TODD A. HAMMER
ANGELA K. JACOBS
HAMMER, HEWITT & SANDLER, PLLC
Attorneys at Law
P.O. Box 7310
Kalispell, MT 59904-0310
Telephone: (406) 755-2225
Attorneys for Respondent

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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

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

INTRODUCTION

Asarco brought this Petition for Declaratory Ruling pursuant to ARM 24.5.351, requesting that the Court adjudge and declare that it properly calculated and paid Keith L. Foster's impairment award under the rate established for payment of permanent partial disability benefits. Pursuant to the provisions of § 39-71-703, MCA (1997), and applicable case law, the Court should grant Asarco the relief it seeks.

LAW AND ARGUMENT

Neither this Court nor the Montana Supreme Court has yet considered the question of the rate at which an impairment award should be paid. Both the plain language of the Montana Workers' Compensation Act (the "Act") and the relevant case law, however, lead inexorably to the conclusion that the permanent partial rate is the appropriate rate to be utilized in determining the amount of an impairment award. The Court should accordingly grant Asarco's Petition and declare that it paid Mr. Foster's impairment award at the correct rate.

I. The plain language of the Act establishes that impairment awards should be paid at the rate set for payment of permanent partial disability benefits.

The clear and unambiguous language of the Workers' Compensation statutes shows that impairment awards should categorized as permanent partial benefits for most purposes. As such, impairment awards should be calculated and paid at the rate used to determine the amount of permanent partial benefits to be paid.

Because Mr. Foster's injury occurred in 1998, the 1997 version of the Act applies to his injury. *See Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Section 39-71-703, MCA, of the 1997 Act, the statute governing compensation for permanent partial disability, specifically provides for impairment awards. That statute states in relevant part:

> **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 not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and
>
> (iii) 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.
>
> ***
>
> (6) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

Mont. Code Ann. § 39-71-703 (1997).

Due to the permanent nature of an impairment rating, an impairment award is inconsistent with temporary disability benefits. *See Rausch v. State Compensation Ins. Fund*, 2002 MT 203, ¶ 23, 311 Mont. 210, ¶ 23, 54 P.3d 25, ¶ 23. Section 39-71-702, MCA (1997), the statute governing compensation for permanent total disability, does not contain any reference to impairment ratings nor does it contain any reference to impairment awards. As such, the only statutory authority for the grant of an impairment award in the 1997 Act is § 39-71-703, MCA.

Title 39, chapters 71 and 72, must be construed according to their terms and not liberally in favor of any party. Mont. Code Ann. § 39-71-105(4) (1997). In construing a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *See* Mont. Code Ann. § 1-2-101; *Stratemeyer v. Lincoln County*, 276 Mont. 67, 72, 915 P.2d 175, 178 (1996). Courts must construe statutes according to their plain language. *See Geiger v. Uninsured Employers' Fund*, 2002 MT 332, ¶ 21, 313 Mont. 242, ¶ 21, 62 P.3d 259, ¶ 21. The courts are to effectuate the intent of the legislature, and if the legislature's intent can be determined from the plain meaning of the words used in a statute, the courts may not go further and apply any other means of interpretation. *State ex rel. Cobbs v. Montana Dept. of Social and Rehabilitative Serv.*, 274 Mont. 157, 162, 906 P.2d 204, 207 (1995).

This court should, first of all, compare and contrast the provisions of § 39-71-702, MCA (1997) and § 39-71-703, MCA (1997). Section 39-71-703, MCA (1997), the statute governing compensation for permanent partial disability, specifically *authorizes* the payment of an impairment award. In decided contrast, however, § 39-71-702, MCA (1997), the statute controlling compensation for permanent total disability, *does not specifically authorize the payment* of an impairment award. In fact, § 39-71-702, MCA (1997), contains no mention of either impairment ratings or impairment awards.

Perhaps more importantly, under this particular version of the law, subsections (1) and (2) of § 39-71-703, MCA (1997) provide for payment of an impairment award, regardless of whether the worker has a wage loss. Subsection (1) covers the event of wage loss. It provides that a worker who suffers a wage loss and has an impairment rating is entitled to a permanent partial disability award. § 39-71-703(1), MCA (1997). Subsection (2) covers the event of no wage loss. It provides that when a worker has no actual wage loss, the worker is eligible for payment of an impairment award only. § 39-71-703(2), MCA (1997).

The concept of an "award," and more particularly the concept of "a permanent partial disability award," is continued in the statute. Perhaps more importantly, the concept of an impairment rating and a "permanent partial disability award" is intermingled or intertwined as shown by an examination of subsections (3), (4), (5) and (6). These subparagraphs set forth the circumstances of how a "permanent partial disability award" is calculated and paid, whether the "permanent partial disability award" includes an impairment rating, and whether the award and rating is subject to a cap.

Subsection (4), for example, sets a cap on the permanent partial disability award that can be paid in connection with an impairment rating. Subsection (4) states "a permanent partial disability award granted to an injured worker may not exceed a permanent partial disability rating of 100%." § 39-71-703(4), MCA (1997). From the plain words used by the legislature, it is clear that subsection (4) talks about the impairment award as being a "permanent partial disability award" and not a "permanent total disability award.

