IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 61

WCC No. 2000-0040

TIMOTHY LINDSKOG,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

FX DRILLING COMPANY, INCORPORATED,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of the Case: Claimant seeks an increase in his temporary total and permanent partial disability rates, arguing that his rate was improperly calculated and failed to take per diem pay for meals into consideration.

Held: Claimant's rate is properly calculated using a year of wages since his wages varied remarkably from week to week. § 39-71-123(3)(b), MCA (1997). However, the State Fund's calculations were erroneous and his rate is therefore recalculated by the Court. $23 of the $24 a day claimant received for meals while traveling was properly excluded from his wages pursuant to § 39-71-123(2)(a) and ARM 24.29.720, which provides that per diem for meals up to the amount by which state employees are reimbursed is excluded from wages.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: § 39-71-123(3)(b) (1997).** Evidence of significant fluctuation in claimant's pre-injury wages provided good cause under section 39-71-123(3)(b), MCA (1997) to use more than the four pay periods preceding injury in calculating average weekly wages. Court looked to the entire prior year's wages to avoid impact of seasonal wage fluctuation.
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> **Constitutions, Statutes, Regulations and Rules: Administrative Regulations: ARM 24.29.720.** Applying ARM 24.29.720, $7 per week added to wage rate where employer paid flat rate for meals $1 in excess of rate paid to state employees.

Wages: Average Weekly Wage. Evidence of significant fluctuation in claimant's pre-injury wages provided good cause under section 39-71-123(3)(b), MCA (1997) to use more than the four pay periods preceding injury in calculating average weekly wages. Court looked to the entire prior year's wages to avoid impact of seasonal wage fluctuation.

Applying ARM 24.29.720, $7 per week added to wage rate where employer paid flat rate for meals $1 in excess of rate paid to state employees.

Wages: Meals. Applying ARM 24.29.720, $7 per week added to wage rate where employer paid flat rate for meals $1 in excess of rate paid to state employees.

¶1 The trial in this matter was held on Monday, June 5, 2000, in Great Falls, Montana, Petitioner, Timothy Lindskog (claimant), was present and represented by Mr. Cameron Ferguson. Respondent, State Compensation Insurance Fund, was represented by Mr. David A. Hawkins.

¶2 Exhibits: 1 through 6 were admitted without objection.

¶3 Witnesses and Depositions: Timothy Lindgskog and Denise Baird testified. No depositions were submitted.

¶4 Issues Presented: As set forth in the Pre-Trial Order, the following issues are presented:

1) What is claimant's correct weekly wage to be used in calculating his temporary total disability rate and his permanent partial disability rate?

2)Whether the per diem pay which the employer paid to claimant should be used to increase his average weekly wage?

(Pre-Trial Order at 2.)

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

FINDINGS OF FACT

¶6 On July 23, 1997, claimant injured his back while working for FX Drilling Company, Incorporated. (Uncontested Fact 1.)

¶7 At the time of the injury, claimant's employer was insured by the State Fund. (Pre-Trial Order at 2.) The State Fund accepted liability and thereafter paid compensation and medical benefits.

¶8 Denise Baird, who adjusted the claim, testified that in determining claimant's benefits she utilized the last four pay periods as reported in the first report of injury, entering the

information in her computer. The computer calculated claimant's average weekly wage as $366.61. Based on that wage, his temporary total disability rate was fixed at $244.40 and his permanent partial disability rate at $198.00. (*Id*.) Claimant's benefits have been paid at those rates.

¶9 The computer calculations are in error. The first report of injury, as well as a SALARY RECAP sheet prepared by the employer shows the following wages, excluding overtime premium,[(1)] for the last four pay periods:

5/31/97	$1,171.80
6/15/97	$167.40
6/30/97	$913.75
7/15/97	$1,353.15
TOTAL	$3,606.10

(Exs. 1 and 2.) Claimant was paid twice monthly, on the 15th and then the last day of each month. Thus, the last two pay periods represent two months or 61 days. His average weekly wage was $413.82[(2)] (*$3,606.10 ÷ 61 x 7*).

¶10 The Court was also provided with claimant's wages for the year prior to his industrial injury. As with the four pay periods just prior to his injury, those wages show wide fluctuations between semi-monthly payments. Claimant's wages for one week -- May 15, 1997, was $1590.30 excluding overtime premium. During three periods he received less than $200, and for many periods (14) his pay was between $600 and $800. His total wages for the pay periods during the year prior to his injury -- July 16, 1996 through July 15, 1997 -- were $19,878.36.[(3)] (Ex. 2.) On that basis, his average weekly wage was $381.23 (*$19,878.36 ÷ 365 x 7*).

¶11 Claimant maintains that the per diem he was paid for his expenses should be included in calculating his average weekly wage and his benefits. His employer paid his motel bill when he was away from home, and claimant does not contend that payment should be included. But he was also paid $182 a week on average, or $24 a day, for food. Claimant was not required to account to his employer for actual meal expenses or produced any receipts. (Petitioner's Trial Brief at 2.)

¶12 Worksheets showing weekly per diem were prepared by the employer and apparently provided to employees, including claimant. Worksheets for four weeks are found at Exhibit 3. The worksheets tell the employee that the per diem amounts will be included on the employee's W-2 forms and that the "EMPLOYEE SHOULD KEEP RECEIPTS OF EXPENSES FOR HIS/HER OWN TAX RETURN TO ACCOUNT FOR THE PER DIEM."

