IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 22

WCC No. 9304-6767

MONTE PERRYMAN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BLUE RANGE MINING COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on September 10, 1993 in Great Falls, Montana. Petitioner, Monte Perryman, was present and represented by Torger S. Oaas. Respondent, State Compensation Insurance Fund, was represented by Charles G. Adams. Monte Perryman, Susan Amicucci and Betty Cross were sworn and testified. No depositions were submitted as evidence. Exhibit Nos. 1 through 3 and 5 through 16 were admitted into evidence by stipulation of the parties. Exhibit No. 4 was objected to and was not received into evidence.

Having considered the pretrial order, the testimony presented at trial, the demeanor of the witnesses, and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. Petitioner was 30 years old at the time of trial and living in Lewistown, Montana. He has a 10th grade education, and has attended a technology school for automotive diagnostics.

2. Petitioner was injured on September 18, 1990, in the course and scope of his employment with Blue Range Mining Company in Fergus County, Montana, when a rock fell and struck him in the back. Petitioner suffered a herniated disc and has undergone back surgery.

3. Petitioner's workers' compensation claim was accepted as compensable by the respondent, State Compensation Insurance Fund (State Fund). The present dispute

between petitioner and respondent is over petitioner's entitlement, if any, to wage supplement benefits.

4. At the time of his injury, petitioner was working at an hourly rate of $12.00 per hour.

5. Petitioner's wages for the four pay periods immediately preceding his injury were as follows:

Pay period ending	Hours	Amount
8/04/90	80	$960.00
8/18/90	78.5	942.00
9/01/90	58	696.00
9/15/90	46	552.00

(Ex. No. 10.)

6. The above earnings averaged $393.75 per week ($3,150.00 divided by eight weeks).

7. Petitioner's earnings from the time he began employment at Blue Range Mining on April 26, 1990 through September 30, 1990, totaled $8,767.00. (Ex. Nos. 7 and 8.)

8. Petitioner's average weekly wage for the time period of April 26, 1990 to September 30, 1990 was $388.61 ($8,767.00 divided by 22 4/7 weeks).

9. Petitioner testified at the time of the trial that the reason he did not always work 40 hour weeks at Blue Range Mining was due to equipment failures and financial difficulties with the mining project.

10. Crawford and Company of Billings was designated the rehabilitation provider in this case. It prepared a Final Status III Employability Assessment Report which identified Option C under section 39-71-1012, MCA, as the most appropriate rehabilitation option for petitioner. The report identified the position of equipment operator as typically available within the claimant's local and/or state job pool. Dr. Snider, who performed the back surgery on the petitioner, approved a job analysis for a typical heavy equipment operator.

11. The Employment Relations Division of the Department of Labor and Industry issued a Final Order of Determination on April 13, 1993. The Order determined that a "return to related occupation suited to the petitioner's education and marketable skills," as outlined in the Panel Report, was the appropriate rehabilitation option for petitioner. Neither party appealed the Order and both parties agreed at trial that the Department's determinations

that heavy equipment operator is within petitioner's post-injury labor market, and that he is capable of returning to work as a heavy equipment operator, are binding.

12. Petitioner's post-injury employment included approximately three months work as a heavy equipment operator for Sanburn Construction in Lewistown at $10.00 per hour; a period of time from the end of October "until winter set in" working for Williams Brothers Construction in Lewistown at $15.00 per hour;[(1)] approximately one and one-half months work as a skidder operator for Maverick Logging for "a couple hundred bucks here, a 100 bucks there"; and approximately three months work as a greenskeeper at $4.50 per hour. He is presently working as a truck driver for Casino Creek Concrete at $8.00 per hour. (Petitioner testified that his wage at Casino Creek was $7.00 per hour, yet his last payroll record of 7/26/93 (Ex. No. 3) reflects a rate of $8.0965. Petitioner's Finding of Fact No. 8 also states his hourly rate at Casino Creek as $8.00 per hour.)

13. Betty Cross, a vocational rehabilitation counselor, testified concerning wages of heavy equipment operators in Montana. The average entry level wage earned by equipment operators is $10.75 per hour according to the Montana Career Information System. The Montana Fringe Benefit and Wage Report identified the entry level wage earned by heavy equipment operators as $10.08 per hour, with a median wage of $12.00 per hour. Statewide research conducted by Ms. Cross indicated that the wage range for heavy equipment operators is between $10.25 per hour and $18.25 per hour. Ms. Cross also testified that most heavy equipment operator positions are full-time jobs.

