

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 79

WCC No. 9806-7995

EDWARD STEVE McGILLIS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BUSH DÉCOR & FIXTURE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 39-year old laborer with eighth grade education suffered low back injury at work and was restricted to light duty labor. Parties disputed the degree of disability sustained by claimant for purposes of permanent partial disability benefits. Claimant also wanted a penalty and attorney's fees for an alleged unreasonable refusal to pay benefits.

Held: Although earlier evidence indicated claimant could perform medium labor, insurer conceded light duty restriction at trial, entitling claimant to a 5% award under section 39-71-703(5)(d), MCA (1995). WCC finds that, over a one year period post-injury, claimant suffered a wage loss of greater than \$2.00 an hour, entitling him to 20% for wage loss. In reaching this conclusion, Court holds that section 39-71-123(3)(a), MCA, provides some indication of the appropriate time period for considering post-injury wages under section 39-71-703(5)(c), MCA, leading the Court to look at earnings of a period not to exceed one year if earnings during the period of four paychecks does not give an appropriate indication of expected earnings. Here, while claimant did work at a relatively high wage rate for some periods post-injury, the credible evidence suggests that work was a lucky break, not likely to be repeated, leaving claimant realistically in a much lower wage bracket. The parties' dispute over an impairment rating is resolved in the insurer's favor based upon the Court's finding that the particular testimony of two chiropractors in this case was not persuasive in comparison to the testimony provided by two medical doctors. Attorney fees and penalty were awarded only with respect to the 10% wage loss which the insurer conceded at trial and should have conceded earlier based on the evidence.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-612, MCA (1995). Attorney fees and penalty were awarded only with respect to the 10% wage loss (PPD benefits) which the insurer conceded at trial and should have conceded earlier based on the evidence.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703(5)(c), MCA (1995). Under section 39-71-703(5)(c), MCA (1995), the wage loss factor is predicated on the difference between claimant's actual wage at the time of his injury and his actual wage he earns or is capable of earning after he reaches maximum medical healing. The subsection refers to wages generally and does not define the periods during which the wages are to be measured. Court holds that section 39-71-123(3)(a), MCA, provides some indication of the appropriate time period for considering post-injury wages under section 39-71-703(5)(c), MCA, leading the Court to look at earnings of a period not to exceed one year if earnings during the period of four paychecks does not give an appropriate indication of expected earnings. WCC finds that, over a one year period post-injury, claimant suffered a wage loss of greater than \$2.00 an hour, entitling him to 20% for wage loss. While claimant did work at a relatively high wage rate for some periods post-injury, the credible evidence suggests that such work was a lucky break, not likely to be repeated, leaving claimant realistically in a much lower wage bracket.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1995). Attorney fees and penalty were awarded only with respect to the 10% wage loss (PPD benefits) which the insurer conceded at trial and should have conceded earlier based on the evidence.

Attorney Fees: Cases Awarded. Attorney fees and penalty were awarded only with respect to the 10% wage loss (PPD benefits) which the insurer conceded at trial and should have conceded earlier based on the evidence.

Attorney Fees: Unreasonable Denial or Delay of Payment. Attorney fees and penalty were awarded only with respect to the 10% wage loss (PPD benefits) which the insurer conceded at trial and should have conceded earlier based on the evidence.

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Under section 39-71-703(5)(c), MCA (1995), the wage loss factor is predicated on the difference between claimant's actual wage at the time of his injury and his actual wage he earns or is capable of earning after he reaches maximum medical healing. The subsection refers to wages generally and does not define the periods during which the wages are to be measured. Court holds that section 39-71-123(3)(a), MCA,

provides some indication of the appropriate time period for considering post-injury wages under section 39-71-703(5)(c), MCA, leading the Court to look at earnings of a period not to exceed one year if earnings during the period of four paychecks does not give an appropriate indication of expected earnings. WCC finds that, over a one year period post-injury, claimant suffered a wage loss of greater than \$2.00 an hour, entitling him to 20% for wage loss. While claimant did work at a relatively high wage rate for some periods post-injury, the credible evidence suggests that such work was a lucky break, not likely to be repeated, leaving claimant realistically in a much lower wage bracket.

