

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 58

WCC No. 2003-0721

DENNY CAMPBELL

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered an occupational disease of his wrist and could not return to his time-of-injury job, which was heavy labor. The insurer paid him a 9% impairment award but denied further permanent partial disability (PPD) benefits even though the hourly wage earned by claimant post-disease was more than \$2 less than his wage at the time of his injury. The insurer determined there was no wage loss based on jobs identified by a vocational consultant. Claimant petitioned for PPD benefits, for a penalty, and attorney fees. Part of the penalty was with respect to mis-mailed benefit checks.

Held: The physical requirements of some of the jobs identified by the insurer's vocational consultant exceed claimant's medically imposed physical restrictions. As to the other jobs, they are not within his geographical labor market. Therefore, none can be used in determining what claimant is capable of earning for purposes of determining his wage loss. Using the post-disease wages he earned, he suffered a wage loss in excess of \$2 an hour and is therefore entitled to PPD benefits. However, the insurer did not act unreasonably and claimant is not entitled to attorney fees or a penalty.

Topics:

Benefits: Permanent Partial Benefits. Under the 1999 Workers' Compensation Act, a claimant is entitled to PPD benefits in addition to an impairment award only if he or she suffers an actual wage loss. Wage loss is computed by subtracting the greater of what the claimant in fact earns or what he is capable of earning post-injury from his or her time-of-injury wage.

Medical Evidence: Competency of Witness. Employers are not competent to render medical opinions concerning a claimant's physical ability to work.

Vocational: Return to Work Matters: Labor Market. A geographic job market is inherent when considering what claimant is capable of earning. The job market for a highway sign painter was the state of Montana, where he traveled throughout the state in his time of injury job. Even though he worked previously as an interstate truck driver, the Court would not consider interstate driving jobs where there was no evidence claimant actively sought post occupational disease employment as an interstate driver.

Vocational: Return to Work Matters: Labor Market. In determining what a claimant is capable of earning, vocational consultants should focus on what the particular claimant is in fact capable of earning rather than theoretical wage ranges for workers generally.

Wages: Wage Loss. Under the 1999 Workers' Compensation Act, a claimant is entitled to PPD benefits in addition to an impairment award only if he or she suffers an actual wage loss. Wage loss is computed by subtracting the greater of what the claimant in fact earns or what he is capable of earning post-injury from his or her time-of-injury wage.

Wages: Wage Loss. In determining what a claimant is "capable of earning" for purposes of determining "actual wage loss" under the 1999 Workers' Compensation Act, four factors are considered in determining whether a job can be included in the computation. First, the claimant must be physically capable of performing the job. Second, the claimant must be vocationally qualified for the job. Third, the job must be available in the claimant's geographical job market. Fourth, the claimant must have a reasonable prospect of actually securing the job.

¶1 The trial in this matter was held on May 8, 2003, in Helena, Montana. Petitioner, Denny Campbell, was present and represented by Mr. Richard J. Martin. Respondent, Montana Contractor Compensation Fund (MCCF), was represented by Mr. Bradley J. Luck.

¶2 Exhibits: Exhibits 1 through 38 and 40 were admitted without objection. The Court reserved ruling on Exhibit 39.

¶3 After further consideration, Exhibit 39 is **refused**. The exhibit consists of a May 2, 2003 letter of respondent's counsel to Dr. Ronald M. Peterson and Dr. Peterson's May 6, 2003 reply. Counsel's letter requested Dr. Peterson's opinion as to whether claimant can work more than forty hours a week.

¶4 Dr. Peterson conducted an independent medical examination (IME) of claimant on July 6, 2002. In his report on that date he restricted claimant to eight hours of work per day and forty hours a week. (Ex. 5 at 6.) Mr. Luck's inquiry arose in light of the identification of jobs which would require claimant to work up to fifty hours a week.

