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FILED

AUG 16 2004

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE
STATE OF MONTANA

<p>ASARCO, INC., vs. KEITH L. FOSTER,</p> <p>Petitioner, Respondent.</p>	<p>WCC NO. 2004-1120</p> <p>PETITION FOR DECLARATORY RULING</p>
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COMES NOW the above-named Petitioner, and for its Petition for Declaratory Judgment, states and alleges as follows:

1. Respondent Keith L. Foster was a former employee of Petitioner ASARCO, Inc. at its plant in East Helena, Montana.
2. On or about March 31, 1998, Respondent sustained an injury to his knee during the course and scope of his employment with Petitioner.
3. At the time of said injury, Petitioner was insured as a Plan I self-insured employer under the provisions of Montana Workers' Compensation Act.
4. Respondent made demand upon Petitioner for the payment of an impairment rating in regard to his March 31, 1998 knee injury.
5. Petitioner paid said indemnity benefits for said impairment rating at the permanent partial rate set forth in section 39-71-703, MCA (1997).

6. Section 39-71-703, MCA (1997) states in pertinent part as follows:

“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 if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is not based exclusively on complaints of pain;

(ii) is established by objective medical findings; and

(iii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

(3) Beginning July 1, 2003, the permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 375 weeks.

...

(6) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.”

7. Respondent objected and disputed the payment of the impairment rating at the permanent partial rate set forth in subparagraph (6) of section 39-71-703, MCA and demanded payment at the rate for permanent total or temporary total benefits based upon *Rausch v. State Compensation Ins. Fund*, 54 P.3d 25 (2002),

8. Petitioner through its counsel advised Respondent through its counsel that the payment of the impairment rating was proper at the permanent partial disability rate. Petitioner's counsel's letter stated:

"We have reviewed the case upon which you place reliance for your demand, *Rausch v. State Compensation Ins. Fund*, 54 P.3d 25 (2002), and we do not believe that it supports your demand. While it is acknowledged that the *Rausch* case does indeed talk about characterizing a claimant's impairment rating as a permanent total benefit in a specific context (Social Security offsets), it does not say anything about requiring an employer or insurer to pay the impairment rating at a different rate than that established by statute. It does not state that the insurer or employer must pay the impairment rating at the claimant's permanent total disability rate. It does not suggest that subsection (6) of 39-71-703, MCA is abolished, struck down or "tossed out of the window." Rather, it simply suggests that, in the specific and limited context of offset of payments of workers' compensation benefits, the Social Security authorities may not offset any benefits paid to claimant arising out of the payment of an impairment rating under the Montana Workers' Compensation Act.

As you will notice under section 39-71-703, MCA, the compensation for an impairment rating is covered under the title "Compensation for Permanent Partial Disability." In subsection (1), the statute provides that "if an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total benefits, the worker is entitled to a permanent partial disability award if that worker has an actual wage loss" and "has a permanent impairment rating that" "is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment." In subsection (2), the statute provides that "when a worker receives an impairment rating as a compensable injury and has no actual wage loss as a result of an injury, the worker is eligible for an impairment award only." In subsection (3), the statute provides that "the permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 350 weeks." Finally, and perhaps most importantly, in subsection (6), the statute provides that "the weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of the injury, but the rate may not exceed one-half of the state's average weekly wage."

Based upon the plain, unambiguous and clear language of the statute and the statements of the Montana Supreme Court in *Rausch* that limited the characterization of impairment ratings insofar as Social Security offsets, ASARCO will pay the impairment rating at the PPD rate, and not at the PTD rate."

9. The parties mediated their dispute, and the mediation provisions of the Workers' Compensation Act have been complied with.

10. Petitioner brings this Petition for Declaratory Ruling pursuant to ARM 24.5.351, asking the Court to adjudge and declare that the payment of the impairment rating was proper pursuant to the provisions of section 39-71-703, MCA (1997) and applicable case law.

11. The following is a list of individuals who are potential witnesses for Respondent in this matter:

<u>NAME</u>	<u>SUBJECT OF TESTIMONY</u>
(a) Kari Schasu	Handling and adjusting of claim.
(b) Any and all witnesses listed by Petitioner	
(c) Any and all witnesses divulged during discovery	
(d) Any witnesses necessary for rebuttal or impeachment	

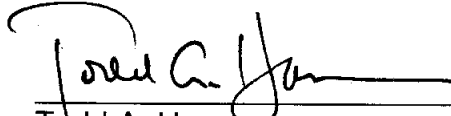
12. The following is a list of written documents relating to this case which may be introduced into evidence by the Respondent:

- (a) Impairment Rating.
- (b) Payment Records Relating to Impairment Rating.
- (c) Correspondence between Parties.

WHEREFORE, Respondent respectfully requests that the Court adjudge and declare that, pursuant to the provisions of section 39-71-703, MCA and case law, the payment of the impairment rating at the permanent partial disability rate was proper; and for such other relief as the Court may determine proper.

DATED this 13th day of August, 2004.

HAMMER, HEWITT & SANDLER, PLLC




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CERTIFICATE OF SERVICE

I, **TODD A. HAMMER**, do hereby certify that on the 13th day of July, 2004, I served a copy of the foregoing **Petition for Declaratory Ruling** in the above matter by mailing a copy thereof, first class postage prepaid to:

Thomas A. Budewitz
Attorney at Law
1625 11th Avenue
Helena, Mt. 59601



Todd A. Hammer