IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 24

WCC No. 2007-1977

BUDD CARDWELL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

TERRY RACKLEY

Respondent/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for benefits as a result of this Court's determination that he suffered an occupational disease while employed by Terry Rackley. At trial, the UEF conceded that Petitioner was entitled to TTD benefits at a rate of $183.15 per week beginning September 20, 2004, up until at least the date of trial. Petitioner argued that the UEF utilized the incorrect method in calculating his wages because the UEF failed to show good cause why the four pay periods preceding Petitioner's occupational disease were not an adequate representation of Petitioner's average weekly wage. The UEF argued that the preceding year more adequately represented the fluctuation in Petitioner's pay and periods of time that he spent being idle. Additionally, Petitioner requested costs and attorney fees.

Held: Petitioner is entitled to TTD benefits at a rate of $183.15 per week. The UEF demonstrated good cause for utilizing one year's worth of wages to determine Petitioner's average weekly wage. Because Petitioner did not prevail on the issue before the Court, he is not entitled to costs or attorney fees.

¶ 1 The trial in this matter was held on March 11, 2008, in Kalispell, Montana. Petitioner Budd Cardwell was present and represented by Garry D. Seaman. Respondent Uninsured Employers' Fund was represented by Arthur M. Gorov. Respondent/Employer Terry Rackley was present and represented by Bryce R. Floch.

¶ 2 Exhibits: Exhibits 1-20 and 22-25 were admitted without objection. Exhibit 21 was excluded on relevancy grounds.

¶ 3 Witnesses and Depositions: All parties stipulated that the Court take judicial notice of the depositions of Alice Elrod, D.C., and Ned Wilson, M.D. – depositions filed previously in a separate dispute involving the same parties. Petitioner and Bernadette Rice were sworn and testified at trial.

¶ 4 Issues Presented: The following are contested issues of law in the present case:

¶ 4a The rate and duration of Petitioner's TTD benefits.

¶ 4b Petitioner's entitlement to costs and attorney fees.[1]

FINDINGS OF FACT

¶ 5 In a separate case involving the same parties, this Court held that Petitioner was an employee of Terry Rackley and suffered an occupational disease during his employment with Rackley.[2] After this Court issued that decision, the Uninsured Employers' Fund (UEF) did not pay any benefits to Petitioner because it did not receive any medical receipts or records, and no benefits of any type were specifically requested by Petitioner.[3] At trial, all parties stipulated that Petitioner is entitled to some TTD benefits.[4]

¶ 6 Petitioner was a credible witness and I find his testimony at trial credible.

¶ 7 Bernadette Rice was a credible witness and I find her testimony at trial credible.

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[1] During the trial of the present issues, all parties stipulated to Petitioner's entitlement to TTD benefits. (*See* Minute Book Hearing No. 3921.) The remaining issues for the Court to determine are issues 4a and 4b.

[2] *See Cardwell v. UEF*, 2007 MTWCC 22.

[3] Trial Test.

[4] Minute Book Hearing No. 3921.

¶ 8 Rice is a claims examiner for the UEF and has been a claims examiner for approximately 17 years.[5]

¶ 9 Rice testified at trial that following this Court's determination that Petitioner suffered an occupational disease as a result of his employment with Rackley, she only paid the medical bill of the physician that performed the independent medical examination (IME) of Petitioner, Dr. Bruce R. Belleville. None of Petitioner's other medical bills have been paid.[6] Rice stated that she has not paid any medical bills because none of the bills had been submitted to her office until a week prior to trial. Therefore, until that time, Rice was unable to determine whether the treatment was related to Petitioner's occupational disease.[7]

¶ 10 In his May 4, 2006, IME report, Dr. Belleville opined that Petitioner was at maximum medical improvement (MMI) for his injury and assigned him an 18% whole person impairment rating.[8] In the same report, Dr. Belleville stated that at the time he performed the IME, he was not presented with a printed job description for drywall installer.[9]

¶ 11 At the time of trial, the UEF had failed to pay any benefits based upon the impairment rating assigned by Dr. Belleville, even though this Court ruled in 2007 that Petitioner's occupational disease was related to his employment with Rackley.[10] Rice testified at trial that she did not pay any benefits because none were specifically requested by Petitioner.[11]

¶ 12 Rice did not send a job description of drywall installer to any of Petitioner's physicians. Nor did she hire a vocational consultant to work up alternative job analyses.[12]

¶ 13 In a July 31, 2007, letter to Garry Seaman, Rice calculated a TTD benefit rate by determining Petitioner's one-year preinjury wages ($14,325) divided by 52.143 and arrived

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[5] Trial Test.