Benefits: Impairment Awards. The parties' dispute over an impairment rating under the 1995 WCA was resolved in the insurer's favor based upon the Court's finding that the particular testimony of two chiropractors was not persuasive in comparison to the testimony provided by two medical doctors. The Court was not required to reach the question whether either chiropractor was statutorily authorized to render an opinion on impairment.

Impairment: Impairment Ratings. The parties' dispute over an impairment rating under the 1995 WCA was resolved in the insurer's favor based upon the Court's finding that the particular testimony of two chiropractors was not persuasive in comparison to the testimony provided by two medical doctors. The Court was not required to reach the question whether either chiropractor was statutorily authorized to render an opinion on impairment.

Penalties: Insurers. Attorney fees and penalty were awarded only with respect to the 10% wage loss (PPD benefits) which the insurer conceded at trial and should have conceded earlier based on the evidence.

Physicians: Chiropractors. The parties' dispute over an impairment rating under the 1995 WCA was resolved in the insurer's favor based upon the Court's finding that the particular testimony of two chiropractors was not persuasive in comparison to the testimony provided by two medical doctors. The Court was not required to reach the question whether either chiropractor was statutorily authorized to render an opinion on impairment.

Physicians: Conflicting Evidence. The parties' dispute over an impairment rating under the 1995 WCA was resolved in the insurer's favor based upon the Court's finding that the particular testimony of two chiropractors was not persuasive in comparison to the testimony provided by two medical doctors. The Court was not required to reach the question whether either chiropractor was statutorily authorized to render an opinion on impairment.

Proof: Conflicting Evidence: Medical. The parties' dispute over an impairment rating under the 1995 WCA was resolved in the insurer's favor based upon the Court's finding that the particular testimony of two chiropractors was not persuasive in comparison to the testimony provided by two medical doctors. The Court was not required to reach the question whether either chiropractor was statutorily authorized to render an opinion on impairment.

Wages: Wage Loss. Under section 39-71-703(5)(c), MCA (1995), the wage loss factor is predicated on the difference between claimant's actual wage at the time of his injury and his actual wage he earns or is capable of earning after he reaches maximum medical healing. The subsection refers to wages generally and does not define the periods during which the wages are to be measured. Court holds that section 39-71-123(3)(a), MCA, provides some indication of the appropriate time period for considering post-injury wages under section 39-71-703(5)(c), MCA, leading the Court to look at earnings of a period not to exceed one year if earnings during the period of four paychecks does not give an appropriate indication of expected earnings. WCC finds that, over a one year period post-injury, claimant suffered a wage loss of greater than \$2.00 an hour, entitling him to 20% for wage loss. While claimant did work at a relatively high wage rate for some periods post-injury, the credible evidence suggests that such work was a lucky break, not likely to be repeated, leaving claimant realistically in a much lower wage bracket.

¶1 The trial in this matter was held on September 14, 1998, in Great Falls, Montana. Petitioner, Edward Steve McGillis (claimant), was present and represented by Mr. Robert C. Kelleher, Sr. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. David A. Hawkins.

¶2 Exhibits: Exhibits A through Z were admitted without objection. Exhibits attached to the depositions of Robert L. Larson, D.C., Dr. Stephanie L. Herder and Dr. Patrick E. Galvas were also admitted without objection.

¶3 Witnesses and Depositions: The claimant, Majorie Lynn McGillis, Dr. W. Patrick Pardis, Dr. Patrick Galvas and Stacie Lee Sheldon were sworn and testified. The parties agreed that the Court may consider the depositions of Dr. Stephanie L. Herder, Dr. Patrick E. Galvas and Robert L. Larson, D.C.

¶4 Issues Presented: The issues, as set forth by the parties in the Pre-trial Order, and as agreed by the parties and the Court at the time of trial, are as follows:

1. The degree of disability sustained by claimant within the meaning of section 39-71-703, MCA (1995).
2. Whether claimant is entitled to attorney's fees, costs, and penalty pursuant to section 39-71-611 -612 and -2907, MCA (1995).

¶15 Having considered the Pre-trial 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

¶16 Claimant is presently 39 years old. Claimant has only an eighth grade education.

¶17 Claimant has worked as a laborer, an automotive detailer, a warehouseman and as a lawn care maintenance worker. From 1991 until his 1995 injury he worked as a laborer. He is a union member and his laboring jobs have been obtained through the union.

