

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 27

WCC No. 9701-7691

RUTH CARLSON-OWENS,

Petitioner,

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION,

Respondent/Insurer for

DISCOVERY CARE CENTER and MARCUS DALY MEMORIAL HOSPITAL,

Employers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 47-year old certified nurses aide/hospital worker injured her right arm and shoulder with one employer, recovered, was placed at MMI, and returned to work. Her employment was later terminated for unrelated reasons. At a new employer, insured by the same insurer, she then injured her right shoulder and neck. She sought PPD and vocational rehabilitation benefits relating to the first injury, and vocational and wage loss benefits relating to the second injury.

Held: Claimant not entitled to additional benefits. Where she had no impairment following the first injury, she was not entitled to PPD benefits under sections 39-71-116 and -703, MCA (1995), which require a permanent impairment established by objective medical findings. Where she had no wage loss following the second injury, she is not entitled to PPD benefits beyond an impairment award. Section 39-71-703, MCA (1995) requires wage loss for PPD benefits other than the impairment award, which the insurer had paid. Similarly, where claimant had no wage loss, she is not entitled to vocational rehabilitation benefits where section 39-71-1006, MCA (1995) makes wage loss a prerequisite to such benefits.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1995). Claimant without impairment established by objective medical evidence is not entitled to PPD benefits under 1995 statute.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1995). Claimant without wage loss is not entitled to PPD benefits beyond impairment award under 1995 statute.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-1006, MCA (1995). Claimant without wage loss is not entitled to rehabilitation benefits under 1995 statute.

Benefits: Permanent Partial Benefits: Generally. Under section 39-71-116 and - 703, MCA (1995), claimant without impairment established by objective medical evidence is not entitled to PPD benefits.

Benefits: Permanent Partial Benefits: Generally. Under section 39-71-703, MCA (1995), claimant without wage loss is not entitled to PPD benefits beyond impairment award.

Benefits: Rehabilitation Benefits. Under section 39-71-1006, MCA (1995), claimant without wage loss is not entitled to rehabilitation benefits.

The trial in this matter was held in Missoula, Montana, on April 21, 1997. Petitioner, Ruth Carlson-Owens (claimant), was present and represented by Ms. Sydney E. McKenna. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

Exhibits: Exhibits 1 through 4 and 7 through 8 were admitted without objection. Exhibit 5 was withdrawn. Exhibit 6, which is a job description, was admitted with the proviso that it would be considered only insofar as the testimony established that it was an accurate depiction of the actual job. Exhibits 9 through 11 were offered by Liberty but refused as untimely.

Witnesses and Depositions: Claimant, Sandy Scholl, Ruby Finch, Debbie Morris, Barbara Wiley, and Jerry Davis were sworn and testified. In addition, the parties submitted the deposition of claimant, Dr. James H. Chandler, and Jerry Davis for the Court's consideration. No transcript of the trial has been prepared.

Pretrial Order: At trial the parties stipulated that the pretrial order be amended to reflect claimant's wages and permanent partial disability rates. The pretrial order was deemed amended by the stipulations, which are incorporated in the following findings of fact.

Issues Presented: The following issues, as phrased by the parties, are presented for determination:

1. Whether Petitioner is entitled to PPD benefits, vocational rehabilitation benefits and other benefits arising out of her injury at Discovery Care Center on August 1, 1995.

2. Whether Petitioner is entitled to vocational rehabilitation benefits and wage loss benefits from the injury sustained on March 20, 1996 at Marcus Daly Memorial Hospital.

3. Whether Petitioner is entitled to an award of reasonable fees and costs pursuant to §39-71-611 and 612, MCA.

4. Whether Liberty overpaid Claimant PPD benefits based on her Marcus Daly injury.

(Pretrial Order at 2.)

* * * *

Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 47 years of age and lives in Hamilton, Montana.

2. Claimant completed the 11th grade but did not graduate from high school. However, she later obtained a GED. Her only additional education was cooking classes at a vocational school and certified nurse's aid training.

