IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 46

WCC No. 2004-0993

BILL CALLAWAY

Petitioner

vs.

VALOR INSURANCE COMPANY, INCORPORATED

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks a 20% permanent partial disability award based on more than a $2 wage loss.

Held: Claimant is entitled to a 20% award. He cannot return to his time-of-injury job as a restaurant floor manager since that position required him to lift more than the 35 pounds to which his treating physician restricted him. He can work as a waiter but his historical hours of work as a waiter for his employer show that less ours of work per week are available to waiters than to floor managers. The difference amounts to 7.15 hours a week. Based on the loss of hours of work, claimant suffered a wage loss of $2.16 an hour.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code: section 39-71-703, MCA (1997-2002). Where the claimant's loss of wages is based on what he is capable of earning rather than actual post-injury earnings, and neither party presents vocational evidence concerning the number of hours of work available with respect to post-injury jobs, in which the claimant had also worked for a time preinjury, the hours actually worked in the position preinjury is the best evidence of the hours available at lest where the only other evidence is anecdotal, undocumented, and unpersuasive.

Benefits: Permanent Partial Disability: Wage Loss. Where a claimant is unable to work as many hours post-injury as he was working when injured, whether because of physical restrictions or simply an unavailability of hours in the jobs for which he is qualified post-injury, the loss of hours must be taken into consideration when

computing wage loss. This is done by dividing post-weekly wages by the average number of hours worked by claimant preinjury.

Proof: Evidence: Vocational. Where the claimant's loss of wages is based on what he is capable of earning rather than actual post-injury earnings, and neither party presents vocational evidence concerning the number of hours of work available with respect to post-injury jobs, in which the claimant had also worked for a time preinjury, the hours actually worked in the position preinjury is the best evidence of the hours available at lest where the only other evidence is anecdotal, undocumented, and unpersuasive.

¶1 The trial in this matter was held in Helena, Montana, on May 4, 2004. The petitioner was present and represented by Mr. Norman H. Grosfield. Respondent was represented by Mr. Shane P. McGovern and Mr. Geoffrey R. Keller.

¶2 Exhibits: Exhibits 1 through 7 and 13 through 22 were admitted without objection. Exhibit 8 is a duplicate of Exhibit 2. Exhibits 9 through 12 were intended exhibits but were not submitted as they were duplicates of other exhibits.

¶3 Witnesses and Depositions: Petitioner, Beth Wing, Jennifer Lynch, Terry Sharpe, and Donna Fisher testified. The parties also submitted the depositions of petitioner and Dr. Allen M. Weinert, Jr. for the Court's consideration.

¶4 Issue Presented: The sole issue to be determined by the Court is:

> ¶4a Whether the petitioner is entitled to a permanent partial disability award for wage loss pursuant to section 39-71-703(5)(c), MCA (2001).

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶6 The following findings of fact reflect my assessment of the credibility of the witnesses in this case. I decline to find any particular witness credible or incredible. As in many cases I found some parts of the testimony by individual witnesses credible and other parts not.

¶7 The petitioner in this matter is Bill Callaway and I shall refer to him hereinafter as "claimant."

¶8 The claimant is presently thirty-one years old and a high school graduate. His work history is primarily as a waiter and restaurant manager.

¶9 The claimant began working for the Stonehouse Restaurant (Stonehouse) in Helena as a waiter in June 1996, quit in December 1996 to become a marlin fisherman guide in Mexico, and returned to work as a Stonehouse waiter in June 1997. (Callaway Dep. at 9-10). He became a floor manager in January 2002. (*Id*. at 10, 17-18.)

¶10 While the testimony was conflicting concerning the physical requirements of the claimant's job as a floor manager, I am persuaded that his job required lifting more than thirty-five pounds. The job required him to perform whatever tasks needed to assure the smooth operation of the restaurant. He helped unload and move supplies when needed, some of which weighed in excess or thirty-five pounds. He was also required to move tables, which weighed more than thirty-five pounds and were difficult to move. While he often had help, he sometimes had to move them by himself.

¶11 On January 22, 2002, the claimant strained his shoulder and upper back while putting up a flag in front of the Stonehouse.

¶12 At the time of the accident, the Stonehouse was insured by Valor Insurance Company (Valor). It accepted liability for his claim as compensable and has paid temporary total disability and medical benefits.

¶13 The present dispute concerns the claimant's entitlement to permanent partial disability benefits, specifically for wage loss under section 39-71-703(5)(c), MCA.

