IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 35

WCC No. 2004-0964

MICHAEL O. WOODWORTH

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Pursuant to section 39-71-703(5)(c), MCA (1999), the claimant is seeking a ten percent permanent partial disability award for lost wages. He injured his neck on June 30, 2001, in an industrial accident and thereafter underwent a cervical diskectomy and fusion. Following his surgery, he returned to work in his time-of-injury job as a millwright but was unable to work the overtime hours he had been working prior to his injury. Also, he returned to work prior to reaching maximum medical improvement (MMI). He suffered a wage loss until some ten weeks after he reached MMI. Then, approximately fifteen months later, he changed jobs because he was physically unable to continue working in his time-of-injury job. He suffered a wage loss in the new job, however, his wage loss lasted only sixteen and one-half weeks assuming his loss is measured by his wage at the time of his injury without consideration of any increases thereafter.

Held: Under section 39-71-703(5)(c), MCA (1997-2001), the claimant is entitled to a ten percent permanent partial disability award for wage loss. Where a claimant returns to work upon reaching MMI, wage loss must be measured by comparing his preinjury wage with his average wage during the first four pay periods following MMI. In the event the claimant is able to return to his time-of-injury job and has no wage loss upon reaching MMI but thereafter is physically unable to continue working at his time-of-injury job or can only work on a reduced schedule, his wage loss must be measured at that time using the same four pay period parameter beginning at the time of his loss.

Topics:

> **Benefits: Permanent Partial Benefits: Wage Loss.** Pursuant to section 39-71-703(5)(c), MCA (1997-2001), wage loss for purposes of permanent partial disability

benefits must be determined at the time the claimant reaches maximum medical improvement. If he returns to work at that time, and the insurer offers no evidence that his actual wage upon return to work is less than he is capable of earning, wage loss should be measured by the difference between his average weekly wage at the time of his injury and his average wage for the four pay periods immediately following his reaching maximum medical improvement and return to work. *See* § 39-71-123(3), MCA (1999). In the event that the claimant's disability thereafter increases and he suffers a further wage loss, then his benefits must be recomputed based on the additional wage loss. § 39-71-739, MCA (1979-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-703, MCA (1997-2001). Pursuant to section 39-71-703(5)(c), MCA (1999), wage loss for purposes of permanent partial disability benefits must be determined at the time the claimant reaches maximum medical improvement. If he returns to work at that time, and the insurer offers no evidence that his actual wage upon return to work is less than he is capable of earning, wage loss should be measured by the difference between his average weekly wage at the time of his injury and his average wage for the four pay periods immediately following his reaching maximum medical improvement and return to work. *See* § 39-71-123(3), MCA (1999). In the event that claimant's disability thereafter increases and he suffers a further wage loss, then his benefits must be recomputed based on the additional wage loss. § 39-71-739, MCA (1979-2003).

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> difference between his average weekly wage at the time of his injury and his average wage for the four pay periods immediately following his reaching maximum medical improvement and return to work. *See* § 39-71-123(3), MCA (1999). In the event that the claimant's disability thereafter increases and he suffers a further wage loss, then his benefits must be recomputed based on the additional wage loss. § 39-71-739, MCA (1979-2003).

¶1 The trial in this matter was held in Missoula, Montana, on April 12, 2004. Petitioner was present and represented by Mr. Howard Toole. Respondent was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 10 were admitted without objection.

¶3 Witnesses and Depositions: The Court received the depositions of Scott Mitten and Michael O. Woodworth. In light of the discussion with counsel and an agreement as to the basic facts determinative of the issues in this case, the Court deemed the receipt of further evidence unnecessary and ruled in the claimant's favor concerning his wage-loss claim.

¶4 Issues Presented: The Pretrial Order sets out the following issues for decision:

> ¶4a Whether Petitioner has suffered wage loss as a result of his injury.
>
> ¶4b Whether Petitioner is entitled to wage loss benefits, benefits for physical restrictions and any other permanent partial disability benefits arising out of the 6/30/2001 injury.
>
> ¶4c Whether Petitioner is entitled to a penalty and attorney fees.

(Pretrial Order at 2.)

FACTS

¶5 This case essentially involves interpretation of the 1999 laws governing permanent partial disability benefits. The interpretive issues are of first impression.

¶6 The basic facts I find essential to the decision in this matter are uncontested and are taken from the uncontested facts set out in the Pretrial Order, the exhibits, the claimant's deposition, and the representations and stipulations of counsel concerning other uncontroverted matters.

