

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1999 MTWCC 22**

**WCC No. 9709-7825**

---

**FRANK R. JONES**

**Petitioner**

**vs.**

**RELIANCE NATIONAL INDEMNITY COMPANY**

**Respondent/Insurer for**

**RHONE-POULENC aka STAUFFER CHEMICAL**

**Employer.**

---

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** 67-year old claimant worked forty years for a chemical plant, suffering several injuries during his employment. He seeks additional permanent partial disability benefits relating to injuries in 1983, 1985, 1987 and 1991.

**Held:** WCC determines claimant was permanently totally disabled following 1991 injury; therefore under section 39-71-116(15) and -703, MCA (1991) he was not entitled to permanent partial disability benefits for that injury. Although chiropractor testified about appropriate impairment ratings for claimant following 1983 and 1987 injuries, statutes in effect at time of those injuries are not satisfied by chiropractor's testimony; thus, impairment awards cannot be based on that evidence. Under section 39-71-705, MCA (1981, 1983), benefits commonly referenced as "indemnity benefits" are available based on a schedule of injuries. Evaluating the various statutory factors in light of evidence in the record, the WCC finds claimant entitled to 100 weeks of PPD benefits for his 1983 injury and an additional 250 weeks of PPD benefits for his 1987 injury. Although no PPD benefits are proper for claimant's 1985 injury, he is entitled to compensation for disfigurement under section 39-71-708, MCA (1985). Because that injury caused claimant to lose the ability to smile, a precious part of our individual identities, he is entitled to the full \$2,500 available under the statute. Costs and attorneys fees are awarded under section 39-71-611, MCA (1981, 1985).

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-703, MCA (1991).** Claimant was not entitled to PPD benefits for time period after which he was permanently totally disabled.

**Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-705, MCA (1981, 1983).** Under section 39-71-705, MCA (1981, 1983), benefits commonly referenced as "indemnity benefits" are available based on a schedule of injuries. Evaluating the various statutory factors in light of evidence in the record, the WCC finds claimant entitled to 100 weeks of PPD benefits for his 1983 injury and an additional 250 weeks of PPD benefits for his 1987 injury.

**Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-708, MCA (1985.)** Claimant, who was scarred by a blow to his face with an air hose, is entitled to compensation for disfigurement under section 39-71-708, MCA (1985). Because that injury caused claimant to lose the ability to smile, a precious part of our individual identities, he is entitled to the full \$2,500 available under the statute.

**Benefits: Disfigurement.** Claimant, who was scarred by a blow to his face with an air hose, is entitled to compensation for disfigurement under section 39-71-708, MCA (1985). Because that injury caused claimant to lose the ability to smile, a precious part of our individual identities, he is entitled to the full \$2,500 available under the statute.

**Impairment: Impairment Ratings.** Although chiropractor testified about appropriate impairment ratings for claimant following 1983 and 1987 injuries, statutes in effect at time of those injuries are not satisfied by chiropractor's testimony; thus, impairment awards cannot be based on that evidence. See, *Weiss v. Division of Workers' Compensation*, 232 Mont. 218, 220, 755 P.2d 1385, 1386 (1988).

**Physicians: Chiropractors.** Although chiropractor testified about appropriate impairment ratings for claimant following 1983 and 1987 injuries, statutes in effect at time of those injuries are not satisfied by chiropractor's testimony; thus, impairment awards cannot be based on that evidence. See, *Weiss v. Division of Workers' Compensation*, 232 Mont. 218, 220, 755 P.2d 1385, 1386 (1988).

¶1 The trial in this matter was held on November 17, 1998, in Butte, Montana. Petitioner, Frank R. Jones (claimant), was present and represented by Mr. Kurt Krueger. Respondent, Reliance National Indemnity Company (Reliance), was represented by Ms. Sara R. Sexe.

¶2 Exhibits: Exhibits 1 through 18 were admitted without objection.

¶3 Witnesses and Depositions: Claimant, Sarah Jane Jones, Stephen Loomis, D.C., Lewis Wilson, Patricia Hink, and Diane Nelson were sworn and testified. In addition, the parties agreed that the Court may consider the depositions of claimant and Sarah Jane Jones.

¶4 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

- Whether or not Petitioner is entitled to additional permanent partial

disability benefits for each of his injuries dated August 24, 1991, April 27, 1987, August 12, 1985, and June 2, 1983. [First Report of Injury (Ex. 15) supports these dates.]

- Whether Respondent is entitled to an overpayment credit for the social security benefits paid to Petitioner.
- Whether or not the insurer's conversion to permanent total benefits from temporary total benefits under the August 24, 1991, injury was appropriate.

