IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 12

WCC No. 9902-8158

LOUIS NIELSON

Petitioner

vs.

MONTANA STATE FUND

Respondent.

DECISION AND JUDGMENT AFTER REMAND

Summary: On appeal the Supreme Court reversed the Workers' Compensation Court's findings that claimant was not permanently partially disabled and held that he had suffered more than a $2 an hour wage loss. It remanded for a determination of the permanent partial disability benefits due him. On remand, the dispute over permanent partial disability benefits was limited to the impairment award.

Held: The only impairment rating in evidence is that of the claimant's treating physician. The Supreme Court held that the opinions of the claimant's treating physician are entitled to deference and relied upon them in its decision. In that light, claimant is entitled to a fifty percent impairment award. The other factors entitle him to an additional forty-two percent , thus his total impairment award is ninety-two percent.

Topics:

Folding: Sometimes ya got to fold 'em. In the words of Kenny Rogers' song, "The Gambler": You got to know when to hold 'em, know when to fold 'em, Know when to walk away and know when to run.

Impairment: Impairment Ratings. Where the only impairment rating is that of the treating physician and the Supreme Court has held on appeal that the treating physician's opinions are entitled to deference and relied upon those opinions in reaching its decision, the treating physician's impairment rating is adopted.

Attorney Fees: Reasonableness of Insurer. Where arguments of insurer in opposition to claimant's request for impairment award of fifty percent were not unreasonable, claimant is not entitled to attorney fees. § 39-71-612, MCA (1993).

However, if the 42% has not been paid, claimant is entitled to a penalty on that portion.

Penalties: Insurer. Where arguments of insurer in opposition to claimant's request for impairment award of fifty percent were not unreasonable, claimant is not entitled to a penalty. § 39-71-2907, MCA (1993). However, if the 42% has not been paid, claimant is entitled to a penalty on that portion.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-612 (1993). Where arguments of insurer in opposition to claimant's request for impairment award of fifty percent were not unreasonable, claimant is not entitled to attorney fees. § 39-71-612, MCA (1993). However, if the 42% has not been paid, claimant is entitled to a penalty on that portion.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2907 (1993). Where arguments of insurer in opposition to claimant's request for impairment award of fifty percent were not unreasonable, claimant is not entitled to a penalty. § 39-71-2907, MCA (1993). However, if the 42% has not been paid, claimant is entitled to a penalty on that portion.

¶1 This case is on remand from the Supreme Court following its decision in *Nielson v. State Compensation Ins. Fund,* 2003 MT 95, 315 Mont. 194, 69 P.3d 1136. The Supreme Court reversed my decision, found at 2000 MTWCC 64, wherein I denied claimant's request for permanent partial disability (PPD) benefits. The Court remanded with instructions that I determine the amount of PPD benefits due claimant.

¶2 The basic facts are set out in the Supreme Court's decision. It's ultimate findings pertaining to remand are found in paragraphs 48 and 49, as follows:

> ¶ 48 The undisputed evidence submitted to the Workers' Compensation Court was that at the time of his injury, Louis Nielson was capable of earning $9 per hour servicing oil wells for his employer. Assuming, for the limited purposes of this appeal, that he is capable of returning to any employment, the only evidence of employment to which he could return were the clerk and sales positions identified by Dennis McLuskie. The auto sales position is based on commission and Nielson's previous experience in that occupation was unsuccessful. The two clerk positions paid a maximum of $5.50 per hour but it was Dr. Ben-Youssef's opinion that *Nielson* could not engage in those occupations on a regular basis.
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> ¶ 49 We conclude, therefore, that based on the only substantial credible evidence offered at the time of trial, Louis Nielson has sustained a work-related permanent partial disability as defined at § 39-71-116(18), MCA (1993), and is entitled to permanent partial disability benefits as provided for at § 39-71-703, MCA (1993), based on the difference between what he was capable of earning in his time of

injury employment and what he is capable of earning on a part-time basis as a sales clerk or video store clerk, earning $5.50 per hour.

2003 MT 95, 315 Mont. 194

¶3 Further facts are found in my first *Nielson* decision denying permanent total disability benefits, 1999 MTWCC 49, and my second decision denying PPD benefits, 2000 MTWCC 64. I will refer to the first decision as *Nielson I* and the Supreme Court opinion as *Nielson SC*.

¶4 The claimant's entitlement to PPD benefits is governed by section 39-71-703, MCA (1993)[(1)]. That section provides:

> **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.
>
> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.
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> (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined **by adding the following applicable percentages to the impairment rating:**
>
> (a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;
>
> (b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;
>
> (c) if a worker has no 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%; and
>
> (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, 20%; 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, 15%; 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, 10%.

(4) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently. [Emphasis added.]

My task on remand is simply to go through the specific factors to determine claimant's PPD award.

¶5 After reading the briefs of the parties it appears that the only controversy is over the impairment award under subsection (3). They do not argue over the other elements, so I assume they are in agreement as to those other elements.[(2)] If they are not, they should be.

