

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 67

WCC No. 9401-6976

THOMAS H. MILLS

Petitioner

vs.

AMERICAN STORES COMPANY

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on June 29, 1994, in Great Falls, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Thomas H. Mills (claimant), was present and represented by Mr. D. Patrick McKittrick. Respondent, American Stores Company (Buttrey), was represented by Mr. Thomas A. Marra. Claimant was sworn and testified on his own behalf. William R. Goodrich and Anne Arrington were sworn and testified. Exhibits 1 through 17 and 21 through 23 were admitted into evidence. Exhibits 18 through 20 were objected to by claimant. Those exhibits concern settlement offers and are admissible, if at all, only as to an issue of attorney fees. It is therefore unnecessary to rule on claimant's objections at this time. The objections may be renewed at the time of any hearing on attorney fees. The parties stipulated that the Court could consider the deposition testimony of Thomas H. Mills, William Goodrich and Anne Arrington.

Claimant made a motion to amend the pretrial order to request a lump sum advance. The motion was denied.

Having considered the Pre-trial 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 issued a bench ruling finding that pursuant to section 39-71-703, MCA, the claimant is entitled to permanent partial disability benefits of \$75.75 weekly for a period of 500 weeks. The Court found that Buttrey did not unreasonably delay or refuse payment of benefits to claimant. It therefore denied claimant's request for a penalty but determined that he is entitled to attorney fees and costs in an amount to be determined at a later date. The following findings of fact, conclusions of law and judgment confirm that bench ruling.

FINDINGS OF FACT

1. Claimant is forty-three years old and has lived for a number of years in Great Falls. He is married, and has a seventeen year old son.
2. Prior to his industrial injury claimant worked as a manual laborer. He worked as a warehouseman at Malmstrom Air Force Base Exchange, a laborer for the Anaconda Copper Company, a laborer for Pepsi-Cola Bottling, a carpenter's helper, and, finally, a warehouseman for Buttrey. He also served in the United States Army.
3. Claimant was employed by Buttrey at the Great Falls warehouse for approximately twelve years.
4. On May 19, 1986, claimant injured his back in the course and scope of his employment with Buttrey. At the time he was working as a meat stocker and was stacking a box of meat on a pallet overhead when he felt something "pop" in his back, followed by a sharp pain.
5. At the time of the injury Buttrey was enrolled under Plan I of the Workers' Compensation Act and was self-insured.
6. Claimant sought medical treatment and was diagnosed as having lumbosacral strain with sciatica on the right, and a degenerative intervertebral disc at L4. Claimant's doctors advised claimant that he should not return to his time-of- injury job at Buttrey, and recommended that he find another type of occupation which did not involve heavy lifting or excessive bending of the back. (Ex. 3.)
7. Buttrey accepted liability for claimant's industrial injury and instituted temporary total disability benefits but thereafter terminated those benefits on December 2, 1988. Claimant then commenced an action in this Court seeking total disability benefits and a **Holton** award. On January 22, 1990, the Court issued a decision determining that claimant was entitled to temporary total disability benefits retroactive to December 6, 1988, along with a **Holton** award of \$3,362.00. **Thomas H. Mills v. Buttrey Foods**, WCC No. 8812-5023 (January 22, 1990) (as amended on May 11, 1990).[\(1\)](#)
8. Claimant pursued a vocational retraining program, enrolling in the College of Great Falls in the fall of 1988. He graduated with a bachelor of science degree (cum laude) in social science in 1993, and has obtained a teaching certificate to teach social sciences in grades 5 through 12.
9. Buttrey paid claimant temporary total disability benefits during the time he was attending school and has also paid the **Holton** award.
10. Following claimant's graduation from college, by letter dated August 11, 1993, Buttrey notified claimant that it was terminating his total disability benefits fourteen days from the date of the letter.
11. On September 13, 1993, Buttrey notified the claimant that it was initiating permanent partial disability benefits in the amount of \$30.86 per week under a full reservation of rights until the Workers' Compensation Court determines claimant's entitlement to permanent partial disability benefits. The basis for the odd rate was not

explained and in any event is irrelevant to the Court's determination in this matter. Buttrey has paid the \$30.86 per week since August 25, 1993.