14. Petitioner has prior experience operating heavy equipment.

15. Based on Mr. Perryman's previous experience as a heavy equipment operator, it was Ms. Cross' opinion that petitioner has the present capacity to earn between $12.00 and $16.00 per hour as a heavy equipment operator.

16. The Court found Ms. Cross to be a credible witness. She has extensive experience in the vocational rehabilitation field, and is familiar with the Montana labor market from working nine years in private rehabilitation employment within the state. She utilized a variety of resources in coming to her opinion. The research she conducted was updated to the week prior to trial. She testified intelligently and logically as to the reasons for her opinion, and the Court finds her testimony persuasive.

17. Based on Ms. Cross' testimony and petitioner's pre- and post-injury employment history, the Court finds that petitioner is qualified to earn a minimum of $12.00 per hour and $480.00 per week as a heavy equipment operator.

18. In reaching its determination, the Court has considered the fact that petitioner is presently earning only $8.00 an hour. However, it does not give great weight to that fact. Since his injury, petitioner has held higher paying jobs. He did not present evidence of a diligent job search for higher paying jobs and other factors could be affecting his

employment opportunities in Lewistown. He left one job he had held after he was involved in an altercation in which he suffered a broken arm. In a deposition in this proceeding, petitioner lied under oath concerning his employment at a time he was also receiving temporary total disability benefits, and at trial he misstated his current wage. The Court did not find him to be a credible witness. Thus, on the evidence presented, the Court is not persuaded that petitioner's present earnings are representative of what he is qualified to earn.

19. Petitioner testified at trial that his back hurts him and makes him "miserable" while working. The Court did not find this testimony credible. It notes that since his surgery petitioner has hunted, operated a chain saw for up to eight hours a day, and is working 40 to 50 hours a week. The last medical note (December 3, 1992) from his surgeon stated he was doing well and "has had good relief of his leg and back symptoms." Petitioner has also lied in testimony given in this proceeding.

CONCLUSIONS OF LAW

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

2. Petitioner is not entitled to wage supplement benefits under section 39-71-703(1)(b), MCA.

Under the Workers' Compensation Act, the party asserting a right has the burden of proving its case by a preponderance of the probative, credible evidence. ***Ricks v. Teslow Consolidated**, 162 Mont. 469, 512 P.2d 1304 (1973)*; ***Dumont v. Aetna Fire Underwriters**, 183 Mont. 190, 598 P.2d 1099 (1979)*.

The law in effect on the date of claimant's alleged injury controls. ***Buckman v. Montana Deaconess Hospital**, 224 Mont. 318, 730 P.2d 380 (1986)*. Petitioner suffered his injury on September 18, 1989. Accordingly, the 1989 version of the Workers' Compensation Act applies in this case.

Resolution of the dispute in this case requires the calculation of petitioner's time-of-injury wages, under section 39-71-123, MCA and the wages he is qualified to earn as a heavy equipment operator. Section 39-71-703, MCA (1989) provides in relevant part:

39-71-703. Compensation for permanent partial disability - impairment awards and wage supplements. (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who has a medically determined physical restriction as a result of a work related injury may be eligible for an impairment award and wage supplement benefits as follows:

. . .

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.

Petitioner argues that benefits should be calculated by comparing his pre-injury hourly wage of $12.00 and the average hourly wage of two of the positions he has held following his injury. That strict hourly wage comparison is contrary to the procedure specified by statute.

Section 39-71-123(3), MCA (1989) sets forth the method for calculating petitioner's actual wages:

39-71-123. Wages defined.

. . .

(3) For compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except if:

(a) the term of employment for the same employer is less than four pay periods, in which case the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work; or

(b) for good cause shown by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods.

The statute is specific. It requires that the method be used "for compensation benefit purposes." Thus, as previously held by this Court, it applies to calculations of "actual wages" under section 39-71-703(1)(b). ***Harold Fitzhugh v. John Heine**, WCC No. 8911-5576 (January 29, 1991)*.

Using the four pay periods immediately preceding his injury, petitioner's actual pre-injury wages were $393.75 per week. Section 39-71-123(3)(b) specifically provides for situations where the last four pay periods before the injury do not accurately reflect the petitioner's wages. For good cause shown by the claimant, the insurer may use "additional pay periods" in computing wages. This alternative, however, does not aid petitioner. He was employed for a period of five months before his injury. Using all of petitioner's pay periods for that period, his average weekly wage was $388.61. Thus, it appears that the last four pay periods immediately prior to petitioner's injury are fairly representative of the petitioner's employment history with Blue Ridge Mining, and that petitioner was not regularly employed on a full 40 hours a week basis.