¶5 Mr. Luck's inquiry to Dr. Peterson was sent just six days before trial. Dr. Peterson replied just two days before trial. The Scheduling Order set March 28, 2003, as the deadline for exchange of trial exhibits. Obviously, the proposed exhibit was not exchanged by then;

thus, it is untimely. While I understand the pressures of preparing for trial, and the need for adjustments in presenting a party's case, Dr. Peterson's original opinion was rendered July 6, 2002, many months before the exchange deadline. He could have been asked for clarification long before May 2, 2003. Moreover, the job descriptions which indicate a need for work greater than forty hours a week were the very job descriptions sent to Dr. Peterson. The forty-hour-a-week issue therefore existed in July 2002, and was not a new issue rearing its head just before trial.

¶16 Mr. Luck's assertion that the exhibit should be admitted because the trial is a search for "truth" is an oversimplification of the evidentiary issue presented. Dr. Peterson previously rendered an opinion concerning work hours. His latest opinion is, of course, different, but which opinion is the "truth?" I note that the May 2, 2003 letter provides additional information indicating the need to increase claimant's work hours because of the requirements of jobs identified for him by a vocational counselor, jobs which allow respondent to argue that claimant does not have a wage loss and is not entitled to further benefits. How much did this additional information influence Dr. Peterson's opinion? Why did he change his opinion? Obviously, the proffered exhibit is not necessarily the "truth." Further exploration of the two opinions would be warranted by way of deposition or trial testimony. That exploration would have required a delay in the trial or permission to take a post-trial deposition. In light of the fact that respondent had Dr. Peterson's opinion long ago and could have timely inquired of him, my throwing out the deadlines in the Scheduling Order and opening up the case for further depositions and trial testimony would be an abuse of discretion on my part.

¶17 Witnesses and Depositions: Denny Campbell, Michelle Campbell, Travis Stortz and Carol Crews testified at trial. The parties also submitted depositions of Linda Waliser, Sharon Ruth, John Corcoran, Patrick Hayden, and Carmella Companion as evidence.

¶18 Issues Presented: The issues as set forth in the Pretrial Order are:

1. Petitioner/Claimant's entitlement to permanent partial disability wage loss, functional loss and age factor benefits pursuant to Montana Code Annotated § 39-71-703.
2. Whether Petitioner/Claimant is entitled to an award of attorney fees and costs and a 20% penalty based on the insurer's unreasonable refusal to issue permanent partial benefits and refusal to mail his benefit checks to the correct address.

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶10 Claimant is presently forty-two years old. He is married and has two children.

¶11 Claimant is a high school graduate. At trial he testified he has worked as a producer, writer, director, and actor in films, radio and theater. He has also worked as a laborer and bartender and done office work. The record does not disclose if his work as a producer, writer, and actor was remunerative. He also told the vocational consultant in this case that he was a photographer in the Navy from 1981 to 1986 (Ex. 11 at 3), and "that prior to 1997 he primarily worked in a variety of Laborer positions dating back to 1986." (Ex. 13 at 2.)

¶12 Claimant went to work for Mark Rite Lines on April 17, 2000. Mark Rite Lines does highway painting throughout Montana. Claimant's job required him to travel throughout the state.

¶13 At the time of his employment with Mark Rite Lines, claimant lived in Billings, Montana.

¶14 Claimant's job entailed painting stripes and other traffic signals on roads, highways and intersections. (Ex. 10 at 2.) His job entailed heavy labor. (*Id.*)

¶15 While working for Mark Rite Lines claimant began experiencing pain in his left wrist after using a jackhammer over a one to two month period. (Ex. 3 at 1.) On October 30, 2000, he sought medical care for his pain. (*Id.*)

¶16 Claimant filed a claim for compensation on October 30, 2000. (Ex. 1.) At that time, Mark Rite Lines was insured by the MCCF. MCCF accepted liability for his condition as an occupational disease (OD). (Uncontested Fact 3.)

