IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 1

WCC No. 9906-8271

DONNA MASTERS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

HAMPTON INN

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Forty-year old claimant was injured working as a housekeeper for a motel. Alleging a wage loss following injury, she sought additional PPD benefits. Insurer identified jobs with wage ranges exceeding claimant's time of injury wages, arguing claimant had no wage loss.

Held: Under section 39-71-703(5)(c), MCA (1997), wage loss is measured by difference between time-of-injury wages and what worker earns or is qualified to earn post-injury. What claimant is "qualified to earn" in entry level positions is determined by her actual job opportunities, not by some hypothetical highest wage, or even average wage, unless claimant is in fact competitive for the higher wage positions. This claimant is competitive only for the lower paying jobs in the fields identified; thus, she suffers a wage loss.

Topics:

> **Constitutions, Statutes, Regulations, Rules: Montana Code: section 39-71-703(5)(c), MCA (1997).** The measure of post-injury wages by what claimant is "qualified to earn" takes into account the possibility that claimant may not return to work immediately after reaching MMI or may be underemployed.
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> What claimant is "qualified to earn" in entry level positions is determined by her actual job opportunities, not some hypothetical highest wage, or even average wage, unless she is in fact competitive for the higher or average wage positions. In light of claimant's lack of prior experience in positions at issue, and her need for

some OJT training, claimant is competitive only for the lower paying jobs in these positions, meaning she has a wage loss under 39-71-703 and is entitled to additional PPD benefits.

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Under section 39-71-703(5), MCA (1997), the measure of post-injury wages by what claimant is "qualified to earn" takes into account the possibility that claimant may not return to work immediately after reaching MMI or may be underemployed.

What claimant is "qualified to earn" in entry level positions is determined by her actual job opportunities, not some hypothetical highest wage, or even average wage, unless she is in fact competitive for the higher or average wage positions. In light of claimant's lack of prior experience in positions at issue, and her need for some OJT training, claimant is competitive only for the lower paying jobs in these positions, meaning she has a wage loss under 39-71-703 and is entitled to additional PPD benefits.

Wages: Wage Loss. Under section 39-71-703(5), MCA (1997), the measure of post-injury wages by what claimant is "qualified to earn" takes into account the possibility that claimant may not return to work immediately after reaching MMI or may be underemployed.

What claimant is "qualified to earn" in entry level positions is determined by her actual job opportunities, not some hypothetical highest wage, or even average wage, unless she is in fact competitive for the higher or average wage positions. In light of claimant's lack of prior experience in positions at issue, and her need for some OJT training, claimant is competitive only for the lower paying jobs in these positions, meaning she has a wage loss under 39-71-703 and is entitled to additional PPD benefits.

Wages: Qualified to Earn. Under section 39-71-703(5), MCA (1997), the measure of post-injury wages by what claimant is "qualified to earn" takes into account the possibility that claimant may not return to work immediately after reaching MMI or may be underemployed.

What claimant is "qualified to earn" in entry level positions is determined by her actual job opportunities, not some hypothetical highest wage, or even average wage, unless she is in fact competitive for the higher or average wage positions. In light of claimant's lack of prior experience in positions at issue, and her need for some OJT training, claimant is competitive only for the lower paying jobs in these positions, meaning she has a wage loss under 39-71-703 and is entitled to additional PPD benefits.

¶1 The trial in this matter was held on November 22, 1999, in Kalispell, Montana. Petitioner, Donna Masters (claimant), was present and represented by Ms. Laurie Wallace. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. A transcript of the trial has not been prepared.

¶2 Exhibits: Exhibits 1 through 9, and 11 were admitted without objection. Exhibits 10 and 12 were not offered. Exhibit 13 was admitted for demonstrative purposes only.

¶3 Witnesses and Depositions: The claimant, Robert Masters, and Cindy Zimmerli were sworn and testified. The parties agreed that the Court may consider the depositions of the claimant and Vim Tesar. They also agreed that the records deposition of Cindy Zimmerli may be considered by the Court.

