**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2001 MTWCC 23**

**WCC No. 2000-0212**

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**MICHAEL J. SIEGLER**

**Petitioner**

**vs.**

**LIBERTY INSURANCE CORPORATION**

**Respondent/Insurer for**

**FEDERAL RESERVE BANK - HELENA**

**Employer.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Case Summary:** Claimant suffered a significant injury in 1992 which left him with a 31% impairment. He did not seek employment until 1996, when he was hired as a protection officer for the Helena Branch of the Federal Reserve Bank. Shortly after being hired he suffered a knee injury. After returning to work he was unable to pass the Bank's firearms qualification test and was terminated. He seeks temporary total disability, permanent partial disability, and rehabilitation benefits.

**Held:** The 1995 law applies. (1) Claimant is entitled to TTD benefits during a month and a half period following his termination since he was unemployed and had not reached MMI. (2) While there is significant doubt that claimant would have been able to pass the firearms qualification test, and therefore keep his employment *irrespective* of his injury, the statutes concerning permanent partial disability do not require proof that he would have passed the test but for the injury and, in any event, a bare preponderance of evidence indicates he probably would have passed. (3) Claimant's actual employment after his injury establishes his post-injury wage for wage loss purposes where there is no evidence indicating that claimant had a reasonable opportunity to obtain employment in the only other job which was medically approved for him. (4) Since claimant suffered a wage loss, he is entitled to rehabilitation benefits.

**Topics:**

**Courts: Issues.** Court will only consider issues raised in the Pretrial Order.

**Maximum Medical Improvement.** MMI opinion of physician who treated claimant over longer period of time and over more recent period of time, and who was subjected to deposition, is adopted over that of earlier treating physician.

**Wages: Wage Loss.** To demonstrate a wage loss for purposes showing entitlement to permanent partial disability and rehabilitation benefits, the claimant need only show that following his injury he was precluded from doing his time-of-injury job and that his actual earnings or earning capacity is less than the time-of-injury wages. Proof that he lost or would have lost his time-of-injury job irrespective of his injury is immaterial.

**Wages: Wage Loss.** Claimant's actual employment after his injury establishes his post-injury wage for wage loss purposes where there is no evidence indicating that claimant had a reasonable opportunity to obtain employment in the only other job which was medically approved for him.

**Wages: Average Weekly Wage.** Where claimant worked less than four pay periods prior to his injury, but the insurer stipulated he would have worked as many hours as his replacement, the replacement's average hours will be used to determine claimant's weekly hours.

¶1 The trial in this matter was held on January 11, 2001, in Great Falls, Montana. Petitioner, Michael J. Siegler (claimant), was present and represented by Mr. Richard J. Martin. Respondent, Liberty Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 9 were admitted without objection. Exhibits 10 through 24 were admitted over objections.

¶3 Witnesses and Depositions: The parties agreed that depositions of claimant, Michelle Rowe, Dr. Ronald Isackson, Larry Heigh, John Wohlfrom, and William James Bird shall be considered by the Court. Claimant was sworn and testified. Michelle Rowe, Larry Heigh, John Wohlfrom, William James Bird, and Bruce Jeffrey were sworn and testified.

¶4 Issues Presented:

1. Whether Petitioner is permanently partially disabled as provided by § 39-71-703, MCA (1999)[sic].[(1)]

2. Whether Petitioner should receive total rehabilitation benefits.

3. Whether Petitioner should receive temporary total disability benefits for the period of 7/6/97 [sic] to 11/17/98.

4. Whether Respondent/Insurer was unreasonable in the denial of Petitioner's claim for permanent partial disability, temporary total disability benefits and total

rehabilitation benefits, and whether Petitioner is entitled to a 20% penalty as provided by § 39-71-2907, MCA (1999)[sic].[2]

5. Whether Petitioner is entitled to an increase in his temporary total isability rate.

¶5 Due to the unavailability of one witness, the attorney fee and penalty issues were bifurcated and deferred until after the Court resolves the main issues.

