IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 115

WCC No. 9408-7126

PATTI POLLARI

Petitioner

vs.

MACO WORKERS' COMPENSATION TRUST

Respondent/Insurer.

DECISION AND JUDGMENT

Summary: Parties disputed claimant's entitlement to permanent partial disability benefits based on alleged wage loss.

Held: Under section 39-71-703, MCA (1991), where claimant is working, wage loss for purposes of permanent partial disability benefits must be computed on a comparison of claimant's wages for her time-of-injury job and her wages for her post-injury work. The comparison must be made for the same time period, because wages may rise over time. Where the wages for claimant's post-injury work, for all periods of time, were less than her time-of-injury wages, but not more than two dollars per hour less, she is entitled to a 10% PPD award.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-703, MCA (1993). Under section 39-71-703, MCA (1991), where claimant is working, wage loss for purposes of permanent partial disability benefits must be computed on a comparison of wages for claimant's time-of-injury job and those for post-injury work. The comparison must be made for the same time period, because wages may rise over time. Where the wages for claimant's post-injury work were less than her time-of-injury wages, but not more than two dollars per hour less, she was entitled to a 10% PPD award.

Benefits: Permanent Partial Disability Benefits: Wage Loss. Under section 39-71-703, MCA (1991), where claimant is working, wage loss for purposes of permanent partial disability benefits must be computed on a comparison of wages for claimant's time-of-injury job and those for post-injury work. The comparison must be made for the same time period, because wages may rise over time. Where the wages for claimant's post-injury work were less than her time-of-injury wages, but not more than two dollars per hour less, she was entitled to a 10% PPD award.

This case comes to the Court on an agreed stipulation of facts and briefs. The Court will, therefore, render its decision in narrative form.

Agreed Facts and Nature of the Dispute

Petitioner, Patti Pollari (claimant), was injured in an industrial accident on June 22, 1993. At that time she was working for Pioneer Nursing Home (Pioneer). She hurt her back while transferring a patient from a chair to a bed.

At the time of the accident, Pioneer was insured under the Montana Association of Counties Workers' Compensation Trust (MACO). MACO accepted liability for claimant's injury and has paid medical costs and temporary total disability benefits.

MACO also concedes that it is responsible for permanent partial disability benefits. However, the amount of its liability is in dispute. Under the formula set forth in section 39-71-703, MCA (1991), the parties agree that claimant is entitled to a twenty-nine (29%) percent award based on a five (5%) percent impairment rating, two (2%) percent for claimant's age, two (2%) percent for her education, and twenty (20%) percent for her physical restrictions. Claimant asserts that she is entitled to an additional ten (10%) percent for lost wages. MACO disagrees, hence this action.

The parties' stipulation provides the Court with the following wage information:

> Claimant's salary for February 1993 was $846.00; the March salary was at a reduced figure due to claimant taking a nurse's aide test; April salary was $814.50; May was $957.13; and June was $866.88.
>
> At the time of claimant's injury, her salary was $4.75 per hour for a 40-hour week. As of July 1, 1993, the position paid $5.25 per hour; and as of July 1, 1994, the position paid $6.10 per hour. At times, claimant was paid overtime, and she received vacation pay, health insurance, and sick leave.

> On October 15, 1993, claimant began employment with Town Pump at the rate of $5.00 per hour for a 40-hour week. As of June 22, 1993, the person in the position now held by claimant was $4.50 per hour. On June 15, 1994, claimant's salary was raised to $6.00 per hour. Claimant receives no other benefits at the Town Pump position.

The parties also agree that claimant's permanent partial disability rate is $174.50 a week.

Discussion

The law in effect at the time of the claimant's injury governs benefits. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986).* The 1991 version of the Workers' Compensation Act therefore applies in this case.

Section 39-71-703, MCA (1991), specifies the method for computing the amount of permanent partial disability benefits. It provides in relevant part:

> **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.
>
> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.
>
> (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:
>
> (a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;
>
> (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 equiva-

lency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

(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%; and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

"Wage loss" is not specifically defined by the Act. However, section 39-71-123, MCA (1991), does define "wages" and specifies the method for computing wages. The section provides in relevant part:

39-71-123. Wages defined. (1) "Wages" means the gross remuneration paid in money, or in a substitute for money, for services rendered by an employee. Wages include but are not limited to:

(a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and sickness periods;

(b) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value; and

(c) payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement.

