

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 6

WCC No. 9806-8000

S.L.H.

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

THIRSTY'S BAR

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Bartender was kidnaped from workplace, beaten, raped, and severely injured physically and emotionally. Following a slow recovery, she returned to part-time work. She claimed additional permanent partial disability benefits for labor restriction, lost wages, and mental impairment. She also claimed the insurer had been unreasonable in its position on certain medical testing and medications and in denying PPD benefits for physical restrictions and wage loss. Finally, she argued that section 39-71-703(3) and -711, MCA (1991) were unconstitutional if read to deny her an impairment award for a mental impairment

Held: Claimant is entitled to additional PPD benefits in the form of 10% for physical restrictions and 20% for wage loss. As the insurer conceded, 10% was appropriate where claimant's time of injury job was medium duty and she could work only light-duty post-injury. The 20% for wage loss was based on the WCC's finding claimant suffered over a \$2.00 an hour wage loss, a finding based on taking into account claimant's post-injury inability to work her pre-injury number of hours. The WCC refused to award benefits for mental impairment where the psychiatrist testifying refused to assign a percentage for mental impairment in light of the recommendation against making such determinations for mental impairments stated in the 4th Edition of the AMA Guides to Impairment. Penalty was awarded with respect to (1) the 10% award for physical restrictions, (2) one half of the 20% wage loss award; and (3) the amounts due for an MRI and EMG the insurer had refused to cover. Penalty was not awarded with regard to (1) State Fund's assertion of a subrogation

interest in a third-party recovery, which assertion was dropped; (2) claimant's request for further impairment award; and (3) a prescription the insurer had denied. Attorneys fees were denied because the insurer had conceded liability pre-hearing on relevant matters.

Note: See *S.L.H. v. State Comp. Ins. Fund*, 2000 MTWCC 362, 303 Mont. 364, 15 P.2d 948, reversing this decision in part, and *S.L.H. v. State Comp. Ins. Fund*, 1999 MTWCC 6A, on remand from Supreme Court.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2907, MCA (1991). Penalty was awarded with respect to (1) a 10% award for physical restrictions, (2) one half of a 20% wage loss award; and (3) the amounts due for an MRI and EMG the insurer had refused to cover. Penalty was not awarded with regard to (1) insurer's assertion of a subrogation interest in a third-party recovery, which assertion was dropped and was not, in any event, relating to benefits due; (2) claimant's request for further impairment award; and (3) a prescription the insurer had denied.

Benefits: Impairment Awards: Mental Impairment. WCC held claimant not entitled to mental impairment award where the psychiatrist testifying refused to assign a percentage for mental impairment in light of the recommendation against making such determinations for mental impairments stated in the 4th Edition of the AMA Guides to Impairment. See *S.L.H. v. State Compensation Insurance Fund*, 2000 MTWCC 362, 303 Mont. 364, 15 P.2d 948, reversing on this ground, and *S.L.H. v. State Compensation Fund*, 1999 MTWCC 6A, on remand from Supreme Court.

Benefits: Permanent Partial Disability: Labor Capacity. Claimant who was kidnaped from work and received severe physical and emotional injuries was entitled to additional PPD benefits in the form of 10% for physical restrictions. As the insurer conceded, 10% was appropriate where claimant's time of injury job was medium duty and she could work only light-duty post-injury.

Benefits: Permanent Partial Disability: Lost Earning Capacity. Claimant is entitled to additional PPD benefits in the form of 20% for wage loss. The 20% for wage loss was based on the WCC's finding claimant suffered over a \$2.00 an hour wage loss, a finding based on taking into account claimant's post-injury inability to work her pre-injury number of hours. An absurd result would be produced if the Court were to construe section 39-71-303(3)(c), MCA (1991) as requiring comparison of pre-injury and post-injury wage rates without taking into account claimant's inability to work the number of hours she worked pre-injury as the result of the injury.

Penalties: Insurers. Penalty was awarded with respect to (1) a 10% award for physical restrictions, (2) one half of a 20% wage loss award; and (3) the amounts due for an MRI and EMG the insurer had refused to cover. Penalty was not awarded with regard to (1) insurer's

assertion of a subrogation interest in a third-party recovery, which assertion was dropped and was not, in any event, relating to benefits due; (2) claimant's request for further impairment award; and (3) a prescription the insurer had denied.

¶1 The trial in this matter convened on September 15, 1998, in Great Falls, Montana and recessed at 5:00 p.m. The trial reconvened on September 30, 1998, in Great Falls. Petitioner, S.L.H. (claimant), was present and represented by Ms. Sara R. Sexe. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. William O. Bronson. The testimony of Dr. Mary Ann Evans has been transcribed. No other parts of the trial have been transcribed.

¶2 Exhibits: Exhibits 1 through 45 were admitted without objection.

¶3 Witnesses and Depositions: Claimant, Dr. Mary Ann Evans, Micki Marion Breedlove, Patricia Lubick, and Patricia Hunt were sworn and testified. In addition, the parties submitted the deposition of Dr. Dennis Dietrich for the Court's consideration.

