

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 104

WCC No. 9405-7054

KELLY REINHARDT

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BILLINGS HOSPITALITY ASSOCIATES, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

On August 12, 1994, the Court was advised that counsel representing the petitioner, Mr. Gary Overfelt, and counsel representing the respondent, Mr. Laurence A. Hubbard, were in agreement that this matter could be submitted for decision based on the Court file, a statement of uncontested facts, and briefs. On November 4, 1994, the Court received a stipulation of relevant facts.

Issue Presented: The issue to be determined by the Court is whether claimant's pre-injury **part-time** earnings must be compared to the post-injury wages she is qualified to earn in the open market on a **full-time** basis.

Having considered the Court file in its entirety, the stipulation, and the briefs filed by the parties, the Court adopts the stipulation of relevant facts and enters its conclusions of law and judgment as follows:

STIPULATION OF FACTS

1. On or about January 24, 1989 Petitioner, Kelly Reinhardt, suffered an industrial injury within the course and scope of employment with Billings Hospitality Associates, Billings, Montana.
2. At the time of Petitioner's injury, the employer was insured by Plan 3, State Fund, of the Workers' Compensation Act.
3. At the time of her injury, and at all relevant times hereto, Petitioner was employed on a part-time basis. Petitioner's employment on a part-time basis was voluntary due to her desire to spend time with her children at home. The time-of-injury job of banquet

waitress was only available on a part-time basis and the employer did not have full-time positions available for that job. In the year preceding her injury, the Petitioner worked a total of 896.75 regular hours and 18.79 hours of overtime, resulting in an average work week of 17.6 hours. At the time of the injury, the Petitioner earned a base wage of \$3.40 per hour. However, when gratuities are included, the Petitioner's earnings for 1988 totaled \$10,309.25 which results in an average weekly wage of \$197.71.

4. Petitioner has been medically precluded from returning to work at her time of injury job as a banquet waitress. On or about September 13, 1993, Petitioner's treating physician, James Lovitt, medically approved the positions of motel clerk and customer service associate/books, music and videos, on a full-time basis. The Petitioner has been vocationally approved for the two positions at jobs she is qualified to perform and at jobs that are typically available. The entry level wage for these jobs is \$4.25 per hour. Petitioner still desires to work part-time post-injury to be at home with her young children.

CONCLUSIONS OF LAW

1. The statutes in effect on the date of claimant's injury govern. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1987 version of the Workers' Compensation Act applies.

2. Section 39-71-703, MCA (1987), 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% 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 the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. . . .

3. Claimant's average weekly wage prior to her injury was \$197.71 for an average work week of 17.6 hours. Post-injury, claimant is capable of performing jobs which pay \$4.25 an hour. The State Fund contends that subsection (b) of section 39-71-703, MCA, requires the Court multiply this latter amount by forty (40) hours and compare the resulting total to her pre-injury wage.

Prior to her injury the claimant chose to work only part-time so she could spend time at home with her children. Presumably she was, and still is, capable of working full-time, but has chosen not to do so. In this situation subsection (b) is silent. It refers to the wages a worker is "qualified to earn" but does not address part-time workers.

Statutes should be construed reasonably to avoid absurd results. See *Darby Spar. Ltd. v. Department of Revenue*, 217 Mont. 376, 379, 705 P.2d 111 (1985). ("Statute should not be construed absurdly when reasonable construction can avoid it.") If the State Fund's proposed construction is adopted, subsection (b) would penalize part-time workers and treat them differently than full-time workers. A half-time worker's hourly wages would be worth only one-half as much as a full-time worker's wages. This can be illustrated by comparing two workers who earned \$8.00 an hour in pre-injury wages but who can only earn \$4.00 an hour after their injuries. One worker is full-time, the other half-time. If respondent's position is adopted, post-injury earning potential for both workers would be calculated by multiplying \$4.00 an hour times forty (40) hours, yielding \$160.00 per week. In the case of the full-time worker, benefits would be based on an \$160.00 wage loss, which is the difference between the worker's pre-injury full-time work week wage of \$320.00 ($\$8.00 \times 40 = \320.00) and \$160.00 post-injury wage potential. The part-time worker, however, would be entitled to nothing since her pre-injury wages ($\$8.00 \times 20 = \160.00) exactly equal her post-injury earning potential ($\$4.00 \times 40 = \160.00) Thus, the part-time worker is treated as if she earned \$4.00 an hour both before and after the injury. In this case, claimant would be entitled to nothing had she worked only fifteen (15) hours a week rather than 17.6.⁽¹⁾

