

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 33

WCC No. 9905-8228

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DENNIS HAND

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

G. JON ROUSH d/b/a  
SWITCHBACK RANCH

Employer.

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ORDER CONCERNING COMPENSATION RATE ISSUE

**Summary:** Petitioner has been totally disabled due to an occupational disease since January 15, 1993. In the late 1980s, Petitioner's employer gave him twenty-five head of breeding cattle in lieu of future wage increases. Petitioner's employer also provided pasture year round, provided hay in the winter, medical supplies, veterinary services, and breeding bulls for the cattle. Petitioner contends that the offspring of these cattle should be included as wages in determining his total disability rate.

**Held:** The value of the calves born from the twenty-five head of cattle given to Petitioner by his employer in the late 1980s are not wages for the purpose of determining Petitioner's total disability rate. However, the value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls for the twenty-five head of cattle provided to Petitioner by his employer are wages for the purpose of determining Petitioner's total disability rate. The parties shall calculate the actual value of these services and supplies for the year preceding Petitioner's last day of work and factor that amount into the calculation for determining Petitioner's total disability rate.

## Topics:

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123.** Where Petitioner was given twenty-five head of breeding cattle in lieu future wage increases, and provided pasture year round, hay in the winter, medical supplies, veterinary services and breeding bulls for the cattle, the Court concludes that the value of the calves born from the twenty-five head of cattle are not wages for the purpose of determining Petitioner's total disability rate. Although Petitioner benefitted economically from the sale of the calves, this was the result of Petitioner's own efforts and wisdom in managing the cattle, just as if he had prudently chosen to invest a cash bonus rather than spending it in the year it was received. However, the value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls provided by Petitioner's employer are considered wages because they constitute a substitute for money.

**Wages: Wages Defined.** Where Petitioner was given twenty-five head of breeding cattle in lieu future wage increases, and provide pasture year round, hay in the winter, medical supplies, veterinary services and breeding bulls for the cattle, the Court concludes that the value of the calves born from the twenty-five head of cattle are not wages for the purpose of determining Petitioner's total disability rate. Although Petitioner benefitted economically from the sale of the calves, this was the result of Petitioner's own efforts and wisdom in managing the cattle, just as if he had prudently chosen to invest a cash bonus rather than spending it in the year it was received. However, the value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls provided by Petitioner's employer are considered wages because they constitute a substitute for money.

¶ 1 The issue pending before this Court is what is the proper total disability rate to which Petitioner is entitled. Specifically at issue is whether the value of an annual calf crop from twenty-five head of breeding cattle given to Petitioner by his employer in the late 1980s should be included in determining Petitioner's total disability rate.

### AGREED FACTS

¶ 2 The following agreed facts are set forth verbatim from the "Agreed Facts Concerning Compensation Rate Issue," jointly filed by Petitioner and the Uninsured Employers' Fund:<sup>1</sup>

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<sup>1</sup> Petitioner and the Uninsured Employers' Fund jointly filed Agreed Facts Concerning Compensation Rate Issue (Agreed Facts). (Docket Item No. 87.)

¶ 2a Petitioner Dennis Hand (“Hand”) was an employee of G. Jon Roush, d/b/a Switchback Ranch (“Roush”) for approximately 12 years. Hand last worked for Roush on January 15, 1993.

¶ 2b During the period when Roush employed Hand, Roush was an uninsured employer within the meaning of § 39-71-501, MCA.

¶ 2c Hand filed a claim with the UEF regarding occupational disease of both knees on March 31, 1993.

¶ 2d By order dated December 18, 1998, the Department of Labor and Industry ordered a medical examination by Dana Headapohl, M.D., which was conducted on December 29, 1998. Dr. Headapohl concluded that Hand “is suffering from an occupational disease” proximately caused by his employment with Roush. Dr. Headapohl also concluded that: “Mr. Hand is unable to perform his time-of-injury job.”

¶ 2e This case was fully litigated before the Workers’ Compensation Court and appealed to the Montana Supreme Court. By decision dated November 30, 2004, the Supreme Court held that Dennis Hand “is entitled to 100% of his total disability benefits if he suffers a total wage loss as a result of his Occupational Disease” and remanded the case for further proceedings consistent with the Supreme Court’s decision.

¶ 2f On May 16, 2005, Dr. Headapohl issued a report that concluded that Hand “had to discontinue doing cattle ranch work in January 1993, due to increased symptoms. It is my opinion that this type of work was unsafe for (Hand) to continue at that time due to the combination of the physical requirements of his job and his physical condition.” . . . “On a more probable than not basis, Mr. Hand was disabled from performing general cattle ranch work as of January 15, 1993.”

¶ 2g Following remand to this Court and consideration of Dr. Headapohl’s May 16, 2005 report, the parties were able to resolve all issues pending before the Court except for the temporary total compensation rate to which Hand is entitled under the Occupational Disease Act.

