

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 36

WCC No. 9507-7343

KEN M. McLAUGHLIN

Petitioner

vs.

ANR FREIGHT SYSTEMS

Respondent/Insurer/Employer.

WCC No. 9603-7517

ANR FREIGHT SYSTEMS,

Petitioner/Insurer/Employer

vs.

KEN M. McLAUGHLIN

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 45-year old truck driver suffered crush injury to hand and wrist while unloading at federal facility. He recovered \$60,000 in settlement of lawsuit against federal government. No longer able to perform trucking work, he obtained an accounts manager job with his same employer. When adjustments are made for the fact that claimant now works an average of 65 hours per week, while previously working on average 42 hours in the trucking job, he sustained a loss-of-earning capacity of \$166.40 weekly. He claimed additional permanent partial disability benefits based on loss of earning capacity theory, section 39-71-703, MCA (1985). Insurer claimed right to subrogation based on third-party recovery.

Held: The relevant inquiry under section 39-71-703, MCA (1985) is whether claimant's ability to earn in the open labor market is diminished by a work-related injury after taking into account all relevant factors, including age, occupation, skills and education, previous health, number of productive years remaining, and degree of physical or mental

impairment. While a worker may return to his time-of-injury job and earn more than before, he may still lose earning capacity if his performance is impaired and his ability to compete in the open labor market is lessened. WCC was persuaded claimant can no longer work safely as a truck driver or endure pain that would result. WCC was also convinced that claimant's job market is reflected by his present accounts manager position. Under sections 39-71-703 and -705, MCA (1985), he is entitled to 280 weeks of PPD benefits for the loss of use of his arm through the shoulder. Insurer is not entitled to subrogation where claimant was not made whole by the \$60,000 recovery. His settlement was made in order to put that litigation to an end, not because it reflected his actual losses.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-414, MCA (1985). 45-year old truck driver suffered crush injury to hand and wrist while unloading at federal facility. He recovered \$60,000 in settlement of lawsuit against federal government. WCC rejected insurer's claim for subrogation where claimant was not made whole by his third-party recovery. He settled in order to end that litigation, but proved his losses far exceeded \$60,000.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1985). 45-year old truck driver suffered crush injury to hand and wrist. No longer able to perform trucking work, he obtained an accounts manager job with his same employer. When adjustments are made for the fact that he now works an average of 65 hours per week, while previously working on average 42 hours in the trucking job, he sustained a loss-of-earning capacity of \$166.40 weekly. Under sections 39-71-703 and -705, MCA (1985), he is entitled to 280 weeks of PPD benefits for the loss of use of his arm through the shoulder.

Benefits: Permanent Partial Disability Benefits: Lost Earning Capacity. 45-year old truck driver suffered crush injury to hand and wrist. No longer able to perform trucking work, he obtained an accounts manager job with his same employer. When adjustments are made for the fact that he now works an average of 65 hours per week, while previously working on average 42 hours in the trucking job, he sustained a loss-of-earning capacity of \$166.40 weekly. Under sections 39-71-703 and -705, MCA (1985), he is entitled to 280 weeks of PPD benefits for the loss of use of his arm through the shoulder.

Subrogation. 45-year old truck driver suffered crush injury to hand and wrist while unloading at federal facility. He recovered \$60,000 in settlement of lawsuit against federal government. WCC rejected insurer's claim for subrogation where claimant was not made whole by his third-party recovery. He settled in order to end that litigation, but proved his losses far exceeded \$60,000.

Wages: Overtime. 45-year old truck driver suffered crush injury to hand and wrist. No longer able to perform trucking work, he obtained an accounts manager job with his same employer. When adjustments are made for the fact that he now works an average of 65 hours per week, while previously working on average 42 hours in the trucking job, he sustained a loss-of-earning capacity of \$166.40 weekly. Under loss of earning capacity theory, sections 39-71-703 and -705, MCA (1985), he is entitled to 280 weeks of PPD benefits for the loss of use of his arm through the shoulder.

Wages: Wage Loss. 45-year old truck driver suffered crush injury to hand and wrist. No longer able to perform trucking work, he obtained an accounts manager job with his same employer. When adjustments are made for the fact that he now works an average of 65 hours per week, while previously working on average 42 hours in the trucking job, he sustained a loss-of-earning capacity of \$166.40 weekly. Under loss of earning capacity theory, sections 39-71-703 and -705, MCA (1985), he is entitled to 280 weeks of PPD benefits for the loss of use of his arm through the shoulder.

The trial in these two consolidated matters was held on August 27, 1996, in Helena, Montana. Petitioner, Ken McLaughlin (claimant), was present and represented by Mr. John C. Doubek. Respondent, ANR Freight Systems (ANR), was represented by Mr. Thomas A. Marra.

Exhibits: Exhibits 1-18 were admitted by stipulation of the parties.

