

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 36

WCC No. 9901-8141

ANNETTE FLINK

Petitioner

vs.

AMERICAN ALTERNATIVE INSURANCE COMPANY

Respondent/Insurer for

MISSOULA TEXTILE SERVICES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a garment sorter injured on her first day of employment, filed a petition regarding the appropriate wage rate to be used for calculation of benefits. Because claimant worked less than four pay periods, the question under section 39-71-123(3)(a), MCA (1997), involved the number of hours for which she was hired to work. The parties disputed, in particular, whether claimant was hired to work overtime. Claimant also sought a penalty and attorneys fees related to the insurer's delay in paying benefits.

Held: Although the WCC found it more probable than not that claimant would have worked overtime had she continued her employment, the Court was unable to find, on a more probable than not basis, how many hours claimant would have worked. Penalty was awarded based upon the insurer's failure to promptly pay benefits after it had conceded those benefits were due. Attorneys fees were denied because the only issue on which claimant prevailed was her request for a penalty, which is not a benefit; attorneys' fees may be awarded only with respect to benefits. [Note: the decision of the WCC regarding the exclusion of possible overtime hours in the wage rate was reversed in [Annette Flink v. American Alternative](#), 2000 MT 224.]

Topics:

Wages: Overtime. Although the WCC found it more probable than not that claimant would have worked overtime had she continued her employment, the Court was unable to find, on a more probable than not basis, how many hours claimant would

have worked. Thus, the WCC refused to include overtime hours in the wage rate appropriate for computing benefits. [Note: the decision of the WCC regarding the exclusion of possible overtime hours in the wage rate was reversed in [*Annette Flink v. American Alternative*, 2000 MT 224.](#)]

¶1 The trial in this matter was held on May 7, 1999, in Missoula, Montana. Petitioner, Annette Flink (claimant), was present and represented by Mr. Rex Palmer. Respondent, American Alternative Insurance Company (American), was represented by Mr. William Dean Blackaby.

¶2 Exhibits: Exhibits 1 through 8 were admitted without objection. Exhibit 9 was admitted as a demonstrative exhibit only.

¶3 Witnesses: Claimant, Rick Clark, Ernie Hummer, John Becker, and Rebekah Pierce were sworn and testified.

¶4 Issues Presented: As set forth in the pretrial order, the following issues were presented for decision:

- a. What were Petitioner's wages at Missoula Textile Services on her date of injury. Since Petitioner had worked less than four pay periods, this issue can be states as: What was [sic] the number of hours Petitioner was hired to work?
- b. Whether Respondent's delays and refusals have been unreasonable and awarding a penalty and attorneys [sic] fees for each delay and refusal which the Court finds was unreasonable.

¶5 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, and the exhibits, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant was hired by Missoula Textile Services (Missoula Textile) as a garment sorter and started work on May 19, 1998.

¶7 On her first day of work, claimant suffered an industrial injury to her left wrist.

¶8 Missoula Textile was insured by American, which accepted liability for her claim for compensation.

¶9 Claimant worked approximately one and one-half hours the next day, May 20, 1998. She was then off work until May 26th. On May 26th she resumed working and continued working until June 11, 1998.

¶10 At the time she was hired by Missoula Textile, claimant was also employed by Noon's Food Store. She continued to work for Noon's until May 22, 1998, at which time she was

suspended. She was thereafter terminated by Noon's without ever returning to work. That termination is not at issue in this case.

¶11 Following cessation of her employment with Missoula Textile and Noon's, claimant worked a few days during the week of July 7, 1998, for Big Sky Answering Service. She has not worked since.

¶12 In the fall of 1998, claimant's physicians determined that she needed wrist surgery. The surgery was done on December 10, 1998. Medical benefits have been paid and are not at issue.

¶13 In September 1998, the claimant retained Mr. Rex Palmer to represent her with respect to her claim. On September 23, 1998, Mr. Palmer wrote the insurer demanding that it initiate temporary total disability (TTD) benefits retroactive to claimant's last day of work. At the time of the demand, the claims adjuster assigned to the case did not have medical information taking claimant off work. Also in question was claimant's work after she left Missoula Textile. Over the next three months, the adjuster sought both medical and employment information.

¶14 On December 14, 1998, four days following claimant's surgery, American commenced paying TTD benefits retroactive to November 21, 1998, which was the day after claimant's treating orthopedic surgeon recommended surgery.

¶15 On January 25, 1999, American paid additional TTD benefits retroactive for the period July 14, 1998 to November 20, 1998. (Ex. 6 at 3.) Two days later, it also conceded liability for additional temporary total and temporary partial disability benefits for the period of June 12, through July 13, 1998. (*Id.*) However, because of a miscalculation, the January 25, 1999 payment covered those benefits and actually resulted in an overpayment. (*Id.*)

¶16 Two issues are presented for decision. The first involves the delay in payment of TTD benefits. Claimant alleges that the delay was unreasonable and requests a penalty. The second concerns claimant's TTD rate, which she alleges should be based on a 50- hour work week for Missoula Textile.

