, 879 P.2d 675, 679).

[25] 1998 MTWCC 18; *see also Rasmusson v. Heebs Food Center*, 270 Mont. 492, 496-97, 893 P.2d 337, 339-40 (1995) (holding that "based on principles of estoppel and judicial admissions" — which the court defined as "an

¶ 81 As in *Birch*, McCrary's position that he is entitled to PTD benefits under his 1977 claim is inconsistent with his position in prior litigation. McCrary has consistently asserted in litigation before this Court that he is permanently totally disabled due to a combination of his back and knee injuries, and that his claim for PTD benefits accrued under 1983 law. When McCrary commenced litigation in this Court in 1997, he set forth that he suffered industrial injuries to his back and knee, and alleged that, "due to the above described industrial injuries, he became permanently totally disabled as of November 13, 1996."[26] Likewise, in his response to an interrogatory, McCrary stated he was treating for his back and knee, stated that even if his employer had stayed in business, he "could not have continued this work in any event due to his back and knee symptoms and limitations," and explained he "could not have continued to tolerate the standing, walking, lifting, turning and other physical requirements of his job."[27]

¶ 82 Moreover, McCrary has asserted to this Court that his PTD rate was $277 and obtained a judgment pursuant to which his PTD benefits and attorney fees were based on the $277 rate. In June 2007, McCrary and Liberty entered into a Stipulation for Entry of Judgment under which Liberty agreed to pay McCrary "PTD benefits accrued or to be accrued between 2/7/07-6/17/09" in the exact amount that McCrary had previously demanded in PTD benefits for this time period, which he calculated at the $277 rate. Under the Stipulation for Entry of Judgment, Liberty also agreed to pay McCrary's attorney fees "on previously paid PTD benefits" in the amount of $24,526.98, the exact amount McCrary had previously demanded in attorney fees for his PTD benefits, which he calculated using the $277 rate. Pursuant to the Stipulation for Entry of Judgment, this Court entered a judgment under which Liberty paid McCrary PTD benefits at the $277 rate, and his attorney fees, the amount of which was 25% of the amount of his PTD benefits.

¶ 83 Third, McCrary acted inconsistently with his asserted right to PTD benefits under his 1977 claim by accepting PTD benefits for nearly 13 years at the $277 rate without objection. Although not a workers' compensation case, the Montana Supreme Court held in *Sperry v. Montana State University*, that accepting payments for years without any complaint as to the amount serves as a waiver of an alleged right to be paid a greater amount. Sperry started at MSU under the Montana 12 Contract, which allowed him paid leave for one quarter, every two years.[28] Thereafter, the Board of Regents decided not to continue with the Montana 12 Contract.[29] Thus, MSU increased his pay by 13% as "conversion compensation" for termination of his paid leave, and he worked under yearly

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express waiver made in court by a party or his attorney conceding the truth of an alleged fact" and stated could occur at any point in the litigation — the State Fund was bound by its counsel's trial representations that it was not relying on the defense of fraud).

[26] Fact No. 26; Parties' Stipulated Facts No. 30.

[27] Fact No. 21; Parties' Stipulated Facts No. 20.

[28] *Sperry*, 239 Mont. at 26-27, 778 P.2d at 896.

[29] *Id*.

contracts from 1967 to 1986, each of which contained his agreed-upon salary.[30] He took an early retirement, with an agreement to increase his salary for his final three years.[31] After he retired, Sperry alleged that he was entitled to "conversion compensation" of an additional 10% per year dating back to 1967 to compensate him for the termination of his paid leave, based upon his claim that his supervisor had agreed in 1967 that his "conversion compensation" would be 23%.[32] Notwithstanding, the Montana Supreme Court held that Sperry waived his alleged right to the additional 10% because he "signed his pay checks for nineteen years with knowledge of any increases and decreases, but without raising objection regarding the lack of any conversion compensation."[33]

¶ 84 Likewise, in a workers' compensation case, the Montana Supreme Court and this Court concluded that equity precluded a claimant from challenging his rate after receiving total disability benefits for 10 years. In *Sampson v. Broadway Yellow Cab Co.*, Sampson did not include tip income when first making a demand for disability benefits. State Fund paid him total disability benefits at the rate calculated using the four pay periods before his injury. Ten years later, he asserted that he received approximately $10 a day in tips and argued that State Fund should have to recalculate his rate and pay him back-due benefits. The Montana Supreme Court recognized that equitable considerations should estop a claimant from seeking additional PPD benefits based on undisclosed tip income he should have reported 10 years earlier.[34] Upon remand, this Court determined Sampson was precluded from relying upon the previously unreported tips to increase his benefit rate, noting that "it would be totally inequitable to now, 10 years after claimant filed his claim, for defendant to have to increase the rate and pay back-due benefits . . . ."[35]

¶ 85 McCrary's situation is analogous to *Sperry* and *Sampson.* McCrary accepted his PTD benefit at the rate for his 1983 injury for nearly 13 years without raising any objection; in fact, he demanded his PTD benefit under his 1983 claim and now stipulates that Liberty has not paid him any benefit to which he was not entitled. Equity does not allow McCrary to assert he was entitled to the PTD benefits under his 1983 claim that he accepted for nearly 13 years without objection, but now obtain PTD benefits under his 1977 claim.[36] McCrary's attempt to distinguish *Sperry* on the grounds that Sperry entered into a settlement agreement fails because, as noted above, McCrary also entered into a settlement under which he obtained his PTD benefit at the $277 rate, and attorney fees calculated as a percentage of his PTD benefit.