¶5a Subsection (3)(a) provides for a percentage based on age. At the time of his injury the claimant was 45 years of age. Under the subsection he is entitled to 2%. (*Nielson I* ¶ 6.)

¶5b Subsection (3)(b) provides for a 2% award for a worker who has completed high school but not gone beyond but 0% for a worker who has had any post-high school education. Claimant attended a junior college for at least a short time (*id.*), therefore he is not entitled to benefits under this subsection.

¶5c Subsection (3)(c) provides for a 20% award if the worker has a wage loss of more than $2 an hour. Paragraphs 48 and 49 of the Supreme Court's decision specifically find that he suffered more than a $2 an hour loss, thus he is entitled to the 20% award.

¶5d Subsection (3)(d) provides for 20% where the worker was performing heavy labor and post-injury can only perform light or sedentary labor. My finding of fact at paragraph 8 of *Nielson I* indicates that claimant was working in a laboring position servicing oil wells and involved "working with heavy hose at well sites." Dr. Ben-Youssef's opinion, which the Supreme Court held is entitled to deference, was that following claimant's injury he "could engage in no employment using the upper extremities." (*Nielson SC ¶ 22.)* It is therefore clear that claimant went from heavy labor to light or sedentary work and is entitled to the 20% under this subsection.

Adding the above entitlements together, the claimant at a minimum is entitled to a forty-two percent PPD award.

¶6 In its brief on remand, the State Fund disputes only the fifty percent impairment rating of Dr. Ben-Youssef. Under section 39-71-703(3), MCA (1993), that impairment rating directly translates into a percentage award of fifty percent. Combined with the forty-two percent discussed above, it would entitle claimant to a ninety-two percent award.

¶7 The State Fund has made a cogent argument as to why Dr. Ben-Youssef's impairment rating is in error. However, much of the argument is based on my findings of fact in *Nielson I*, findings which the Supreme Court found were not supported by substantial evidence. While I sympathize with the State Fund's attack on Dr. Ben-Youssef's rating, the State Fund did not present a contrary rating at trial and the Court cannot render its own impairment rating.[(3)] In light of the Supreme Court's reliance on Dr. Ben-Youssef' s opinions as the treating physician, this is a case where, in the words of the Kenny Rogers' song, "The Gambler":

You got to know when to hold 'em, know when to fold 'em,
Know when to walk away and know when to run.

As it presently sits, Dr. Ben-Youssef's impairment rating is the only one in evidence in this case and the Supreme Court has expressly indicated that his opinions are entitled to deference.

¶8 The final question is whether the claimant is entitled to a penalty and attorney fees with respect to the fifty percent impairment award. To award either, I must find that the State Fund has acted unreasonably in opposing the award. §§ 39-71-612 and -2907, MCA (1993). While I have adopted Dr. Ben-Youssef's impairment rating, the State Fund's arguments for rejecting it were not unreasonable and were supported by many of my own findings of fact. The Supreme Court did not address the impairment rating, only the lost wages. I therefore

find that the State Fund's opposition to the fifty percent rating was not unreasonable and that the claimant is not entitled to a penalty.

However, the Supreme Court specifically held that claimant is entitled to permanent partial disability benefits, especially wage loss benefits, see ¶ 2. Thus, the 42 percent attributable to the other factors should have been paid within a reasonable period of time after the Supreme Court's decision. That decision was on April 23, 2003. If the 42 percent has not been paid, then it has been unduly and unreasonably delayed, entitling the claimant to a 20 percent penalty on the 42 percent. § 39-71-2907, MCA (1993). The claimant is also entitled to attorney fees under section 39-71-611, MCA (1993), since the failure to pay amounted to a denial of all PPD benefits and that denial was unreasonable to the extent of the 42 percent.

JUDGMENT ON REMAND

¶9 Under section 39-71-703, MCA (1993), the claimant is entitled to a ninety-two percent permanent partial disability award, which the State Fund shall pay.

¶10 The claimant is not entitled to attorney fees or a penalty with respect to the 50 percent impairment award. However, if the 42 percent for other factors has not been paid, claimant is entitled to a 20 percent penalty on that percentage and attorney fees in an amount to be determined by the Court in accordance with its rules.

¶11 The claimant is entitled to his costs. He shall file his memorandum of costs in accordance with Court rules, and any opposition to the costs shall be filed in accordance with Court rules.

¶12 This JUDGMENT is certified as final for purposes of appeal.

¶13 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment After Remand.

DATED in Helena, Montana, this 20th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. David A. Hawkins
Submitted: November 17, 2003

1. Claimant was injured on April 18, 1995, therefore his entitlement to benefits is governed by the 1993 version of the law as that was the version in effect at the time. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. After writing this paragraph I contacted counsel and determined that in fact they are in agreement with the percentages I had determined. The only dispute was as to impairment.

3. In its brief on remand it suggests that an "equitable solution would be to order an Independent Medical Exam to determine an appropriate rating." (Respondent's Brief on Remand at 9.) Unfortunately, the record is closed, and was closed long ago.