¶4 Issues Presented in Pretrial Order: As set forth in the pretrial order, the following issues were presented for decision:

1. Whether Petitioner is entitled to permanent partial disability [PPD] benefits in addition to the 11% impairment rating.
2. Whether the State Fund unreasonably refused or delayed the authorization for the medical care requested by Dr. Dietrich, including an EMG, MRI, and gastrointestinal medications, thereby entitling Petitioner to attorneys' fees, costs and a penalty.
3. Whether Petitioner has not been made whole by the third-party settlement of her negligence claim against the alarm installer, thereby precluding the State Fund from exercising its subrogation interest?
4. Whether the State Fund's actions in denying, delaying, or refusing authorization for, [sic] benefits was unreasonable, thereby entitling Petitioner to her attorney's fees, costs, and a penalty?
5. Whether the State Fund's [position] forcing Petitioner to litigate the subrogation issue, given the facts of the case, subjects the State Fund to the payment of attorney's fees, costs and a penalty.

¶5 Waiver of Subrogation Claim: At trial the State Fund expressly waived any claim to subrogation. Therefore, that issue is not addressed.

¶6 Additional Issue Not Raised in Pretrial Order: At trial the parties agreed that petitioner may submit a post-trial challenge to the constitutionality of sections 39-71-703(3) and - 711, MCA (1991), insofar as those sections preclude an impairment award for mental or

psychological injuries. That issue was the subject of post-trial briefing and finally submitted for decision on December 22, 1998.

¶17 Bench Rulings: At the time of trial, the Court made the following bench rulings:

1. Claimant is not entitled to an impairment award with respect to her psychological injuries since she could not establish a percentage rating under the AMA Guides to Impairment.
2. Based on the evidence presented at trial, claimant is entitled to a 20% award for lost wages based on an actual wage loss of more than \$2.00.
3. The claimant is not entitled to attorney's fees or a penalty with respect to the State Fund's subrogation claim. *O'Brien v. State Compensation Insurance Fund*, WCC No. 9710-7854, findings of fact, conclusions of law and judgment (February 10, 1998) (holding that the waiver of a subrogation claim is not a benefit within the meaning of the Workers' Compensation Act and therefore not something to which a penalty may attach).
4. At trial the State Fund conceded liability for a 10% award for physical restrictions. Claimant is further entitled to a penalty and attorney's fees with respect to that 10% award since Dr. Patrick Galvas had restricted claimant to light duty in March 1998 (Ex. 41 at 2) and the State Fund was aware of the restriction and of the fact that claimant was performing at least medium-duty work in her time-of-injury job. [Upon further consideration, for the reasons set forth in the Conclusions of Law the Court has voided the attorney fee award.]
5. The claimant is entitled to a penalty and attorney's fees with respect to its denial of an EMG and MRI ordered by Dr. Dietrich. At trial the State Fund agreed to pay for the procedures.

¶18 Issues Remaining: The following issues remain for the Court's decision:

1. Whether the State Fund unreasonably refused or delayed authorization for gastrointestinal medications requested by Dr. Dietrich, thereby entitling claimant to attorney's fees and a penalty.
2. Whether claimant is entitled to attorney's fees and a penalty with respect to the remaining 10% award for wage loss.
3. Whether sections 39-71-703(3) and -711, MCA (1991), are unconstitutional insofar as they preclude the Court from awarding claimant an impairment award for her psychological injuries, and if so what is the amount that should be awarded claimant with respect to her psychological impairment?

¶19 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶10 Claimant is 34 years old. She is a high school graduate and has also completed some vocational technical school courses.

¶11 Claimant has worked as a cook, food waitress, cocktail waitress, bartender, keno caller and grocery checker.

¶12 In 1991 she was hired by Thirsty's Bar (Thirsty's) as a bartender. She worked approximately 32 hours a week and was paid \$7.00 an hour. In addition to serving drinks to customers, she was responsible for the cash drawers and for stocking beer, soft drinks and wine coolers. She worked evenings.

Industrial Injury

¶13 On November 13, 1991, the claimant was kidnaped from her place of employment. Her kidnaper forced her into her vehicle and ordered her to drive away from her employment. After she drove away, he made her stop the car. He then brutally beat and repeatedly raped her. He threatened her life with a knife and a gun and slit her throat.

¶14 The assault and rape resulted in severe physical and psychological injuries to the claimant.

¶15 At the time of the kidnaping, assault and rape, Thirsty's was insured by the State Fund. Claimant submitted a claim for compensation to the State Fund, which accepted liability and commenced paying medical and temporary total disability benefits.

Recovery

¶16 Claimant's recovery has been slow and difficult. She was not declared at maximum healing until October 1997, and has been released by her psychiatrist to part-time work only. She was out of work until May 1998, when, with rehabilitation assistance, she took a part-time job at Pizza Hut paying \$5.15 an hour. Her temporary total disability benefits were discontinued on March 15, 1998, when she was placed on rehabilitation benefits.

Permanent Partial Disability

I. Labor Restriction

¶17 A Functional Capacity Evaluation (FCE) of claimant was done by Dr. Patrick Galvas (Dr. Galvas) in January 1998. Based on the FCE, claimant is physically able to perform only light-labor. (Ex. 41 at 2.)

¶18 Claimant testified that her job at Thirsty's required her to lift in excess of 50 pounds. She was required to move beer kegs and garbage cans, and also testified that she acted as a bouncer of sorts.

