

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 2A

WCC No. 9303-6721

STEVEN K. BURGLUND

Petitioner

vs.

LIBERTY MUTUAL NORTHWEST INSURANCE COMPANY

Respondent/Insurer for

UNITED PARCEL SERVICE

Employer.

ORDER WITHDRAWING FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

Summary: Following issuance of Findings and Fact and Conclusions of law published at 1995 MTWCC 2, respondent notified the Court the parties had stipulated that the Court would analyze this case under section 39-71-703, MCA (1983), not under section 39-71-705, MCA (1983).

Held: Prior Findings and Conclusions are withdrawn. See *Burglund v. Liberty Mutual Northwest Ins. Co.*, 1995 MTWCC 25, where Court replaces these findings and conclusions.

Mea culpa!

On January 19, 1995, this Court issued its Findings of Fact, Conclusions of Law and Judgment. Among other things, the Court found that the petitioner is entitled to permanent partial disability benefits based on a twenty (20%) percent disability. While the parties had argued their case under section **39-71-703, MCA (1983)**, I analyzed the case under section **39-71-705, MCA (1983)**, since the Pretrial Order affirmatively stated that petitioner was proceeding under the latter section. I also awarded a penalty as to one half of a ten (10%) percent impairment rating.

On February 9, 1995, the respondent filed a Petition for Amendment to Court's Findings and Conclusions or Alternatively a New Trial. In the petition the respondent correctly pointed out that the Court had overlooked a stipulation filed by the parties on the first day of trial. That stipulation provided that this case was to proceed under section 39-71-703, MCA. Respondent also points out that it paid the full ten (10%) percent impairment award long before trial, a fact overlooked by the Court, and that in Claimant's Proposed Findings of Fact, Conclusions of Law and Judgment the petitioner did not request a penalty.

The Court's oversight was profound and material, and it offers no excuses or alibis. I must therefore determine what to do next.

After considering the matter, I conclude that the original decision should be and is hereby **withdrawn**. Under section 39-71-703, MCA, petitioner would be entitled to nothing in addition to his impairment rating since he failed to persuade the Court that he suffers a loss of earning capacity. The penalty issue also requires reassessment in light of the overlooked facts.

However, rather than immediately issue an amended decision, the Court believes it would be helpful to hear how parties propose to proceed hereafter. In light of the original result reached under section 39-71-705, MCA, I anticipate that petitioner will file a new petition under that section should I limit my consideration of his case to section 39-71-703, MCA. Requiring an entirely new proceeding would surely be a waste of the parties' and the Court's time and resources. Thus, consideration should be given to permitting a post-trial amendment to allow consideration under both sections, thus leaving the award of benefits intact (subject, of course, to the right to appeal from the amount of the award). That should be a possible and reasonable solution unless the parties have somehow been prejudiced in the presentation of their respective cases.

The Court will therefore arrange a conference with counsel before proceeding further.

Dated in Helena, Montana, this 1st day of March, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Darrel S. Worm
Mr. Larry W. Jones