

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9211-6627

TED CHAFFEY

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY/

UNITED PARCEL SERVICE

Defendant/Employer.

* * * * *

ORDER ADOPTING AND MODIFYING 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.

The Court has reviewed the record of the proceedings. I also requested and received additional arguments from counsel concerning questions I had after my initial review of the hearing examiner's proposed decision. Having considered the additional arguments, I find that the hearing examiner's decision is correct except as to the amount of the wage supplement entitlement.

Prior to his injury the claimant worked five ten hour days a week. With overtime he averaged a 55-hour work week.

The hearing examiner has determined that claimant is now limited to a 45-hour work week. I am persuaded that the finding is correct. Dr. Hilleboe medically restricted claimant to driving 45 hours a week. His testimony concerning the restriction was strong and unequivocal. While claimant is required to stop every 2 hours to check tires, thus providing him an opportunity to stretch and walk around, he spends most of his time in his truck driving. Evidence does not indicate that the time involved in tire-checks and a turn-around in Helena was substantial. While claimant may exceed the 45 hour a week limit on

occasion, that fact does not prove that he could work 55 hours a week on the average. He testified that following his return to work he attempted a five-day work week but experienced discomfort. (Tr. at 21) In 1991 and 1992 he averaged 45.62 and 45.19 hours a week respectively. The averages are very close to the 45 hour restriction.

However, we must still determine if claimant is entitled to wage supplement benefits based on the difference in hours. The insurer argues that claimant's work week was reduced to 45 hours for reasons unrelated to his injury, and that he therefore suffered no wage loss on account of his injury. Claimant responds that the statutory formula for wage supplement benefits is mechanical and must be applied whether or not the wage loss was in fact caused by the injury.

The wage supplement benefit is computed by multiplying "the difference between the worker's actual wages at the time of the injury and the wages the worker is qualified to earn in the worker's job pool" by two thirds (2/3). Section 39-71-703 (1)(b)(i), MCA (1989). There is a statutory cap on the benefit. *Id.* If claimant's argument is adopted, the benefit is payable whether or not the difference resulting from the calculation is a consequence of the injury. The benefit would be payable even if the lesser wage the worker is qualified to earn in his post-injury job market is due entirely to circumstances unrelated to the injury, e.g. the elimination of the highest paid jobs from the job market on account of independent business or economic reasons. The benefit would also be payable even if the worker's inability to perform jobs within his pre-injury job market is due to reasons other than his industrial injury, e.g., to some other non-work injury or disease.

The wage supplement provisions must be construed reasonably and with common sense. "It is a well-established rule of statutory construction that a statute be read as a whole and construed so as to avoid absurd results." ***Dover Ranch v. Yellowstone County*, 187 Mont. 276, 283, 609 P.2d 711 (1980).** The purpose of the wage supplement is to compensate the worker for lost wages resulting from his industrial injury. The requirement of a causal connection is implicit in the statute, and it is explicit in the statement of purpose adopted by the legislature when it enacted the wage supplement provision. Section 39-71-105(1), MCA (1989), enacted in 1987, sets forth the following statement regarding wage loss benefits:

39-71-105. Declaration of public policy. For the purposes of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this stated:

(1) . . . Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that limitation, ***the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.*** [Emphasis added.]

Therefore, the claimant is not entitled to a wage supplement if the difference in his pre-injury wage and the wage he is qualified to earn in his post-injury job market is caused by circumstances unrelated to his injury.

The evidence that the difference in this case is in fact attributable to claimant's injury is sufficient and convincing.

At the time of his injury the claimant was one of three full-time feeder truck drivers working at the UPS regional center in Kalispell. Prior to his injury all three drivers worked five, ten hour days a week. Upon his return to work, UPS cut the days of work of all three drivers to four, ten hour days a week. There is uncontradicted evidence that the cutback in days of work was authorized by the contract between UPS and the union, of which claimant was a member. Other regional centers had adopted similar cutbacks. Thus, at first glance it would appear that the new policy was the independent intervening cause of claimant's lost hours of work.

However, the cutback was effected only after claimant consented to it. Claimant's consent, as well as the consent of the other two feeder drivers, was required by the Union contract. Claimant testified that he consented to the cutback because of by his back injury. Before the cutback was broached by UPS, claimant had already requested "a four-day work week" on account of his medical restrictions. (Tr. at 21.) Thus, there is substantial evidence supporting a conclusion that the claimant's injury was a substantial factor in the elimination of the 55 hour position from his Kalispell labor market.

