

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 57

WCC No. 9704-7741

GERMAINE M. BRATCHER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

NOVCO, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 40-year old parts-runner for auto parts store was injured in automobile accident while making a delivery. Because the job involved heavy lifting, and post-injury restrictions precluded heavy lifting, claimant could not return to her time-of-injury work. After a period in which she did not seek work, claimant began working as a housekeeper, making \$5.25 an hour. The parts-runner position paid \$6.25 an hour. The parties dispute her entitlement to permanent partial disability benefits for wage loss under section 39-71-703(1)(a), MCA (1995).

Held: Claimant is not entitled to PPD benefits for wage loss where she is "qualified to earn" at least \$6.25 an hour, her time of injury wages. §39-71-703(5)(c), MCA (1995). Claimant has a high school education, a stable work history, and some experience dealing with customers in person and on the phone. She is qualified for and competitive for positions as receptionist or telemarketer paying \$6.50 per hour and more. Such positions are and have been available in her area since her time of injury.

Topics:

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Former parts-runner for auto parts stores was not able to return to time of injury job after compensable car accident where she could no longer lift over fifty pounds. Although claimant returned to work as housekeeper earning \$5.25 per hour, she was not entitled to PPD benefits for wage loss where she is "qualified to earn" at least \$6.25 an hour,

her time of injury wages. §39-71- 703(5)(c), MCA (1995). Claimant has a high school education, a stable work history, and some experience dealing with customers in person and on the phone. She is qualified for and competitive for positions as receptionist or telemarketer paying \$6.50 per hour and more. Such positions are and have been available in her area since her time of injury.

Vocational – Return to Work Matters: Employability. Former parts-runner for auto parts stores was not able to return to time of injury job after compensable car accident where she could no longer lift over fifty pounds. Although claimant returned to work as housekeeper earning \$5.25 per hour, she was not entitled to PPD benefits for wage loss where she is "qualified to earn" at least \$6.25 an hour, her time of injury wages. §39-71-703(5)(c), MCA (1995). Claimant has a high school education, a stable work history, and some experience dealing with customers in person and on the phone. She is qualified for and competitive for positions as receptionist or telemarketer paying \$6.50 per hour and more. Such positions are and have been available in her area since her time of injury.

Wages: Wage Loss. Former parts-runner for auto parts stores was not able to return to time of injury job after compensable car accident where she could no longer lift over fifty pounds. Although claimant returned to work as housekeeper earning \$5.25 per hour, she was not entitled to PPD benefits for wage loss where she is "qualified to earn" at least \$6.25 an hour, her time of injury wages. §39-71-703(5)(c), MCA (1995). Claimant has a high school education, a stable work history, and some experience dealing with customers in person and on the phone. She is qualified for and competitive for positions as receptionist or telemarketer paying \$6.50 per hour and more. Such positions are and have been available in her area since her time of injury.

The trial in the above-entitled matter was held on September 30, 1997, in Helena, Montana. Petitioner, Germaine Bratcher (claimant), was present and represented by Mr. Cameron Ferguson. Respondent was represented by Mr. Larry W. Jones.

Exhibits: Exhibits 1 through 4 were admitted without objection.

Witnesses and Depositions: The parties agreed that the depositions of the claimant and Dr. Ronald M. Peterson can be considered part of the record. Petitioner, Germaine Bratcher and Colleen M. Lordemann were sworn and testified.

Issues:

1. Whether the Petitioner is due a permanent, partial disability settlement relating to her injury of November 30, 1995 upon the grounds that she has sustained a wage loss, which she claims, pursuant to Section 39-71-703(1)(a).

2. The amount Petitioner is due for a permanent partial disability settlement.

3. Whether Petitioner is entitled to costs.

(Pretrial Order at 2.)

At the close of the petitioner's case, a directed ruling was made finding that the insurer's denial of wage-loss benefits was not unreasonable and that petitioner is not entitled to attorney fees. A penalty was not requested.

FINDINGS OF FACT

1. The claimant is 40 years old. She is a high school graduate and has two children ages 12 and 16. She lives in Vaughn, Montana, which is near Great Falls.

2. Over the years, claimant has worked as a waitress, a dining room manager, a cashier/checker, a hostess, and a shipping and receiving clerk, and a parts runner for an auto parts store.

3. In 1989 the claimant went to work for Novco, Incorporated (Novco) in Great Falls, Montana. Novco is an auto parts store. She initially worked as a parts runner, then in 1990 she worked as a shipping and receiving clerk. From 1991 to November 1995, she worked as a parts runner.