¶6 The parties stipulated at trial that if the Court finds claimant has an actual wage loss because of his injury at the Federal Reserve Bank (Bank) then his entitlement to rehabilitation benefits will be the eight weeks of benefits paid in a lump sum without a discount. The claimant also stipulated that payment of eight weeks of rehabilitation benefits would resolve any of his claims to rehabilitation benefits in relation to his injury at the Bank. (Tr. at 16-17.)

¶7 The parties further stipulated that claimant would have likely worked the same amount of hours that his replacement, William James Bird, worked. (*Id*. at 191.)[3]

¶8 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, and the exhibits, the Court makes the following:

## FINDINGS OF FACT

¶9 Where testimony is conflicting, credibility questions are resolved in favor of the testimony which supports the following findings of fact.

¶10 Claimant, Michael J. Siegler, is 50 years old. He has a high school diploma (ex. 19 at 4; ex. 22 at 2), and has worked in insurance sales, as a correctional officer, as a law enforcement officer, and as a security guard. He worked in law enforcement in Montana for approximately nine years. During his basic training at Montana Law Enforcement Academy (MLEA) in 1986, claimant received a firearms rating of 92.80 as a "sharpshooter" in handgun proficiency. (Tr. at 56; Ex. 24 at 130.) ¶11 On June 28, 1992, while he was working as a deputy sheriff for Phillips County, Montana, claimant was injured in an auto accident. He sustained extensive injuries to his back, arm, and neck. (Tr. at 49-50; Ex. 22 at 1; Ex. 23 at 1.) Claimant filed a workers' compensation claim for the June 28, 1992 accident. (Exs. 11-13, 16-17.)

¶12 Claimant was unable to return to work as a deputy sheriff. The rehabilitation specialist for his 1992 claim identified three alternative jobs. (Ex. 19 at 1-7; Ex. 22 at 1.) Those jobs were security guard, parking enforcement officer, and cashier. All were conditionally approved by Dr. Litle, a chiropractor who was claimant's attending physician at that time. (*Id*. at 1-2; Ex. 20-21.) For the unskilled cashier job, Dr. Litle noted that claimant needed to be able to alternate sitting and standing. He also stated that claimant's lower back might be aggravated by riding in the patrol car or by lifting sand barrels as a parking enforcement

officer. (Ex. 19 at 1; Ex. 20 at 6.) Dr. Litle noted that claimant may have difficulty with manipulative hand movements for all three jobs. (Ex. 20 at 3, 6; Ex. 21 at 2-3 .)

¶13 On June 15, 1994, claimant was placed at maximum medical improvement (MMI) by Dr. Isackson, an orthopedic surgeon, and assigned an 18% impairment based upon his lumbar spine and cervical spine injuries. (Ex. 18 at 1.)

¶14 Later on the insurance carrier apparently agreed that claimant's impairment rating was 31% when allowing for his other injuries to his arms, head, and ear. (Ex. 12 at 1; Ex. 13 at 1.) In June 1995, the parties settled his remaining claims for benefits. (Ex. 10 at 1.)

¶15 Claimant has been self-employed as a part-time private investigator (PI) since 1995. (Ex. 5 at 72; Ex. 8 at 1; Ex. 24 at 7, 125.) His PI work has been sporadic. (Ex. 8 at 1; Rowe Dep. at 16.)

¶16 Claimant's license as a PI requires him to show proficiency in firearms. Claimant last qualified his proficiency with Gene Couch, the sheriff of Fergus County, in 1998. (Tr. at 90.)

¶17 Other than his PI work, claimant did not return to the labor market until 1997.

¶18 Claimant's first attempt to go back to regular work was when he applied for employment with the Bank in 1997 as a Protection Officer. (Siegler Dep. at 19, 23.) Protection officers patrol the Bank building in Helena. The building has several floors and protection officers are required to climb up and down the stairways in the bank. They are also required to carry firearms and to protect the bank in case of a robbery attempt. Since the Bank has many employees, it is essential to their safety that protection officers be able to "shoot straight."

¶19 In applying for the job, claimant disclosed his previous injury. (*Id*. at 52; Siegler Dep. at 24; Ex. 5 at 50.)

