

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 69

WCC No. 9710-7857

KEVIN CAPLETTE

Petitioner

vs.

RELIANCE NATIONAL INDEMNITY COMPANY

Respondent/Insurer for

BARNARD CONSTRUCTION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: After recovering from compensable back injury, heavy equipment operator claimed permanent partial disability benefits for loss of lifting capacity and wage loss, as well as entitlement to further rehabilitation benefits.

Held: Under section 39-71-703(1)(a), MCA (1995), claimant is entitled to PPD benefits for lost lifting capacity and wage loss only if he suffered an actual wage loss because of his injury. Similarly, under section 39-71-1011(2), MCA (1995), claimant is entitled to further rehabilitation benefits only if he proves an actual wage loss as the result of the injury. Claimant has not proved wage loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find work as a heavy equipment operator at the same wage rate as the result of that restriction.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: Montana Code, section 39-71-703, MCA (1995). Under section 39-71-703(1)(a), MCA (1995), claimant is entitled to PPD benefits for lost lifting capacity and wage loss only if he suffered an actual wage loss because of his injury. Claimant has not proved wage

loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find work as a heavy equipment operator at the same wage rate as the result of that restriction.

Constitutions, Statutes, Regulations and Rules: Montana Code: Montana Code, section 39-71-1011(2), MCA (1995). Under section 39-71-1011(2), MCA (1995), claimant is entitled to further rehabilitation benefits only if he proves an actual wage loss as the result of the injury. Claimant has not proved wage loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find work as a heavy equipment operator at the same wage rate as the result of that restriction.

Benefits: Permanent Partial Benefits: Labor Capacity. Under section 39-71-703(1)(a), MCA (1995), claimant is entitled to PPD benefits for lost lifting capacity only if he suffered an actual wage loss because of his injury. Claimant has not proved wage loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find work as a heavy equipment operator at the same wage rate as the result of that restriction.

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Under section 39-71-703(1)(a), MCA (1995), claimant is entitled to PPD benefits for wage loss only if he suffered an actual wage loss because of his injury. Claimant has not proved wage loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find

work as a heavy equipment operator at the same wage rate as the result of that restriction.

Benefits: Rehabilitation Benefits: Proof of Wage Loss. Under section 39-71-1011(2), MCA (1995), claimant is entitled to further rehabilitation benefits only if he proves an actual wage loss as the result of the injury. Claimant has not proved wage loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find work as a heavy equipment operator at the same wage rate as the result of that restriction.

Wages: Wage Loss. Under section 39-71-703(1)(a), MCA (1995), claimant is entitled to PPD benefits for lost lifting capacity and wage loss only if he suffered an actual wage loss because of his injury. Similarly, under section 39-71-1011(2), MCA (1995), claimant is entitled to further rehabilitation benefits only if he proves an actual wage loss as the result of the injury. Claimant has not proved wage loss as the result of his injury where he earned a slightly lower wage post-injury because he chose to take a lower-paying job because it was scheduled to last longer and was closer to home. Moreover, his higher paying pre-injury job (a Davis-Bacon construction job) was only a short term job and he has not proven the injury caused him to lose the opportunity to work on such jobs. Although claimant now has a medium-duty restriction, he has not proved an actual loss of ability to find work as a heavy equipment operator at the same wage rate as the result of that restriction.

¶1 The trial in this matter was held on April 3, 1998, in Great Falls, Montana. Petitioner, Kevin Caplette (claimant), was present and represented by Mr. Thomas J. Murphy. Respondent, Reliance National Indemnity Company (Reliance), was represented by Mr. Kelly M. Wills. A transcript has not been made of this proceeding.

¶2 Exhibits: Exhibits 1, 2 and 11 through 25 were admitted without objection. Exhibits 3 through 10 were withdrawn. Pages 44 and 71 through 76 of Exhibit 26, were admitted over objection.

¶3 Witnesses and Depositions: Claimant, James A. Tilleman, Arlon P. Peda, Judy Ferris, Lee Richardson and Kevin Babcock were sworn and testified. The parties agreed that the Court may consider the depositions of claimant, Kevin Babcock, Lee Richardson and Arlon P. Peda.