4. Claimant's job duties as a parts runner included retrieving auto parts from the parts store, loading them into a car or truck, and delivering them to customers. Some auto parts, such as batteries and cases of oil and antifreeze, weighed in excess of 50 pounds.

5. On November 30, 1995, claimant was involved in an automobile accident while working in the course and scope of her employment with Novco. A Suburban collided with the passenger side of the pickup claimant was driving, causing claimant to hit her head and shoulder.

6. At the time of claimant's injury, Novco was insured by Liberty Northwest Insurance Corporation (Liberty). Liberty accepted liability for the accident.

7. Claimant was initially treated for her injuries at the emergency room.⁽¹⁾ She was treated for a minor scalp laceration and given a prescription for Tylenol #3, which is an analgesic with codeine.

8. She was again seen at the emergency room on December 4, 1995, at which time she was experiencing headaches and some tingling in her arms. Claimant also sought chiropractic care.⁽²⁾

9. Following the accident, claimant was treated at the Great Falls Occupational and Sports Medicine Clinic. She was initially seen at the clinic on December 18, 1995, by Dr. Jon H. Walz, D.O. She was thereafter treated by both Dr. Walz and Dr. Ronald M. Peterson, M.D.

10. Dr. Walz's office note for December 18, 1995, reflects that at that time the claimant was complaining of "intermittent numbness and tingling in the upper extremities, as well as recurrent headaches." (Ex. 2 at 33.) She also reported neck stiffness.

11. Subsequent medical records indicate that claimant continued to suffer pain and tightness in her trapezius muscles. The trapezius muscles extend from the medial aspect of the shoulder blade in the back, to the top of the shoulders of the back, thence into back of the neck, terminating in the lower back of the head.

12. On April 30, 1996, Dr. Peterson determined that claimant had reached maximum medical improvement. (Ex. 2 at 8 and 13.) His office note for that date indicates that claimant was still suffering from "muscle tightness" and pain but without any motor or neurological abnormalities. (*Id.* at 13.) She also demonstrated "fairly good range of motion with distraction." (*Id.*)

13. On May 20, 1996, Dr. Peterson rendered a 7% whole person impairment rating based on loss of range of motion of the shoulders. (*Id.* at 12.) He noted no neurologic deficits and diagnosed "Myofascial pain syndrome involving primarily the trapezius muscles . . ." (*Id.* at 11-12.)

14. On June 17, 1996, Dr. Peterson released claimant to return "to her job of injury if lifting is less than 30 pounds and pushing or pulling activities are less than or equal to 20 lbs, with minimal overhead lifting or overhead activity." He further observed that "[s]he should limit driving activities to 30 minutes then she must take a break." (*Id.* 2 at 8.)

15. The restrictions imposed by Dr. Peterson precluded claimant from returning to her time-of-injury job since it required her to lift 50 pounds or more and her employer determined that her job could not be modified.

16. However, Dr. Peterson approved a number of other jobs for claimant. The approved jobs included telemarketer (Ex. 3 at 47-53), receptionist (*Id.* at 54-60), and night auditor (*Id.* at 61-67).

17. Dr. Peterson was deposed. He was specifically asked whether, in his medical opinion, the claimant can perform the job of telemarketer. (Peterson Dep. at 26.) He testified that she could (*id.*) and his opinion is uncontradicted.

18. At the time of her industrial accident, claimant was earning \$6.25 an hour. (Ex. 1.)

19. At the time of trial, claimant was employed by Superior Cleaning as a housekeeper, cleaning homes. She does housework, including dusting, vacuuming, and making beds. She began her employment on August 20, 1997, and works 15 to 25 hours a week. Her hourly wage is \$5.25.

20. Her current employment is her first since her injury. Between the date of her injury and her employment by Superior Cleaning, claimant did not diligently seek employment.

21. Liberty employed Colleen Lordemann (Lordemann) to do a vocational analysis respecting claimant. Lordemann is a certified rehabilitation consultant. She testified at trial and her testimony was credible, persuasive, and uncontroverted.

22. Lordemann determined that claimant is qualified and employable as a telemarketer and receptionist. Those positions require the abilities to converse on the telephone, perform rudimentary computer operations, and interact with customers. The receptionist position also required preparation of simple paperwork and simple computation.

23. Claimant is qualified and competitive for both the telemarketer and receptionist positions.

24. She has a stable job history, having worked for Novco for six years. Her stable job history is a significant, positive consideration for prospective employers.