CONCLUSIONS OF LAW

¶13 The benefits due claimant are governed by the 1997 version of the Workers' Compensation Act since that was the law in effect on the date of his industrial injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶14 Section 39-71-123, MCA (1997), governs the computation of the claimant's average weekly wage, providing in relevant part:

> **39-71-123. Wages defined.** (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:
>
> (a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and sickness periods;
>
> . . . .
>
> (2) The term "wages" does **not** include any of the following:
>
> (a) employee expense reimbursements or **allowances for meals**, lodging, travel, subsistence, and other expenses, as set forth in department rules;
>
> . . . .
>
> (3)(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is 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.
>
> (b) For good cause shown, **if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer**, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, **including periods of idleness or seasonal fluctuations.** [Emphasis added.]

¶15 Under subsection (3), the Court must use the last four pay periods to compute claimant's wages unless those pay periods do "not accurately reflect the claimant's employment history with the employer." In this case, there were significant fluctuations in claimant's semi-monthly pay. His average pay during the last four pay periods averaged $32.59 more than his annual average. The discrepancy is even greater when comparing the last four pay periods with the previous 20 pay periods. The difference between those two periods was $39.13. That difference may be explained by the fact that the last four pay periods were for the late spring to mid-summer, however, subsection (3)(b) specifically

contemplates use of longer than the prior four periods in cases of seasonal fluctuations. I conclude that the last four periods overstate claimant's wages and find good cause to use the prior year of wages in computing his average weekly wage. Therefore, excluding consideration of claimant's per diem for meals, I find that $381.23 was his average weekly wage for purposes of computing his benefits.

¶16 Subsection (2)(a) of 39-71-123, MCA, governs per diem amounts for meals. The section specifically provides that "allowances for meals" are **not** included in computing wages. However, the section also grants the Department rulemaking power under the section and the Department has adopted a rule governing the exclusion. ARM 24.29.720 provides in relevant part:

> **24.29.720 Payments that are not wages-Employee expenses.** (1) Effective January 1, 1993, payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred in the course and scope of employment are **not wages** if all of the following are met:
>
> (a) the amount of each employee's reimbursement is entered separately in the employer's records;
>
> (b) the employee could reasonably be expected to incur the expenses while traveling on the business of the employer;
>
> (c) the reimbursement is not based on a percentage of the employee's wages nor is it deducted from wages; and
>
> (d) the reimbursement does not replace the customary wage for the occupation.
>
> (2) Reimbursement for expenses may be based on any of the following methods that apply:
>
> (a) for actual expenses incurred by the employee, to the extent that they are supported by receipts;
>
> (b) **for meals and lodging; at a flat rate no greater than the amount allowed to employees of the state of Montana** pursuant to 2-18-501 (1) (b) and (2) (b), MCA for meals, and 2-18-501(5), MCA for lodging, unless, through documentation, the employer can substantiate a higher rate. [Emphasis added.]

All of the criteria of subsection (1) are met. Since that subsection is met, the employer was permitted to pay a flat rate pursuant to subsection (2)(b), limited only by the per diem reimbursement rate for state employees. That per diem rate on July 23, 1997, was $23 per day: section 2-18-501(1)(b), MCA, provides for "$5 for the morning meal, $6 for the midday meal, and $12 for the evening meal." The insurer and employer in this case have not provided evidence to "substantiate a higher rate," ARM 24.29.720(2)(b), thus the $23 flat

rate applies. Since claimant was paid $24, there is a daily excess of $1, or $7 a week, which must be added to claimant's wages.

¶17 Adding the $7.00 per week to $381.23 yields an average weekly wage of $388.23.

¶18 Section 39-71-701(3), MCA (1997), provides, in relevant part, "(3) Weekly compensation benefits for injury producing temporary total disability are 66% 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." Two-thirds of $388.23 is $258.82. That amount is claimant's correct rate. Since the State Fund paid temporary total disability benefits at $244.40, it owes claimant an additional $14.42 per week for the duration of his temporary total disability.

¶19 The same average weekly wage must also be used to compute claimant's other benefits, including permanent partial disability benefits. The parties can do their own calculations. If they cannot agree, they shall notify the Court and I will make the calculations for them.

JUDGMENT

¶20 1. Claimant's average weekly wage for purposes of computing his workers' compensation benefits is $258.82.

¶21 2. The State Fund shall pay claimant $14.42 weekly additional temporary total disability benefits for all weeks the claimant was temporarily totally disabled.

¶22 3. The State Fund shall recompute all other benefits due claimant, using the $258.82 average weekly wage, and pay him the difference between the amounts paid and what he is due. It shall use the recomputed amounts in paying any future benefits. If the parties cannot agree on the amounts, then they shall notify the Court and it will make the calculations.

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

¶24 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 19th day of September 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Cameron Ferguson
Mr. David A. Hawkins
Date Submitted: August 16, 2000

1. Under section 39-71-123(a), MCA (1997), overtime is to be calculated at the regular wage rate, thus any premium paid for overtime, e.g., time and a half or double time, is ignored.

2. Rounded up from $413.81475

3. The first pay period was that ending July 31, 1996, and encompassing July 16, 1996 to July 31, 1996. The last period included in the computation is that ending July 15, 1997, encompassing July 1 to 15, 1997. Two additional pay periods, one ending July 15, 1996 and the other July 31, 1997, are disregarded since those weeks would extend the period to 13 months.