IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 17

WCC No. 2008-2174

PHILLIP PETERS

Petitioner

vs.

AMERICAN ZURICH INS. COMPANY

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PETITIONER'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING RETIREMENT ACCOUNT CONTRIBUTIONS, SOCIAL SECURITY OFFSETS AND RECOUPMENT, AND RECOUPMENT OF OVERPAYMENT

Summary: Respondent moved for summary judgment on the issues of Petitioner's entitlement to have his employer's 401(k) contributions included in his average weekly wage calculation, an offset and recoupment of past overpayment for Petitioner's son's receipt of auxiliary SSDI benefits, and recoupment of a $6,048.60 overpayment which Respondent erroneously made to Petitioner. Petitioner cross-motioned for summary judgment on the issues of the offset and recoupment of past overpayment for his son's auxiliary SSDI benefits and the $6,048.60 overpayment, arguing that Respondent is equitably estopped from claiming an offset of the auxiliary SSDI benefits and from recouping the overpayments.

Held: Respondent is entitled to summary judgment in its favor on these issues. Section 39-71-123(2)(b)(i), MCA, clearly bars the inclusion of employer contributions to 401(k) plans in average weekly wage calculations. On the remaining issues, Petitioner did not establish the sixth element of equitable estoppel in that he has not proven that allowing Respondent to recoup the overpayment would change Petitioner's position for the worse.

Topics:

Procedure: Motions: Generally. Where Petitioner failed to substantively address the merits of Respondent's argument, and where the Court found Respondent's argument to be supported by the case law and statutes which Respondent cited in its brief, the Court concluded that Respondent's motion was well-taken and granted its motion for summary judgment on the issue.

Equity: Equitable Estoppel. Where Respondent had a "quick and easy" way to discover that Petitioner's son was receiving auxiliary SSDI benefits, and where the evidence demonstrates that Petitioner did not attempt to conceal this information but provided it as soon as Respondent asked about it, the Court concluded that knowledge of the benefits could be imputed to the insurer and therefore Petitioner had fulfilled the second element of equitable estoppel (the circumstances must be such that knowledge of the facts is necessarily imputed to the party estopped).

Equity: Equitable Estoppel. Where there was both an overpayment and an underpayment of benefits, it would hardly be equitable to require Respondent to increase Petitioner's average weekly wage (AWW) by including his yearly bonus while not allowing it to recoup its overpayment. The Petitioner cannot satisfy the sixth element of equitable estoppel since he cannot demonstrate that he changed his position for the worse by spending the overpayment of benefits; the Respondent can recover its overpayment from the increase in Petitioner's AWW or from the lump-sum of back benefits.

¶ 1 Respondent American Zurich Ins. Company (Zurich) moves this Court for partial summary judgment in its favor on the issues of: Petitioner Phillip Peters' entitlement to a change in benefits based on his employer's contribution to a retirement account; Zurich's right to offset certain social security benefits and recoup overpayments related thereto; and Zurich's right to recoup an overpayment of $6,048.60.[1] Peters opposes

[1] Brief in Opposition to Peters' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Opening Brief), Docket Item No. 20.

Zurich's motion.[2] Peters has filed a cross-motion for summary judgment in his favor on the issues of the social security offset and the $6,048.60 overpayment.[3]

Undisputed Facts[4]

¶ 2 On January 18, 1999, Peters suffered an industrial injury while employed by Roscoe Steel. Zurich accepted liability for the claim and has paid medical, temporary total, permanent partial, and permanent total disability benefits.

¶ 3 On October 29, 2001, Peters' counsel informed Zurich that Peters was receiving social security disability insurance (SSDI) benefits. Peters' counsel did not inform Zurich that Peters' son was receiving auxiliary SSDI benefits.

¶ 4 On November 1, 2001, Zurich's claims adjuster wrote to Peters and his then-counsel and asserted Zurich's right to a SSDI offset of Peters' benefits. Peters consented to Zurich taking an "appropriate social security offset."

¶ 5 In early 2003, Jerry Driscoll, a union representative, contacted Zurich's claims adjuster Jim Kimmell. Driscoll erroneously convinced Kimmell that Peters' benefits had been underpaid and obtained a check for Peters in the amount of $6,048.60.

