IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 30

WCC No. 2001-0290

MARJORIE BRODIE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BOYNE USA RESORTS, INCORPORATED

(BIG SKY RESORT)

Employer.

DECISION AND JUDGMENT

Summary: Claimant worked as a seasonal housekeeper at Big Sky for several years. Her employment was terminated at the end of each season. She was a good employee and was rehired for successive seasons, however, there was no guarantee she would be rehired. She was injured February 25, 1999. The insurer computed her wages based upon her prior year of employment with Big Sky rather than her immediately preceding four pay periods. Her wages for the prior year were substantially less than for the four preceding pay periods. Claimant's treating physician released her to return to work at her job, however, he also ordered a functional capacities evaluation (FCE), indicating that the FCE would be helpful in determining claimant's impairment. The insurer refused to authorize the FCE. Following medical depositions, the insurer agreed that if claimant suffered a wage loss, she is entitled to a 27% permanent partial disability award in addition to an 8% impairment award.

Held: (1) Since claimant's prior employment with Big Sky had been terminated without any guarantee of re-employment during the next season, her wages must be based upon her latest employment, therefore, the last four pay periods must be used. (2) Based upon claimant's last four pay periods, she has suffered a wage loss and is therefore entitled to a 27% permanent partial disability award in addition to the 8% impairment award, both awards to be based upon her time-of-injury wages as determined by her last four pay periods. (3) The insurer's use of the prior year of wages in computing benefits was not

unreasonable since the statute concerning wages is not all that clear with respect to the particular circumstances of this case. (4) The insurer's refusal to authorize an FCE was not unreasonable since the FCE was proposed in conjunction with an impairment rating and the evidence fails to establish the necessity of an FCE for an impairment rating.

Topics:

Wages: Average Weekly Wage. Where claimant had been employed on a seasonable basis for several years, but her employment had been terminated at the end of each season, and she was forced to reapply for employment with no guarantee of re-employment, her wages must be computed using her latest employment only. Wages for prior employments may not be considered. § 39-71-123(3).

Statutes: 39-71-123(3), MCA (1997). Where claimant had been employed on a seasonable basis for several years, but her employment had been terminated at the end of each season and she was forced to reapply for employment with no guarantee of re-employment, her wages must be computed using her latest employment only. Wages for prior employments may not be considered. § 39-71-123(3).

Attorney Fees: Unreasonable denial or delay of payment. Where claimant was employed for several years on a seasonal basis, the insurer's use of her prior year's wages in determining benefits was not unreasonable. While the Court interprets section 39-71-123 (1997), as requiring use of wages from the claimant's last employment only, the insurer's application of the exception allowing the use of wages up to a year prior to the injury was not beyond the pale of arguable interpretation of the exception.

Attorney Fees: Unreasonable denial or delay of payment. An insurer's refusal to approve a FCE was not unreasonable where the claimant had been released to work without restrictions, where the FCE was proposed for purposes of rendering an impairment rating, and where no justification for an FCE in connection with an impairment rating was provided.

¶1 This matter was tried on May 7, 2001, in Helena, Montana. Petitioner, Marjorie Brodie (claimant), was present and represented by Mr. James G. Edmiston. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits 1 through 4 were admitted without objections. The depositions of claimant, Dr. John Vallin, and Dr. John Campbell were submitted for the Court's consideration. Claimant and Christine Stobb were sworn and testified.

¶3 The parties agreed at trial that if claimant had a wage loss as a result of her industrial accident, then she is entitled to 27% permanent partial disability award in addition to an 8% impairment award.

¶4 Following the testimony of the witnesses, and having considered the exhibits and depositions, the Court ruled from the bench, finding that (1) claimant's compensation rate must be based upon her pay for the four pay periods preceding her injury, therefore, claimant had a wage loss. I also ruled that the insurer was not unreasonable in using claimant's wages for the prior year in computing her rate. Finally, I found that the insurer acted reasonably in refusing authorization for an FCE.

¶5 At the conclusion of the Court's bench ruling, the parties agreed that the Court's bench ruling was sufficient and that a transcript of the bench ruling shall be filed in lieu of formal findings of fact and conclusions of law. A copy of the transcript of the bench ruling is attached. However, upon reading the bench ruling, I find that it would be helpful to provide a brief narrative of the facts essential to the bench ruling. Briefly summarized, those facts are as follows:

> ¶5A The claimant was employed as a housekeeper at Big Sky for several years.
>
> ¶5B At the end of each season, claimant's employment was terminated by Big Sky and she was laid off for a couple of months. She was required to reapply for employment for the next season. There was no guarantee that she would be rehired, however, she was a good employee and reasonably expected she would be rehired.
>
> ¶5C Claimant was injured February 25, 1999. There is no dispute as to her injury or Liberty's liability.
>
> ¶5D The claimant's wages for the four pay periods preceding her injury were significantly more than her average wages over the previous year of her employment with Big Sky. The insurer used claimant's average wages for the prior year in computing her benefits rate and in determining whether she suffered a wage loss.
>
> ¶5E Dr. Campbell, who was claimant's treating physician, released claimant to return to her housekeeping work without restrictions. While he ordered an FCE, his order stated that he was seeking the FCE in connection with a determination of claimant's impairment.