¶14 Following his accident, the claimant first sought chiropractic care from Bryan Hilborn, D.C. He initially saw Dr. Hilborn on January 23, 2002, the day after the accident, and reported a constant "burning feeling in the upper back radiating to the right shoulder." (Ex. 2 at 3.) Dr. Hilborn treated the claimant on multiple occasions thereafter. Although Dr. Hilborn's chiropractic note for April 11, 2002, reflects that claimant was better, and characterized his pain as only "mild in nature" and occurring only 10-25% of the time. (*Id*. at 20). Despite that characterization, the claimant stopped treating with Dr. Hilborn after April 11, 2002, testifying that he did so because, "my back wasn't getting well enough for me to be able to work . . . The treatment wasn't very effective." (Callaway Dep. at 31.)

¶15 The claimant, at the recommendation of his girlfriend, then went to see Dr. Allen M. Weinert, Jr. His first visit was on April 25, 2002, and he saw Dr. Weinert on seven more occasions over the next year and a half, the last visit being on December 16, 2003.

¶16 On April 25, 2002, Dr. Weinert reported the claimant's complaints as "right interscapular and mid back pain." (Ex. 4 at 1.) He also noted that the claimant had suffered a recent outbreak of herpes zoster (shingles) in the same distribution of his pain. (*Id*. at 2.) His impression was, "Right thoracic region pain due to right thoracic paraspinal and rhomboid region myofascial strain with confounding issue of herpes zoster in a similar distribution." (*Id*.)

¶17 At the time of his April 25th visit to Dr. Weinert, the claimant was no longer working but had begun attending Helena College of Technology (HCT). (*Id*. at 1.) Nonetheless, the claimant requested "a note to excuse him from work, as he is now considering returning to waitering." (*Id*. at 2.) Dr. Weinert agreed to do so but only on account of his herpes zoster. (*Id*.)

¶18 On May 16, 2002, the claimant returned to Dr. Weinert and reported that he had completed his semester at HCT, had returned to work as a waiter three days a week, and was "tolerating this well." (*Id*. at 3.) Dr. Weinert released the claimant "to return to his time of injury job as a waiter without specific restrictions." (*Id*.) He also prescribed physical therapy exercises for his back.

¶19 On August 12, 2002, the claimant again saw Dr. Weinert, still complaining of pain in his right thoracic and scapular region, worse with activity. (*Id*. at 5.) At that time he reported he had fractured his foot and had not been consistent in doing his back exercises. (*Id*.) Dr. Weinert ordered a thoracic spine x-ray at that time and discovered a T6 wedge compression fracture. He urged the claimant to do his home exercises and also prescribed a thoracic bone scan to obtain further information about the compression fracture. (*Id*.)

¶20 A bone scan was subsequently done and indicated that the claimant's compression fracture was old and not related to his industrial injury. (*Id*. at 9, 11.)

¶21 The claimant next saw Dr. Weinert on October 4, 2002, still complaining of upper back pain for which he was using a TENS unit for his pain. (*Id*. at 11.) (A TENS unit is a "transcutaneous electrical nerve stimulator." Merriam-Webster Medical Dictionary.) He was also going to physical therapy and doing home exercises. (*Id*.) Dr. Weinert prescribed a continuation of the home exercise program and use of the TENS unit but released him "to work full duty." (*Id*.)

¶22 The next visit to Dr. Weinert was on December 6, 2002, at which time the claimant was still complaining of "chronic burning pain in the right scapular region" and an inability to work for more than twelve hours a week. (*Id*. at 13.) He was still using a TENS unit and doing some home exercises. (*Id*.) Dr. Weinert noted that the claimant was "frustrated by his lack of improvement and inability to return to full time work." (*Id*.)

¶23 On February 25, 2003, the claimant was doing better but Dr. Weinert recommended that he go to a health club to work out and limited him to "the light/medium physical demand classification restricting lifting in the 35 pound range." (*Id*. at 19.) He found the claimant to be at MMI and rated his impairment from his industrial injury at five percent. (*Id*.)

¶24 Dr. Weinert subsequently saw the claimant on September 16 and December 16, 2003. (Ex. 4 at 22-24.) The claimant was still complaining of thoracic pain. Respondent in its proposed findings of fact states that Dr. Weinert released the claimant to "work full duty"

(Respondent's Proposed Findings of Fact, Conclusions of Law, and Judgment, ¶ 20), apparently based on a "Medical Condition Status Report" dated December 16, 2000, and found at Exhibit 4, page 25. That report is a form and has three check-off boxes with respect to work status: one for "off work", one for "regular work", and one for "modified work." Dr. Weinert checked the box for "regular work." But he had previously released the claimant for regular work as a waiter with a thirty-five pound restriction. (*See* ¶ 23.) I see no inconsistency between the check off on December 16th and the prior restrictions.

