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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ASARCO, INC., Petitioner, vs. **KEITH L. FOSTER,** Respondent.	WCC NO. 2004-1120 **REPLY BRIEF IN SUPPORT OF PETITION FOR DECLARATORY RULING**

COMES NOW the above-named Petitioner Asarco, Inc. ("Asarco") and hereby submits its Reply Brief in Support of its Petition for Declaratory Ruling.

DISCUSSION AND ARGUMENT

Respondent makes an important concession in his brief. Respondent concedes that the reason for characterizing an impairment award as a benefit available to permanently totally disabled claimants was because the court in *Rausch* wanted to avoid Social Security offsets. At page 3 of his brief, Respondent states:

> "It is true that in *Rausch* the reason for discussing the characterization of the benefit as a permanent total benefit was the application of the social security offset." (Respondent's brief, p. 3).

Respondent, however, does not concede that impairment awards should be paid at the rate for permanent partial disability. Respondent suggests that impairment awards should be paid to permanently totally disabled claimants at the permanent total disability rate and that impairment awards should be paid to permanently partially disabled at the permanent partial disability rate. The obvious question is: exactly where do the statutes provide for this and where do they specify that impairment awards be paid to claimants at different rates?

If one looks to the provisions of the Workers' Compensation Act, simply put, there is no such language. In fact, as stated hereafter, the language and construction of statutes is to the contrary.

Without discussing the context in which the Court was speaking in *Rausch* or the language of the statutes, Respondent argument is simply this: because the court in *Rausch* concluded that impairment awards were payable to permanently totally disabled claimants, "this conclusion necessarily follows." (Respondent's brief, p. 4).

It is respectfully submitted that the conclusion does not follow, and Respondent's ignoring the context of the statement or the language of the statutes is critical. Context is all-important. Indeed, the context is what was important to the court in *Rausch* and this Court recognized the contextual statements in *Rausch* by stating the following in *Warner*:

> "22 While the Rausch decision provides support for characterizing impairment awards which are due permanently totally disabled workers as permanent total disability benefits, the discussion in Rausch indicates that its classification of those benefits as permanent total disability benefits was for purposes of the Social Security Act and not for other purposes. While noting that the benefits are distinct in nature from other benefits, the Court in Rausch was faced with classifying the benefits within the four classifications set out in the Social Security Act. The Court found that for purposes of the Act and social security offset provisions the benefit should most logically be characterized "consistently with the claimant's disability status." Rausch, ¶¶'s 40-41.
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> ¶23 It is apparent from the Court's decision in Rausch that impairment awards have a unique, sui generis status under Montana law. Rausch at ¶ 21 and see previous discussion in this decision. But, like the Social Security Act, section 39-71-741, MCA (1997-2003) does not recognize impairment awards as separate benefits, distinguishing only between permanent and partial total disability benefits."

Warner at ¶ 22 and 23.

To characterize an impairment award as being consistent with a claimant's disability status does not necessarily lead to the conclusion that an impairment award must be paid at the permanent total disability rate for claimants. This is apparent for at least two reasons.

First, courts cannot and should not divorce themselves from the context of facts and circumstances present in *Rausch* and the importance of which was noted by this Court in *Warner.* The result in *Rausch* was expressly reached because of the interplay between state and federal laws or acts and the interpretations of those law or acts, and in particular, terms or interpretations that may be inconsistent with one another or at the very least difficult to fit and reconcile. The particular problem faced by the court in

Rausch was that the Social Security Administration did not recognize a class of benefits entitled "impairment award" or "impairment benefits," and accordingly, an interpretation of the Administration categorized the impairment award as a permanent partial award, thereby allowing an offset under federal law. In other words, the Social Security Administration did not allow impairments awards to be categorized as benefits that were distinct from disability benefits. Impairment awards had been historically treated under state law in Montana as intended to compensate claimants for only the medical component of their disability.[1] To achieve the result that there would be no offset (and for this purpose only), the court in *Rausch* "characterized" the impairment award as including a permanent total disability award. The Court stated:

> "Periodically, the Social Security Administration requests workers' compensation insurers to complete a form for confirmation and classification of workers' compensation benefits being paid to individuals who concurrently receive workers' compensation benefits and social security disability benefits. Therefore, because Rausch will receive an impairment award, the State Fund will have to advise the Social Security Administration of how it classified those benefits by completing Form SSA-1709. Form SSA-1709, however, like Montana law, only recognizes the existence of four classifications of benefits, i.e., temporary partial, temporary total, permanent partial and permanent total. If we were to adopt the State Fund's suggestion, and a fifth classification of benefits was recognized under the guise of "impairment benefits," the Social Security Administration has stated that it would categorize the impairment award as a permanent partial benefit. Therefore, the Social Security Administration will offset Rausch's disability benefits, even though Rausch is permanently totally disabled, not permanently partially disabled.
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> That result irrationally reduces Rausch's impairment award benefit, even though the State Fund concedes that impairment is merely the medical component of his total disability and that classification of impairment benefits for a permanently totally disabled worker as a partial disability benefit is improper. The most logical approach is to characterize the impairment award consistently with the claimant's disability status, considering that the impairment is a result of the claimant's injury and a substantial factor in his disability."