There is also other evidence to support a finding that the wages which claimant is qualified to earn in his job pool were diminished by his injury. As the most senior employee at the Kalispell center, claimant had the option of taking another UPS driving job with a work-week greater than 45 hours. He declined the option because of his injury. (Tr. at 25.) There are also five other UPS feeder driving positions in Montana which still have five, ten hour day work weeks. All are located in rural areas far from Kalispell, namely Cut Bank, Havre, Malta, Lewistown and Broadus. (Tr. at 63.) In light of claimant's many years of residence in Kalispell, it is doubtful that he would pursue these jobs even if fully healthy, and his seniority at the Kalispell center would not provide him with any preference in applying for the positions. However, the wage supplement statute is based on the availability of jobs in the market, not on actual job openings, or the likelihood of a worker actually securing a particular position, or the geographical preferences of a worker. But for his injury, the five feeder driving positions would have been within the claimant's job market. Therefore, they provide an additional nexus between the claimant's injury and any wage loss benefit.

The remaining matter to be decided is the calculation itself. The hearing examiner calculated the benefit by using claimant's wages from the four weeks immediately preceding the injury but increased those wages to reflect an increase in hourly pay which occurred subsequent to the injury. This resulted in wage supplement benefits based on

current wages rather than the wages paid at the time of the injury, which is contrary to the statutory directive that the wages used in the calculation are "the worker's acknowledged wages at the time of the injury." Section 39-71-703 (1)(b)(i), MCA. Since the wage loss in this case is based on simple multiplication of the lost hours by the hourly wage, it was unnecessary and improper to use the present wage in the calculation.

The calculation further distorts the benefit because it fails to account for the fact that the wages for the four weeks immediately preceding the injury included overtime hours at time and a half. While the hearing examiner's calculations assumed that all hours were paid at straight time, and similarly used straight time to compute wages for the 45 hour post-injury work week, this method of calculation in effect gave claimant credit for working an average pre-injury work week of 61 hours. (\$983.41 divided by \$16.13 equals 60.9677.) A review of pay records for the four pay periods immediately preceding the injury reflect claimant's actual overtime as follows:

<u>Week ending</u>	<u>Overtime hours</u>
4/07/90	18.02
3/31/90	15.69
3/24/90	13.73
3/17/90	<u>19.14</u>
TOTAL	66.58

AVERAGE WEEKLY OVERTIME 16.645

This average is somewhat more than the average number of overtime hours for the three previous years, which were as follows:

<u>Year</u>	<u>Average weekly overtime</u>
1987	12.32
1988	14.92
1989	15.26

AVERAGE FOR THREE YEARS 14.16

While almost two hours a week higher than the three year average, the four week average is not grossly disproportionate to the three year average and is consistent with the three year upward trend. I conclude that the average overtime hours for the four weeks preceding the injury is representative of overtime hours worked by claimant. See section 39-71-123(3), MCA. That average will therefore be used in calculating the wage supplement benefit.

Claimant is medically limited to 45 hours a week, or 5 overtime hours weekly. In 1991 and 1992 he in fact averaged 5.405 hours a week in overtime, which is consistent with the limitation. Since actual hours are used in the pre-injury calculation, actual hours should also be used in post-injury calculations.⁽¹⁾ Using those hours, claimant is entitled to a \$120.86 weekly wage supplement (16.645 minus 5.405 times 16.13 times 2/3) for 500 weeks, less any impairment award and wage supplement benefits already paid.

THEREFORE, IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law and Proposed Judgement of the Hearing Examiner are adopted with the revisions set forth in this order. Insofar as the Hearing Examiner's specific findings of fact and conclusion of law number are inconsistent with this Order, the Order shall govern.

ACCORDINGLY, IT IS FURTHER ORDERED that Judgement is entered as follows:

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant is entitled to 500 weeks of wage supplement benefits in the amount of \$120.86 per week pursuant to section 39-71-703, MCA (1989). The defendant is entitled to a credit for any impairment award and wage supplement benefits previously paid.
3. Claimant is not entitled to a 20 percent penalty pursuant to section 39-71-2907, MCA.
4. Claimant is entitled to costs but not an attorney fee pursuant to section 39-71-612(2), MCA (1989).
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 25th day of January, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Allan M. McGarvey
Mr. Charles E. McNeil

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9211-6627

TED CHAFFEY

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY/

UNITED PARCEL SERVICE

Defendant/Employer.