Witnesses and Depositions: Claimant, Teresa McLaughlin, Michael Anderson, and Patricia Hink were sworn and testified. In addition, the parties submitted the depositions of claimant, Ren Beyer, and Michael Anderson for the Court's consideration. Exhibit 15 contains additional depositions of claimant, Michael Anderson, Ren Beyer, and Dr. Paul Donaldson. These depositions were taken in a third-party action brought by claimant against the United States.

Issues Presented: The issue in WCC No. 9507-7343 is whether claimant is entitled to permanent partial disability benefits and, if so, in what amount. Claimant also seeks attorney fees, costs and a penalty. The issue in WCC No. 9603-7517 is whether ANR is entitled to subrogation with respect to a \$60,000 settlement obtained by claimant in his third-party action against the United States.

* * * * *

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

FINDINGS OF FACT

1. Claimant is 45 years old and resides in Helena, Montana. He is married and has three children. He is a high school graduate and has completed approximately one year of college. (Ex. 15 at 533; Tr. at 30.)
2. Claimant was a credible witness. His testimony has therefore been incorporated and adopted in the following findings.
3. In the early 1970s claimant served in the National Guard and in the Army Reserve. (Tr. at 30-31.) He also worked for Burlington Northern (ex. 15 at 533), Kentucky Fried Chicken (*id.*), Boyles Brothers Drilling Company (*id.* at 534), and the Highway Department on a survey crew (*id.*).
4. In March 1973 claimant began working as a truck driver for Garrett Freight Lines (Garrett). (Ex. 15 at 525.) ANR Freight (ANR) acquired Garrett in 1988. (Tr. at 33.) Claimant continued to work as a truck driver for ANR. (Ex. 5. at 525.)
5. Claimant's job duties as a truck driver included loading and unloading freight weighing as much as 300 pounds. (*Id.*)
6. During his employment as a truck driver for Garrett and ANR, and later for Consolidated Freightways, claimant was a member of the Teamsters Union. (*Id.* at 530-31.) Contracts between the Teamsters Union and his employers governed his wages.
7. On April 15, 1987, while employed by ANR, claimant injured his left wrist while unloading 2500-pound crates of tank cannon barrels at Fort Harrison in Helena. (Tr. at 36-37.) During unloading, a forklift driven by a government worker lurched forward, pinning claimant's wrist between a crate and the forklift. (Ex. 15 at 541; Tr. at 38.) Claimant's left wrist and forearm were crushed.
8. At the time of claimant's industrial accident, ANR was self-insured under Plan I of the Workers' Compensation Act. It accepted liability for the accident and paid temporary total disability benefits at the rate of \$299 per week. It has also paid medical benefits and an impairment award. (Ex. 15 at 564.) Its payments on account of the injury are \$5,591.30 as an impairment award; \$12,301.68 in temporary total disability benefits, and \$10,091.69 in medical benefits. (Pretrial Order at 2.)
9. Immediately following the industrial accident, claimant was taken to St. Peter's Community Hospital in Helena. Dr. Chess initially examined claimant and admitted him to the hospital. (Ex. 9.) Thereafter, claimant was treated by his family physician, Dr. Paul S. Donaldson. (Ex. 15 at 189.) Dr. Donaldson diagnosed claimant with "[e]arly compartment syndrome with evidence of compression of the median nerve" (*id.*) and discharged claimant the next day (*id.* at 191). Dr. Donaldson gave claimant a splint, prescribed physical therapy, and predicted that he would recover from his injury within two to three weeks. (*Id.* at 217.)

10. However, claimant's wrist continued to be painful. On April 30, 1987, his wrist was x-rayed but the x-ray was negative for a fracture. (*Id.* at 188.) Dr. Donaldson fit claimant with a new splint and told him to return in two weeks. (*Id.*)

11. The pain continued and on June 22, 1987, Dr. Bill J. Tacke, performed an electromyography nerve conduction study of claimant's wrist. His findings were as follows:

FINDINGS: 1) Nerve conduction studies normal for bilateral median and ulnar motor and sensory nerves. Left ulnar motor forearm segment slightly slower than similar segment on the right (left 56 m/s; right 65 m/s).

2) EMG testing showed recruitment reduction for the ulnar innervated hand muscles on the left.

ASSESSMENT: Findings indicate there may be some mild left ulnar nerve neuropraxia but no marked denervation is present. If symptoms persist, repeat testing may be helpful in 2-3 months.

(Ex. 1 at 13.)

12. Dr. Donaldson also referred claimant to Dr. M. Brooke Hunter, an orthopedic surgeon. Dr. Hunter examined claimant in June of 1987 and noted that when working for prolonged periods of time, claimant's wrist pain became intense on the "ulnar border of his wrist and he goes numb in the 4th and 5th fingers." (Ex. 2 at 14.) Dr. Hunter noted that claimant should not be performing any heavy lifting. (*Id.*)

13. On June 30, 1987, Dr. Hunter made the following note:

Is making slow improvement now that he is not lifting and pushing all the time. Has tried to mow the lawn and so on with his splint but had problems with that. Went thru the results of his EMG and CV which showed some ulnar nerve problems. Explained that I'd like to wait 2-3 months and repeat the studies if he is not making subjective improvement. . . .