Industrial Injury

¶18 On November 11, 1995, claimant was dismantling a temporary pharmacy at a Buttrey Foods store when a several hundred pound beam fell onto his back and shoulders. He bore the weight of the beam for several seconds. (Trial Test.) Following that event, he continued to work, however, shortly after the incident, while carrying a load of plywood, he slipped and fell on his behind. As a result of the accident claimant suffered an injury to his lower back.

¶19 At the time of his injury, claimant was employed as a laborer for Bush Décor & Fixture, Incorporated (Bush).

¶110 Bush was insured by the State Fund. Claimant submitted a claim for compensation to the State Fund and it accepted liability for his claim. The State Fund thereafter commenced paying medical and temporary total disability benefits.

Permanent Partial Disability

I. Labor Restriction

¶111 At the time of his injury, claimant's job required heavy labor. While earlier evidence indicated that claimant could perform medium labor, at trial the State Fund conceded that claimant is entitled to a 5% award based on a restriction to light labor activity. § 39-71-703(5)(d), MCA (1995).

II. Lost Wages

¶112 Claimant's wage at the time of his injury was \$13.55 an hour and he was a full-time worker.

¶113 Following his injury, claimant received temporary total disability benefits until September 30, 1997, on which date he became employed by Foster Wheeler (Foster) to do janitorial work. He obtained the job through his union.

¶14 Claimant worked as a janitor until April 1998, when Foster lost its contract on the project where claimant was working.

¶15 While working for Foster, claimant earned \$13.10 an hour.

¶16 Since his job with Foster ended, claimant has obtained approximately five, one day, light-duty jobs. (Trial Test.) As with his time-of-injury and his Foster jobs, his employment has been obtained through his union. (*Id.*)

¶17 Claimant's average hourly wage for his post-Foster light-duty work was \$12.40. (*Id.*)

¶18 Because of claimant's education, his prior work experience, and the labor restrictions placed upon him by Dr. Galvas, his job market is limited. While he obtained full-time employment for a few months, he has been unable to find full-time work since April 1998, and I am satisfied that the Foster job was more in the nature of a lucky break than an indication of regular availability of high-paying janitorial positions.

¶19 Claimant's testimony established that as a heavy laborer he was able to regularly obtain full-time work.

¶20 Over a one-year period, claimant has suffered a wage loss of greater than \$2.00 an hour due to his inability to find employment. On a long-term, full-time basis claimant can reasonably expect to obtain work paying only \$5.50 to \$8.00 an hour. (Trial Test.; Exhibit H at 92.) Claimant is therefore entitled to 20% for wage loss.

III. Treatment and Impairment Rating by Dr. Galvas

¶21 After his injury, claimant was initially treated by Dr. Tim Six, a chiropractor in Great Falls. (Ex. K.) He received approximately 18 treatments, which provided him only some initial relief.

¶22 On February 6, 1996, claimant sought care from Dr. Patrick Galvas, who is a physiatrist. Dr. Galvas is board certified in physical medicine and rehabilitation. He became claimant's treating physician.

¶23 On February 6, 1996, claimant complained of low-back pain. Dr. Galvas' physical examination of claimant's cervical and thoracic area was negative. (Ex. A at 4, 57.)

¶24 Dr. Galvas thereafter saw claimant 23 times. The last examination was on June 11, 1998. His final and current diagnosis of claimant's low-back condition is sacroiliac joint dysfunction and myofascial low-back pain. (Trial Test.)

¶25 Dr. Galvas declared claimant at maximum medical improvement (MMI) on June 26, 1996, and gave him an impairment rating of 5% of the whole person. (Ex. A at 18.) Dr. Galvas found no objective evidence of radiculopathy. (*Id.* at 21.) He testified that based upon the AMA guides, claimant fit under DRE Lumbosacral Category II: Minor Impairment.

American Medical Association, Guides to the Evaluation of Permanent Impairment [Ama Guides] at 102 (4th ed. 1993). Category II provides for a 5% impairment of the whole person. (*Id.*)

¶26 In September of 1996, the claimant complained of pain in his legs. Dr. Galvas ordered a EMG nerve conduction study on the claimant. The EMG showed acquired sensory motor polyneuropathy. Claimant had been diagnosed with diabetes in May 1996. The EMG results were consistent with claimant's diabetic condition and Dr. Galvas attributed claimant's pain and weakness in his extremities to diabetic neuropathy. (Trial Test. and Ex. A at 21.)