12. The present action was commenced to determine claimant's entitlement, if any, to permanent partial disability benefits. Claimant is unable to return to his job at Buttrey or to other heavy manual laboring jobs.

13. Since his graduation from college claimant has been actively seeking a teaching position in Great Falls and in surrounding communities. He worked as a substitute teacher during the 1993-94 school year, earning \$55.00 per day with the Great Falls School District, \$50.00 per day with the Centerville School District and \$45.00 per day with the Ulm School District. His total earnings for the school year were \$7,335.00. He is presently seeking a permanent teaching position. Based on claimant's academic record, his appearance, his persistence, and his ambition, the Court believes that claimant will ultimately find employment and lauds claimant for his hard work in obtaining an education so he can find employment.

14. Claimant has limited his job search to the Great Falls and surrounding areas because Great Falls is his home and his wife has a good job. If he relocated his wife would lose her job.

15. At trial the Court heard testimony from two vocational consultants. William R. Goodrich testified on behalf of the claimant and Anne Arrington testified on behalf of Buttrey. Both individuals are certified rehabilitation counselors. Both are very qualified in their field.

16. Both consultants agreed that teaching jobs for claimant are generally available in Great Falls and surrounding communities.

17. Ms. Arrington identified other non-teaching positions as part of claimant's current labor market. She identified the jobs based on his transferable and marketable skills, which in turn are based on his education. Examples of non-teaching jobs identified by Ms. Arrington are employment service specialist and case worker, social service types of jobs. The jobs she identified had a broad range of entry level pay, from \$5.27 an hour to \$12.20 an hour. (Ex. 3 at 6.)

18. Ms. Arrington agreed that teaching is claimant's real strength. Realistically and logically, teaching represents claimant's best and highest opportunity for earning a living. Unless the Court arbitrarily adopts the high end pay for the social studies jobs identified by Ms. Arrington, which it declines to do, teaching also represents the best entry level wage available to claimant.

19. The annual entry level salaries for teachers in Great Falls and surrounding communities range from \$16,510 (Vaughn) to \$20,034 (Great Falls). Excluding Great Falls, the median salary for the eleven school districts surveyed by Mr. Goodrich is \$17,600 annually. Great Falls has thirty-six teaching social study teachers. The surrounding communities have 13.5 social studies teachers. At present there are five openings for social studies teachers in Great Falls. Based solely on numbers, claimant has a better chance of obtaining a job in Great Falls than in the surrounding

communities. However, claimant may be more competitive for any given position in a rural community than in Great Falls. Considering all of these factors, I have determined that the best measure of claimant's current earning capacity is the average of the Great Falls starting salary and the median starting salary in the surrounding communities. That average is \$18,817 annually.

20. School teachers typically work approximately nine months a year. Claimant is therefore available for summer work. Both Mr. Goodrich and Ms. Arrington testified that claimant is qualified to perform a number of short term summer teaching jobs. At present claimant is teaching summer school at Largent School Adult Education, for which he will earn \$1,722 over the course of the summer. Mr. Goodrich testified that his actual earnings represent his summer earning capacity. Ms. Arrington testified that the summer jobs for which claimant is qualified pay from \$9.50 to \$14.75 an hour for four to six weeks of work of five hours a day. The maximum pay identified by Ms. Arrington was \$2,100. In light of the range identified by Ms. Arrington, and claimant's actual pay (which falls somewhere in the middle of that range), I find that claimant's actual pay represents the best measure of his summer earning capacity.

21. Mr. Goodrich testified that the claimant has lost significant access to the job market due to his injury, i.e., there are a lesser number of jobs available to him now than prior to his injury. However, Mr. Goodrich's analysis of the post-injury jobs available to claimant did not include non-teaching jobs for which claimant is qualified. The pre-and post-injury market access comparisons were therefore invalid and are given little weight.

22. Claimant's former job at Buttrey currently pays \$12.71 per hour, and that wage is the best measure of claimant's pre-injury earning capacity since neither vocational consultant suggested any other basis for computing pre-injury earning capacity.