**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 27, 1993, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on February 24, 1993. Pertinent parts of the Pretrial Order are as follows:

STATEMENT OF JURISDICTION

The Court has jurisdiction in the above-entitled matter, pursuant to Section 39-71-2905, MCA.

STATEMENT OF UNCONTESTED FACTS

1. On or about April 13, 1990, Claimant suffered an industrial injury arising out of and in the course of his employment with United Parcel Service, Flathead County, Montana.

2. Claimant timely reported the injury and filed a claim for compensation to receive benefits for lost earnings and medical expenses. The insurer has accepted liability for the claim.

3. Employer is enrolled under Compensation Plan II of the Workers' Compensation Act and its insurer is Liberty Mutual Fire Insurance Co.

4. The mediation procedure set forth in the Workers' Compensation Act has been completed.

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

1. Whether Claimant sustained a loss in the wages he is able to earn in his post-injury job market when compared to his time of injury wages;

2. If so, the amount of Claimant's wage supplement entitlement;

3. Whether Employer/Insurer has unreasonably failed, refused, and delayed payment of benefits;

4. Whether Claimant is entitled to an award of attorney fees and costs.

5. The trial in this matter came on March 3, 1993, in Kalispell, Montana, before Hearing Examiner Robert J. Campbell. Claimant, Ted Chaffey and Harold Wilshire were sworn and testified. The deposition of Dr. John W. Hilleboe was stipulated into evidence. The deposition of claimant Ted Chaffey was offered into evidence as the deposition of an adverse party, which can be used for any purpose. The deposition was allowed into evidence over claimant's objection. Exhibit Nos. 1 and 2 and Nos. 4 through 11 were admitted into evidence by stipulation. Exhibit No. 3 was admitted into evidence for limited purposes. The Proposed Findings of Fact, Conclusions of Law and Proposed Judgments having been filed by counsel, this matter was deemed submitted on April 28, 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 fact.

Claimant

2. Claimant is 56 years old (DOB May 30, 1936), married with three children. (Dep. of Claimant at 5.)

3. Claimant did not graduate from high school but received his GED while in the service. His military experience was in the army from May 30, 1953 to February 8, 1958 with an honorable discharge. After military service, claimant went to Pasadena City College on the G.I. bill. (Dep. of Claimant at 6-8.)

4. Claimant's work history after the military includes work on an assembly line and as a shipping clerk in California. On May 26, 1959, he began working with United Parcel Service (UPS) in California. (Dep. of Claimant at 8-10; Tr. at 12.)

5. Claimant worked for UPS as a package car driver until 1972 when he successfully applied for the job of feeder driver, which involves driving semi-trucks from one UPS center to another. Claimant completed the UPS school in 1975 and he was transferred to the feeder department. (Tr. at 12; Dep. of Claimant at 10-11.) Since May 1976 claimant has been a feeder driver in Kalispell. Since 1988 he has driven the run from Kalispell to Helena and return. (Tr. at 31; Dep. of Claimant at 11-12.)

Injury

6. On April 13, 1990, claimant sustained an injury arising out of and in the course of his employment as a UPS driver. Claimant's vehicle had a flat tire at Seeley Lake and he injured his back lifting the tire into the trailer. Claimant felt a sharp pain in his back but he did not seek medical treatment until he went to Dr. Loren Vranish a month later. (Tr. at 12-13.)

Medical Evidence

7. On May 18, 1990, at Kalispell Regional Hospital claimant received his initial treatment from his family physician, Dr. Vranish, assisted by Dr. John L. Rogers. An MRI performed on that date revealed degenerative disc changes with mild posterior disc protrusion at the L4-L5 and L5-S1 levels. On May 19, 1990, Dr. Vranish consulted with orthopedic surgeon, Dr. John W. Hilleboe, who recommended continued conservative care. On May 23, 1990, Dr. Vranish consulted with Dr. John V. Stephens. Dr. Hilleboe testified that the conservative treatment was unsuccessful and he diagnosed claimant's condition as a herniated nucleus pulposus at the L4-L5 level on the left. (Dep. of Hilleboe at 5-8.)

