

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 57

WCC No. 9307-6835

CARL FAHRENBRUCK,

Petitioner,

vs.

MONTANA POWER COMPANY,

Defendant/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on November 1, 1993 in Billings, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Carl Fahrenbruck (claimant), was present and represented by Mr. Patrick R. Sheehy. Respondent, Montana Power Company (MPC), was represented by Mr. Robert T. O'Leary. Claimant, Brenda Williams, and Jerry Woods testified. Exhibits 1 through 10 and 16 were admitted into evidence without objection. Exhibits 11 through 15 were duplicates and were withdrawn. Exhibits 17 through 21 were identified in two post-trial depositions. There being no objections to the additional exhibits, they are also admitted. The depositions of Dave Johnson and Janelle Jensen were taken after trial and submitted to the Court for its consideration.

The principal issue in this case concerns claimant's entitlement, if any, to permanent partial disability benefits under sections 39-71-705 to 708, MCA (1983).

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

1. Claimant is 56 years old and married. At the time of his industrial injury he was 47 years old.
2. Claimant attended school through the fourth grade. He did not continue schooling because his family needed his help on the family farm. He cannot read or write.

3. Claimant worked on his family's farm as a laborer from the time he dropped out of school until he was 19. Claimant then worked as a laborer for other farmers for a number of years. He also operated and repaired heavy equipment for two contractors.

4. Claimant began working for MPC as a utility worker on August 8, 1979. As a utility worker he performed heavy manual labor.

5. He became a journeyman mechanic in 1982 after he completed an apprenticeship program. Claimant completed the apprenticeship with the help of his co-workers and instructors, who read the course materials to him and allowed him to take tests orally.

6. In the fall of 1983 claimant was assigned to do mechanical work on a dredge at MPC's Colstrip operation. He continued in that position until the time of his injury.

7. Claimant injured his neck and lower back on January 25, 1985, while working on the dredge. He was attempting to remove a bolt from a pump when the bolt broke. He fell backwards, hitting his back on the corner of a doorway. Claimant felt immediate pain in the lower part of his back. Over the next few days he also began experiencing pain in his neck and a sensation that bugs were crawling on his right arm. Although he did not initially seek medical treatment and continued working, over the next few months his symptoms intensified.

8. Claimant filed a formal claim for compensation on August 7, 1985.

9. MPC is self-insured under Plan 1 of the Montana Workers' Compensation Act and it accepted liability for the claim.

10. In the early summer of 1985 claimant consulted a physician in Forsyth about his condition. He was referred to Dr. Lewis Robinson, a neurologist in Billings. Dr. Robinson examined claimant on July 9, 1985 and made a preliminary diagnosis of C7 radiculopathy. (Ex. 3 at 29.) Following a myelogram of claimant's neck, a herniated disc at C6-7 was diagnosed. The herniation was on the right side. (Ex. 3 at 57.) On July 11, 1985, Dr. Neil Meyer, a neurosurgeon, performed an anterior cervical disc excision and fusion of the C6-7. (Ex. 3 at 53.)

11. Claimant ceased working in early July 1985 and began receiving temporary total disability benefits. (Ex. 4.) Temporary total disability benefits of \$293.00 per week were paid from July 2, 1985 until May 17, 1988. (Statement of Uncontested Facts.)

12 The July 11, 1985 surgery relieved claimant's neck and arm pain. However, he continued to have considerable pain in his lower back. Since surgery claimant has also had a sore, hoarse throat due to a paralysis of the right vocal cord. That paralysis resulted from traction on his superior laryngeal nerve during surgery. (Ex. 3 at 49; Ex. 3 at 35.) Also, a mild tremor in his right arm has worsened since the surgery. Claimant's tremor is diminished by medication (Inderal). (Ex. 3 at 47.)

13. Claimant initially attempted to return to work on October 1, 1985, but worked only a few days. He experienced pain and on October 7, 1985, Dr. Meyer examined claimant on account of his low back pain. The pain radiated into the legs. A CT scan done at that time revealed a narrow canal at L3-4, degenerative disc protrusion at L4-5 along with spinal stenosis, and L5-S1 central disc protrusion. (Ex. 3 at 46.) Claimant was unable to continue working and was placed back on temporary total disability benefits. (Ex. 4.)