¶7 The petitioner (claimant) was injured on June 30, 2001, while working for Stimson Lumber Company (Stimson), at its Bonner, Montana mill. While lifting an oxygen tank, he twisted and experienced pain in his left shoulder and neck. (Ex. 4 at 1.) He was subsequently diagnosed as suffering from left-sided C6-7 disk herniation with radiculopathy and underwent a C6-7 diskectomy and fusion. (Ex. 1.)

¶8 At the time of the claimant's industrial injury, Stimson was insured by Liberty Northwest Insurance Company (Liberty.) Liberty accepted liability for his injury and has paid temporary total disability benefits, medical benefits, and an impairment award.

¶9 At the time of his injury, the claimant was a millwright, a job which entailed very heavy labor. (Claimant's Dep. at 11; Ex. 3 at 1.) He worked significant overtime. While his hourly wage was $17.60 an hour, Liberty factored his overtime hours into its wage calculation and determined that he earned $19.17 an hour. That calculation was based on the claimant's total pay for his last four pay periods divided by the total number of hours in a regular, forty-hour work week.

¶10 A record of claimant's last four pay periods verifies Liberty's calculation within one cent. The record is found at Exhibit 9 at page 2. It shows that the claimant was paid semi-monthly (twice monthly) and earned $6,666.65 during his last 4 pay periods, i.e., during the 2 months immediately preceding his injury. Annualized, he was earning $39,999.90. A 365-day year has 52.1429 weeks in it (*365/7*). Dividing the number of weeks in a year into the claimant's annualized salary yields $767.12 weekly, or $19.18 an hour based on a 40-hour work week.

¶11 During colloquy, counsel for the claimant indicated that his calculation of the claimant's hourly wage was higher. However, he did not contend that his calculations would result in a wage loss of $2 or more. In view of my determination of the legal issues, it was unnecessary to further parse the claimant's time-of-injury wages.

¶12 The claimant's surgery was on September 26, 2001. Even though he had not reached maximum medical improvement (MMI), in late December 2001 he returned to work in his time-of-injury job. However, he was physically unable to resume working as much overtime as previously and therefore had a wage loss. His wage loss was less than $2 an hour.

¶13 His wage loss continued until July 2002 when he resumed working a full schedule of overtime. His wage loss ceased at that time.

¶14 Meanwhile, the claimant was declared at MMI as of April 16, 2002. (Ex. 1 at 9.) Since the claimant was still working a reduced number of hours on that date, as of that date he had a wage loss. The wage loss was less than $2 an hour.

¶15 The claimant continued working at his time-of-injury job until July 6, 2003, at which time he took a new job as business manager for the local Union of Lumber, Production & Industrial Workers. (Ex. 10 *and* Claimant's Dep. at 7-8.) He took the job because he was having difficulty physically performing his job as a millwright. Liberty stipulated that as of July 6, 2003, the claimant was no longer physically able to perform his time-of-injury job and that his inability to do so was on account of his industrial injury.

¶16 The claimant's initial wage as business manager was $18.73 per hour, thus he experienced a wage loss of less than $2.00 an hour in comparison to his time-of-injury job.

¶17 On November 1, 2003, the claimant received an increase in pay to $19.18 an hour for his work as business manager. Thus, assuming the wage computations in paragraph nine are accurate, his wage at that point was equal to his wage at the time of his injury. However, at the same time he received the increase, Stimson increased the wage for his old millwright position. If compared to that increased wage, the claimant continued to experience a wage loss.

¶18 The claimant's impairment was rated at nine percent. (Ex. 1 at 9.) Based on that rating, Liberty paid claimant a nine percent impairment award, however, it has not paid him any benefits for wage loss or physical restrictions. It contends he suffered no wage loss in light of the fact that he returned to full wages within a short time after he reached MMI and again after he became business manager for his Union.

CONCLUSIONS OF LAW

¶19 The claimant's entitlement to permanent partial disability benefits is governed by the 1999 version of the Workers' Compensation Act since that version was in effect on the date of claimant's injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶20 His entitlement to permanent partial disability benefits is governed by sections 39-71-703, MCA (1997-2001), and 39-71-116(23), MCA (1999-2001). Section 39-71-703, MCA (1999), 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 . . .
>
> . . . .
>
> (2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.
>
> (3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 350 weeks.

. . .

