

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 47

WCC No. 9904-8185

DONNA JENKINS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MONTANA VETERANS HOME

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Nurses's aide with 1996 injury of left shoulder and 1997 injury of right shoulder sought PPD benefits for wage loss for each injury separately, twenty percent for each injury. Undisputed facts indicated claimant was not released back to full duty following the first injury, but was released to light duty only. After the second injury, claimant was still eligible for light duty only according to medical opinion, with the same resulting wage loss as based on the first injury.

Held: Under these facts, the second injury did not cause any wage loss for claimant. That wage loss was suffered based on the first injury. Claimant was entitled to PPD benefits based on the first injury as follows: twenty percent for wage loss, five percent for loss of labor capacity, and one percent for age. Where she did not have a wage loss as the result of the second injury, she was not entitled to such PPD benefits for that injury.

Topics:

Benefits: Permanent Partial Benefits: Generally. Nurses's aide with 1996 injury of left shoulder went back to work in modified job before reaching MMI. In 1997, she injured her right shoulder. Undisputed evidence indicated she was released to light duty following the first injury and remained at light duty following the second. When she sought PPD benefits (including percentages for wage loss, loss of labor capacity, and age) relating to each injury, the WCC held she was entitled only to such benefits for the first injury because that injury caused her wage loss. Where the 1997 injury caused no wage loss, and caused wage loss is

a prerequisite for recovering PPD benefits other than an impairment award, her request for PPD percentages for wage loss, lost labor capacity, and age relating to the second injury was denied.

Causation: Wage Loss. Nurses's aide with 1996 injury of left shoulder went back to work in modified job before reaching MMI. In 1997, she injured her right shoulder. Undisputed evidence indicated she was released to light duty following the first injury and remained at light duty following the second. When she sought PPD benefits (including percentages for wage loss, loss of labor capacity, and age) relating to each injury, the WCC held she was entitled only to such benefits for the first injury because that injury caused her wage loss. Where the 1997 injury caused no wage loss, and caused wage loss is a prerequisite for recovering PPD benefits other than an impairment award, her request for PPD percentages for wage loss, lost labor capacity, and age relating to the second injury was denied.

Wages: Wage Loss. Nurses's aide with 1996 injury of left shoulder went back to work in modified job before reaching MMI. In 1997, she injured her right shoulder. Undisputed evidence indicated she was released to light duty following the first injury and remained at light duty following the second. When she sought PPD benefits (including percentages for wage loss, loss of labor capacity, and age) relating to each injury, the WCC held she was entitled only to such benefits for the first injury because that injury caused her wage loss. Where the 1997 injury caused no wage loss, and caused wage loss is a prerequisite for recovering PPD benefits other than an impairment award, her request for PPD percentages for wage loss, lost labor capacity, and age relating to the second injury was denied.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-703, MCA (1995). Nurses aide hurt left shoulder at work. When she returned to work in a modified position pre-MMI, she hurt her right shoulder. Undisputed facts indicated she could not return to work as a nurses aide and suffered a wage loss. While claimant was entitled to a PPD award under section 39-71-703, MCA (1995) including percentages for wage loss, restrictions, age and impairment relating to the first injury, she was not entitled to a similar award relating to the second injury where that injury did not cause her wage loss.

¶1 The matter before the Court is claimant's motion for partial summary judgment. The simplified facts upon which claimant bases her motion, and which the State Compensation Insurance Fund (State Fund) does not dispute, are as follows:

- On December 10, 1996, claimant was working as a nurse's aide.
- On that date she hurt her left shoulder at work.
- Claimant's own demands on the insurer, as set forth in her supporting brief, indicate that her regular position as a nurse's aide required her to perform heavy labor.

- Even though she had not reached maximum medical improvement, sometime in early 1997 she returned to work for her time-of-injury employer in a modified nurse's aide position which allowed her to work at light duty. Information furnished by claimant concerning her inability to return to work in a light-duty job following a second, 1997 injury show that the modified position to which she returned in early 1997 was temporary and limited to 90 days.
- On March 17, 1997, while working in the modified job, and prior to reaching MMI with respect to her December 1996 injury, claimant fell and injured her right shoulder. She was thereafter unable to return to even light-duty work. Her employer then terminated her since light-duty positions were limited to 90 days.
- Claimant subsequently reached MMI with respect to both injuries. However, each injury individually precludes her from returning to full-duty work as a nurse's aide.
- A rehabilitation plan prepared by the insurer's vocational provider identifies one position for which the claimant is now physically and vocationally qualified. That position pays \$5.15 to \$5.50 an hour.
- At the time of her first injury, claimant was earning \$7.54 an hour. At the time of her second injury, she was earning \$7.77. The reason for the increase in wage is not disclosed.

¶12 Based on the foregoing facts, claimant contends that she is entitled to 27% and 28% permanent partial disability awards for her 1996 and 1997 injuries, respectively. Twenty percent of each award is for wage loss. Claimant contends she is entitled to the full 20% with respect to each injury because she was earning \$2 an hour more per hour at the time of each injury than she is presently able to earn. Another 5% for each injury is alleged for loss of labor ability - in both cases, from heavy to light. The final percentages are for age (1% for each injury) and for the impairment ratings (1% for the first, 2% for the second).

Summary Judgment Standards

¶13 Summary judgment must "be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ARM 24.5.329(2).

Discussion

¶14 Section 39-71-703, MCA (1995), governs both injuries since both occurred while the 1995 version of the Montana Workers' Compensation Act was in effect. *Buckman v.*

Montana Deaconess Hospital, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). The section provides in relevant part:

(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 that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

...

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (4) 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%.

...

(8) If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable under this section must be calculated based on the wages that the worker earns or would be qualified to earn following the completion of the rehabilitation plan.