Discovery Care Center Injury

3. Claimant worked at Discovery Care Center (Discovery) as a certified nurse's aid for approximately five years.

4. On August 1, 1995, claimant injured her right arm and shoulder while she was assisting a patient from her wheelchair to a toilet.

5. At the time of claimant's injury, Discovery was insured by Liberty. Claimant submitted a claim for compensation. Liberty accepted liability for her claim and thereafter paid medical and temporary total disability benefits.

6. Claimant's wage at the time of her Discovery injury was \$6.60 an hour. She was working full time and her permanent partial disability rate for this injury is \$181.

7. Claimant was initially treated by A.D. Wagner (Wagner), a nurse practitioner at the Bitterroot Clinic in Hamilton. Wagner first saw claimant on August 5, 1995, at which time claimant's primary complaint was pain in her right elbow and lower right arm. (Ex. 4 at 4.) Wagner prescribed a tennis elbow band and Advil. (*Id.*) Wagner continued to treat claimant through October 1995, during which time she prescribed physical therapy and additional medication. (*Id.* at 1-3.)

8. Claimant continued to have pain in her right elbow. In late October 1995, she was referred to Dr. James H. Chandler, an orthopedic surgeon practicing in Hamilton.

9. Dr. Chandler examined claimant on November 2, 1995. By that time claimant's primary complaint was pain in her right shoulder. Dr. Chandler diagnosed a "right shoulder rotator cuff injury" and injected the shoulder with cortisone solution. (Ex. 4 at 23.) On November 10, 1995, he also prescribed physical therapy. (*Id.* at 22.)

10. Dr. Chandler examined claimant again on November 13, 1995. Her shoulder had significantly improved. Dr. Chandler noted, "She is not [sic] longer experiencing any significant shoulder complaints in her previous subacromial and deltoid insertional area" and that claimant "somewhat begrudgingly admits that her shoulder pain has been improved." (*Id.* at 20.) He noted that her most significant complaint involved her elbow (lateral epicondylar process). He further noted that claimant had returned to modified light-duty work on November 4, 1995. He recommended continued light-duty work for an additional three weeks, and prescribed an additional two weeks of physical therapy. (*Id.*)

11. In a follow-up examination on November 27, 1995, Dr. Chandler noted that claimant was continuing to make progress. He recommended she continue working on light duty and continue physical therapy. (Ex. 4 at 18.)

12. On December 13, 1995, Dr. Chandler reexamined claimant and found that both her elbow and shoulder had improved. He approved her return to regular work as of December 19, 1995. (Ex. 4 at 15.)

13. On February 8, 1996, Dr. Chandler examined claimant for purposes of determining maximum medical healing. He declared her to be at maximum healing. He further determined that she had "fully recovered from her occupational injury with minimal symptomatic pain responsive to conservative treatment not resulting in residuum or need for further medical care, treatment or follow up." (Ex. 4 at 13.) Finally, he noted that she had been performing full CNA duties "without experiencing any difficulty." (*Id.*) In light of his finding of no residuum, he did not provide an impairment rating.

14. Discovery terminated claimant from her job in early February 1996. Claimant conceded that her termination was **not** on account of any physical problems she was experiencing with her job.

15. At trial the claimant testified that after she returned to full duty at Discovery she continued to experience pain and that as a result she used her left arm more and frequently requested assistance from her coworkers. I did not find her testimony credible. Claimant's supervisor, Ruby Finch, testified that she did not observe claimant having any difficulty doing her job. While she may not have observed claimant all the time, she nonetheless had a fair opportunity to observe claimant at work. Moreover, in his

examination of claimant on February 8, 1996, Dr. Chandler noted claimant's only complaints as follows:

The patient, on follow up evaluation today, indicates that she did have some low grade achy pain across the anterior aspect of the right shoulder and across the lateral aspect of the elbow **on rare occasions** that responded to the physical therapy home exercise instruction program.