23. Under the current contract between Buttrey and the union representing Buttrey warehouse workers, warehouse worker's are guaranteed 2080 hours of work per year. Those hours, however, include paid days off.

24. Anne Arrington calculated claimant's hourly earning capacity as a teacher at \$14.25 an hour. The respondent requests the Court to accept that calculation and determine that claimant is entitled to no permanent partial disability benefits since his pre-injury earning capacity was only \$12.71 per hour.

25. I reject Ms. Arrington's approach. Initially, it uses Great Falls starting wages, which are the highest among all the school districts surveyed. Moreover, the hourly rate was determined by multiplying the *actual* number of days (187) worked by teachers in Great Falls by 7.5 hours, and dividing the product (1,402.5 hours a year) into the annual salary (\$20,034). This methodology is flawed for several reasons. First, it ignores the fact that Buttrey warehousemen are paid for numerous holidays and vacation, but does not correct the wages for warehousemen to reflect that fact. Had claimant continued working as a warehouseman he would presently be entitled to four weeks of paid vacation. He would also be entitled to five paid holidays and three paid personal days. (Ex. 12.) The total of these paid days off is twenty-eight days a year, amounts to 224 hours a year. Thus, on an annual basis the number of actual days he would work as a warehouseman is 232 (based on five days a week, fifty-two weeks a year) and the

number of hours is 1,856 (232 days times eight hours a day). On an annual, days-actually-worked basis, the current hourly wage for claimant's old job at Buttrey is \$14.24 (\$12.71 times 2080 paid hours a year, divided by 1856 actual hours worked a year), not \$12.71. Second, the 7.5 hours a day used by Ms. Arrington does not accurately reflect the number of hours of actual work. According to Ms. Arrington 7.5 hours is the number of hours Great Falls teachers are required to be in the school building. Ms. Arrington agreed that teachers also typically do work outside of school, for example preparing lesson plans and grading papers.⁽²⁾ Furthermore, under the Great Falls teacher's contract, the hours of work at school "shall not exceed **eight** hours a day," and those hours do **not** include "PTA meetings, student-related educational conferences, departmental and faculty meetings, open houses, . . . special programs which involve student participation, or activities for which teachers volunteer" which occur outside of regular school hours. (Ex. 10 at 23.) I am persuaded that together with summer work, the actual hours worked annually by a teacher are not significantly different than the actual hours worked by a warehouseman.

26. For the reasons set forth in the previous paragraph, as well as the lack of persuasive evidence establishing that claimant could earn more in a full-time, non-teaching job available in his current labor market, I find that the most appropriate way to compare claimant's pre-and post-injury earning capacities is to do so on an annual basis. On an annual basis the current wage for a warehouseman is \$26,436.80. His current earning capacity as a teacher is \$20,539 (\$18,817 plus \$1,722). Under section 39-71-703, MCA (1985), he is entitled to weekly benefits based on that difference. At trial I converted the lost earning capacity to a weekly amount by dividing claimant's annual earning capacity by the number of theoretical work hours in a year (2080), and multiplied the difference by forty hours a week to yield an amount representing lost earning capacity on a weekly basis, then multiplied that amount by two-thirds to determine claimant's weekly benefit. The amount I derived at was \$75.73, which I rounded off to \$75.75. The steps for the computation are:

$$\$20,539 \div 2080 = \$ 9.87 \text{ an hour}$$

$$\$12.71 - \$9.87 = \$ 2.84$$

$$\$ 2.84 \times 40 = \$113.60/\text{week}$$

$$\$113.60 \times 2/3 = \$ 75.73 \text{ weekly benefit}$$

An alternative and better way to calculate the benefit is simply to convert the lost annual earning capacity directly to a weekly loss, as follows:

$$\$26,436.80 - \$20,539 = \$5,897.80$$

$$\$5,897.80 \div 52.14 \text{ weeks} = \$ 113.11469$$

$$\$ 113.114 \times 2/3 = \$ 75.41 \text{ weekly benefit}$$

Since the latter calculation is more accurate, it is adopted herein, thus changing the Court's initial calculation by thirty-four cents. The difference between the two

calculations is due to rounding errors in the original computation, including the rounding of the number of weeks in a year to fifty-two.

