IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 4

WCC No. 2008-2174

PHILLIP PETERS

Petitioner

vs.

AMERICAN ZURICH INS. COMPANY

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTIONS TO AMEND AND/OR RECONSIDER

Summary: Petitioner moved for amendment or reconsideration of decisions reached by the Court in two underlying Orders regarding portions of his claims against Respondent. Respondent objected to Petitioner's motions, arguing that the Court correctly resolved the pertinent issues.

Held: Petitioner's motions are denied. In one instance, Petitioner has requested that the Court reach the same result it reached in the underlying decision, and therefore no "reconsideration" is necessary. In the other instance, Petitioner addresses only one of the two reasons as to why the Court reached its decision and fails to support his argument with any citation to case law or statute.

Topics:

> **Procedure: Reconsideration.** Since the Court's rules do not provide for a reply brief to a motion for reconsideration, and since Petitioner did not move for leave to file additional briefing, the Court did not consider Petitioner's reply brief when ruling upon Petitioner's motion for reconsideration.
>
> **Evidence: Exhibits: Generally.** Where Petitioner argued for reconsideration, contending that the Court had overlooked evidence presented, the Court held that Petitioner had the burden of informing the Court as to how the evidence was critical to his case. Instead, the Court found, Petitioner attached a document as an exhibit without any context,

and in which the Court saw no meaning or significance without explanation.

Remedies: Generally. Where the Court ruled in Petitioner's favor that he was entitled to have his annual bonus included in his average weekly wage calculation regardless of whether it was paid in the last four pay periods, the Court found no further relief to offer Petitioner when Petitioner asked the Court to reconsider its decision on this issue.

Wages: Average Weekly Wage. On reconsideration, the Court reaffirmed its previous holding that where Petitioner received a bonus on an annual basis, the amount of the bonus should be included in his average weekly wage over the time period of a year.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Citing *Sturchio v. Wausau Underwriters Ins. Co.*, 2007 MT 311, ¶ 15, the Court rejected Petitioner's argument that the average weekly wage of a single employment may be divided into "components" and calculated under both § 39-71-123(3)(a) and –(3)(b), MCA.

Wages: Average Weekly Wage. Citing *Sturchio v. Wausau Underwriters Ins. Co.*, 2007 MT 311, ¶ 15, the Court rejected Petitioner's argument that the average weekly wage of a single employment may be divided into "components" and calculated under both § 39-71-123(3)(a) and (3)(b), MCA.

Proof: Burden of Proof: Generally. The Court rejected Petitioner's argument that he should be excused from meeting his burden of proof because of "an extremely severe mental and emotional injury" where Petitioner cited no legal authority in support of his position.

Benefits: Overpayment and Recoupment. The Court found that recoupment of an overpayment would not be onerous if Respondent recouped the overpayment solely by reducing the increased benefits Petitioner would receive as a result of this Court's contemporaneous ruling in his favor on another issue.

¶ 1 Petitioner Phillip Peters moves this Court to amend and/or reconsider the Orders this Court issued regarding various summary judgment motions filed by the parties.[1] Respondent American Zurich Ins. Company (Zurich) opposes Peters' motions.[2] Although Peters filed a reply brief, I did not consider it, as reply briefs to motions for reconsideration and motions to amend are not allowed under this Court's rules and Peters did not move for leave to file additional briefing.[3]

Order Regarding Average Weekly Wage

¶ 2 Peters raises two issues pertaining to the Order Regarding Average Weekly Wage. Peters contends that the Court erred in ¶ 14 when it stated, "[T]here is no indication from the evidence presented that the bonus was paid during the four pay periods preceding Peters' industrial injury . . . ." Peters also contends that the Court erred in ¶ 21 where it found that the parties did not present any argument regarding what time period to use in calculating Peters' average weekly wage.[4]

¶ 3 Peters argues that the Court overlooked evidence he presented in support of the motion underlying the Order Regarding Average Weekly Wage. Peters contends that he did present evidence indicating that his bonus was paid during the four pay periods preceding his industrial injury. Specifically, Peters points to an attached affidavit from his counsel which included a statement that Peters had received a bonus "immediately preceding" his industrial injury.[5] Peters further points to an exhibit attached to his counsel's affidavit which he describes as:

> Exhibit one to the Affidavit, states the name of Phillip Peters, shows the amount of $2,000.05, states "Roscoe Steel Department #1" and notes "Current quarter number one." The document notes **"Run date 1/11/99"**

[1] Petitioner's Motion to Amend (and/or Reconsider) the July 31, 2013[,] Orders and Brief in Support (Opening Brief), Docket Item No. 42. *See Peters v. American Zurich Ins. Co.*, 2013 MTWCC 16 (Order Regarding Average Weekly Wage) and *Peters v. American Zurich Ins. Co.*, 2013 MTWCC 17 (Order Regarding Offsets and Overpayments).

