IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 111

WCC No. 9408-7134

BRANDON GJERDE

Petitioner

vs.

EMPLOYERS INSURANCE OF WAUSAU

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Twenty-four year old laborer was injured when 100 pound bag of rice fell and hit him on the shoulder, causing him back and leg pain. Time of injury position was disapproved due to lifting requirements, though other jobs were medically approved. Claimant sought rehabilitation benefits and/or additional permanent partial disability benefits.

Held: Considering claimant's age, education, training, work history, residual physical capacities, and vocational interests, his desire for two years of rehabilitation benefits to obtain certification in computer programming and business management at a technical college is not a reasonable vocational goal that would significantly enhance his earning potential requiring the insurer to approve his vocational plan, which was not approved by a vocational counselor. Claimant has already had two years of schooling and failed to diligently pursue the career for which he prepared; his motivation and follow-up are questionable. While claimant may be entitled to vocational assistance in finding employment, he has not requested that assistance. He is entitled, however, to additional permanent partial disability benefits under section 39-71-703, MCA (1991). Where the insurer has agreed to a lump-sum advance of permanent partial disability benefits, it is not entitled to discount that advance to present value where no statutory provision authorizes that discount.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-2001, MCA (1991). Considering claimant's age, education, training, work history, residual physical capacities, and vocational interests, his desire for two years of rehabilitation benefits to obtain certification in computer programming and business management at a technical college is not a reasonable vocational goal that would significantly enhance his earning potential requiring the insurer to approve his vocational plan, which was not approved by a vocational counselor. Claimant has already had two years of schooling and failed to diligently pursue the career for which he prepared; his motivation and follow-up are questionable.

Benefits: Rehabilitation Benefits: Retraining. Considering claimant's age, education, training, work history, residual physical capacities, and vocational interests, his desire for two years of rehabilitation benefits to obtain certification in computer programming and business management at a technical college is not a reasonable vocational goal that would significantly enhance his earning potential requiring the insurer to approve his vocational plan, which was not approved by a vocational counselor. Claimant has already had two years of schooling and failed to diligently pursue the career for which he prepared; his motivation and follow-up are questionable.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-703, MCA (1991). Where the insurer has agreed to a lump-sum advance of permanent partial disability benefits under 39-71-703, MCA (1991), it is not entitled to discount that advance to present value where no statutory provision authorizes such discount.

Benefits: Permanent Partial Disability Benefits: Generally. Where the insurer has agreed to a lump-sum advance of permanent partial disability benefits under 39-71-703, MCA (1991), it is not entitled to discount that advance to present value where no statutory provision authorizes such discount.

This case came to trial in Billings, Montana, on November 16 and 17, 1994. Petitioner, Brandon Gjerde (claimant), was present with his attorney, Mr. Patrick R. Sheehy. Respondent, Employers Insurance of Wausau (Wausau), was represented by Mr. Kelly M. Wills. Exhibits 1 though 5 and 7 through 9 were admitted. (There is no Exhibit 6.) Depositions of Jeanne Adams and the claimant were submitted for the Court's consideration. (At trial counsel could not find the original deposition of claimant and agreed that the Court could consider a copy.) Claimant, Mary Dvarishkis and Patricia Hink testified.

Issues Presented: Claimant seeks total rehabilitation benefits to enable him to attend two years of vocational technical school. He also seeks additional permanent partial disability benefits.

Bench Ruling: After all evidence had been taken, the parties were permitted closing statements. The Court then entered a bench ruling. It denied claimant's request for total rehabilitation benefits and awarded him an additional twenty (20%) percent in permanent partial disability benefits based on loss of wages, to be paid in a lump-sum without discount. The Court denied claimant's request for an additional two (2%) percent based on education and denied his request for attorney fees and a penalty.

The following findings of fact, conclusions of law and judgment confirm the Court's bench ruling and are based on its consideration of the testimony at trial, the demeanor of the witnesses, the two depositions, the exhibits, and the arguments of counsel.

FINDINGS OF FACT

1. Claimant is 24 years of age. He is married.

2. Claimant was employed as a laborer by Sysco Corporation (Sysco) for a period of several months commencing in 1991. He worked as a laborer loading cases of food onto trucks. Some of the items he lifted weighed one hundred (100) pounds.

3. On January 3, 1992, claimant injured his back in the course of his employment when a one hundred (100) pound bag of rice fell and hit him on the shoulder, causing him to fall down onto his back. Thereafter the claimant experienced pain in his back and numbness in his legs.