(Ex. 15 at 214.)

14. Dr. Hunter thereafter referred claimant to Dr. Stephen G. Powell, an orthopedic surgeon in Missoula. (*Id.* at 207.) Dr. Powell examined claimant on August 4, 1987, and entered the following impressions:

(1) a non-union of the ulnar styloid, actually off the distal metaphysis; whether or not this involves the area of attachment of the triangular fibrocartilage is difficult to say clinically.

(2) tenderness over the lunate triquetral joint suggests a possibility of a tear in this area, although X-rays do not indicate this.

(*Id.* at 208.) He recommended a wrist arthrogram and arthrotomy. (*Id.*) Arthrotomy is the surgical incision of a joint.

15. On August 18, 1987, Dr. Powell performed arthroscopic surgery on claimant's wrist. (Ex. 1 at 1.) During the arthroscopy, Dr. Powell fused the triquetral and lunate joints with small fragment screws. (*Id.*)

16. Dr. Powell provided follow-up care. On September 4, 1987, he observed: "Wrist looks good S/P arthroscopy with triquetrum to lunate arthrodesis [fusion] and repair of non-union of the styloid." (*Id.*) He noted again on November 19, 1987, that the x-ray of the styloid looks good but that it is "certainly not totally healed." (*Id.*) On January 5, 1989, Dr. Powell noted that claimant's wrist was doing very well. (*Id.*) At that time Dr. Powell recommended that claimant continue working on increasing his range of motion and strength exercises but stop physical therapy. (*Id.*)

17. Claimant was off work on account of his injury for 11 months. (Ex. 15 at 564.) In March 1988 he returned to ANR as a truck driver. (Ex. 15 at 580.)

18. In May of 1989, claimant believed that ANR's Helena business was decreasing, so he applied for a job with Consolidated Freightways (Consolidated). (*Id.* at 1033.) He was hired and began working for Consolidated as a truck driver. (*Id.* at 580.)

19. Claimant worked as a truck driver for Consolidated for approximately two years. (*Id.* at 581.) Ren Beyer, claimant's supervisor at Consolidated, testified that claimant performed his duties satisfactorily and that claimant "[d]id his job well, good production, company-minded." (*Id.* at 1120-21, 1126.)

20. Claimant testified that when he returned to work in 1990 his wrist was weak and painful. He said that he had limited movement in his wrist, however, he was "under the assumption that it would continue to get stronger, the movement and rotation would get better, that by using it, it would develop strength." (Tr. at 41.) However, full function never returned and he had continuing difficulty performing his job. (*Id.* at 95.) As long as he handled things "straight-wristed" he had "pretty decent strength" in his hand and wrist (*id.* at 41), however, if he had to rotate his wrist in any direction he lost grip strength and was unable to hold onto things (*id.*). He had difficulty handling the hand truck to load heavy items. (*Id.*) There were "a lot of activities that raised concern. . . as far as safety-wise and confidence-wise in doing [his] job." (*Id.* at 42.) He also had a hard time steering the truck with both hands. (*Id.*)

21. Dr. Powell's medical records confirm that claimant suffered permanent impairment including loss of motion and grip strength. On July 29, 1988, he reported the following:

Ken is doing very well; he has a little aching from time to time with use. Certain motions, such as extension of the wrist fully with strong grip causes some pain from

time to time but generally speaking he is very satisfied with the wrist. Says that he has about 20 percent of the pain that he had before and only with significant use.

Examination : ROM reveals dorsiflexion to 40 degrees; palmar flexion to 45 degrees; radial deviation 10 degrees; 15 degrees ulnar deviation. Grip strength is limited on the left to 121 which is actually quite good but compared to his right side it is 171 and is about 60 percent of right side. His x-rays show excellent healing of both the ulnar styloid fracture as well as the triquetral lunate arthrodeses. I think he has reached his permanent healing and has a permanent partial impairment of seventeen (17%) percent of the upper extremities secondary to loss of motion of the wrist. No further treatment is indicated although I think that he should be followed at four to five year intervals to check the wrist for development of possible degenerative change.

(Ex. 1 at 3, underlining in original.)

22. Dr. Hunter's medical records corroborate claimant's testimony that after returning to work he had difficulty performing his job and had to rely primarily on his right arm. Dr. Hunter reported in an office note dated March 15, 1991:

Here for annual wrist x-ray and check up. Wrist still bothers him with activities but he hasn't slowed down much. **He says he does about 70% of the heavy lifting with his opposite arm now.**

His exam shows no obvious swelling or problems about the wrist. He is limited a little bit is [sic] flexion and extension and by about half motion in ulnar and radial deviation. Supination pronation down about 20° each. Good grip strength in neutral extension with any radial and ulnar deviation loses quite a bit of this. X-rays are made and show only early degenerative changes about the fusion. The fusion appears quite intact. Return at Dr. Powells' [sic] discretion.