¶25 The parties took Dr. Weinert's deposition. Much of the deposition was devoted to a medical records review and simply reaffirms what is in his records. Most importantly, Dr. Weinert reaffirmed his thirty-five pound restriction on the claimant's work and his opinion that the claimant can perform full-time work. (Weinert Dep. at 29.)

¶26 Dr. Weinert specifically opined that the claimant is able to work three days in a row, although he noted that working as a waiter may cause soreness to uninjured individuals and may therefore cause even greater soreness in the claimant. (*Id*. at 35-36.)

¶27 Dr. Weinert continues to prescribe Vioxx to treat claimant's continuing pain. Vioxx is an anti-inflammatory prescription drug. (*Id*. at 36-37.)

¶28 Dr. Weinert's opinions are the only medical opinions in this case. Thus, they are conclusive as to claimant's medical restrictions to thirty-five pounds lifting. However, his opinion concerning the number of days claimant can work is not conclusive since claimant's pain tolerance must be considered.

¶29 As I have already found, the claimant's duties as floor manager required him to lift more than thirty-five pounds. I have anecdotal but no vocational evidence concerning the lifting requirements for floor managers at other establishments. I therefore rely on claimant's actual lifting requirements and find that he is unable to perform his time-of-injury job.

¶30 The claimant concedes that waiters' hourly wages equal those of a floor manager. His case for wage loss is based on his contention that waiters work less hours than floor managers. He also contends that his hours of work are further restricted by his inability to work more than two consecutive days as a waiter on account of his back pain, thus limiting his work week to four (4) days.

¶31 I have no vocational testimony, therefore the best evidence of the typical hours per day of the claimant's job as both a floor manager and a waiter is the claimant's own history of work for the Stonehouse prior to his injury. Exhibit 13 shows the number of hours the claimant worked each pay period and the number of days he worked.

¶32 In 2001 the claimant worked an average of 5.17 hours per day as a waiter. A spreadsheet showing the calculation is attached as Appendix A. He did not work five days a

week, however, he held a second job during 2001. He did not dispute that waiters can work five days a week. On a 5.17-hour-a-day basis, he could have worked 25.85 hours a week on average.

¶33 From January 1, 2002 to February 15, 2002, when he was working as a floor manager, claimant worked 216.26 total hours, or 33 hours a week (*216.26 hours ÷ 46 days x 7=32.909*[(1)]). (Ex. 13 at 1-2.) While the claimant testified that he worked forty hours a week on average as a floor manager, I am unpersuaded. His actual hours do not add up to forty hours a week and his testimony concerning other managerial jobs was unsupported and unconvincing. His description of his work, however, shows that his floor manager duties required working more hours than a waiter.

¶34 At the time of his injury, the claimant was making approximately $10 an hour. I do not have an exact amount since the claimant's pay was based in part on tips. The parties have not provided me with bimonthly pay except for the four pay periods prior to the injury, as set forth in the First Report. (Ex. 6). The last two pay periods encompass the last two weeks of December 2001 and the first two weeks of January 2002, thus encompassing two weeks as a waiter and two as a manager. Those two pay periods show earnings equivalent to about $11 an hour for both periods, that amount derived by dividing the total pay by the hours of work reported in Exhibit 13. But the prior two pay periods average only a little more than $9 an hour. The claimant concedes that on an hourly basis waiters make as much per hour as floor managers. Given seasonal and tip variability, $10 an hour is the best estimate I can come up with for purposes of the present analysis.

¶35 Based on the average 33-hour-week for work as a floor manager and an average 25.85-hour week as a waiter, the claimant suffered a wage loss of $71.15 per week as a result his injury. Based on a thirty-three-hour week as a manager, that equates to a wage loss of $2.16 an hour.

¶36 In light of the foregoing finding, it is unnecessary for me to determine whether the claimant is limited to working four days a week as he claims.

CONCLUSIONS OF LAW

¶37 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶38 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶39 Section 39-71-703, MCA (1997-2002), governs the claimant's entitlement to benefits. Subsection (5)(c) provides for a percentage of 350 weeks of benefits based on the actual wage loss:

(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.