¶20 The Bank required claimant to undergo a pre-employment firearms proficiency test. He took the test on May 22, 1997. The test required him to fire 2 rounds at 7, 10, 15, and 25 yards. The test was not timed. Claimant scored a 68%. (Ex. 5 at 66.) Larry Heigh (Heigh), the Bank's supervisor of protection officers, felt claimant's shooting needed work but that further training and shooting practice would bring his proficiency up to Bank standards.

¶21 On June 23, 1997, Heigh hired claimant as an on-call Protection Officer I for the Bank. (Ex. 5 at 20, 28, 49.) "On-call" officers are required to work when regular protection officers take vacation, sick or other leave time. The Bank contemplated he would work approximately 24 hours weekly. (Ex. 5 at 64; Tr. at 26.)

¶22 Claimant's wage was $8.22 an hour for regular shifts and $9.04 for the 4:00 p.m. to midnight and midnight to 8:00 a.m. shifts. (Ex. 1 at 1; Ex. 5 at 19, 49; Tr. at 34.)

¶23 According to Heigh, after they are hired, protection officers are required to undergo and pass a further proficiency test in order to continue employment. The proficiency test involves shooting 50 rounds at different distances. The tests are timed and require shooting from different positions. The minimal score acceptable to the Bank is 80%.

¶24 The further qualification is not spelled out in the Bank's hiring documents. Indeed, the job description indicates that passing the pre-employment firearms test is all that is required:

> Previous formal firearms (handgun) training is required; candidates will be required to demonstrate their proficiency on a pre-employment shooting test as part of the selection process.

(Ex. 5 at 25.) The new hire information sheet, which was prepared by the Bank and signed by the claimant, does not refer to further firearms tests and states that the "Initial Evaluation Period Review Date" was December 20, 1997, with the further statement that "Requirements for transfer to regular status include satisfactory performance, good attendance, and punctuality." (*Id.* at 28.) A Human Resources checklist did not indicate any further firearms testing requirements.

¶25 However, claimant was told upon starting his job that he would be required to pass an additional firearms proficiency test and that if he did not pass it his employment would be terminated.

¶26 On June 27, 1997, just four days after being hired, claimant was working at the Bank and while walking backwards fell off the stairs to the control room. He injured his left knee. (*Id*. at 52; Ex. 1 at 1.)

¶27 At the time of the injury, the Bank was insured by Liberty, which accepted liability for the accident.

¶28 Claimant was seen for severe knee pain at the emergency room of St. Peter's Hospital on the same day of his accident. (Ex. 3 at 6.) The ER physician opined that claimant had "either an anterior cruciate ligament or an injury of the extensor quadriceps at the anterior tibia beneath the patella." (*Id.* at 4; Ex. 24 at 39, 46.)

¶29 Claimant thereafter treated with Dr. Harris Hanson, an orthopedic surgeon, from June 30, 1997 to July 21, 1997. (Ex. 3 at 11-14.) Dr. Hanson's impression was that claimant had a "probable patellar subluxation on the left." (*Id*. at 14.)

¶30 Claimant was off work for about two weeks.

¶31 On July 7, 1997, Dr. Hanson noted that although the knee was still discolored and swollen, it seemed stable enough. He told claimant to wear a brace and released him to return to work but restricted him from climbing stairs. (*Id.* at 13.)

¶32 When he came back to work on July 7, 1997, claimant still needed to take the hand gun qualification test in order to retain his employment. (Tr. at 62.) Initially, he was unable to practice shooting or take the test because the Bank's shooting range was downstairs and he was precluded from walking down stairs.

¶33 On July 21, 1997, Dr. Hanson released claimant to full duty but with the comment that he should "take it easy on stairs." (*Id*. at 61-63; Ex. 3 at 11; Ex. 5 at 20, 36-37.)

¶34 On September 15, 1997, Dr. Hanson also noted: "I would feel that he has reached maximum medical improvement at this point but his activities would have to have a precautionary element to them." (Ex. 3 at 11; Ex. 24 at 34.)

