IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 73

WCC No. 9901-8141

ANNETTE FLINK,

Petitioner,

vs.

AMERICAN ALTERNATIVE INSURANCE COMPANY,

Respondent/Insurer for

MISSOULA TEXTILE SERVICES,

Employer.

ORDER AND JUDGMENT AFTER REMAND

Summary of Case: The Supreme Court reversed the decision of the Workers' Compensation Court which denied claimant's request for adjustment of her average weekly wage to include overtime hours, holding that a guarantee of overtime is not required. It remanded for determination of the number of hours which should be included.

Held: The best measure of overtime hours is the overtime hours worked by the employee who ultimately replaced claimant. Other workers' overtime hours are not comparable since their circumstances differ. One hour of overtime wages is added.

Topic:

> **Wages: Overtime.** Where there is no guarantee of overtime but overtime is expected, and the worker is injured shortly after becoming employed, the best evidence of the number of overtime hours she would have worked is the overtime hours worked by a similarly situated employee.

¶1 This matter is on remand. The Supreme Court held that I erred in denying claimant's request for inclusion of overtime pay. My decision was based on the fact that claimant was not guaranteed overtime, and it was that holding which was reversed. The Supreme Court remanded for a redetermination of claimant's wages and benefits rate after including the number of overtime hours claimant would have worked but for her injury.

¶2 In my original decision, I found:

> 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.
>
> 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.

(*Flink v. American Alternative Ins. Co.,* 1999 MTWCC 36, ¶¶ 25-26.) With these findings in mind, and reaffirming them at this time, I make the following additional findings of fact:

> The overtime hours worked by the employee who replaced claimant is the best measure of the overtime the claimant would have worked but for her injury. That employee's overtime average was approximately of an hour weekly, which should be rounded up to 1 hour weekly. Thus, claimant's weekly wage for purposes of computing her benefits should be based on a 41-hour work week.
>
> At the time of claimant's injury her hourly rate of pay at Missoula Textile Services was $6.05. In addition, claimant was working 24 hours a week at Noon's at a wage of $5.15 an hour. Her average weekly wage for purposes of benefits is computed as follows:
>
> 41 hours weekly at $6.05 an hour = $ 248.05
>
> 24 hours weekly at $5.15 an hour = $ 123.60
>
> AVERAGE WEEKLY WAGE = $ 371.65

¶3 That weekly wage shall be used in recomputing the benefits due claimant.

JUDGMENT ON REMAND

¶4 Respondent, American Alternative Insurance Company, shall recompute claimant's compensation benefits based on the foregoing findings of fact. It shall then subtract the compensation benefits previously paid to her and pay the difference to her in a single payment.

¶5 In the event the parties disagree as to the arithmetic, they may request the Court do the computation, in which case they shall furnish the Court with a record of all benefits paid to date, along with the class of benefits paid and the periods of time for which they were paid.

¶6 This Judgment on Remand is certified as final.

DATED in Helena, Montana, this 22nd day of November, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Rex Palmer
Mr. William Dean Blackaby