

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 94

WCC No. 9508-7362

JAN GATES

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANIES

Respondent/Insurer for

DARBY LUMBER

Employer.

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary: Claimant has not returned to work since his industrial injury. He earned \$9.50 per hour at time of injury; medically approved jobs identified by the insurer pay in a range from \$4.25 to \$9.73. Claimant seeks partial summary judgment that appropriate measure of wage loss would use average of medically approved jobs. Insurer argues for use of highest paid job, which would mean claimant would have no wage loss.

Held: Partial summary judgment denied where the Court cannot determine the appropriate measure of wages on the facts given. Where the claimant is capable of working but does not return to work, the Court must determine what he is capable of earning, that is, what jobs he is likely to obtain if he made a diligent job search. High end wages may be appropriate in one case, but inappropriate in another. If evidence establishes he will not likely obtain a high-end job, but can do better than a low-end job, an average of all wages for approved positions may be appropriate.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1993). Where the claimant is capable of working but does not return to work, to determine wage loss under section 39-71-703(c), MCA

(1993), the Court looks to what he is capable of earning, that is, what jobs he is likely to obtain if he made a diligent job search. High end wages may be appropriate in one case, but inappropriate in another. If evidence establishes he will not likely obtain a high-end job, but can do better than a low-end job, an average of all wages for approved positions may be appropriate.

Wages: Wage Loss. Where the claimant is capable of working but does not return to work, to determine wage loss under section 39-71-703(c), MCA (1993), the Court looks to what he is capable of earning, that is, what jobs he is likely to obtain if he made a diligent job search. High end wages may be appropriate in one case, but inappropriate in another. If evidence establishes he will not likely obtain a high-end job, but can do better than a low-end job, an average of all wages for approved positions may be appropriate.

Wages: Qualified to earn. Where the claimant is capable of working but does not return to work, to determine wage loss under section 39-71-703(c), MCA (1993), the Court looks to what he is capable of earning, that is, what jobs he is likely to obtain if he made a diligent job search. High end wages may be appropriate in one case, but inappropriate in another. If evidence establishes he will not likely obtain a high-end job, but can do better than a low-end job, an average of all wages for approved positions may be appropriate.

Benefits: Permanent Partial Disability Benefits: Wage Loss. Where the claimant is capable of working but does not return to work, to determine wage loss under section 39-71-703(c), MCA (1993), the Court looks to what he is capable of earning, that is, what jobs he is likely to obtain if he made a diligent job search. High end wages may be appropriate in one case, but inappropriate in another. If evidence establishes he will not likely obtain a high-end job, but can do better than a low-end job, an average of all wages for approved positions may be appropriate.

Petitioner (claimant) has moved for partial summary judgment, asking the Court to determine that, since he has not returned to work following an August 1993 injury, his wage loss for purposes of computing his percentage entitlement under section 39-71-703(c), MCA, is the difference between his wages at the time of his injury and the *average* wage of jobs which have been medically approved following his injury. Respondent, Liberty Northwest Insurance Co., argues that the *highest* wage for medically approved jobs must be used.

The motion has been submitted on a Joint Stipulation of Parties. The essential facts set forth by the stipulation are as follows:

1. Claimant was injured at work on August 16, 1993, and has not returned to work since that date.
2. His wage at the time of the injury was \$9.50 an hour.
3. Job analyses for seven positions have been medically approved. The wages for those positions range from a high of \$9.73 per hour to a low of \$4.25 an hour.
4. The claimant reserves the right to contest any and all of the job analyses.

After reviewing these sketchy facts, the Court is unable to rule as a matter of law that either the highest wage or an average wage should be used in computing claimant's entitlement under section 39-71-703(c), MCA (1993).

Section 39-71-703(c), MCA, provides for a percentage award of permanent partial disability benefits based on loss of wages. The subsection provides:

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%;

The subsection contemplates determination of actual wage loss. Thus, the wages earned prior to the injury must be compared with the actual wages the injured worker earns after he recovers and returns to work.

The statute is easy to apply where the injured worker in fact returns to work, albeit in a different job.¹ E.g. *Pollari v. MACO Workers' Compensation Trust*, WCC No. 9408-7126 (December 21, 1994). The statute, however, does not by its express terms cover a case where the worker, for whatever reason, has not returned to work. This Court confronted such a situation in *Brandon Gjerde v. Employers Ins. of Wausau*, WCC No. 9408-7134 (December 9, 1994). In that case the Court determined that where an injured worker has not returned to work but is capable of doing so, the Court must determine what he is capable of earning post-injury and use that amount in computing wage loss. Mr. Gjerde was earning \$8.11 an hour prior to his injury. After his injury he was able to work in retail sales and as a cashier, jobs that paid between \$4.25 and \$6.50 an hour. Based on Mr. Gjerde's poor work history, the Court found that it was unlikely that he could obtain

¹The worker will typically return to work in the highest paying position available. The Court has not considered any case where the insurer alleges that the worker is underemployed, and makes no determination as to what wage must be used in such a case.

employment at the high end of the range and concluded that his earning capability was less than \$6.11 per hour, thus arriving at a 20% award for lost wages.

Gjerde teaches that no automatic formula applies in determining a claimant's post-injury earning capability. High end wages may be appropriate in one case and inappropriate in another depending on the facts of the case. The goal of the Court's inquiry is to best approximate claimant's actual post-injury wages based on what he would earn if he made a diligent and successful job search after recovering from his injury. If the Court is satisfied that the claimant can reasonably be expected to obtain a job with the high-end wage, then that amount may be used. Where the evidence establishes that it is unlikely claimant can obtain a high-end job but can do better than a low-end job, then some other measure, including the possible use of an average of all wages for approved positions, may be appropriate.

The stipulated facts in this case are insufficient for the Court to make any determination concerning the post-injury wage to be used in computing benefits under section 39-71-703(c), MCA (1993). The motion for partial summary judgment is therefore **denied**.

Counsel for the parties shall confer and notify the Court when they will be ready for trial. If agreeable, the Court will place the matter on the Kalispell docket for the week of December 11, 1995.

Dated in Helena, Montana, this 7th day of November, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace
Mr. Larry W. Jones