

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 50

WCC No. 9307-6827

WAYNE BLAYLOCK

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE OF PITTSBURGH

Respondent/Insurer for

MANVILLE CORPORATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on November 1, 1993, in Billings, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Wayne Blaylock(claimant), was present and represented by Mr. Patrick R. Sheehy. Respondent, National Union Fire Insurance of Pittsburgh (National),was represented by Mr. Kelly M. Wills.

Claimant testified on his own behalf. Leslie M. Kissler, Kenneth James Gauthier and John Thompson were sworn and testified. Exhibits 1 through 9 were admitted into evidence by stipulation. No depositions were offered. The matter at issue in this case is claimant's entitlement, if any, to permanent partial disability benefits under sections 39-71-705 to 708, MCA (1983).

Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is currently 34 years old. He is married and has three children. He graduated from high school but has no post-highschool education.
2. After graduation from high school, claimant worked for approximately a year as a construction and concrete worker; as a member of a seismograph crew; and as worker on a "glue crew" making wood laminated beams.

3. In 1979 claimant began work at the Stillwater Mine. He began as a core driller's helper. His duties included breaking core drilling rods loose and replacing them with empty rods, loading 50-100 pound sacks of chemicals into agitators, and removing cores. Claimant rapidly advanced to the position of core driller. Both jobs involved surface drilling.

4. On October 13, 1983, while working as a core driller, claimant's left arm and hand were pulled into the spinning fins of an alternator fan. Claimant was able to extract his arm and hand by pulling them back through the alternator fan. He suffered a gash approximately three inches wide and four inches long extending from his fingers to his wrist, exposing bones and veins. A less serious gash extended approximately six inches up his arm from the wrist.

5. At the time of the industrial accident, the operator of the Stillwater Mine, and claimant's employer, was Manville Corporation (Manville). Manville was enrolled under Compensation Plan 2 of the Workers' Compensation Act, and was insured by National Union Fire Insurance Company of Pittsburgh. National accepted liability for the claim and has paid compensation and medical benefits.

6. Claimant was initially treated with pain medication and suturing of his wounds.

7. On October 17, 1983, claimant was examined by Dr. Frankel, a hand specialist, who thereafter treated claimant. On January 16, 1984, Dr. Frankel performed a surgical procedure known as az-plasty, a scar excision, and a tendon graft on claimant's wound. Dr. Frankel recommended daily exercises to increase claimant's wrist flexion. Claimant performed the exercises, which were painful.

8. Dr. Frankel released claimant to work with no restrictions on April 23, 1984. The doctor performed an impairment evaluation on July 17, 1984, and assigned claimant a permanent partial impairment rating of the left upper extremity at 8 percent. This rating was based on a 5 percent rating for loss of function/mobility (of about 25 degrees on the left wrist) and 3 percent for "recurrent discomfort about dorsum of wrist from dorsal capsular scarring." (Ex. 2 at 3).

9. Claimant returned to work in late April 1984. In July of 1984 he resumed his duties as a core driller.

10. Claimant returned to Dr. Frankel on October 10, 1985, to determine if anything further could be done about the pain he was experiencing in his arm, and also to see if his impairment rating could be increased. In his medical note of October 10, 1985, Dr. Frankel stated: The patient came in to see if his impairment rating could be revised. His wrist still does cause him some discomfort but he is using it in a reasonably normal manner. His motion is exactly as it was. He does not have full palmar flexion; he has lost about 20 degrees of full palmar flexion . . . I told him I can see no legitimate reason for modifying his

impairment rating up. If he feels he does have trouble at any time in the future, I would be more than happy to check him again. (Ex. 2 at 2.)

11. In 1986, when a new company took over operation of the Stillwater Mine, claimant took an underground mining job as a diamond driller, a position which is very similar to that of a core driller but which is performed underground rather than on the surface. Claimant has worked in that position since then and is the senior diamond driller at the Stillwater Mine.