[2] Brief Opposing Petitioner's Motion to Amend and/or Reconsider (Response Brief), Docket Item No. 44.

[3] ARM 24.5.337 and 24.5.344. *See Montana Mun. Ins. Auth. v. Roche*, 2007 MTWCC 59, ¶ 2, n.4.

[4] Opening Brief at 1.

[5] Affidavit of Chris J. Ragar appended to Petitioner's Motion for Summary Judgment on Average Weekly Wage and Brief in Support, Docket Item No. 17, at 2.

> **and a "w/e date 1/13/99",** with a handwritten notation, **"Bonus"** and the date (partially obscured by a punch hole) **"1/13/99".**[6] [sic]

¶ 4 If in fact this exhibit in any way advanced Peters' case, its significance was lost on me. Counsel provided this inscrutable document[7] as an exhibit to an attachment with absolutely no context. I was unable to decipher or find any meaning in this document on its own, and Peters failed to provide any guidance as to the alleged significance of this document in his supporting briefs. Over the years, I have repeatedly reminded counsel who practice in this Court that if they have a critical piece of evidence, it may behoove them to point out to me exactly ***how*** this evidence is critical. Counsel may have photos that conclusively prove that his client's metallic mint green 1964 Buick Skylark convertible could not possibly have made the tire marks driving away from the Sac-O-Suds;[8] but if there is an error committed in the Court's failure to appreciate the significance of these photos, the error is counsel's presumption that I am an expert on tire marks.

¶ 5 More to the point, even if this exhibit indeed proves that Peters' bonus was paid during the four pay periods preceding his industrial injury, there is still no relief to grant in response to Peters' motion. In the underlying motions, I ruled in Peters' favor regarding the inclusion of the bonus in his average weekly wage calculation regardless of whether it was paid in the last four pay periods. I therefore am at a loss as to what other relief may be available to Peters, except perhaps to say: "Okay, you really ***really*** win on this issue."

¶ 6 Peters further contends the Court erred in its finding at ¶ 21 of the Order Regarding Average Weekly Wage. Specifically, Peters takes exception to the Court's statement, "with no argument from the parties suggesting the time period to use." Peters alleges that this statement is erroneous and contends that he presented argument regarding the time period to use. Citing to the underlying briefing, Peters offers the following:

> At page 2, paragraphs 8 and 10, Petitioner's March 9, 2010 brief stated:
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> > " A $ 2,000.00 yearly bonus (divided by 52 weeks in a year) would increase the A.w.w. by $ 38.46 per week. (Id., para 10)
> > ….

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[6] Opening Brief at 2. (Emphasis Peters'.)

[7] *See* Ex. 1, attached hereto.

[8] Reference, *My Cousin Vinny*, 20th Century Fox, 1992.

> From July 22, 1998 through January 18, 1999 (25.57 weeks), Mr. Peters earned 60 hours of vacation pay at $ 10.00 per hour….$ 600.00 divided by 25.57 weeks equals $ 23.46 per week, which should be included in the A.W.W.…."

At page 4, Petitioner's May 21, 2010 brief stated:

> "The $ 2,000.00 bonus divided by approximately 50 weeks in a year increases the a.w.w. by approximately $ 40.00 per week; and an increase of approximately $26.66 in the benefit rate." [sic][9]

¶ 7 In reviewing the language from the briefs Peters draws to my attention, I do not find where my previous finding that the parties presented no ***argument*** is incorrect. Even assuming that the statements Peters emphasizes above are true and accurate, none of them constitute an ***argument***. Although it may be – and indeed is – true that 2,000 divided by 50 equals 40, simply stating this fact is not an ***argument*** which would persuade the Court to use 50 weeks when prorating an ***annual*** bonus. Peters offered several examples as to how the math would work out in this matter under certain scenarios; however, he offered no analysis nor set forth any reasons the Court should use a time period of 25.57, 50, or 52 weeks.

¶ 8 Moreover, Peters additionally argues that the Court's statement at ¶ 21 is in error because, "[Peters] specified what time period to use. The bonus should be pro rated over a year (because paid on an annual basis)." [sic][10] However, the entire sentence in ¶ 21 of my Order from which Peters extracts the language which he contends is in error, reads as follows:

> Since Peters received his bonus on an annual basis, and with no argument from the parties suggesting the time period to use, ***I conclude that Peters' average weekly wage should be calculated pursuant to § 39-71-123(3)(b), MCA, using a time period of one year prior to his date of injury***.[11]

¶ 9 So, notwithstanding Peters' quibble with the Court deeming his lack of argument to be a lack of argument, I nonetheless have already reached the result which Peters

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[9] Opening Brief at 4.

[10] *Id*.

