

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 8

WCC No. 9707-7794

STEVEN KUYKENDALL

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer for

STIMSON LUMBER COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a plugger operator for a plywood mill, was injured during a fight at work. He was also discharged because of the fight. In an previous hearing, the WCC found the injury compensable. Now, claimant requests temporary total or temporary partial disability benefits for periods after the injury and before he reached maximum medical healing. The parties stipulated that claimant worked at various temporary positions following his discharge, but at lesser wage rates.

Held: While the Court believed claimant would have tried to perform his time-of-injury job if he had not been fired, persuasive medical and vocational evidence indicates he was not capable of performing that job post-injury. He has never been released to return to preinjury employment or to employment with similar characteristics. By proving he was medically/vocationally unable to return to his time-of-injury job or to work with similar characteristics, claimant has proven his entitlement to temporary total disability benefits for those periods pre-MMI when he was not working. For those periods pre-MMI when he worked at lesser paying jobs, he is entitled to temporary partial disability benefits.

Topics:

Benefits: Temporary Partial Benefits. By proving he was medically/vocationally unable to return to his time-of-injury job or to work with similar characteristics, claimant has proven his entitlement to temporary total disability benefits for those

periods pre-MMI when he was not working. For those periods pre-MMI when he worked at lesser paying jobs, he is entitled to temporary partial disability benefits.

Benefits: Temporary Total Benefits. By proving he was medically/vocationally unable to return to his time-of-injury job or to work with similar characteristics, claimant has proven his entitlement to temporary total disability benefits for those periods pre-MMI when he was not working. For those periods pre-MMI when he worked at lesser paying jobs, he is entitled to temporary partial disability benefits.

Introduction

¶1 This is the second proceeding involving a dispute arising out of an elbow injury that claimant, Steven Kuykendall, suffered in a fight on May 23, 1996 with a co-employee. At the time of his injury, claimant was employed as a plugger for Stimson Lumber Company (Stimson) at its mill in Bonner, Montana. In the previous case, *Kuykendall v. Liberty Northwest*, WCC No. 9611-7646 (*Kuykendall I*), this Court determined that claimant's left elbow injury was compensable.

¶2 This present case concerns whether claimant is entitled to temporary total disability benefits and/or temporary partial disability benefits due to his injury.

¶3 The trial in this matter was held October 14, 1997, in Missoula, Montana. Steven Kuykendall was present and represented by Mr. Rex Palmer. Respondent, Liberty Northwest, was represented by Mr. Larry W. Jones.

¶4 Exhibits: Exhibits 1 through 13 were admitted without objections.

¶5 Witnesses and Depositions: The parties agreed that the depositions of Steven Kuykendall, Jason Miller, Bryan Erhart, Jeff Verworn and Dr. J.A. Evert can be considered part of the record. Steven Kuykendall, Betsy Hart, and Bill Cady were sworn and testified.

¶6 Stipulation and Partial Bench Ruling: Mr. Jones stipulated to the dollar amounts and places of employment of the claimant as recited in Mr. Palmer's opening statement. The Court resolved one issue, that being that if the claimant had been allowed to returned to his job as plugger, he would have attempted to do the job.

¶7 Issue: The Pretrial Order sets forth the following issue:

Whether Petitioner is entitled to temporary total disability benefits and/or temporary partial disability benefits due to the injury to his elbow.

(Pretrial Order at 2.)

* * * * *

¶18 Having considered the pretrial order, the trial testimony, the demeanor and credibility of the witnesses, the exhibits, depositions, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶19 The facts of this case were set out in detail in this Court's Findings of Fact, Conclusions of Law and Judgment in *Kuykendall I*. In summary, prior to his May 23, 1996 injury, claimant worked at Stimson's plywood mill in Bonner, Montana. During the nine months prior to his injury, he worked as a "plugger" operator, fixing defects, such as knots, in plywood veneer sheets. On May 23, 1996, after much goading, a fight ensued between claimant and another Stimson employee. In the fight claimant hit his elbow on the floor.

¶110 Following the fight claimant was taken to the first-aid room at Stimson. Later he was taken to the St. Patrick Hospital Emergency Room, where he was treated for a left elbow contusion and possible bursal rupture.

¶111 Stimson fired claimant for fighting. Claimant grieved the firing but was unsuccessful in getting his job back.

¶112 The Court is persuaded that despite his elbow injury the claimant would have attempted to return to his plugger job had Stimson continued his employment. However, he was never provided with that opportunity.

¶113 Following termination of his employment and the denial of his workers' compensation claim, claimant sought other employment so he could support himself and his young son. (Kuykendall Trial Test.) He applied for a number of jobs, some for which he was not remotely qualified, such as a bookkeeper for Missoula Federal Credit Union (Kuykendall Dep. at 42). Claimant was successful in obtaining a series of temporary and seasonal jobs, interspersed with periods of unemployment.