¶35 Following the release to return to full duty, claimant did several shooting practices, and ultimately a series of qualification tests. The qualification test series included shooting some rounds peering around a barricade and some rounds while kneeling. However, because of his knee condition, claimant was unable to kneel and never required to shoot while kneeling.

¶36 Claimant made several attempts at qualifying. His final attempt was on August 12, 1997: he scored 71.6, which was a failing score in light of the Bank's policy of requiring a score of 80. His score on August 12th was the highest of all of his qualifying scores.

¶37 Claimant was warned before his last qualifying test that if he failed the test he would not be able to meet the minimum qualifications for his position. Following his failing score on August 12th, claimant's employment with the Bank was terminated. While claimant testified that he believed he was also fired because he hurt his knee and filed a workers' compensation claim, there is ample and persuasive evidence that the Bank had a policy requiring a score of 80 on the qualifying test. The Bank's reasons for the requirement are compelling ones and I am persuaded that the sole reason for claimant's termination was his inability to shoot straight.

¶38 Claimant's total wages from the Bank was $2,445.39. (Ex. 24 at 71.)

¶39 Claimant's replacement, William James "Jim" Bird (Bird), averaged 28.67 hours a week over his first year of employment. Claimant's supervisor testified that he expected claimant would have worked as many hours as Bird did, and Liberty at that point stipulated such fact. (*See* ¶ 7 and n.3.) Almost exactly two-thirds of Bird's shifts were evening and nights.

¶40 One of the questions naturally arising in this case is whether claimant's knee condition contributed to his inability to pass the firearms test, because of pain or his favoring the knee.

¶41 In addition to replacing claimant at the Bank, Bird was also a licensed firearms officer for the Townsend Sheriff's Office, for the State of Montana, and the Fish & Game. (Bird Dep. at 10; Siegler Dep. at 38; Tr. at 121.) Bird had tested claimant for firearms proficiency in

connection with his PI license. He testified that while claimant passed the PI test after two or three attempts, he was unable to pass a test he had established for the Townsend Sheriff's Office. Bird said that the Bank's course was "much more difficult than the State private investigator's license, and I would say it's probably on a par with what was at the sheriff's office. It's a different setup, entirely different set up, but the skills needed are about the same." (Bird Dep. at 12.)

¶42 On the other hand, there is significant evidence that claimant's knee problems continued and ultimately precluded him from ever being able to fire while kneeling, thus, his industrial injury precluded him from ever being able to take one part of the qualifying test and therefore from ever qualifying.

¶43 Claimant also testified that during the testing he was wearing a brace prescribed by Dr. Hanson. He also felt that his shooting was affected by his knee. He testified he did not feel comfortable in his shooting stances.

¶44 Considering claimant's condition after he returned to work for the Bank following his injury, I find that the Bank's contention that claimant could not have passed the firearms exam even if he had not been injured is speculative and unproven. I note that claimant's supervisor felt that his prior firearms experience and his pre-employment test indicated that with practice the claimant should have been able to pass the Bank's shooting test. Claimant is the only person hired by the Bank that ever ultimately failed the test. Claimant testified as to his belief that his shooting was affected by his knee. While there is evidence indicating that claimant's shooting ability was already impaired prior to his injury, it is also fair to say that his injury further impeded and impaired his shooting. By a bare preponderance, I am persuaded that he would have passed the test had he not injured his knee.

¶45 Claimant's knee problems continued after his termination. Subsequent medical history shows that Dr. Hanson's July 1997 release for claimant to return to full duties was premature.

¶46 On November 10, 1997, Dr. Hanson stated that claimant "has definite evidence of a partial avulsion of the suprapatellar muscular cutaneous junction." (Ex. 3 at 9; Ex. 24 at 33-34.) Dr. Hanson referred claimant to Dr. Isackson, an orthopedic surgeon in Lewistown, Montana, since claimant was moving to Stanford, Montana. (*Id*.)

¶47 On January 7, 1998, Dr. Isackson's impression was that claimant had a partial tear of the left quadricep. (Ex. 3 at 39.)