14. Claimant again returned to work for MPC on January 11, 1988, as a utilityman and was assigned light-duty work. However, his back continued to hurt and on February 20, 1988, claimant ceased working and went back on temporary total disability.

15. On May 17, 1988, claimant returned to work and was assigned a job driving a van to transport workers to different parts of the Colstrip plant. Claimant worked as a van driver until April 28, 1993, when he was reinstated as a journeyman mechanic in the machine shop.

16. At the time of his injury claimant's wages as a journeyman mechanic were \$15.91 per hour. From May 18, 1988 to April 28, 1993, claimant was paid utilityman wages, which were less than the wages for a journeyman mechanic. (Ex. 1). The following chart shows the wages for mechanics and utilitymen between 1988 and 1993, and the claimant's last wages for that period.

Start Date	5/85	1988	1989	1990	1991	1992
Mechanic: Hourly	\$15.91	\$17.56	\$18.09	\$18.53	\$19.09	\$19.77
Utilityman: Hourly	NA	\$13.72	\$14.13	\$14.57	\$15.01	\$15.54
Hourly Difference		\$3.84	\$3.96	\$3.96	\$4.08	\$4.23
Weekly Difference		\$153.60	\$158.40	\$158.40	\$163.20	\$169.20
Number of Weeks		58	56	48	48	44
Total Loss for Period		\$8,908.80	\$8,870.40	\$7,603.20	\$7,833.60	\$7,444.80
TOTAL WAGE LOSS	1988-93					\$40,660.80

The foregoing calculations are based on Exhibit 1, to which both parties stipulated.⁽¹⁾

17. MPC paid claimant permanent partial disability benefits pursuant to section 39-71-703, MCA, with respect to the wage loss set forth in the preceding paragraph. Initially, it based those benefits on the difference between the claimant's wage at the time of his injury and his actual wages as a utilityman. Between May 17, 1988 and March 14, 1993, MPC paid claimant \$9,910.68. In March of 1993 Jerry Woods, MPC's workers' compensation claims manager, determined that the benefits had been improperly calculated and should have been based on the difference between the **current** wages for mechanics and claimant's actual wages. MPC therefore recalculated claimant's entitlement in accordance with the above chart and made up the difference in a March 26, 1993 lump-sum payment to claimant in the amount of \$17,199.06. The total amount paid claimant was \$27,109.74, or two-thirds of his wage loss. Thus, excluding consideration of overtime hours, claimant's loss was compensated to the full extent provided by section 39-71-703, MCA.

18. Since returning to work on May 28, 1988, claimant has also suffered a loss of overtime hours and pay. During the three and a half year period preceding claimant's back injury he worked a total of 958.5 hours of overtime, as follows:

1982 = 345 hours

1983 = 282 hours

1984 = 15.5 hours

1985 = 316 hours

After his return to work in 1988 he worked the following overtime hours:

1988 = 2 hours

1989 = 98 hours

1990 = 0 hours

1991 = 120 hours

1992 = 111 hours

1993 = 104 hours

Claimant asks that the Court determine that his lost overtime is the absolute difference between the annual average of his 1982 to 1985 overtime hours and his actual overtime hours in 1988 through 1993. There is insufficient evidence to do so. Claimant did not provide persuasive evidence which would show that the overtime hours would have continued at the level of the 1982 to 1985 average. Moreover, the 1982 to 1985 period shows that overtime was not consistent. There was almost no overtime worked in 1984. And, while claimant was placed near the bottom of the overtime list upon his return to his mechanic's duties in 1993 and worked only 104 hours overtime between April 1 and

December 31 that year (156 hours on a full year basis), in 1982, when claimant first became a journeyman mechanic and therefore had little seniority, he worked 345 hours. I am therefore unable to determine a specific number of overtime hours lost.

19. For the period of May 1988 through April 1993, the maximum benefits available to claimant under the formula specified in sections 39-71-703, 705 and 706, MCA (1983) were \$36,322.00 (254 weeks x \$143.00=\$36,322.00). However, claimant received \$27,109.74 for that period. Thus, the maximum amount of benefits still available to claimant for lost overtime during 1988 to 1993 is \$9,212.26 (\$36,322.00 minus \$27,109.74).