4. Claimant gave Sysco timely notice of his industrial accident.

5. At the time of the accident Sysco was insured by Employers Insurance of Wausau, which accepted the claim for compensation.

6. Claimant worked for three days following his injury. He has not worked since that time.

7. Claimant was initially treated by a chiropractor but was thereafter treated by orthopedic surgeons. On January 30, 1992, he was examined and treated by Dr. D.R. Huard, an orthopedic surgeon. (Ex. 2 at 10.) Dr. Huard continued caring for claimant until September 15, 1992, when Dr. John Dorr, another orthopedist assumed his care. (Ex. 2 at 10-16.)

8. An independent medical examination of claimant was performed on January 25, 1993 by Dr. John Diggs. The doctor found claimant to be at maximum healing and gave him a three (3%) percent impairment rating. (Ex. 2 at 1-4.) On February 25, 1993, Dr. Diggs approved several jobs as medically suitable for claimant, including those of Blow Mold Operator/Bagger. (Ex. 2 at 7-8.) He disapproved claimant's time-of-injury job because the lifting requirements of the job exceeded claimant's physical abilities. (Ex. 2 at 5-6.)

9. On September 13, 1993, Dr. Dorr also determined that claimant had reached maximum healing.

10. As of the date of trial Wausau had paid, or obligated itself to pay, $15,024 in permanent partial disability benefits, which represents an award of 25.5 percent or 89.75 weeks. The benefits have been paid biweekly. As of the date of trial, Wausau had provided claimant with a fourteen (14) day notice of termination of benefits and owed claimant an additional $578 which will have been paid by the time these written findings of fact are issued.

11. One of the issues in this case concerns claimant's entitlement, if any, to further permanent partial disability benefits. Claimant seeks an award based on a forty-five (45%) percent disability rating, while Wausau contends that he has already been overpaid and is entitled to only a twenty-three (23%) percent rating. The difference is due to a dispute over wage loss and education factors.

12. Wausau agreed at the time of trial to pay any additional permanent partial disability benefits which the Court may find owing in a lump sum.

13. Claimant also seeks rehabilitation benefits pursuant to section 39-71-2001, MCA, to enable him to attend Montana Technical College of Billings (formerly Vo-Tech) for two years to obtain certification in computer programming and business management.

14. Claimant graduated from high school in 1988. He then attended Billings Vocational Technical School for two years, learning autobody repair and painting. His grade point average was 2.8 and he received his certification in autobody repair and painting.

15. Claimant failed to diligently pursue employment in auto repair and painting.

a. While still at Vo-Tech, claimant worked for an auto repair shop in Billings for approximately a week. The job was an internship set up by the school as a part of a program to match students with potential employers. The internship could have led to a job but claimant did not pursue employ-

ment at the shop because he felt he was too much of a "perfectionist" to fit in at the shop.

b. For a short time following his graduation, claimant looked for work in auto repair in Billings. In his deposition he testified that, ". . . I looked around and I couldn't find anything that was *going to financially make me happy here*, so I moved down to South Dakota to see about their body shops." (Gjerde Dep. at 8.) (Italics added.)

c. Claimant testified at trial that he looked for work in auto repair and painting in South Dakota, then took a job as a laborer for a construction company. In his deposition he testified that he went to work in construction because he could make more money than in auto repair and painting. (Gjerde Dep. at 8-9.) Having assessed claimant's overall credibility, the Court finds that claimant took a construction job because of the higher pay rather than any lack of auto repair jobs.

d. After a year in South Dakota, claimant returned to Billings. He worked for an autobody shop for a few days, but the shop apparently went into b-ankruptcy.

e. Claimant then found employment with Sysco, where he worked for several months. He did not thereafter seek employment in autobody repair and painting.

16. Claimant's longest full-time job lasted eight months. He has now been out off work for almost two years and has not applied for employment during that time even though he reached maximum healing more than a year ago.

17. He is presently living with his wife on a ranch in Ballantine which is owned by his parents-in-law. Ballantine is a very small community approximately twenty to twenty-five miles from Billings. His living expenses exceed his income and the two vehicles he owns are old.