(Ex. 4 at 13, emphasis added.) As mentioned earlier, he also noted that she had been performing her full duties as a CNA "without experiencing any difficulty." (*Id.*)

Marcus Daly Injury

16. Claimant began part-time work (16 hours weekly) as a housekeeper at Marcus Daly Memorial Hospital (Marcus Daly) in Hamilton in late February 1996.

17. On March 20, 1996, while working at Marcus Daly, claimant reinjured her right shoulder and sustained a new injury to her neck while pushing a piece of equipment.

18. At the time of her injury, Marcus Daly was insured by Liberty. Claimant submitted a claim for compensation with respect to the Marcus Daly injury and Liberty accepted liability for the injury.

19. Claimant's wage at Marcus Daily was \$5.79 an hour. Her permanent partial disability rate with respect to the Marcus Daly injury is \$61.79.

20. Claimant initially sought treatment for her injury at the emergency room of the hospital. (Ex. 4 at 75.) The emergency room physician diagnosed "[a]cute exacerbation of chronic right shoulder, right elbow and wrist extensor muscle syndrome." (*Id.*)

21. Thereafter, claimant returned to Dr. Chandler, who assumed her care. Dr. Chandler saw claimant on March 26, 1996, at which time claimant was complaining of right shoulder, right elbow and neck pain which arose while working at Marcus Daley. (Chandler Dep. Ex. 1, March 26, 1996 letter.) Dr. Chandler indicated that "recent MRI study of her left shoulder indicates findings compatible with mild impingement tendinitis and no evidence of rotator cuff tear." He further found that she was suffering "degenerative disk disease in the mid and lower portion of the cervical spine, as evidenced by osteophyte formation and subchondral irregularity." He prescribed Motrin and scheduled a follow-up visit for 10 days thereafter. (*Id.*)

22. Dr. Chandler continued to treat claimant over the next couple of months.

23. On May 24, 1996, he found claimant at maximum medical healing with respect to the Marcus Daly injury. While determining that claimant would in the future need "intermittent anti-inflammatories" due to ongoing shoulder and neck pain, he concluded that she otherwise would "not need any future orthopedic surgical care or treatment." He rendered a

5% impairment rating, 2.5% for the neck, which he apportioned 75% to preexisting factors, and 2.5% for the shoulder. Finally, he limited claimant to lifting no more than 10 pounds on account of claimant's shoulder and precluded her from "any bending or stooping or frequent twisting activities" on account of her neck. (Chandler Dep. Ex. 1, May 24, 1996 letter at 2.)

24. On June 26, 1996, Dr. Chandler reviewed job analyses for a housekeeper position and for a switchboard/receptionist. He disapproved the housekeeper position but approved claimant to work as a switchboard/receptionist. (Chandler Dep. Ex. 1.)

25. Liberty paid claimant a 5% impairment award based on the Marcus Daly injury and at claimant's Marcus Daly permanent partial disability rate.

26. Due to uncertainty concerning claimant's entitlement to further permanent partial disability benefits, Liberty continued to pay claimant biweekly permanent partial disability benefits for a time. It paid her an additional \$1,049.76, which it contends was an overpayment. However, it does not seek reimbursement of any portion of that amount.

Impairment Rating

27. Neither Dr. Chandler nor any other doctor has provided any impairment rating with respect to the August 1, 1995 injury at Discovery.

28. In his deposition, Dr. Chandler said that on February 8, 1996, claimant had no ratable impairment. (Chandler Dep. at 8-9.) On May 24, 1996, Dr. Chandler saw claimant "for purposes of maximal medical improvement determination pertaining to her occupational injury of March 20 [the Marcus Daly injury]." (Chandler Dep. Ex. 1, May 24, 1996 letter at 1.) Following his examination of claimant he wrote the insurer a letter in which he stated:

As a result of ongoing symptomatology the patient does, in my opinion, have a partial whole person disability rating of 5% attribute [sic] 2.5% as a residuum from the shoulder and 2.5% as a residuum from the neck.