¶4 Issues Presented: The issues, as set forth by the parties in the Final Pretrial Order, are as follows:

1. Whether the petitioner is entitled to any additional permanent partial disability benefits pursuant to section 39-71-703, M.C.A. (1995). These include factors for lifting (3% - heavy to medium), and wage loss (but the percentage, if any, is disputed).
2. Whether the claimant is entitled to any further rehabilitation benefits.
3. Whether the claimant is entitled to attorneys' fees, costs, and penalty pursuant to section 39-71-611 or 612, M.C.A. (1995).

* * * * *

¶5 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the parties' arguments, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 28 years of age. He is a high school graduate and has one year of college. He also has a certificate in automobile mechanics. (Caplette Dep. at 6-9; Peda Dep. Ex. 1 at 4.)

¶7 Claimant has worked as a construction laborer, sawyer, farm worker, mechanic, truck driver, carpenter and at odd jobs. (Ex. 26 at 30-31; Trial Test., Caplette Dep. at 10 -15.)

¶8 On October 4, 1996, claimant suffered an industrial injury to his low back while working for Barnard Construction (Barnard). At that time, claimant was working as a heavy equipment operator on Barnard's Bonneau Dam project on the Rocky Boy Reservation.

¶9 Claimant's job as a heavy equipment operator was a medium-labor job, requiring that he lift up to 50 pounds occasionally. However, Barnard has a policy of allowing its heavy equipment operators to work in laboring positions when they are not needed to operate heavy equipment. The policy enables heavy equipment operators to work a full-time, 40-hour work week when they would otherwise be sent home for lack of work. Heavy equipment operators are not, however, required to work at laboring jobs and have the option of taking time off when not running heavy equipment. (Babcock Dep. at 14-15; Trial Test.)

¶10 Barnard pays its heavy equipment operators their normal hourly wage when they work at laboring jobs.

¶11 At the time of his injury, claimant was not working as a heavy equipment operator but rather as a laborer. The injury occurred when claimant was lifting bundles of rebar with a coworker. Claimant's lifting load exceeded 50 pounds.

¶12 At the time of the injury, Barnard was insured by Reliance. Reliance accepted liability for the injury.

¶13 Following his injury the claimant was diagnosed as suffering a severe disk herniation at the L4-L5 level. (Ex. 26 at 133.) He underwent a diskectomy and decompression of the L5 nerve root on November 7, 1996. (Ex. 11 at 4.)

¶14 The surgery was successful. On January 3, 1997, Dr. Smith reported that claimant was "pain free" and at maximum medical improvement. (*Id.* at 1.) However, he restricted claimant to medium-duty work and limited his lifting to 50 pounds maximum. (*Id.*; Uncontested Fact 5.)

¶15 On January 21, 1997, Dr. Ronald See examined claimant for the purpose of providing an impairment rating. He rated claimant's impairment at 10% of the whole person. The insurer did not contest the rating and has paid a 10% impairment award in the amount of \$6,720. (Uncontested Fact 6.)

¶16 Following his recovery from surgery, Reliance provided claimant with vocational rehabilitation services through CRA Managed Care, Incorporated.

¶17 The rehabilitation counselor assigned to claimant's case was Arlon P. Peda (Peda). (Uncontested Fact 7; Peda Dep. at 5; Ex. 14.) Peda determined that claimant could return to work as a heavy equipment operator.

¶18 Since the Bonneau Dam project had been completed, Peda attempted to find claimant a job at one of Barnard's other jobs. Two jobs were identified as available to claimant. One was at Barnard's Tongue River Dam project near Decker, Montana, the other in Butte, Montana. Peda prepared a rehabilitation plan calling for claimant to complete, at Reliance's expense, a course in hazardous waste treatment, then return to work.

¶19 Claimant testified that he was turned down for the Decker job because he did not have a Native American preference applicable to the Decker project. The claims adjuster's testimony was the more credible: He testified that he informed claimant, through his attorney, that even though claimant did not meet the preference requirement he was considered "core crew" and did not need a preference.

¶20 The Decker job paid \$22.12 an hour, while the Butte job paid \$20.08 per hour. Claimant's hourly wage while working on the Bonneau Dam job was \$21.51 an hour. The Decker job, however, was a short-term project. Claimant elected to take the Butte job because it was scheduled to last longer and it was closer to his home.