¶ 6 On April 23, 2007, Zurich learned that Peters' son had been receiving $480 per month in auxiliary SSDI benefits after it posed a discovery question to Peters which asked about the gross income of family members.

¶ 7 On June 13, 2007, Zurich informed Peters that it would not waive its entitlement to a social security overpayment.

¶ 8 On September 4, 2007, Zurich informed Peters that it was seeking $7,467.74 in overpayment of SSDI benefits in connection with Peters personally, and an additional $23,591.16 in connection with Peters' son's receipt of auxiliary SSDI benefits. Zurich's

---

[2] Petitioner's Combined Brief: 1. Supporting Petitioner's Motion for Summary Judgment on the Average Weekly Wage and 2. Opposing Respondent's Motion for Summary Judgment on Social Security Offset (Response Brief), Docket Item No. 27.

[3] Petitioner's Cross-Motion for Partial Summary Judgment on Social Security Offsets, Docket Item No. 30.

[4] Unless otherwise noted, taken from Zurich's Statement of Facts, Opening Brief, at 2-5. Peters raised objections to certain alleged uncontested facts Zurich set forth. See Response Brief at 15-16. However, I did not find any of the alleged uncontested facts to which Peters objected relevant to the issues before the Court and they are therefore not referred to in this Order.

adjuster began an additional weekly offset of Peters' benefits to recoup the overpayment.

¶ 9 On October 15, 2007, Peters' counsel wrote to Zurich and, pertinent to the present Order, demanded that Zurich waive the overpayments resulting from Peters' receipt of SSDI benefits and Peters' son's receipt of auxiliary SSDI benefits. Peters further demanded that Zurich increase Peters' average weekly wage to include Peters' employer's contribution to a retirement plan.

¶ 10 Zurich has refused to waive its right to the overpayments and has denied Peters' request to have his employer's contribution to a retirement plan included in his average weekly wage calculation. Zurich now moves the Court for summary judgment in its favor on these issues, as well as the issue of recoupment of the $6,048.60 check Kimmell tendered at Driscoll's request. Peters has filed a cross-motion for summary judgment on the issues of the SSDI and auxiliary SSDI offset and the recoupment of the $6,048.60 payment.

Analysis and Decision

¶ 11 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[5] The material facts necessary for disposition of the issues presented in this motion are undisputed.[6] Accordingly, these issues are appropriate for summary disposition.

¶ 12 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Peters' industrial accident.[7]

///

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

[6] Although Zurich and Peters style their respective motion and cross-motion as a motion (or cross-motion) for summary judgment, the Petition for Hearing contains additional issues not addressed in this motion, cross-motion, and briefs. Therefore, I consider the pending motion and cross-motion as motions for partial summary judgment.

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

Whether Peters is entitled to have his employer's 401(k) contributions included in his average weekly wage calculation.

¶ 13 Zurich contends that the increase Peters seeks in his average weekly wage to account for funds Peters' employer contributed to a 401(k) plan is barred by § 39-71-123(2)(b)(i), MCA, which states:

> (2) The term "wages" does not include any of the following:
> . . . .
> (b) the amount of the payment made by the employer for employees, if the payment was made for:
> (i) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code[.]

¶ 14 Zurich also draws the Court's attention to *Briese v. Ace Am. Ins. Co.*, in which I held that this statutory provision "could not be more clear or more plain" and that under § 39-71-123(2)(b)(i), MCA, injured workers are not entitled to increases in their average weekly wage calculation to account for funds an employer contributes to a 401(k) plan.[8] Zurich argues that the 401(k) funds which Peters seeks to have included in his average weekly wage calculation are barred from inclusion by statute.[9]

¶ 15 Peters has not addressed Zurich's argument regarding this issue. As this Court has previously held, failing to substantively address the merits of a motion within the body of a response brief does not constitute substantive opposition to the motion and this Court may deem the lack of responsiveness as an admission that the motion is well-taken.[10] In the case at hand, given Peters' failure to address Zurich's argument – particularly in light of the statutory and case law authority which Zurich has presented in support of its argument – I conclude that Zurich's motion for summary judgment on this issue is well-taken. Pursuant to § 39-71-123(2)(b)(i), MCA, I will not order Zurich to include the funds which Peters' employer contributed to a 401(k) plan in its calculation of Peters' average weekly wage. Summary judgment on this issue is granted in Zurich's favor.