¶48 On January 13, 1998, claimant had an MRI of his left knee. Dr. Isackson diagnosed a "horizontal tear of the posterior horn of the medial meniscus, but otherwise, it was a negative study." (Ex. 3 at 18; Ex. 24 at 27.) However, an addendum noted, "There is a small amount of fluid anterior to the attachment of the quadriceps tendon with some high signal

in the tendon suggesting there may be a partial tear, but there is no evidence of a complete tear of the quadriceps tendon or infrapatellar tendon." (*Id.*) Dr. Isackson prescribed a brace and exercise program. (Ex. 3 at 38; Ex. 24 at 26.)

¶49 During 1998, claimant complained of instability and locking of his knee. (Ex. 3 at 36; Ex. 24 at 24-25, 34-35.) Dr. Isackson put claimant on an exercise program to rehabilitate his knee. (Ex. 3 at 34-38.)

¶50 On November 17, 1998, Dr. Isackson reported that claimant was at MMI with the permanent physical restrictions that he should be considered "light labor activity," lifting up to 25 pounds occasionally or up to 10 pounds frequently. (*Id.* at 32.) In addition, he **restricted claimant from any bending, squatting, or kneeling**. Dr. Isackson also noted that claimant "may need surgical reconstruction of the quadricep tendon if [it] continues with weakness." (*Id.*) Claimant's job at the Bank was classified as medium. (Ex. 4 at 60.) Dr. Isackson precluded him from returning to work at the Bank. (*Id.*)

¶51 In deposition, Dr. Isackson testified that claimant's injury to his left knee continues to adversely affect his ability to squat, kneel, bend, stand, stoop, and to climb stairs. (Isackson Dep. at 15.) Claimant's own testimony confirms his difficulty in performing these activities.

¶52 On January 25, 1999, Dr. Isackson rated claimant's impairment from his knee injury at 3% of the whole person. (Ex. 3 at 31; Ex. 24 at 20.) His diagnosis at the time of the impairment rating was: "chronic quadriceps tear of the left lower extremity which has produced a residual dislocation subluxation instability of the left lower knee along with weakness." (*Id.*) He noted that claimant might need reconstructive surgery of the knee in the future. (*Id.*) However, as of the date of trial in this matter, claimant had not required surgery.

¶53 In light of Dr. Isackson's longer and later treatment of claimant, and his deposition, I find his MMI opinion more persuasive than that of Dr. Hanson.

Post-termination Employment

¶54 After claimant was terminated by the Bank, he worked part time at a Helena radio station for six hours per week for several months. He also worked part time at a Lewistown radio station for a couple of months in early 1998.

¶55 Unemployment insurance quarterly reports show that claimant did not start work for the Helena radio station until after September 30, 1997. (Ex. 24 at 71.) The only reported wages for the 3rd quarter of 1997 were his Bank earnings. (*Id.*)

¶56 Claimant's total earnings for October, November, and December 1997 were $396.55. (*Id.*) His earnings for January, February, and March 1998 were $324.45. (*Id.*) He was working

part time for the radio stations during those periods and there is no evidence indicating that he had no earnings in any particular week during those six months.

¶57 In March 1998, claimant and his wife bought a bar in Stanford, Montana. They operated the bar together. Claimant opened the bar in the mornings, turned on gambling machines, served patrons, stocked some supplies, checked deliveries of supplies, and supervised bartenders. He worked 2-4 hours per day, five days a week.

¶58 While claimant testified that he did not receive a wage, he did have an ownership interest in it with his wife, who was the managing partner. He took cash draws to purchase groceries for their household, but he does not have any record of his draws. A Schedule C (profit and loss from business) for 1998 states a net profit of $399 for the business. (Ex. 6 at 14.) The Schedule indicates payment of wages in the amount of $12,037, which claimant imputes to himself and his wife, however, the imputation appears to be incorrect. No corresponding wages are reported on claimant's 1044 for wages. Moreover, proprietors and partners take draws, not wages. The wages reported on Schedule C appear to be third-party wages, indeed claimant testified that the bar employed bartenders. In looking over the Schedule, it appears that on a cash flow basis, the business provided only a subsistence income to claimant and his wife. (Depreciation expense was only $2,924).