Similarly, subsection (3) continues the concept of a "permanent partial disability award." It is a calculation and multiple of percentages. Subsection (3) states that the "permanent partial disability award" must be "arrived at by multiplying the percentage arrived by multiplying the percentage arrived at through the calculation set forth in subsection (5)." § 39-71-703(3), MCA (1997).

Subsection (5) similarly continues the concept of "permanent partial disability award" and further incorporates and includes the impairment rating into that concept. Subsection (5) states "the percentage to be used in subsection (3) must be determined *by adding* all of the following applicable percentages *to the impairment rating*." (Emphasis added).

Finally, subsection (6) makes clear that the payment or benefit rate that applies to permanent partial disability is two-thirds of the weekly wages, subject to a cap of one-half of the state's weekly wage. Subparagraph (6) states "the weekly rate for permanent partial disability" is 66 2/3% of the wages received at the time of the injury, *but the rate may not exceed one-half of the states' average weekly wage*." § 39-71-703(6), MCA (1997) (Italics added).

All of this intermingling between the subsections of the statute is in stark contrast to permanent total disability benefits and the rate set forth for such benefits in § 39-71-702, MCA (1997). Subsection (3) of that statute provides the payment rate for such benefits is two-thirds of the weekly wage, but subject to a cap or maximum of the state's weekly wage. Subparagraph (3) of § 39-71-702, MCA (1997) provides that permanent total disability rates be paid at 66 2/3% of the wages received at the time of the injury" subject to the provision that "*maximum weekly benefits may not exceed the state's average weekly wage at the time of the injury*." § 39-71-702 (3), MCA (1997) (Italics added).

Thus, the clear language of both statutes plainly indicates that the legislature intended impairment awards to be categorized as permanent partial disability benefits and paid at the permanent partial rate. In particular, the clear language of § 39-71-703, MCA (1997) and the intermingling and intertwining of concepts involving the impairment rating and "the permanent partial disability award" plainly indicate that the legislature intended impairment awards be categorized as permanent partial disability benefits and paid at the permanent partial rate.

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 not only have to change the language of the statute, but it would have to disassociate the intertwining and intermingling of the concepts of an "impairment rating" and the "permanent partial disability award" used throughout the subsections of the statute. The laws of statutory construction simply do not allow such an action to occur.

It is anticipated that Respondent will rely heavily on the Montana Supreme Court's statement in *Rausch* that impairment awards are not linked to partial disability. *Rausch*, ¶ 27. This statement, however, should not have a bearing on the outcome of this case for at least two reasons:

(a) The plain language of the Act does not support such a construction;

(b) the statement in *Rausch* is dicta.

Each of these reasons will be discussed separately.

First, as previously explained, the plain language of the Act supports the conclusion that an impairment award should be paid at the permanent partial, and not the permanent total, rate for indemnity benefits. The court's statement in *Rausch* was based upon the premise that if a claimant has suffered no wage loss, he or she is still entitled to an impairment award even though he or she cannot meet the statutory definition of permanent partial disability. *Id.*, ¶ 27. From this premise, the court concludes that impairment awards and partial disability are not statutory linked. *Id.* In making the statement, however, the court ignored that the legislature specifically chose in § 39-71-703, MCA (1997) to categorize impairment awards as permanent partial benefits. The court also ignored the intertwining and intermingling between the concepts of an impairment rating and a "permanent partial disability award" as explained above. The plain language of § 39-71-703, MCA (1997) indicates that an impairment rating is a permanent partial disability benefit and part and parcel of a "permanent partial disability award."

This conclusion is further buttressed by other provisions within the Act and in particular the plain language of § 39-71-710, MCA (1997), covering the 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).

The plain, unambiguous language of the Act mandates that impairment awards are to be generally classified as permanent partial disability benefits and should be paid at the rate established in § 39-71-703(6), MCA (1997).

Second, the statement in *Rausch* is dicta. In *Rausch*, the issue before the court was whether permanently totally disabled claimants are entitled to impairment awards. The court's statement that impairment awards are not linked to partial disability was made within the context of rejecting this Court's conclusion that § 39-71-703, MCA (1997), limited impairment awards to partially disabled claimants. *Id.*, ¶¶ 24, 27-28. The court's ultimate decision that impairment awards are available to permanently totally disabled claimants as well as partially disabled claimants was based on the recognition of such awards in § 39-71-710, MCA and § 39-71-737, MCA (1997). *Id.*, ¶ 30. The court's statement regarding the absence of a link between impairment awards and partial disability, therefore, was not an integral and necessary part of its conclusion and has no binding force. *See State ex rel. Mazurek v. District Court Twentieth Judicial District*, 1998 MT 156, ¶ 13, 290 Mont. 18, ¶ 13, 966 P.2d 103, ¶ 13 ("Dicta is not binding precedent.").