25. While claimant is not a typist, she can "hunt and peck" on a computer keyboard and used a computer while working for Novco. The telemarketing and receptionist jobs require no greater computer skills than she has demonstrated.

26. While employed by Novco, claimant answered the telephone when other salespersons were busy. Thus, she has some telephone skills.

27. In addition to interacting with Novco customers, claimant has worked as a hostess. Thus, she has people skills.

28. Both the receptionist and telemarketing positions require only a high school education. Nothing in the record of this case indicates that claimant is incapable of learning the information required by the positions.

29. Lordemann testified as to the availability of telemarketing and receptionist positions in Great Falls, as well as the range of wages for entry level employees. Her testimony established:

a. There are numerous telemarketing jobs in Great Falls and those jobs are frequently available.

b. There are numerous receptionist jobs in Great Falls and those jobs are frequently available.

c. The range of wages for entry level telemarketers is \$4.25 to \$6.65. Lordemann surveyed four large telemarketing firms. The two largest firms paid \$6.50 and \$6.65 for newly hired employees. The other two, smaller firms paid \$4.25 and \$5.00 respectively to their newly hired employees. One of the higher paying firms,

however, did not commence business in Great Falls until October 1996, which is six months after claimant reached maximum medical healing. However, the other largest firm, which paid \$6.65 an hour to its entry level employees, was in business at the time the claimant reached MMI. That firm employed 90 individuals in its telemarketing department, and had significant turnover. At the time of Lordemann's analysis, the firm was training 20 new employees, and indicated that it was constantly looking for new employees.

d. Entry level receptionists are paid between \$6.00 and \$8.25 an hour. There are several hundred positions available in the Great Falls area.

30. Based on claimant's education and job history, and Lordemann's testimony, I find that claimant is qualified and competitive for entry level telemarketing and receptionist positions paying \$6.50 an hour and more. While she is presently only earning \$5.25 an hour, I do not find her current earnings persuasive as to her earning capability since she has not done a diligent job search and does not appear motivated to do so.

CONCLUSIONS OF LAW

1. The matter presented to the Court involves claimant's entitlement to benefits and is within this Court's jurisdiction. § 39-71-2905, MCA.

2. Claimant was injured on November 30, 1995, therefore the 1995 version of the Montana Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

3. Claimant is seeking wage-loss benefits under section 39-71-703, MCA (1995), which provides in relevant part:

39-71-703. Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (4) by 350 weeks.

(4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

....

(c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%. Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.

4. Claimant and Liberty interpret the wage-loss provision differently. Liberty argues that wage loss must be measured by the highest wage of any job for which claimant is theoretically qualified. I reject the argument. The statute states that claimant's wage loss must be measured by "the difference between the actual wages received at the time of injury and the wages that **the worker** earns or is qualified to earn after the worker reaches maximum healing." § 39-71-703(5)(c), MCA (1995). I have highlighted the most important words of the statute in the context of this case. The statute refers to "**the worker**", meaning the claimant. Wage loss must therefore be measured by what the claimant in this case is "qualified to earn," not by what other workers in her situation might be qualified to earn. Therefore, I must determine what **this claimant** is qualified to earn.

5. Claimant is presently earning less than her time-of-injury wage. However, section 39-71-703(5)(c), MCA (1995), expressly provides that the Court must consider not only what she is earning but also what she is "qualified to earn." The alternative makes sense. Lordemann testified that it is not unusual for workers to be "underemployed." Personal considerations, such as the dislike for a particular job, may deter workers from seeking the highest paying jobs available to them.

6. A preponderance of evidence in this case persuades me that claimant is qualified to earn more than her time-of-injury job. I am persuaded that if claimant diligently pursued employment as a telemarketer or receptionist she would obtain employment paying more than \$6.25 an hour.

7. Therefore, under section 39-71-703, MCA (1995), claimant is not entitled to wage-loss benefits.

JUDGMENT

1. Claimant is not entitled to wage-loss benefits and her petition is **dismissed with prejudice**.
2. Claimant is not entitled to costs.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 22nd day of October, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Larry W. Jones

Submitted: September 30, 1997

1. Information concerning claimant's emergency room visits is derived from the records of the Occupational and Sports Medicine Clinic, specifically Dr. Walz's office note of December 18, 1995. (Ex. 2 at 32.)
2. As with the emergency room visits, information concerning chiropractic treatment is derived from Dr. Walz's December 18, 1995 office note. (Ex. 2 at 32.)