---

[8] *Briese v. Ace Am. Ins. Co*., 2009 MTWCC 5, ¶ 11.

[9] Opening Brief at 13.

[10] *Shell v. Valor Ins. Co.*, 2006 MTWCC 12, ¶ 4.

Whether Zurich is entitled to offset Peters' benefits against Peters' son's receipt of auxiliary SSDI benefits.

¶ 16 Zurich argues that it is entitled to offset its payments to Peters against the auxiliary SSDI benefits received by Peters' son, and that it further is entitled to recoup overpayments it made during the time it was unaware that Peters' son had been receiving auxiliary SSDI benefits.[11] Zurich relies on *Flynn v. State Compen. Ins. Fund*, in which the Montana Supreme Court held that the insurer was entitled to suspend a portion of the claimant's benefits to recover an alleged overpayment caused by a delay in the acceptance of the claimant's social security claim.[12]

¶ 17 Furthermore, § 39-71-701, MCA, provides in pertinent part:

> (5) In cases in which it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week, which amount is to be calculated from the date of the disability social security entitlement.
>
> (6) If the claimant is awarded social security benefits, the insurer may, upon notification of the claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to recover any resulting overpayment of benefits. This subsection does not prevent a claimant and insurer from agreeing to a repayment plan.

¶ 18 Peters responds that Zurich is equitably estopped from asserting an offset against the auxiliary SSDI benefits received by Peters' son. Peters further relies on *Filcher v. Nat'l Union Fire Ins. Co.*, in which this Court held that an insurer was estopped from taking an offset against a claimant's social security benefits where the insurer failed to promptly assert its right to do so.[13]

¶ 19 The elements a party must meet for an estoppel claim are well-established. In *Selley v. Liberty Northwest Ins. Corp.*, the Montana Supreme Court stated:

---

[11] Opening Brief at 13-14.

[12] *Flynn v. State Compen. Ins. Fund*, 2002 MT 279, ¶ 24, 312 Mont. 410, 60 P.3d 397.

[13] *Filcher v. Nat'l Union Fire Ins. Co.*, 1996 MTWCC 30.

> As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. . . .
>
> [S]ix elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. A party must establish all six elements before the doctrine can be invoked. Equitable estoppel must be established by clear and convincing evidence.[14]

¶ 20 In *Filcher*, this Court noted that overpayments sometimes arise because social security benefits are often awarded retroactively or because insurers are not promptly notified of the awards. The Court held that the fact that an offset is not contemporaneously taken when biweekly benefits were paid does not preclude the insurer from recovering overpayments resulting from the failure to contemporaneously take the offset.[15]

¶ 21 In *Filcher*, the claimant received notice that he was entitled to SSDI benefits on February 9, 1992. Although Filcher believed that he promptly notified his insurer's third-party adjuster about his entitlement, the Court could not find as a matter of fact that he did so. Over the next three years, the insurer received some correspondence which put it on notice that Filcher was receiving social security benefits, but this correspondence misidentified the type of benefits as retirement, rather than disability, benefits. On one occasion, Filcher informed an employee of a "sister company" to the third-party adjuster

---

[14] *Selley v. Liberty Northwest Ins. Corp.*, 2000 MT 76, ¶¶ 9-10, 299 Mont. 127, 998 P.2d 156. (Citations omitted.)

[15] *Filcher* at 5-6.

that he was receiving disability benefits, and that employee passed the information on to the claims adjuster, who did not act upon the information. In May 1994, the third-party adjuster assigned a different adjuster to the claim. In January 1995, the claims adjuster learned from Filcher that he was receiving SSDI benefits. She immediately reviewed the claims file and notified Filcher that the insurer would offset his benefits and seek recoupment of the overpayment.[16]

¶ 22 Filcher then petitioned this Court to estop the insurer from offsetting his benefits and recouping the overpayment. The Court found that Filcher relied on his monthly workers' compensation benefits, that he spent the funds as he received them, and that he had had to borrow money from a family member after the insurer terminated the payments. The Court found that Filcher had established that, while receiving workers' compensation benefits, he had spent more money than he would have if he had known his benefits could be terminated. Therefore, the Court considered whether Filcher's reliance on his benefits precluded the insurer from taking the offset to which it would otherwise be entitled.[17]