18. Claimant was referred to Patricia Hink (Hink), a certified rehabilitation counselor, for vocational services on February 25, 1992. (Ex. 7 at 1.) In the fall of 1992, claimant also applied to the Montana Department of Social and Rehabilitation Services (SRS) for vocational services. Sally Munson (Munson) was assigned to his case. Claimant failed to maintain contact with Hink and Munson, failed to keep appointments, and failed to follow-up with regard to their requests. His file was closed by SRS in early 1993 as a result of his failures.

19. Claimant was referred to Adult Education in Billings for testing. Following testing, courses in English and mathematics were recommended to improve his skills in those areas. He enrolled in the classes but abandoned them after a class or two because he felt the classes were too elementary and he could learn on his own.

20. He also began and then abandoned a computer class because he believed he could learn on his own.

21. Claimant evidenced little motivation to follow through with regard to rehabilitation until December 1993, when he reapplied to SRS for services. (Adams Dep. at A.) His reapplication was assisted by his attorney. (Adams Dep. at 10.)

22. Claimant has failed to persuade the Court that he has the motivation to complete two more years of schooling or that he would use such education in seeking employment.

23. Claimant's lack of a history of long-term, full-time employment, and his being off work for almost two years, affects his present and future employability. Further delay in his returning to employment will make it more difficult for him to find a good job even if he obtains further education. (See testimony of Hink.)

24. Claimant's goals of becoming an assistant manager of a sporting goods store or an autobody shop, or of becoming an insurance adjuster, after obtaining two more years of education is unrealistic. Hink testified that the types of positions that the further schooling will qualify claimant for are already saturated with qualified applicants, and that schooling is not the typical route to the types of positions he desires. The Court found her testimony to be credible.

25. Claimant is currently qualified and able to perform jobs in retail sales and cashiering, jobs which are plentiful and readily available. Wages for these jobs range from minimum wage ($4.25 an hour) to $6.50 an hour. However, given his work history it is unlikely that claimant would be hired at the upper range.

26. At the time of his injury claimant was earning $8.11 an hour.

27. Hink testified that in her opinion claimant could expect to earn between $5 and $6 an hour after two more years of education. The Court finds her opinion persuasive and concludes that even though the theoretical upper range of salaries for graduates of programs similar to that which claimant wishes to undertake may be higher than the $5 to $6 figure, it is unlikely that claimant would find employment at the higher end of the wage scale. Thus, employment over the two years claimant wants to attend school may well result in pay increases which would eliminate any differential between what he can earn now and what he might earn with two more years of school.

28. Claimant has sustained a wage loss in excess of $2 an hour. The Court finds it unlikely that claimant is presently qualified to earn $6.11 or more an hour, especially in light of his employment history. While Hink testified that claimant can still work as an auto painter and also as a "Blow Mold Operator/Bagger", I find that claimant is unable to perform the former and that the latter job is not typically available. Only two positions were identified for the Blow Mold Operator. As to the position of auto painter, Hink's classification of the job as light-duty was based on what was reported to her by auto shop operators. Claimant, who has actually done the work, testified credibly that the job required heavier lifting and physical effort than reported, and the Court did not have the opportunity to explore the matter with the individuals on whose information Hink's opinion was based. I am not satisfied that the job is within the physical capabilities of claimant. Dr. Diggs' approval of the position is not conclusive since he relied on the job description.

29. Claimant is in need of a lump sum. His local labor market is the Billings area, which is a commuting distance from his present residence. Transportation will prove expensive on a daily basis, and his older vehicles may prove unreliable. His best opportunity for reemployment is to move back to Billings and establish himself. Given his present financial situation, claimant will need funds to make the move and seek employment.

30. While a counselor for SRS approved claimant's plan for additional schooling, the counselor's deposition shows that her approval was primarily based on claimant's desires and not on any analysis of whether his goal is a reasonable one in light of his age, education, training, and work history.

31. Claimant's plan of rehabilitation is not a reasonable one in light of his lack of motivation, failure to follow through with courses recommended as needed for further education, his work history, and the likelihood that he will be no better off wage-wise upon completion of further schooling than if he returns to work now in a job he is presently capable of performing.

32. Wausau's denial of rehabilitation benefits and further permanent partial disability benefits has not been unreasonable. It has prevailed on the rehabilitation issue. The matter of further partial disability benefits raised triable issues of fact. Wausau's position was supported by medical and vocational opinion, though they failed to carry the day.

CONCLUSIONS OF LAW

1. Claimant was injured on January 3, 1992. Therefore, the 1991 version of the Workers' Compensation Act governs his entitlement to benefits. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986)*.