4. If it is determined that the Petitioner is not permanently totally disabled, is the Respondent entitled to a credit for the permanent total disability benefits paid.

- Whether Petitioner is entitled to his attorney's fees and costs.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the parties' arguments, the Court makes the following:

#### FINDINGS OF FACT

¶6 Claimant is 67 years old. He completed the seventh grade.

¶7 From the ages of 14 to 20, claimant worked various jobs in the Butte area. When he was 20, claimant went to work as a laborer building the Victor Chemical Plant (Victor). Claimant helped build the plant in which he was to work for the next forty years.

¶8 Victor was eventually sold to Stauffer and then to Rhone-Poulenc (Rhone). Claimant remained employed at the plant through each of the transfers of ownership. He has no other significant employment other than his work at the plant.

¶9 Over the course of his career, claimant worked as a general laborer, a shovel operator, a switch man, a hoist operator, and finally as an engineer. He was promoted to engineer in 1978 and worked in that capacity until 1991, when he retired. At the time of his retirement, claimant was 60.

¶10 All of claimant's jobs were physically demanding. Even as an engineer, he was often required to lift 100 pounds. His work history demonstrates a strong work ethic.

¶11 Throughout his career, claimant suffered multiple work-related injuries.

#### Work-Related Injuries and Related Medical Treatment

¶12 In 1971 claimant was severely injured while working in a slag pit. He was forced to jump from the machine he was operating into three feet of boiling water, suffering burns to his hands and legs. He later developed phlebitis in his right leg. He also strained his back, however, that injury was insignificant. He testified that he had a sore back for about a month but his soreness resolved.

¶13 Between 1971 and 1983, claimant sought occasional chiropractic treatments for his back. (Ex. 9 at 003.) Given the physical demands of his job, this history does not strike the Court as unusual.

¶14 On June 2, 1983, the claimant suffered a significant injury to his back. While unloading electrodes, claimant felt a sharp pain which radiated into his right leg. (Trial Test.) Following the injury, claimant sought treatment from Philip Blom, D.C. He received treatment over a three-month period. (Ex. 1 at 048-049.)

¶15 Following his 1983 injury, claimant was off work for approximately two weeks. He then returned to work in a lighter duty position. With chiropractic treatment, his back pain improved and he returned to full duty. Dr. Blom released him to return to work without restrictions in August of 1983. (Ex. 16 at 009.)

¶16 Claimant testified that following his 1983 injury he was more careful about his work, especially in his lifting. When he could, he sought help with heavy lifting. He had back pain which varied from day to day depending on how hard he was working. He ceased doing tasks at home which required heavy lifting and cut back on his recreational activities.

¶17 Claimant's recollections about the degree of pain he suffered following his 1983 injury were not entirely clear. His testimony was somewhat contradictory, probably reflecting a fading memory of events long past. A review of the medical records indicate that following his release in August 1983, he did not seek treatment again until 1985, when he suffered an aggravation of his back condition. (Ex. 9 at 001.) Claimant's testimony and medical history persuade me that while his 1983 injury caused him pain, he was able to continue his job without restrictions and his pain only moderately affected his life.

¶18 On August 12, 1985, claimant was struck on the left side of his face by an air hose. He suffered a deep cut to the inside and outside of his left cheek beginning at the corner of his mouth. His wound was closed with stitches and he continued to work. However, he suffered nerve and tissue damage on the left side of his face which renders him unable to smile and causes his speech to be somewhat slurred. He is self-conscious about his slurred speech and his disfigurement. He is distressed by his inability to smile.

¶19 Also in 1985, claimant experienced renewed back pain as a result of a further strain (Ex. 9 at 001) for which he is not seeking benefits. Beginning in April of 1986, Dr. James B. Mossman, a chiropractor, treated claimant. Dr. Mossman related the necessity for treatment to claimant's 1983 injury (Ex. 7 at 005) and treated claimant until April 1, 1987.

According to Dr. Mossman's records, by April 1, 1987, the claimant's lower back condition had stabilized. (Ex. 7 at 010.) Dr. Mossman released claimant to return to work on April 1, 1987. (Ex. 7 at 013.)

¶20 While unloading fence posts on April 27, 1987, claimant suffered yet another injury to his lower back. As in 1983, he felt a sharp pain which radiated into his right leg. Claimant could not recall if he missed any work due to this injury, but he again obtained chiropractic treatment on a regular basis from Dr. Mossman.