I. Rate

¶17 American calculated claimant's TTD rate based on a 40-hour work week for Missoula Textile and her hours of work at Noon's. The amount attributable to work at Noon's is not in dispute, however, claimant alleges that she was hired to work 50, not 40, hours a week for Missoula Textile.

¶18 I am unpersuaded by claimant's assertion that she was hired to work 50 hours a week. She testified that she was hired to start work at 6:00 a.m. and work until 4:30 p.m. I did not find her testimony credible.

¶19 Ernie Hummer (Hummer), who was claimant's supervisor and John Becker (Becker), the general manager of Missoula Textile, testified that Missoula Textile employees are hired on a 40-hour a week basis but often work overtime hours. However, overtime is on an as-needed basis. While employees are often asked to work overtime, no employee is required to work overtime. No other employee for Missoula Textile was employed to work more than 40 hours a week on a regular basis and I find it illogical that Missoula Textile would have made a special exception for claimant.

¶20 Hummer and Becker also testified that the regular hours of employment of Missoula Textile employees are from 8:00 a.m. to 4:30 p.m., with a half hour for lunch.

¶21 Claimant made much of the fact that her initial hours of work commenced at 6:00 a.m., and asserted that she was to work until 4:30 p.m. five days a week; hence, 50 hours a week. However, at the time she was hired, claimant was working at Noon's. According to Hummer and Becker, claimant told them that she needed to give Noon's a couple of weeks notice that she was terminating her employment with them, therefore, she needed to schedule her hours at Missoula Textile so she could work her shifts at Noon's during those two weeks.

¶22 Hummer and Becker, particularly Hummer, were credible witnesses. I am persuaded that Missoula Textile's initial scheduling of claimant to start work at 6:00 a.m., rather than the usual 8:00 a.m., was to accommodate her request so she could be to work at Noon's at 4:00 p.m. I am further persuaded that claimant was scheduled to work only eight hours a day when starting work at 6:00 a.m., thus assuring the end of her workday at 2:30 p.m. While claimant testified that she changed her Noon's schedule so that she could work until 4:00 p.m. at Missoula Textile, I am unpersuaded. I also note that commencing May 27th, claimant's work day at Missoula Textile started at 8:00 a.m., which is consistent with the regular Missoula Textile workday.

¶23 Rebekah Pierce (Pierce), also worked in the garment department. She was a garment sorter and by the time claimant was hired had assumed additional responsibilities for customer scheduling. She actively sought overtime. She testified that she was not guaranteed more than 40 hours a week and that her overtime was approved on a day-by-day basis. She was a credible witness and I am unable to find any reasonable explanation why Missoula Textile would have guaranteed claimant 50 hours a week while not doing so for Pierce.

¶24 It is more probable than not that had claimant continued her employment with Missoula Textile she would have worked overtime. However, I am unable to say, on a more probable than not basis, how many hours a week she would have averaged.

¶25 Claimant urges that I use ten hours a week based on what Pierce averaged during several weeks in 1998, however, Pierce had taken on additional responsibilities and was

learning new tasks. Also, the ten-hour average does not apply over the long term; examining Pierce's hours during 1998, the Court notes that in some weeks she worked little overtime. Moreover, since Pierce was a senior and more experienced employee, it is unlikely that Missoula Textiles would have given claimant overtime over Pierce.

¶26 Claimant also urges that the fact that another employee (Ernie Hummer's wife) helped in the garment department while she was there is evidence that she would have worked at least ten hours of overtime a week. However, there was evidence that the other employee was required because claimant could not fully perform her job on account of her wrist injury. Also, after Hummer's wife ceased working in the garment department, the employee who replaced claimant worked a total of 22 hours overtime in 31 weeks of work, an average of less than 1 hour a week.

II. Penalty

¶27 At trial claimant conceded that until at least December 1, 1998, American was not acting unreasonably with respect to her benefits. The evidence presented to the Court supports that concession. As noted earlier, on December 14, 1998, American conceded that claimant was TTD as of November 21, 1998, when her surgery was recommended. However, at that time it was still trying to determine whether claimant had been taken off work prior to that date.

¶28 On November 30, 1998, the claims adjuster wrote to claimant's family doctor, Dr. Deanna Phinney, asking whether claimant was able to work at the time Dr. Phinney had examined her. (Ex. 6 at 87.) On December 9th, Dr. Phinney wrote back stating her opinion that claimant was incapable of working as a garment sorter since her May 19th injury.

¶29 Since claimant's condition was an orthopedic one, the adjuster then queried Dr. Thomas A. Rickard, the orthopedic surgeon who recommended and performed surgery on claimant's wrist. The adjuster put the following question to Dr. Rickard:

To a reasonable degree of medical certainty, please respond with a date that Ms. Flink was unable to perform her duties at Missoula textile [sic]. Please also provide objective medical evidence to support your medical opinion.

(Ex. 6 at 85.) The letter was written on January 5, 1999. (The letter is misdated 1998.) On January 7, 1999, Dr. Rickard telephoned the adjuster and said that he would have taken claimant off work as of May 20, 1998.