20. Due to his back pain, claimant has taken numerous hours of disability and sick leave since he returned to work in 1988. Sick leave is paid at one hundred per cent of claimant's wages. Disability leave is paid at 60 percent of his wages. The disability leave provided by the company is voluntary on its part and is used when claimant takes time off due to his back condition. Thus, assuming the weekly cap on benefits is not exceeded, claimant receives 6 percent less than the two-thirds provided under permanent partial disability sections. Based on Exhibits 18 and 19, which the Court adopts, claimant's lost time from work due to his back injury over the last five and a half years totaled 991 hours. His lost hours in 1992 totalled 100 and in 1993 they totalled 94.5 hours. It can reasonably be expected that claimant will continue to lose a minimum of 100 hours of work a year due to his injury.

21. Since May 1, 1993, claimant's pay has been \$20.57 an hour.

22. While claimant has been able to return to his old job he has been aided by a number of accommodations at work. Specifically, MPC has provided claimant with an electric crane to lift items onto his work bench, a special pad to stand on, and a stool.

23. Claimant's current treating physicians are Dr. Lovitt, an orthopedic surgeon, and Dr. David Healow, an anesthesiologist. Dr. Lovitt has diagnosed claimant as having three level lower lumbar degenerative disease, lumbar spinal stenosis, and left L-5 lumbar radiculopathy. (Ex. 3 at 5-6.)

24. Claimant experiences constant low back pain, which at times runs down into his legs. He has received six or seven epidural steroid injections in the lumbar area since 1989. Dr. Healow administered the injections and each one provided claimant relief for a month or so. Claimant takes two prescription medications for his back condition, Percocet, a pain reliever, and Naprosyn, an anti-inflammatory. He also takes Inderal to control the tremor in his right hand. Claimant can only sit for 20 to 25 minutes at a time. He can stand for 5 to 10 minutes. He has difficulty walking for any distance. The Court found the claimant to be a credible witness and finds that his symptoms are serious and genuine.

25. Brenda Williams, a rehabilitation counselor retained by the claimant, testified that claimant is limited to medium-duty work. She computed claimant's loss of labor market

using four different methods, which showed a range of 18 to 37 percent loss of labor market. Ms. Williams averaged the first three methods, which she felt were more consistent, to arrive at her opinion that claimant has suffered a 34 percent loss in his labor market. Ms. Williams further testified that if claimant were to lose his job with MPC, his entry level wage range for the occupations he could perform would be between \$5 and \$8 an hour. However, she conceded that claimant might obtain employment similar to his present position if the employer is willing to provide accommodations similar to those provided by MPC. She further testified that given claimant's skills it would be reasonable to assume that an employer would want to accommodate him. Claimant is a highly skilled mechanic and a hard worker and the Court finds that should he lose his job at MPC, he has a reasonable prospect of finding equivalent employment. His prospects, however, are diminished by his back condition.

26. After considering claimant's lost wages, his age and education, work experience, continued pain, lost earning capacity, and diminished competitiveness in an open labor market, I find that claimant is entitled to a 75 percent disability award under sections 39-71-705 through 708, MCA, amounting to 375 weeks of benefits at \$143.00 per week. MPC is entitled to offset permanent partial disability benefits already paid (\$27,109.74).

27. MPC's position regarding further benefits was not unreasonable. There is no mathematical formula for determining indemnity benefits and MPC paid substantial benefits to claimant prior to his petitioning the Court.

28. MPC's failure to properly compute claimant's permanent partial disability rate was not unreasonable. The Court takes judicial notice that as late as 1992 the Montana Supreme Court reversed a decision of this Court because, like MPC, it failed to bring time-of-injury wages up to date in computing the rate of permanent partial disability. **Anderson v. Hammer**, 252 Mont. 73, 826 P.2d 931 (1992).

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.
2. Claimant's injury occurred in January of 1985. The statutes in effect on the date of injury apply in determining the benefits due. **Buckman v. Montana Deaconess Hospital**, 224 Mont. 318, 730 P.2d 380 (1986).
3. Claimant seeks additional permanent partial disability benefits under section 39-71-705 through 708, MCA. He has received wage loss supplement benefits under section 39-71-703, MCA., but now elects benefits pursuant to section 39-71-705 through 708. MPC argues that claimant cannot change his election. It's contention, however, was recently rejected by the Montana Supreme Court in **Timothy Lund v. State Fund/Garden City Plumbing and Heating, Inc.**, 263 Mont. 346, 868 P.2d 611(1994). In **Lund**, the claimant had received permanent partial disability benefits under section 39-71-703, MCA. He then

withdrew his initial election and sought benefits under section 39-71-705 to 708, MCA. The Court held that section 39-71-709 authorizes such a change in election.⁽²⁾ *Id.* at 352. Accordingly, we must determine the amount of indemnity benefits due.