¶21 Dr. Mossman characterized claimant's condition after the 1987 accident as "acute & chronically exacerbated severe lumbo-sacral [sic] sprain with accompanying myofascitis with accompanying lumbar neuralgia with resultant IVD Syndrome." (Ex. 7 at 012.) He treated claimant weekly through 1988.

¶22 In February 1989, Dr. Stephen Loomis, D.C., took over claimant's care. At that time the claimant was complaining of low-back pain and right lower extremity pain.

¶23 After the 1987 injury, claimant began wearing a belt to help with lifting. (Trial Test.) His pain increased. His non-work activities were further restricted. After work his wife massaged his back and applied heating pads to his back.

¶24 Dr. Loomis testified that after reviewing claimant's medical records and history of his complaints, it was his opinion that the injury in 1987 was more significant than the 1983 injury. The Court agrees.

¶25 Claimant suffered a further work-related back injury on August 24, 1991. At that time he also suffered new injuries to his arms, neck, and shoulders.

¶26 Dr. Loomis continued to treat claimant after the 1991 injury. On claimant's first visit after that injury, he complained of upper back, lower back, upper extremity, and cervical pain. Dr. Loomis treated claimant until October 27, 1993. He stopped treatment because claimant was by then under the care of medical doctors. (Trial Test.)

¶27 Claimant ceased working on October 24, 1991, when pain prevented him from continuing. (Trial Test.)

#### Benefits for 1991 Injury

¶28 On October 31, 1991, Reliance initiated temporary total disability benefits with respect to the claimant's 1991 injury. It continued those benefits until July 13, 1995, at which time it converted his benefits to permanent total disability benefits. (Pretrial Order, Uncontested Fact No. 6.)

¶29 Reliance paid permanent total disability benefits until October 10, 1996, at which time claimant reached his 65<sup>th</sup> birthday. Thereafter, from October 11, 1996 through July 10, 1998, Reliance paid out a 26% impairment award on a biweekly basis.

### Disability from 1991 Injury

¶130 Despite Reliance's acknowledgment and payment of permanent total disability benefits, claimant now contends that he was only partially disabled on account of his 1991 injury.

¶131 Claimant does not contend that he can return to his 1991 job and the evidence presented at trial shows that he is unable to sit or stand for long periods of time. He experiences episodes of numbness in his hands and legs. He can walk only short distances. He has significant pain on a daily basis. His doctors recommended retirement. Patricia Hink, a vocational consultant designated by Royal, testified that she did not pursue vocational rehabilitation because claimant was not interested in returning to work, his doctors had recommended retirement, claimant's symptoms and his age greatly restricted his capabilities, and he had no significant transferable job skills.

¶132 I ruled at trial, and reiterate that ruling, that after his 1991 injury the claimant was physically unable to perform regular employment and was in fact permanently totally disabled.

### Impairment Ratings for 1983 and 1987 Injuries

¶133 Claimant seeks payment of impairment ratings with respect to both his 1983 and 1987 injuries. His request was supported by opinions provided by Dr. Loomis, who opined that claimant suffered a 10% impairment as a result of his 1983 injury and an additional 10% impairment on account of his 1987 rating.

¶134 Dr. Loomis' treatment of claimant began in 1989, therefore his opinions regarding impairment were based on his review of claimant's medical records and his observations of claimant after he began treatment in 1989.

¶135 Dr. Loomis' explanations for his ratings were reasoned and credible.

### Social Security Offset

¶136 Reliance seeks to offset a \$6,644.56 overpayment due to social security benefits. At trial claimant conceded the offset is due.

## CONCLUSIONS OF LAW

### I. Applicable Law

¶137 The law in effect at the time of each of claimant's injuries governs his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Based on the effective dates of amendments to the Workers' Compensation Act, the 1981 law applies to the 1983 injury, the 1985 law to his 1987 injury, and the 1991 law to his 1991 injury.

## II. Burden of Persuasion

¶138 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

## III. 1991 Claim for Permanent Partial Disability Benefits

¶139 At the time of claimant's 1991 injury, the statute governing payment of permanent partial disability benefits provided:

**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.

...

Permanent partial disability was defined as:

(15) "Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.

§ 39-71-116(15), MCA (1991).

¶140 As a matter of fact, I have determined that following his 1991 injury the claimant was permanently totally disabled within the meaning of the 1991 definition. The plain language of section 39-71-703(1), MCA (1991), renders him ineligible for permanent partial disability.