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;

(b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;

(c) if a worker has no actual 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%. Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.

(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, 5%; 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, 3%; 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, 2%.

. . . .

Section 39-71-116(23), MCA (1999), provides:

(23) "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.

¶21 Pursuant to section 39-71-703(5)(c), MCA (1999), the claimant is seeking a ten percent award for wage loss. Ten percent is equivalent to thirty-five weeks of PPD benefits. § 39-71-703(3), MCA (1997-2001).

¶22 Liberty urges that the claimant had no wage loss since his pay rebounded to his pre-injury levels within weeks of his reaching MMI. In the alternative, it urges that wage-loss benefits should be payable only during the actual weeks he suffered a wage loss.

¶23 As set forth in sections 39-71-703(5) and 39-71-116(23), MCA, determination of the claimant's entitlement to PPD benefits initially requires him to demonstrate an "actual wage loss." "Actual wage loss" is expressly defined. Section 39-71-116(1), MCA (1999), provides:

> (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.

Since Liberty does not contend claimant is capable of earning more than the wages he has in fact earned, the section requires a comparison between the claimant's actual wages at the time of his injury and the wages he earned upon and after reaching MMI.

¶24 Section 39-71-116(1), MCA (1999-2001), fixes the time to measure wage loss. The time fixed is at the time the claimant reached MMI. Seemingly, the section precludes wage-loss benefits if the claimant returned to his time-of-injury job and earned the same wages as he did preinjury, even though sometime thereafter he suffered a wage loss because he became physically unable to continue working in his time-of-injury job or was able to work only on a reduced schedule. However, the section must be read together with section 39-71-739, MCA (1979-2003), which provides:

> **39-71-739. Compensation in case of changes in degree of injury**. If aggravation, diminution, or termination of disability takes place or is discovered after the rate of compensation is established or compensation is terminated in any case where the maximum payments for disabilities as provided in this chapter are not reached, adjustments may be made to meet such changed conditions by increasing, diminishing, or terminating compensation payments in accordance with the provisions of this chapter.

Under the plain language of this latter section, the claimant's PPD benefits must be recomputed if his disability increases at a later time. Therefore, even if the claimant did not suffer a wage loss at the time of his MMI, he is entitled to PPD wage- loss benefits if he suffered a wage loss when he became unable to continue working as a millwright.

¶25 The more difficult question is what time frame must be used in computing the claimant's wages after he reached MMI. I can think of a number of possibilities, including the following: (1) the hourly wage paid the instant the claimant returned to work without consideration of the hours worked thereafter; (2) his first week's wages post-MMI; (3) the first four pay periods post-MMI; (4) a longer period of time up to a year if the first four pay periods are not representative of his post-MMI wages; (5) the actual wages paid during each week, limiting wage-loss benefits to those weeks during which he in fact suffered a wage loss, up to the maximum thirty-five or seventy weeks provided in section 39-71-

703(5), MCA (1997-2001); and (6) the highest wage achieved during the first few weeks after returning to work.

¶26 Liberty apparently adopted the sixth alternative in denying the claimant benefits. The claimant's wages did in fact rebound to preinjury status within ten weeks of his reaching MMI. Ignoring the wage increase given millwrights in November of 2003, his wages also rebounded within sixteen and one-half weeks of his becoming the business manager of his Union. Nonetheless, despite the rebound, he still suffered a wage loss during twenty-six weeks of his post-MMI employment. None of the PPD sections provide a "slack time" for determining wage loss, and the Court is prohibited from writing in such a requirement. § 1-2-101, MCA.[(1)] Moreover, section 39-71-703(5)(c), MCA (1997-2001), does not limit wage-loss benefits to the weeks of actual wage loss. The section specifically provides that if there is *any* wage loss, no matter how small, the claimant is entitled to a ten percent PPD award, which is equivalent to thirty-five weeks of PPD benefits. § 39-71-703(3), MCA (1979-2001). I therefore conclude, as a matter of law, that if the claimant suffered any wage loss he is entitled to the full thirty-five weeks of PPD benefits.

¶27 In considering the other alternatives, I conclude that the most appropriate measure of claimant's post-MMI earning is the actual amounts he earned during the four pay periods subsequent to his achieving MMI.[(2)] Similarly, the most appropriate measure of his earnings after he became disabled from working as a millwright was the wages he earned as a business manager for his Union during the first four pay periods for that position. Under either measure, he suffered a wage loss of less than $2 an hour and is entitled to 35 weeks of benefits.