[6] Trial Test.

[7] Trial Test.

[8] Ex. 16 at 11.

[9] Ex. 16 at 1.

[10] Trial Test.

[11] Trial Test.

[12] Trial Test.

at the figure of $274.73. Rice then calculated two-thirds of $274.73 to arrive at a TTD benefit rate of $183.15 per week.[13]

¶ 14 Petitioner received payments on the following dates for the year immediately preceding his occupational disease:

August 8, 2003	$ 1,100
August 21, 2003	$ 1,000
October 3, 2003	$ 300
November 6, 2003	$ 850
December 11, 2003	$ 1,200
March 5, 2004	$ 1,000
March 19, 2004	$ 1,000
April 20, 2004	$ 1,200
April 30, 2004	$ 2,400
June 2, 2004	$ 1,200
June 18, 2004	$ 750
June 25, 2004	$ 1,125
July 1, 2004	$ 1,200[14]

¶ 15 Rice testified that she used the preceding preinjury year to determine Petitioner's TTD rate because the four pay periods preceding his injury did not accurately reflect Petitioner's wages while working for Rackley, whereas utilizing the preinjury year wages accounted for Petitioner's periods of idleness.[15]

¶ 16 In a February 21, 2006, letter, Dr. Ned A. Wilson opined that Petitioner was not capable of competitive gainful employment because of his significant neck pain.[16]

¶ 17 On June 6, 2006, Dr. Steve Martini and Christopher Rost, PA-C, opined that Petitioner was permanently disabled due to his spinal fusion.[17]

¶ 18 Although Rice did not receive current medical documentation from Petitioner until one week prior to trial, she admitted that Petitioner's initial medical release to the UEF

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[13] Ex. 24 at 1.

[14] Ex. 22 at 1.

[15] Trial Test.

[16] Ex. 9 at 31-32.

[17] Ex. 15 at 15.

allowed her to access any medical records related to Petitioner's occupational disease without obtaining these records directly from Petitioner's counsel.[18]

¶ 19 Rice testified at trial that she was aware of the *Coles* criteria and considered it applicable to Petitioner's claim. Rice defined the *Coles* criteria to mean that when a claimant is released to return to work in some capacity but is unable to return to his job at the time of his injury, jobs must be identified that the claimant is capable of physically performing, has the education or experience to perform the job, and are also approved by a physician.[19]

¶ 20 On cross-examination, Rice stated that her regular practice after receiving medical documentation on a case where the *Coles* criteria applies is to obtain a vocational analysis. However, she further testified that this was not done in the present case because the UEF had initially denied liability.[20]

¶ 21 Rice conceded that Petitioner was entitled to TTD benefits beginning September 20, 2004, up to the time of trial, notwithstanding Dr. Belleville's determination that Petitioner had reached MMI by May 4, 2006.[21]

¶ 22 The social history portion of an August 30, 2006, medical summary states, "Patient is employed."[22] However, Petitioner testified at trial that he has not been employed since the day his employment terminated with Rackley.[23] Aside from the one statement in the social history portion of one medical report, no credible evidence exists that Petitioner was employed any time after he left his employment with Rackley. I therefore find that Petitioner has not been employed since that time.

¶ 23 Petitioner testified at trial that the payments recorded by the UEF's investigator, Steve LaVoie, did not account for some cash payments he received from Rackley over the years. However, Petitioner further testified that he made no record or account of the cash payments he received and could not recall with any amount of specificity how much cash

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[18] Trial Test.

[19] Trial Test.

[20] Trial Test.

[21] Trial Test.

[22] Ex. 8 at 71.

[23] Trial Test.

he may have received.[24] Because of Petitioner's inability to recall any definitive amounts of cash and because of a total lack of accounting for the cash, I find the evidence regarding cash payments too scant to consider them in calculating payments Rackley may have made in cash to Petitioner.

¶ 24 Petitioner testified at trial that his wages were often based on a percentage of the amount Rackley received for a given job and his wages fluctuated accordingly.[25]

CONCLUSIONS OF LAW

¶ 25 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's last day of work.[26]

¶ 26 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[27]

¶ 27 Because all parties stipulated to Petitioner's entitlement to TTD benefits, I must now determine the rate and duration of the benefits.