4. The benefits provided under old-law sections 39-71-705 through 708, MCA (1983), are commonly referred to as "indemnity benefits" and are based on the schedule of injuries set forth in section 39-71-705, MCA. The schedule sets forth the maximum number of weeks of benefits payable on account of the loss of limbs and other body parts. Benefits for less than total loss of a scheduled part

. . . shall be proportionate to loss or loss of use. . . In all other cases of permanent injury less than total not included in the schedule provided for in 39-71-705, the compensation for partial disability shall bear such relation to the periods stated in the schedule provided for in 39-71-705 as the disabilities bear to those produced by the injuries named in the schedule or to partial disability (500 weeks).

§ 39-71-706(1), MCA (1983). The purpose of the indemnity benefits is to indemnify the injured worker for possible loss of future earning capacity, rather than any "actual" loss of earning capacity. ***Stuker v. Stuker Ranch***, 251 Mont. 96, 98, 833 P.2d 105 (1991).

Indemnity benefits are computed by determining a disability percentage and multiplying that percentage by 500 weeks, subject to the maximum number of weeks the schedule provides for the part of the body injured. ***McDanold v. B.N. Transport, Inc.***, 208 Mont. 300, 470, 679 P.2d 1188 (1984). Since claimant's injury is not a "scheduled injury," it is subject to the maximum 500 weeks of benefits.

Disability cannot be calculated with mathematical precision. In determining disability, the Court must consider the claimant's age, education, work experience, pain and disability, actual wage loss, and possible loss of future earning capacity. ***Hartman v. National Union Fire Insurance***, 236 Mont. 141, 145, 768 P.2d 1380 (1989); ***Holton v. F.H. Stoltze Land and Lumber Co.***, 195 Mont. 263, 271, 637 P.2d 10 (1981).

The Court has evaluated each of the factors, as follows:

EDUCATION: Claimant was educated through the fourth grade, and cannot read or write. He completed the journeyman mechanic apprenticeship program at MPC through the help of his instructors and co-workers, who read the course materials to claimant and allowed him to take the tests orally. Claimant's lack of education is an impediment. Nonetheless, claimant was able to complete an apprenticeship course and is now a skilled journeyman mechanic. He testified that he does not need to be able to read to do his work as a journeyman mechanic. He has to a significant degree compensated for his lack of education.

WORK HISTORY: Claimant worked on his father's farm as a farm laborer until he was 19 years old, and then worked as a laborer on several other farms. Claimant also repaired and operated heavy equipment before beginning work as a utilityman at MPC. Claimant has worked as a journeyman mechanic at MPC from 1982 through 1985, and then again since May of 1993. His working life has involved manual labor, especially heavy labor. However, in 1982 he advanced into a job which is less physically demanding and which can be modified to accommodate disabilities such as claimant's.

PAIN & DISABILITY: Claimant has constant and severe pain in his lower back. He cannot sit or stand for long periods of time without pain. He is also limited in how far he can walk. MPC has provided claimant several accommodations to allow him to continue working without lifting heavy objects and constantly standing. Claimant's job ratings have been satisfactory, although he has missed a number of days due to his pain. An impairment rating has not been rendered for claimant, although he was restricted by Dr. Lovitt to lifting no more than 10 pounds. Although claimant testified that he experiences pain, he is still able to perform his job and also works overtime.

ACTUAL WAGE LOSS: Claimant is currently working as a journeyman mechanic, the same position he held at the time of his injury. He is currently earning \$20.57 per hour, at the time of his injury he was earning \$15.91 per hour. However, from the time claimant returned to work in 1988 until he was reinstated as a journeyman mechanic in 1993, claimant was paid at a utilityman's wages, which were less than the wages of a journeyman mechanic (Ex. 1). Claimant's actual wage loss due to the wage differential was \$40,660.80. However, MPC paid claimant wage loss benefits amounting to \$27,120.25, or 2/3 of his actual wage loss (excluding overtime), in accordance with the wage loss provisions of section 39-71-703, MCA.