¶59 Claimant quit working at the bar in June 1999 and moved to Lewistown. (Tr. at 83, 86; Ex. 8 at 1.) He currently manages the Lewistown Apartments. (Ex. 8 at 1; Rowe Dep. at 16.) He is paid $400 per month and is also provided an apartment which has a value of $380 per month. (Ex. 8 at 1; Rowe Dep. at 16; Siegler Dep. at 4.) He spends six hours a day in the office on two days each week. The total number of other hours he works weekly is not in evidence.

¶60 Claimant has applied for jobs. He applied for a State of Montana probation officer position in Great Falls that paid $9-$10 an hour. While he testified that he would have moved to Great Falls for the job, he was not hired. (*Id*.) He also applied for a casino job in Minnesota. (Siegler Dep. at 48.)

Labor Market and Vocational Evidence

¶61 Claimant was referred to Bruce Jeffrey (Jeffrey), a certified vocational counselor, for an employability assessment. (Ex. 4 at 48-52.) Jeffrey evaluated claimant's labor market as including jobs available in the Helena, Lewistown, and Great Falls areas; he did not limit his evaluation to Fergus County.

¶62 Jeffrey testified that no alternative or modified jobs were available to claimant at the Bank due to his knee injury. He identified alternative jobs and presented analyses for four jobs to Dr. Isackson. The only job approved by the doctor was for a PI position. (*Id.* at 1-22; Ex. 24 at 50-70.)

¶63 Jeffrey testified that the statewide average wage for private investigators in Montana is $8.90[(4)] an hour, or $1,540.00 per month. (Ex. 4 at 51.) In 1998, there were 65 PIs in Montana, including the claimant. Jeffrey did not evaluate claimant's ability to compete in the open market for employment (as opposed to self-employment) as a PI.

CONCLUSIONS OF LAW

¶64 The 1995 version of the Workers' Compensation Act applies to the claimant's fall since that was the law in effect on the date of his alleged injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶65 The Pretrial Order indicates that claimant is seeking temporary total disability (TTD) benefits for the period of July 6, 1997 to November 17, 1998. However, in his Proposed Findings of Fact claimant indicates that the period for which he is seeking TTD benefits is limited to August 13, 1997 through September 30, 1997. As to the period after September 30, 1997, he acknowledges that he received some wages and argues that he is entitled to temporary **partial** disability benefits.

¶66 TTD benefits are governed by section 39-71-701, MCA (1995), which provides in relevant part:

> (1) Subject to the limitation in 39-71-736 [regarding no compensation for the first six day of lost wages] and subsection (4) of this section [regarding return to work], a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a **total loss of wages** as a result of an injury and until the worker reaches maximum healing; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

One of the requirements for payment of TTD benefits is a "total loss of wages." The only period for which the claimant has shown a total wage loss was from August 13, 1997 through September 30, 1997. As I have found, he was not at MMI until November 1998, therefore, he is entitled to TTD benefits for that period (August 13 through September 30, 1997).

¶67 The rate of TTD benefits shall be based on claimant's wages, as determined in paragraph 77 below.

¶68 Claimant's request for temporary **partial** disability benefits is outside the issues raised in the Pretrial Order and is not properly before the Court. I therefore do not consider the request.

¶69 Claimant also requests both permanent partial disability (PPD) benefits and rehabilitation benefits. Both classes of benefits require proof that he suffered a wage loss as a result of his injury. Section 39-71-703, MCA (1995), provides in relevant part:

> **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 if that worker:
>
> (a) **has an actual wage loss as a result of the injury**; and
>
> (b) has a permanent impairment rating that:
>
> (i) is established by objective medical findings; and
>
> (ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. [Emphasis added.]

