

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 89

WCC No. 9808-8038

JEFFERY LEE BURNER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

MARK NEWSOM, d/b/a ROCKY MOUNTAIN ROOFING

Employer.

DECISION AND JUDGMENT

Summary: Claimant and Uninsured Employers' Fund disputed claimant's wages for purposes of computing benefits.

Held: In a bench ruling, Court found wages to be hourly rate (\$8) times 40 hours per week, relying on claimant's testimony and that of person who hired him, which suggested that claimant was on track to work forty hours per week.

Topics:

Wages: Average Weekly Wage. In a bench ruling, Court found claimant's weekly wages to be hourly rate (\$8) times 40 hours per week, relying on claimant's testimony and that of person who hired him, which suggested that claimant was on track to work forty hours per week.

¶1 The trial in this matter was held on November 25, 1998, in Helena, Montana. Petitioner, Jeffery Lee Burner, was present and represented by Mr. Thomas A. Budewitz. Respondent, Uninsured Employers' Fund (UEF), was represented by Mr. Patrick A. Trammelle and Mr. Mark E. Cadwallader.

¶2 The parties agreed that the depositions of Dr. M. Brooke Hunter, Mark Newsom, Chris Van Dyke, and Dennis Van Dyke can be considered part of the record. Claimant, Shannon Montgomery, and Chris Van Dyke were sworn and testified.

¶3 The parties seek a determination as to what claimant's wages are for purposes of calculating benefits.

¶4 After considering the trial testimony, depositions, and the arguments of counsel, the Court ruled from the bench that claimant's wages for purposes of computing benefits are his hourly wage (\$8) times 40 hours per week. The transcript of the bench ruling shall constitute the Court's Findings of Fact and Conclusions of Law.

JUDGMENT

¶5 1. For the reasons set forth in the bench ruling, a transcript of which is attached, the Court finds that claimant's wages for purposes of computing benefits are his hourly wage (\$8) times 40 hours per week.

¶6. 2. Petitioner is entitled to his costs in accordance with ARM 24.5.342.

¶7 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶8 4. Any party to this dispute may have 20 days in which to request a rehearing from this Judgment.

DATED in Helena, Montana, this 15th day of December, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Thomas A. Budewitz

Mr. Patrick A. Trammelle

Mr. Mark E. Cadwallader

Attached: Copy of Bench Ruling

Submitted: November 25, 1998

COPY OF BENCH RULING

1 WHEREUPON; the following proceedings were

2 had, to-wit:

3 * * * * *

4

5THE COURT: I'm going to give you at

6 least a partial ruling on this. Sometimes I try to

7 simplify things and this one actually I think I've

8 simplified it by going back to Mr. Newsom's

9 deposition. When I look at Mr. Newsom's

10 deposition, when I was sitting here right at the
11 very beginning, he's given me the following facts
12 and he's the employer, he's given me the fact that
13 he paid Mr. Burner between \$200 and \$2s0, that's
14 what he said and then at another point he said he
15 paid him several hundred dollars and he seems to
16 remember 30 hours as being the amount of time
17 worked. He also says that he hired him to work 40
18 hours, that was what was anticipated.
19 That testimony and the fact that this accident
20 occurred on an early Thursday morning and you've
21 got one more day in the workweek indicates that he
22 was on track to work 40 hours that week and is
23 consistent with his testimony.
24 The other thing, it appears to me that when
25 you're looking at his hours, because Newsom was

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1 transferring back and forth between the day and the
2 night shift, you can't just look at those night
3 shift hours. In fact, a lot of these hours are day
4 shift hours and Newsom really confirms out of his
5 own mouth that this guy~s on track to work 40 hours
6 and he expected 40 hours and that's where I'm going
7 to come out.
8 I understand the problem in this case because
9 Mr. surner sort of reported this other stuff, and
10 it's not the cleanest case I've ever seen for wages
11 from a claimant's perspective, but when I cut
12 through all of that stuff and I look at Newsom's
13 testimony, and Newsom's the guy that did the
14 hiring, Newsom's the guy that's doing the paying
15 and he's confirming essential parts of what
16 Mr. Burner is testifying to. I think that's where
17 I have to end up, so I'm going to give him the 40.
18 I don't think I have to go to the other part of
19 it because if it was a matter that he was just
20 working on the outside and there were short hours,
21 I think lid have a little more difficult of a call

22 in this case trying to figure out what that 40
23 hours meant under those kind of conditions. Was
24 that a guarantee of the 40 hours, do I use the 40
25 hours just because they contemplated that when, in

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1 | fact, that wasn't the way it worked out7 Do I do
2 that? I don't have to answer that question, I
3 don't think, because he was switching back and
4 forth. Newsom was using him, it sounds like Newsom
5 was using him sort of as a gofer and Newsom's own
6 testimony gives me 40, so that's where I'll start
7 and end this case.

8 For me that seemed to be, when I was looking at
9 Newsom's testimony and hearing this and knowing
10 that he's going back and forth through the day and
11 the night shift, I just simplified it, really. I
12 really made it simple, didn't I?

13 MR. CADWALLADER: Yes, you did, Your
14 Honor. The UEF will get a check out next week.

15 THE COURT: Okay.

16 MR. BUDEWITZ: Do you want a
17 proposed order, Judge?

18 THB COURT: Why donit I do this,
19 I've essentially made my findings and told you why
20 I'm reaching those findings. What if I just enter
21 a judgment and indicate that the findings were
22 rendered orally and then a transcript of what I've
23 found just now will constitute my findings of fact;
24 that way nobody has to do any more work. Does that
25 make sense?

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1 MR. TRAMMELLE: Yes, it does,
2 Your Honor.

3 MR. BUDEWITZ: Yes.

4 THE COURT: That will save me
5 writing and that will save you guys writing.

6 MR. TRAMMELLE: Thank you very much.

7 (The proceedings concluded at
8 11:05 a.m.)

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1 C E R T I F I C A T E

2 S T A T E O F M O N T A N A

3 C O U N T Y O F L E W I S A N D C L A R K

5 I, LISA R. LESOFSKI, Registered Professional

6 Reporter, Notary Public in and for the County of

7 Lewis and Clark, State of Montana, do hereby

8 certify:

9 That the proceedings were taken before me at

10 the time and place herein named; that the

11 proceedings were reported and transcribed by me

12 with a computer-aided transcription system and that

13 the foregoing -6- pages contain a true record of

14 the proceedings to the best of my ability.

15 IN WITNESS WHEREOF, I have hereunto set my

16 hand and fixed my notarial seal this

17 day of December, 1998.

18

19 LISA R. LESOFSKI

20 Registered Professional Reporter Notary Public

21 Commission Expires 3/31/00.

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