An individual section of an act should be interpreted in a manner which insures coordination with other sections. *State v. Meader*, 184 Mont. 32, 37, 601 P.2d 386 (1979). In this case, section 39-71-703(b), MCA, must be coordinated with section 39-71-105(1), MCA (1987), which provides in relevant part:

. . . Wage-loss benefits are not intended to make an injured worker whole; they are intended to assist a worker at a reasonable cost to the employer. **Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease.** [Emphasis added.]

The "[c]ourt should not interpret statute so as to defeat its purpose; rather interpretation should achieve the social purpose for which statute was enacted." *Maney v. State*, 255 Mont. 270, 274, 842 P.2d 704 (1992). The State Fund's interpretation of subsection (b) would substantially frustrate the express purpose of wage supplement benefits in cases involving part-time workers.

Subsection (b) is more reasonably construed as requiring the use of equivalent part-time hours when calculating the wages a part-time worker is qualified to earn in his or her job pool. In accordance with the cited principles of statutory construction, the Court adopts this interpretation.

This Court's decision in *Perryman v. State Compensation Insurance Fund*, WCC No. 9304-6767 (December 14, 1993), cited by respondent in support of its position, is inapposite. In that case the Court used forty (40) hours as the basis for determining the wages the claimant was qualified to earn in his job pool even though, on the average,

claimant was not averaging forty (40) hours a week. prior to his injury. However, *Perryman*, who had been working as a miner, was available for full-time work prior to his injury. His pre-injury employment was also considered to be full-time work. The reason he did not average forty (40) hours a week was due to equipment failures and the financial difficulties of his employer. Thus, he worked forty (40) hours some weeks but less during others. Vocational testimony established that both before and after his injury the claimant could have obtained more regular work as an equipment operator. Moreover, the hourly wage for an equipment operator was equal to or greater than claimant's pre-injury hourly wage.

The claimant is entitled to two-thirds of the difference between her pre-injury average weekly wage and the amount she is now qualified to earn working 17.6 hours a week. At \$ 4.25 an hour, claimant is qualified to earn \$74.80 for a 17.6 hour week. Her resulting wage supplement rate is \$81.94 ($\$197.71 - \$74.80 \times 2/3$).⁽²⁾

4. In light of the conclusion reached above, it is unnecessary to consider claimant's constitutional arguments.
5. The State Fund's position in this case was not unreasonable. It is entitled to assert colorable arguments concerning issues of law. The statute in question does not specifically address the issue presented, thus requiring resort to principles of statutory interpretation. State Fund's arguments in this case were colorable, though not ultimately convincing. The State Fund's reliance on *Perryman*, while misplaced, was not outside the bounds of legitimate advocacy.
6. An award of attorney fees requires a finding of unreasonableness on the part of the insurer. § 39-71-612 (2), MCA (1987). Since the conduct of the insurer was not unreasonable, claimant is not entitled to an award of attorney fees. (Claimant did not request a penalty.)
7. Claimant is entitled to costs in an amount to be determined at a later date.

JUDGMENT

1. Claimant's wage supplement rate for purposes of section 39-71-703(b), MCA (1987), is \$81.94 weekly.
2. Claimant is not entitled to an award of attorney fees.
3. Claimant is entitled to costs in an amount to be determined by the Court. She shall have twenty (20) days in which to submit an affidavit of costs. Respondent shall have ten (10) days thereafter in which to respond.
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 twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 22nd day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Gary Overfelt
Mr. Laurence A. Hubbard

1. Claimant earned \$197.71 weekly based on an average work week of 17.6 hours. On an hourly basis she earned \$11.233522. Thus, for 15 hours she would have earned \$168.50 weekly, which is less than the \$170 a week she can earn post-injury based on a 40 hour week ($\$4.25/\text{hour} \times 40 = \$170/\text{week}$).
2. The State Fund erroneously calculated the rate at \$81.46 as the result of a subtraction error. It calculated the difference between \$197.71 and \$74.80 as \$122.20. The actual difference is \$122.91.