[11] Order Regarding Average Weekly Wage, ¶ 21. (Emphasis added.)

now urges me to reach yet again. Since Peters and the Court are apparently in agreement that Peters' bonus was paid on an annual basis, and therefore should be included in his average weekly wage over the time period of a year, I conclude Peters is not entitled to reconsideration or amendment regarding ¶ 21 of the Order Regarding Average Weekly Wage.

¶ 10 In addition to the errors Peters alleges within the findings in this Order, Peters argues that the Court erred in concluding that his average weekly wage should be calculated pursuant to § 39-71-123(3)(b), MCA.[12] Peters argues:

> 1) only the bonus component of wages should be pro rated over one year, 2) the hourly pay component (of "wages") should be based on the last four pay periods, [and] 3) the hourly pay component should not be averaged over a full year. [sic][13]

¶ 11 Peters argues that the Court erred because nothing requires that all components of his wages be calculated in the same way. He contends that the Court should only calculate his bonus in that manner, while using a different approach for the other components of his wages.[14] Peters offers no legal support – either via the language of § 39-71-123, MCA, or by citation to any case law – for this argument. I find nothing in my reading of § 39-71-123(3), MCA, which suggests this approach is contemplated under the statute. Moreover, the Montana Supreme Court has specifically held to the contrary. In *Sturchio v. Wausau Underwriters Ins. Co.*, the claimant held several concurrent employment positions at the time of her industrial injury.[15] While the claimant maintained that each of her concurrent employments should be considered individually and that her average weekly wage should be determined pursuant to the statutory method best suited to each employment's circumstances, the insurer argued that only one calculation method could be used for all concurrent employments and that different methods could not be used for each individual employment.[16] The Montana Supreme Court affirmed this Court in rejecting the insurer's position, holding, in pertinent part:

> ***Though we agree that only one of the methods described in subsection (3) can ultimately apply to individual employments*****,** the statutory language fails to support Wausau's position . . . . A reasonable

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[12] Opening Brief at 5.

[13] *Id.*

[14] *Id.*

[15] 2007 MT 311, ¶ 4, 340 Mont. 141, 172 P.3d 1260.

[16] *Id.*, ¶ 6.

> reading of § 39-71-123, MCA (2003), in its entirety, supports the WCC's interpretation that the calculation methods contained in subsection (3) should apply to each individual employment comprising the concurrent employments in the same manner they apply to individual employments . . . .[17]

¶ 12 In light of the case law to the contrary, I reject Peters' argument that the average weekly wage of a single employment may be divided into "components" and calculated under both § 39-71-123(3)(a), MCA, and § 39-71-123(3)(b), MCA. Therefore, his motion for reconsideration or amendment of this issue is denied.

Order Regarding Offsets and Overpayments

¶ 13 Peters further moves that this Court should amend or reconsider its Order Regarding Offsets and Overpayments. Specifically, Peters contends that the Court should reconsider its conclusion that he failed to satisfy the sixth element of equitable estoppel and should instead conclude that Zurich is estopped from recouping an overpayment it made to Peters.[18]

¶ 14 In the Order at issue, I concluded that Peters had not met the sixth element of equitable estoppel because he had not proven that he acted upon Zurich's conduct so as to change his position for the worse. In reaching this conclusion, I noted two factors which impacted my decision: (1) Peters provided no information as to how, or whether, he spent the overpayment; and (2) it would not be onerous for Zurich to recoup the overpayment via an offset. I explained:

> 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[, which is] 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.[19]

¶ 15 Peters now argues that he should not be required to provide an accounting of how, or if, he spent the funds because he suffers from "an extremely severe mental and

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[17] *Id.*, ¶ 15. (Emphasis added.)

[18] Opening Brief at 2.

[19] Order Regarding Offsets and Overpayments, ¶ 39.

emotional injury."[20] Peters cites no statutory or case law to support his contention that a movant should be excused from meeting his burden of proof because of mental or emotional injuries. However, even if I were to accept this argument at face value in the absence of any citation to legal authority, it does not change the outcome of my ruling. Peters' lack of information is only one of two reasons for which I concluded that he had not met the sixth element of equitable estoppel. In his motion to amend or reconsider, he does not address the fact that I found that recoupment of the overpayment would not be onerous if Zurich recouped the overpayment solely by reducing the increased benefits Peters would receive as a result of my contemporaneous ruling in his favor regarding the inclusion of his annual bonus in his average weekly wage. Because Peters has failed to address this part of my ruling, I conclude he has not proven that he is entitled to amendment or reconsideration of my Order Regarding Offsets and Overpayments. His motion is therefore denied.

ORDER

¶ 16 Petitioner's motion to amend is **DENIED**.

¶ 17 Petitioner's motion for reconsideration is **DENIED**.

DATED in Helena, Montana, this 11th day of February, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Chris J. Ragar
Joe C. Maynard
Submitted: August 29, 2013

[20] Opening Brief at 9. (Emphasis removed.)