IV. Impairment Rating Dispute

¶27 Claimant disputes the 5% impairment rating. He contends that since the time of his injury, he has suffered not only chronic back pain but also right-side neck and right shoulder and right arm pain. He argues that Dr. Galvas' impairment rating does not take into account those additional symptoms.

¶28 Claimant's case for a higher impairment award is based on the examinations and testimony of two chiropractors, Dr. Robert L. Larson and Dr. W. Patrick Pardis. Dr. Larson testified by deposition, Dr. Pardis at trial.

A. Dr. Larson's Rating

¶29 Dr. Larson saw the claimant one time, on March 24, 1997. He diagnosed claimant as suffering from bilateral radiculopathy from the low back, a lumbar strain sprain, radiculopathy in the right upper extremity, myofascitis and head pain. (Larson Dep. at 20-21.) Relying on x-rays that he took of claimant, Dr. Larson testified that he saw a slight "compression fracture" at C-5 which was less than 25%. (*Id.* at 40, 84.) He did not believe it was related to claimant's injury but opined that it was aggravated by the injury. (*Id.* at 40.)

¶30 According to Dr. Larson, claimant's extremity complaints were not due to diabetic neuropathy. (*Id.* at 63.) He dismissed diabetic neuropathy as a cause of claimant's extremity symptoms based on his observation that claimant received immediate relief after his chiropractic adjustment.

¶31 Based upon his findings and diagnosis, Dr. Larson rated claimant's impairment at 40% of the whole person. His rating was an accumulation of separate ratings for individual items.

¶32 Initially, Dr. Larson placed claimant in DRE Lumbosacral Category III: Radiculopathy. Ama Guides at 102 (4th ed. 1993). According to Dr. Larson, that category translates into a 20% whole person impairment award, however, the Ama Guides, as written, provide for only a 10% rating.⁽¹⁾ (*Id.*)

¶133 Dr. Larson next put claimant in DRE Cervicothoracic Category III: Radiculopathy. Ama Guides at 104. Category III provides for 15% whole person impairment.

¶134 Dr. Larson then combined the 20% lumbar impairment with the 15% cervical impairment to arrive at a 32% whole person impairment.⁽²⁾ (Larson Dep at 68-69.) Next, Dr. Larson included the 5% impairment rating given by Dr. Galvas, a 5% impairment for daily bilateral headaches, and 5% impairment for a cervical vertebra compression of less than 25%, to arrive at his final whole person impairment rating of 40%. (*Id.* at 69-70)

¶135 Without regard to other impairment rating evidence, Dr. Larson's impairment ratings are fraught with problems. First, Dr. Larson's 20% rating for a DRE Lumbosacral Category III: Radiculopathy is contradicted by the Ama Guides, which the parties agreed the Court may consult. The Ama Guides specify a 10% rating. Ama Guides at 102.

¶136 Second, Dr. Larson did not address specific criteria under that category. The category appears to require findings of a nature which are not supported by the evidence in this case. The category provides:

DRE Lumbosacral Category III: Radiculopathy

Description and Verification: The patient has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm above or below the knee, compared to measurements on the contralateral side at the same location. The impairment may be verified by electrodiagnostic findings. See Table 71, p. 109, differentiators 2, 3, and 4.

Structural Inclusions: (1) 25% to 50% compression of one vertebral body; (2) posterior element fracture, but *not* fracture of transverse of spinous process, *with* displacement disrupting the spinal canal, healed without loss of structural integrity. Radiculopathy may or may not be present.

Differentiation from congenital and developmental conditions may be accomplished by examining preinjury roentgenograms or a bone scan performed after onset of the condition.

Impairment: 10% whole-person impairment.

AMA Guides at 102 (4th ed. 1993). There is no significant evidence of signs of lumbar radiculopathy, such as "loss of relevant reflex(es) or measured unilateral atrophy of greater than 2 cm above or below the knee." There are no electrodiagnostic findings of lumbar radiculopathy. There is no evidence of a compression fracture or posterior element fracture at the lumbar level.

¶137 There is a similar lack of information and support for Dr. Larson's assignment of the DRE Cervicothoracic Category III: Radiculopathy, Ama Guides at 104, and his use of Table

22, Ama Guides at 152, to rate headaches. (Larson Dep. at 69.) Dr. Larson may have had valid medical reasons for the impairment categories, but he did not articulate them. It is unfortunate that neither party chose to explore the specific criteria of the various categories and tables when examining Dr. Larson.