8. On May 30, 1990, Dr. Hilleboe performed surgery which consisted of laminectomy and disc excision at the L4-5 level. (*Id.* at 8-11.) Post-operatively, the claimant underwent some physical therapy and his course of recovery was excellent. Claimant was released to return to work on September 4, 1990. Claimant returned to work at his former job as a full-time UPS feeder driver September 9, 1990. The next medical examination was one year later on September 6, 1991, at which time Dr. Hilleboe noted that the claimant was doing well driving his truck and did not need any medical treatment. (*Id.* at 11.) On November 8, 1991, Dr. Hilleboe wrote a letter to Mr. McGarvey that indicated claimant's condition would not allow him to drive more than 45 hours a week. (*Id.* 12-13.)

9. Claimant next saw Dr. Hilleboe on February 25, 1992 and claimant reported a recurrence of back pain. Claimant was placed on an exercise program and anti-inflammatory prescriptions. On March 10, 1992, claimant was again examined by Dr. Hilleboe who released him to return to work as a driver and advised him to resume his exercise program. In addition, claimant was instructed to get out of his vehicle every 60 to 100 miles and change his position. (*Id.* at 14-15.) At that time, claimant had reached maximum medical improvement and was assigned an 18 percent impairment rating. (*Id.* at 13-15.)

10. On July 16, 1992, the claimant returned to see Dr. Hilleboe due to low-back discomfort which had occurred while doing lawn work over the weekend. A repeat MRI was performed showing no evidence of recurrent disc herniation or post-operative fibrosis. The last medical treatment of the claimant was a follow-up by Dr. Hilleboe on July 21, 1992 which indicated that claimant had improved. (*Id.* at 15-17.) Dr. Hilleboe described the claimant's physical limitations as follows:

Indeed, I feel that Mr. Chaffey subjectively reported that he was unable to work more than 45 hr. per week without discomfort. That is certainly within the realm of normal for post-operative back surgery, particularly since his job is heavy hauler or long term driving in a truck and that sitting position can become very aggravating post-operatively. What happens is that the disc has been removed at the 4-5 level and he is developing narrowing of the 4-5 interspace which then produces facet impingement secondary to settling. This then develops degenerative arthritis at the facet joint.

I do not expect Mr. Chaffey's condition will improve to a point that he would be able to exceed the 45 hour driving. I feel that if he were to engage in heavy lifting and unloading of his truck afterwards, that that would actually increase his complaints and degenerative change and possibly decrease his ability to even work 45 hr. per week.

Ex. No. 2 at 4.

11. Dr. Hilleboe explained the basis for his opinion as follows:

Q And the mere fact that he was able to, on a few occasions, drive weeks that exceed 45 hours per week, does that change your opinion that on the long term he should not exceed an average of 45 hours per week?

A I think that, you know, if he can work 55 hours a week without injuring himself, that may be great for him and for his wallet, but I don't think it's good for him physically.

Dep. of Dr. Hilleboe at 23.

12. Dr. Hilleboe arrived at the 45 hour suggested limitation on actual driving time per week through discussions with the claimant. On two occasions the claimant exceeded that

limitation without incident, when he worked fifty-five hours during the week ending August 28, 1992, and fifty-one hours during the week ending December 4, 1992. (Dep. of Dr. Hilleboe at 17-19, Ex. No. 7.) Dr. Hilleboe felt there was no medical reason why the claimant could not continue to work as a feeder driver within the 45 hours per week average. (Dep. of Dr. Hilleboe at 19-20.)

Post-Injury Employment

13. On September 9, 1990, claimant returned to work as a feeder driver, the same job he held on the date of injury. He is not responsible for loading or unloading and he is able to put on chains during the winter months. (Tr. at 31-33; Dep. of Claimant at 28, 32.) As of August 24, 1992, claimant indicated on a UPS form that he did not have any condition that might require special accommodations or assistance to enable him to perform his job. (Ex. No. 10 at 2.)

14. At the time of his injury on April 13, 1990, claimant was earning \$16.13 per hour. (Tr. at 19, 32.) Claimant returned to the same job which currently pays \$17.79 per hour. (Dep. of Claimant at 31.)