(*Id.* at 2.) At his deposition he was asked to refer to his May 24, 1996 letter and was asked regarding the impairment rating:

Q. -- but then you refer that she now has a residuum. To what are you referring in this letter?

A. As it pertained to Workmans' Compensation definition as a whole person impairment.

Q. So now she has a permanent impairment as a result of the Marcus Daly injury?

A. Correct.

....

Q. -- you give a five percent rating, and this is for the shoulder and the neck as you've stated.

A. Correct.

Q. And again, that is as a result of the Marcus Daly injury. A. Yes.

(Chandler Dep. at 16-17, emphasis added.)

29. While claimant has identified Dr. Chandler's letter of May 17, 1996 (Chandler Dep. Ex. 1), and other portions of his deposition as suggesting that his impairment rating for the shoulder was attributable to the Discovery injury, or to the combined injuries, a careful reading does not support her suggestion. The letter indicates that the claimant's symptoms following the Marcus Daly injury were "near[ly] identical" to her earlier symptoms following the Discovery injury and that the "ongoing progression of the same disease process . . . was initiated by her occupational injury at Discovery Care." But, his subsequent letter of May 24, 1996 (*id.*), shows that he adhered to his opinion that the Discovery injury resolved without residual impairment, and, while the symptoms following the Marcus Daily injury were similar or even identical to those following the Discovery injury, the reinjury at Marcus Daley did not resolve as had the Discovery injury and was what caused the residual impairment. When asked in cross-examination by claimant's counsel whether he attributed a 2.5% impairment rating to the initial injury with Discovery, he replied in relevant part:

I think that the shoulder was initially injured at Discovery Care, and when we declared her MMI, the pain at that point had acquiesced to minimally symptomatic levels, then reinjured again at Marcus Daly.

(Chandler Dep. at 27.) Further questions and answers make it clear that he considered the injury at Marcus Daly a new injury causing the residual impairment not present prior to that injury:

Q. So do you consider it, now, her permanent impairment to be -- the permanent impairment to be a result of the initial injury at Discovery Care **or was there a new injury at Marcus Daly?**

A. I consider the Marcus Daly to be a new injury.

Q. And in what way was is it distinguishable from the first injury at Discovery Care?

A. Only in the sense that **what was quiescent and without residual at Discovery was re-exacerbated, if you will, at Marcus Daly, and this time it didn't completely clear.** It continued to give her pain in which case she was rendered with a whole person impairment.

(*Id.*, emphasis added.)

Switchboard/receptionist Position

30. Marcus Daly employs several switchboard/receptionists. Entry level pay is \$6.15 an hour. The job varies between 32 and 40 hours a week. Marcus Daly has approximately eight (8) openings a year.

31. No specific skills are required and a two-day training period is provided. In recent years Marcus Daly has hired housekeepers with no more qualifications than claimant's. I find claimant qualified for the position.

32. While claimant attempted to impeach the latest job analysis for the switchboard/receptionist position by pointing to the employer's 1994 job description for the position (exhibit 6), employees of the hospital testified without contradiction that the job description set out in Exhibit 7 is accurate, and the Court so finds.

33. Approximately six months after her injury, claimant was notified by letter that her employment with Marcus Daly was terminated since she had not returned to work. However, she was also notified that she would have a hiring preference at the Marcus Daly for a period of two years. As previously mentioned, approximately eight openings occur annually. While claimant has never applied for the switchboard/receptionist job, I find that the positions are available in sufficient numbers to offer her a realistic opportunity for employment and that it is more likely than not that if she applies for future openings she will be hired.

34. Dr. Chandler approved the old job description, which is Exhibit 6. The job described in the newer job description, which is Exhibit 7, is even less physically demanding than the old one.