¶138 In any event, other factors are more important to the Court's resolution of the impairment rating dispute.

B. Dr. Pardis' Rating

¶139 At some point, Dr. Larson referred claimant to Dr. Pardis, in Great Falls. Dr. Pardis first saw claimant with complaints of neck, shoulder, and back pain which radiated along his right side, on June 17, 1998.

¶140 On June 18, 1998, Dr. Pardis took additional x-rays of claimant. He testified that he noted a compression fracture at C-5. (Trial Test.) However, unlike Dr. Larson, Dr. Pardis estimated the compression factor at 25% to 50% and attributed the compression fracture to claimant's industrial accident on November 11, 1995. (*Id.*) He also opined that he had a loss of motion segment integrity at the C-5 level.

¶141 Based on the AMA guides, Dr. Pardis put claimant in DRE Cervicothoracic Category IV: Loss of Motion Segment Integrity, resulting in a 25% whole person impairment. Ama Guides at 104 (4th ed. 1993). He further testified that claimant had a 32% upper extremity impairment due to sensory loss in his right extremity, entitling claimant to a 19% whole person impairment. Combining the two ratings, Dr. Pardis concluded that claimant's whole person impairment award was 40%.

¶142 Dr. Pardis attributed claimant's sensory loss and pain in his right arm to the compression fracture and loss of motion segment integrity of the cervical spine.

C. Dr. Galvas' Opinions

¶143 Dr. Galvas testified that claimant does not have radiculopathy and that claimant's extremity pain, numbness and weakness are caused by his diabetes. He noted that it is common for symptoms of diabetic neuropathy to initially begin in the lower limbs and show up later in the arms. Claimant's history is consistent with that pattern.

¶144 While claimant and his wife testified that claimant told Dr. Galvas of neck and arm problems prior to June 11, 1998, I do not find their testimony credible. When they mentioned it on June 11, 1998, Dr. Galvas specifically noted it. If claimant had reported neck and upper extreme symptoms such as those related to Drs. Larson and Pardis, I find it unlikely that Dr. Galvas would have ignored them, as claimant has suggested in his testimony.⁽³⁾ Dr. Galvas impressed me as a conscientious and straight-shooting physician unlikely to ignore such symptoms.

¶45 Dr. Galvas' opinion that claimant's leg pain, numbness and burning was due to diabetic neuropathy was supported by an EMG nerve conduction study. (Ex. A at 21.)

D. Dr. Herder's Opinions

¶46 On August 4, 1998, claimant saw Dr. Herder, a neurosurgeon. Claimant reported that he had neck, shoulder and arm pain since his 1995 injury that had not been treated.⁽⁴⁾

¶47 In her physical examination of claimant, Dr. Herder

found that he had full range of motion in his neck that was in flexion, extension, left and right lateral turning and tilting. However when he tilted it left laterally it reproduced pain on the right side of his neck. So even though it caused pain he was still able to do it. I also found that he had a number, and I would say three or more trigger points scattered throughout his right trapezius muscle. . . .

(Herder Dep. at 6.)

¶48 Dr. Herder's physical examination contradicts that of Dr. Larson, who found significant losses in claimant's ranges of cervical motion. (Larson Dep. Ex. 22.) She found no significant loss of motion in her physical examination. (Herder Dep. at 6.)

¶49 Dr. Herder's other physical findings concerning the claimant's use of his right arm and involvement of a cervical spine injury in his arm symptoms are incompatible with both Dr. Larson's and Dr. Pardis' impairment rating opinions. She testified:

I found it very difficult to assess his strength for two reasons. First of all he is just a huge guy. He is going to overpower me no matter what. **Secondly, he tended to give way in all major groups when I tested his right arm. That is not exactly physiologic. I also tested to see if there was any loss of sensation in an appropriate distribution that would indicate a nerve-root injury, and there was no such loss of sensation. He did complain of areas on his body on the right side which seemed to feel the sensory stimulus a little less, but those areas included his trunk, meaning his thorax and the side of his face. Those would never have anything to do with a cervical pinched nerve.** The other finding I found was a flicker, meaning a diminished right triceps jerk, the other deep tendon reflexes were fine. . . .