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[30] *Id*.

[31] *Sperry*, 239 Mont. at 27-28, 778 P.2d at 897.

[32] *Sperry*, 239 Mont. at 28, 29-30, 778 P.2d at 897-98.

[33] *Sperry*, 239 Mont. at 31, 778 P.2d at 899.

[34] *Sampson*, 226 Mont. at 277, 735 P.2d at 300.

[35] *Sampson v. Broadway Yellow Cab Co*., WCC No. 8512-3369, decided June 9, 1988, Vol. X, No. 588.

[36] And, to be sure, one cannot be doubly permanently totally disabled, i.e., McCrary is not entitled to PTD benefits under both claims, either concurrently or consecutively.

¶ 86 The final element of waiver is also satisfied; if McCrary is now allowed PTD benefits under his 1977 claim, Liberty will be prejudiced. Liberty paid PTD benefits to McCrary at the 1983 rate for nearly 13 years, paying McCrary a total of $52,233 more in PTD benefits than it would have paid under his 1977 claim. The parties have stipulated that if McCrary prevails in this case, Liberty will be entitled to a credit in that amount. Nevertheless, that credit would not eliminate the prejudice to Liberty in full. Liberty also paid McCrary's attorney fees, which were calculated as 25% of his PTD benefits, specifically a $3,333 payment in March 2007, and a $24,526.98 payment as part of the settlement the parties reached in June 2007. McCrary has asserted his attorney will be entitled to fees if he receives PTD benefits under his 1977 claim, but there is no agreement that Liberty will get a credit for what would be an overpayment of attorney fees. Furthermore, the amount set for Liberty's credit for the alleged overpayment of PTD benefits does not factor in the time-value-of money; i.e., McCrary has not agreed to pay any interest on the overpayment of benefits, which Liberty paid between 1997 and 2009. While it is not prejudicial for an insurer to pay benefits it should have paid since the inception of the claim,[37] it is prejudicial to require an insurer to make what would essentially be a long-term, interest-free loan, and to require it to pay extra attorney fees. In short, even if Liberty got credit for what would be considered an overpayment of PTD benefits, it would end up paying more than it would be required to pay under the 1977 WCA, which is prejudicial.

¶ 87 McCrary makes a handful of arguments in support of his position that he did not waive his right to PTD benefits under his 1977 claim. This Court is not persuaded.

¶ 88 McCrary first argues that under the statute — which states, "No agreement by an employee to waive any rights under this act for any injury to be received shall be valid"[38] — a claimant cannot waive his right to benefits under any circumstances. However, in *In re Gaither*, the Montana Supreme Court held that this language, by its plain terms, prohibits "a waiver before the injury is received."[39] The statute is inapplicable to representations and actions post-injury, which is what occurred in this case. Indeed, in *In re Gaither*, the Supreme Court held that under § 1-3-204, MCA — which provides in relevant part that "[a]ny person may waive the advantage of a law intended solely for that person's benefit" — personal rights to benefits under the WCA are capable of being waived.[40]

¶ 89 Second, McCrary argues that he was not capable of waiving his right to PTD benefits under his 1977 claim on the basis of his low intellectual functioning. However,

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[37] *Peters*, ¶ 27.

[38] § 92-803 R.C.M. 1947 (1977) (later recodified at § 39-71-409, MCA (1979) ("No agreement by an employee to waive any rights under this chapter for any injury to be received shall be valid.")).

[39] *In re Gaither*, 244 Mont. at 389, 797 P.2d at 212.

[40] *In re Gaither*, 244 Mont. at 389, 797 P.2d at 212 ("[t]he right to receive [workers' compensation] benefits was personal to [the surviving widow], and undoubtedly she had the right to waive or abandon the same"); *Shea v. North-Butte Mining Co.*, 55 Mont. 522, 179 P. 499 (1919) (holding that an employee may waive the advantage of any provision of law that was intended solely for his benefit as long as the waiver does not violate public policy).

neither diminished mental capacity nor borderline intellectual functioning is sufficient to establish incompetency; rather, the claimant must have a complete inability to understand.[41] The record does not establish McCrary's complete inability to understand. Moreover, at all times relevant to this inquiry, McCrary was represented by competent counsel.