¶15 Statutes must be construed in accordance with their plain language. If unambiguous, they must be applied as written. *State v. Dahlin*, 1998 MT 113, ¶ 19, 961 P.2d 1247, 1250. On the other hand, a portion of a statute cannot be construed in isolation of other provisions: the statute must be construed, if possible, to harmonize and coordinate all of its provisions. See *Groves v. Clark*, 277 Mont. 179, 184, 920 P.2d 981, 984 (1996).

¶16 Claimant takes a simplistic approach to the section, arguing that at the time of each injury she was earning \$2 more than she can now earn, therefore she is entitled to full amount of benefits for each injury. Thus, she urges that she is entitled to 20% for wage loss with respect to **each** of her injuries. Similarly, she seeks duplicate payments for the age factor and for the reduction in her ability to perform heavy labor.

¶17 Section 39-71-703(5)(c), MCA, provides for benefits based on "actual wage loss." That term is defined 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.

Section 39-71-703(8), MCA (1995), further provides that where the injured worker is eligible for a rehabilitation plan, the projected post-rehabilitation wage must be compared to the time-of-injury wage. There is no ambiguity in these statutes as applied to the 1996 injury. At the time of the injury, claimant was earning \$7.54 an hour. When she reached MMI she was not earning any wage and, according to the insurer's vocational assessment, was capable of earning only \$5.50 an hour. Thus, the plain terms of the cited provisions entitles her to 20% with respect to the 1996 injury. Since the vocational assessment limited her to light duty, she is also entitled to 5% for her restriction to the impairment award, and to the age and education factors.

¶18 State Fund argues that there is a genuine issue of fact precluding summary judgment with respect to the 1996 injury. Dr. Stephen's opined that claimant could not return to her time-of-injury job on account of her 1996 injury. He performed an IME in 1998, opined that claimant's left and right shoulder injuries independently precluded her from returning to work as a nurse's aide, and limited her to sedentary to light work. The State Fund points out that Dr. Ingham, who treated claimant through at least the summer of 1997, approved claimant's return to work immediately following her left shoulder injury, and that in fact claimant did return to work. From this State Fund argues that Dr. Stephen's opinion that

claimant could not return to work as a nurse's aide is clearly erroneous and should be disregarded.

¶9 The State Fund's argument ignores the fact that Dr. Ingham released claimant to return to work in a **modified position that required only light duty labor**. He never released her to full duty. Moreover, on August 14, 1997, when Dr. Ingham found claimant at MMI with respect to her left shoulder injury, he specifically disapproved claimant's return to full duty work as a nurse's aide. With respect to the 1996 injury, State Fund has failed to provide admissible evidence showing a genuine dispute with respect to claimant's ability to return to her time-of-injury job upon reaching MMI, with respect to her resultant wage loss, or with respect to any other factor. Claimant is therefore entitled to the full 26% she claims with respect to the 1996 injury.

¶10 The 1997 injury is an entirely different matter. The State Fund correctly points out that claimant must show a causal relationship between her 1997 injury and any wage loss before she can recover **any** permanent partial disability benefits for that injury. Subsection (1) of section 39-71-703, MCA (1995), requires as a prerequisite to benefits that claimant demonstrate "an actual wage loss **as a result of the injury.**" (Emphasis added.)

¶11 The facts tendered by claimant do not establish a causal relationship between the second injury and her wage loss. Her evidentiary proffer indicates that the light-duty job she was working when injured in 1997 was a temporary, modified job which would have ended within 90 days unless she had been able within that time to resume her full, heavy labor duties as a nurse's aide. Her own evidence also shows that her 1996 injury precluded her from ever returning to her time-of-injury job and limited her to jobs paying only \$5.50 an hour. **Irrespective of the intervening 1997 injury**, her employment on March 17, 1997, at the \$7.77 position would have ended within 90 days. **Irrespective of the 1997 injury**, on March 17, 1997, claimant was qualified to earn only \$5.50 an hour. Her 1996 injury, not her 1997 injury, caused her wage loss.

¶12 Since claimant did not suffer a wage loss with respect to her 1997 injury, she is not entitled to permanent partial disability benefits on account of that injury. On this point, the State Fund is entitled to summary judgment. A formal cross-motion is not required for the court to grant summary judgment to the non-moving party, as long as "the original movant had a full and fair opportunity to meet the proposition" and the other party is entitled to judgment as a matter of law. *Hereford v. Hereford*, 183 Mont. 104, 107-08, 598 P.2d 600, 602 (1979).

PARTIAL SUMMARY JUDGMENT

¶13 1. The claimant is entitled to, and the State Fund shall pay her, 94.5 weeks (27% of 350 weeks) of permanent partial disability benefits with respect to her December 10, 1996

industrial injury. The claimant is not entitled to permanent partial disability benefits with respect to her March 17, 1997 industrial injury.

¶14 2. The State Fund is entitled to credit any permanent partial disability benefits it has paid claimant on account of the two injuries

¶15 3. The only remaining issues in this case are claimant's entitlement to attorney fees, costs, and a penalty. Costs will be awarded only if this Partial Summary Judgment results in claimant obtaining a net recovery (the award minus what the State Fund has already paid). Attorney fees and a penalty will be considered if this Partial Summary Judgment results in a net recovery or the claimant certifies her intent to present evidence that the State Fund unreasonably delayed benefits. Within 10 days of this Partial Summary Judgment, the claimant shall provide the Court with a written statement as to the amount of the net recovery and her intent to present additional evidence. In the event the net recovery is zero and claimant does not intend to offer evidence showing that State Fund unreasonably delayed the benefits due her, final judgment will be entered.

DATED in Helena, Montana, this 30th day of July, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Laurie Wallace
Mr. David A. Hawkins
Submitted: July 9, 1999