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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** **RESPONDENT'S BRIEF**

This case presents a single issue for determination:

Should an impairment award to a claimant who is permanently, totally disabled be paid at the permanent total rate or the permanent partial rate?

FACTS

Keith Foster is a permanently, totally disabled claimant as the result of a March 31, 1998 injury. He is currently receiving permanent total disability benefits pursuant to Section 39-71-702, MCA. Pursuant to Rausch v. State Compensation Insurance Fund, 2002 MT 203, 311 Mont. 210, 54 P.2d 25, he is also entitled to an impairment award which has been determined to be 32% (112 weeks). ASARCO, a Plan One employer, has determined to pay Foster's impairment award at the rate established in Section 39-71-703 for permanent partial disability rather than at the rate established in Section 39-71-702 for permanent total disability.

ARGUMENT

ASARCO argues that much of the important language in Rausch is mere dicta and that this Court should actually substitute its own (actually ASARCO's) rationale for that of the Supreme Court. In doing so, ASARCO misses the whole point of Rausch. The threshold issue in Rausch, indeed the very reason for its existence, is that this Court had determined that a permanently, totally disabled claimant was not entitled to an impairment award at all.

It was in the context of holding that a permanently, totally disabled claimant is entitled to an impairment award that the Court discussed the de-linking of impairment awards from partial disability. Rausch at ¶ 27, discussing Issue 1 - whether a permanent total claimant is entitled to an impairment award. After concluding in Issue 1 that a permanent total claimant is entitled to an impairment award and in Issue 2 that the award is due immediately, the Court then discussed the characterization of the award in Issue 3, ¶¶ 36-42. It was as to Issue 3 that the Court discussed the social security offset as the result, not the cause of the characterization of an impairment award as a permanent total disability benefit.

There is nothing in Rausch to suggest that the characterization of an impairment award as a permanent total benefit is solely for social security purposes. Rather, it is a permanent total benefit because that is the nature of his injury.

ASARCO makes a rather convoluted argument attempting to interpret 703 contending that its various subsections are intermingled and intertwined and somehow reaching the conclusion that 703 dictates a finding that it applies to 702. In doing so ASARCO ignores, actually dismisses as dicta, the plain language of Rausch in its Issue 1 holding that a permanent total claimant is entitled to an impairment award for reasons wholly unrelated to § 703.

In ¶ 20 the Court stated:

> "No section of the Workers' Compensation Act explicitly authorizes impairment awards per se. However, impairment awards are impliedly authorized to any injured worker classified in one of four distinct classes of disability benefits by two sections of the Act, § 39-71-710, MCA, and § 39-71-737, MCA."

In other words, § 703 was not considered by the Court as a statutory authorization of an impairment award, even for permanent partial claimants. Although § 703 was amended prior to Foster's accident, the amendment was discussed in Rausch at ¶ 27. Still, the Court said that impairment awards are not linked to partial disability. Rather, § 39-71-710 and § 39-71-737 are, according to the Court, the actual statutory authority for impairment awards to all claimants. Even if the 1997 amendments change the law as to partial disability, the amendment has no effect on permanent total since, as the Court said at ¶ 30 that the actual basis for an impairment award is in § 710 and § 737:

> "We conclude, therefore, that permanently totally disabled claimants are legally entitled to an impairment award for the loss of physical function of their body occasioned by a work-related injury pursuant to the recognition of such awards in § 39-71-710, MCA, and § 39-71-737, MCA . . . ."

In Williams v. Plum Creek Timber Co., 270 Mont. 209, 213, 891 P.2d 502, 505 (1995) the Court recognized the impairment rating as the "medical component" of the disability award. See also Holton v. F. H. Stoltze Land & Lumber Co., 195 Mont. 263, 637 P.2d 10 (1981); Grimshaw v. L. Peter Larson Co., 213 Mont 291, 691 P.2d 805 (1984).

Implicit in finding that impairment is the medical component of the disability award is the notion that an impairment award should be consistent with the type of disability benefits a claimant currently is receiving. Why would an impairment rating to a permanently totally disabled claimant be considered a medical component of a permanent partial disability benefit?

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. However, the Court had already stressed the point that the impairment award to a permanent total claimant was not dependent on § 703 but on § 710 and § 737 which apply also to permanent total disability. In other words, the characterization of the impairment award as a permanent total benefit to a permanent total claimant was the reason for the Court's comments regarding social security, not the result of that finding. As the reason for the finding that language is not dicta. "That which is within the issue, fully argued by counsel and fully considered by the Court in its opinion, is not dictum." Bottomly v. Ford, 117 Mont. 160, 167, 157 P.2d 108, 112 (1945).

Having determined that an impairment award to a permanent total claimant is a permanent total disability benefit and that it is not based on § 703 why would the award be

paid at any rate other than the total disability rate? To pay it at the permanent partial rate would be to characterize the injury as permanent total for some purposes and permanent partial for others. That is not what Rausch says:

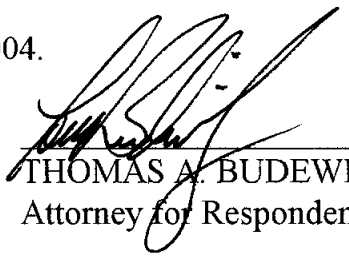
> "¶ 41 . . . The most logical approach is to characterize the impairment award consistently with the claimant's disability status, considering that the impairment is a result of the claimant's injury and a substantial factor in his disability.
> ¶ 42 Therefore, we conclude that because Kevin Rausch was permanently and totally disabled, his impairment award should be characterized as a total disability benefit."

Since a total disability benefit is payable at the rate specified in § 702 (3) that is the rate at which his impairment award should be paid. ASARCO's argument to the contrary is really an argument with the Supreme Court and should be taken up on appeal. In the meantime, however, this Court need only recognize what the Court said in Rausch: that impairment awards to totally disabled claimants are permanent total benefits. The conclusion necessarily follows that permanent total benefits should be paid at the permanent total rate. To the extent that this Court's holding in Liberty Mutual v. Warner, 2004 MT WCC 24 is contrary to that conclusion, it is in error and should not be applied to this case. This Court's statement in Warner, ¶ 22, that the Rausch characterization is for purposes of the Social Security Act only is not supported by the clear language of Rausch which does limit its effect to the Social Security Act. Rather, the comments about the effect on social security are merely the natural and logical result of the Court's initial finding that a permanent total claimant is entitled an impairment award based on § 710 and § 737 and not § 703.

CONCLUSION

For the foregoing reasons Respondent/Claimant respectfully asks the Court to declare that the correct rate to be applied to this Claimant's impairment award is the rate specified in Section 39-71-702 (3), MCA.

DATED this 26th day of October, 2004.



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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served upon all parties and interested persons of record by mailing a copy thereof, postage prepaid, to them or their attorneys at the address set forth below on the 29th day of October, 2004

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