IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 35

WCC No. 2000-0212

MICHAEL J. SIEGLER

Petitioner,

vs.

LIBERTY INSURANCE CORPORATION

Respondent/Insurer for

FEDERAL RESERVE BANK - HELENA

Employer.

ORDER DENYING MOTION TO AMEND

Summary of Case: Respondent insurer moved to amend findings of fact and conclusions of law previously made by the Court, arguing that the Court misconstrued and misapplied the "actual wage loss" standard applicable to permanent partial disability benefits.

Held: The motion is denied. Actual wage loss is measured by post-injury earnings or, in the alternative, what the claimant "is qualified to earn." Post-injury wages in this case were less than time-of-injury wages, and respondent does not argue otherwise. "Qualified to earn" is what the claimant **in fact** is qualified to earn. If his physical disability or any other factor render him non-hireable in the open labor market for a particular job, then he is not qualified to earn the wages for that position.

Topics:

> **Wages: Wage Loss.** Actual wage loss is measured by post-injury earnings or, in the alternative, what the claimant "is qualified to earn." Post-injury wages in this case were less than time-of-injury wages, and respondent does not argue otherwise. "Qualified to earn" is what the claimant **in fact** is qualified to earn. Qualifications are measured in the real world, not hypothetically. If a claimant's physical disability or some other factor render him non-hireable in the open labor market for a particular job, then he is not qualified to earn the wages for that position.

¶1 Respondent moves to amend the Court's Findings of Fact, Conclusions of Law and Judgment. Essentially, respondent argues that the Court has misconstrued and misapplied

the definition of "actual wage" loss. That definition is set forth 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.

As set forth in the bolded language, the benchmark for post-injury wages sets out two standards. The first is what the worker actually earns post-injury. The second, alternative standard, is what the worker is "qualified to earn."

¶2 Liberty does not argue that claimant's post-injury earnings are equal to his time-of-injury. Actual post-injury earnings in this case are significantly less, a fact that Liberty recognizes in arguing that the Court should consider average earnings of private detectives. Thus, Liberty is invoking the "qualified to earn" standard.

¶3 "Qualified to earn" means exactly what it says: Claimant must be "qualified to earn" for employment as a private detectives in order to be qualified to earn private detective wages. He must be employable **in fact** as a private detective, **not as some theoretical matter.** If his physical disabilities or other factors are such that he has no realistic chance of ever being hired as a private investigator, then he is **not** "qualified to earn" the wages which private detectives generally make in Montana. I found that claimant does not have a realistic chance of being hired.

¶4 While the "qualified to earn" concept may harken back in some respects to the "earning capacity" concept, it is nonetheless clear and unambiguous. Qualifications are measured in the real world based on the specific facts of the case, not hypothetically.

¶5 The motion is **denied**.

DATED in Helena, Montana, this 22nd day of June, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Larry W. Jones
Submitted: June 18, 2001