Somewhat redundantly, section 39-71-116(22), MCA (1995), defines permanent partial disability as follows:

> (22) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:
>
> (a) has a permanent impairment established by objective medical findings;
>
> (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and
>
> **(c) has an actual wage loss as a result of the injury.**

Section 39-71-1006, MCA (1995), which governs rehabilitation benefits provides that a "disabled worker" as defined in section 39-71-1001, MCA, is eligible for rehabilitation benefits if the worker has an "actual wage loss" as a result of the injury. A "disabled worker" is defined as a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury. § 39-71-1006(1), MCA (1995).

¶70 An "actual wage loss" is defined in section 39-71-116(1), MCA (1995), as follows:

> (1) "Actual wage loss" means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the **actual wages the worker received at the time of the injury**.

¶71 Liberty argues that there can be no wage loss in this case because the claimant was terminated from his Bank employment for reasons unrelated to his injury, therefore the

wages paid by the Bank should not be considered at all. It focuses on the language of sections 39-71-703 and 39-71-1006, MCA, which refer to wage loss "as a result of the injury." It argues that there was no wage loss in this case because irrespective of his injury the claimant could not have qualified to continue his Bank employment, hence he had no wage loss resulting from his injury.

¶72 I am unpersuaded by Liberty's arguments. First, as a matter of statutory interpretation, I conclude that all claimant is required to show is that he is unable to make as much following his injury as his time-of-injury job wage. Second, as a matter of fact, I am persuaded that claimant could have passed the shooting qualifications test had he not been injured.

¶73 As set forth in section 39-71-116(1), MCA (1995), "actual wage loss" is the difference between the claimant's "actual wages . . . at the time of injury" and his post-injury earnings or earning capacity. Sections 39-71-703 and 39-71-1006(1), MCA (1995), must be read together and harmonized with the definition of "actual wage loss" which is found in section 39-71-116(1), MCA (1995). *Taylor v. Matejovsky,* 261 Mont. 514, 520, 863 P.2d 1022, 1026 (1993). Where a claimant suffers an injury and is ultimately precluded from returning to his time-of-injury job, I read the statutes together to require only that after an injury the claimant is precluded from earning as much as he was earning at his time-of-injury job. This interpretation gives effect to all of the sections. It avoids an isolated reading of section 39-71-116(1), MCA, which would only require proof that claimant lost his job and was thereafter able to earn less regardless of the reasons for the loss of his job and the reasons for his loss of earning capacity. It avoids the flip-side, which is a requirement that claimant prove that his loss of earning capacity is solely and exclusively the result of his injury.

¶74 Moreover, the proof in this case indicates that the claimant's injury contributed to his inability to pass the firearms proficiency test. While I have some significant doubts that claimant could have passed the test even absent his injury, his ability to pass prior law enforcement shooting tests, along with his supervisor's belief that based upon his pre-employment test he should have been able to pass the test, are sufficient for me to conclude that his knee condition adversely affected his shooting abilities.

¶75 Once claimant is determined to have a wage loss, section 39-71-116(1), MCA (1995), provides the manner in which the wage loss must be measured. As set forth earlier, it is the difference between his wage at his time-of-injury job and his post-injury wage or his post-injury earning capacity.

¶76 In determining the claimant's time-of-injury wage, the presumption is that the wages for the last four pay periods preceding the injury shall be used, however, where the claimant has not worked a full four pay periods, the number of hours he was hired to work must be used. Section 39-71-123(3)(a), MCA, provides:

> (3)(a) Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

Claimant had not worked four pay periods prior to his injury. Therefore, the number of hours for which he was hired governs. Liberty has stipulated that claimant would have worked as many hours as Bird (28.67 hours per week), therefore, Bird's average hours shall be used in calculating his wages. *See Flink v. American Alternative Ins. Co.*, 2000 MT 224.

¶77 At $8.22 an hour, claimant's weekly wage was $235.67. At $9.04 an hour (the rate for evening and night shifts), his weekly wage would have been $259.18 a week. Almost two-thirds of Bird's actual shifts were evening and night shifts for which he was paid a differential. Therefore, the anticipated work by claimant will be allocated equally among the shifts, i.e., 8 hours for morning, 8 hours for evening, and 8 hours for night. This allocation method yields an average weekly wage of $251.33 (*9.56 hours times $8.22 plus 19.11 hours times $9.04*).