¶ 23 Peters contends that a similar approach is warranted in his case. He argues that, like Filcher, he relied on the benefits he received and that Zurich's failure to timely take an offset should estop Zurich from asserting the offset and recouping overpayment at this time.[18]

¶ 24 The first element of equitable estoppel requires "the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts."[19] Peters argues that Zurich's conduct in paying his benefits – while taking an offset for Peters' SSDI benefits but not his son's auxiliary SSDI benefits – amounts to a representation that Peters' remaining benefits were "free and clear, with no warning that there was a reservation of rights or question as to the other benefits."[20] Peters argues that by taking an offset for his SSDI benefits while not taking an offset for his son's auxiliary SSDI benefits, Zurich's conduct amounted to a representation that it did not

---

[16] *Filcher* at 2-4.

[17] *Filcher* at 5.

[18] Response Brief at 11-12.

[19] *Selley*, ¶ 10.

[20] Response Brief at 14.

intend to take an offset for Peters' son's auxiliary SSDI benefits.[21] I find this to be the case and conclude that Peters' has fulfilled the first element of equitable estoppel.

¶ 25 The second element of equitable estoppel requires that "the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party."[22] It is undisputed that Zurich did not learn that Peters' son was receiving auxiliary SSDI benefits until 2007.[23] Therefore, Zurich cannot be said to have knowledge of the fact. However, Peters argues that knowledge of Peters' son's receipt of auxiliary SSDI benefits can be imputed to Zurich: Peters contends that Zurich knew that he had a minor child, "which would normally trigger auxiliary social security benefits."[24]

¶ 26 As is also appropriate in the present case, the Court in *Filcher* focused its attention on the second element of equitable estoppel: "the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party."[25] In *Filcher*, the Court found that the insurer did not have actual knowledge, and therefore stated that Filcher could only prevail if he could show that the circumstances were such that knowledge must nonetheless be imputed to the insurer. The Court noted that the more recent claims adjuster recognized that the previous information the insurer had received which categorized Filcher's social security benefits as retirement benefits may have been in error, and that she had a "quick and easy" way to determine if Filcher was receiving SSDI benefits. The Court found it "inexplicable" that the previous claims adjuster had not heeded the information provided to him by the "sister company" employee, had ignored several inquiry letters regarding the nature of Filcher's benefits, and had not noticed that Filcher was not old enough to be eligible for social security retirement benefits. The Court concluded that the first adjuster had had "ample information to put him on notice" that the letter which identified Filcher's social security benefits as retirement benefits may have been erroneous, and that the adjuster had a duty to investigate at the time he received that letter in May 1992. Therefore, the Court found that knowledge of Filcher's SSDI benefits could be imputed to the insurer and

---

[21] *Id*.

[22] *Selley*, ¶ 10.

[23] *See* ¶ 6, above.

[24] Response Brief at 14. (Emphasis removed.)

[25] *See* ¶ 21, above.

concluded that the second element – and ultimately all six elements – of equitable estoppel were met.[26]

¶ 27 In Peters' case, he argues that while Zurich may not have had actual knowledge that Peters' son was receiving auxiliary SSDI benefits, this knowledge should nonetheless be imputed to Zurich because Zurich knew that Peters was receiving SSDI benefits and that Peters had a minor child, which would normally trigger the receipt of auxiliary SSDI benefits. Peters argues that Zurich therefore should have realized that Peters' son was receiving auxiliary SSDI benefits.[27] In reply, Zurich argues only that *Filcher* is not applicable to Peters' case because Zurich did not know that Peters' son received auxiliary SSDI benefits "until right before it took affirmative action."[28]

¶ 28 Zurich, however, ignores the key analysis of *Filcher*, which considers under which circumstances such knowledge could be imputed to the insurer. Zurich makes no effort to distinguish the facts of the present case from *Filcher*. In *Filcher*, the Court found it noteworthy that that insurer had a "quick and easy" means to determine whether the claimant was receiving SSDI benefits. In the present case, Zurich likewise had a "quick and easy" way to discover that Peters' son was receiving auxiliary SSDI benefits: it simply asked Peters about his family members' gross income. Although Zurich argues that its failure to timely offset Peters' son's auxiliary SSDI benefits is due to Peters' failure to disclose the receipt of these benefits, the evidence presented is that Peters did disclose receipt of those benefits as soon as Zurich asked about them. And as set forth in *Filcher*, it is the insurer's duty to investigate the nature of a claimant's social security benefits.