2. The rehabilitation benefits requested by claimant are governed by section 39-71-2001, MCA (1991). The section provides in full part:

> **Rehabilitation benefits.** (1) An injured worker is eligible for rehabilitation benefits if:
>
> (a) the injury results in permanent partial disability or permanent total disability as defined in 39-71-116;
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> (b) a physician certifies that the injured worker is physically unable to work at the job the worker held at the time of the injury;
>
> (c) a rehabilitation plan completed by a rehabilitation provider and designated by the insurer certifies that the injured worker has reasonable vocational goals and a reemployment and wage potential with rehabilitation. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests.
>
> (d) a rehabilitation plan between the injured worker and the insurer is filed with the department. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of social and rehabilitation services to use the funds.
>
> (2) After filing the rehabilitation plan with the department, the injured worker is entitled to receive rehabilitation benefits at the injured worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. Rehabilitation benefits must be paid during a reasonable period, not to exceed 10 weeks, while the worker is waiting to begin the agreed-upon rehabilitation plan. Rehabilitation benefits must be paid while the worker is satisfactorily completing the agreed-upon rehabilitation plan.
>
> (3) If the rehabilitation plan provides for job placement, a vocational rehabilitation provider shall assist the worker in obtaining other employment and the worker is entitled to weekly benefits for a period not to exceed 8 weeks at the worker's temporary total disability rate. If, after receiving benefits under this subsection, the worker decides to proceed with a rehabilitation plan, the weeks in which benefits were paid under this subsection may not be credited against the maximum of 104 weeks of rehabilitation benefits provided in this section.

> (4) If there is a dispute as to whether an injured worker can return to the job the worker held at the time of injury, the insurer shall designate a rehabilitation provider to evaluate and determine whether the worker can return to the job held at the time of injury. If it is determined that he cannot, the worker is entitled to rehabilitation benefits and services as provided in subsection (2).
>
> (5) A worker may not receive temporary total or bi-weekly permanent partial disability benefits and rehabilitation benefits during the same period of time.
>
> (6) The rehabilitation provider, as authorized by the insurer, shall continue to work with and assist the injured worker until the rehabilitation plan is completed.

As set forth above, subsection (4) provides that if it is determined that a worker cannot return to his time-of-injury job he is "**entitled** to rehabilitation benefits and services as provided in subsection (2)." (Emphasis added.) Subsection (2) provides that "[a]fter filing the rehabilitation plan with the department, the injured worker is **entitled** to receive rehabilitation benefits at the injured worker's temporary total disability rate" and goes on to provide that benefits **"must** be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks" so long as the worker "is satisfactorily completing the agreed-upon rehabilitation plan." (Emphasis added.) Read alone, the words "entitled" and "must" would at first glance appear to create an entitlement to 104 weeks of rehabilitation benefits where the worker cannot return to his time-of-injury job.

However, words and subparts of a statute cannot be read in isolation: all provisions of a statute must be read together and harmonized. ***McClanathan v. Smith,*** *186 Mont. 56, 61, 606 P.2d 507 (1980).* Other parts of the section make it clear that a worker is not automatically entitled to 104 weeks of rehabilitation benefits, and that specific criteria must be met before the "entitlement" language comes into play.

Initially, subsection (3) shows that a rehabilitation plan may provide for "job placement" rather than education and training. Confirmation that a plan may provide job placement rather than further training or education is found in section 39-71-1011(4), MCA (1991), which defines "rehabilitation plan" in the following manner:

> **39-71-1011. Definitions.** As used in this chapter, the following definitions apply:
>
> . . .
>
> (4) "Rehabilitation plan" means an individualized plan to assist a disabled worker in acquiring skills or aptitudes to return to work through job placement, on-the-job training,

> education, training, or specialized job modification." [Emphasis added.]

The reference to "this chapter" is to chapter 71, which encompasses section 39-71-2001, MCA. Hence, the definition applies to rehabilitation plans formulated under the latter section.

More importantly, subsection (1)(c) provides that the rehabilitation plan be one prepared by a rehabilitation provider "**designated by the insurer**" who must certify "that the injured worker has reasonable vocational goals and a reemployment and wage potential with rehabilitation." The subsection also requires that the "plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests."