## IV. 1983 and 1987 Impairment Awards

¶141 At trial the Court questioned whether it could consider Dr. Loomis' impairment ratings. I noted the current law allows both licensed physicians and *treating* chiropractors to render impairment ratings. § 39-71-711, MCA. Prior to the enactment of section 39-71-711, MCA, in 1987 only impairment ratings rendered by licensed medical physicians could be considered when determining a claimant's entitlement under the Workers' Compensation Act. *Weis v. Division of Workers' Compensation of the Dep't of Labor & Indus.*, 232 Mont. 218, 220, 755 P.2d 1385, 1386 (1988). The impairment ratings given by Dr. Loomis for claimant's 1983 and 1987 injuries do not satisfy the requirements of pre-1987 law and do not entitle claimant to any impairment award. The rating for the 1983 injury also fails to satisfy the "treating" chiropractor rule enacted thereafter.

¶142 While the Court does not adopt the impairment ratings rendered by Dr. Loomis, it did find his testimony regarding impairment to be credible and well reasoned. Therefore, I have considered his opinions in evaluating claimant's overall entitlement to indemnity benefits for his 1983 and 1987 injuries.

#### V. Indemnity for 1983 and 1987 Injuries

¶143 Claimant is seeking additional benefits under sections 39-71-705 through 708, MCA (1981, 1985). The permanent partial disability benefits available under those sections are commonly referred to as "indemnity benefits." They are based on the schedule of injuries set forth in section 39-71-705, MCA (1981, 1985). The schedule sets forth the maximum number of weeks of benefits payable on account of the loss of limbs and other body parts. In the case of a non-scheduled injury, such as a back injury, the maximum number of weeks of benefits is 500 weeks. § 39-71-706, MCA. Benefits for less than total loss of a scheduled part "shall be proportionate to loss or loss of use." § 39-71-706(1), MCA (1981, 1985).

¶144 The purpose of the indemnity benefits is to indemnify the injured worker for "possible" loss of future earning capacity, rather than any "actual" loss of earning capacity. *Stuker v. Stuker Ranch*, 251 Mont. 96, 98, 822 P.2d 105, 107 (1991). The benefits are computed by determining a percentage of disability and multiplying the percentage times the maximum number of weeks specified in the schedule. *McDanold v. B.N. Transport, Inc.*, 208 Mont. 470, 679 P.2d 1188 (1984). In determining disability, the Court must consider the claimant's age, education, work experience, pain and disability, actual wage loss, and possible loss of future earning capacity. *Hartman v. Staley Continental*, 236 Mont. 141, 145, 768 P.2d 1380, 1383 (1989); *accord, Holton v. F.H. Stoltze Land and Lumber Co.*, 195 Mont. 263, 271, 637 P.2d 10, 14 (1981).

¶145 The Court evaluates the disability factors, as they relate to claimant's 1983 and 1987 back injuries, as follows:

1. AGE: Claimant is presently 67 years old. At the time of his 1983 injury he was 52. At the time of the 1987 injury he was 56 years old. Had he chosen to leave his employment after either of his industrial injuries, his age would have worked to his disadvantage. "[T]he longer the person is on the labor market the more economic losses he will suffer, all other factors being equal. However, a younger individual who can be retrained or has transferable skills will be able to ameliorate some of his post-injury earning losses in the long run through additional training." *Carroll v. Wells Fargo Armored Serv.*, 245 Mont. 495, 500, 802 P.2d 618, 621 (1990).

2. EDUCATION: Claimant has a 7<sup>th</sup> grade education. He never completed his GED or received any additional training. Claimant's limited education limits his potential for employment in other occupations.

3. WORK HISTORY: With the exception of some part-time employment before he was 20 years old, claimant's entire 40-year work history was with Rhone and its predecessors. His long time employment with a single employer, and lack of experience with other employers and employment, limited his employability. Moreover, even though from 1978 forward the claimant was employed as an engineer, that position and his prior positions required heavy labor. His work history did not provide him with any significant transferable job skills.

4. ACTUAL AND FUTURE WAGE LOSS: Claimant failed to prove that he suffered any actual wage loss following his 1983 and 1987 injuries, indeed he continued working at his time-of-injury employment. He also presented no vocational evidence that he would have suffered any wage loss had he left his employment after either of his injuries. He continued working in a position requiring heavy labor and there is no evidence that he could not have obtained similar heavy laboring positions.

5. PAIN & DISABILITY: Following both the 1983 and 1987 injuries the claimant returned to work and continued to be able to perform his job. However, he paid a price for his work. He experienced pain at work and had to curtail his non-work activities. The price he paid was significantly greater after the 1987 injury.

¶46 Determining the indemnity award due claimant is difficult. The law in effect at the time of the injuries requires the Court to compensate the claimant for each individual injury he suffered. *Tiedeman v. Cooper Logging, Inc.*, 218 Mont. 312, 708 P.2d 255 (1985).

