IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2002-0500

JEREMY RUHD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

RICHARD BARBER d/b/a BARBER HOMES

Employer.

SUMMARY JUDGMENT

REVERSED AND REMANDED 12/10/02

Topics:

Benefits: Permanent Total Benefits: In an unpublished decision, Supreme Court applies *Rausch v. State Compensation Insurance Fund*, 2000 MT 203, to hold permanently totally disabled claimant entitled to an impairment award under the 1999 Workers' Compensation Act. Remand to Workers' Compensation Court for determination of proper method of payment and regarding whether this claimant's counsel, or counsel handling the *Rausch* matter, are entitled to common fund attorneys fees relating to claimants allegedly situated similarly to this claimant.

Class Actions: In an unpublished decision, Supreme Court applies *Rausch v. State Compensation Insurance Fund*, 2000 MT 203, to hold permanently totally disabled claimant entitled to an impairment award under the 1999 Workers' Compensation Act. Remand to Workers' Compensation Court for determination of proper method of payment and regarding whether this claimant's counsel, or counsel handling the *Rausch* matter, are entitled to common fund attorneys fees relating to claimants allegedly situated similarly to this claimant.

Impairment: Generally. In an unpublished decision, Supreme Court applies *Rausch v. State Compensation Insurance Fund*, 2000 MT 203, to hold permanently totally disabled claimant entitled to an impairment award under the 1999 Workers' Compensation Act. Remand to Workers' Compensation Court for

determination of proper method of payment and regarding whether this claimant's counsel, or counsel handling the *Rausch* matter, are entitled to common fund attorneys fees relating to claimants allegedly situated similarly to this claimant.

¶1 The petitioner (claimant) in this case is totally disabled but is seeking an impairment award. In *Fisch, Frost and Rausch v. State Compensation Ins. Fund,* 2000 MTWCC 56, this Court held that permanently totally disabled claimants are not entitled to impairment awards under the 1997 and 1991 versions of the Workers' Compensation Act since impairment awards are limited to workers who are permanently **partially** disabled, at least where those claimants have never been able to return to any sort of work following their industrial injuries and thus have never been in permanently partially disabled status. In a subsequent decision, I rejected constitutional challenges to the failure to provide impairment awards to permanently totally disabled workers. 2001 MTWCC 15. Both decisions are on appeal to the Montana Supreme Court.

¶2 Based on my decisions in *Fisch*, respondent (Liberty) moves for summary judgment. It states that it is paying claimant total disability benefits and that claimant is not permanently partially disabled. Claimant agrees that he is not and never has been permanently partially disabled but tenders his own motion for summary judgment, arguing that the Court's prior decisions are inapplicable or were erroneous and should be overruled. After reviewing the motions, I notified counsel for both parties that I was disinclined to reconsider the prior decisions. I offered them two choices: first, they could elect to stay the present proceedings and await the decision of the Supreme Court in *Fisch* or, second, they could request entry of judgment in accordance with the prior decisions. Both parties chose the latter.

¶3 In *Fisch* I fully considered the statutory and constitutional questions surrounding the claim that a totally disabled worker who has never been deemed able to return to any sort of work should be entitled to an impairment award. The statute at issue here is the 1999 version, which, is identical to the 1997 law considered in *Fisch*. Claimant has not advanced any arguments which would persuade me to reconsider my *Fisch* decision. The correctness of my decisions is best left to the Supreme Court. Accordingly, in compliance with counsels' wishes, I am entering summary judgment for respondent.

JUDGMENT

¶4 In accordance with the foregoing discussion, **judgment is entered** finding that claimant is not entitled to an impairment award. The petition is **dismissed with prejudice**.

DATED in Helena, Montana, this 12th day of August, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: July 29, 2002