IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 10

WCC No. 9906-8271

DONNA MASTERS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

HAMPTON INN

Employer.

ORDER DENYING REQUEST FOR RECONSIDERATION

Summary: Insurer moved for reconsideration of WCC decision finding claimant suffered wages loss. Relying on S.L.H. v. State Compensation Ins. Fund, 1999 MTWCC 6, insurer argued claimant, who worked only part-time pre-injury, could earn more post-injury if she worked full time.

Held: Motion to reconsider denied. Where claimant was working only part-time pre-injury, appropriate comparison involves absolute wages pre- and post-injury in part-time work.

Topics:

Constitutions, Statutes, Regulations, Rules: Montana Code: section 39-71-703(5)(c). Where claimant was working only part-time pre-injury, the question of wage loss is determined by comparing absolute part-time wages pre- and post-injury. Court distinguished situation where claimant loses the ability to work full time as a result of the injury, which requires some adjustment in computing wages pre- and post-injury.

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Where claimant was working only part-time pre-injury, the question of wage loss is determined by comparing absolute part-time wages pre- and post-injury. Court distinguished situation where claimant loses the ability to work full time as a result of the injury, which requires some adjustment in computing wages pre- and post-injury.

Wages: Wage Loss. Where claimant was working only part-time pre-injury, the question of wage loss is determined by comparing absolute part-time wages pre- and post-injury. Court distinguished situation where claimant loses the ability to work full time as a result of the injury, which requires some adjustment in computing wages pre- and post-injury.

Wages: Qualified to Earn. Where claimant was working only part-time pre-injury, the question of wage loss is determined by comparing absolute part-time wages pre- and post-injury. Court distinguished situation where claimant loses the ability to work full time as a result of the injury, which requires some adjustment in computing wages pre- and post-injury.

¶1 On January 6, 2000, this Court entered its Findings of Fact, Conclusions of Law and Judgment, holding that claimant suffered a wage loss and is entitled to permanent partial disability benefits. The respondent/insurer has timely filed a Motion for New Trial or Alternatively Request for Amendment to Findings of Fact, Conclusions of Law and Judgment. The motion has been briefed and is submitted for decision.

Discussion

¶2 Relying upon this Court's decision in *S.L.H. v. State Compensation Ins. Fund,* 1999 MTWCC 6, respondent argues that the Court erred in finding a wage loss because claimant can earn more post-injury by working full-time than she was earning part time pre-injury.

¶3 In *S.L.H.* the claimant had been working 32 hours a week. Post-injury she was restricted to 20 hours a week. Thus, even if she earned the same absolute hourly wage post-injury as preinjury, she suffered a substantial wage loss. Under those circumstances, I held:

> Statutes must be construed reasonably to avoid absurd results. *Billings Properties, Inc. v. Yellowstone County,* 144 Mont. 25, 38, 394 P.2d 182, 198 (1964) ("Statutory or constitutional construction should not lead to absurd results if reasonable construction will avoid it."). If section 39-71-703(3)(c), MCA (1991), is construed as requiring that the post-injury wage per hour be compared with the preinjury hourly wage without consideration of the number of hours of employment, then a worker who preinjury was working 40 hours a week at $7.00 but post-injury can work only 10 hours a week but still earn $7.00 an hour during those 10 hours would suffer **no** "wage loss" under the section. That result is contrary to the plain meaning of "wage loss." It is also contrary to the first phrase of the subsection which, *without* regard to an hourly rate, provides that a worker is entitled to no wage loss benefits only if the worker "has no wage loss as a result of the industrial injury." A worker who cannot work as many hours post-injury as preinjury has a "wage loss" even if she can work at the preinjury "hourly" wage, thus an interpretation of the subsection as limiting

> wage loss comparisons to absolute hourly rates would fly in the face of the plain meaning of "wage loss" and the language of the first phrase of the subsection.
>
> The only way to compute wages in such cases, and thereby avoid an absurd result, is to divide the weekly post-injury compensation by the number of hours the worker was employed per week preinjury. That will provide an hourly rate based on the number of preinjury hours and result in a reasonable comparison of pre- and post-injury wages. In this case, claimant returned to work at a $5.15 an hour job for 20 hours a week, earning $103.00 weekly. On a 32-hour work week basis she earned $3.21 an hour. Even at $6.00 an hour for 20 hours a week, on a 32-hour work week basis she would earn $3.75 an hour. In either case she experienced more than a $2.00 an hour wage loss based on a 32 hour week and is entitled to a 20% award.

S.L.H. ¶¶ 64-65.

¶4 *S.L.H.* addressed only the situation where the injury restricts the number of hours a claimant can work. In this case, the respondent would turn the holding upside down. The simple answer to its argument is that yes, claimant can work 40 hours a week post-injury, **but she was also able to work 40 hours a week preinjury**. The injury did not increase her ability to work. Thus, there is no reason or justification for adjusting the absolute hourly wages or for departing from an absolute hourly wage comparison.

¶5 The respondent's motion is **denied**.

DATED in Helena, Montana, this 23rd day of February, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Larry W. Jones
Date Submitted: February 4, 2000