12. National paid claimant permanent partial disability benefits of \$138.50 per week commencing July 17, 1984 and ending October 11, 1985. The benefits amounted to 63 and 5/7 weeks, or \$8,824.48. Claimant asserts that he is entitled to additional benefits. National claims that he has already been overpaid.

13. According to representations made by counsel at the commencement of trial, an offer of settlement was made by National prior to trial. The amount of the offer was not disclosed.

14. Claimant testified that underground working conditions affect his wrist and arm. The temperature underground hovers around 60 degrees, although it is colder in areas with more ventilation. The drill used by claimant uses water during operation; claimant is thereby exposed to a cold water spray.

15. Over the past two years the claimant has switched off working as a driller's helper one day and as a driller the next. Claimant testified that his work as a driller's helper is more difficult because he is required to constantly use his wrist and hand.

16. Claimant has lost sensation in the back of his hand. He has aching and soreness in his wrist. The cold and damp conditions appear to contribute to that aching and stiffness. As he testified at trial, "At the beginning of the shift I can use my wrist for awhile, and halfway through the wrist -- I can tell I can -- it's automatic that I favor it, because I just hang onto it [the pipe] and turn with one hand. I don't use both wrists anymore." (Tr. at 55-56). He favors his left wrist, and has lost some flexion of that wrist.

17. Claimant also experiences some soreness and problems with his left hand and wrist when not working.

18. Claimant did not seek further medical care for his wrist and arm until October 2, 1992, approximately seven years after last seeing Dr. Frankel. In the meantime Dr. Frankel had retired, so on October 2, 1992, claimant saw Dr. Richard Lewallen regarding soreness in his hand. Dr. Lewallen noted that claimant had a little tenderness to palpation over the dorsal aspect of his hand, but did not find any other problems. Claimant's range of motion was satisfactory. Dr. Lewallen also noted a little calcification dorsally on claimant's left hand. He suggested anti-inflammatory medication such as Advil, and advised claimant that there was nothing surgically he could do for him. (Ex. 2 at 1).

19. Claimant's current position is the highest paid job he has ever held. Although there was no evidence of claimant's earnings at the time of his injury, claimant's earnings for the years 1987 to 1993 were as follows:

DATE EARNINGS

1987 \$28,150.91

1988 \$37,392.08

1989 \$35,845.83

1990 \$43,208.72

1991 \$38,244.68

1992 \$43,099.31

1993 \$42,335.00

Tr. at 135.

20. Claimant's position as a diamond driller pays \$13.92 an hour. Another position within the mine, Miner I, pays \$14.45 an hour. Claimant testified that he was offered the Miner I position in 1987, but that he turned it down because he believed that a piece of equipment required in the job, called a jackleg drill, would aggravate his wrist condition. The jackleg is a vibrating machine. Claimant's testimony was credible and is consistent with his existing wrist complaints. I find that claimant could have worked as a Miner I prior to his injury but would find it difficult, if not impossible, to perform the duties of a Miner I with his present wrist condition.

21. Both drillers and miners are paid bonuses based on production. Claimant argues that his actual wage loss is greater than the absolute difference in hourly wages between the driller and miner positions because he would earn more in bonuses as a miner than he does as a driller. Bonuses, however, are highly individualistic and vary from miner to miner. I am not persuaded that claimant would have earned more in bonuses as a miner than as a driller. I therefore find that claimant has an actual wage loss of \$.53 an hour, which represents the hourly wage difference between diamond driller and miner.

22. Claimant also testified that he did not know if he could return to his former job on a glue crew because the air gun used by crew members is a vibrating tool similar to a jackleg. He also testified that he would not want to return to his previous job as a construction laborer because of the heavy lifting involved. However, claimant held these jobs for only a short period of time following his graduation from high school, and there was no evidence to indicate that the jobs paid as much or more than claimant's present job.

23. Claimant is entitled to a 25 percent disability award under sections 39-71-705 and 708, MCA, amounting to 125 weeks of benefits at \$138.50 per week, totaling \$17,312.50. However, National is entitled to offset permanent partial disability benefits already paid (\$8,824.48).