¶4 Issues presented: The issues, as set forth in the pretrial order are as follows:

1. Whether Petitioner suffered an actual wage loss and thus is entitled to compensation benefits pursuant to section 39-71-703, MCA.

2. Whether Petitioner is entitled to an increased award of 20% pursuant to section 39-71-2907, MCA.

3. Whether Petitioner is entitled to costs and attorneys fees, pursuant to section 39-71-612, MCA.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the parties arguments, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 40 years old and lives with her husband, daughter, and 13-month-old grandchild in Kalispell, Montana.

Industrial Accident

¶7 On May 5, 1998, claimant was hired as a housekeeper for Hampton Inn in Kalispell, Montana at a wage of $5.75 per hour. During the three plus weeks she worked for the Hampton Inn, she worked less than 40 hours a week.

¶8 On May 30, 1998, claimant slipped and fell backwards while cleaning a tub and shower at the Hampton Inn. She injured her neck, shoulder, and arm. (Trial Test., Ex. 5 at 14, Ex. 1 at 5.)

¶9 Liberty insured Hampton Inn at the time of the accident and accepted liability for claimant's injury. It paid temporary total disability benefits, an impairment award (Trial - opening statement of Ms. Wallace), and some medical benefits.

Parties Contentions

¶10 In this proceeding, claimant seeks additional permanent partial disability benefits, alleging that she has suffered a wage loss. She conceded at trial that she is capable of working and can earn a minimum wage, however, she contends she can no longer earn the $5.75 an hour wage she was earning when injured. Liberty denies liability for permanent partial disability benefits, other than the impairment award, urging that claimant fails to qualify for such benefits because she is capable of earning as much or more than her time-of-injury wage, thus she suffered no wage loss. § 39-71-703(1)-(2), MCA.

Medical

¶11 Claimant was treated initially by Dr. Sarah Walker, a family practitioner, who treated her until July 1998. (Ex. 1.) On August 3, 1998, Dr. Albert D. Olszewski, an orthopedic physician, picked up her care and saw her on three occasions - August 3, 4, and 12. (Ex. 2.) He indicated that claimant's neck injury was muscular and possibly ligamentous in nature. (*Id.* at 1.) Dr. Olszewski thereafter referred claimant to Dr. Patrick Burns, a neurologist, who first saw claimant on September 1, 1998. He recommended chiropractic treatment and referred her to Greg Pisk, D.C., who then began treating her. Dr. Burns saw claimant again on October 12 and November 12, 1998. On the later date he wrote that claimant "does not have any objective criteria or findings to indicate the reason for her having continued long-lasting, non-improving pain syndrome" and stated he had nothing further to offer her "from a neurological perspective." (Ex. 4 at 1.)

¶12 Dr. Pisk's treatment of the claimant began on September 9, 1998. (Ex. 5 at 14.) On November 13, 1998, he released her from his care, giving her a 5% whole person impairment rating. He found her unable to return to her time-of-injury job but opined she could return to work if she avoided repetitive arm movements and repetitive overhead work. (Ex. 5 at 9.) Neither claimant nor Liberty quarrel with Dr. Pisk's determinations or the restrictions he has placed upon claimant.

¶13 Dr. Pisk released claimant to return to a light-duty job as "Laundry Worker-Modified" (ex. 9 at 63) at the Hampton Inn. She returned to that job on December 7, 1998. However, her work, which required her to vacuum and dust overhead, caused a flareup of her symptoms. (Ex. 5 at 3.) Dr. Pisk treated her for the flareup. The modified job ended on December 31, 1998, when the Hampton Inn laid her off because it lacked light-duty work of the sort specified in the job description. (Ex. 9 at 40.)