¶114 At trial, the parties agreed to claimant's dates of employment and his earnings. His post-injury employment is as follows:

- Maintenance man for the Drummond Motel commencing approximately three weeks after his termination from Stimson through September 28, 1996. His hourly wage was \$7.00 and his total earnings were \$3,402.00.
- Christmas tree cutter and seller for Parker Trees commencing approximately October 15, 1996, and continuing through December 23, 1996. His wages for the entire period were \$3,682.00.
- Temporary employee with Manpower, a temporary service agency. Initially he was assigned as a production worker for Ultrafem, working for that company from

approximately February 14, 1997, until March 9, 1997. His wage was \$6.35 per hour and he earned a total of \$574.61. (Ex. 10 at 1.)

- Thereafter, Manpower placed him as a lot attendant for Avis Rent-A-Car. He worked for Avis from approximately April 6, 1997, and was still working there at the time of trial on October 14, 1997. His wage was \$5.50 per hour and his total earnings through August 9, 1997 were \$2,561.07. (Ex. 10 at 3-5.) Although the Court has been provided with claimant's earnings only through August 9, 1997, as discussed below, his subsequent earnings have no bearing on the issue presented in this case.

¶15 Claimant has reached maximum medical improvement (MMI) with respect to his elbow injury. Dr. J.A. Evert, claimant's treating physician, testified that claimant reached MMI on or about October 25, 1996 (Evert Dep. II at 6), and the Court adopts that date as the date of MMI.

¶16 Claimant has never been released to return to his preinjury employment or to employment with similar characteristics. Betsy Hart (Hart), an occupational therapist who performed a post-injury Functional Capability Evaluation (FCE) on claimant in September 1997, testified that she would not approve claimant's return to the plugger job because the job requires nearly continuous use of both arms for grip/grasp and radial/ulnar deviation of the upper extremities and claimant would have difficulty performing those tasks. (Hart Trial Test.; Ex. 9 at 3.) Dr. Evert likewise opined that the plugger job is unsuitable for claimant. In the first instance, Dr. Evert's opinion was based upon claimant's preexisting back injury. However, he also testified that claimant cannot perform his old job due to his elbow injury. (Evert Dep. II at 7-8).

[A]s we have learned from Steve's experience ever since the elbow injury, he cannot do work that requires using the elbow all day long. And I think that the repetitive kind of work as was described in the plugging job would be impossible for him to handle because of his symptoms of the elbow.

(Evert Dep. II at 5.)

¶17 While I am persuaded that claimant may have attempted to return to his time-of-injury job immediately after his injury, had he been provided the opportunity to do so, I am not persuaded that he would have been able to perform that job. Moreover, he was not released to return to the job.

¶18 Claimant's claim for compensation states that he was earning \$11.40 an hour at the time of his injury. (Ex. 11.) Stimson's Job Classification card shows claimant's wage as a veneer patch operator was \$10.66 an hour. (Ex. 7 at 14.) Neither party addressed this wage discrepancy during the trial, and all exhibits were admitted without objection. Since Stimson has not disputed the hourly wage reported on the claim, and since there is a possibility that the classification card does not reflect the actual hourly wage at the time of

claimant's injury, I find that claimant was earning \$11.40 an hour as reported on his Claim for Compensation.

CONCLUSIONS OF LAW

¶19 Since claimant's injury occurred on May 23, 1996, his injury is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶20 As mentioned earlier, this Court previously determined that claimant was injured in the course and scope of his employment with Stimson Lumber Company when he suffered an elbow injury during a fight with a co-employee on May 23, 1996. (*Kuykendall I*). The present issue before the Court as framed by the parties is "Whether Petitioner is entitled to temporary total disability benefits and/or temporary partial disability benefits due to the injury to his elbow." (Pretrial Order at 2).

¶21 Temporary total disability is defined as "a physical condition resulting from an injury, as defined in this chapter, that **results in total loss of wages and exists until the injured worker reaches maximum medical healing.**" § 39-71-116(33), MCA (1995) (emphasis added.). Entitlement to temporary total disability benefits is governed by section 39-71-701, MCA, which provides:

(1) Subject to the limitation in 39-71-736 [governing when compensation is paid] and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

(a) **when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing;** or

(b) **until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.**

(2) The determination of temporary total disability must be supported by a preponderance of objective medical findings.

(3) Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury. Temporary total disability benefits must be paid for the duration of the worker's temporary disability. The weekly benefit amount may not be adjusted for cost of living as provided in 39-71-702(5).

(4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same

employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.

....

(7) A worker may not receive both wages and temporary total disability benefits without the written consent of the insurer. A worker who receives both wages and temporary total disability benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301. [Emphasis added.]

¶22 Temporary partial disability is defined by section 39-71-116(31), MCA, as:

(1) "Temporary partial disability" means a physical condition resulting from an injury, as defined in 39-71-119, in which a worker, **prior to maximum healing**:

(a) is temporarily unable to return to the position held at the time of injury because of a medically determined physical restriction;

(b) returns to work in a modified or alternative employment; and

(c) suffers a partial wage loss. [Emphasis added.]