Claimant has also taken time off work under disability leave when his back was hurting. However, MPC pays claimant 60 percent of his regular wage when he takes disability leave.

Claimant also experienced a reduction in overtime hours. Claimant regularly worked overtime hours prior to his injury, and such overtime work was expected. In **Coles v. Seven Eleven Stores**, 217 Mont 343, 348, 704 P.2d 1048 (1985), the Supreme Court held that if the employer hired a claimant expecting overtime work and the claimant actually worked overtime on a consistent and regular basis, the overtime hours must be included in determining wages but only at the claimant's regular hourly pay. However, the lost overtime for the period of 1988 to 1993 cannot be precisely calculated. Variances occurred in the 1982 to 1985 time period. Claimant's overtime hours after returning to his mechanic's duties in 1993 also indicate that total annual overtime hours are not constant and the hours have, at

least recently, decreased. For the 1988 to 1993 period the maximum additional benefits available to the claimant are limited to \$9,212.26.

FUTURE WAGE LOSS: Claimant has suffered a loss of labor market. Claimant's vocational rehabilitation counselor testified that she used four different methods to determine claimant's loss of labor market, and the result was a range from 18 percent to 37 percent loss. She also testified that if for some reason claimant were not able to continue his employment with MPC, his entry level wage would drop to a range of \$5.00 to \$8.00 per hour. However she conceded that should he lose his job at MPC, he might find an equivalent position with some other employer. Claimant is skilled and a hard worker and the Court finds that there is a reasonable prospect of claimant finding an equivalent, high paying job should he lose his job at MPC. Additionally, there was no evidence that claimant's employment at MPC is in jeopardy.

AGE: Claimant is 57 years old. He has only eight more years until he reaches the age of 65, so he has a relatively short period of working years left. "The longer the person is on the labor market the more economic losses he will suffer, all other factors being equal. However, a younger individual who can be retrained or has transferable skills will be able to ameliorate some of his post-injury earning losses in the long run through additional training." ***Carroll v. Wells Fargo Armored Serv.***, 245 Mont. 495, 500, 802 P.2d 618 (1990).

Determination

Having considered and weighed all factors, I find that claimant is 75 percent disabled. He is therefore entitled to 375 weeks of disability benefits at his maximum permanent partial disability rate of \$143.00 per week. MPC has paid claimant \$27,109.74 (Ex. 1) or 189.5786 weeks in permanent partial disability benefits, and is entitled to an offset in that amount. Claimant is therefore entitled to an additional 185.4214 weeks of benefits at \$143.00 per week retroactive to April 28, 1993.

4. The Court has awarded benefits and claimant is entitled to attorney fees based on the difference between the amount awarded by the Court and the amount previously paid by MPC. § 39-71-712, MCA (1983).

5. Claimant is not entitled to a penalty. Section 39-71-2907, MCA provides that when payment of compensation has been unreasonably delayed or refused by an insurer, the full amount of compensation benefits may be increased by 20 percent . Where a bona fide dispute exists as to the amount of benefits, a penalty is not warranted. While it has been decided that claimant is entitled to additional benefits, there was a valid disagreement as to the amount due claimant. The insurer paid claimant significant benefits.

6. MPC's failure to correctly calculate claimant's benefit rate between 1988 and 1992 was also not unreasonable. This Court made a similar mistake leading to reversal in ***Anderson, supra***. The ***Anderson*** case and the rule that wages must be compared for the same time period, came to MPC's attention in March 1993. It promptly rectified the error.

7. Since MPC did not act unreasonably, claimant is not entitled to a penalty.

JUDGMENT

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

2. Claimant has established a 75 percent disability and is entitled to 375 weeks of permanent partial disability benefits at a weekly rate of \$143.00.

3. Claimant is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in an amount to be determined. ARM 24.5.343 governs further proceedings for attorney fees and costs.

4. Claimant is not entitled to a penalty.

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 these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 23rd day of June, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick R. Sheehy

Mr. Robert T. O'Leary

1. Claimant calculates total wage loss for the period at \$41,337.32. (petitioner's proposed findings of fact and conclusions of law at 4.) However, he uses a greater number of weeks than reflected in Exhibit 1 and also uses a different number of weeks for each year than is reflected in Exhibit 1.

2. In this case it appears that MPC made the initial 39-71-703 election for claimant when it began paying benefits pursuant to that section.