Medically Approved Alternative Jobs

¶14 The only vocational evidence in this case was that of Vim Tesar (Tesar), a certified vocational counselor employed by Liberty. Tesar provided an initial evaluation on November 4, 1998. She recommended the return of "Ms. Masters to a light-duty position with the time of injury employer." (Ex. 9 at 90-91.) Tesar identified other light-duty jobs she

felt appropriate for claimant and submitted job descriptions for those jobs to Dr. Pisk, who approved them. The approved jobs were as follows:

a. Restaurant Hostess: The specific job description was for a hostess at Perkins Family Restaurant. (Ex. 11 at 11-12.) Dr. Pisk approved the job with the proviso that claimant not do any heavy lifting but approved lifting "over 20 lb. occasionally." (*Id*. at 11.) However, the job description does not call for lifting over 5 pounds. (*Id*. at 13.)

b. Receptionist: The specific job description was for a receptionist at Summit Fitness Center. As with the hostess position, Dr. Pisk precluded heavy lifting but permitted occasional lifting over 20 pounds. The job description calls for lifting up to 30 pounds "rarely (0-5%)" (*id*. at 3) but also stated that "Lifting requirements (up to 30 lbs normally) can be significantly reduced or accommodated." (*Id*. at 2.)

c. Customer Service Representative: The specific job description was for a position at WalMart. (*Id*. at 7.) Dr. Pisk approved the position unconditionally. (*Id*. at 6.)

d. Motel Desk Clerk: The specific job description was for a job at Friendship Inn. Dr. Pisk approved the position unconditionally. (*Id*. 11 at 16-17.)

e. Laundry Worker - Modified: The specific position was at the Hampton Inn, where claimant had been working when injured. Dr. Pisk approved the position without qualification. (*Id*. 11 at 23.) However, following a flareup after claimant's return to work in the modified position, Dr. Pisk noted that she had been vacuuming and that vacuuming had not been part of the job description. He commented, "I have reviewed the modified job analysis I returned her to, which did not include vacuuming, and feel that the repetitive motion is what caused her most recent exacerbation. I have given her a note to avoid this." (Ex. 5 at 3.)

¶15 None of the positions approved by Dr. Pisk have been medically disapproved by any other doctor.

Vocational Analysis

¶16 Claimant argues that while she is capable of working, the jobs identified by Tesar are either incompatible with her physical restrictions or require skills she does not have. Since she did not present her own vocational expert, her case rests on her own testimony concerning her skills and her attorney's cross-examination of Tesar. She argues that the cross-examination proves her case.

¶17 Claimant completed 10th grade but testified she has some difficulty reading. She does read the newspaper. She can add and subtract but denies other mathematical skills. On the other hand, she has provided no evidence that she functions at less than a 10th grade level. She impressed the Court as being of normal intelligence and presented no evidence

which would support a finding that she has below-normal intelligence or that she is incapable of learning new tasks.

¶18 Claimant has worked as a housekeeper, janitor, wreath maker, day care provider, and manufacturing inspector at a factory making bags. (Ex. 9 at 90.) She ran her own house cleaning business for a brief time.

¶19 At present claimant babysits her grandchild on a full-time basis. She began babysitting in June or July 1999. Her daughter, who lives with her, pays one half of the rent and the entire telephone bill. She buys some groceries for the household. (Trial Test., Masters' Dep. at 49-50.)

¶20 Claimant's search for jobs since reaching maximum medical improvement has been perfunctory and minimal. Her search has involved little more than to investigate a handful of jobs identified by Tesar. She submitted only one application with respect to four jobs identified by Tesar. (Ex. 9 at 5.) She did not register with job service or with an employment agency.

¶21 Claimant testified that her job search was limited because of her physical limitations, yet since at least early summer of 1999 she has provided full-time care to a grandchild born October 28, 1998. Thus, she has changed diapers, fed, cared for, and lifted an infant during eight continuous hours a day. Moreover, she applied for a janitorial job at her husband's place of work despite her claim that she has difficulty doing her own housework, including vacuuming. She also claimed to have registered for work with LC Staffing, which provides temporary jobs, but LC Staffing had no record of her registering. I did not believe her and her husband's testimony about her registering at LC Staffing.