24. National's defense in this matter was not unreasonable. Claimant is not entitled to a penalty.

CONCLUSIONS OF LAW

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

2. Claimant seeks additional permanent partial disability benefits under section 39-71-705 through 708, MCA. Claimant was injured in October of 1983, and the statutes in effect on the date of his injury must be applied in determining the benefits due him. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). The benefits provided under old-law sections 39-71-705 through 708, MCA, are commonly referred to as "indemnity benefits," and are based on the schedule of injuries set forth in section 39-71-705, MCA. The schedule sets forth the maximum number of weeks of benefits payable on account of the loss of limbs and other body parts. Benefits for less than total loss of a scheduled part shall be proportionate to loss or loss of use." Sec. 39-71-706(1), MCA. The purpose of the indemnity benefits is to indemnify the injured worker for possible loss of future earning capacity, rather than any "actual" loss of earning capacity. *Stuker v. Stuker Ranch*, 251 Mont. 96, 98, 833 P.2d 105 (1991). Indemnity benefits are computed by determining a percentage disability and multiplying that percentage times 500 weeks, subject to the maximum number of weeks the schedule provides for the part of the body injured. *McDanold v. B.N. Transport, Inc.*, 208 Mont. 300, 470, 679 P.2d 1188 (1984). Disability cannot be calculated with mathematical precision. In determining disability, the Court must consider the claimant's age, education, work experience, pain and disability, actual wage loss, and possible loss of future earning capacity. *Hartman v. National Union Fire Insurance*, 236 Mont. 141, 145, 768 P.2d 1380 (1989) (citations omitted); accord, *Holton v. F.H. Stoltze Land and Lumber Co.*, 195 Mont. 263, 271, 637 P.2d 10 (1981). The Court has evaluated each of the factors, as follows:

EDUCATION: Claimant has a high school education. This education is suited to the type of work claimant has chosen. Claimant did not persuade the Court that he is incapable of further education.

WORK HISTORY: Except for the first year following graduation from high school, claimant has worked only as a driller or a driller's helper. It appears that despite pain and stiffness in his wrist he is able to continue his present job.

PAIN & DISABILITY: Claimant has pain and stiffness in his hand and wrist. Nonetheless, he has been able to satisfactorily perform his job for the past nine

years. He was given an impairment rating of 8 percent to the extremity, which is 5 percent to the whole person, but his physicians have not placed any restrictions on his work or activities.

ACTUAL WAGE LOSS: Claimant is working in a position equivalent to the position he held at the time of his injury, and is earning more money than he made before his injury. However, his injury precludes him from employment as a Miner I, a job which pays more and which is within claimant's ordinary job market. But for the injury, he could have sought and obtained a job as a Miner I, which pays \$.53 an hour more than his present job.

FUTURE WAGE LOSS: Claimant cannot work as a Miner I due to his injury. He also testified that he could not work as a construction laborer or a glue laminator, jobs he held for short periods of time following his graduation from high school. However, these jobs are remote in time and were short-lived; he also did not present evidence indicating that they paid as much as or more than his current position. It also appears that he will continue working in his present position.

AGE: Claimant is 34. He has approximately 28 years left to work. His young age has its advantages and disadvantages. "The longer the person is on the labor market the more economic losses he will suffer, all other factors being equal. However, a younger individual who can be retrained or has transferable skills will be able to ameliorate some of his post-injury earning losses in the long run through additional training." *Carroll v. Wells Fargo Armored Serv.*, 245 Mont. 495, 500, 802 P.2d 618 (1990). In *Stuker v. Stuker Ranch*, 251 Mont. 96, 822 P.2d 105 (1991), the Supreme Court regarded the claimant's age as being an advantage: "Stuker is a young man of thirty-six and can obtain additional training by his own choice." (*Id.* at 100). In this case, the Court considers age a neutral factor. Based on the evidence presented at trial it appears that claimant's injury is not a major impediment to his continued employment as a driller. It also does not appear that he is incapable of further education should his injury become an impediment.