Benefits Paid

15. Temporary total disability benefits were paid at the rate of \$299.00 per week, for one day, April 15, 1990, and then from May 17, 1990, through September 3, 1990, when claimant was released to return to work. They were again paid from January 28, 1992, through March 15, 1992. (Ex. No. 11.)

16. Permanent partial disability benefits have been paid at the maximum rate of \$149.50 per week beginning March 10, 1992, through the time of trial, which amounted to 96 weeks of benefits as of March 4, 1993. (Ex. No. 11.) The impairment award of 18 percent constitutes 90 weeks of benefits, and the balance of permanent partial disability benefits paid to present are credited against any future wage supplement.

Wage Supplement Benefits

17. The law in effect at the time of claimant's April 13, 1990 injury, calculates pre-injury wages by averaging the four pay periods immediately preceding the injury. Section 39-71-123(3), MCA (1989).

18. Claimant's four pay periods prior to his injury were as follows:

April 07, 1990	\$1,081.19
March 31, 1990	1,024.82
March 24, 1990	848.36
March 17, 1990	<u>979.25</u>

TOTAL = \$3,933.62

WEEKLY AVERAGE - \$983.41

Tr. at 16-17; Ex. No. 7 at 3.

19. Claimant contends that the weeks of March 17 and 24, 1990, each contain one day he did not work and therefore do not accurately reflect the claimant's wage history with UPS. (Claimant's Proposed Finding of Fact, No. 15.) After reviewing the payroll records and the evidence presented, the Court finds that the four pay periods prior to claimant's injury do accurately reflect his pre-injury wages.

20. Claimant's post-injury earning capacity is best reflected in his actual earnings in 1991 and 1992. Claimant earned a total of \$43,827.69 in 1991 and \$43,181.66 in 1992. Claimant's current weekly wage thus averages \$836.63 per week and his current pay wage is \$17.79 per hour. (Tr. at 26.)

21. All of the drivers in UPS centers have been switched to four ten hour shifts and drive only four days instead of five days per week. Working out of the Kalispell Center, it is not unusual for the claimant to drive 42 to 45 hours on a usual work week. (Tr. at 57.) On occasion claimant has worked in excess of 51 hours per week. (Tr. at 56.)

CONCLUSIONS OF LAW

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

2. Claimant is entitled to 500 weeks of wage supplement benefits in the amount of \$149.50 per week pursuant to section 39-71-703, MCA (1989). Defendant is to receive credit for wage supplement benefits previously paid.

Claimant has the burden of proof to establish an entitlement to the relief sought. *Aho v. Burklund Studs, Inc.*, 153 Mont. 1, 452 P.2d 415 (1969); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 598 P.2d 1099 (1979). As of 1987, that burden became heavier. *Decock v. State Compensation Mutual Insurance Fund*, WCC No. 9107-6197 ORDER ON REMAND (February 19, 1993).

The law in effect on the date of claimant's injury controls. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Accordingly, the 1989 version of the Workers' Compensation Act applies to claimant's injury of April 13, 1990.

It is the expressed public policy and objective of the Montana Workers' Compensation System that:

. . . Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. Within that

limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease. [Emphasis added.]

§ 39-71-105(1), MCA (1989).

The concept of liberal construction in favor the claimant was repealed in 1987. Section 68, Chapter 464, Session Laws of Montana, 1987. Accordingly, the claimed wage loss, or wage supplement benefits, must be the result of the work-related injury. Such is consistent with the long-standing requirement of proximate cause primarily imposed through decisional law.

At the time of his industrial injury, wages are defined as:

39-71-123. Wages defined. (1) "Wages" means the gross remuneration paid in money, or in a substitute for money, for services rendered by an employee. Wages include but are not limited to:

....

(3) For compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except if:

(a) the term of employment for the same employer is less than four pay periods, in which case the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work; or

(b) for good cause shown by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods.

Montana courts have consistently required that a claimed disability must be causally related to the injury in the workplace. Where the requisite causal connection is absent, additional disability benefits were properly denied. As to pre-1987 injuries, see *White v. Aetna Life & Casualty*, (Mont. 1993) 843 P.2d 787, 49 St. Rptr. 1117; *Eastman v. Transport Insurance Co.*, 255 Mont. 262, 843 P.2d 300 (1992). As to post-1987 injuries, see *Garcia v. State Compensation Mutual Insurance Fund*, 253 Mont. 196, 832 P.2d 770 (1992); *Struble v. Plum Creek Timber Co.*, WCC No. 9104-6131 (March 13, 1992).