¶19 In September 1998, the claimant's job at Thirsty's was evaluated by Micki Marion Breedlove (Marion), a vocational consultant working for Crawford & Company (Crawford). Marion testified that claimant's job required only medium labor. She was not required to lift kegs, only to tip and shove them, efforts requiring 35 to 37 pounds of force. Full garbage cans weighed 25 to 30 pounds. A case of beer weighed 31 pounds. Acting as a bouncer was not part of her duties.

¶20 Marion's testimony was persuasive. I therefore find that claimant's time-of-injury job was medium duty.

¶21 At trial the State Fund conceded that claimant is entitled to a 10% award based on a restriction to light-labor activity. § 39-71-703(3)(d), MCA (1991). In light of the previous finding, claimant is entitled to no further award for physical restrictions.

II. Lost Wages

¶22 At the time of her injury, claimant was earning \$7 an hour and she was working 32 hours a week. (Trial Test.)

¶23 In May 1997 Marion was assigned to address claimant's employment potential and to provide a rehabilitation recommendation. Ultimately, she developed a rehabilitation plan calling for job placement services from March 16, 1998 until June 7, 1998. (Ex. 1 at 28.)

¶24 Dr. Mary Ann Evans (Dr. Evans), a psychiatrist who has treated claimant for post-traumatic stress syndrome, major depression, and cognitive deficits arising from the physical and mental trauma she suffered on November 13, 1991, testified that claimant is not yet ready and able to return to work full time. She noted that claimant had spent seven years out of the work force. While she is hopeful that claimant may return to full-time work in the future, she is unable to predict when that will occur. (Trial Test.; Ex. 30 at 5.)

¶25 Marion was aware of Dr. Evans' opinion that claimant is able to work only part-time and assisted claimant in finding a part-time, temporary job at Pizza Hut. Claimant began working at Pizza Hut in Great Falls on May 1, 1998. However, at the time of trial she was no longer employed. (Trial Test.; Ex. 1.)

¶26 While working part-time for Pizza Hut, claimant earned \$5.15 an hour. (*Id.*) The job at Pizza Hut is her only employment since 1991.

¶27 Marion acknowledged that claimant's attention, concentration and memory problems present significant barriers to her future employment.

¶28 On an absolute hourly basis the claimant's Pizza Hut wage was \$1.85 an hour less than her time-of-injury job. However, if her weekly pay is averaged over her time of injury work-week of 32 hours, her hourly wage on that basis was more than \$2.00 an hour less. Moreover, since leaving Pizza Hut, she has had no earnings.

III. Impairment

¶29 Dr. Galvas, who has treated claimant for her physical injuries, declared claimant at maximum medical healing in October 1997. At that time he rated her physical impairment at 11% of the whole person.

¶30 In his office notes Dr. Galvas explained how he arrived at that impairment rating:

CALCULATION OF TOTAL PERCENT IMPAIRMENT OF WHOLE PERSON: The Combined Values Chart on page 322 was utilized in arriving at the total impairment. A 5 percent impairment of whole person for traumatic brain injury combined with a 1 percent impairment of whole person for post-traumatic stress disorder equals a 6 percent impairment of whole person. A 6 percent impairment of whole person combined with a 2 percent impairment of whole person for seizure disorder equals and [sic] 8 percent of whole person. An 8 percent of whole person combined with a 3 percent impairment of whole person for left ankle fracture equals an 11 percent impairment person.

(Ex. 40 at 5.)

¶31 Claimant contends that she is entitled to an additional impairment rating as a result of the psychological injuries she suffered. She sought to establish a further impairment rating through the testimony of Dr. Evans.

¶32 Dr. Evans, who is board certified in psychiatry, has treated claimant since September 1995. In her opinion claimant suffers from three major diagnoses: major depressive disorder, post-traumatic stress disorder (PTSD), and cognitive disorder, NOS [not otherwise specified]. (Partial Tr. at 10.)

¶33 Dr. Evans evaluated claimant's impairment utilizing the third edition of the American Medical Association's Guides. Chapter 14 governs impairment due to mental and behavioral disorders. It sets out four areas of functional limitation. Within each area the Guides set out criteria for assessing the severity of impairment. The areas are: activities of daily living, social functioning, concentration, and adaptation. (american medical association, guides to the evaluation of permanent impairment [ama guides], 3rd ed. (1990) at 237; Ex. 38 at 5.)

¶34 The ama guides provide for the assignment of mental and behavioral disorders to five classes which range from no impairment (Class 1) to extreme impairment (Class 5) which "preclude[s] useful function." Dr. Evans' opinion is that overall claimant falls between Class 3, which is moderate impairment, and Class 2, which is mild impairment. (Partial Tr. at 54-55.) In terms of her depression claimant suffers mild impairment, placing her in Class 2. With respect to her PTSD she suffers moderate impairment, placing her in Class 3. (*Id.* at 58.) Dr. Evan's ascribes both impairments to the claimant's 1991 injuries.

¶35 In the individual categories she evaluated, Dr. Evans rated claimant as mildly impaired in activities of daily living, mild to moderately impaired in the area of social functioning, moderately impaired in the area of concentration, and mildly impaired in her adaptation to stressful circumstances. (Trial Test.)

¶36 However, Dr. Evans was unable to translate the impairment into a percentage. She testified:

I don't feel comfortable with it. I am not trained in it. I am not trained to assign numbers. That's not my field of expertise.

