IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 34

WCC No. 9703-7718

VELLEDA BATES

Petitioner

vs.

RANGER INSURANCE COMPANY

Respondent/Insurer for

WESTERN CARE NURSING HOME

Employer.

PARTIAL FINDINGS OF FACT, CONCLUSIONS OF LAW
AND PARTIAL JUDGMENT

Summary: Former nurses aide, who is permanently totally disabled, claims her weekly wages for purposes of determining her PTD rate should include overtime.

Held: Under section 39-71-116(20), MCA (1981), wages were defined as "average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered." In Coles v. Seven Eleven Stores, 217 Mont. 343, 704 P.2d 1048 (1985), the Supreme Court concluded that "usual hours of employment" and an exclusion of overtime created an ambiguity in situations where the employee's usual hours included overtime. The Supreme Court found the statute to exclude overtime hours "from the calculation unless the overtime is consistently and regularly part of the claimant's work record." Here, claimant did not prove she worked consistent and regular overtime.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-116(20), MCA (1981). Former nurses aide, who is permanently totally disabled, claimed her weekly wages for purposes of determining her PTD rate should include overtime. Under section 39-71-116(20), MCA (1981), wages were defined as "average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered." In Coles v. Seven Eleven Stores, 217 Mont.

343, 704 P.2d 1048 (1985), the Supreme Court concluded that "usual hours of employment" and an exclusion of overtime created an ambiguity in situations where the employee's usual hours included overtime. The Supreme Court found the statute to exclude overtime hours "from the calculation unless the overtime is consistently and regularly part of the claimant's work record." Here, claimant did not prove she worked consistent and regular overtime.

Wages: Average Weekly Wage. Former nurses aide, who is permanently totally disabled, claimed her weekly wages for purposes of determining her PTD rate should include overtime. Under section 39-71-116(20), MCA (1981), wages were defined as "average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered." In Coles v. Seven Eleven Stores, 217 Mont. 343, 704 P.2d 1048 (1985), the Supreme Court concluded that "usual hours of employment" and an exclusion of overtime created an ambiguity in situations where the employee's usual hours included overtime. The Supreme Court found the statute to exclude overtime hours "from the calculation unless the overtime is consistently and regularly part of the claimant's work record." Here, claimant did not prove she worked consistent and regular overtime.

Wages: Overtime. Former nurses aide, who is permanently totally disabled, claimed her weekly wages for purposes of determining her PTD rate should include overtime. Under section 39-71-116(20), MCA (1981), wages were defined as "average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered." In Coles v. Seven Eleven Stores, 217 Mont. 343, 704 P.2d 1048 (1985), the Supreme Court concluded that "usual hours of employment" and an exclusion of overtime created an ambiguity in situations where the employee's usual hours included overtime. The Supreme Court found the statute to exclude overtime hours "from the calculation unless the overtime is consistently and regularly part of the claimant's work record." Here, claimant did not prove she worked consistent and regular overtime.

This matter came for trial on Tuesday, May 20, 1997, in Helena, Montana. Petitioner, Velleda Bates (claimant), was present and represented by Mr. Andrew J. Utick. Respondent was represented by Mr. Jason G. Dykstra and Mr. Thomas A. Marra.

After opening statements and colloquy with counsel, the Court determined that claimant's request for a lump sum was not ready for trial and that further information should be presented by claimant to respondent to enable respondent to fairly evaluate her request. That part of the trial was vacated and will be reset on an expedited basis if further information does not produce an agreement between the parties. The remaining matter, involving calculation of claimant's wages, proceeded to trial.

Claimant testified, providing the only evidence with respect to the wage issue. Her objection to purported time records offered by respondent was sustained since the purported records were not authenticated.

Following claimant's testimony the Court agreed to provide an expedited ruling on the wage issue. These Partial Findings of Fact, Conclusions of Law and Partial Judgment, shall serve as its disposition of the issue.

Having considered claimant's testimony, the stipulated facts, the depositions and exhibits, insofar as they pertain to the wage issue, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant was injured in a work-related accident on October 6,1982. At the time of her industrial accident, she was employed as a nurse's aid at Western Care Nursing Home (Western) in Helena, Montana. She filed a claim for compensation, which was accepted by Western's insurer, Ranger Insurance Company (Ranger).

2. Ranger has conceded that claimant is permanently totally disabled as a result of her industrial accident and has been paying her biweekly permanent total disability benefits.

3. At the time of her injury, the claimant's hourly wage was $3.93. In determining claimant's benefits the insurer used a 40-hour week, which yields a weekly wage of $157.20 and a permanent total disability rate of $104.80.

4. Claimant contends that her weekly wage should include overtime hours she worked during the eight weeks reported in the Employer's First Report. Those wages were as follows:

Two week period ending:	Wages paid:
August 12, 1982	$306.54
August 26, 1982	$340.93
September 9, 1982	$435.74
September 23, 1982	$314.40

TOTAL	$1,397.61

5. After taking the overtime rate of pay into consideration, the reported wages show that during the last four, two-week pay periods, the claimant worked the following hours:

Two week period ending:	Hours worked:
August 12, 1982	78
August 26, 1982	84.5
September 9, 1982	100.6
September 23, 1982	80
AVERAGE hours per week	42.8875

Claimant contends that her weekly wages should be increased by $11.36 to $168.56 per week to reflect an additional 2.89 hours of work per week.