(2) Wages do not include:

(a) employee expense reimbursements or allowances for meals, lodging, travel, and subsistence, and other expenses, as set forth in department rules;

(b) special rewards for individual invention or discovery;

(c) tips and other gratuities received by the employee in excess of those documented to the employer for tax purposes;

(d) contributions made by the employer to a group insurance or pension plan; or

(e) vacation or sick leave benefits accrued but not paid.

(3) For compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except if:

(a) the term of employment for the same employer is less than four pay periods, in which case the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work; or

(b) for good cause shown by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods.

Since claimant is working, wage loss must be computed based on a comparison of claimant's wages for her time-of-injury job and her wages for her post-injury job.[1] Claimant did not commence her current job until October 1993, several months after her injury. MACO argues that the Court must compare claimant's time-of-injury job with the actual wages she has earned since October 1993, and ignore the time differential. Since claimant earned a $5.00 an hour starting wage, and was later increased to $6.00, claimant would have no actual wage loss since her time-of-injury position paid only $4.75.

In ***McDanold v. B.N. Transport, Inc.,*** *208 Mont. 470, 479-80, 679 P.2d 1188 (1984),* the Supreme Court rejected a similar argument and held that "pre-injury and post-injury wages must be compared for the same period of time." MACO correctly points out that ***McDanold*** involved the `"old law" concept of loss of earning capacity.'" Response to Petitioner's Brief at 3. However, like the "old law," the "new law" is silent regarding the specific time at which the wage loss determination should be made. As in this case, wages may rise over time. ***See Fermo v. Superline Products,*** *175 Mont. 345, 349, 574 P.2d 251, 253 (1978).* MACO's interpretation would lead to absurd results. For example, had claimant been hired on by Town Pump immediately after her industrial accident, MACO would be forced to agree that she would be entitled to wage loss benefits since she would have earned only $4.50 an hour, which is less than the $4.75 she was earning at the time of her injury. But because she did not obtain immediate employment, MACO asks the Court to penalize her. It will not do so. Statutes should be construed reasonably. ***Darby***

[1]In a case where a claimant had reached maximum healing and was capable of employment but was unemployed, the Court computed post-injury wages by using the wages for jobs the claimant was capable of performing. ***Brandon Gjerde v. Employers Ins. of Wausau,*** *WCC No. 9408-7134 (December 9, 1994).*

Spar, Ltd. v. Department of Revenue, *217 Mont. 376, 379, 705 P.2d 111 (1985).* As in ***McDanold***, we hold that "pre-injury and post-injury wages must be compared for the same period of time."

In the present case it makes no difference at which point of time the comparison is made. At all potential comparison points, the wages for claimant's current job were less than her time-of-injury job. The following chart shows the differences:

Date	Wages: Time-of-Injury Job	Wages: Town Pump
6/22/93	$4.75	$4.50
10/15/93	$5.50	$5.00
7/1/94	$6.10	$6.00

(Claimant's Brief at 8.) Under section 39-71-703(3)(c), MCA, any loss of wages entitles the claimant to a minimum benefit of ten (10%) percent. If the loss is greater than $2 an hour, there is a twenty (20%) percent entitlement. Since the loss in this case is less than $2 an hour, claimant is entitled to an additional ten (10%) percent based on wage loss.

Judgment

1. Based on a ten (10%) percent award for actual wage loss, MACO shall pay claimant an additional thirty-five (35) weeks of permanent partial disability benefits at $174.50 per week.

2. Claimant is entitled to costs in an amount to be determined by the Court. She shall submit her affidavit of costs within fourteen (14) days of this decision. MACO shall have ten (10) days thereafter in which to file its objections.

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

4. Any party to this dispute may have twenty (20) days in which to request a rehearing from this Decision and Judgment.

Dated in Helena, Montana, this 21st day of December, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Allen L. McAlear
Mr. Norman H. Grosfield