IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 8

WCC No. 9906-8258

VINCE S. KAPPHAN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

AMERICAN FORK RANCH

Employer.

DECISION AND JUDGMENT

Summary: Ranch hand injured his low back, suffering a herniated disk. Upon reaching MMI, he was limited to light duty work and precluded from returning to his time of injury job. Insurer paid impairment award, but refused to pay additional PPD benefits on ground claimant did not suffer a wage loss. Insurer identified jobs as bartender, cashier, and production technician.

Held: Under section 39-71-703, MCA (1997), claimant entitled to wage loss benefits of 10%, not 20%, where proper calculations indicated he suffered a wage loss of $1.70 per hour.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-703(1)(a). Claimant entitled to wage loss benefits of 10%, not 20%, where proper calculations indicated he suffered wage loss of $1.70 per hour after injury. Court compared actual hourly earnings pre-injury (total weekly earnings divided by 60, where claimant worked 60 hour weeks) with actual post-injury hourly earnings. Court refused to find claimant's wage loss was greater where he was working 60 hours pre-injury and only 40 hours post-injury because it did not credit claimant's testimony that he could no longer work additional hours and no medical evidence suggested he was in fact limited.

Wages: Overtime. Under 39-71-703, MCA (1997), claimant entitled to wage loss benefits of 10%, not 20%, where proper calculations indicated he suffered wage loss of $1.70 per hour after injury. Court compared actual hourly earnings pre-injury (total weekly earnings divided by 60, where claimant worked 60 hour weeks) with actual post-injury hourly earnings. Court refused to find claimant's wage loss was greater where he was working 60 hours pre-injury and only 40 hours post-injury because it did not credit claimant's testimony that he could no longer work additional hours and no medical evidence suggested he was in fact limited.

Wages: Wage Loss. Under 39-71-703, MCA (1997), claimant entitled to wage loss benefits of 10%, not 20%, where proper calculations indicated he suffered wage loss of $1.70 per hour after injury. Court compared actual hourly earnings pre-injury (total weekly earnings divided by 60, where claimant worked 60 hour weeks) with actual post-injury hourly earnings. Court refused to find claimant's wage loss was greater where he was working 60 hours pre-injury and only 40 hours post-injury because it did not credit claimant's testimony that he could no longer work additional hours and no medical evidence suggested he was in fact limited.

¶1 The petitioner in this case is seeking permanent partial disability (PPD) benefits pursuant to section 39-71-703, MCA (1997). His entitlement to benefits under that section, other than an impairment award, is conditioned upon his demonstrating both an actual impairment and an actual wage loss. §§ 39-71-703(1) and (2), MCA (1997).[(1)] He demonstrated to the insurer's (State Fund's) satisfaction that he suffered an impairment of 5% and the insurer paid the 5%. (Ex. 9 at 1.) However, he was unable to convince the State Fund that he suffered a wage loss. His petition ensued.

¶2 A trial was held on September 20, 1999, in Great Falls, Montana, to determine whether claimant suffered a wage loss. Exhibits 1 through 12 were admitted without objection. Claimant, Bruce Carmichael, who is a certified vocational consultant, and Shauna Foley, who is the claims adjuster responsible for the claim, were sworn and testified. Depositions of Sheila Riesenberg and Micki Marion, both of whom provided vocational evidence, were also submitted for the Court's consideration.

¶3 At the close of trial, the Court called for legal briefs regarding burden of proof, the claimant's relevant labor market, and calculation of wage loss. In its Post-Trial Supplemental Brief, the State Fund for the first time conceded that claimant suffered a wage loss, however, it contends that the wage loss is less than $2 an hour and that he is therefore due 10% for wage loss, § 39-71-703(5)(c), MCA (1997),[(2)] and 5% for loss of laboring capacity, § 39-71-703(5)(d), MCA,[(3)] for a total of 15%. Claimant disputes the wage loss calculation, arguing that his wage loss was greater than $2 an hour and that he is entitled to 20% for wage loss, for a total of 25%. (Brief in Support of Petitioner's Contentions.) The parties agree that claimant's preinjury average weekly wage was

$335.64. (Post-trial Supplemental Brief at 1; Brief in Support of Petitioner's Contentions at 3, ¶ 6[4]; Pretrial Order, ¶ 5.) Thus, his weekly permanent partial disability rate is $198.00, which is one-half the state's average weekly wage at the time of injury. § 39-71-703(6), MCA.

¶4 In light of the limited scope of the issue presented, this decision will be in narrative form. Statements of fact in the narrative are based upon the uncontested facts stipulated by the parties or are the Court's findings of fact.

Discussion

¶5 Claimant was injured on May 29, 1998, while working as a ranch hand for American Fork Ranch near Two Dot, Montana. He injured his low back, suffering a herniated disk at the L4-L5 level. He reached maximum medical improvement (MMI) on October 15, 1998, however, he was limited to light duty and precluded from returning to his time-of-injury job which was heavy labor.

¶6 Upon reaching MMI, several light-duty jobs were identified and medically approved for claimant, specifically bartender, cashier, and production technician. (Ex. 4 at 2.) Subsequently, claimant worked for a short time as a part-time bartender, then found a job in Saratoga, Wyoming, working 40 hours a week as a convenience store clerk. At the time of trial, claimant was working in that job.