(Partial Tr. at 54.)

¶37 Dr. Evans' inability to assign a percentage impairment rating is due in large part to the failure of the ama guides to provide for percentage impairments for mental and behavioral disorders. Actually, it is not a "failure" on the part of the ama guides, rather the ama guides state that mental impairment cannot be objectively quantified as can physical conditions. (ama guides at 241; Ex. 38 at 9.)

Reasonableness of Insurer's Denials

I. Medical Tests and Medications Prescribed by Dr. Dietrich

¶38 Dr. Dennis Dietrich (Dr. Dietrich) is a board certified neurologist. Since 1992 he has treated claimant for a post-concussion disorder and other complaints which stem from her 1991 injuries.

¶39 On March 12, 1998, Dr. Dietrich examined claimant. He noted at that time that claimant was "having more pain in the back and left leg" that the increased pain was curtailing her activities. (Ex. 15 at 1.) He further noted:

She did have an MRI about 15 months ago which showed slight disc bulging at L4-5 but nothing significant. She has not had an EMG for a number of years.

(*Id.*) He determined that new MRI and EMG studies should be done. (*Id.*) Also noting claimant's "reflux" complaints, he renewed her prescription for Prevacid.

¶40 On March 18, 1998, Dr. Dietrich's office contacted Patricia Hunt (Hunt), the claims adjuster assigned to claimant's case, and requested authorization to proceed with the MRI and EMG. Hunt requested further information. A copy of the doctor's March 12, 1998 notes was faxed to her.

¶41 Hunt then denied the request. She did so because an MRI had been done in 1996, an EMG had been done sometime in the past, and claimant had been declared at MMI with respect to her back in 1993 and again in 1997. She also denied payment for the Prevacid prescription because she viewed claimant's reflux problems more related to the stress of

an upcoming federal civil trial against the manufacturer of the security alarm at Thirsty's and because other less expensive drugs are available to treat reflux.

¶42 In denying authorization for the MRI, EMG and Prevacid, Hunt acted on her own without any medical consultation or advice (other than the advice supplied by Dr. Dietrich.)

¶43 In his deposition, Dr. Dietrich testified to the need for updated, new MRI and EMG studies. He testified:

A. A number of years ago, we diagnosed a neuralgic paresthesia, which was a condition of numbness of the thigh due to an injury to her leg, and I guess lower abdomen, which we thought that was related to her assault.

She then has since developed this back and leg pain, and she has had a number of falls over the last few years, some of them have a serious nature, one in which she actually broke her leg.

Those have been, I felt, related to difficulty with equilibrium and dizziness, which she had, which was a result of a concussion she experienced at the time of her assault.

So my concern is one of these falls may have caused worsening of a problem in the spine. Since the last evaluation it was more - I guess now it would now be almost two years ago.

....

In 1995, I saw her after she had one of these falls, in particular one that resulted in breaking her leg.

After this, she had developed some numbness of the left thigh, and then she started developing some difficulty with back pain and spasms in her back.

It was after that that Dr. Mahan performed an MRI scan of her spine, and we did an EMG and nerve conduction test. There was some evidence of disc bulging on the MRI, but we couldn't prove that that was causing any nerve problems, affecting her leg.

Recently the symptoms had become [sic] more persistent with this pain, and my concern is further problems have developed with regard to her spine.

Q. And that's the reason that you have ordered the additional testing?

A. Yes.

(Dietrich Dep. at 8-9, 16.)

¶44 Dr. Dietrich further testified that claimant suffers from gastroesophageal reflux, which means that she experiences a burning sensation in her stomach and esophagus. (Dietrich Dep. at 17.) Referring to information provided by Dr. Smith, who had previously treated claimant for hyper acidity, he noted that in September 1997, Dr. Smith had found

inflammation in the back of her larynx due to reflux. Dr. Dietrich noted that an impending federal trial was causing claimant severe stress, "worsening" her underlying condition. (*Id.* at 18-19.)

¶45 In Dr. Dietrich's opinion, while claimant has a long history of acid reflux, her condition has worsened since the 1991 assault. (Dietrich Dep. at 26.) He opined that claimant's need for gastrointestinal medication is due primarily to "the ongoing stress of dealing with the various physical symptoms that she has in combination with post-traumatic stress disorder. . . ." (*Id.* at 19.) Dr. Dietrich's office notes of November 26, 1997, also indicate that he felt that the upcoming trial, as well as stress related to her workers' compensation case, were contributing to her condition. (Ex. 15 at 2.) He summarized as follows:

I would view this as an exacerbation of an underlying condition due to the stress, mostly all of which is connected in some way to her assault and subsequent problems.

(*Id.*) He confirmed that opinion in his deposition. (Dietrich Dep. at 25-26.)

¶46 Following Dr. Dietrich's deposition the State Fund authorized the MRI and EMG studies and agreed to reimburse claimant for the Prevacid prescriptions.

¶47 The State Fund's denial of authorization for the MRI and EMG studies was unreasonable. The questions raised by the claims adjuster were legitimate questions, however, in disregarding Dr. Dietrich's advice she made a medical decision she was not qualified to make.