In *Tiedeman*, the Supreme Court affirmed the ruling of this Court that "each new compensable injury, though successive, begins a new benefit consideration beginning at zero." *Id.* at 316, 708 P.2d at 257. However, claimant's injuries are over a decade old. It was difficult for him to identify exactly what impacts each individual injury had on his life. His work ethic and motivation are to be commended, and the Court does not doubt that he worked in pain. On the other hand he was able to perform his job.

¶47 In evaluating cases such as this one, this Court has previously noted that there are no mathematical criteria for determining entitlement. *Burgan v. Nation Wide Ins. Co.*, WCC No. 9505-7308, Findings of Fact, Conclusions of Law and Judgment (October 4, 1995).

¶48 Having considered and weighed all the evidence in this case, the Court finds that claimant is entitled to 100 weeks of permanent partial disability benefits at his compensation rate for his 1983 injury, and an additional 250 weeks of permanent partial disability benefits at his maximum rate for his 1987 injury.

#### VI. Award for Disfigurement - 1985

¶49 Although claimant is not entitled to any permanent partial benefits for the 1985 injury to his face, compensation for disfigurement is appropriate. Section 39-71-708, MCA (1985), states:

**39-71-708. Compensation for disfigurement.** (1) The division may award proper and equitable indemnity benefits for serious face, head, or neck disfigurement, not to exceed \$2,500, in addition to any other indemnity benefits payable under 39-71-705, 39-71-706, or 39-71-707.

(2) no payment under this section shall be in lieu of the separate benefit of medical and hospital services and of any benefits paid under 39-71-701 for temporary total disability.

The statute gives no guidance on the manner in which an award for disfigurement should be determined. The Supreme Court has not addressed the matter.

¶150 Colorado has a disfigurement statute similar to Montana's. It provides for compensation for an employee who is "seriously, permanently disfigured about the head, face, or parts of the body. . . ." Colo. Rev. Stat. § 8-42-108 (1997). In interpreting the statute, the Colorado Supreme Court has said, "[A] disfigurement is an observable impairment of the natural appearance of a person." *Arkin v. Industrial Comm'n of Colo.*, 145 Colo. 463, 471, 358 P.2d 879, 884 (1961); see also *Felix v. The Griffith Center, Inc.*, W. C. No. 3-972-633 (1998)(Colorado Workers' Compensation Court applying Supreme Court precedent in a 1998 disfigurement case.).

¶151 During the trial I visually examined the claimant's facial scar. It is not particularly noticeable. However, the scar tissue precludes his ability to smile.

¶152 A smile is a precious part of our individual identity. It can radiate our innermost being. It lights us up when we are pleased or happy. It is sometimes coy. It is another voice by which we communicate.

¶153 What claimant lost is not recoverable. His lack of a smile is evident to the world. He is entitled to the full award of \$2,500.

## VII. Social Security Offset

¶154 Claimant has conceded Reliance's entitlement to a social security offset credit in the amount of \$6,644.56.

## VIII. Attorney Fees

¶155 Claimant is entitled to reasonable costs and attorney's fees with respect to the amounts awarded for 1983, 1985, and 1987 injuries after Reliance is credited for its offset. Section 39-71-611, MCA (1981, 1985), governs benefits for those years. It provides:

**39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable.** In the event an insurer denies liability for a claim for compensation or terminates compensation benefits and the claim is later adjudged compensable by the workers' compensation judge or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the workers' compensation judge.

## JUDGMENT

¶156 1. Claimant is entitled to 100 weeks of permanent partial disability benefits at the maximum rate for his 1983 injury, and an additional 250 weeks of permanent partial disability benefits at the maximum rate for his 1987 injury. If the parties cannot agree on the amount due, they shall notify the Court and it will hold a further hearing to determine the amount.

¶157 2. The claimant is not entitled to further benefits with respect to his 1991 injury.

¶158 3. Claimant is entitled to \$2,500.00 for disfigurement resulting from his 1985 injury.

¶159 4. Reliance is entitled to an offset \$6,644.56 against the amounts the Court has determined are due.

¶160 5. Claimant is entitled to attorney fees and costs pertaining to his claim for benefits for his 1983, 1985, and 1987 injuries pursuant to section 39-71-611, MCA, in accordance with ARM 24.5.343. Attorney fees shall apply to the net amount due claimant.

¶161 6. Claimant is entitled to costs in an amount to be determined by the Court.

¶162 7. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 17th day of March, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Kurt Krueger

Ms. Sara R. Sexe

Date Submitted: November 17, 1998