In the present case, Hink was the designated rehabilitation provider. She did not approve the plan. The fact that a SRS counselor approved claimant's plan does not provide the necessary predicate for benefits. The counselor was not the rehabilitation provider designated by the insurer, and in any event was more focused on the claimant's wishes than on the statutory criteria. Thus, no rehabilitation plan has been certified or filed with the Department. The prerequisites to entitlement have not been satisfied.

The refusal of Hink to approve and file claimant's plan for further schooling, however, presents a dispute which must be resolved by the Workers' Compensation Court. § 39-71-2905, MCA. The Court must therefore review all of the evidence presented at hearing and by deposition to determine whether claimant's rehabilitation plan has a **reasonable** rehabilitation goal and whether it provides a reasonable prospect of reemployment at reasonable wages.

3. In determining whether the vocational goals of a rehabilitation plan are "reasonable," the Court must consider the overall purposes and objectives of the Workers' Compensation Act. ***See Montana Talc Co. v. Cyprus Mines Corp.,*** *229 Mont. 491, 498, 748 P.2d 444 (1987).* One of the express objectives of the Act is to return the worker to work as soon as possible. Section 39-71-105(2), MCA (1991) provides:

> (2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

On the other hand, the 1991 Legislature repealed the automatic return to work options it had previously adopted in 1987. § 39-71-1012, MCA (1987) (repealed, 1991

Montana Laws, ch. 574, § 14.) At the same time it also enacted the rehabilitation benefits section which is at issue in this case. The actions of the 1991 Legislature indicate that an immediate return to work may not always be the best option for the worker or the State, and that the rehabilitation provider should consider and prescribe further retraining and education where it will enable a worker to better sustain himself than would an immediate return to work option. In formulating the final plan, the rehabilitation provider, and in this case the Court, must address the factors set out in section 39-71-2001(1)(c), MCA (1991).

4. Having considered claimant's age, education, training work history, residual physical capacities, and vocational interests, the Court concludes that the claimant's vocational goals are *not* reasonable and that further schooling would *not* significantly enhance his earning potential. The additional schooling is unlikely to lead to the types of positions in which claimant has expressed an interest. The schooling will take him out of the labor market for an additional two years. Claimant has been unemployed for two years and has never held a full-time job for longer than eight months. He is twenty-four years old, and in the six years since he graduated from high school, only two of those years have involved further education. In light of his work history, an additional two years of unemployment is likely to impact his job prospects upon completion of further schooling and his prospects more likely will be at the lower end of the wage scale. Claimant has already had two years of schooling but failed to diligently pursue the career for which that schooling prepared him. His motivation and follow-up are questionable. His request for rehabilitation benefits is **denied**.

5. Claimant has not requested the Court to determine his possible entitlement to assistance in finding employment or to eight weeks of benefits pursuant to section 39-71-2001(3), MCA (1991). Therefore, this opinion does not foreclose him from seeking such assistance and benefits.

6. Pursuant to section 39-71-703, MCA (1991), claimant is entitled to partial disability benefits based on the following factors:

Age	0%
Education	0%
Restrictions	20%
Wage Loss	20%
Impairment	3%
TOTAL	43%

Thus, the total amount of claimant's benefits due claimant is $25,284 (45% x 350 weeks x $168/week), less the $15,024 already paid by Wausau. Thus, the net amount still due claimant is $10,260.

Both parties agree to the percentages assigned for age, restrictions and impairment. They also agree concerning the proper rate. Their disagreement is over the education and wage loss factors. Claimant argues that his two years at Vo-Tech should not be counted as education. Wausau argues that claimant has sustained no wage loss and that the wage loss factor should be zero.

The percentage to be assigned claimant's education is prescribed by section 39-71-703(3)(b), MCA (1991), which states:

> (b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education, or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

Since 1987 the vocational-technical school located in Billings has been under the "general administrative and supervisory control" of the Board of Regents. § 20-16-101, MCA (enacted by 1987 Mont. Laws, ch. 658, §1). The Board of Regents oversees higher education. 1972 Mont. Const. Article X, § 9. Students at vocational-technical schools are referred to as "students," e.g., § 20-16-101, MCA, thus denoting the educational nature of the institutions. The diploma claimant received upon completion of school in 1990, reads, "This Certifies That Brandon L. Gjerde has satisfactorily completed a Course of Study prescribed for Graduation from this School and is therefore awarded this Automotive Collision Refinishing Technician." (Ex. 5 at 82; capitalization in original.) Thus, the "course of study" was education in addition to the twelve years of schooling claimant had already received. He is therefore entitled to nothing on account of this factor.