27. I have used entry level wages in computing claimant's current earning capacity even though claimant's earning capacity may increase once he obtains a job. I have done so because he may not be able to immediately obtain employment, thus offsetting any increase, and because no evidence was presented which would demonstrate that his earning capacity as a teacher will increase at a faster rate than a warehouse worker's earning capacity.

28. Claimant is entitled to 500 weeks of permanent partial disability benefits in the weekly amount of \$75.41.

29. The insurer is entitled to a credit in the amount of the **Holton** award and biweekly permanent partial disability benefits it has paid to date.

30. Claimant is entitled to attorney fees and costs. He prevailed in this action and was awarded compensation greater than that paid by the insurer.

31. Claimant did not unreasonably delay or refuse payment of benefits to the claimant, thus is not entitled to a twenty percent penalty. The insurer has been paying a significant portion of the weekly benefit ultimately awarded by the Court, and the amount of the award is significantly less than the amount sought by the claimant. There was a reasonable dispute concerning claimant's entitlement and that dispute was appropriately presented to and resolved by the Court.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The statutes in effect on the date of injury must be applied in determining benefits. **Buckman v. Montana Deaconess Hospital**, 224 Mont. 318, 321, 730 P.2d 380 (1986). Claimant was injured on May 19, 1986, thus the 1985 version of the Workers' Compensation Act applies.

The claimant is seeking a permanent partial disability award pursuant to section 39-71-703, MCA (1985), which provides:

39-71-703. Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be $66\frac{2}{3}\%$ 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.

(2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of 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.

Since claimant suffered an unscheduled back injury, the 500 weeks limitation applies.

The correct test for loss of earning capacity is whether the injury has caused a loss of ability to earn on the open labor market. **Beck v. State Compensation Mutual Insurance Fund**, 230 Mont. 294, 749 P.2d 527 (198). Lost earning capacity has been defined as the "permanent diminution of the ability to earn money in the future." **Chagnon v. Tilleman Motor Co.**, 50 St. Rptr. 198, 200 (1993). The loss is "determined by comparing earning capacity absent injury with earning capacity given the injury." **McDanold v. B.N. Transport, Inc.**, 308 Mont. 470, 479, 679 P.2d 1188 (1984).

Lost earning capacity is determined not only by a "comparison of pre-injury and post-injury wages, but also by age, occupational skills, education, previous health, remaining number of productive years and degree of physical or mental impairment." **Chagnon v. Tilleman Motor Co.**, 50 St. Rptr. 198, 200 (1993) (quoting *Hurley v. Dupuis*, 233 Mont. 242, 246, 759 P.2d 996, 999 (1988)); **Sedlack v. Church Mutual Insurance**, 230 Mont. 273749 P.2d 1085 (1988). In the present case the claimant's injury prevents him from returning to his former position at Buttrey, or to any other heavy manual labor positions. However, since his injury he has obtained a bachelor's degree and has been certified to teach 5th through 12th grade social studies. His education has also opened up other job opportunities which require a college education but no other specific skills. Claimant's best and highest earning opportunity, however, is teaching. Thus, the best measure of claimant's post-injury earning capacity is teaching wages.

The evidence presented at trial showed a range of entry level wages for teachers in claimant's home town, Great Falls, and surrounding areas. The insurer argued at the time of trial that in determining post-injury earning capacity the Court should also include wages for teachers in the states of Washington and Oregon, as reported by Ms. Arrington (Ex. 13 at 5). However, in her testimony Ms. Arrington agreed that those out-of-state positions are not within claimant's normal labor market. As a matter of law those out-of-state positions cannot be considered, at least where, as in this case, claimant has not and does not intend to work in those states. In pre-1987⁽³⁾ cases this Court has held that a claimant's normal labor market does not include long-distance jobs, **Christopher M. Waits v. State Compensation Mutual Insurance Fund**, WCC No. 8908-5463 (April 13, 1990); and that the location of the claimant's normal labor market should be determined in the area of the claimant's residence. **Daniel S. Morrison v. Buttrey Foods, Inc.**, WCC No. 9204-6436 (January 13, 1993).

