

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**WCC No. 9210-6609**

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**BRUCE BARNES**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**BLUE RANGE MINING COMPANY**

**Employer.**

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**ORDER ADOPTING FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF  
HEARING EXAMINER AND ENTERING JUDGMENT**

The above-entitled matter was duly heard by Court-appointed Hearing Examiner, ROBERT J. CAMPBELL who conducted the hearing, considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

Thereupon, the Court considered the record in the above-captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED the Judgment is to be entered as follows:

**JUDGMENT**

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant has presented credible evidence relating his present jaw symptoms to his August 14, 1989 industrial injury. If claimant consents to the recommended surgery such medical bills are payable by the respondent.
3. Claimant is not entitled to additional temporary total disability benefits after his August 14, 1989 industrial injury.

4. Claimant is entitled to reasonable costs but not attorney fees pursuant to section 39-71-612, MCA.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 26th day of January, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
AND PROPOSED JUDGMENT**

1. Claimant filed a petition to resolve a dispute between himself and the insurer under Title 39, Chapter 71, Part 29, MCA.

2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by

notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. Section 2-4-601, MCA.

3. A pretrial conference was conducted on January 13, 1993, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on May 10, 1993. Pertinent parts of the Pretrial Order are as follows:

#### C. STATEMENT OF JURISDICTION

This Court has jurisdiction of the above-captioned matter pursuant to Section 39-71-2905, MCA.

...

#### E. UNCONTESTED FACTS

1. Claimant sustained an injury as a result of an industrial accident on August 14, 1989 in that he sustained a laceration to his chin.

2. At the time of the injury the employer under Compensation Plan No. III and its insurer was State Compensation Mutual Insurance Fund.

4. The parties have proposed and the Court adopts the following issues to be decided by the Court:

1. Whether claimant is entitled to medical benefits in addition to those medical benefits paid by the State Fund through Claim #3-90-01518-8 (DOA 8/14/89).

2. Whether Claimant is entitled to initiation of temporary total disability benefits for any period after the August 14, 1989 industrial injury and, if so, at what rate and for what period(s).

3. Whether claimant is entitled to attorney's fees or costs.

5. The trial in this matter was held on May 10, 1993, in Butte, Montana, before Hearing Examiner Robert J. Campbell. Claimant, Bruce Barnes, his wife Marie Barnes and his father Charles Barnes were sworn and testified. The depositions of the claimant and Dr. Philip J. Milanovich were presented to the Court and admitted into evidence. Exhibit Nos. 1 through 4 and Exhibit Nos. 6 and 7 were admitted into evidence without objection. Exhibit Nos. 5 and 9 were admitted by stipulation. Exhibit No. 8 was withdrawn by respondent. Upon filing the Proposed Findings of Fact, Conclusions of Law and Reply Briefs, this matter was deemed submitted on November 29, 1993.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the

witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Proposed Judgment:

#### FINDINGS OF FACT

1. The uncontested facts are found as fact and adopted as facts and adopted herein.

#### Claimant

2. At the time of trial, claimant was 25 years of age (DOB 6/13/68). He has a ninth grade education and is working on obtaining his GED. (Tr. at 47-48.)

3. Claimant's work history includes welding, fabricating work, ranching and he has experience with irrigation pipe. He has worked in a pork processing plant in Minnesota and six months at the Salt Lake International Airport until he was fired for failing to close a safety door. He worked for a tire company in Butte and Town Pump until he was fired on November 24, 1991, for misappropriation of money.

#### Claim for Compensation

4. During the summer of 1987, claimant moved from Butte to Lewistown, Montana, to work for Blue Range Mining doing underground mining work.

5. Claimant was injured on August 3, 1989, when he struck his middle finger on a corner of a fan. After medical treatment to suture his finger, claimant returned to work the next day. (Tr. at 52.)

6. On August 14, 1989, claimant fell approximately 10 feet through rails at the mine catching himself by his chin. The only part of his body described as injured at the time was his chin.

#### Medical Evidence

7. The day of the injury claimant was seen by Dr. Berbert in Lewistown. Dr. Berbert noted that he complained of pain in his jaw, but "otherwise no discomfort."

8. In his deposition and at trial, claimant testified that he told Dr. Berbert that on the day of the injury he was extremely sore in the back, shoulders, neck and could not open his mouth. (Tr. at 56-57.) No such statements appear in the records of Dr. Berbert.

9. Claimant was given a release to return to work with no restrictions and returned to full-time employment the next day, August 15, 1989. Three days later he was terminated for safety reasons. (Tr. at 59.)

#### Subsequent Employment

10. In February of 1990, claimant went to work for Quality Pork in Minnesota. In his employment application, he represented he was not suffering from any disability. (Tr. at 99-

100.) When claimant injured his finger and needed medical attention he saw Dr. Lillie and Dr. Janolo. Respondent, State Fund paid for the medical expenses for treatment and paid temporary total disability benefits for the resulting recovery. (Tr. at 99-101.)

11. On March 27, 1990, claimant told Dr. Janolo that he had been healthy all his life with no known significant medical problems. (Tr. at 101; Dep. Ex. No. 3 of Barnes Dep.)

12. After returning to work at Quality Pork, claimant alleged an injury to his low back. Quality Pork questioned whether a work-related injury occurred and claimant filed suit which was settled. (Tr. at 102.)

13. Claimant returned to Montana and received unemployment benefits from August to December 1990. Each week he indicated he was physically able and available to work.

14. Claimant worked for the Salt Lake Airport for a short time then returned to Butte to work for Town Pump. On November 24, 1991 he was fired for misappropriating funds. (Tr. at 108.)