¶48 The State Fund's denial of payment for the Prevacid was not unreasonable. Dr. Dietrich's medical notes indicate that prior to the fall of 1997, the claimant's reflux had been adequately treated by lower cost medications and that the need for the higher priced medication occurred when claimant was under additional stress due to an impending federal trial. The State Fund's liability for the more expensive medication was reasonably debatable as it may be reasonably argued that the more costly medication is attributable to the stress of the impending trial, not to the injury, and that the State Fund's liability should have been limited to the lower cost medication.

II. Physical Restrictions

¶49 The State Fund conceded a 10% award for physical restrictions shortly before trial. However, it should have been apparent to the State Fund long before then that claimant was entitled to the 10% award. Dr. Galvas ordered an FCE in January 1998 and the State Fund was aware of the FCE results limiting claimant to light labor at least as early as March 24, 1998. (Ex. 41.) In reviewing actual results from the FCE, the claims examiner interpreted them as indicating claimant could perform medium labor, however, her interpretation was inconsistent with the statutory definition of medium labor. (Ex. 41 and § 39-71-703 (6)(b), MCA (1991).) Moreover, no job analysis of the time-of-injury job was ordered or performed

until September 1998 despite the fact that the rehabilitation provider had been working on the case since May 1997.

¶150 The State Fund could and should have determined that claimant was entitled to 10% for physical restrictions in March or April 1998 and its delay in making that determination was unreasonable.

III. Wage Loss

¶151 As noted in earlier findings, on May 1, 1998, claimant obtained part-time employment at Pizza Hut at a starting wage of \$5.15 an hour. (*Id.* at 20.) She was scheduled to work 20 hours per week.

¶152 Although claimant had secured employment at Pizza Hut, Marion continued providing her with job placement assistance with a view to placing claimant in a clerical position. (*Id.*) Marion also sought to place claimant in retail sales and other positions. (*Id.* at 1-16.) As set out in reports to the State Fund (*id.*), most of the jobs paid between \$5 and \$6 an hour for entry level positions.

¶153 Hunt testified as to her belief that claimant would not suffer a wage loss because she could be retrained in computer use and obtain employment at \$7.00 an hour or more. Her analysis was unreasonable. Marion's reports in May and June 1998 plainly showed that wages for positions in claimant's job market were in the \$5.00 to \$6.00 an hour range. Although, some jobs paying as high as \$7.00 and \$7.50 an hour were identified, those jobs were the exception and typically were wages paid after the employee gained experience in the position. Without consideration of claimant's ability to work only part-time, by June of 1998 it should have been clear to Hunt that claimant was entitled to at least a 10% award for wage loss. § 39-71-703 (3)(c), MCA (1991).

¶154 However, the State Fund's refusal to acquiesce to claimant's demand for 20% for wage loss was not unreasonable. Her 20% entitlement, as found by the Court, requires consideration of her inability to work as many hours post-injury as she worked preinjury, and on averaging her weekly wages post-injury over her preinjury hours. Section 39-71-703(3)(c), MCA (1991), speaks simply of a "wage loss of less than \$2 or less an hour" and a "wage loss of more than \$2 an hour." It does not address the precise time the wage loss is to be measured or the period of time over which it should be measured. Those matters require statutory interpretation. At the time it was analyzing this case it was not unreasonable for the State Fund to simply compare the absolute hourly rates pre- and post-injury.

CONCLUSIONS OF LAW

I. Applicable Law

¶55 Claimant's entitlement to permanent partial benefits is governed by the 1991 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶56 Claimant must prove her entitlement to benefits by a preponderance of the evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

III. Permanent Partial Disability Awards - In General

¶57 Section 39-71-703(1) and (2), MCA (1991), provides for when an injured worker is entitled to permanent partial disability benefits and how that award must be calculated.

Section 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.

(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%.

¶158 The parties agree that claimant is permanently partially disabled, thus she is eligible for an impairment award and the other benefits available under subsection (3) of section 39-71-703, MCA.

IV. Physical Restrictions

¶159 As a matter of fact, the Court has found that the claimant's time-of-injury job involved medium-labor activity. Following her injury she was restricted to light-labor activity. Therefore, she is entitled to a 10% award for her physical restriction. § 39-71-703(3)(d), MCA (1991).

V. Wage Loss

¶160 Section 39-71-703(3)(c), MCA (1991), refers to an "actual wage loss of \$2 or less an hour" and an "actual wage loss of more than \$2 an hour." It does not specify the precise time the wage loss is to be measured or the period of time over which the loss should be measured. In many cases the lack of further specificity makes no difference. For example, if an injured worker was working 40 hours a week and earning \$7 an hour at the time of his injury and immediately upon reaching maximum medical improvement goes back to work in a 40 hour a week job at \$5.15 an hour, his wage loss is \$1.85 an hour and he is entitled to 10%. But in some cases the injured worker does not return to work immediately after reaching MMI and/or may not be capable of working his preinjury hours. How is the wage loss measured in such cases?

¶161 In the recent case of *McGillis v. State Compensation Insurance Fund*, WCC No. 9806-7995, findings of fact, conclusions of law and judgment (November 2, 1998), I determined that in such cases the Court must look to the general definition of wages provided in section 39-71-123(3), MCA, of the Workers' Compensation Act. Section 39-71-123(3)(1991), provides:

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.