Petitioner next argues that the post-injury wages he is qualified to earn in his job pool should be based on the wages he has been paid for the jobs he has held since his injury, regardless of what he "may" be able to earn.

The Court disagrees. Ms. Cross' uncontradicted testimony was that entry level wages for heavy equipment operators in Montana is $10.18 per hour according to one source, and the average entry-level wage is $10.75 per hour according to another source. It is her opinion, which the Court adopts, that based upon petitioner's previous experience as a heavy equipment operator, he is qualified to earn higher than an entry level wage, in the range of $12.00 and $16.00 per hour. Even assuming, for argument, that petitioner were to earn only the entry level wage for a heavy equipment operator (between $407.20 and $430.00 per week), he is still capable of earning more than his time-of-injury wages ($393.73 per week).

Petitioner argues that his post-injury wages of $8.00 per hour at his present job, and $9.00 per hour at Maverick Logging (although it is not clear if petitioner actually received this $9.00 per hour wage) should be used to determine what wage petitioner is qualified to earn. Petitioner cites three cases to support his argument, although he fails to discuss them in his brief.

The first is ***Dilling v. Buttrey Foods,*** *251 Mont. 286, 825 P.2d 1193 (1992),* a case in which the Supreme Court determined that the post-injury job claimant was performing was not within her job pool. The job had been specially modified to accommodate her, and thus did not accurately reflect her post-injury earning capacity. The holding is inapposite. In the present case, the petitioner has not disputed that the heavy equipment operator position is within his job pool.

The second case cited by petitioner is ***Harmon v. Parker Bros. Logging and State Fund***, *WCC No. 8907-5437 (September 24, 1990)*, which dealt with the 1985 version of section 39-71-703, MCA, before its amendment in 1987. The statutes are significantly different. The 1985 statute did not contain the specific provision for determining wage supplement benefits which is specified by the 1989 statute. Thus, the case is similarly inapposite.

The last case cited by petitioner is ***Abrahamson v. Toole Co. Sheriff's Dept.****, WCC No. 9011-5996 (May 1, 1991).* That case involved a claimant who entered into the insurance industry after he was injured while working as a sheriff's deputy. In determining claimant's wage supplement benefits under section 39-71-703, MCA (1987), this Court compared claimant's actual wages at the time of his injury to his averaged weekly earnings as an insurance agent for the year preceding trial. The Court did not specifically address what wages the claimant was qualified to earn in his job pool, but simply used claimant's previous year's earnings of $7,613. The Court did so despite testimony from a former insurance agent that new insurance agents earn approximately 15 to 18 thousand dollars per year. The decision failed to provide any discussion or reasoning for using the claimant's

previous years income as a wage he was qualified to earn. There was evidence, however, that the claimant lacked the typical outgoing personality of an insurance salesman, and it is possible that the Court was also influenced by that factor.

In any event, each case must stand on its own facts. In this case there is no evidence that the petitioner has any impediments in competing for jobs as a heavy equipment operator. While he claims his back continues to hurt him, the Court has found that his complaints are exaggerated and that he is working 40 to 50 hours a week on a regular basis. Moreover, petitioner ignores the fact that he has also held a post-injury job as a heavy equipment operator at $10.00 per hour. The statute requires the Court to look at the wage the worker is **qualified** to earn in his job pool. Petitioner has failed to persuade the Court that his current wages are representative of what he is qualified to earn.

The job approved by the rehabilitation panel for petitioner is the job of heavy equipment operator, which is undisputed by petitioner. As a heavy equipment operator, petitioner is qualified to earn wages which exceed his time-of-injury wages. Accordingly, petitioner is not entitled to wage supplement benefits.

3. Petitioner is not entitled to an award of attorney fees and costs.

JUDGMENT

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

2. The petitioner is not entitled to wage supplement benefits under section 39-71-703, MCA (1989).

3. The petitioner is not entitled to an award of attorney fees and costs.

4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

5. 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 14th day of December, 1993.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Torger S. Oaas
Mr. Charles G. Adams

1. Petitioner held this job prior to his surgery. It involved concrete work and is therefore not considered in determining post-injury incapacity.