

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2001-0468

HEATHER APPLGATE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BITTERROOT VALLEY LIVING CENTER

Employer.

DECISION AND JUDGMENT

1 This matter came on for trial on January 15, 2002, in Missoula, Montana. Petitioner, Heather Applegate, was present with her attorney, Mr. Steve Fletcher. Respondent was represented by Mr. Larry W. Jones.

2 At the commencement of trial, the Court entered several rulings of law affecting the evidence to be presented at trial.

3 First, the Court ruled that the preinjury wage to be used in computing any wage loss was the wage claimant in fact was earning at the time of her injury, not some other wage the claimant may have believed she was entitled to based on policies of her employer. That ruling was based on the clear language of section 39-71-116(1), MCA (1999), which 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**. [Emphasis added.]

The Random House Unabridged Dictionary (1993) defines "actual" as "existing in act or fact" or "existing now," and that definition is in accord with the common understanding of the term.

4 Second, the Court ruled that the wage loss and rehabilitation provisions found in sections 39-71-116(1), -1006 and -1011, MCA (1999), do not amount to "an unconstitutional delegation of legislative authority," as claimed by petitioner in her contention number 6 of the Pretrial Order. Initially, contrary to her contention, the "wage loss" provision does have

guidelines, indeed the guidelines are plain and clear on their face. Further, the provisions attacked do not "effectively allow an insurance company to arbitrarily deny a rehabilitation plan and/or vocational and permanent partial disability benefits," as further asserted in contention number 6. An adverse determination by the insurer is reviewable by this Court, 39-71-2905, MCA (1999); indeed, the claimant invoked this Court's jurisdiction when she filed her petition. The Court determines *de novo* whether claimant is entitled to benefits, and if the insurer's denial of a plan or benefits is unreasonable it may assess a penalty and attorney fees against it, 39-71-611, -612, 2907, MCA (1999). For the same reasons, *Ingraham v. Champion International*, 243 Mont. 42, 793 P.2d 769 (1990), is inapposite. In *Ingraham* the statute in question stripped the courts of jurisdiction to review the insurer's denial of a lump-sum conversion.

5 Following my rulings, as set forth above, respondent's attorney stipulated that if the Court finds a wage loss then respondent agrees that the rehabilitation plan proposed by Deborah A. Peterson and found in Exhibit 15 to her deposition is reasonable. Upon inquiry by the Court, claimant indicated that she wishes to embark on the rehabilitation plan proposed by Ms. Peterson.

6 Exhibits 1, 2, 4, and 6 were admitted without objection. Insofar as Exhibits 3 and 5 contain irrelevant information they will be disregarded in accordance with the Court's previous rulings. The parties agreed that the depositions of claimant, Jamie Kern, and Deborah Peterson can be considered part of the record. (Lacking any objections to the exhibits which were attached to the depositions, the deposition exhibits were deemed admitted.) Claimant, Heather Applegate, was sworn and testified. Jamie Kern, Margie Fruit, and Deborah Peterson were sworn and testified.

7 At the conclusion of the hearing, the Court ruled from the bench, finding that claimant suffered a wage loss. Therefore, the rehabilitation plan found in Exhibit 15 was approved with the proviso that claimant consult with Ms. Peterson and undertake the plan as soon as practicable. The attorney fees and penalty issues were denied, the Court finding that the insurer acted reasonably in concluding that claimant did not suffer a wage loss and therefore in denying rehabilitation benefits.

8 At the time of the bench ruling, I indicated that unless counsel requested detailed written findings of fact I would enter judgment based upon my oral findings of fact and conclusions of law, attaching a transcript of the ruling to the Judgment. Neither counsel requested written findings. Accordingly, the transcript attached to this judgment shall constitute the Court's findings of fact and conclusions of law.

JUDGMENT

9 In accordance with those findings of fact and conclusions of law, judgment is entered determining and adjudging that the rehabilitation plan which is found in Exhibit 15 to

Deborah Peterson's deposition is reasonable and shall be undertaken by claimant as soon as practicable. Upon claimant's beginning the plan, the respondent shall pay benefits in accordance with the statutory provisions governing rehabilitation benefits. It is further ordered and adjudged that claimant is not entitled to attorney fees or a penalty, however, she is entitled to costs in accordance with the rules of this Court and shall file her memorandum of costs in accordance with Court rules.

10 This JUDGMENT is certified as final for purposes of appeal.

11 Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 31st day of January, 2002.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Steve Fletcher

Mr. Larry W. Jones

Attachment

Submitted: January 15, 2002