

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 29

WCC No. 9311-6955

CURT DAVID

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MIKE McCOY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 2, 1994, in Billings, Montana. Petitioner, Curt David (claimant), was present and represented by Mr. Patrick R. Sheehy. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Daniel J. Whyte. Claimant, Dennis Small and Mike McCoy were sworn and testified. Exhibit Nos. 1 through No. 8 were admitted into evidence.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor of the witnesses, and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 33 years old and has a high school education and some scattered college credits. His work history is primarily as a cowboy, including rodeo work, but he is also trained as a massage therapist.
2. Claimant suffered a previous back injury in 1986 and underwent a fusion of his lower lumbar vertebrae. During surgery rods were affixed to the vertebrae.
3. On April 25, 1993, claimant was hired by Mike McCoy to work for a single day moving cattle. Wages were not discussed but both McCoy and claimant understood that claimant would be paid \$50.00. There was no prospect of additional employment beyond the one day of work.

4. While moving cattle the claimant's horse bucked. The bucking caused the rods in claimant's back to break, although his fusion remained intact. (Ex. No. 3.)
5. At the time of the injury the State Fund insured McCoy. It accepted liability for the claim.
6. The State Fund paid claimant temporary total disability benefits for a period of eighteen weeks and four days at a rate of \$33.33. The rate was based on a weekly wage of \$50.00.
7. Claimant disputes the temporary total disability rate but not the duration of benefits. He alleges that his weekly wage should be computed by multiplying \$50.00 a day times five days a week. He also contends that in computing his weekly wage the earnings from his work as a massage therapist and projected earnings from work as a rodeo clown/bull fighter should be added.
8. Prior to his 1993 injury claimant worked as a self-employed massage therapist at the Billings YMCA. In exchange for his offering massage therapy at the YMCA facility, the YMCA provided him office space but, as claimant sets forth in his proposed findings of fact, he "developed his own clientele at the Y and was paid by his clientele, not by the Y." Claimant's earnings as a massage therapist for the year of 1993 were as follows:

January 1993	\$447.50
February 1993	360.00
March 1993	350.00
April 1993	<u>560.00</u>
TOTAL EARNINGS	\$1,717.50

For the period of January 3, 1993 and April 25, 1993, petitioner's average weekly earnings from his massage therapy was \$107.34 per week.

9. While temporarily totally disabled the claimant was unable to work as a massage therapist.
10. Claimant worked on and off as a rodeo clown/bull fighter for a number of years since 1979. A rodeo bull fighter's job is primarily to protect bull riders from injury. A clown's job is to entertain the crowd. Claimant worked as a rodeo clown/bull fighter between 1982 and 1986 in California, but did little work after moving to Montana. He testified that the work requires "credibility", which has to be built. His wife did not like him working as a rodeo clown/bull fighter. In 1992 he stayed home and cared for his children while his wife worked, but he separated from his wife in the fall of 1992.
11. According to claimant, 32 years old is "old" for a bull fighter.

12. However, he testified that he had been planning to return to rodeo clowning/bullfighting in 1993, and in January 1993 began seeking jobs. According to claimant, he had obtained verbal commitments totalling \$3,150.00 for rodeos in Arizona, Montana and Wyoming. The commitments were not in writing and were not otherwise verified. Claimant testified that he also expected to secure a number of other jobs prior to the start of the rodeo season. His estimate of earnings was gross earnings and did not take into account his expenses, including expenses for travel and lodging.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.
2. The sole issue in dispute in this case is the calculation of the appropriate average weekly wage under section 39-71-123, MCA, for purposes of determining claimant's temporary total disability benefit rate. The law in effect at the time of injury controls. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 321, 730 P.2d 380 (1986).

At the time of claimant's injury section 39-71-123(1), MCA (1991) defined wages as follows:

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:

- (a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and sickness periods;
- (b) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value; and
- (c) payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement.

Section 39-71-123(3), MCA describes the method for computing wages:

- (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.

The party asserting a right has the burden of proving its case. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 484, 512 P.2d 1304 (1973). Claimant has failed to prove that the State Fund improperly calculated his wages.

Section 39-71-123(3) provides that the usual manner of calculating weekly wages is to average actual earnings for the four weeks prior to injury. However, if the term of employment is less than four pay periods, subsection (a) provides that wages must be calculated by multiplying claimant's hourly wage rate by the number of hours a week of employment. It is undisputed that claimant's term of employment with Mike McCoy was for the term of less than four pay periods. In fact it was for one day. Thus, subsection (3)(a) applies. Claimant's employment for one day during a one week period was equivalent to eight hours of employment during the week at an hourly wage of \$6.25 an hour. The State Fund therefore properly calculated claimant's weekly wage at \$50.00 a week and his weekly temporary total disability benefits at \$33.33.

Claimant's earnings from his massage therapy do not augment his weekly wage. As a therapist he was working as a private contractor, not as an employee of the YMCA. Section 39-71-123(4)(c), MCA (1991), provides:

(c) The compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the aggregate of average actual wages of all employments, **except self-employment as a sole proprietor or partner who elected not to be covered**, from which the employee is disabled by the injury incurred. [Emphasis added.]

Claimant worked as a sole proprietor. He failed to offer evidence proving that he had workers' compensation coverage for his business. The Court is therefore precluded from considering those earnings in computing his weekly wage.

Claimant's prospective earnings as a bull fighter/rodeo clown meet the same fate. In soliciting business for the 1993 rodeo season he was acting as a sole proprietor. Again, he failed to offer evidence proving that he had elected workers' compensation coverage with respect to that enterprise.

Moreover, "prospective earnings" do not satisfy the definition of concurrent employment. Section 39-71-123(4)(c) refers to "*actual wages* of all employments." Claimant's 1993 rodeo projected rodeo earnings (1) were *projected earnings* not actual earnings, (2) were speculative since he had no written contracts or confirmation and had not had regular work in that area for several years, and (3) failed to take into account his prospective expenses. "There can be no computation of a workers' compensation award based on concurrent employment unless there was such employment." ***Gee v. State Compensation Insurance Fund***, 197 Mont. 335, 337, 642 P.2d 1070 (1982). Wages from a job at which claimant was no longer employed cannot be included. ***Id.*** The Court in ***Gee*** also pointed out that in

providing for temporary total disability, the legislature chose to base compensation on loss of wages rather than the loss of earnings or earning capability. *Id.* at 338.

The applicable statutes are clear on their face. There is no room for interpretation and must be applied as written. ***Montana Talc Co. v. Cyprus Mines Corp.***, 229 Mont. 491, 498, 748 P.2d 444 (1987); ***GMB, Inc. v. Montana Department of Revenue***, 249 Mont. 261, 265, 915 P.2d 595 (1991). Claimant's benefits were properly calculated.

3. Claimant has failed to show that respondent acted unreasonably. He is not entitled to attorney fees, costs or a penalty.

JUDGMENT

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

2. Claimant is not entitled to increased temporary total disability benefits.

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

4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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 Judgment.

DATED in Helena, Montana, this 18th day of March, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick R. Sheehy

Mr. Daniel J. Whyte