Section 39-71-123(3), MCA, acknowledges that an instantaneous slice of time may not accurately reflect an employee's wages, thus as a general rule at least four weeks should be considered. Section 39-71-123(b), MCA, acknowledges that in some cases four weeks may not be a sufficient measure of wages and that a longer time may be a better measure.

¶162 In this case, the claimant returned to work at a job paying \$5.15 an hour. At the time of trial, she was no longer employed but the testimony and reports of Marion show that she is capable of earning between \$5.00 and \$6.00 an hour. Thus, she is entitled to at least 10% for wage loss.

¶163 However, post-injury the claimant is unable to work the same number of hours a week as she worked preinjury. Preinjury she was working 32 hours a week. Post-injury at Pizza Hut she worked 20 hours a week. While both her psychiatrist and vocational counselor were hopeful that claimant may ultimately be able increase her hours of employment work up to full time, claimant has been unable to do so, at least to the present time. (Ex. 1 at 8.)

¶164 Statutes must be construed reasonably to avoid absurd results. *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 38, 394 P.2d 182, 198 (1964) ("Statutory or constitutional construction should not lead to absurd results if reasonable construction will avoid it."). If section 39-71-703(3)(c), MCA (1991), is construed as requiring that the post-injury wage per hour be compared with the preinjury hourly wage without consideration of the number of hours of employment, then a worker who preinjury was working 40 hours a week at \$7.00 but post-injury can work only 10 hours a week but still earn \$7.00 an hour during those 10 hours would suffer **no** "wage loss" under the section. That result is contrary to the plain meaning of "wage loss." It is also contrary to the first phrase of the subsection which, *without* regard to an hourly rate, provides that a worker is entitled to no wage loss benefits only if the worker "has no wage loss as a result of the industrial injury." A worker who cannot work as many hours post-injury as preinjury has a "wage loss" even if she can work at the preinjury "hourly" wage, thus an interpretation of the subsection as limiting wage loss comparisons to absolute hourly rates would fly in the face of the plain meaning of "wage loss" and the language of the first phrase of the subsection.

¶165 The only way to compute wages in such cases, and thereby avoid an absurd result, is to divide the weekly post-injury compensation by the number of hours the worker was employed per week preinjury. That will provide an hourly rate based on the number of preinjury hours and result in a reasonable comparison of pre- and post-injury wages. In this case, claimant returned to work at a \$5.15 an hour job for 20 hours a week, earning \$103.00 weekly. On a 32-hour work week basis she earned \$3.21 an hour. Even at \$6.00 an hour for 20 hours a week, on a 32-hour work week basis she would earn \$3.75 an hour. In either

case she experienced more than a \$2.00 an hour wage loss based on a 32 hour week and is entitled to a 20% award.

IV. Impairment Award

A. Evidentiary Basis

¶66 Section 39-71-703(3), MCA (1991), provides for impairment awards to injured workers suffering permanent impairment. It provides in relevant part:

(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. . . . [Emphasis added.]

¶67 Section 39-71-711, MCA (1991), governs impairment ratings and awards. It provides:

39-71-711. Impairment evaluation -- ratings. (1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association; and

(c) must be expressed as a percentage of the whole person.

(2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice. If the claimant and insurer cannot agree upon the rating, the mediation procedure in part 24 of this chapter must be followed.

(3) An evaluator must be a physician licensed under Title 37, chapter 3, except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12.

(4) Disputes over impairment ratings are not subject to 39-71-605.

¶68 The 11% impairment rating rendered by Dr. Galvas was not disputed by the State Fund and has presumably been paid. Claimant contends, however, that she is entitled to an additional 25% to 49% impairment award on account of her mental injuries. (petitioner's proposed findings of fact, conclusions of law and judgment at 15.)

¶69 Claimant's request for an additional impairment rating and payment fails for lack of evidence. Dr. Evans could not provide a percentage impairment rating. Section 39-71-711, MCA, provides that an impairment rating is a medical determination which must be made by a physician. The Court cannot supply an impairment rating where a physician does not.

B. Constitutional Challenge

¶170 Dr. Evans' inability to provide a percentage impairment rating was due in large part to the failure of the ama guides to provide for percentage ratings for mental impairment. Both the third edition of the ama guides, which was in effect at the time of claimant's injuries, and the fourth edition, which is the current edition, provide for evaluation for four types of functioning -- (1) activities of daily living, (2) social functioning, (3) concentration, and (4) adaptation. They further provide five classes of impairment, ranging from no impairment [class 1] to extreme impairment [class 5] for each of the four functions. ama guides, 3rd ed. at 241, 4th ed. at 301; Exhibits 38 and 39.

¶171 The text of both editions make it clear that the impairment for mental disorders is limited to the five classes and is not intended to be converted into a percentage. The third edition says:

Translating these guidelines for rating individual impairment on *ordinal* scales into a method for assigning percentage impairments, as if the ratings were made on precisely measured *interval* scales, is not recommended. For example, we cannot be certain that the difference in impairment between a rating of mild and moderate is the same as the difference between moderate and marked. Furthermore, a moderate impairment does not imply 50% limitation in useful function. Similarly, a rating of moderate impairment in all four areas of function does not imply a 50% impairment of the whole person. In reality, however, physicians often are required to make such judgment. It is important to remember that such judgments are based on clinical impression rather than on empirical evidence. In those circumstances in which it is essential to make a percentage rating, the ordinal scale might be of some help: one could assume that the extreme rating approaching 100% mental impairment is similar to a coma, which is the extreme impairment of central nervous system function and level of consciousness.