¶ 90 Third, McCrary argues that Liberty cannot rely upon equity, speculating that Liberty has unclean hands because it may have agreed to pay him at the higher rate knowing his benefits would terminate at his Social Security retirement age, thereby saving it money in the long run. However, there is insufficient evidence for this Court to determine that Liberty had a nefarious motive when it paid McCrary PTD benefits under his 1983 claim, a decision pursuant to which it paid him, on average, more than $4,000 per year more than it would have paid him if it had paid him under his 1977 claim. Indeed, since McCrary was at all times represented by an attorney with substantial experience in workers' compensation law, it is equally likely that McCrary weighed his options in 1997 and determined that it was in his best interest to demand and take the proverbial bird in his hand rather than the two in the bush.

¶ 91 Fourth, McCrary asserts that Liberty is essentially arguing that the parties reached a settlement on his PTD claim for his 1977 injury, and that such a settlement is invalid under the statute, which states, in relevant part: "All settlements and compromises of compensation provided in this act are void without the approval of the division."[42] However, Liberty is not relying on the defense of accord and satisfaction; rather, it is relying on the equitable doctrine of waiver. In short, Liberty is not arguing that the parties reached a settlement over McCrary's asserted right to PTD benefits under his 1977 claim.

¶ 92 Fifth, McCrary argues that when he and Liberty settled disputes in 2007 and 2010, they agreed that benefits not expressly closed remained open, and that they specifically recognized that he was claiming an entitlement to additional benefits. Therefore, he argues, his entitlement to PTD benefits under the 1977 claim remains an open issue, to be decided solely on the medical and vocational evidence. However, the fact that the parties agreed to keep a claim for benefits open does not mean that Liberty could not raise defenses to that claim. And, in the 2007 settlement, McCrary obtained PTD benefits at the $277 rate, and his attorney fees, which were calculated on the PTD benefits paid at the $277 rate. Having entered into a settlement agreement which resulted in a Stipulation for Entry of Judgment pursuant to which this Court entered judgment under which McCrary received PTD benefits under his 1983 claim at the rate of $277, and his attorney fees which were calculated on a percentage of those benefits, McCrary cannot

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[41] *Hartung v. Mont. State Fund*, 2016 MTWCC 3, ¶¶ 61-68 (citing *Wilkes v. Estate of Wilkes*, 2001 MT 118, 305 Mont. 335, 27 P.3d 433). *Cf. Pearson v. Mont. Ins. Guar. Assoc.*, 2012 MTWCC 1 (ruling, based on an extensive factual record, that the settlement agreement should be reopened or set aside because the Petitioner was incompetent to enter into it).

[42] § 92-715 R.C.M. 1947 (1977) (later recodified at § 39-71-741, MCA (1979) ("All settlements and compromises of compensation provided in this chapter are void without the approval of the division.").

now obtain PTD benefits under his 1977 claim on the grounds that he has changed his mind about the cause of his total disability.[43] And, by the time McCrary and Liberty settled their dispute over PPD benefits for McCrary's 1977 claim in 2010, McCrary had already waived his alleged right to PTD benefits under that claim by his express declarations and course of conduct during the preceding 13 years.

¶ 93 Finally, McCrary argues that he should prevail under the liberal construction statute, which states, "Whenever this act or any part or section thereof is interpreted by a court, it shall be liberally construed by such court."[44] However, the only statute this Court has construed regards the invalidity of certain waivers,[45] which the Montana Supreme Court already interpreted in *In re Gaither*. This Court is bound to follow that interpretation, which is based on the plain language of the statute.[46]

¶ 94 In sum, McCrary's declarations and course of conduct demonstrate that he intentionally waived his asserted right to PTD benefits under his 1977 claim. Presumably because of the higher rate, he demanded and accepted PTD benefits under his 1983 claim, which Liberty paid. Accordingly, McCrary is not entitled to PTD benefits under his 1977 claim.

JUDGMENT

¶ 95 The equitable doctrine of waiver bars Petitioner from receiving PTD benefits after the age of retirement, as the result of his October 17, 1977, industrial injury to his back.

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

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[43] *See Narum v. Liberty Northwest Ins. Corp.*, 2008 MTWCC 30, ¶¶ 40-42 (ruling that an insurer could not accept a claim, settle it with medicals open with the understanding that claimant might need a hip replacement, thereby making causation no longer at issue, but then un-accept the claim because it changed its mind about whether it should have accepted liability in the first place).

[44] § 92-838 R.C.M. 1947 (1977) (later recodified at § 39-71-104, MCA (1979) ("Whenever this chapter or any part or section thereof is interpreted by a court, it shall be liberally construed by such court.")) (repealed 1987).

[45] *See* ¶ 88 and note 38 above.

[46] *See Thompson v. CIGNA*, 2000 MT 306, ¶ 25, 302 Mont. 399, 14 P.3d 1222 (explaining that while 1981 WCA provided that statutes were to be liberally construed in claimant's favor under § 39-71-104, MCA, "that does not entitle us to read into the Workers' Compensation Act terms that are not there.").

DATED this 2nd day of March, 2018.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Rex Palmer
Michael P. Heringer

Submitted: November 17, 2015