¶78 After claimant was terminated from the Bank, his earnings were significantly less. He earned $396.55 during the last three months of 1997 working for a Helena radio station. His earnings for January, February, and March 1998 were $324.45 for a Lewistown radio station. His subsequent interest and work in the Stanford bar produced virtually no income although he took cash out of the business. His PI earnings were negligible.

¶79 However, his earnings as an apartment manager are $780.00 a month. On a weekly basis, his earnings are $179.50 weekly, which is $71.82 a week less than his bank earnings. Assuming he works the same number of hours as an apartment manager as he would have at the Bank, his wage loss is $2.50 an hour. Claimant would like the Court to use a 40-hour week in assessing claimant's apartment manager duties, however, proof of a 40-hour work week is lacking. Claimant testified at trial that he spends 6 hours in the office two days a week (totaling 12 hours weekly) but did not detail how many hours he spent out of the office on his duties. On the other hand, Liberty did not offer evidence showing claimant worked less than 28.67 hours per week.

¶80 The only other approved job for claimant is as a PI. However, Liberty's vocational expert did not address whether claimant is competitive for PI jobs available in the open market. In light of claimant's physical limitations and disabilities, and his long-term unemployment following his 1992 injuries, that question should have been addressed. Lacking proof that claimant has a reasonable prospect of being hired by a PI firm, I am unpersuaded that he can compete for PI positions in the open labor market. Therefore, I do not consider PI jobs in determining wage loss.

¶81 I am therefore left with the claimant's apartment house manager job as the best measure of wage loss. As noted above, the wage loss is $2.50 an hour.

¶82 In light of the foregoing conclusions regarding wage loss, it is unnecessary for me to consider the parties' arguments concerning the geographical area which should be used as claimant's labor market.

¶83 Claimant's Bank job was a medium labor job. Following his injury, he was restricted to light duty. Under section 39-71-703(5)(d), MCA (1995), he is entitled to 2% for the restriction.

¶84 Applying the percentages set forth in section 39-71-703, MCA (1995), the claimant is entitled to PPD benefits (in addition to the impairment award) based on the following percentages:

| | |
|---|---|
| Age | 1% |
| Wage loss | 20% |
| Loss of Labor ability | 2% |
| TOTAL | 23% |

¶85 Since claimant sustained a wage loss, he is also entitled to rehabilitation benefits. § 39-71-1006, MCA (1995). The parties agree that his entitlement is eight weeks of benefits. (Trial Stipulation by Liberty; Claimant's Proposed Findings at 10.)

¶86 Claimant is entitled to his costs.

¶87 The request for attorney fees and a penalty has been bifurcated and is therefore not addressed.

## JUDGMENT

¶88 Claimant is entitled to TTD benefits from August 13, 1997 through September 30, 1997.

¶89 Claimant is entitled to a 23% PPD award in addition to his impairment award.

¶90 Claimant is entitled to eight weeks of rehabilitation benefits.

¶91 Benefits shall be calculated based upon a weekly wage of $251.33.

¶92 Claimant is entitled to costs.

¶93 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶94 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 16th day of May, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Larry W. Jones
Submitted: March 7, 2001

1. Since the date of injury is June 27, 1997, the 1995 statute applies, not 1999.

2. Since the date of injury is June 27, 1997 , the 1995 statute applies, not 1999.

3. Q. Hello again, Mr. Haigh. [sic] All right. Just a few things here. I just want to confirm that your testimony was that Mr. Siegler would have, you would have every reason to expect that he would have had the same number of hours had that Mr. Byrd had?

A. Yes.

Q. No reason to think otherwise?

A. Yes.

THE COURT: You are going to give him a chance to wiggle out of what he has already said, and I have already said the end of the hours issued.

MR. JONES: We will stipulate to it, Judge.

(Tr. at 191.)

4. Jeffrey's actual report stated that PIs earned $8.70 an hour, not $8.90 an hour as he stated at trial. (Ex. 4 at 52.)