6. Claimant testified that until a month and a half prior to her injury she had been working 40-hour weeks. However, she said that nurse's aids at Western were then told that they had to provide reports to the next shift, which might or might not cause overtime, and that due to family complaints they were to take at least three patients for walks each day. If the walks were not accomplished during their normal shifts, they were required to stay and work overtime to complete them. Claimant was told that the requirement would continue until Western obtained volunteers to perform the function. Claimant expressed doubt that the employer would have followed through in obtaining volunteers, testifying:

Q. What was your understanding about the future, was this supposed to continue?

A. That was going to not change, it was going to be that way.

Q. For how long?

A. To my opinion, what I thought.

Q. For how long?

A. Until they were able to get more people to come in and volunteer to do things like that, so the aids and job they were going to - they hadn't had any plans that I know of changing it, of changing.

(Tr. at 72, bold in original.)

7. There is no record or other evidence indicating the number of hours of overtime claimant might have worked on a regular basis, or how often she would have been unable to walk patients during her regular shift.

CONCLUSIONS OF LAW

1. Claimant's benefits are governed by the 1981 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. At the time of claimant's injury, section 39-71-702, MCA (1981), provided that permanent total disability benefits "shall be 66 2/3% of the wages received at thetime of the injury." In turn, wages were defined as "average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered." § 39-71-116(20), MCA (1981).

3. Claimant cites two cases as supporting her contention that her overtime hours should be considered "usual hours of employment" counted in computing her benefits. Initially, she cites *Coles v. Seven Eleven Stores,* 217 Mont. 343, 704 P.2d 1048 (1985). In *Coles* the Supreme Court considered the "wages" definition set forth in the preceding paragraph. It considered whether any overtime hours could be included notwithstanding the limiting language "overtime shall not be considered." It held:

Section 39-71-116(20), MCA, defines wages as "the average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered . . ." The insurer argues, in the second issue, that section 39-71-116(20), MCA should be strictly construed so that the claimant's regular overtime hours are not considered when computing her rate of compensation. The claimant argues that the words "usual hours of employment" and "overtime" as used in this statute are conflicting when a person's usual hours includes overtime hours. The court below acknowledged the conflict and concluded that the statute was ambiguous because its reference to overtime does not indicate whether this means overtime earnings are not to be considered, overtime hours are not to be considered, or both. We agree that the statute is ambiguous under these circumstances.

When construing a statute, every provision must be given meaning or effect if possible. *State v. District Court of the First Judicial Dist. in and for Lewis and Clark County* (1926), 77 Mont. 290, 250 P. 973. Further, the Court is under a duty to construe the

Workers' Compensation Act liberally, section 39-71-104, MCA, and resolve ambiguity in favor of the injured worker. *Gaffney v. Industrial Accident Board* (1955), 129 Mont. 394, 287 P.2d 256. The interpretation that gives effect to all the provisions and also resolves the ambiguity in favor of the injured worker is one which includes overtime hours that are part of a claimant's usual hours of employment at the straight pay rate in the benefit calculation. **Thus, overtime will generally be excluded in determining the usual hours of employment. However, if the work record shows that the employer hired the claimant expecting overtime work and the claimant actually worked overtime on a consistent and regular basis, as in the case at bar, then that overtime becomes part of the usual hours of employment. The overtime will not be included at the premium rate, but as extra hours at regular pay.**

We construe section 39-71-116(20), MCA to mean overtime premium earnings are not considered in calculating wages and that the phrase "usual hours of employment" excludes overtime hours from the calculation unless the overtime is consistently and regularly part of the claimant's work record, as in the case at bar.

Id. at 348, 704 P.2d at 1051-52, emphasis added.

To prevail under *Coles,* claimant must prove that the overtime she worked was both consistent and regular. She has failed in her proof. There is no regularity or consistency to her overtime hours. The Court notes that in the final two week period of her employment, she worked two regular 40 hour weeks. Her industrial accident does not explain her lack of overtime hours for that week since those two weeks ended September 23, 1982, whereas her injury occurred on October 6, 1982. Moreover, the overtime hours she worked during two of the four periods were dissimilar and inconsistent. During one period she worked only 4.5 overtime hours, during the other 20.6. Counting the 20.6 hours grossly skews the overtime average and claimant has provided no credible evidence that those hours would have been regular and consistent in the future, indeed the very next period she worked **no** overtime. According to her own testimony, claimant was told by the employer that overtime was temporary until volunteers could be recruited to walk patients. Claimant speculated that the employer would not recruit volunteers, basing her testimony on the fact that she was unaware of any specific plans to recruit volunteers. (Tr. at 72.) Given the limited overtime claimant worked, the short period of time covered, and the fact that claimant worked no overtime during the last full two weeks recorded, her speculation is insufficient to prove that the employer required her to consistently and regularly work overtime.

Claimant also cites *Stuber v. Moodie Implement,* 236 Mont. 189, 769 P.2d 1205 (1989), as supporting her position. *Stuber*, however, addressed the number of pay periods which should be included in computing wages when the employee's hours were affected by large seasonal swings in his employment and he worked overtime on a seasonal basis. The

decision does not support claimant's argument since this case does not involve seasonal fluctuations and both parties in *Stuber* agreed that overtime hours should be included. Stuber neither overrules nor modifies the test laid out in *Coles*.

PARTIAL JUDGMENT

1. Claimant is not entitled to inclusion of overtime in computing her wages for purposes of determining her permanent total disability benefits.

2. Claimant is not entitled to additional permanent total disability benefits with respect to past compensation.

3. The claimant's request for a lump sum is not presently ripe for adjudication. Further proceedings will be scheduled once it is ripe.

4. Any party to this dispute may have 20 days in which to request a rehearing from these Partial Findings of Fact, Conclusions of Law and Partial Judgment.

DATED in Helena, Montana, this 3rd day of June, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Andrew J. Utick
Mr. Jason G. Dykstra
Date Submitted: May 20, 1997