¶22 Claimant's activities, her application for janitorial work at her husband's place of work, and my own evaluation of her credibility, persuades me she has exaggerated her physical limitations, that she is unmotivated to go back to work, and that she would rather care for her grandchild than work. Therefore, in determining whether claimant is physically capable of performing the various jobs, I rely on Dr. Pisk's medical approvals.

¶23 With respect to the modified housekeeping job, that job ended for lack of work and no other job opportunities have been identified. It was not among the jobs finally identified by Tesar.

¶24 Laurie Wallace's cross-examination of Tesar was technical and well done. It showed that Tesar failed to take an adequate job history of claimant and that her rating of claimant's skill level was excessive. Notwithstanding the cross-examination, Tesar testified that while the considerations raised during cross-examination were certainly factors in reaching an opinion, they were not the only factors. (Tesar Dep. at 69.) She stuck by her original opinion that claimant is employable in the four jobs she identified.

¶25 With respect to the receptionist position, Tesar's own information shows that claimant is not competitive for the position. The job requires use of a typewriter and computer. (Ex. 11 at 2.) Claimant has no experience using either. She has a computer at home but she has done little with it and has not acquired typing or keyboarding skills. While Tesar indicated that several employers provide on-the-job training, claimant has no typing skills whatsoever. (Ex. 9 at 18.) It is difficult for me to believe that these employers hire persons with no typing skills; at least it is likely that persons with some typing experience will have a significant edge over claimant when applying for such jobs.

¶26 Similarly, the motel desk clerk position, as described in the job description, requires use of a computer and switchboard. While Liberty's attorney made the point that some computers require only rudimentary skills, e.g., McDonald's where food workers simply hit a labeled key for the food item, Tesar's testimony failed to show that motel computers are as simple or that motels hire persons without computer keyboarding or switchboard experience.

¶27 That leaves two jobs - hostess and customer service representative. I find claimant qualified for both. I further find that claimant is competitive for those jobs.

¶28 The job description for retail store customer service representative lists use of the scanner, telephone, and cash register. These are simple devices learned quickly with simple instruction. Tesar testified that these positions are often entry level ones with on-the-job training (OJT) (Tesar Dep. at 69), and in one of her reports she indicated that most employees are "trained on the job." (Ex. 9 at 11.) I am unpersuaded that claimant is incapable of learning to operate the necessary devices with OJT, or that she lacks the personal and communications skills necessary for the position. Tesar testified that the position is classified as "unskilled", requiring a specific vocational preparation level (SVP) of 2. While Tesar's classification of claimant as having an SVP of 6 was unsupported, her testimony established that claimant has at least an SVP of 2, and more likely of 3.

¶29 The job description for the restaurant hostess position requires vacuuming (ex. 11 at 12), which Dr. Pisk excluded. However, in a later report, Tesar identified jobs not requiring vacuuming and which had only very light lifting well within Dr. Pisk's limitations. (Ex. 9 at 19.) One required no cleaning whatsoever. (*Id*.) I am unpersuaded that claimant is incapable of learning to operate a cash register and credit card machine on the job. These are simple machines. Based on the Court's own ordinary everyday experience, retailers often employ high school students who operate these machines. ("Jurors are expected to bring to the courtroom their own knowledge and experience to aid in the resolution of a case." *Stage v. Sittner,* 980 P.2d 1053, 1056 (1999). In a bench trial the judge is the jury.)

¶30 Tesar's market research indicates that some hostess and customer service jobs pay $5.75 or more. However, in identifying actual jobs, she also found jobs paying less. Significantly, of four hostess jobs identified in her May 5, 1999 report, three paid less than

$5.75 an hour. (*Id.* at 28.) Two paid only $5.15. (*Id.*) Tips were not included but no information was provided to show that restaurant hostesses receive significant tips which would raise earnings to more than $5.75.