#### Evaluation by Dr. Milanovich

15. Claimant was first evaluated by Dr. Milanovich on June 4, 1991, almost two years after the accident at Blue Range Mining. Dr. Milanovich could make no comment regarding claimant's condition at the time of claimant's August 14, 1989 industrial injury. Based upon the statements of claimant, Dr. Milanovich identified symptoms of difficulty in claimant opening his mouth, pain in his jaw, neck and shoulders as related to his August 14, 1989 injury. (Tr. at 9-10.)

16. Following his evaluation of claimant, Dr. Milanovich performed a substantial amount of dental work which was paid by respondent as medical benefits. Dr. Milanovich referred claimant to a Butte oral surgeon, Dr. Paul G. Sims for an evaluation and possible surgery.

#### Evaluation by Dr. Booth

17. The State Fund sent claimant for an evaluation by Dr. James L. Booth on January 27, 1992. After reading the report, the parties agreed that the State Fund would pay for orthodontic work to be done by Dr. Philip Milanovich and the physical therapy related to claimant's sprained capsular ligaments.

#### Evaluation by Dr. Sims

18. Dr. Sims examined the claimant on March 30, 1992, on a referral from Dr. Milanovich. After reviewing the medical records and examining the claimant, Dr. Sims prescribed surgical advancement of claimant's mandible. (Ex. No. 9 at 16.)

19. Respondent, State Fund refused to authorize the surgery on the grounds that the surgery is not related to his August 14, 1989 injury. Claimant has not decided if he wants the surgery recommended by Dr. Sims. (Tr. at 73.)

20. Dr. Sims relied upon the examinations and reports of Dr. Milanovich who concluded that claimant's August 14, 1989 industrial injury aggravated claimant's need for surgery on his mandible. No report or deposition was submitted to refute the testimony of Dr. Milanovich or the surgery recommended by Dr. Sims. The Court finds that the treatment by Dr. Milanovich and the surgery recommended by Dr. Sims is related to claimant's August 14, 1989 industrial injury.

21. Claimant is entitled to reasonable costs but not attorney fees since a legitimate dispute existed between the parties. The evidence does not support a finding of an unreasonable refusal to pay benefits that would entitle claimant to an award of attorney fees.

#### CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. Claimant has presented credible evidence relating his present jaw symptoms to his August 14, 1989 industrial injury. If claimant consents to the recommended surgery such medical bills are payable by the respondent.

When claimant fell 10 feet through the rails at the Blue Ridge Mine on August 14, 1989, he struck his chin and the injury was accepted as compensable.

At the time of claimant's injury, medical benefits payable as the result of such injury were defined as follows:

**39-71-704. Payment of medical, hospital, and related services-fee schedules and hospital rates.** (1) In addition to the compensation provided by this chapter and as an additional benefit separate and apart from compensation, the following must be furnished:

(a) After the happening of the injury, the insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained.

Claimant has the burden of proving his case by a preponderance of the credible medical evidence. *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 598 P.2d 1099 (1979); *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973). To discharge this burden, the claimant must, by a preponderance of the probative, credible evidence, establish that the truth of the proposition is more probable than not. *Hackney v. Liberty Mutual Fire Ins. Co.*, WCC No. 8405-2445 (March 11, 1985).

The deposition of claimant's treating orthodontist, Dr. Philip J. Milanovich, presents the best evidence of claimant's current condition. The examinations and treatments were thoroughly presented in the reports and the deposition of Dr. Milanovich.

Respondent argues that the opinions of Dr. Milanovich should not be accepted because of the prior instances in which claimant's actions have been less than responsible. The Court finds the opinions of Dr. Milanovich are supported by objective findings and believes his opinions to be credible to a reasonable degree of medical certainty.

Dr. Milanovich concluded that claimant's industrial injury on August 14, 1989, in which he fell at the mine striking his chin, did aggravate his jaw by causing sprained capsular ligaments.

In the course of treatment, Dr. Milanovich referred the claimant to Dr. Paul G. Sims for evaluation. Dr. Sims recommended surgery on claimant's mandible which the Court finds reasonable and results from claimant's August 14, 1989 injury. Any additional temporary total disability benefits after the surgery are payable at \$200.50 per week.

3. Claimant is not entitled to additional temporary total disability benefits after his August 14, 1989 industrial injury.

The requirement for receiving temporary total disability benefits at the time of claimant's August 14, 1989 injury are set forth in section 39-71-701, MCA (1989).

**39-71-701. Compensation for temporary total disability.** (1) Subject to the limitation in 39-71-736, a worker is eligible for temporary total disability benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing.

Claimant failed to meet either of the two requirements, (1) that he suffered a total loss of wages resulting from the injury and, (2) that he had not reached maximum healing. Maximum healing was reached on August 17, 1989 when claimant was given a full release to return to work.

The record is clear that claimant reached maximum healing three days after the August 14, 1989, injury and went on to full-time employment on at least four additional occasions.

If claimant chooses the surgery and he meets the requirements of temporary total disability benefits following the surgery, he would be entitled to temporary total disability benefits.

4. Claimant is entitled to reasonable costs but not attorney fees pursuant to section 39-71-612, MCA.

#### PROPOSED JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Claimant has presented credible evidence relating his present jaw symptoms to his August 14, 1989 industrial injury. If claimant consents to the recommended surgery such medical bills are payable by the respondent.
3. Claimant is not entitled to temporary total disability benefits after his August 14, 1989 industrial injury.
4. Claimant is entitled to reasonable costs but not attorney fees pursuant to section 39-71-612, MCA.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Proposed Judgment.

DATED in Helena, Montana, this 26th day of January, 1994.

(SEAL)

/s/ Robert J. Campbell  
ROBERT J. CAMPBELL  
Hearing Examiner

c: Mr. John C. Doubek  
Mr. Oliver H. Goe