Asarco paid Mr. Foster's impairment award at that rate. The Court should accordingly declare that Asarco's payment of Mr. Foster's impairment award was proper.

II. The relevant case law establishes that the permanent partial rate is the correct rate to be used in determining an impairment award.

Case law from both the Montana Supreme Court and this Court confirms that the proper rate to be applied in determining an impairment award is the permanent partial rate.

As indicated above, in *Rausch*, the Montana Supreme Court reached the conclusion that impairment awards are recoverable by both permanently partially and permanently totally disabled claimants. *Rausch*, ¶ 23. In the decision, the Court recognized the difficulty of categorizing impairment awards as one of the four distinct classes of disability benefits recognized under Montana law:

> Disability benefits compensate the worker for losses related to their inability to work. An impairment award is paid to compensate the worker for the loss of physical function of his or her body, which may have ramifications beyond just the worker's ability to return to work. The difference is subtle, yet important. The inclusion of continued impairment award liability in § 39-71-710, MCA (1991 & 1997), indicates the distinct nature of the impairment award from other types of disability benefits.

Id., ¶ 21.

The Montana Supreme Court also addressed the issue of how an impairment award to a permanently totally disabled claimant should be characterized for purposes of the social security offset. The court explained that the Social Security Administration offsets disability benefits that are designated as partial benefits but does not offset benefits designated as permanent benefits. *Rausch*, ¶ 37. The court noted that the Administration, like Montana law, only recognizes four classifications of benefits and that the Administration had taken the position that it would categorize impairment awards as a permanent partial benefits. *Id.*, ¶ 40. The court concluded that Rausch's impairment award should be characterized as a permanent total disability benefit because if it was not so characterized, the Administration would offset Rausch's disability benefits. *Id.*, ¶ 41.

In *Rausch*, the court explicitly recognized the unique nature of impairment awards and the difficulty with pigeonholing them into one of the four classifications of benefits recognized in Montana. The court clearly indicated that it reached the holding it did because any other interpretation (or no interpretation) would have resulted in a Social Security offset. Thus, although impairment awards must be categorized as permanent total benefits for purposes of determining whether the Social Security Administration may offset benefits, *Rausch* does not stand for the proposition that impairment awards must be categorized as permanent total benefits for other purposes. In other words, for Social Security offset purposes, and for those purposes only, the impairment rating is classified as a permanent total disability benefit.

This Court recognized the above distinction in *Liberty Mut. Ins. Co. v. Warner*, 2004 MTWCC 24. In *Warner*, the claimant and Liberty stipulated to a 100% impairment rating. After Liberty initiated payments, it filed a Petition for Declaratory Judgment, requesting, *inter alia*, that the Court determine whether the lump summing of the impairment award was subject to the $20,000 limitation set forth in § 39-71-741(1)(c), MCA (1997-2003).

This Court noted that the issue before it was whether an impairment award due to a permanently totally disabled claimant is a permanent partial disability benefit for the purposes of § 39-71-741(1), MCA (1997-2003) or a permanent total disability benefit subject to the $20,000 limitation. *Warner*, ¶ 21. After discussing *Rausch* in detail, this Court stated:

> While the *Rausch* decision provides support for characterizing impairment awards which are due permanently disabled workers as permanent total disability benefits, the discussion in *Rausch* indicates that its classification of those benefits as permanent disability benefits was for purposes of the Social Security Act and not for other purposes.

Id., ¶ 22.

This Court thus decided that the permanent partial disability provision, § 39-71-741(1)(b), MCA (1997-2003), was applicable to lump summing of impairment awards irrespective of the disability status of the claimant. *Id.*, ¶ 25.

Applying the above principles to the facts at hand, it is clear that, as in *Warner*, an impairment award must be classified as a permanent partial disability benefit for purposes of determining the proper rate at which to calculate it regardless of the disability status of the claimant. As this Court acknowledged in *Warner*, *Rausch*'s holding that impairment awards should be characterized as permanent total benefits applies only in the situation where the Social Security offset is at issue. Impairment awards have a unique status under Montana law. However, because § 39-71-703 (1997), MCA specifically authorizes impairment awards while § 39-71-702 (1997) does not, impairment awards must be calculated at the rate provided in § 39-71-703(6) (1997).

CONCLUSION

Both the plain language of the Act and the applicable case law from the Montana Supreme Court and this Court establish that the correct rate to be utilized in calculating an impairment award is the rate for permanent partial disability. The Court should thus adjudge and declare that Asarco has properly paid Mr. Foster's impairment award.

DATED this 22nd day of October, 2004.

HAMMER, HEWITT & SANDLER, PLLC

Todd A. Hammer
Angela K. Jacobs
P.O. Box 7310
Kalispell, MT 59904-0310
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, **TODD A. HAMMER**, do hereby certify that on the 22nd day of October, 2004, I served a copy of the foregoing **Substitute Brief in Support of Petition for Declaratory Ruling** in the above matter by mailing a copy thereof, first class postage prepaid to:

Thomas A. Budewitz
Attorney at Law
1625 11th Avenue
Helena, Mt. 59601

Todd A. Hammer