¶23 Temporary partial disability benefits are governed by 39-71-712, MCA (1995), which provides:

(1) If, **prior to maximum healing**, an injured worker has a physical restriction and is approved to return to a modified or alternative employment that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction, the worker qualifies for temporary partial disability benefits.

(2) An insurer's liability for temporary partial disability must be the difference between the injured worker's average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week, and the actual weekly wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate.

(3) Temporary partial disability benefits are limited to a total of 26 weeks. The insurer may extend the period of temporary partial disability payments.

(4) A worker requalifies for temporary total disability benefits if the modified position is no longer available to the worker and the worker continues to be temporarily totally disabled as defined in 39-71-116.

(5) Temporary partial disability may not be credited against any permanent partial disability award or settlement under 39-71-703. [Emphasis added.]

¶24 As set forth by the statutes above, claimant's entitlement to temporary total and temporary partial disability benefits ended once he reached maximum medical improvement. Thus, his entitlement to those benefits ended on October 25, 1996.

¶25 Claimant has the burden of establishing his entitlement to benefits by a preponderance of evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979).

¶26 Claimant has satisfied his burden with respect to temporary total disability benefits by presenting medical evidence that prior to October 25, 1996, he could not return to his preinjury job or to employment with similar characteristics. (Hart Trial Test.; Evert Dep. II at 7-8). Regardless of the fact that claimant could not return to his plugger position because he was fired, a preponderance of the medical evidence shows that he was medically unable to return to that job. Therefore, during those post-injury periods in which claimant suffered a total wage loss prior to October 25, 1996, he is entitled to temporary total disability benefits as provided in section 39-71-701, MCA (1995). Those periods, as set forth in the findings of fact, are as follows:

- 3 weeks following the injury, approximately May 24 until June 13, 1996, a period of 21 days.
- September 29 to October 15, 1995, a period of 18 days.

Summing the above, claimant's temporary total disability entitlement amounts to 39 days, less the 6 day waiting period specified in section 39-71-736, MCA. Claimant is therefore entitled to 33 days or 4.71 weeks of benefits, which amounts to \$1,789.80 (4.71 weeks x \$380.00, the maximum TTD rate).

¶27 Claimant has also satisfied his burden of proof with respect to temporary partial disability benefits for those periods prior to October 25, 1996, during which he was working. Temporary partial disability benefits are due when an injured worker, prior to MMI, is "approved to return to a modified or alternative employment that the worker is able and qualified to perform and the worker suffers an actual wage loss" § 39-71-712, MCA (1995)(emphasis added). Claimant was not approved by his physician to return to modified or alternative employment; however, the insurer in this case denied liability and cannot insist on actual medical approval in determining claimant's entitlement to benefits. He in

fact returned to alternative employment but lost wages. He is therefore entitled to temporary partial benefits.

¶28 The temporary partial benefits due claimant are as follows:

Dates	# of weeks	TOI wages x weeks ⁽¹⁾	Actual wages	Difference	Benefits
6/14/96 - 9/28/96	15 1/7	\$6,905.14	\$3,402.00	\$3,503.14	\$3,503.14 ⁽²⁾
10/15/96 - 10/24/96 ⁽³⁾	1 3/7	\$651.42 ⁽⁴⁾	\$526.00 ⁽⁵⁾	\$125.42	\$125.42
TOTAL					\$3,628.56

JUDGMENT

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

¶30 Claimant is entitled to temporary total disability benefits in the amount of \$1,789.80. Liberty shall pay such amount to claimant.

¶31 Claimant is entitled to temporary partial disability benefits in the amount of \$3,628.56. Liberty shall pay such amount to claimant.

¶32 Claimant is entitled to costs pursuant to section 39-71-612, MCA. Within 10 days of this Judgment, claimant shall submit his memorandum of costs. Liberty shall file its objections, if any, within 10 days thereafter. Claimant shall then have 10 days in which to respond to the objections.

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

¶34 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 13th day of February, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. Larry W. Jones

Date Submitted: October 14, 1997

1. This column reflects what claimant would have earned during those weeks had he still been employed by Stimson. As set forth in the findings of fact, claimant was earning \$11.40 an hour. On a 40-hour basis, his weekly wages were \$456 a week, which is the figure used in computing his time-of-injury (TOI) wages for the period at issue.

2. Benefits are calculated pursuant to section 39-71-712(2), MCA (1995). The section specifies that temporary partial benefits shall equal the difference between the "worker's average weekly wage received at the time of the injury . . . and the actual weekly wages earned during the period that the claimant is temporarily partially disabled." The rate is subject to the maximum amount payable for temporary total disability, which in this case is \$380.00 per week.

3. Although claimant worked as a Christmas tree cutter from October 15 to December 23, 1996, he reached MMI on October 25, 1996. §§ 39-71-116(3) and -712. His entitlement to temporary partial disability therefore ended on October 25.

4. \$456 a week times 1 3/7 weeks.

5. Claimant's employment cutting Christmas trees lasted 10 weeks, and he earned \$3,682.00. His weekly wage was therefore \$368.20.