Rate

¶ 28 Generally, to calculate the proper rate for TTD benefits, the four pay periods preceding the employee's injury should be utilized to determine the employee's wages.[28] However, to account for Petitioner's periods of idleness, the UEF relied on § 39-71-123(3)(b), MCA, as an alternative to this method of calculation. That section of the statute reads:

> For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

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[24] Trial Test.

[25] Trial Test.

[26] *Grenz v. Fire & Cas. of Conn.,* 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

[27] *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

[28] § 39-71-123(3)(a).

¶ 29 The UEF argues that, upon a review of Petitioner's wage history with Rackley, an average weekly wage utilizing payments made during an entire year is a better reflection of Petitioner's actual wages. Petitioner argues that the general rule of utilizing the four pay periods preceding Petitioner's injury should be used to calculate his TTD rate because good cause has not been shown by the UEF to utilize subsection (3)(b). Petitioner's argument is without merit.

¶ 30 In *Lindskog v. State Compensation Ins. Fund,*[29] this Court concluded that good cause had been shown to utilize the claimant's wages over the preceding year of his injury because of the discrepancy between the average weekly wage when utilizing the four preceding pay periods of the injury versus utilizing the previous year's wages. In that case, this Court concluded that a difference of $32.59 per pay period average was sufficient to warrant the use of subsection (3)(b).[30] I conclude the circumstances in the present case warrant the UEF's utilization of § 39-71-123(3)(b), MCA, as well. As shown in paragraph 14 above, Rackley's payments to Petitioner widely varied in both time and amount. Payments were not made every two weeks or on any other set time frame. Petitioner testified that he was paid a percentage of the amount Rackley received for a given job and the pay fluctuated accordingly. I conclude that the UEF has shown good cause for utilizing § 39-71-123(3)(b), MCA, in calculating Petitioner's average weekly wage. Petitioner is entitled to receive TTD benefits at the rate of $183.15 per week.

Duration

¶ 31 The Court was presented with no evidence contrary to a TTD benefit commencement date of September 20, 2004. The Court therefore adopts this as the proper commencement date.

¶ 32 I then must determine on which date Petitioner's TTD benefits terminate, if at all. At trial, Rice explained that she understood what the *Coles* criteria entailed. Because this case is governed by the 2003 Workers' Compensation Act, the *Coles* requirements have been codified at § 39-71-609, MCA.[31] Section 39-71-609, MCA, reads, in pertinent part:

> (2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary

[29] *Lindskog,* 2000 MTWCC 61.

[30] *Id.* at ¶ 15.

[31] *Coles v. Seven Eleven Store,* 217 Mont. 343, 704 P.2d 1048 (1985).

> total disability benefits or temporary partial disability benefits to permanent partial disability benefits:
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> (a) must have a physician's determination that the claimant has reached medical stability;
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> (b) must have a physician's determination of the claimant's physical restrictions resulting from the industrial injury;
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> (c) must have a physician's determination, based on the physician's knowledge of the claimant's job analysis prepared by a rehabilitation provider, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;
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> (d) shall give notice to the claimant of the insurer's receipt of the report of the physician's determinations required . . . .

¶ 33 Dr. Belleville placed Petitioner at MMI for his injury in his May 4, 2006, IME report. However, he was not presented with any job analysis for drywall installer. Rice testified that she did not send any job analyses to any physicians for review at any time. Rice further testified that it was the UEF's position that the *Coles* requirements had not been met at the time of trial and that Petitioner was entitled to TTD benefits until at least the time of trial. Therefore, I determine that Petitioner's TTD benefits should commence on September 20, 2004, and continue forward until such time as the statutory criteria for conversion of these benefits have been met.

Costs and Attorney Fees

¶ 34 Because Petitioner did not prevail on the issue before the Court, he is not entitled to costs or attorney fees.

JUDGMENT

¶ 35 Petitioner is entitled to TTD benefits at a weekly rate of $183.15 beginning September 20, 2004, through at least the date of trial.

¶ 36 Petitioner is not entitled to costs or attorney fees.

¶ 37 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 16th day of May, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Garry D. Seaman
Arthur M. Gorov
Bryce R. Floch
Submitted: March 25, 2008