While claimant has not yet obtained a permanent teaching position, he has an excellent academic record. During the past year he gained actual job experience by working as a substitute teacher and teaching summer school. He is highly motivated and is diligently searching for a permanent job. The Court is persuaded that it is merely a matter of time before he obtains a job. It is therefore appropriate to examine his present earning capacity based on the wages entry level teachers earn.

Those wages, as mentioned, vary from school district to school district. Where claimant is ultimately employed will depend on which districts have available jobs and competition from other job seekers. The greater numbers of positions available in Great Falls, the highest paying district, is offset by the fact that claimant may have a better opportunity for employment in lower paying, more rural districts. I have therefore determined that claimant's current earning capacity is best measured by averaging Great Falls entry level wages with the median entry level wage for the other outlying school districts.

Lost earning capacity has been measured on an annual rather than hourly basis. My reasons for applying the annual yardstick are set out in the findings of fact. Adoption of Buttrey's approach to earning capacity would artificially inflate claimant's current earning capacity since it is based on several false premises. As determined in the findings of fact claimant's lost earning capacity is \$5,897.80, or \$113.11469 on a weekly basis. Applying the two-thirds formula specified by section 39-71-703, MCA (1985), claimant is entitled to \$ 75.41 a week for 500 weeks. However, Buttrey is entitled to a credit for the **Holton** award and the permanent partial disability benefits it has paid to date.

In calculating claimant's lost earning capacity, I have considered claimant's age, occupational skills, education, previous health, remaining number of productive years and his physical and mental condition. While many of the jobs claimant was previously capable of performing have been eliminated from his labor market because he can no longer perform heavy lifting, that loss is offset by the jobs he can now do on account of his additional education. Claimant, who is forty-three, is young enough to look forward to many years of teaching. There was no evidence indicating that claimant's physical condition will limit his teaching career and his positive mental attitude and perseverance are very positive factors. There is no reason to enhance or reduce the amount of the award determined herein.

3. Claimant is not entitled to a penalty under section 39-71-2907, MCA. The insurer has been paying claimant \$30.86 weekly permanent partial disability benefits, albeit under a full reservation of rights. Claimant's request in this case was also significantly greater than the amount finally awarded. There was reasonable room for disagreement between the parties. Under these circumstances the insurer did not unreasonably delay or refuse payment of compensation to the claimant.

4. Since the Court's award to the claimant is greater than the amount paid or tendered by the insurer, the claimant is entitled to an award of attorney fees and costs pursuant to section 39-71-612, MCA (1985). The amount will be determined at a later date.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Pursuant to section 39-71-703, MCA (1985), the claimant is entitled to 500 weeks of permanent partial disability benefits at \$75.41 per week. The insurer is entitled to a credit against this liability in the amount of the **Holton** award and permanent partial disability benefits it has paid to date.

3. Claimant is not entitled to a penalty.
4. Claimant is entitled to reasonable attorney fees pursuant to section 39-71-612, MCA. In determining the amount of those fees, the procedure set forth in ARM 24.5.343 shall apply .
5. Claimant is entitled to costs in an amount to be determined by the Court.
6. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.
7. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 1st day of August, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. D. Patrick McKittrick
Mr. Thomas A. Marra

1. The parties have agreed that the Court may take judicial notice of the prior proceeding. The Court's initial decision determined that claimant was entitled to permanent total disability benefits. Order Adopting Findings of Fact and Conclusions of Law of Hearing Examiner and Entering Judgement (January 22, 1990). However, on May 11, 1990, it entered an order amending its decision to provide that claimant was entitled to "temporary" total disability benefits. Order Denying Claimant's Motion for Rehearing and Request for Oral Argument (May 11, 1990).

2. In this case it appears that MPC made the initial 39-71-703 election for claimant when it began paying benefits pursuant to that section.

3. In 1987 the legislature statutorily expanded labor market considerations to a statewide basis; however, those statutory changes do not apply since claimant's injury occurred in 1986.