¶ 29 In *Filcher*, the Court concluded that the insurer had a duty to investigate the nature of the claimant's social security benefits. The Court noted that the Montana Supreme Court had previously held that an insurer has a duty to investigate prior to applying a social security offset.[29] In *Filcher*, the Court further found it significant that the insurer had received "information implied in the three written inquiries" about Filcher's claim and that the insurer knew Filcher's age and should have realized Filcher

---

[26] *Filcher* at 7-8.

[27] Response Brief at 14.

[28] Reply in Support of Cross-Motion for Summary Judgment (Reply Brief), Docket Item No. 31, at 5.

[29] *Filcher* at 8. (Citation omitted.)

was not old enough to receive social security retirement benefits.[30] In the present case, Zurich received information that Peters himself received SSDI benefits, and Zurich does not dispute that it knew that Peters had a minor child. Just as the Court in Filcher concluded that the insurer should have deduced from Filcher's age that he was ineligible for social security retirement benefits, I conclude that in the present case, Zurich should have deduced that the minor child of a SSDI recipient was likely receiving auxiliary SSDI benefits. At a minimum, the existence of the minor child should have put Zurich on notice that additional investigation was warranted. Since I have found that knowledge of Peters' son's receipt of auxiliary SSDI benefits can be imputed to Zurich, I conclude that Peters has met the second element of equitable estoppel.

¶ 30 The third element of equitable estoppel requires that "the truth concerning these facts must be unknown to the other party at the time it was acted upon."[31] Peters contends that he meets this element because the truth about the offset – that Zurich could take an offset against his son's auxiliary SSDI benefits – was unknown to him.[32] Zurich does not dispute that this is the case. I therefore conclude Peters has met the third element of equitable estoppel.

¶ 31 The fourth element of equitable estoppel requires that "the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon."[33] Peters contends that the "conduct" is Zurich's failure to offset his son's auxiliary SSDI benefits, and argues that it was natural and probable that he would act upon Zurich's failure to take an offset against these benefits by believing that the funds were "free and clear" and therefore available for his family to use as they saw fit.[34] Again, Zurich makes no challenge to Peters' argument regarding this element and I conclude Peters has met the fourth element of equitable estoppel.

¶ 32 The fifth element of equitable estoppel requires that "the conduct must be relied upon by the other party and lead that party to act."[35] Peters contends that he relied

---

[30] *Id*.

[31] *Selley*, ¶ 10.

[32] Response Brief at 14.

[33] *Selley*, ¶ 10.

[34] Response Brief at 14.

[35] *Selley*, ¶ 10.

upon Zurich's conduct in failing to take an offset against his son's auxiliary SSDI benefits and that he was therefore led to act in spending those funds without any concern that the funds were encumbered in any way.[36] Zurich does not dispute Peters' allegations regarding the fifth element and I conclude Peters has fulfilled the fifth element of equitable estoppel.

¶ 33 The sixth element of equitable estoppel requires that "the other party must in fact act upon the conduct in such a manner as to change its position for the worse."[37] Regarding this element, Peters argues that he changed his position for the worse because he spent these funds without any concern that Zurich might someday assert an offset and recoupment. Peters contends that his family spent his son's auxiliary SSDI benefits and made no attempt to save any of these funds because they did not know there was any possibility that they would be called upon to repay this money. He therefore argues that he acted upon Zurich's failure to offset against these benefits in a manner which changes his position for the worse if Zurich is now allowed to offset and recoup against these benefits.[38]

¶ 34 In response, Zurich points to *Young v. Montana State Fund*[39] and argues that Peters "should not be allowed to pocket the money simply because he says he spent it."[40] Zurich argues that Peters made no effort to explain how he allegedly spent his son's auxiliary SSDI benefits and he therefore has not demonstrated that he acted in a manner which changed his position for the worse.[41]

¶ 35 In *Filcher*, this Court determined that the claimant had met the sixth element of equitable estoppel where he testified that he relied on his monthly workers' compensation benefits, he "spent the money as [he] received it," and he had to borrow money from a family member to cover his expenses from the time his benefits were terminated until his retirement benefits began. The Court noted that Filcher's testimony

---

[36] Response Brief at 15.