¶17 Claimant's wrist condition was initially diagnosed as "Left wrist tendonitis/overuse syndrome." (Ex. 3 at 2.) However, claimant continued to experience pain. On May 10, 2001, Dr. E. Denise Quinlan, a hand specialist, diagnosed stage I Kienböck's disease of the wrist which she related to claimant's use of a jackhammer. (Ex. 4 at 6-7, 9.)

¶18 On May 25, 2001, Dr. Quinlan performed surgery on claimant's wrist. (Ex. 6.) Following his recovery from surgery, Dr. Quinlan restricted claimant from lifting over fifty pounds and from repetitive activities using his left hand and wrist. (Ex. 4 at 20.)

¶19 On July 6, 2002, at the request of MCCF, Dr. Ronald M. Peterson performed an independent medical examination (IME) of claimant. He determined claimant to be at maximum medical improvement and rated claimant's wrist impairment at 9% of the whole person. (Ex. 5 at 4.) He determined that claimant should be physically restricted from repetitive or prolonged gripping with his left hand and limited claimant to medium work involving lifting of no more than fifty pounds. He further determined that claimant should be limited to working eight hours a day and forty hours a week.

¶20 Dr. Peterson disapproved the job analysis for claimant's time-of-injury job. Dr. Peterson also reviewed a number of other job analyses. He approved job analyses for roller operator, truck driver, pilot car driver, and flagger.

¶21 MCCF paid claimant a 9% impairment award but has rejected his request for additional PPD benefits based on its determination that claimant has no wage loss.

Wage Loss Issue

¶22 Claimant cannot return to his time-of-injury job. He is therefore entitled to PPD benefits in addition to the impairment award if he can show he suffered "an actual wage loss as a result of the injury." § 39-71-703(1)(a), MCA (1999).

¶23 At the time of claimant's OD claim (October 30, 2000), he was earning \$17.60 an hour. (Ex. 1.) The wages were Davis-Bacon mandated and claimant testified that all his work for Mark Rite Lines were Davis-Bacon wages.

¶24 Claimant's last four pay periods prior to his OD claim show weekly earnings of \$964.48, \$1079.71, \$575.82 and \$975.35. Assuming claimant was paid time and a half for overtime, he averaged 7.38 hours overtime per week, for a total average of 47.38 hours of work a week. The Court has no information concerning average hours over a longer period of time.

¶25 Following his surgery, claimant returned to work as a school bus driver for Glasgow, Montana schools, working approximately three hours a day. He began work September 12, 2001, and worked there for only a month, leaving to move to Trenton, North Dakota with his family.

¶26 After moving to North Dakota, claimant worked for a time as a delivery driver, delivering snacks such as potato chips for Okay Distribution. He was paid \$8.78 an hour. (Ex. 14 at 2.)

¶27 In May 2002 claimant was hired by Wal Mart in Williston, North Dakota, where he continues working. His starting wage was \$5.75 an hour and his current wage is \$7.09 an hour. (Trial Test; Ex. 9.)

¶28 Based on what claimant in fact earned, he would have an "actual wage loss." However, "actual wage loss" is defined as encompassing "the wages that a worker earns **or is qualified to earn** after the worker reaches maximum healing." § 39-71-116(1), MCA (1999) (emphasis added). To determine what claimant was qualified to earn, MCCF retained Travis Stoltz, a vocational consultant.

¶29 Stoltz prepared an Initial Employability Assessment on May 7, 2002. In his initial assessment he recorded claimant's work history since 1997. (Ex. 11.) Three of the seven positions claimant held were as a laborer, including his job with Mark Rite Lines. The report also indicated that claimant's work history from 1986 to 1997 was primarily in laboring

positions. Two of the other four jobs were the bus driver and delivery position claimant held after his injury. The remaining two were as an "auto hauler," driving trucks loaded with cars, and as a security guard. The claimant worked as an auto hauler from June 1999 to March 2000, earning \$2,300 per month or \$13.30 an hour according to Stortz. The security guard job paid \$6.50 an hour.

¶130 The Initial Employability Assessment set out a "Projected Post-Injury Wage Earning Potential" of "Likely \$13.00-16.50/hr." (Ex. 11 at 4.) Stortz testified that the range stated in the report was based on his overall general experience. I also note that the report is an "initial" and treat it as such.

¶131 On September 9, 2002, Stortz prepared an Employability and Wage Loss Assessment. He identified the jobs approved by Dr. Peterson - flagger, pilot car driver, truck driver, roller operator, and belly dump truck driver - as within claimant's labor market. (Ex. 12 at 5.) He indicated a wage range for those positions of \$10.00 to \$21.14 an hour plus "up to \$4.30/hr. in fringes." (*Id.* at 6.)

¶132 Accompanying Stortz' September 9th report was a more detailed analysis of wages. The report had a listing of approved jobs available through the Montana job service, however, none of those jobs paid more than \$12 an hour. (*Id.* at 7.) Stortz also checked information compiled by the United States Department of Labor for Montana for the year 2000. For positions encompassing the ones for which claimant was released to return to work, the highest median⁽¹⁾ wage was \$15.08 while the highest mean⁽²⁾ hourly wage was \$15.64. Finally, Stortz contacted local employers and determined that "Little Davis Bacon" wages, which are "used when union contracts are in place," were \$17.44 to \$21.14 an hour for truck drivers, \$11.68 to \$15.38 for flaggers, \$13.41 to \$17.11 for pilot car drivers, and \$17.30 to \$21.00 for roller operators. (*Id.* at 8.) The local wage information was at the time of the study, which was nearly two years after the claimant filed his claim for compensation.

¶133 Stortz' report was copied to claimant's attorney, who thereafter made a demand for PPD benefits. That demand was conveyed by an October 21, 2002 letter to Carol Crews, the claims adjuster for MCCF, and sought 20% for wage loss, 1% for age, and 3% for functional loss, in addition to the 9% impairment award. (Ex. 33.)

¶134 Crews replied on October 28, 2002, rejecting the demand because claimant "can earn \$14.50 to \$21.14 hourly." (Ex. 34.) At about the same time she also requested Stortz to readdress claimant's employability, including his time-of-injury labor market. (Ex. 13 at 2.) She told Stortz that the wage range provided in the previous report was "too vague" and asked him to give an opinion as to what claimant was capable of earning. In argument, claimant has portrayed the request for a further report as an indicator of unreasonableness and as an attempt to cause Stortz to revise his wage analysis upwards. The Court rejects that portrayal. I have previously criticized reports and testimony which provide nothing

more than ranges of theoretical wages. I have indicated my desire for opinions as to what a claimant is *in fact* capable of earning in the labor market. Crews was merely requesting information that I have sought in the past and which I have encouraged vocational consultants to provide.

¶135 Stortz complied with Crews' request, providing a report entitled "Denny Campbell Labor Market Clarification 11/4/02." (Exhibit 13.) That report summarized his contact with local Billings, Montana firms. One - JTL - was a construction contractor employing belly, end, and side-dump truck drivers. It employed dump truck drivers at \$17.44 an hour plus a \$2.20 an hour differential if working thirty to sixty miles from Billings and a \$3.70 an hour differential if working more than sixty miles from Billings. Ostermiller, which also employed belly, end, and side-dump truck drivers, paid \$16.37 an hour. Watkins-Shepard reported its entry level over-the-road drivers earned \$16.35 to \$17.35 an hour, while experienced drivers earned up to \$19.25 an hour. Corcoran Trucking, also an over-the-road trucking firm, reported wages from \$14.50 to \$19.30 an hour.

¶136 There are two problems with the jobs identified by Stortz. First, the over-the-road trucking jobs are not limited to Montana, rather they are interstate trucking positions. (See Ex. 23; Ruth Dep. at 4; Corcoran Dep. at 8.) At the time of his occupational disease, claimant's geographical labor market was limited to Montana. Although he subsequently moved to North Dakota, his job market there has been local. As set forth in the Conclusions of Law, the job market for determining wages for jobs a claimant is capable of performing is the geographical labor market in which the claimant is working at the time of his injury unless other information shows claimant is willing to consider a wider geographical area for employment.

¶137 Second, dump truck drivers and many over-the road truckers must be able to work more than eight hours a day and forty hours a week. (Ex. 10; Hayden Dep. at 13-14; Corcoran Dep. at 7-8; Ruth Dep. at 5.) Indeed, the job analyses prepared by Stortz for roller driver, belly dump truck driver, flagger, and pilot car driver all indicate working hours of more than eight hours a day. While MCCF elicited testimony from some of the employers to the effect that claimant should be able to work more than eight hours a day despite his wrist condition, (see e.g. Companion Dep. at 14-15; Corcoran Dep. at 19-20) an employer's opinion concerning a claimant's ability to work more than eight hours a day or forty hours a week does not override a physician's medical restrictions and is entitled to no weight.

¶138 Post-disease claimant is actually earning far less than his time-of-injury position. MCCF has failed to identify jobs in the Montana labor market or in claimant's present North Dakota job market which are limited to eight hours a day and forty hours a week which claimant is capable of performing and which are within \$2 of his time-of-injury job.

Penalty and Attorney Fees

¶139 Claimant alleges that the insurer's denial of PPD and its mis-mailing of some of his benefit checks was unreasonable and give rise to a penalty and attorney fees.

¶140 With respect to the PPD benefits, I find the insurer did not act unreasonably. But for the eight hour a day and forty-hour work week limitation imposed by Dr. Peterson, there is substantial evidence that claimant is capable of driving a dump truck in his Montana labor market and that there is a reasonable prospect of his earning as much or more as he was earning when he contracted his occupational disease. Dr. Peterson signed off on the positions even though they indicated they required more than eight hours a day, creating at least an impression that he could do the jobs as set out in the job analyses. Dr. Peterson's specific restrictions, however, override any requirement of more than forty hours a week. In addition, MCCF reasonably relied on the opinions of its vocational consultant. Finally, MCCF's inclusion of over-the-road truck driving positions was not beyond the pale of legitimate advocacy since claimant was an over-the-road trucker for nine months back in 1999 and early 2000. He had also attended truck driving school in 1997 (he did not graduate). However, following his short stint as an auto hauler in 1999 and early 2000, he did not look for work as an over-the-road trucker and showed no interest in returning to interstate driving.

¶141 Three checks are involved in the penalty request for delayed payments. The first was issued January 14, 2002, and was sent to claimant at his old Glasgow address. It was cashed January 17, 2002, so any delay was trivial. (Ex. 38-1.) The second was issued March 8, 2002, and was sent to claimant's old address in Glasgow. It was cashed March 19, 2002, a delay of eleven days. (Ex. 38-2.) It is not clear why this one took longer than the first. The final check dated November 8, 2002, was also misdirected to claimant's Glasgow address but it was dual payee to claimant and his attorney and therefore had to go to two places. (Ex. 38-3.) Nonetheless, it was cashed seven days after it was issued. While the insurer must comply with mailing instructions, the delay in this case was insubstantial and not unreasonable. It is not the stuff which gives rise to a penalty.

CONCLUSIONS OF LAW

¶142 This case is governed by the 1999 version of the Montana Workers' Compensation and Occupational Disease Acts 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).

¶143 Although claimant suffers from an occupational disease rather than an injury he is nonetheless entitled to PPD benefits under the Workers' Compensation Act if he otherwise meets the criteria for those benefits. *Stavenjord v. State Compensation Ins. Fund*, 2003 MT 67.

¶144 Permanent partial disability benefits are governed by section 39-71-703, MCA (1999). That section 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 (5) 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:

(a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;

(b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;

(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.

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 5%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can

perform only medium labor activity, 3%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 2%.

As set forth in subsection (1), claimant must suffer an "actual wage loss" to be eligible for the benefits.⁽³⁾ The question in this case is whether he did.

¶145 Actual wage loss is a term of art under the WCA, encompassing more than a simple comparison of pre- and post-injury wages. Section 39-71-116(1), MCA (1999), provides an alternative measure of actual wage loss. The measure is what the claimant is "qualified to earn." The section reads:

"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. [Emphasis added.]

The "qualified to earn" provision is apparently intended to cover situations where the claimant is under-employed following recovery from an industrial injury or disease either because of a lack of motivation to pursue jobs with higher pay or because he or she has not yet been able to secure a higher paying position.

¶146 As applied to this case, claimant's post-disease wages are far less than what he was earning prior to his disease. MCCF, however, asserts that he is "qualified to earn" as much or more than he earned with Mark Rite Lines.

¶147 In determining what a claimant is qualified to earn, the Court looks at several factors in deciding which jobs should be included. First, the claimant must be qualified physically for the job. Second, he must be vocationally qualified for the job. Third, the job must be available in the claimant's job market. Fourth, the claimant must have a reasonable chance of employment in the job. The first and third factors are critical in the present case.

¶148 Initially, claimant is not physically qualified for several of the jobs identified by the insurer for purposes of wage comparison since the jobs require that claimant be able to work in excess of forty hours a week. Claimant has been medically restricted to working only forty hours a week, thus he does not qualify for the higher paying construction jobs identified by the vocational consultant since those jobs require that he be capable of working in excess of forty hours a week. While the insurer provided employer testimony that claimant can work more than forty hours a week, that testimony is incompetent. Claimant's physical ability to work more than forty hours a week is a medical matter to be determined by his physicians.

¶149 As to the remaining over-the-road trucking jobs identified by the vocational consultant, those jobs are not within claimant's geographical job market. A geographical job market is inherent when considering what claimant is capable of earning. It would be absurd to use

Alaska or New York City wages in computing a Montana claimant's potential wages unless claimant commutes to those areas. That holds true even if claimant at one time resided and worked in either Alaska or New York City. For the same reason, the geographical job market for claimant in this case must be limited to Montana. While he worked for a time as an interstate trucker, he quit that job and there is no evidence that he thereafter actively sought employment as an interstate trucker or was interested in such employment. Even if his move to North Dakota increases his geographical job market to include the geographical area where he presently lives, it does not expand it to interstate trucking.

¶150 The Court must therefore compare the wages claimant has in fact earned since his claim. That comparison yields a wage loss in excess of \$2 an hour. Accordingly, under section 39-71-703, MCA (1999), the claimant is entitled to an impairment award of 20% for wage loss and 5% for physical restrictions (claimant performed heavy labor at the time of his injury and is now limited to medium labor), for a total award of 25%. He is not entitled to anything for education since he completed twelve years of education. He is not entitled to anything for age since he had not reached age forty at the time of his OD claim.

¶151 Claimant is not entitled to either a penalty or attorney fees. Both require proof of unreasonableness on the part of the insurer. §§ 39-71-611, -612, -2907, MCA. As a matter of fact, I have found that the insurer did not act unreasonably.

JUDGMENT

¶152 Claimant is entitled to 87.5 weeks of PPD benefits. This is in addition to the impairment award he has already received. The benefits shall be paid bi-weekly retroactive to July 6, 2002, which is the date claimant was found by Dr. Peterson to be at MMI.

¶153 Claimant is not entitled to attorney fees or a penalty.

¶154 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶155 This Judgment is certified as final for purposes of appeal.

¶156 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 20th day of August, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Richard J. Martin
Mr. Bradley J. Luck
Submitted: May 8, 2003

1. "Median" is the wage above and below which there are equal numbers of lower and higher wages.

2. "Mean" is the average wage.

3. A redundant requirement for "actual wage loss" is set out in the definition of PPD benefits. Section 39-71-116(23), MCA (1999), defines PPD as follows:

(23) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;

(b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury. [Emphasis added.]