(Ex. 2 at 18, emphasis added.)

23. Claimant contends that the lingering effects of his wrist injury have aggravated preexisting back and knee problems. Claimant has, in fact, suffered from back and knee pain post-injury, however, he has failed to prove that he suffered any permanent, material aggravation to preexisting conditions affecting those parts of the body.

24. Prior to claimant's industrial injury, Dr. Donaldson diagnosed claimant with spondylolisthesis⁽¹⁾ and chondromalacia.⁽²⁾

(Ex. 15 at 97, 100.) Dr. Donaldson testified that people with spondylolisthesis are "more prone to back strains and back injuries," and that heavy lifting is likely to aggravate the problem. (*Id.* at 98.) As early as April 14, 1986 -- a year prior to the wrist injury -- Dr.

Donaldson counseled claimant about finding other employment. (*Id.* at 116.) He wrote at that time:

Ken was a young man, and after presenting to me a history of multiple back problems, my concern would have been, in addition to discussing the condition, what is likely to occur down the road or not likely to occur. "Here's the things you can do to avoid the likelihood of complications," a long [sic] those same lines. "If you have an opportunity some day to find work that doesn't involved [sic] using your back, it would be wise to take a serious look at it."

(*Id.* at 98-99.) Dr. Donaldson also testified that claimant's knee condition would likely deteriorate especially if he continued to perform heavy lifting. (*Id.* at 100-102.)

25. With respect to his knee, Dr. Hunter reported on September 30, 1987, the time during which claimant was convalescing from his wrist injury, as follows:

Here to have his knee examined. Says that the right knee pain in the medial joint line area has caused him quite a bit of problems. Tends to lock up on him several times a day now and when this happens, the pain is enough that his knee gives out on him. Has had no true buckling type episodes. This is really a long standing problem and over the last several years has gone from being a once every month or so phenomenon to now 3-5 times a day.

(Ex. 2 at 15.)

26. On August 23, 1988, Dr. Bates examined claimant with respect to back pain. Dr. Bates reported:

[Claimant] Is here with return of his back pain. Apparently he has been seen for this previously and was noted to have a spondylolisthesis of L5-S1. He works at a job which requires heavy lifting and has been causing increased pain lately.

(Ex. 15 at 185.) Dr. Bates prescribed Feldene for pain. (*Id.*)

27. Claimant recalled a specific incident in which he was attempting to unload a stove from the back of a truck. He was unable to hold the stove with his left hand and it "broke lose and buckled [his] left knee." (Tr. at 43.) An industrial injury report dated September 21, 1989, corroborates claimant's testimony. The report states that he had pulled a tendon in his knee while attempting to unload a 300-pound stove at 4 B's restaurant in Helena. (Ex. 15 at 1036.) Dr. Donaldson prescribed a knee brace for claimant. (*Id.* at 1040.)

28. In an office note in which the date cannot be deciphered, Dr. Hunter noted the following:

Wrist is much better than pre-operatively already. Is having chronic problems with his low back which has been a years [sic] in duration. Complains of pain down the

right hip posterior thigh occasionally posterior calf, and numbness into his foot. The back pain is much worse than the leg pain. There has been no bowel or bladder or sexual dysfunction. Valsalva is not really significant except for a little increase back pain occasionally.

(Ex. 15 at 198.)

29. Post-injury the claimant modified his body mechanics when lifting, however, he presented no medical testimony opining that his preexisting knee and back condition were aggravated or accelerated by such change. As presented in this case, the medical evidence is consistent with a natural progression of his underlying conditions.

30. Although claimant failed to prove that his preexisting knee and back problems were aggravated or exacerbated, he nonetheless proved to the Court's satisfaction that his wrist condition in fact caused him to cease working as a truck driver and seek less strenuous work.

31. Claimant testified as follows:

Once I realized that -- I was always under the assumption that my hand and wrist had got better. I'd never been involved in anything where you did not improve. You had an injury, fine, two weeks later you were back to normal and you were working at 100 percent again. The realization that, "Hey, this is as good as it gets and it's only going to deteriorate from there." Once that sets in, you better determine that you have got to look for something else because I guess the end is in sight as far as what you have chosen as a vocation.

(Tr. at 46.) He further testified that "it came to a point where I could see the writing on the wall that because of the reoccurrences and the continuance of the problems, that I was going to have to seek employment doing something that was not nearly as physical as what I was doing." (*Id.*)

32. After reviewing both the medical evidence and the claimant's testimony, I find that claimant indeed had difficulty in performing his truck driving job after his injury, that the labor required by that job increased his wrist pain, and that the change in body mechanics to compensate for his loss of grip strength and wrist pain put him at a higher risk for injury, as evidenced by the incident involving the stove. While claimant performed his truck driving job to the satisfaction of his employer, I find that he did so at personal cost and risk. I further find that claimant's wish to decrease his activity on account of his continuing pain and his fear of further accident on account of the diminished use of his left hand and arm in lifting were reasonable and did in fact cause him to change jobs.