¶7 When injured claimant was earning $850.00 per month in wages. He also received $200.00 per month in board and $94.50 per week for meals. Based on an average 60 hours a week of work at the ranch, the State Fund calculates his hourly wage at $5.59, while claimant calculates it as $5.68. The Court has done its own calculations using exact numbers.[5] Those calculations show that claimant's weekly wage was $336.14. His hourly wage, based on a 60-hour work week, was $5.60, and that is the figure which will be used in calculating his wage loss.

¶8 In his current job as a convenient store clerk, claimant is paid $5.85 an hour. However, the State Fund agrees that claimant's raw hourly wages cannot be directly compared since one is based on a 60-hour week and the other a 40-hour week. It has therefore taken claimant's total weekly pay of $234.00 ($5.85 x 40) and divided it by 60 hours, which results in an hourly wage, on a 60-hour week basis, of $3.90. That approach yields a wage loss of $1.70 per hour.

¶9 While using the identical approach (Brief in Support of Petitioner's Contentions at 6), claimant calculates the wage loss at $2.59 an hour. His calculation, however, is based on faulty arithmetic. He divides $234.00 per week by 60 to get $3.09 an hour. The correct quotient is $3.90, as set forth in the previous paragraph. I therefore find that claimant's wage loss is $1.70 per hour, entitling him to 10% under section 39-71-703(5)(c), MCA (1997).

¶10 While vocational testimony was introduced at trial, that testimony concerned wages claimant is capable of earning. Section 39-71-703(5)(c), MCA, provides that wage loss be calculated "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 workers reaches maximum healing." In light of the State Fund's concession of liability based on claimant's actual post-injury wages, it is unnecessary to consider the testimony. Moreover, lacking proof that claimant has ignored higher paying jobs or jobs with longer hours, his current earnings are the best evidence of post-injury wages.

¶11 In concluding that claimant's wage loss is $1.70 an hour, I have considered his testimony that his current job might be reduced to 32 hours a week and testimony of certified vocational consultant, Bruce Carmichael, that cashier jobs in rural areas are typically 32 hours a week. In fact, claimant's job has not been reduced to 32 hours and claimant offered no evidence of any actual plan to do so. A reduction of hours is speculative and does not afford a basis for recalculating wage loss. Mr. Carmichael's testimony is also not a basis for recalculation. While his testimony indicated that many jobs available to claimant are 32-hour jobs and that it would be difficult for claimant to put together two 32-hour jobs in a rural area, he failed to persuade me that claimant could not put together a 32-hour job and another part-time job of less than 32 hours, for example an 8 to 10-hour job. I note he worked for a time as a part-time bartender after his injury and he has been released to work as a bartender. Part-time bartending provides an opportunity outside the convenient stores and expands his opportunities even in rural areas. His testimony that he had abused alcohol in the past and might be "tempted" to abuse it again was not persuasive. He provided no further history of any problem, failed to mention it to vocational consultants when bartending was under consideration, and actually worked as a bartender post-injury.

¶12 Finally, claimant has asked for attorney fees and a penalty. Both require a finding of unreasonable conduct on the part of the State Fund. §§ 39-71-611 and -2907, MCA. While raising the issues in his petition and the Pretrial Order, claimant did not argue the issues in his proposed findings of fact and conclusions of law. Moreover, I find that the State Fund has not acted unreasonably. While most wage loss cases are straight forward, cases such as this present difficult issues of statutory interpretation under section 39-71-703(5)(c), MCA (1997), which merely calls for a comparison of hourly wages. The section provides no guidance regarding how the calculation is to be made in cases where the worker's hours of employment are restricted as a result of the injury or the claimant is working overtime when injured. This Court addressed the former issue in *S.L.H. v. State Compensation Ins. Fund,* 1999 MTWCC 6. That case involved a claimant who was working less than 40 hours a week and was further restricted in her weekly hours of employment by her injury. This case is dissimilar in that claimant is not restricted from working full time. Indeed, despite his testimony that he does not have the stamina to work overtime, he is not medically

restricted from working overtime. Moreover, I did not find his testimony convincing. On a pure hourly wage comparison, he now earns more per hour than preinjury. Under these circumstances, given the lack of guidance provided by the statute, it was not unreasonable for the State Fund to take the position that there was no wage loss.

JUDGMENT

¶13 1. Pursuant to section 39-71-703, MCA, claimant is entitled to wage loss benefits of 10% and loss of laboring capacity of 5%.

¶14 2. Claimant is not entitled to attorney fees or a penalty. He is entitled to his costs in an amount to be determined under this Court's rules.

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

¶16 4. 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 17th day of February, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Ms. Carrie L. Garber
Date Submitted: October 18, 1999

1. Sections 39-71-703(1) and (2), MCA (1997), provide:

> **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 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.

> (2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

2. Subsection (3) of section 39-71-703(3), MCA (1997), provides for a percent payment, as follows:

> (3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 350 weeks.

Subsection (5)(c) provides in relevant part:

> (5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:
>
> . . . .
>
> (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.

3. Subsection (5)(d) provides:

> (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%.

4. Claimant's calculation of his average weekly wage is actually a few cents short of the State Fund's calculation - $335.18 versus $335.64. The State Fund's figure is adopted since it is conceded by the State Fund.

5. The weekly food allotment was converted to an annual amount by dividing by 7 and multiplying by 365. The monthly wage and board were multiplied by 12 to obtain annual amounts. All three were then added to obtain an annual total which was then divided by 365 and multiplied by 7 to obtain a total weekly wage.