

VOLUME NO. 40

OPINION NO. 38

STATE AVERAGE WEEKLY WAGE INCREASES - Effect of state average weekly wage increases on existing workers' compensation awards;

WORKERS' COMPENSATION - Effect of state average weekly wage increases on existing workers' compensation awards;

MONTANA CODE ANNOTATED - Sections 39-71-116(1), 39-71-701(1), 39-71-702(1), 39-71-703(1).

HELD: The amount of an existing benefit award under sections 39-71-701(1), 39-71-702(1) or 39-71-703(1), MCA, is unaffected by increases in the state's average weekly wage level.

9 March 1984

Robert R. Ringwood
Legislative Auditor
State Capitol
Helena MT 59620

Dear Mr. Ringwood:

You have requested my opinion on the following question:

Should the benefit payments under sections 39-71-701(1), 39-71-702(1) and 39-71-703(1), MCA, to an individual whose wages times two-thirds exceed the state's average weekly wage, as to sections 39-71-701(1) and 39-71-702(1), and one-half the state's average weekly wage, as to section 39-71-703(1), MCA, be increased when the state's average weekly wage increases?

A response to your question involves an analysis of pertinent statutory provisions, Montana Supreme Court decisions, and administrative practice.

Sections 39-71-701(1), 39-71-702(1), and 39-71-703(1), MCA, read:

39-71-701. Compensation for injuries producing temporary total disability. (1) Weekly compensation benefits for injury producing total temporary disability shall be $66\frac{2}{3}\%$ of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed \$110 beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total temporary disability benefits shall be paid for the duration of the worker's temporary disability.

39-71-702. Compensation for injuries producing total permanent disability. (1) Weekly compensation benefits for injury producing total permanent disability shall be $66\frac{2}{3}\%$ of the wages received at the time of the injury. The maximum weekly compensation

benefits shall not exceed the state's average weekly wage. Total permanent disability benefits shall be paid for the duration of the worker's total permanent disability.

39-71-703. Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be $66\frac{2}{3}\%$ of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

The term "average weekly wage" is defined in section 39-71-116(1), MCA, as "the mean weekly earnings of all employees under covered employment, as defined and established annually by the Montana department of labor and industry" and is redetermined by the Workers' Compensation Division to the nearest whole dollar prior to July 1 of each year.

The clear purpose of the "average weekly wage" limitation in sections 39-71-701(1), 39-71-702(1), and 39-71-703(1), MCA, is to restrict the compensation rate which otherwise would be applicable if a claimant's wage rate at the time of injury constituted the only determinative factor. The amount of compensation to which a claimant is entitled is thus calculated once and with initial reference only to his wage rate at the time of injury; the "average weekly wage" amount serves merely as a limiting factor and under no circumstances increases the amount of compensation to which a claimant is entitled.

While the Montana Supreme Court has never addressed the precise question raised here, it has determined in several decisions that both entitlement to and the amount of benefits available under the Workers' Compensation Act are determined at the time of injury. Thus, in Yurkovich v. Industrial Accident Board, 132 Mont. 77, 86, 314 P.2d 866, 872 (1957), the Court modified a district court's award of permanent partial disability compensation calculated on the basis of a benefits schedule first effective five and one-half months after the involved injury.

The act and schedule in force at the time of the accident, and applicable herein, was section 1 of chapter 38, Laws of 1953. It is an accepted canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made that such was the intention of the legislature.... [Citations omitted.]

Yurkovich is consistent with later Montana decisions. Gaffney v. Industrial Accident Board, 133 Mont. 448, 453, 324 P.2d 1063, 1065 (1958) (rejecting contention that amount of compensation paid should include increases in the compensation rate provided by subsequent statutory amendments); Profitt v. Watts Construction Company, 143 Mont. 210, 215, 387 P.2d 703, 705 (1963) (holding statutory amendments effective subsequent to date of injury inapplicable); Simons v. Bennett Lumber Company, 146 Mont. 129, 133, 404 P.2d 505, 507 (1965) (refusing to allow claimant to benefit from compensation increase effective after date of injury); Hutchinson v. General Host Corporation, 178 Mont. 81, 89, 582 P.2d 1203, 1208 (1978) (holding that district court erred in determining temporary total compensation amounts on basis of provision enacted after date of injury); Iverson v. Argonaut Insurance Company, 39 St. Rptr. 1040, 1041, 645 P.2d 1366, 1367 (1982) (beneficiary's right to lump sum death payment governed by provision in effect at time of spouse's death and not by subsequent statutory amendment). Yurkovich and the subsequent decisions, therefore, indicate that modifications in the State's average weekly wage amount do not affect prior-determined compensation rates.

It must be further noted that "[t]he general rule is that benefit increases, whether automatic under escalator clauses or legislatively enacted, are not retroactive, and that the benefit level in effect at the time of the injury controls." 2 A. Larson, Workmen's Compensation Law § 60.50 (1982). Other jurisdictions have accordingly held that periodic increases in the maximum amount of disability compensation available under workmen's compensation provisions comparable to sections 39-71-701(1), 39-71-702(1), and 39-71-703(1), MCA, do not ordinarily serve to increase already established compensation rates. See, e.g., Cates v. T.I.M.E., DC, Inc., 513 S.W.2d 508, 510 (Tenn. 1974); Frick v. Nevada Industrial Commission, 95 Nev. 263, 592

P.2d 942, 948 (1979). Although Cates and Frick dealt with legislative modification of specific minimum dollar amounts, the reasoning of those decisions is fully analogous: Unless otherwise specifically indicated, increases in compensation levels act only prospectively. Similarly, to conclude that the Montana Legislature intended annual modifications in the minimum amounts available under sections 39-71-701(1), 39-71-702(1), and 39-71-703(1), MCA, to affect existing compensation awards requires substantial textual support from the provisions of the Workers' Compensation Act; such textual support is not present. See generally § 1-2-109, MCA; City of Harlem v. State Highway Commission, 149 Mont. 281, 284-85, 425 P.2d 718, 720 (1967); Penrod v. Hoskinson, 170 Mont. 277, 281, 552 P.2d 325, 327 (1976); State v. Marsh, 175 Mont. 461, 469, 575 P.2d 38, 44 (1978).

Last, I note the long-established administrative practice of the Workers' Compensation Division, Department of Labor and Industry, under which increases in the state average weekly wage rate have not been applied to existing compensation awards under sections 39-71-701(1), 39-71-702(1), or 39-71-703(1), MCA. That practice developed by the agency responsible for the administration of the Workers' Compensation Act is entitled to substantial deference. Bartels v. Miles City, 145 Mont. 116, 122, 399 P.2d 768, 771 (1965); Montana Consumer Counsel v. Public Service Commission, 168 Mont. 130, 187, 541 P.2d 770, 774 (1975) (per curiam). Consequently, on the basis of the statutory language, pertinent decisions, and administrative practice, your question must be answered negatively.

THEREFORE, IT IS MY OPINION:

The amount of an existing benefit award under sections 39-71-701(1), 39-71-702(1), or 39-71-703(1), MCA, is unaffected by increases in the state's average weekly wage level.

Very truly yours,

MIKE GREELY
Attorney General