33. Claimant approached Ren Beyer, his supervisor at Consolidated, about the possibility of going into management. Beyer confirmed that claimant had "expressed some interest" in

a promotion to an accounts manager. (Beyer Dep. at 5.) When an accounts manager position opened up, Beyer hired claimant. (Ex. 15 at 1134.)

34. Claimant began work as an accounts manager in June or July of 1991. (Ex. 15 at 581.) He initially received on-the-job training from the accounts manager he replaced. (*Id.* at 1131.) During his employment he also attended sales training classes in Denver and Dallas. (*Id.* at 1131.)

35. As an accounts manager, claimant's duties were to "take care" of current customers and find new customers. (Tr. at 97.) He negotiated contracts, attended to service problems, did public relations work, entertained customers and prospective customers, and pursued the collection of overdue bills. (McLaughlin Dep. at 8.)

36. When claimant began working as an accounts manager, his territory included the Butte and Helena areas. (Tr. at 97.) However, Consolidated eliminated an accounts manager position in Montana and assigned claimant additional areas, including West Yellowstone, Livingston, Bozeman, Gardiner, Manhattan, Three Forks, Dillon, Deer Lodge, and Anaconda. (McLaughlin Dep. at 8.) Thereafter, claimant's job required him to be on the road a substantial amount of time. Often, he would leave his home in Helena as early as 5:45 a.m., and not return for several days. (Tr. at 99.)

37. In addition to the accounts management duties, claimant supervised truck drivers. (McLaughlin Dep. at 33; Tr. at 120.) He created and implemented sales programs for the truck drivers. (McLaughlin Dep. at 33.) He also rode with and evaluated at least one truck driver every month. (McLaughlin Dep. at 33; Tr. at 120.) He supervised approximately ten drivers. (McLaughlin Dep. at 34.)

38. Consolidated required claimant to entertain customers as often as three evenings a week and two weekends a month. (McLaughlin Dep. at 17; Tr. at 99.) The job description described claimant's duties as follows:

ENTERTAINMENT - Meet or exceed the standards of 5 customer lunches each week, 4 weeknight [sic] customer entertainment and 2 customer weekend entertainment events each month. Customer entertainment is to be well planned and of a first class nature with a specific business purpose to be achieved as a result of the event.

(Ex. 15 at 911.) Claimant took customers to dinner, golfing, and to sporting events. (McLaughlin Dep. at 17.)

39. Claimant's salary for 1994 was \$40,313.56. (Ex. 15 at 1116.) He averaged between 60 and 70 hours a week of work. (Tr. at 137-38.)

40. Claimant's new job resulted in decreased wrist pain. In Dr. Powell's final follow-up note of October 15, 1993, he reports:

He [claimant] says that now that he is doing management work **he is not having as much pain as he was but still has some aching with heavy grip**. He is consistently doing strengthening exercises on his wrist and hand. He has got 40 degrees dorsiflexion, 45 degrees palmar flexion, 25 degrees ulnar deviation, 15 degrees radial deviation. This is a little better than previously. X-rays look excellent with no degenerative changes that I can see. He is a bit tender over his screw head ulnar to the triquetrum. This could probably be removed simply under fluoroscopy either here or in Helena. We will plan on seeing him back as needed. I don't think that he is going to have any problems with degeneration.

(*Id.* at 142, bold added.) In an office note of February 3, 1993, Dr. Donaldson noted the following:

I spoke w/John Doubek today. He is requesting a deposition. He relates a hx of Ken's hand injury, **the switch that Ken made to management job so he didn't have to use his back and hand (long hx of chronic back pain provided by John today)**. He now is not happy with the stress associated with his management job and wants to go back to driving a truck. Apparently there's a lawsuit against the government for the original hand injury as it relates to his subsequent problems.

(Ex. 15 at 106, emphasis added.)

41. Claimant grew unhappy with his management position at Consolidated because he was required to spend too much time away from home. (McLaughlin Dep. at 29.)

Ultimately, he chose his family over his job, resigning his position at Consolidated and going to work as an outside sales representative for Empire Office Machines (Empire) in August of 1995. (*Id.* at 5) He was still employed by Empire at the time of trial.

42. Claimant's job at Empire is in sales. He sells office furniture, supplies, copiers, fax machines, and other office equipment. (*Id.*) His salary is \$27,000 annually. (Tr. at 115-16.) He has received no raise since commencing his employment.

43. Claimant retained Michael Anderson (Anderson) as a vocational rehabilitation consultant. ANR retained Patricia Hink (Hink) as its consultant.

44. In preparation for his report, Anderson talked to claimant, claimant's wife, and Dr. Donaldson. (Tr. at 51.) He reviewed the medical records, claimant's deposition, and claimant's tax records from 1986 to the present. (*Id.* at 51; Ex. 15 at 6.) He also contacted Mergenthaler's Transport and Northwest Transport (Northwest) specifically in this case. (Tr. at 52, 64.) Anderson classified claimant's time-of-injury job as heavy duty. The branch manager at Northwest supported his opinion, indicating that a truck driver for that company must be able to lift over 100 pounds. (*Id.* at 64-65.) Based on this evidence and the claimant's testimony, I find that claimant's time-of-injury job was heavy labor and that

his industrial accident precluded him from continuing to work at that job on a long term, sustained basis.

