IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 52

WCC No. 2005-1257

MARK S. RYCKMAN

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: The respondent, after apparently agreeing to pay the claimant 20% for wage loss pursuant to section 39-71-703(5)(c), MCA (1997), reneged. The claimant then petitioned the Court for the benefits. The respondent now moves for summary judgment with respect to the claimant's request for a 20% award for wage loss suffered as a result of the claimant's industrial injury, tendering a perfunctory opinion of its vocational consultant stating that he had performed a labor market analysis and determined that the claimant did not suffer a wage loss.

Held: Summary judgment is denied. The parties did not address whether the respondent's acceptance of liability for the 20% wage-loss benefits may be rescinded and if so on what grounds. Moreover, a perfunctory opinion by a vocational consultant is not conclusive and binding on the Court where the claimant in fact is earning less after his injury.

Topics:

Evidence: Expert Testimony: Generally. The opinion of an expert is not conclusive. A court must determine what if any weight the opinion is to be given. Thus, a vocational expert's perfunctory opinion stating that, based on his labor market analysis, the claimant did not suffer a wage loss, does not entitle an insurer or self-insured to summary judgment where the claimant in fact is earning less than his time-of-injury wage. Since the claimant's actual earnings provide one basis for determining wage loss, the claimant need not tender an opposing expert opinion to avoid summary judgment.

Benefits: Permanent Partial Disability Benefits: Wage Loss. While section 39-71-116(1), MCA (1997), provides an alternative measure of wage loss based

> on the wages the claimant is "**qualified** to earn" after reaching maximum medical improvement, what a worker is actually earning is typically the best measure of what he or she is qualified to earn. The "qualified to earn" standard thus applies in situations where a claimant is underemployed or fails to seek work.

¶1 The petitioner in this matter is seeking permanent partial disability benefits based on wage loss. The respondent moves for summary judgment.

Factual Background

¶2 The petitioner suffered a work-related injury on July 22, 1998, while working for ASARCO, Incorporated (ASARCO). ASARCO, which is self-insured, accepted liability for his claim.

¶3 In 2004 the claims adjuster apparently agreed to pay the claimant a 36% permanent partial disability award, which included 20% for wage loss. § 39-71-703(5)(c), MCA (1997). According to ASARCO, both parties "assumed" the claimant suffered a 20% wage loss. However, ASARCO thereafter had a vocational consultant analyze the claimant's job market. The consultant concluded that the claimant is employable at the same or a greater wage than he was earning at the time of his injury. Based on that perfunctory opinion, ASARCO revoked its apparent agreement to pay the 20% for wage loss. The claimant then petitioned the Court for the benefits.

Discussion

¶4 Summary judgment may be granted only where uncontroverted material facts demonstrate that the respondent is entitled to judgment as a matter of law. *Lewis v. Nine Mile Mines, Inc.*, 268 Mont. 336, 340, 886 P.2d 912, 914 (1994).

¶5 Although ASARCO appears to concede that its adjuster agreed to the 36% award, including 20% for wage loss, it denies that it entered into an enforceable settlement agreement; alleges that even if it did so it was based on mutual mistake of fact and should therefore be rescinded; and asserts that it is entitled to summary judgment on the merits of the wage-loss claim since its vocational expert's affidavit demonstrates as an uncontroverted matter that the claimant did not in fact suffer a wage loss.

¶6 Initially, the adjuster's agreement to pay benefits does not constitute a settlement agreement. Settlement agreements are governed by section 39-71-741, MCA (1999), which governs lump-sum and compromise settlements. Such settlements must be in writing and approved by the Department of Labor and Industry, and there is no evidence of such agreement in this case. Where an insurer simply agrees to pay biweekly benefits, section 39-71-741, MCA is inapplicable. The real question presented here is whether and on what grounds an insurer can revoke its acceptance of liability for specific benefits – here the 36%

award. Neither party has addressed that issue and the motion for summary judgment must therefore be denied solely on that basis.

¶7 Moreover, the respondent is not entitled to judgment on the merits of the 20% wage-loss claim. Actual wage loss is typically measured by comparing the claimant's time-of-injury wage to the wages he earns after reaching maximum medical improvement. § 39-71-116(1), MCA (1997). While section 39-71-116(1), MCA (1997), provides an alternative measure of wage loss based on the wages the claimant is "**qualified** to earn" after reaching maximum medical improvement, what a worker is actually earning is typically the best measure of what he or she is qualified to earn. The "qualified to earn" standard applies in situations where a claimant is underemployed or fails to seek work. Expert vocational opinion is admissible in determining whether a claimant is underemployed or has failed to diligently seek employment, but it is not conclusive. A court is not bound by an expert's opinion and must determine what, if any, weight to give it. *Christofferson v. City of Great Falls,* 2003 MT 189, ¶ 14, 316 Mont. 469, 74 P.3d 1021 (2003). The rule is especially true in wage-loss cases where the Court must weigh the claimant's actual experience in seeking and obtaining employment against a vocational consultant who offers opinions, and where the in-fact wages provide one basis for determining wage loss.

¶8 "Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists. " *Spinler v. Allen,* 1999 MT 160, 295 Mont. 139, 983 P.2d 348 (1999). The question of wage loss does not present a situation, as in a medical malpractice case, which requires an expert opinion to make out a prima facie case. The perfunctory opinion by a vocational consultant stating the claimant suffered no wage loss is not a substitute for trial.

ORDER

¶9 The motion for summary judgment is **denied**.

DATED in Helena, Montana, this 24th day of August, 2005.

(SEAL)

MIKE McCARTER
JUDGE

c: Mr. John C. Doubek
Mr. Todd A. Hammer
Submitted: July 27, 2005