Eventually research may support the direct link between medical findings and percentage of mental impairment. Until that time the medical profession must refine its concepts of mental impairment, improve its ability to measure limitations, and continue to make clinical judgments.

(Guides to the Evaluation of Permanent Impairment, 3rd ed. at 241; Ex. 38 at 9.)

The fourth edition is even more emphatic, pointing out that, unlike ratings for physical impairments, there is no objective basis for rendering a percentage impairment with respect to mental impairments:

Comment on Lack of Percents in This Edition

The decision not to use percentages for estimates of mental impairment in this fourth edition of the *Guides* was made only after considerable thought and discussion. The

second edition (1984) provided ranges of percentages for estimating such impairment. Mental functions, such as intelligence, thinking, perception, judgment, affect, and behavior, were considered to fall into five classes, and the ranges were given as follows: normal, 0% to 5%; mild impairment, 10% to 20%; moderate impairment, 25% to 50%; moderately severe impairment, 55% to 75%; and severe impairment, more than 75%. Ability to carry out daily activities was estimated as follows: class 1, self-sufficient; class 2, needs minor help; class 3, needs regular help; class 4, needs major help; and class 5, quite helpless. From estimates of the individual's functioning, a whole-person impairment estimate could be made.

The procedure for the second edition was highly subjective. The third edition (1988) did not list percentages but instead provided the same classes of impairment as the fourth edition. There are some valid reasons to use ranges of percents for mental impairments. If this were done, the chapter on mental disorders would be consistent with *Guides* chapters for the other organ systems. Another point is that various systems for estimating disability have developed ranges of percentages; if such estimates were not provided in the *Guides*, the material in the *Guides* on mental disorders might be ignored. This would increase the likelihood that estimates would be made inconsistently in the various jurisdictions.

A more persuasive argument is that, unlike the situations with some organ systems, there are no precise measures of impairment in mental disorders. The use of percentages implies a certainty that does not exist, and the percentages are likely to be used inflexibly by adjudicators, who then are less likely to take into account the many factors that influence mental and behavioral impairment. Also, because no data exist that show the reliability of the impairment percentages, it would be difficult for *Guides* users to defend their use in administrative hearings. After considering this difficult matter, the Committee on Disability and Rehabilitation of the American Psychiatric Association advised *Guides'* contributors against the use of percentages in the chapter on mental and behavioral disorders of the fourth edition.

(*Guides to the Evaluation of Permanent Impairment*, Fourth Ed. at 301, 302; Ex. 39.)

¶72 Insofar as impairment ratings rendered pursuant to sections 39-31-703 (3) and -711 (1), MCA, rely on either the third or fourth edition of the ama guides, claimant challenges the constitutionality of the sections. She argues that the failure of the sections, via the ama guides, to provide for percentage ratings and monetary awards for mental impairments violates her rights to equal protection of the laws and to due process of law. U.S. Constitution, Amend. XIV; Mont. Const., Art. II, §§ 4 and 17.

¶73 As an initial matter, claimant must overcome the presumption that the statutes are constitutional. *Heisler v. Hines Motor Co.*, 282 Mont. 270, 279, 937 P.2d 45, 50 (1997) (citations omitted). To succeed in her challenge, she must prove the challenged statute to

be unconstitutional beyond a reasonable doubt; if any doubt exists the Court must resolve it in favor of the statute. *Id.* at 279, 937 P.2d at 50.

¶74 Claimant's argument is straight forward. She contends that the statutes, through the ama guides, make it impossible to obtain an impairment award for a mental impairment and that they therefore provide disparate and arbitrary treatment of mental disorders in comparison to physical disorders.

¶75 Claimant is correct in contending that no impairment award is available for mental disorders whereas an award is available for physical impairments. However, she is incorrect in contending that the distinction between mental and physical impairments is arbitrary and violates equal protection and due process principles.

¶76 Under the Equal Protection Clauses, classifications under the Workers' Compensation Act are subject to a rational basis test. That test requires only that the discriminatory classification bear a rational relationship to a legitimate governmental purpose. *Heisler* at 279; 937 P.2d at 50 (citing *Stratemeyer v. Lincoln County*, 259 Mont. 147, 151, 855 P.2d 506, 509 (1993)). Similarly, substantive due process principles invoked by claimant prohibit arbitrary government action. *Newville v. State Department of Family Services*, 267 Mont. 237, 249, 883 P.2d 793, 800 (1994). The essence of substantive due process is:

[T]he State cannot use its power to take unreasonable, arbitrary or capricious action against an individual. Therefore, in order to satisfy guarantees of substantive due process, a statute enacted by the legislature must be reasonably related to a permissible legislative objective.

Id. at 250, 883 P.2d at 801 (citations omitted).

¶77 As stated in section 39-71-711, MCA, impairment ratings are a medical determination. They are intended to objectively quantify loss of function, however, they imperfectly correlate with disability. A person who has lost a leg in a work-related injury may have a relatively high impairment rating, but if that person is a lawyer may suffer no disability within the meaning of the Workers' Compensation Act.