Claimant's entitlement to wage supplement benefits is provided by section 39-71-703, MCA (1989), which was in effect at the time of claimant's April 13, 1990 industrial injury. That section provides as in part as follows:

39-71-703. Compensation for permanent partial disability - impairment awards and wage supplements. (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who

has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:

....

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. A worker's failure to sustain a wage loss compensable under subsection (1)(b)(i) does not extend the period of eligibility. However, if a worker become eligible for temporary total disability, permanent total disability, or total rehabilitation benefits after reaching maximum healing, the eligibility period for wage supplement benefits is extended by any period for which a worker is compensated by those benefits after reaching maximum healing.

(2) The determination of permanent partial disability must be supported by a preponderance of medical evidence.

The intent of the legislature in enacting the amendments to section 39-71-703, MCA, was to eliminate specific factors previously considered in determining partial benefits based on an actual loss of earning capacity. The legislature limited the claimant's entitlement by providing wage supplements calculated only on a comparison of claimant's pre-injury actual earnings and his post-injury earning potential in his job pool.

In the case at bar, it is agreed that at the time of his industrial injury, claimant was earning \$16.15 per hour and that he returned to work as a feeder driver earning \$17.79 per hour.

Under the law in effect at the time of the injury, supplemental benefits are payable to the claimant in the amount of two-thirds of the proven loss of actual wages which resulted from the industrial injury.

First, in determining claimant's pre-injury actual earnings, claimant's counsel argues that the four preceding pay periods prior to the April 13, 1990 injury, do not accurately reflect claimant's actual earnings. Instead claimant urges the Court to average his entire wages from 1988 to the date of the injury.

Claimant's payroll records were stipulated into evidence as Exhibit No. 7. Using these payroll records, defendant, relying on 1988 and 1989 wages, calculates claimant's pre-injury earning capacity at \$887.15 per week.

The Court finds the previous four pay periods accurately reflect claimant's pre-injury earning capacity and sets \$983.41 per week as of his pre-injury earnings. To calculate present value, divide the present wage (\$17.79 per hour) by the wage paid at the time of injury (\$16.13), times his present weekly wage (\$983.41) which results in his pre-injury earning capacity in present dollars (\$1,084.62).

Claimant's post-injury earnings of \$17.79 per hour is higher than his pre-injury earnings per hour, but Dr. Hilleboe has placed a 45 hour per week limitation on claimant's driving time. The limitation is reasonable and necessary to minimize future aggravation to claimant's back. Claimant's post-injury earning potential in his job pool is \$800.55 per week (17.79 x 45).

Claimant's wage supplement as calculated in section 39-71-703(1)(b), MCA (1989) is \$1,084.62 pre-injury wages less \$800.55 post-injury earnings, equalling \$284.04 times sixty-six and two-thirds percent or \$189.37 per week which is more than one-half the average weekly wage and claimant's wage supplement entitlement is limited to \$149.50 per week.

3. Claimant is not entitled to a 20 percent penalty pursuant to section 39-71-2907, MCA.

A bona fide dispute existed between the parties and defendant did not unreasonably delay or deny benefits which would justify a 20 percent penalty pursuant to section 29-71-2907, MCA.

4. Claimant is entitled to costs but not an attorney fee pursuant to section 39-71-612(2), MCA (1989).

At the time of claimant's industrial injury, the law in effect denies an attorney fee unless there is a determination that the actions of the insurer were unreasonable.

PROPOSED JUDGMENT

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

2. Claimant is entitled to 500 weeks of wage supplement benefits in the amount of \$149.50 per week pursuant to section 39-71-703, MCA (1989). Defendant is to receive credit for wage supplement benefits previously paid.

3. Claimant is not entitled to a 20 percent penalty pursuant to section 39-71-2907, MCA.

4. Claimant is entitled to costs but not an attorney fee pursuant to section 39-71-612(2), MCA (1989).

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 25th day of January, 1994.

(SEAL)

\s\ Robert J. Campbell

ROBERT J. CAMPBELL

Hearing Examiner

Submitted: April 28, 1993

1. Claimant argues that defendant conceded that he is working 42 to 45 hours weekly. The actual figure is within the upper limits of any such concession.