¶6 With regard to computation of wages, section 39-71-123(3), MCA (1997) 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.

As I found in my bench ruling, claimant's wages for the prior year (subsection (b)) should not be used because her prior employment had been terminated. She was not guaranteed re-employment upon her termination, thus, only the wages she was paid after she was rehired should have been considered.

¶7 Medical depositions taken in preparation for this trial indicate that claimant cannot in fact return to her time-of-injury job despite her treating physician's previous release for her to do so. After the depositions, and prior to trial, Liberty conceded that claimant is unable to return to her housekeeping job, and agreed that if the Court finds she has a wage loss, then it owes a 27% permanent partial disability award (in addition to the impairment award already paid). I have found that claimant suffered a wage loss, therefore, she is entitled to the 27%.

¶8 As to the attorney fee and penalty claims, those awards require a finding that the insurer acted unreasonably. §§ 39-71-611, -612, -2907, MCA (1997). The claimant urged that Liberty was unreasonable in using one year's wages in determining her benefits and in refusing to authorize an FCE.

¶9 Section 39-71-123(b), MCA (1997), expressly authorizes consideration of up to a year of prior wages where the "use of the last four pay periods does not accurately reflect the claimant's employment history with the employer." In this case, there was a substantial difference between the claimant's wages during the four pay periods prior to her injury and her wages for the one year prior to her injury. Liberty looked to the one year history of wages as a more accurate reflection of claimant's average weekly wage. While I have found that the four prior pay periods should be used, I am unable to say that Liberty's position was unreasonable. The statute sets down a general standard. It does not speak to the specific issue in this case. Liberty reasonably contended that the Court should look at the claimant's entire employment. While I have interpreted section 39-71-123(b) as referring to the current, uninterrupted employment, Liberty's position is not beyond the pale of legitimate argument and is not unreasonable.

¶10 The claimant's FCE argument raises a factual issue regarding the need for an FCE. As presented to the claims' adjuster, Dr. Campbell was seeking an FCE for the purpose of determining claimant's impairment rating. Functional capacity evaluations are not routinely required for impairment ratings, and claimant did not offer any proof of the need for an FCE to determine claimant's impairment in this case. The adjuster was not required

to guess that the claimant's physician wanted the FCE for other purposes. The refusal to authorize the FCE was not unreasonable.

JUDGMENT

¶11 The claimant is entitled to a 27% permanent partial disability award. The award shall be computed based on the claimant's last four pay periods prior to her injury.

¶12 The claimant's 8% impairment award shall be recomputed based on the claimant's last four pay periods prior to her injury.

¶13 Claimant is not entitled to attorney fees or a penalty.

¶14 Claimant is entitled to her costs to be determined in accordance with Court rules.

¶15 This JUDGMENT is otherwise certified as final for purposes of appeal. ARM 24.5.348.

¶16 Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 1st day of June, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Larry W. Jones
Attachment: Bench Ruling
Submitted: May 17, 2001

BEFORE THE WORKERS' COMPENSATION COURT

STATE OF MONTANA

MARJORIE BRODIE,

Claimant,

-vs-

LIBERTY NORTHWEST INSURANCE

CORPORATION/BOYNE USA RESORTS,INCORPORATED

(BIG SKY RESORT)

Respondent.

EXCERPT OF PROCEEDINGS

BE IT REMEMBERED, that a hearing was held in the above matter before Honorable Mike McCarter, Judge of the Workers' Compensation Court, Federal Building, Helena, Montana, on the 7th of May, 2001, beginning at the hour of 9:20 a.m., pursuant to the Montana Rules of Civil Procedure before Theresa A. Strauch, Notary Public.

A P P E A R A N C E S

ATTORNEY APPEARING ON BEHALF OF THE CLAIMANT:

JAMES G. EDMISTON
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310 Grand Avenue
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ATTORNEY APPEARING ON BEHALF OF THE RESPONDENT:

LARRY W. JONES
Senior Attorney
Liberty Northwest
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Missoula, Montana 59803

WHEREUPON, the following proceedings were had and testimony taken, to-wit:

* * * * * * * * *

THE COURT: At this point, I'm going to bench rule on the wage rate, and I'm going to rule that the last four pay periods should be used, and so the 27 percent will be based on the higher $180-some-odd rate. And my rationale is as follows, based on the testimony and the exhibits I have, it's very clear that Big Sky, rather than lay off its workers subject to being recalled, was terminating them during its down periods, forcing them to reapply for work and making it clear, in fact, making it in writing that they had to reapply for their jobs and that there was no guarantee of reemployment. So under that particular circumstance, I think I have to treat that and will treat it as a new employment and could very well reach a different result if it had been just a mere layoff subject to recall so that they basically still had a job, but here, the way they worked this policy, even though there was an expectation of reemployment, I would expect that Big Sky would try to rehire their good employees. Even though there was that expectation, I think I've got to look at this as a new employment

because of the way that Big Sky characterized it and because of the lack of any guarantee and thus, the lack of any requirement that they have good cause not to bring them back.