¶78 The third and fourth editions of the ama guides provide a reasonable, if not compelling, justification for distinguishing between physical and mental impairments. As set forth in those editions, percentage impairment ratings for mental disorders are subjective. In essence, they are arbitrary. Arbitrariness is the very vice that the Equal Protection and Due Process Clauses forbid. The Montana impairment rating statutes do not violate either equal protection or due process principles.

V. Attorney Fees and Penalty

¶79 Attorney fees and a penalty may be awarded only if the insurer's conduct is unreasonable. §§ 39-71-612 and -2907, MCA.

¶180 Initially, claimant is not entitled to attorney's fees or a penalty with respect to the State Fund's subrogation claim. Under section 39-71-612, MCA (1991), attorney fees may be awarded only if the controversy relates to "compensation" due claimant. Under section 39-71-2907, MCA (1991), a penalty attaches only to "benefits due a claimant" which have been delayed or refused. In *O'Brien v. State Compensation Ins. Fund*, order granting partial summary judgment (February 10, 1998), I determined that a claim for subrogation with respect to benefits *already* paid does not constitute benefits due. No penalty or attorney fees attach to such claim.

¶181 Claimant is not entitled to attorney fees or a penalty with respect to her claim for the additional impairment award she sought. She did not prevail in her request.

¶182 Claimant is not entitled to attorney fees or a penalty with respect to a full 20% award for lost wages. While the Court awarded the full 20%, it has also found that the insurer's contention that she was entitled to only 10% was reasonable.

¶183 Claimant is entitled to a 20% penalty with respect to the 10% for physical restrictions, 10% for wage loss, and medical expenses for an MRI and EMG since the State Fund unreasonably delayed or refused those benefits. At the close of trial, the Court ruled that claimant is also entitled to attorney fees with respect to those amounts, however, upon further review of the attorney fee statute and case law, I conclude that I erred in my oral ruling and that claimant is not entitled to attorney fees because the amounts were conceded prior to the commencement of trial.

¶184 Attorney fees are governed by section 39-71-712, MCA (1991), which provides in relevant part:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

....

Under a prior version of this section, the Supreme Court has held that where an insurer concedes liability prior to hearing there is no controversy for trial, hence nothing for the Workers' Compensation Court to adjudicate. *Lasar v. E.H. Oftedal & Sons*, 222 Mont. 251, 253, 721 P.2d 352, 354 (1986); accord *Field v. Sears, Roebuck & Co.*, 257 Mont. 81, 84-85, 847 P.2d 306, 308-09 (1993).

The prior version of section 39-71-612, MCA, at issue provided:

If an employer or insurer pays or tenders payment of compensation under chapter 71 or 72 of this title, but controversy relates to the amount of compensation due and the settlement or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as established by the division or the workers' compensation judge if the case has gone to a hearing, based solely upon the difference between the amount settled for or awarded and the amount tendered or paid, may be awarded in addition to the amount of compensation.

Field at 83, 847 P.2d at 308 (quoting section 39-71-612, MCA (1979)). The current provision does not use the word controversy and has eliminated reference to settlement and the power of the division to award attorney fees, however, it retains the qualification that for attorney fees to be awarded by the Court the case must have gone to hearing and the Court must have awarded additional compensation. Under *Lasar* and *Field*, where the insurer concedes the issue prior to hearing, there is nothing to adjudicate.

¶185 The State Fund conceded liability for the 10% labor restriction, a 10% wage loss, the MRI and the EMG sometime prior to trial. It is not clear exactly how long prior to trial the issues were conceded but the timing is not critical, all that is required is that the concession be made prior to trial and eliminate the need for an adjudication. The concession of the twin 10% amounts was made, according to claimant's counsel, by prior counsel for the State Fund, who was replaced approximately three weeks prior to trial. The concession of liability for the MRI and EMG was made shortly after Dr. Dietrich's deposition on August 31, 1998. Thus, those matters were not presented for adjudication and adjudication was unnecessary. No attorney fees are due with respect to the matters.

VI. Costs

¶186 Since the claimant has prevailed with respect to some of her prayers for relief, she is entitled to costs in an amount to be determined by this Court.

JUDGMENT

¶187 Claimant is entitled to only 10% for physical restrictions, pursuant to section 39-71-703(3)(d), MCA (1991).

¶188 Pursuant to section 39-71-703(3)(c), MCA (1991), claimant is entitled to and the State Fund shall pay 20% for loss of wages.

¶189 Claimant is not entitled to a further impairment award with respect to her psychological injuries.

¶190 Claimant is not entitled to a penalty with respect to (1) the State Fund's assertion of a subrogation interest in monies she recovered from a security alarm manufacturer; (2) her request for a further impairment award; (3) one half of the 20% wage loss award; and (4) the Prevacid prescription.

¶191 Claimant is entitled to a penalty with respect to (1) the 10% award for physical restrictions; (2) one half of the 20% wage loss award; and (3) the amounts due for a MRI and EMG.

¶192 Claimant is not entitled to attorney fees.

¶193 Claimant is entitled to her costs. The Court has received her memorandum of costs and the State Fund's opposition to some of the costs she seeks. The amount of costs due will be addressed in a separate order.

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

¶195 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 14th day of January, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Sara R. Sexe

Mr. William O. Bronson

Submitted: September 30, 1998