(Herder Dep. at 7; emphasis added.)

¶50 Dr. Herder also ordered new cervical x-rays. She was provided with chiropractic x-rays but found "they were of negligible quality." (Herder Dep. Ex. A, August 4, 1998 letter from Dr. Herder to Dr. Melvin at 2.) It is unknown which chiropractor's films were involved.

¶51 Both Dr. Herder's and the radiologist's interpretation of the x-rays taken August 4, 1998, are incompatible with the opinions of Drs. Larson and Pardis. Dr. Gary L. Schumacher, the

radiologist, wrote, "There is some straightening of the cervical spine, otherwise it looks normal." (Herder Dep. Ex. A, Radiology Report.) He specifically reviewed the x-rays for fractures and found, "No fracture is identified." Dr. Herder read the x-rays and noted the presence of a "very small osteophyte . . . at the C5-6 neural foramen" but no fracture. (Herder Dep. Ex. A, August 4, 1998 letter of Dr. Herder to Dr. Melvin.) Neither noted any loss of motion segment integrity.

¶52 Dr. Herder also ordered an MRI. While the MRI was degraded because of movement by claimant, she determined that it was "interpretable" and read it as essentially normal. (Herder Dep. at 4 and Dep. Ex. A, Office Note of 8-17-98.) "The only abnormality noted is a very mild anterior spondylotic changes at C4-5." (Herder Dep. Ex. A, Office Note of August 17, 1998.)

¶53 Dr. Herder found no cervical pathology but did opine that claimant does have myofascial pain in his right trapezius muscle:

My diagnosis here is that he does not have significant neck pathology, he does not specifically have a herniated disk or a pinched nerve. I think the cause of his pain is myofascial pain emanating from the right trapezius muscle.

(Herder Dep. at 8.) She attributed the trapezius injury to claimant's industrial accident and testified that the trapezius injury caused referred pain into his right arm, however, she further testified that the arm pain was not radicular pain associated with a cervical nerve root. (*Id.* at 7-10.)

E. Resolution

¶54 I find that the chiropractor's impairment ratings are not supported by a preponderance of the evidence. I am unpersuaded by Drs. Larson's and Pardis' analyses. I was particularly unimpressed by Dr. Pardis' testimony about the breadth of his medical training and found it inflated. Drs. Larson and Pardis lack the extensive medical training and experience of Drs. Galvas and Herder,⁽⁵⁾ especially in diagnosing and treating diabetes. The chiropractic x-rays on which Drs. Larson and Pardis relied, or at least their interpretations of them, are unpersuasive in light of Dr. Herder's testimony that the chiropractic x-rays she reviewed were of "negligible quality" and in light of the new x-rays and MRI she ordered and interpreted.

¶55 Dr. Galvas has provided the only credible impairment rating. Claimant may be entitled to a further impairment rating for myofascial pain in his trapezius muscles, but I have no evidence concerning what that impairment rating might be. Based on the evidence presented, I find that claimant is entitled to a 5% impairment award.

V. Attorney Fees and Penalty

¶156 The State Fund conceded at the time of trial that claimant is entitled to a 10% award wage loss based on the difference in hourly wage between claimant's time-of-injury job and the Foster job.

¶157 Stacie Lee Sheldon (Sheldon) was the claims adjuster handling claimant's file. She testified that she learned on June 5, 1998, that claimant's wage while he worked for Foster was \$13.10, whereas his time-of-injury wage was \$13.55. (Trial Test.) The State Fund presented no evidence that claimant earned or was reasonably capable of earning more than \$13.10 post-injury. Therefore, within a reasonable time after June 5, 1998, it should have paid claimant 10% for lost wages. Waiting until trial to concede the 10% was not a reasonable time.

¶158 The State Fund's failure to pay 20% for wage loss, as opposed to 10%, was not unreasonable. Claimant did return for some months to a job which paid him a wage only \$0.45 less than his time-of-injury job. The Court's ultimate award of 20% is based on a matter of first impression involving statutory interpretation. The award breaks new ground.