¶28 While the legislature did not provide specific guidelines for determining post-injury wages, the requirement that post-injury wages be compared to preinjury wages contains an *inherent* directive that equivalent measures of wages be used in the comparison. Otherwise, the wages cannot be truly compared.

¶29 The comparison required by section 39-71-116(1), MCA (1999-2001), is between the wages that the claimant was in fact earning at the time of injury with his post-injury wages, i.e., "actual" preinjury wages versus "actual" post-injury wages. While the legislature did not provide any further measure of post-injury wages, it has provided a very specific measure of preinjury wages. That measure is set out in section 39-71-123(3)(a), MCA (1999), which 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.

(b) For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

A similar measure must be used in determining post-injury, post-MMI earnings for purposes of PPD benefits.

¶30 Applying the four pay period measure in the present case, the claimant suffered a wage loss both at the time of his MMI and at the time he became disabled from his time-of-injury job.[(3)] That loss was less than $2 an hour, therefore, he is entitled to 35 weeks of PPD benefits for wage loss. § 39-71-703(5)(c), MCA (1979-2001).

¶31 During discussion with counsel, Liberty's counsel requested that the Court determine whether preinjury wages must be increased to reflect any increases in wages up to the time the claimant reached MMI. It is unnecessary for me to answer that query in this case since the raw wages paid the claimant at the time of his injury were less than the raw wages paid to him upon reaching MMI and upon becoming disabled from his time-of-injury employment. Liberty's request is therefore for an advisory opinion, which courts are loathe to give.

¶32 Counsel indicated that there is a remaining issue concerning the claimant's entitlement to benefits based on his physical restrictions. § 39-71-703(5)(d), MCA (1979-2001). While counsel had originally scheduled a medical deposition to determine the claimant's physical restrictions, they agreed to cancel it pending my determination of the wage-loss issue. Their agreement was imminently reasonable: If I had determined there was no wage loss, then the claimant would not be entitled to benefits based on his physical restrictions.

¶33 In light of my resolution of the wage-loss issue, counsel indicated that they may be able to resolve the physical restrictions issue without further litigation, however, they requested that the Court retain jurisdiction in the event they are unable to do so. Their request is reasonable and prudent, and it is granted.

¶34 With respect to the claimant's request for attorney fees, I find that Liberty's denial of PPD benefits was not unreasonable. Its denial was based on its interpretation of PPD statutes. The specific issues raised are matters of first impression. While I have rejected Liberty's interpretation of PPD statutes, its arguments were not unreasonable or beyond the pale of legitimate advocacy.

JUDGMENT

¶35 The claimant is entitled to a ten percent permanent partial disability award for wage loss. That award amounts to thirty-five weeks of permanent partial disability benefits, which are presently due and shall be paid forthwith.

¶36 The claimant is not entitled to attorney fees or a penalty.

¶37 The claimant is entitled to his costs and shall submit a memorandum of costs in accordance with Court rules.

¶38 The Court reserves continuing jurisdiction to determine the claimant's entitlement to permanent partial disability benefits based on physical restrictions, in the event the parties are unable to agree on those benefits. § 39-71-703(5)(d), MCA (1997-2001).

¶39 This JUDGMENT is certified as final for purposes of appeal.

¶40 Any party to this dispute may have twenty 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 April, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole
Mr. Larry W. Jones
Submitted: April 12, 2004

1. Section 1-2-101, MCA, provides in relevant part:

> In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, **not to insert what has been omitted** or to omit what has been inserted. [Emphasis added.]

2. By analogy, had the claimant not suffered a wage loss immediately following MMI but experienced one later on after becoming unable to continue his time-of-injury job or his usual number of hours working at that job, then the measure of actual wage loss would be based on the four pay periods following his change of jobs.

3. Liberty did not argue that there is good cause to extend the post-injury period beyond the four pay period rule, as might be allowed under subsection 39-71-123(3)(b), MCA (1999). Moreover, it is difficult to imagine how good cause for an extension would exist. While claimant's physical limitations may restrict his overtime hours, thus resulting in a wage loss, an increase in overtime hours after his return to work indicates nothing more than the

employer's demand for greater hours of work. Such demand is independent of the claimant's industrial injury and would have occurred irrespective of his injury. Thus, the increased hours and concomitant wages should not offset lost wages suffered prior to claimant's regaining his ability to work a full complement of overtime.