Determination

Having considered all factors, I find that claimant is 25 percent disabled. He is therefore entitled to 125 weeks of disability benefits at his maximum permanent partial disability rate of \$138.50. National has paid \$8,824.48 in permanent partial disability benefits, and is entitled to an offset in that amount. Claimant is therefore entitled to a net amount of \$8,488.02.

Further discussion

I have reviewed recent decisions of this Court to determine if the award made herein is consistent with those prior decisions. I am persuaded that it is.

In *Hobby v. Buttrey Foods*, WCC No. 9102-6071 (January 6, 1992), the Court assigned the claimant a 20 percent disability rating. The claimant in that case was 22 years old. Although she had limited work experience as a cashier and sales clerk, she had completed high school and a year of college, and was considered capable of retraining. She had an impairment rating of 5 percent of the whole person. She experienced neck, shoulder, and headache pain when she exceeded her capacity for lifting, driving or sitting, which the Court found would limit the number of positions she could work in upon becoming a nurse, which was her desired vocation. The Court assigned a 20 percent disability rating.

In *Atkinson v. State Mutual Ins. Fund*, WCC No. 9207-6532 (April 6, 1993), the Court assigned the claimant, who was 52 years old, a 45 percent disability rating. At the time of his injury the claimant was a car salesman. The Court considered claimant's education: a GED and several classes dealing in communications, and 200 college credits but no degree from Eastern Montana College with a major in psychology and a business minor. Claimant had worked in a recruiting office and managed a warehouse while in military service. He also had ten years as a credit supervisor, and been self-employed as a part-owner/salesman. Claimant had a 25 percent impairment rating and suffered pain on a constant basis. He had an actual wage loss of \$4.49 an hour based on a \$13.14 per hour pre-injury wage. The Court attributed 25 percent of claimant's total disability to his impairment rating and the remaining 20 percent to the other factors.

In *Maisel v. Liberty NW Ins. Corp.*, WCC No. 9111-6293 (September 4, 1992), the Court awarded the claimant, who was 40 years old, a 5 percent disability rating. Claimant had a high school diploma and one quarter of business college. After her injury she found a higher paying, secure job. She was released to work with no physical restrictions, although she suffered occasional low-back pain. Since she earned more in her post-injury job, the Court found no actual wage loss.

In *Stuker v. SCMIF*, 251 Mont. 96, 822 P.2d 105 (1991), WCC No. 8912-5635 (January 29, 1991), the Court assigned the claimant a disability rating of 15 percent. The claimant was a 36 year old farm worker with a high school education. He suffered a biceps injury. His pre-injury work record was limited by choice, and the Court would not speculate to what his pre-injury earning capacity was. However, if claimant worked any one of the five jobs he performed after his injury, he would have earned more than he had during any of the five years preceding his injury. Claimant had a 12 percent impairment rating. When he exceeded his lifting capacity, he experienced pain in his arm that lasted 30 minutes or less. He was precluded from performing heavy labor. The Court noted that claimant was young enough to obtain additional training.

In *Dvorak v. Glendeen Nursing Home*, WCC No. 8812-5020 (April 13, 1990), the Court assigned the claimant, who was 47 years old, a 20 percent disability rating. She had a 5 percent impairment rating and suffered back pain in her daily activities. After participating

in a two year retraining program, she earned \$402.80/week compared to the \$4.25/hour she earned as a nurse's aide at the time of her injury. She had a GED, and had nurse's aide training and medical laboratory technician training. She had formerly worked as a waitress, factory worker, head housekeeper and nurse's aide. Her physicians had imposed a 10 pound lifting restriction.

In *Johnson v. ASARCO, Inc*, WCC No.8812-5055 (June 19,1990), the Court gave claimant, who was 35 years old, a 20 percent disability rating. The Court considered the claimant's "relatively young age" of 35, and the fact he had 160 college credits out of 195 needed to graduate. Claimant had worked for ASARCO for 10 years, and there was no evidence that he could not continue his employment. He testified his ankle injury restricted his movement, which caused him to be a slower worker. Claimant continued with his same job, although his ankle was unstable, caused him pain, and restricted his movements.