¶21 Claimant returned to work as a heavy equipment operator on the Butte job on May 5, 1997. His pay was \$20.08 per hour. (Uncontested Facts 8 and 10.)

¶22 Upon returning to work, claimant was required to submit to a drug screen. The drug screen, reported on May 15, 1997, was positive for controlled substances. Claimant declined a second test and Barnard terminated his employment on May 15, 1997. (Uncontested Fact 9.)

¶23 Since his termination by Barnard, claimant has worked only part-time driving a truck and a combine and at other odd jobs. (Caplette Dep. at 23-24.)

¶24 Even though claimant's post-injury wage on the Butte job was less than his wage on the Bonneau Dam project, he did not suffer a wage loss "as a result of the injury." § 39-71-703 (2), MCA (1995).

¶25 Barnard Construction is a large construction firm that contracts for construction projects throughout Montana. Some of its projects involve federal funding and are subject to the Davis-Bacon Act, which requires Barnard to pay prevailing wages to its workers. 40 U.S.C. § 276a. Those wages are typically higher than the wages paid on non-Davis-Bacon projects.

¶26 The Bonneau Dam project was a Davis-Bacon job. However, the project had ended by the time claimant was able to return to work, thus even if claimant had not been injured he would have had to find employment on another project. Some of those projects were Davis-Bacon projects, like the Decker job, some were not. Claimant presented no evidence that he was less able to compete for the Davis-Bacon jobs on account of his injury, hence he failed to establish any connection between his injury and his lesser wage on the Butte project.

¶27 Moreover, Peda identified several heavy equipment operator jobs post-injury that claimant was qualified and able to perform and which paid as much or more than his time-of-injury job. Peda's testimony was credible.

¶28 The Court has also considered whether claimant may have lost wages because he could no longer perform heavy labor when not operating equipment. I find that he did not. Barnard's safety officer, Kevin Babcock, testified that most of the labor available to heavy equipment operators was light work and that there was always sufficient light-duty work available that claimant could fill out his work week, when needed, doing only light-duty labor. I found the safety officer's testimony credible and persuasive.

¶29 The insurer has not acted unreasonably in refusing claimant's demands for additional benefits.

CONCLUSIONS OF LAW

I.

¶130 The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). The injury at issue in this case occurred on October 4, 1996. The law applicable at that time was the 1995 version of the Workers' Compensation Act.

II.

¶131 Claimant bears the burden of proving, by a preponderance of the evidence, that he is entitled to additional benefits. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

III.

¶132 Rehabilitation benefits are available to "disabled workers." Section 39-71-1011(2), MCA, defines disabled worker as follows:

(2) "Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury.

Claimant does not meet the definition since he was able to return to his time-of-injury job. Therefore, he is not entitled to additional rehabilitation benefits.

IV.

¶133 Claimant's request for permanent partial disability benefits is governed by 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. (Emphasis added.)

While claimant has received a 10% impairment rating, he has not suffered an "actual wage loss as a result of the injury." His lesser wage post-injury was due to his own election to take the lower-paying Butte job because it was scheduled to last longer and was closer to home. Moreover, preinjury he was not guaranteed work on Davis-Bacon jobs and he offered no evidence demonstrating that post-injury his opportunity to work on Davis-Bacon jobs was in any way diminished. Similarly, claimant has failed to persuade me that he lost any opportunity for hours of work because he could only perform medium labor when not working as a heavy equipment operator.

V.

¶34 Attorney fees and a penalty are available only if the insurer has acted unreasonably in denying claimant's demands for additional benefits. §§ 39-71-612 and -2907, MCA (1995). The insurer has not acted unreasonably.

VI.

¶35 Since claimant has failed to prevail in this action, he is not entitled to costs.

JUDGMENT

¶36 1. Claimant is not entitled to additional rehabilitation benefits.

¶37 2. Claimant is not entitled to additional permanent partial disability benefits.

¶38 3. Claimant is not entitled to attorney fees, costs or a penalty.

¶39 4. This JUDGMENT is certified as final for purposes of appeal.

¶40 5. 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 1st day of October, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas J. Murphy

Mr. Kelly M. Wills

Date Submitted: April 3, 1998