The second part of my bench ruling is that I don't think it was unreasonable for the insurer to take a different point of view. I think it's arguable, especially in light of the expectation that Ms. Brodie testified to, that she would be reemployed, and I would, as a realistic and practical matter, expect that unless they've got a bad employee, they're going to be rehiring their previous employees. And maybe its policy is it's something so they don't have to fine tune their terminations. I don't know what the reason for the policy is, but I think I have to apply their policy, but I'm indicating here that I don't think the insurer's position, in trying to look at the whole period of employment, is unreasonable.

And I would note that in other cases, I have found good cause to use the longer period of time, and typically that is a year, where the claimants have had interruptions in employment or they've had variable wages, they work more hours at certain periods of time. And the result of using the longer period has been to benefit the employee because there's some sort of significant difference in the weekly rate that has come out. So the argument that I should use on behalf of the insurer is not an unreasonable argument, and I don't -- you know, I'm not indicating here that I would adopt that position, but it's certainly a reasonable position, and in my own mind, I would have difficulty not applying it to an insurer's request while applying it to the claimant's request in light of the statutory language, which just talks about good cause. It doesn't mean claimant's using good cause. So I don't think the insurer's position in the case has been unreasonable. I think it's a colorful argument that could be advanced. It was made. I'm just rejecting it. All right. So that takes care of that issue.

THE COURT: Okay. Then I'm going to bench rule. I don't know if this will surprise you too much. You know, I tracked this through. Jim, you did a good job of tracking this through. The thing that impresses me is that we do have a release without any restrictions in November.

Dr. Campbell doesn't go back on that in the spring. He says more probable than not that she has no restrictions. When the conversation happens with the office, the office, his office person, I think it was Lynn, is indicating that he wanted the FCE and didn't do FCEs, or he didn't do impairment ratings without FCEs. He, himself, when he testified, testified that that's not true, and certainly that isn't in my experience, and suspect it's not in our experience either.

I guess my feeling is the mess-up in this case was really by Campbell and Vallin. They could have -- I mean, if he felt that the FCE was needed to find restrictions and that she couldn't go back to work, he could have said it, and he didn't. Campbell didn't. Now, Vallin says it, but is it unreasonable for a claims adjuster to question that, especially in light of what appears to be an unequivocal release before? And I don't think that's really unreasonable to ask him to reconsider, particularly since he was not the treating physician.

I don't think there's anything sinister about her sending her to Vallin. Sounds like, you know, in looking at Campbell's and Vallin's testimony, Vallin does a lot of IMEs for the other docs down there. There are some docs who don't even do IMEs, and you have to send them to other docs too. So she missed in the sense that this truly wasn't an IME because of the relationship between the two docs, but I don't think that's penalty grounds or territory. Vallin comes back, and he replies to that letter, gee, I agree and even goes further saying I agree and I agree that she doesn't have any job-related restrictions in going back to work. I forget the exact language. And that's the way -- that's where basically this whole case stood until you went and took the two doctors' depositions.

When we took the two doctors' depositions, then I think everything became pretty clear. At that point that she was having some problems, there was some miscommunication. You know, that comes across really in Larry's cross-examination of Dr. Campbell as far as what he communicated, and Larry did a pretty good job of getting Campbell to say, you know, I messed up.

You know, at that point, it's pretty clear, but I'm having a hard time finding that what the adjuster did here was wrong. I think if the communication had been clearer and stronger to her by Dr. Campbell, then this would probably be a different case. It's an unfortunate case because if it had, then I don't think -- I mean, I think you guys would have gotten this resolved a heck of a lot sooner. And I just, when I read through this stuff and read her notes, I, too, had the impression that, you know, he was saying probably no restrictions, she's doing fine, you know, she has a couple of little squeaks in the shoulder when she's working, but she's doing fine, but I want that FCE to do the impairment rating, and I just don't think that it was unreasonable for the claims adjuster to sit back and say wait a second, you don't need an FCE for an impairment rating particularly where you don't have any restriction, you got a full release to return to work, which Campbell wasn't going back on.

So I think the case is unfortunate, but my opinion is that the doctors are more to blame in this than the adjuster is, and the docs could have made this a heck of a lot clearer and made your jobs a lot easier, and they just didn't do that. So I think they mucked it up, and I think Dr. Campbell in his deposition and some of his statements states that he takes a little bit of responsibility for that. So that's where I end up. And I know that probably doesn't please you an awful lot, but I think that's where I got to end up.

(The hearing was concluded at 10 11:34 a.m.)

C E R T I F I C A T E STATE OF MONTANA

COUNTY OF LEWIS AND CLARK

I, THERESA A. STRAUCH, Notary Public in and for the County of Lewis and Clark, State of Montana, do hereby certify:

That a hearing in the foregoing matter was held; that the hearing was then taken before me at the time and place herein named; that the hearing was reported and transcribed by me with a computer-aided transcription system, and that the foregoing - 9 - pages contain a true excerpt of the proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this day 11th day of May, 2001.

THERESA A. STRAUCH
Court Reporter-Notary Public
My Commission Expires 3/11/2004