¶30 As of January 7, 1999, the issue of claimant's ability to work after her industrial injury was fully laid to rest. The adjuster agreed in his testimony that as of that date claimant was entitled to the retroactive benefits that were outstanding.

¶31 Nonetheless, the adjuster did not order and send a check for the retroactive benefits. Instead, he called claimant's attorney to explore settlement of the claim. On January 8,

1999 (the letter is misdated 1998), he also wrote to Dr. Rickard asking when the doctor anticipated claimant reaching maximum medical improvement (MMI) and asking for an estimate of her impairment. (Ex. 6 at 84.) He sent the letter in an attempt to determine the settlement value of the case.

¶132 Not willing to settle, claimant filed her petition for benefits on January 20, 1999. On January 25, 1999, American paid the past due benefits.

¶133 In determining whether the delay in paying the past-due benefits was unreasonable, there is one further fact of consequence. After losing her jobs, and until she received workers' compensation benefits, the claimant sought and received public assistance. By at least October 28, 1998, the adjuster was aware of the public assistance.

¶134 The insurer's failure to promptly pay the benefits due for the period May 20 to November 10, 1998, was unreasonable. The benefits were due. Settlement was premature as claimant had not reached maximum medical improvement and any determination of her ultimate impairment and disability were speculative. Moreover, even if it was appropriate to explore settlement, the insurer could have promptly paid the admittedly due benefits **and** explored settlement at the same time. The insurer was on notice of claimant's need for public assistance, thus that she was financially destitute. Under these circumstances, the past due benefits should have been paid immediately.

CONCLUSIONS OF LAW

I. Governing Law

¶135 The 1997 version of the Workers' Compensation Act applies to this claim. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶136 The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *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).

III. Rate

¶137 Wages are defined in section 39-71-123, MCA. Ordinarily, an injured worker's wages are calculated on the basis of "the average actual earnings for the four pay periods immediately preceding the injury. . ." Mont. Code Ann. § 39-71-123(3)(a)(1997). However, when an injured worker is employed for less than four pay periods, the employee's wages "are the hourly rate times the number of hours in a week for which the employee was hired to work." (*Id.*)

¶138 I have found that claimant was not hired to work 50 hours a week, rather she was hired on a 40-hour a week basis. While I have also found that claimant would have worked some

overtime, there was no guarantee of any specific number of overtime hours. The evidence concerning overtime also failed to establish the number of overtime hours claimant would have averaged had she not been injured. What she might have worked is simply speculative. In *Robertson v. Aero Power-VAC, Inc.*, 272 Mont. 85, 899 P.2d 1078 (1995), the Supreme Court affirmed this Court's ruling that *prospective* overtime cannot be used in calculating wages unless an employer guarantees the overtime or hires an employee to work a scheduled number of overtime hours. Therefore, claimant's wages were properly computed utilizing a 40-hour work week.

IV. Penalty

¶39 Section 39-71-2907, MCA, governs the penalty awarded in this case. It provides in relevant part:

Section 39-71-2907. Increase in award for unreasonable delay or refusal to pay.

(1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refused to make the payments.

Subsection (1)(a) applies since the insurer agreed that it was liable for compensation benefits between May 20 and November 20, 1998, but delayed payment of the benefits while exploring possible settlement. The rationale for finding the delay unreasonable is set out in the findings of fact.

¶40 The Court has not determined the amount of the penalty. Such determination is ordinarily left to the parties, however, the Court will reserve jurisdiction to determine the amount should the parties be unable to do so.

V. Attorneys Fees

¶41 Claimant is not entitled to attorney's fees. Section 39-71-612(1), MCA, governs the award of attorneys' fees. It states:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for *adjudication of the controversy*, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable

attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation. [Emphasis added.]

The Court can award attorney's fees and costs only when the "case is brought before the workers' compensation court for adjudication. . . ." The dispute concerning payment of retroactive TTD benefits was never brought before this Court and was therefore never adjudicated. The issue adjudicated was whether or not the insurer's delay was unreasonable. Although claimant prevailed in her request for a penalty, a penalty is not a benefit and attorney's fees may be awarded only with respect to benefits. Claimant is not entitled to attorney's fees or costs pursuant to section 39-71-612, MCA (1997.)

JUDGMENT

¶42 1. Claimant is entitled to a 20% penalty on the retroactive benefits paid by the insurer after she filed her January petition. The parties shall determine the amount of the penalty owed, however, the Court will reserve jurisdiction to determine the amount should the parties be unable to do so.

¶43 2. Claimant's average weekly wage was properly calculated using a 40-hour work week at Missoula Textiles.

¶44 3. Claimant is not entitled to attorney's fees. She is entitled to costs with respect to the penalty issue. She shall present a memorandum of costs in accordance with ARM 24.5.343.

¶45 4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶46 5. 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 25th day of May, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Rex Palmer
Mr. William Dean Blackaby
Date Submitted: May 14, 1999