[37] *Selley*, ¶ 10.

[38] Response Brief at 15.

[39] *Young v. Montana State Fund*, 2008 MTWCC 2.

[40] Reply Brief at 4-5.

[41] Reply Brief at 6.

was unrebutted and therefore adopted it as fact.[42] In concluding that Filcher had met the sixth element of equitable estoppel, the Court noted that Filcher spent his benefits with the understanding that he was entitled to them without offset and, "He did not adjust his expenditures downward and save for the rainy day that was coming," thereby changing his position for the worse.[43] The Court also noted:

> Claimant, who was unrepresented by an attorney until his benefits were cut off, relied on his . . . benefits to meet his expenses. He did not provide a detailed explanation demonstrating that he spent more than he would have spent had he known that a cutoff was coming; however, individuals and families generally adjust their expenditures in rough tandem to their incomes. . . . [R]eductions in income generally compel reductions in expenditures. Claimant's testimony, as general as it was, is sufficient to establish that while receiving workers' compensation benefits he spent more than he would have had he known he was facing a benefit cut-off. Without speculating on what he might have saved had he known an offset was down the road, I do not doubt that he would have saved something for that rainy day.[44]

¶ 36 In *Young*, the claimant provided a detailed accounting of how he spent funds which an insurer had inadvertently overpaid him,[45] in contrast to the "general" testimony given by Filcher. In *Young*, I held that the sixth element of equitable estoppel requires a party to suffer a loss if he were ordered to repay the funds and in considering the claimant's accounting, reasoned:

> . . . I note that $3,500 of the award was not "spent," but rather placed into a savings account. Therefore, specifically regarding the $3,500 Petitioner placed in a savings account, I find that Petitioner has failed to satisfy the sixth element of estoppel.
>
> As noted above, the sixth element requires a party to suffer a loss if he were ordered to repay the funds. In reviewing Petitioner's accounting as to how the PPD award was disbursed, I find that many of the items which

---

[42] *Filcher* at 5.

[43] *Filcher* at 7.

[44] *Filcher* at 5.

[45] *Young*, ¶ 11.

> Petitioner paid out of the award are items which Petitioner owed regardless. For example, Petitioner would have had to make his car payments, medical bill payments, insurance payments, and house payments regardless of whether he received the PPD award. . . . However, I find that a few items on Petitioner's list were purchases that he may not otherwise have made if Respondent had not erroneously given him the PPD award. . . .[46]

I then itemized those purchases and held that the insurer was equitably estopped from asserting repayment for those particular purchases.[47]

¶ 37 While *Filcher* demonstrated that a detailed, itemized accounting for how the funds were spent is not necessary in every instance, as noted above, equitable estoppel must nonetheless be proven by clear and convincing evidence. In Filcher's case, his testimony regarding his use of the funds was undisputed. Based on Filcher's undisputed testimony, the Court concluded that Filcher would have reduced his expenditures and saved for "that rainy day."[48] In the present case, Zurich raises questions as to how – or if – Peters spent the funds. While the Court characterized Filcher's testimony as "general," Peters' assertions are even less informative than Filcher's. As I noted in *Young*, the sixth element requires the party to suffer a loss if he were ordered to repay the funds, and using the funds to pay bills which are owed regardless does not cause the party to suffer a loss. I further noted in *Young* that, in using the funds in question to pay bills he would have had to pay regardless of the overpayment, Young received what essentially amounted to "an interest-free loan." I also noted that the insurer was recouping the overpayment in "small increments over time."[49] Therefore, the burden on Young in repaying the overpayment was minimized.

¶ 38 As it pertains to the sixth element of equitable estoppel, this case occupies a unique landscape in that there has been both an underpayment and an overpayment of benefits, with both parties arguing that the other should be estopped from recouping the money owed. In an Order being issued concurrently in this case, I rejected Zurich's equitable estoppel argument and have ruled that Peters was entitled to have his annual

---

[46] *Young*, ¶¶ 34-35.

[47] Young, ¶ 35.

[48] *Filcher* at 5.