In *Cantrall v. Epworth United Methodist Church*, WCC No.8811-4990 (June 23, 1989), the Court assigned the claimant, who was 29 years old, a disability rating of 40 percent. Claimant had a high school education but no special skills. Her doctor determined that she could not return to her former job as a day care employee, and could perform only light to sedentary positions which fit her physical limitations. She had a 10 percent impairment rating based on her low back and cervical injuries. Claimant's pre-injury earning was \$4.50/hour; her post-injury earning capacity was \$3.35/hour.

In *Allee v. Aluminum Products*, WCC No. 8803-4752 (November 9, 1989), the Court assigned a claimant, who was 29 years old, a 20 percent disability rating. Claimant had a hand injury, and suffered a 25 percent loss of strength. He was assigned a 10 percent impairment of his left upper extremity based on a continued loss of sensation in the index finger of his left hand, limitation of abduction of the first web space, and loss of strength. Claimant testified he had become less efficient at his job, which was a glazer. However, he was earning more after his injury than he was at the time of injury. He also had pain when moving heavy objects at work. Claimant had an eleventh grade education, and a work history limited to manual labor. The Court deemed him less competitive in the labor market following his injury, but, on the other hand, did not find any significant evidence that claimant could not continue working at his job.

In *Kubesh v. SCMIF*, WCC No. 8702-4205 (July 1, 1988), the Court assigned the claimant a 20 percent disability rating. Claimant was earning more following his injury, but his post-injury work was not on par with his pre-injury work and he required assistance. The Court considered claimant's past earnings as a welder and oil field worker of \$1000/month and compared those earnings to his current earnings of \$1400/month (plus house and car). The Court also considered the fact that claimant worked in a family business.

3. Claimant is entitled to reasonable attorney fees under section 39-71-612, MCA. The insurer has paid claimant compensation of \$8,824.48 in partial permanent disability

benefits. The claimant sought additional permanent partial disability benefits, thus the controversy in this case concerns amount of compensation due. The Court has awarded claimant benefits in the amount of \$17,312.50, or \$8,488.02 more than the amount paid by the insurer. Pursuant to section 39-71-612, MCA, the claimant is entitled to attorney fees based on the difference between the amount awarded by the Court and the amount paid by insurer.

Claimant argues that he is entitled to attorney fees under section 39-71-611, MCA, rather than section 39-71-612, MCA, since National is asserting that no benefits are due. He cites *Carroll v. Wells Fargo Armored Serv.*, 240 Mont. 151, 782 P.2d 1286 (1989), as supporting his position. *Carroll*, however, is distinguishable. In that case the insurer denied all liability for permanent partial disability benefits. In this case the insurer has admitted liability for permanent partial disability benefits, paid \$8,824.48, and only disputes claimant's contention that he is due more benefits.

National argues that it made a pretrial settlement offer which should be considered in determining attorney fees. The record shows that a settlement offer was made on August 13, 1993. (Tr. at 5). However, the amount of the settlement offer was not disclosed at trial. Since the amount of the settlement offer is not in evidence or on the record, the Court will not consider it.

4. Claimant is not entitled to a penalty. Section 39-71-2907, MCA provides that when payment of compensation has been unreasonably delayed or refused by an insurer, the full amount of compensation benefits due a claimant may be increased by 20 percent. Where a bona fide dispute exists as to the amount of benefits, a penalty is not warranted. The insurer paid claimant significant benefits. There is no clear, bright line delineating the amount due claimant. The insurer's actions were not unreasonable; claimant is not entitled to a penalty.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant has established a 25 percent disability and is entitled to 125 weeks of permanent partial disability benefits at a weekly rate of \$138.50, or \$17,312.50. The insurer is entitled to a credit of \$8,824.48. Thus, the net amount due claimant is \$8,488.02.
3. Claimant is entitled to attorney fees and costs pursuant to section 39-71-612, MCA in an amount to be determined. ARM 24.5.343 governs further proceedings for attorney fees and costs.
4. Claimant is not entitled to a penalty.

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 these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 1st day of June, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE