IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 48

WCC No. 2002-0648

SAMUEL COX, JR.

Petitioner

vs.

PACIFIC EMPLOYERS' INSURANCE COMPANY

Respondent/Insurer for

AIRCRAFT SERVICES INTERNATIONAL GROUP

Employer.

DECISION AND JUDGMENT ON THE PLEADINGS

Summary: Claimant filed a petition seeking permanent partial disability benefits based on age (1%) and labor restrictions (3%) even though he conceded in his petition that he suffered no wage loss. The insurer moved for judgment on the pleadings.

Held: The petition is dismissed since permanent partial disability benefits are available only if the claimant suffered a wage loss.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-703), MCA (1999).** Awards for wage loss and labor restrictions are components of permanent partial disability benefits and cannot be made absent a wage loss.
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> **Benefits: Permanent Partial Benefits: Education Factor.** Awards for wage loss and labor restrictions are components of permanent partial disability benefits and cannot be made absent a wage loss.
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> **Benefits: Permanent Partial Benefits: Labor Capacity.** Awards for wage loss and labor restrictions are components of permanent partial disability benefits and cannot be made absent a wage loss.

¶1 The petitioner/claimant seeks benefits under section 39-71-703, MCA (1999), for age (1%) and for work restrictions (3%). He concedes in his petition that he has no wage loss.

¶2 Respondent moves for judgment on the pleadings. For the reasons set forth below, the judgment is granted.

Discussion

¶3 The Workers' Compensation Court has no rule governing judgment on the pleadings, therefore, it looks to the Montana Rules of Civil Procedure for guidance, *Murer v. Montana State Compensation Mut. Ins. Fund,* 257 Mont. 434, 849 P.2d 1036, 1037 (1993). Rule 12(c), Mont.R.Civ.P, governs such motions, providing:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgment on the pleadings is appropriate where the pleadings demonstrate that one of the parties is entitled to judgment as a matter of law.

¶4 In the present case, the Petition for Hearing affirmatively alleges that claimant was injured on June 26, 2001, but never missed work. However, he received an impairment rating of 5%, which has been paid. He argues that under section 39-71-703(5), MCA (1999), he is entitled to an additional 4% for his age and restrictions.

¶5 Assuming the allegations of the petition to be true, the petition fails to state a cognizable claim for additional benefits under section 39-71-703, MCA (1999), which provides:

> **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%.

(6) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(7) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(8) If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable under this section must be calculated based on the wages that the worker earns or would be qualified to earn following the completion of the rehabilitation plan.

(9) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 20 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

The section, as pertains to the present claim, is clear on its face and must be applied as written. *In re Marriage of Christian*, 1999 MT 189, ¶ 12, 295 Mont. 352, 983 P.2d 966 (1999) ("When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation."). Subsection (1) provides that a worker is entitled to a permanent partial disability award **only if he has both** an impairment rating and a **wage loss**. Under the plain language of the subsection, claimant is **not** entitled to permanent partial disability benefits since he never missed work and has no wage loss.

¶6 The requirement of a wage loss to qualify a claimant for permanent partial disability benefits is reiterated in subsection (2), which provides that a claimant with an impairment rating but no wage loss is entitled only to an impairment award. It is further reiterated in section 39-71-116(23), MCA (1999), which defines permanent partial disability 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.]

I do not know how the legislature could have made the wage loss requirement more clear.

¶7 Under the plain language of subsections (3) and (5) of section 39-71-703, MCA (1999), awards for age and restrictions are components of a permanent partial disability award. Clamant is therefore entitled to neither.

JUDGMENT

¶8 Judgment is entered dismissing the petition **with prejudice**.

¶9 The judgment is certified as final for purposes of appeal. ARM 24.5.348.

DATED in Helena, Montana, this 16th day of October, 2002.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Carl A. Hatch
Mr. Leo S. Ward
Submitted: October 7, 2002