

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 91

WCC No. 9505-7298

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BRAD CERTAIN

Petitioner

vs.

PPG INDUSTRIES, INCORPORATED

Respondent/Insurer/Employer.

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JUDGMENT

**Summary:** Parties disputed whether claimant was entitled to a 25% or 15% permanent partial disability benefit award under sections 39-71-703 to -708, MCA (1985).

**Held:** Claimant entitled to 25% award under sections 39-71-703 through 708, MCA (1985), not the 15% argued by the insurer, where he credibly testified to severe back problems limiting his physical capability, even though he is currently employed without wage loss. In ascertaining claimant's lost earning capacity, the Court also considered claimant's age, loss of heavy labor capacity, and eagerness to work.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1985).** Claimant entitled to 25% award under sections 39-71-703 through 708, MCA (1985), not the 15% argued by the insurer, where he credibly testified to severe back problems limiting his physical capability, even though he is currently employed without wage loss. In ascertaining claimant's lost earning capacity, the Court also considered claimant's age, loss of heavy labor capacity, and eagerness to work.

**Benefits: Permanent Partial Disability Benefits: Lost Earning Capacity.** Claimant entitled to 25% award under sections 39-71-703 through 708, MCA (1985), not the 15% argued by the insurer, where he credibly testified to severe back problems limiting his physical capability, even though he is currently employed

without wage loss. In ascertaining claimant's lost earning capacity, the Court also considered claimant's age, loss of heavy labor capacity, and eagerness to work.

This matter came on for trial on Thursday, October 12, 1995, in Great Falls, Montana. Petitioner, Brad Certain (claimant), was present and represented by Mr. Thomas J. Murphy. Respondent, PPG Industries, was represented by Mr. William O. Bronson.

Exhibits 1 through 7 were admitted without objections. Claimant, Dr. Mark Stoebe and Juanita Hooper testified. Depositions of claimant, Terry Blackwell, and Juanita Hopper were submitted and also considered by the Court.

The issue presented in this case is the amount due claimant as a permanent partial disability award under sections 39-71-703 to -708, MCA (1985). The claimant sought an award of 25% disability. PPG argued for a 15% award.

After considering all of the trial testimony and exhibits, the depositions, and the arguments of counsel, the Court ruled from the bench, finding that claimant is entitled to a 25% disability award. Counsel for PPG has informed the Court the PPG "will acquiesce in the decision of the court announced immediately after trial on Thursday, October 12." (October 25, 1995, letter of William O. Bronson to Patricia Kessner.) PPG suggested that the decision be memorialized by "a short order and judgment with the transcript of the oral decision . . . ." (*Id.*) The Court accepts the suggestion.

THEREFORE, IT IS HEREBY ADJUDGED AND DECREED, as follows:

1. Pursuant to section 39-71-703, MCA (1985), and for the reasons set forth in the partial transcript which is attached to this Judgment, PPG Industries shall pay claimant a 25% disability award but shall receive credit for the 5% impairment award (\$3,662.50) it has already paid. Since claimant's permanent partial disability rate is \$146.50, the gross award is \$18,312.50 ( $\$146.50 \text{ times } 125 \text{ weeks}$ ). With the credit, the net amount due claimant is \$14,650.00 ( $\$18,312.50 \text{ minus } \$3,662.50$ ), which shall be paid in a lump sum.
2. Claimant is entitled to costs in an amount to be determined by the Court. The claimant shall have ten days in which to submit his affidavit of costs. PPG shall then have ten days in which to file its objections, if any.
3. Under the law in effect at the time of the injury, claimant is entitled to attorney fees in an amount to be determined by the Court. Pursuant to section 39-71-612, MCA (1985), the attorney fees shall be based on the difference between the amount awarded (25%) and the insurer's last offer (15%).
4. This judgment is certified as final for purposes of appeal.

5. Any party to this dispute may have 20 days in which to request a rehearing from this Judgment.

Dated in Helena, Montana, this 6th day of November, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

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c: Mr. Thomas J. Murphy  
Mr. William O. Bronson

Attached: Copy of Bench Ruling  
Submitted Date: October 25, 1995