45. Hink reviewed the depositions of claimant, Michael Anderson, Ren Beyer and Dr. Donaldson. (*Id.* at 148-49.) In addition she reviewed the medical records. (*Id.* at 148.) She determined that claimant had no physical restrictions as a result of the industrial accident. (*Id.* at 151, 185-86.) Her conclusion is correct in the sense that no doctor has specifically precluded claimant from his old job, however, as previously found, claimant's pain and the restricted use of his left hand and arm render him incompatible with his time-of-injury job.

46. Both Anderson and Hink agreed that claimant has acquired additional job skills as a result of his management position. His labor market has expanded to include sales and accounts management positions.

47. Anderson testified that claimant is limited to medium-duty jobs. Hink testified that even if that is true, there are high paying medium-duty truck driving jobs that claimant can perform.

48. Both Hink and Anderson identified medium, light and sedentary jobs which claimant can perform post-injury. Anderson concluded that fewer jobs are now available to claimant than before. Hink concluded that more jobs are available than before. The critical issue, however, is not the number of jobs available but his competitiveness for those jobs and the amount of compensation for those jobs.

49. Anderson concluded that claimant's earning capacity has decreased as a result of the wrist injury and that his normal labor market has been adversely affected by his injury. (*Id.* at 69.)

50. Hink concluded that claimant has not lost any earning capacity. She identified 561 truck driving positions available in 1996; only 25 of those jobs were heavy-duty positions. (*Id.* at 172.) The remaining jobs were medium or light duty but some of those were low wage, such as pizza delivery. (*Id.* at 173.) Hink identified one high paying truck driving job which she characterized as medium duty. That job is at Northwest Transportation Services. (*Id.* at 161.) Claimant was familiar with the job and testified persuasively that the position is an LTL (less-than-truckload) position similar to his old truck driving jobs and that it in fact requires heavy labor. (*Id.* at 204-5.) Also, Northwest has an opening for a truck driver on the average of only once a year. (Tr. at 179.) ANR presented no evidence of other non-heavy truck driving jobs which pay wages in the range of what claimant was earning, or could earn, as an LTL truck driver.

51. Hink also identified some sales and account-type positions for which claimant is qualified. Those jobs, however, have a broad range of wages. For example, the TCI position, which Anderson said was unavailable to claimant because he was not qualified, has, according to Hink, a wage range of \$19,000 to \$37,000. (*Id.* at 169.) Hink identified another

job in sales with Hershey which covered the entire western part of the state. Hink was unable to say how often an opening with Hershey occurs, only that the last hire was the year previous. (*Id.*) The wage range for Hershey was reported at \$25,000 to \$33,000. Hink also found Capital Office Supply (Capital) as a possible employer. Capital reported a wage range of \$18,000 to \$40,000 after five years. (*Id.*) The broad wage ranges suggest that wages for the position are based on sales success. To find that claimant would make the higher end salaries, the Court would have to assume that claimant would achieve high sales volumes. Since claimant's sales background has been limited to trucking and office supply, and since there is no evidence that he is an outstanding office supply salesman, I decline to make that assumption.

52. Hink also identified a "route sales counselor" for Associated Foods as a possible job. It pays between \$15.64 to 18.40 (in five years) but is a traveling job requiring sales of food products across the western part of the state. (*Id.* at 170, 182-83.) Claimant has no experience in food sales, although Hink testified that the employer does not require such experience. (*Id.* at 184.)

53. The actual jobs claimant has obtained are the best indicators of his post-injury earning capacity. All the vocational and job market analysis in the world will not provide or guarantee a job. Claimant testified that he actively looked for jobs in the transportation industry. He has followed want ads and applied for jobs for which he believes he is qualified. (*Id.* at 111-13.) There is no evidence that his job search has been less than diligent. I find that his accounts position with Consolidated and his sales job with Empire are the best measures of his post-injury earning capacity.

54. At the time of trial the wage for claimant's old truck driving position, which is governed by contract with the Teamsters Union, was between \$17.50 and \$18.00 an hour. (*Id.* at 116.) At the time of his injury, claimant was working an average of 42 hours a week. (*Id.* at 137.) While he was working less hours during the last year he worked as a truck driver for Consolidated (*id.*), there is no evidence that he was incapable of working 42 hours either then or in the future. In his later positions he has worked 40 hours or more on the average.

55. While working as an accounts manager for Consolidated, claimant worked an average of 65 hours a week. (*Id.* at 138.) During his last year as an accounts manager, claimant earned \$45,200. On an hourly basis he earned \$13.34 an hour (*\$45,200 divided by 52.14 weeks in a year, and then divided by 65 hours per week*). His weekly earnings for 40 hours a week in this position were \$533.60.