35. Claimant argues that Dr. Chandler did not approve the new job description when it was presented to him during his deposition. However, the only reason he did not approve it is because the claimant has recently experienced radicular symptoms **unrelated** to her injury. He testified that at the time he approved the old job description (exhibit 6), claimant was also able to perform those duties, as well as the duties described in the newer description (exhibit 7). (Chandler Dep. at 20.) However, he went on to say that in light of new radicular symptoms emerging in January 1997, he would want to review EMG studies before approving or disapproving the new job description. (*Id.* at 24.) He specifically testified that he did not consider the new symptoms to be related to her prior injuries. (*Id.* at 21-22.) Thus, if claimant is physically unable to perform the job it is for reasons unrelated to her injuries.

CONCLUSIONS OF LAW

1. Claimant's entitlement to benefits is governed by the 1995 version of the Montana Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. The burden of proving her entitlement to permanent partial disability benefits rests on claimant. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 201, 598 P.2d 1099 (1979).

3. Claimant is not entitled to permanent partial disability benefits with respect to her August 1, 1995 injury at Discovery because she does not meet the definition of permanent partial disability. Section 39-71-116, MCA (1995), provides in relevant part:

(22) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;

(b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury.

Claimant failed to establish that she had any permanent impairment as a result of the Discovery injury. To the contrary, Dr. Chandler determined that she did not. Moreover, she failed to persuade me that her injury impaired her ability to work as a CNA or that she had any wage loss as a result of the injury.

Section 39-71-703, MCA (1995), confirms that claimant is not entitled to benefits for the Discovery injury. Subsection (1) sets forth the prerequisites for any award of permanent partial disability benefits:

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.

As already noted, she does not have an impairment rating nor has she persuaded the Court that she suffered any wage loss as a result of her injury. Her termination of employment as a CNA was wholly unrelated to any physical difficulty in performing her job.

Claimant is also not entitled to any further permanent partial disability benefits with respect to her March 20, 1996 Marcus Daly injury. Sections 39-71-703(2), MCA (1995), expressly limits permanent partial disability benefits to an impairment award unless the claimant suffers an actual wage loss, providing:

(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.

Section 39-71-116(1), MCA (1995), expressly defines "actual wage loss" as meaning "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." [Emphasis added.] The evidence presented at trial established that claimant's time-of-injury wage was \$5.79. A preponderance of the evidence further established that she is capable of earning \$6.15 an hour as a switchboard/receptionist. Numerous openings for the job occur annually and it is more likely than not that claimant can secure employment in that position if she applies. She therefore suffered no wage loss and is limited to the impairment award already paid.

4. Claimant is not entitled to rehabilitation benefits. Those benefits are governed by section 39-71-1006, MCA (1995), which provides in part:

39-71-1006. **Rehabilitation benefits.** (1) A disabled worker as defined in 39-71-1011 is eligible for rehabilitation benefits if:

(a) the worker has an **actual wage loss** as a result of the injury;

(b) a rehabilitation provider, as designated by the insurer, certifies that the injured worker has reasonable vocational goals and reemployment opportunity and will have a reasonable reduction in the worker's actual wage loss with rehabilitation; and

(c) a rehabilitation plan agreed upon by the injured worker and the insurer is filed with the department. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning and completion date. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of public health and human services to use the funds.

As stated in the prefatory language of subsection (1), the claimant must in the first instance be "[a] disabled worker as defined in 39-71-1011." Section 39-71-1011(c), MCA (1995), defines "disabled worker" as follows:

(2) "Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an **actual wage loss** as a result of the injury. [Emphasis added.]

The requirement of an "actual wage loss" is set out twice. Claimant does not have an "actual wage loss," as defined by the WCA, and is therefore ineligible for rehabilitation benefits.

Claimant is not entitled to attorney fees or costs.

JUDGMENT

1. Claimant is not entitled to any further permanent partial disability benefits.
2. Claimant is not entitled to rehabilitation benefits.
3. Claimant is not entitled to attorney fees or costs.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. 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 28th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Sydney E. McKenna

Mr. Larry W. Jones

Submitted: April 21, 1997