¶159 On September 3, 1996, the State Fund received a report from its vocational consultant stating that based on a functional capacities evaluation (FCE) the claimant was capable of performing medium work. (Ex. H at 91.) On August 18, 1998, Dr. Galvas testified that claimant could only perform light work and the State Fund then conceded that fact at trial. Since Dr. Galvas' opinion was disclosed only a short time prior to trial and there was a prior FCE indicating claimant could perform medium labor, the State Fund's delay in conceding 5% based on a reduction of labor capacity to light was not unreasonable. Moreover, it had already conceded 3%.

CONCLUSIONS OF LAW

I. Applicable Law

¶160 Claimant's entitlement to permanent partial benefits is governed by the 1995 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶161 Claimant must prove his 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).

III. Permanent Partial Disability Awards - In General

¶162 The parties agree that claimant is entitled to compensation for permanent partial disability pursuant to section 39-71-703, MCA (1995). However, the parties dispute the amount of compensation owed.

¶163 Section 39-71-703(1) and (2), MCA (1995), provides that a worker is entitled to a permanent partial disability award if he or she suffered an actual wage loss and has an impairment rating based on objective medical findings:

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.

The parties agree that claimant has an impairment and also suffered a wage loss, thus he is eligible for an impairment award and the other benefits available under subsection (5) of section 39-71-703, MCA.

IV. Impairment Award

¶164 Section 39-71-711, MCA (1995), governs impairment ratings and awards. It provides:

39-71-711. Impairment evaluation -- ratings.

(1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association;

(c) must be expressed as a percentage of the whole person; and

(d) must be established by objective medical findings.

(2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice. If the claimant and insurer cannot agree upon the rating, the mediation procedure in part 24 of this chapter must be followed.

(3) An evaluator must be a physician licensed under Title 37, chapter 3, except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12.

(4) Disputes over impairment ratings are not subject to 39-71-605.

Under subsection (3), a chiropractor is authorized to provide impairment ratings only if he or she is "the claimant's treating physician." Dr. Pardis conceded that under current law he is not considered claimant's treating physician⁽⁶⁾ and certainly Dr. Larson cannot be considered a treating physician in light of his single examination of claimant for impairment purposes. I need not address the standing of either chiropractor to provide an impairment rating in this case since the State Fund has not objected to their testimony.

¶165 However, as a matter of fact, I have found that the chiropractic ratings are unsupported by a preponderance of medical evidence. I have therefore found that Dr. Galvas' impairment rating is controlling. The State Fund has already adopted Dr. Galvas' rating, therefore claimant is not entitled to any further impairment award.

V. Permanent Partial Disability Awards Generally

¶166 The claimant's remaining entitlement to permanent partial disability benefits is governed by subsections (3) and (5) of section 39-71-703, MCA (1995). The subsections provide:

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (4) by 350 weeks.

...

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;

(b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;

(c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%. 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.

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 5%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 3%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 2%.

VI. Age and Education Factors

¶167 The parties agree that claimant is entitled to 0% for age and 1% for education, therefore these factors are not in dispute and need not be addressed.

VII. Wage Loss

¶168 As set forth in section 39-71-703(5)(c), MCA (1995), the wage loss factor is predicated on the difference between claimant's actual wage at the time of his injury and his actual wage he earns or is capable of earning after he reaches maximum healing. The subsection refers to wages generally. It does not define the periods during which the wages are to be measured.

¶169 The provision for post-injury wages that the claimant "is qualified to earn" takes into account the possibility that the claimant may not return to work immediately after he reaches maximum healing or may voluntarily be unemployed or underemployed.

¶170 In this case, the claimant returned to work shortly after reaching maximum healing but at a job paying him less per hour than his time-of-injury job. The difference in hourly wages was \$0.45 but that difference entitled him to a minimum 10% award under subsection (5)(c). The evidence presented by claimant, however, persuaded me that his first post-injury job was fortuitous, as evidenced by his inability to obtain similar positions on a regular basis since he lost his job with Foster. There is no evidence that claimant has not diligently sought employment.

¶171 The difficult issue presented in this case is how the wage loss is to be measured. The State Fund measured it by comparing the hourly wage on the Foster job with the hourly wage of the time-of-injury job. However, as I have already indicated, subsection (5)(c) does not specify the period of time to be used in comparing preinjury with post-injury wages.

¶172 While section 39-71-703(5)(c), MCA, provides no specific guidance as to the time period to be used in computing loss of wages, section 39-71-123(3), MCA, does. That section defines wages for purpose of benefits. Its definition provides guidance for wage loss calculations. The section provides in relevant part:

(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.