56. Claimant's current hourly wage is \$12.95 an hour (*\$27,000 divided by 52.14 weeks in a year, and then divided by 40 hours per week*). Thus, his current weekly earnings for a 40 hour week are \$518.00.

57. In current dollars, claimant's weekly wage for his time-of-injury job was \$700 weekly for 40 hours of work.

58. Using claimant's highest post-injury earnings, i.e., his earnings as an accounts manager, claimant has sustained a loss-of-earning capacity of \$166.40 weekly (\$700 minus \$533.60). If claimant had worked as many hours as a truck driver as he did as an accounts manager, his lost earning capacity would be even greater due to the differential in hourly wage.

Subrogation Issue

59. Claimant presented a claim to the United States on March 8, 1989, alleging that his industrial injury was caused by the negligence of a government employee. (Ex. 15 at 64.) The claim was not resolved and the claimant thereafter filed a third-party action against the United States. (*Id.* 15 at 243.) The trial was originally set for January 31, 1994. (*Id.* at 143.) After several continuances, claimant settled his claim for \$60,000. (Tr. at 110; Ex. 15 at 511.)

60. ANR contends that the settlement fully compensated claimant for his losses and that it is therefore entitled to subrogation. Claimant contends that his losses far exceed the combined amount of the settlement and his workers' compensation benefits. The Court agrees with claimant.

61. Claimant testified that he compromised his claim against the United States because of repeated delays in getting his case to trial and the prospect that it was not going to be tried for some time. I found his testimony credible and therefore adopt his settlement rationale.

62. To date ANR has paid a total of \$27,984.67 to claimant. (Pretrial Order at 2.) Pursuant to the decision in this case, ANR is liable for an additional \$25,469.09 in permanent partial disability benefits. ANR's combined payments and liability are \$53,453.77. The total received by claimant, when combined with the \$60,000.00 received from the settlement with the United States, is \$113,453.77.

63. Claimant was off work on account of his injury for 41 weeks. (Ex. 15 at 564.) Claimant testified that at the time of his injury he was earning between \$14.00 and \$14.50 per hour and working 42 hours a week. Using \$14 as his hourly wage, his lost wages during his convalescence were \$24,108.

64. During the time he was off work, claimant lost vacation time and pension contributions, which amounted to approximately another \$3,800. (Tr. at 101; see *also* Ex. 15 at 1045, estimating that he lost \$2020 vacation pay and \$1800 pension contribution.)

65. At the time he stopped working as a truck driver, claimant was a month or two shy of 40 years old. (His date of birth is August 23, 1951 and he began working as accounts manager

in June or July 1991.) Thus, he had another 25 years to reach the usual retirement age of 65. Twenty-five years of lost-earning capacity equals \$216,902.40. ($\$166.40 \times 52.14 \times 25$).

66. Without considering his attorney fees, lost-pension benefits, pain and suffering, or diminished life style, claimant's damages from his industrial accident exceed the combined amount he has received from ANR and the third-party settlement.

CONCLUSIONS OF LAW

1. Claimant's injury is governed by the 1985 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).

2. Claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible 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).

3. Claimant is entitled, pursuant to section 39-71-709, MCA, to elect to pursue permanent partial disability benefits under either a loss of earning capacity theory, § 39-71-703, MCA, or as an indemnity award, § 39-71-705 through -708, MCA. Claimant has elected to proceed under section 39-71-703, MCA (1985). (Tr. at 56.)

Section 39-71-703, MCA, provides in relevant part:

Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be 66 2/3% of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

4. Permanent partial disability is defined in section 39-71-116(12), MCA, as:

"Permanent partial disability" means a condition resulting from injury as defined in this chapter that results in the **actual loss of earnings or earning capability** less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a **preponderance of medical evidence**. [Emphasis added.]

5. The relevant inquiry under section 39-71-703, MCA (1985), is whether claimant's ability to earn in the open labor market is diminished by a work-related injury after taking into account all relevant factors. *Sedlack v. Bigfork Convalescent Center*, 230 Mont. 273, 749 P.2d 1085 (1988). These factors include the claimant's age, occupation, skills and education, previous health, number of productive years remaining, and degree of physical or mental impairment. *Reever v. Sears, Roebuck & Co.*, 266 Mont. 509, 514, 881 P.2d 620, 623 (1994).

While a worker may return to his time-of-injury job and earn more than before, he or she may still lose earning capacity if his or her performance is impaired and his or her ability to compete in the open labor market is lessened. *Fermo v. Superline Products*, 175 Mont. 345, 348, 574 P.2d 251, 253 (1978); *Hafer v. Anaconda Aluminum Co.*, 198 Mont. 105, 643 P.2d 1192 (1982). Loss of efficiency in work decreases a worker's chances of finding employment in the open labor market and "translates into a reduced earning capacity." *Sedlack*, 230 Mont. 273, 278, 749 P.2d 1085 (1988).