The wage loss percentage is prescribed by section 39-71-703(3)(c), MCA, which reads:

> (c) if a worker has no 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%; . . . .

While claimant is not presently working, he is capable of working and earning a wage. His present earning capability must therefore be used in computing his wage loss. After considering the evidence, including the vocational testimony of Hink, the Court has found as fact that claimant's earning capacity is less than $6.11 an hour. Since his preinjury wage was $8.11 an hour, he has sustained a wage loss in excess of $2 an hour. Thus, the wage loss factor is twenty (20%) percent.

7. Wausau has agreed to a lump-sum advance of any remaining permanent partial disability benefits. It argues, however, that the advance must be discounted to present value.

The legislature has provided for discounting of lump-sum advances in section 39-71-741, MCA (1991). Subsection (4) then provides:

> (4) Any lump-sum conversion of benefits under subsection (3) must be converted to present value using the rate prescribed under subsection (5)(b).

Subsection (3) permits permanent total disability benefits to be paid in a lump sum, not to exceed $20,000. Subsection (5)(b) ties the discount rate to 10-year treasury bills.

On its face the discount requirement applies only to subsection (3), and subsection (3) pertains only to permanent *total* disability benefits. No similar discounting provision is made for lump sums of permanent *partial* disability benefits, which are governed by subsection (2).[1]

Wausau argues, however, that discounting is required by subsection (5)(a), which provides:

> An insurer may *recoup* any lump-sum payment amortized at the rate established by the department, prorated biweekly over the projected duration of the compensation period. [Italics added.]

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[1]Subsection (2) of 39-71-741, MCA (1991), provides:

> (a) If an insurer has accepted initial liability for an injury, permanent partial disability benefits may be converted in whole or in part to a lump-sum payment.
> (b) The total of any lump-sum conversion in part that is awarded to a claimant prior to the claimant's final award may not exceed the anticipated award under 39-71-703 or $20,000, whichever is less.
> (c) An agreement is subject to department approval. The department may disapprove an agreement only if the department determines that the settlement amount is inadequate. If disapproved, the department shall set forth in detail the reasons for disapproval.
> (d) Upon approval, the agreement constitutes a compromise and release settlement and may not be reopened by the department.

Discounting or converting to present value occurs when a lump sum is made. Recouping occurs when a lump-sum advance is repaid to the insurer by the claimant through withholding from bi-weekly benefits. In this case recoupment is not at issue: the advance will satisfy the Wausau's obligation in full, and biweekly benefits will cease. Section (5)(a) does not address any discount in calculating the original lump sum.

"It is a rule of statutory construction that the express mention of one matter excludes other similar matters not mentioned." ***Helena Valley Irrigation District v. State Highway Commission,*** *150 Mont. 192, 198, 433 P.2d 791 (1967).* As applied in this case, the express discounting requirement for lump-sum advances of permanent total disability benefits, and the omission of any similar requirement pertaining to advances of permanent partial disability benefits, evidences a legislative intent that no discount apply to the latter.

Therefore, the full, undiscounted amount shall be paid.

8. An award of attorney fees and imposition of a penalty require a finding that the insurer has acted unreasonably. §§ 39-71-611, -612 and -2907, MCA. Wausau's conduct in this case was not unreasonable. It had substantial, non-frivolous reasons for opposing rehabilitation benefits, and has actually prevailed on that issue. It has paid the permanent partial disability benefits it believed was due the claimant. It has prevailed on the education factor. Its opposition to the wage loss factor was supported by opinion testimony of a vocational counselor concerning claimant's wage earning potential. Those opinions were not frivolous or insubstantial even though ultimately rejected by the Court. The requests for attorney fees and a penalty are **denied**.

JUDGMENT

1. Claimant is not entitled to rehabilitation benefits under section 39-71-2001, MCA (1991), for additional schooling.

2. Pursuant to section 39-71-701, MCA (1991), the claimant is entitled to an additional $10,260 in permanent partial disability benefits. That amount shall be paid in a lump sum.

3. Claimant is not entitled to attorney fees or a penalty.

4. Claimant is entitled to costs in an amount to be determined by the Court. He shall have fourteen (14) days in which to submit an affidavit of costs. Wausau shall thereafter have ten (10) days in which to file any objections.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 9th day of December, 1994.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Patrick R. Sheehy
Mr. Kelly M. Wills