Rausch, 311 Mont. at 222-223, 54 P.3d at 33-34.

Context is all important, and Respondent fails to recognize context which this Court explicitly and correctly recognized in *Warner.*

Second, Respondent fails to recognize or respond to the four points of Petitioner's analysis concerning statutory construction. It is respectfully submitted that courts also cannot and should not divorce themselves from principles of statutory

[1] Incidentally, Petitioner has no disagreement the treatment followed by Montana Court recognizing that impairments awards were payable for loss of physical function or as the "medical component" of a disability award. See *Williams, Holton* and *Grimshaw* cited by Respondent in his brief at page 3.

construction, particularly in workers' compensation matters. Workers' compensation finds its birth and source in legislation and legislative enactments since it did not exist at common law. Here, Respondent completely fails to respond to the four points made by Petitioner in its initial brief.

First, Respondent does not address the fact that the legislature specifically chose to categorize impairment awards or include them within §39-71-703, MCA (1997) as "compensation for permanent partial disability." This is the title of the statute. Not only that, it is also statute in the Workers' Compensation Act that states that impairment is to be measured by "the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. §39-71-703(1)(b)(ii), MCA (1997). No other statute contains such a provision.[2] §39-71-703, MCA (1997) is the only statutory authority for the grant of any impairment award and the only statute that measures impairment expressly by the latest edition of JAMA guidelines. As a benefit payable for the medical component of an award or the loss of physical function, it is significant that the legislature included impairment awards and the delineation of such an award, utilizing JAMA guidelines, in the statute titled "compensation for permanent partial disability."

Why did the legislature title the statute in such a fashion? Why did the legislature include impairment as a medical component measured by JAMA guidelines as "compensation for permanent partial disability?" The answer must be because the impairment award is compensation for permanent partial disability. In arguing which rate is applicable, it is respectfully submitted that it error for Respondent to fail to address the title of the statute, the reference to JAMA guidelines for impairment *within* the statute, and the absence of any reference to impairment awards or JAMA guidelines in §39-71-702, MCA (1997).

Second, Respondent fails to address Petitioner's argument that, to find that impairment awards are permanent total disability benefits and payable at the permanent total disability rate, the Court would have to insert new language to into §39-71-702, MCA (1997). The Court would have to insert subsection (2) of § 39-71-703, MCA (1997) into § 39-71-702, MCA (1997), and further, the Court would have to insert a mechanism for payment into § 39-71-703, MCA (1997), such as that found in subsection (5) of § 39-71-703, MCA (1997).

Third, as stated in Respondent's initial brief, the Court would not only have to change the language of the statute, but it would have to disassociate the intertwining and intermingling of concepts used throughout the subsections of § 39-71-702, MCA (1997). The laws of statutory construction simply do not allow such an action to occur.

Fourth and finally, Respondent fails to address Petitioner's citation to other parts of the Act, specifically the plain language of § 39-71-710, MCA (1997), covering the

[2] Nothing of the sort is contained within §39-71-702, MCA (1997). There is no mention of impairment or impairment awards, including but not limited any awards measured by JAMA guidelines for loss of physical function.

termination of benefits upon retirement, which states in pertinent part:

> When a claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.

Mont. Code Ann. § 39-71-710, MCA (1997) (emphasis added).

Based upon the context of facts recognized in *Rausch,* and based upon the above four points of statutory construction, it is respectfully submitted that the plain, unambiguous language of the Act mandates that impairment awards should be classified as permanent partial disability benefits and should be paid at the rate established in § 39-71-703(6), MCA (1997).

DATED this 8th day of November, 2004.

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CERTIFICATE OF SERVICE

I, **TODD A. HAMMER**, do hereby certify that on the 8th day of November, 2004, I served a copy of the foregoing **Reply Brief in Support of Petition for Declaratory Ruling** in the above matter by mailing a copy thereof, first class postage prepaid to:

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