¶31 Of three customer service jobs Tesar identified in her May 5th report, none paid more than $5.50 an hour. (*Id.* at 29.) Even of the motel desk clerk jobs, two of the four paid $5.75 per hour while the other two paid $5.15 per hour. (*Id.* at 29.)

¶32 According to Tesar, jobs in Kalispell are plentiful. Hostess and customer service jobs are readily available.

¶33 Tesar concluded that "there are vocational opportunities which could return Ms. Masters to gainful employment at wages ranging from $5.15 to $7.36 per hour." (*Id.*) However, the highest paying jobs were for receptionist. Given claimant's limited skills I find it unlikely that she will be hired for the higher paying jobs. More likely, given her minimal qualifications, she is competitive for only the lower paying jobs with wages in the $5.15 to $5.50 an hour range.

CONCLUSIONS OF LAW

¶34 Claimant's entitlement to permanent partial benefits is governed by the 1997 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶35 Claimant's entitlement to permanent partial disability benefits is governed by section 39-71-703, MCA (1997), which provides in relevant part:

> **Section 39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
>
> (a) **has an actual wage loss** as a result of the injury; and
>
> (b) has a permanent impairment rating that:
>
> (i) is established by objective medical findings; and
>
> (ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.
>
> (2) **When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.** [Emphasis added.]

The claimant has received her impairment award. The issue to be determined is whether claimant has suffered a wage loss, thus becoming eligible for the additional permanent partial disability benefits available under subsection (5) of section 39-71-703, MCA (1997).

¶36 Claimant must prove her entitlement to permanent partial disability benefits by a preponderance of the evidence. *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).

¶37 Wage loss is defined in subsection (5)(c) of section 39-71-703, MCA (1997), as follows:

> Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns **or is qualified to earn** after the worker reaches maximum healing. [Emphasis added.]

The provision for post-injury wages based on what a claimant "is qualified to earn" takes into account the possibility that the claimant may not return to work immediately after reaching maximum healing or may be underemployed.

¶38 In this case I found as fact that claimant is qualified to work in entry level positions as a hostess and retail customer service representative. What she "is qualified to earn" in those positions is determined by her actual job opportunities, not some hypothetical highest wage, or even average wage, unless she in fact is competitive for the higher or average wage positions. In light of her lack of prior experience in either position, and the fact that she will have to undergo some OJT training, I have found that claimant is competitive only for the lower paying jobs, i.e., for jobs paying less than $5.75 per hour. Thus, she has a wage loss and is entitled to the additional permanent partial disability benefits prescribed under section 39-71-703(3)-(5), MCA (1997).

¶39 The parties have not asked the Court to determine the actual amount due claimant. Typically such amount is readily determined by the parties themselves. In the event they are unable to agree, they may request the Court to make the determination. Continuing jurisdiction is retained for that contingency and purpose only.

¶40 Claimant requests attorney fees and a penalty, alleging that the insurer has unreasonably delayed or refused benefits. At trial claimant's attorney stated that the alleged unreasonableness relates to unpaid medical bills. A finding of liability for the bills is a predicate to any finding that the insurer unreasonably refused to pay the bills in issue in this case. Therefore, the Court ruled at trial, and reiterates the ruling here, that the penalty and attorney fees sought by claimant are beyond the scope of the present proceeding. The request is therefore **denied.**

JUDGMENT

¶41 1. Claimant has a wage loss and is entitled to the additional permanent partial disability benefits prescribed under section 39-71-703(3)-(5), MCA (1997).

¶42 2. Continuing jurisdiction is retained for the purpose of determining the actual amount due claimant if such amount cannot be determined by the parties.

¶43 3. Petitioner is entitled to costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343. She is not entitled to either a penalty or attorney fees.

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

¶45 4. 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 6th day of January, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Larry W. Jones
Date Submitted: November 22, 1999