[49] *Young*, ¶ 35.

bonus included in his average weekly wage calculation.[50] Equitable estoppel is a doctrine grounded in equity. (Hence the name.) It would hardly be equitable for the Court to estop Zurich from recouping the overpayment of benefits while simultaneously allowing Peters to recoup the underpayment of benefits.

¶ 39 More to the point, in analyzing the sixth element in *Young*, I noted that it would not be onerous for the claimant if the insurer recouped the portion of the overpayment to which it was entitled in small increments over time. In the present case, I find it would not be onerous for Zurich to recoup the overpayment via an offset of the retroactive payment or – if necessary – a reduction of Peters' increased benefit resulting from the recalculation of his average weekly wage. While Peters argues that he changed his position for the worse by spending the overpayment when he could have saved it, Peters' position cannot be changed for the worse if the overpayment is recouped ***solely*** by reducing the amount of benefits he receives for the recalculation of his average weekly wage; an increase in benefits Peters could not have counted on as it was only speculative prior to my contemporaneous ruling in his favor on that issue. For these reasons, I conclude Peters has not proven that he has fulfilled the sixth element of equitable estoppel.

¶ 40 Since a party must establish all six elements of equitable estoppel for the doctrine to be invoked, I must conclude that Peters has not established equitable estoppel in the present matter. Therefore, Zurich is entitled to an offset against Peters' son's auxiliary SSDI benefits and it is further entitled to recoup the funds it overpaid during the time it did not invoke the offset. Zurich is entitled to summary judgment in its favor on this issue.

Whether Zurich is entitled to recoup the $6,048.60 Peters obtained via Driscoll.

¶ 41 Zurich further contends that it is entitled to recoup an overpayment of $6,048.60 which Peters obtained after Driscoll met with Kimmell regarding Peters' claim. Zurich argues that Peters has "unclean hands" regarding this overpayment and that Zurich is entitled to recoup these funds. Zurich further contends that it promptly notified Peters that these funds had been incorrectly disbursed and that Zurich intended to recoup

[50] *See Peters v. Am. Zurich Ins. Co.*, 2013 MTWCC 16, ¶ 42.

them.[51] However, I note that Zurich did not offer any facts as to when, or how, it notified Peters to this effect.[52]

¶ 42 Peters responds that Zurich is estopped from asserting a right to repayment of the "Driscoll funds." Peters contends that he spent the money "long ago" and that under *Filcher*, Zurich cannot demand repayment of these funds.[53] Peters further argues that, except as to the first element of equitable estoppel, the same analysis applies to this issue as applies to the issue of his son's auxiliary SSDI benefits.[54]

¶ 43 Assuming Peters is correct in that the same analysis applies here as applied above, I therefore first consider the problematic sixth element of equitable estoppel. In this instance, Peters contends that he changed his position for the worse by spending the funds and that his position would be changed for the worse if he were now forced to repay the funds.[55] For the same reasons as this argument failed regarding Peters' son's auxiliary SSDI benefits, it must fail here as well.[56] Zurich is entitled to summary judgment in its favor on this issue.

ORDER

¶ 44 Summary judgment is **GRANTED** in Respondent's favor on the issue of inclusion of Petitioner's employer's 401(k) contributions in the average weekly wage calculation.

¶ 45 Summary judgment is **GRANTED** in Respondent's favor on the issue of an offset and recoupment of any overpayment made regarding Petitioner's son's auxiliary SSDI benefits.

¶ 46 Petitioner's cross-motion for summary judgment on the issue of Respondent's offset and recoupment of any overpayment made regarding Petitioner's son's auxiliary SSDI benefits is **DENIED**.

---

[51] Opening Brief at 14.

[52] *See* Opening Brief at 2-5.

[53] Response Brief at 11.

[54] Response Brief at 13.

[55] *Id*.

[56] See ¶¶ 37-40, *Supra*.

¶ 47 Summary judgment is **GRANTED** in Respondent's favor on the issue of the $6,048.60 overpayment.

¶ 48 Petitioner's cross-motion for summary judgment is **DENIED** regarding the $6,048.60 overpayment.

DATED in Helena, Montana, this 31st day of July, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Chris J. Ragar
Joe C. Maynard

Submitted: June 3, 2010 & July 8, 2010