

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 116

WCC No. 9311-6928

MICHAEL STERMITZ

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

STATE OF MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS

Employer.

ORDER DENYING MOTION TO REOPEN

Summary: In case involving lost earning capacity under section 39-71-703, MCA (1985), claimant moved post-trial for permission to re-open record to take additional evidence on his employment situation.

Held: Where parties had full opportunity to present evidence on claimant's employment situation at trial, and there is no suggestion that there has been a change in his physical condition post-trial, motion to re-open record post-trial, to take additional testimony on claimant's employment situation, is denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1985). In assessing lost earning capacity under section 39-71-703, MCA (1985), an "old law" section, the Court must compare claimant's earning capacity absent injury to present earning capacity, looking to claimant's ability to earn in the open labor market, considering also his difficulty in performing his old job.

Benefits: Permanent Partial Disability Benefits: Lost Earning Capacity. In assessing lost earning capacity under section 39-71-703, MCA (1985), an "old law" section, the Court must compare claimant's earning capacity absent injury to present earning capacity, looking to claimant's ability to earn in the open labor market, considering also his difficulty in performing his old job.

Procedure: Post-Trial Proceedings: New Trial: Newly Discovered Evidence. Where parties had full opportunity to present evidence on claimant's employment situation at trial, and there is no suggestion that there has been a change in his physical condition post-trial, motion to re-open record post-trial, to take additional testimony on claimant's employment situation, is denied.

This matter was tried in Kalispell, Montana, on February 28, 1994. The parties thereafter prepared post-trial proposed findings of fact and conclusions of law. The case was deemed submitted for decision on May 9, 1994, and is at the top of the Court's ever decreasing list of submitted cases. Petitioner, however, has moved to reopen the evidentiary record to present new evidence regarding petitioner's employment situation.

This is an old law case and petitioner is seeking benefits under section 39-71-703, MCA (1985). The section provides compensation based on actual loss of earning capacity. "The disability rating [under the section] is to be determined by comparing earning capacity absent injury with earning capacity given the injury." **McDanold v. B.N. Transport, Inc.**, 308 Mont. 470, 479, 679 P.2d 1188 (1984). Lost earning capacity must be measured by claimant's "ability to earn in the open labor market." **Fermo v. Superline Products**, 175 Mont. 345, 348, 574 P.2d 251 (1978). The Court is also required to consider the claimant's difficulties in performing his old job. **Hafer v. Anaconda Aluminum Co.**, 198 Mont. 105, 111, 643 P.2d 1192 (1982).

The parties had a full and fair opportunity to present evidence concerning claimant's ability to earn wages in the open labor market. There was extensive vocational testimony. The present motion does not suggest that there has been any change in claimant's physical condition.

Under these circumstances the Court is persuaded that the case should be decided on the record presently before it. If the petitioner then determines that there are grounds to request a new trial, he may do so by filing a timely motion. The motion to reopen is **denied**.

Dated in Helena, Montana, this 21st day of December, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Ms. Sydney E. McKenna
Mr. Oliver H. Goe