Section 39-71-123(3)(a), MCA, acknowledges that an instantaneous slice of time may not accurately reflect an employee's wages, thus as a general rule at least four weeks should be considered. Section 39-71-123(3)(b), MCA, acknowledges that in some cases four weeks may not be a sufficient measure of wages and that a longer time, up to a year, may be a better measure.

¶173 While the legislature has not specifically made the criteria of section 39-71-123(3), MCA, applicable to section 39-71-703(5)(c), MCA, section 39-71-123(3), MCA, is the best and only indicator of what time period the legislature intended when it spoke of wages in section 39-71-703(5)(c), MCA.

¶174 I have found as fact that the claimant's initial post-injury employment is not a true measure of his lost wages. Applying the criteria of section 39-71-123(3), MCA, it is appropriate to look at up to one year of employment in determining his post-injury wages. In doing so, I have found that on a full-time, 40-hour a week basis, his post-injury wages were more than \$2.00 less than his wages for his time-of-injury job. He is therefore entitled to a 20% award under section 39-71-703(5)(c), MCA.

VII. Lost Laboring Capacity

¶175 At the time of his injury, claimant's job required heavy labor activity. Following his injury, he has been restricted to light labor activity. At hearing the State Fund conceded that reduction in laboring capacity and that claimant is accordingly entitled to 5% under section 39-71-703(5)(d), MCA (1995).

VIII. Attorney Fees and Penalty

¶76 Attorney fees and a penalty may be awarded only if the insurer's conduct is unreasonable. §§ 39-71-612 and -2907, MCA. In this case, I have found that the State Fund unreasonably refused to pay 10% for wage loss. While the State Fund ultimately conceded the 10%, it did so only after the trial had begun. It is therefore liable for both attorney fees and a penalty with respect to the 10% for wage loss. The amount of attorney fees will be determined by separate Order.

IX. Costs

¶77 Since the claimant has prevailed with respect to some of his prayers for relief, he is entitled to costs in an amount to be determined by the Court. The amount of costs will be determined by separate Order.

JUDGMENT

¶78 1. Claimant is entitled to 108.5 weeks of benefits under section 39-71-703, MCA (1995). This represents 31% of 350 weeks. The 31% represents a 5% impairment award, a 1% award on account of education, a 5% award based on a reduction in labor capacity from heavy to light, and a 20% award for loss of wages. The State Fund has previously conceded a portion of the final award. It is entitled to a credit for any amounts previously paid under section 39-71-703, MCA, and shall pay the remainder to claimant in a lump sum.

¶79 2. Claimant is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343. Attorney fees are applicable only to 10% for lost wages and not to any other amounts awarded herein. *Worts v. Hardy Construction Company*, 249 Mont. 477, 484, 817 P.2d 231, 236 (1991) (citing *Buckman v. Deaconess Hospital*, 238 Mont. 516, 776 P.2d 1210 (1989)).

¶80 3. Claimant is entitled to a 20% penalty on 35 weeks of benefits.

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

¶82 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 2nd day of November, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Robert C. Kelleher, Sr.

Mr. David A. Hawkins

Date Submitted: September 14, 1998

1. Dr. Larson's written report found at Exhibit 22 to his deposition initially put claimant in Category IV, which does translate to a 20% rating, but the doctor then crossed out the IV and penned in III.
2. Where different parts of the body are involved, the final impairment rating is not merely the sum of the ratings for the different parts. Rather, a table is used to combine ratings. Ama Guides, Combined Values Chart at 322.
3. Claimant testified that when he earlier told Dr. Galvas of neck and arm problems the doctor said that he wanted to concentrate on his low back first because that was the more significant condition. I did not believe claimant's testimony.
4. By the time of claimant's visit with Dr. Herder he was already involved in this litigation, which he filed on June 15, 1998, four days after his examination by Dr. Larson.
5. Both Drs. Galvas and Herder are board certified in their specialties and have several years of residency training in those specialties. In addition they had four years of medical school and four years of undergraduate college. While the Court is not informed of Dr. Pardis' education, Dr. Larson had two years of college and four years of chiropractic school.
6. Dr. Larson's testimony may reflect the limitation on choice of treating physicians as set forth in section 39-71-1103, MCA (1995).