Actual wage loss is defined in section 39-71-116(1), MCA (1999-2002), as follows:

(1) "Actual wage loss" means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury.

However, as set out in subsection (5)(c) to section 39-71-703, MCA, if the claimant is qualified to earn more than his actual post-injury wages, then that is the measure which must be used in calculating wage loss.

¶40 This case is complicated by the fact that since reaching MMI and becoming eligible for PPD benefits, the claimant has been attending school. He does not contend that his actual post-injury earnings should be used to measure his wage loss, rather he has attempted to prove that the wages he is qualified to earn post-injury are less than his time-of-injury earnings. He bases his wage loss contention on the fact that he is able to work less hours than before.

¶41 In *SLH v. State Compensation Ins. Fund,* 1999 MTWCC 6, I held that where a worker is unable to work as many hours post-injury as he or she was working preinjury, the post-injury hourly rate must be determined by dividing what the claimant earns or is capable of earning post-injury by the number of hours he or she worked preinjury. In *SLH*, I said:

¶64 Statutes must be construed reasonably to avoid absurd results. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 38, 394 P.2d 182, 198 (1964) ("Statutory or constitutional construction should not lead to absurd results if reasonable construction will avoid it."). If section 39-71-703(3)(c), MCA (1991), is construed as requiring that the post-injury wage per hour be compared with the preinjury hourly wage without consideration of the number of hours of employment, then a worker who preinjury was working 40 hours a week at $7.00 but post-injury can work only 10 hours a week but still earn $7.00 an hour during those 10 hours would suffer no "wage loss" under the section. That result is contrary to the plain meaning of "wage loss." It is also contrary to the first phrase of the subsection which, without regard to an hourly rate, provides that a worker is entitled to no wage loss benefits only if the worker "has no wage loss as a result of the

industrial injury." A worker who cannot work as many hours post-injury as preinjury has a "wage loss" even if she can work at the pre injury "hourly" wage, thus an interpretation of the subsection as limiting wage loss comparisons to absolute hourly rates would fly in the face of the plain meaning of "wage loss" and the language of the first phrase of the subsection.

¶65 The only way to compute wages in such cases, and thereby avoid an absurd result, is to divide the weekly post-injury compensation by the number of hours the worker was employed per week preinjury. That will provide an hourly rate based on the number of preinjury hours and result in a reasonable comparison of pre- and post-injury wages. . . .

¶42 In this case the best evidence I have indicates that the claimant's post-injury job as a waiter is limited to 25.85 hours a week versus the 33 hours he was working as a floor manager. Accordingly, I have divided total wages for 25.85 hours of work as a waiter by 33 hours and determined that the claimant has suffered a $2.16 an hour wage loss. He is therefore entitled to a twenty percent award, or seventy weeks of permanent partial disability benefits, as provided in section 39-71-703(5)(c), MCA (1997-2002.)

JUDGMENT

¶43 The claimant is entitled to a twenty percent award, or seventy weeks of permanent partial disability benefits, as provided in section 39-71-703(5)(c), MCA (1997-2002), which shall be paid in accordance with the section.

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

¶45 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 2nd day of June, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Shane P. McGowan
Mr. Geoffrey R. Keller
Submitted: May 4, 2004
Attachment - APPENDIX A**APPENDIX A**

Bill Callaway's Hours in 2001

Pay Period ending	Total Hours	Days worked	Average hours/day

1/15/01	23.4	5	4.68
1/31/01	21.5	4	5.38
2/15/01	21.8	5	4.36
2/28/01	20.9	4	5.23
3/15/01	25.25	6	4.21
3/31/01	34.2	7	4.89
4/15/01	47.5	9	5.28
4/30/01	46.4	8	5.80
5/15/01	53	8	6.63
5/31/01	34	7	4.86
6/15/01	42.8	7	6.11
6/30/01	39.3	7	5.61
7/15/01	41.9	7	5.99
7/31/01	38.5	8	4.81
8/15/01	37.8	8	4.73
8/31/01	45.2	9	5.02
9/15/01	47.5	8	5.94
10/1/01	19.25	4	4.81
10/15/01	32.6	7	4.66
10/30/01	30.2	6	5.03
11/15/01	30.9	8	3.86
11/30/01	33.7	7	4.81
12/15/01	49.7	9	5.52
12/31/01	40.9	7	5.84

AVERAGE 5.17

1. I do not have the actual days he worked or the hours he worked each day. He was paid bimonthly and I only have those amounts and the corresponding number of hours he worked during each pay period.