In this case the claimant has persuaded the Court that he can no longer safely work as a truck driver or endure the increased pain caused by that work. His physical limitations are supported by a preponderance of medical evidence confirming a loss of grip strength and loss of mobility of his left wrist.

Claimant has further persuaded the Court that the jobs reasonably available to him are those which he has obtained. He has therefore sustained a loss-of-earning capacity in the amount of \$166.40 a week. While his post-injury earnings are not conclusive as to his earning capacity, *Fermo*, 175 Mont. at 348, 574 P.2d at 253, in this case they are the best indicator. Under section 39-71-703, MCA (1985), claimant is entitled to permanent partial disability benefits equal to 2/3 of that amount, or \$109.82.

The duration of the benefits is governed by subsection (2) of section 39-71-703, MCA, which provides:

(2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of permanent partial disability. **However, compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in 39-71-705 for the loss of the member.** [Emphasis added.]

Section 39-71-705, MCA, limits benefits to 200 weeks for the loss of a hand, 220 weeks for the loss of an arm between the wrist and elbow, 240 weeks for loss of the arm at the elbow, and 280 weeks for loss of the arm at the shoulder. Claimant has failed to prove that his injury extends beyond his arm, and is therefore limited to the schedule. *Raffety v. Kanta Products, Inc.*, 250 Mont. 268, 819 P.2d 1272 (1991). Since his injury effects the use of his entire arm, the appropriate period for benefits is 280 weeks for an injury involving the whole arm. *Allee v. Aluminum Products and Alpine Class, Inc.*, 239 Mont. 243, 779 P.2d 929 (1989). Accordingly, claimant is entitled to \$31,060.40, which must be reduced by the impairment award of \$5,591.31 which he has already received, netting \$25,469.09 in additional permanent partial disability benefits.

6. The Workers' Compensation Court has jurisdiction to determine the subrogation issue raised in this case. *Ness v. Anaconda Minerals Co.*, 929 P.2d 205, 53 St. Rep. 1241 (Mont. 1996).

7. At the time of claimant's injury, section 39-71-414, MCA (1985), provided:

Subrogation. (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.

(2)(a) If the injured employee intends to institute the third party action, he shall give the insurer reasonable notice of his intention to institute the action.

(b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost of the action, including attorneys' fees.

(c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by this section.

(d) If the injured employee or the employee's personal representative institutes the action, the employee is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of reasonable costs, including attorneys' fees, if the amount of recovery is insufficient to provide the employee with that amount after payment of subrogation.

(3) If an injured employee refuses or fails to institute the third party action within 1 year from the date of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any amount received by judgment or settlement which is in excess of the amounts paid or to be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorneys' fees for prosecuting the action, have been deducted from the recovery.

(4) An insurer may enter into compromise agreements in settlement of subrogation rights.

(5) If the amount of compensation and other benefits payable under the Workers' Compensation Act have not been fully determined at the time the employee, the employee's heirs or personal representatives, or the insurer have settled in any manner the action as provided for in this section, the division shall determine what proportion of the settlement shall be allocated under subrogation. The division's determination may be appealed to the workers' compensation judge.

The 1983 version of the above section is identical to the 1985 version and was definitively interpreted by the Supreme Court in *Zacher v. American Insurance Co.*, 243 Mont. 226, 794

P.2d 335 (1990), as precluding any subrogation until claimant has been made whole for his entire loss and for the costs of recovery. The Court said in *Zacher*:

We hold that where a workers' compensation claimant recovers against a third party, an insurer has no subrogation rights until a claimant has been made whole for his entire loss and any costs of recovery, including attorney fees. In determining whether a claimant has been made whole, the amounts received and to be received under the workers' compensation claim shall be added to the amounts otherwise received or to be received from third party claims, and also added to the costs of recovery, including attorney fees; and when that total equals claimant's entire loss, then the insurer shall be entitled to subrogation from all amounts received by the claimant in excess of his entire loss, pursuant to sec. 39-71-414, MCA (1983). To the extent that *Hall* and *Getten* contain requirements which may be interpreted as adding to the foregoing holding, *Hall* and *Getten* are expressly overruled.

243 Mont. at 231, 794 P.2d at 338.

The most recent statement concerning subrogation is set out in *Ness*, 929 P.2d 205, 53 St. Rep. 1241 (Mont. 1996). The Supreme Court held that the question of whether an injured worker has been made whole is a question of **fact**. As stated in Finding of Fact 66 claimant was not made whole. ANR is not entitled to subrogation.

JUDGMENT

1. ANR shall pay permanent partial disability benefits to claimant in the sum of \$25,469.07 in a lump sum.
2. Petitioner is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
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 4th day of June, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. John C. Doubek

Mr. Thomas A. Marra

Date Submitted: September 12, 1996

1. A back condition wherein the vertebral bodies slip on one another and can cause instability with severance of nerves of the lower extremities or chronic back pain. (Ex. 15 at 97.)
2. A "wear-and-tear" phenomenon of the knees. (Ex. 15 at 100.)