¶ 2h Hand has been totally disabled due to his occupational disease since January 15, 1993 and has received total disability benefits at the rate of \$254.68 per week since then.

¶ 2i The maximum compensation rate on January 15, 1993, the last day of his employment with Roush, is \$349 per week.

¶ 2j Hand earned \$20,000 per year plus cash and noncash bonuses as compensation while employed by Roush. (Roush depo., p. 9, l. 4-10) The annual cash bonuses ranged from \$500 to \$900 per year. (Roush depo., p. 14, l. 9-15) In the late 1980's, Roush gave Hand 25 head of breeding cattle.

¶ 2k Roush testified as follows in his deposition: "Q. At some point you reached a decision that you didn't want to increase his pay for cost-of-living increases, etc., and you decided that you would give him cattle and allow him to run cattle on the ranch so that he could make money indirectly by annual calve sales; is that correct? A. That's correct." (Roush depo., p. 15, l. 23 - p. 16, l. 4) Roush's intent was that Hand would obtain additional annual compensation by selling calves from the mother cows every year that Hand worked for Roush[.] (Roush depo., p. 17, l. 2 - 5) Roush provided pasture year around [sic], provided hay in the winter, medical supplies, veterinary services, and breeding bulls for the 25 head of mother cows. (Roush depo., p. 17, l. 6 - p. 18, l. 14) Hand had 80% or 20 head of calves from the 25 mother cows available to be sold each year. (Roush depo., p. 20, l. 10 - p. 21, l. 22)

¶ 2l Roush specifically testified as follows concerning the cattle arrangement with Hand: "Q. Now, basically, this marketable calf crop was what you offered Mr. Hand as additional earnings per year in lieu of increasing his salary to keep up with inflation or in lieu of further merit increases; is that true? A. That was our agreement, yes. Q. In fact, that was what the entire intent of your agreement was when you gave him the 25 mother cows, correct. A. That's right. Q. You had no intent to give him the 25 mother cows so he could take them to the market and sell them. The whole idea was that you gave them to him with the idea that he would have additional compensation each year through the calf crop; is that true. A. That's true." (Roush depo., p. 21, l. 23 - p. 22, l. 14)

¶ 2m If the value of the calves that were the offspring of the cattle provided by Roush and sold pursuant to his arrangement with Hand is included as compensation for purposes of determining the total disability rate, Hand qualifies for the maximum compensation rate of \$349 per week.

### ANALYSIS

¶ 3 This case is governed by the 1991 version of the Montana Workers' Compensation

Act since that was the law in effect at the time of Petitioner's last day of work.<sup>2</sup>

¶ 4 Section 39-71-123, MCA (1991), reads in pertinent part:

**39-71-123. Wages defined.** (1) "Wages" means the gross remuneration paid in money, or in a substitute for money, for services rendered by an employee. Wages include but are not limited to:

(a) commissions, bonuses, and remuneration at the regular hourly rate for overtime work, holidays, vacations, and sickness periods;

(b) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value; and

(c) payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profit-sharing arrangement.

(2) Wages do not include:

(a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, and other expenses, as set forth in department rules;

(b) special rewards for individual invention or discovery;

(c) tips and other gratuities received by the employee in excess of those documented to the employer for tax purposes;

(d) contributions made by the employer to a group insurance or pension plan; or

(e) vacation or sick leave benefits accrued but not paid.

(3) For compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except if:

(a) the term of employment for the same employer is less than four pay periods, in which case the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work; or

(b) for good cause shown by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods.

¶ 5 The statute clearly contemplates that wages may be paid by way of a "substitute for money." Moreover, there is ample case law in which non-monetary compensation has

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<sup>2</sup> *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

been included in calculating an employee's average weekly wage.<sup>3</sup> Therefore, if Petitioner's injury claim was made during the year in which he was given the twenty-five head of cattle from Roush, there likely would be no dispute that the cattle would constitute wages within the meaning of the statute. The distinction in the present case, however, is Petitioner's claim that the financial benefit he derived from the cattle given to him several years earlier (i.e., the offspring of these cows) should constitute wages. This is a situation, Petitioner acknowledges, that has not previously come before this Court.

¶ 6 Petitioner's argument focuses on the intent of the original agreement between Petitioner and Roush, which was that the twenty-five mother cows would produce twenty calves each of the ensuing years which Petitioner could then sell "in lieu of increasing [Petitioner's] salary to keep up with inflation or in lieu of further merit increases."<sup>4</sup> Petitioner argues that each year's calf crop constituted real economic gain for Petitioner and, therefore, constituted a "substitute for money" as contemplated by § 39-71-123(1), MCA.

¶ 7 The Uninsured Employers' Fund (UEF) responds that even if, as Petitioner and Roush contend, the one-time payment of twenty-five head of cattle was "in lieu of" future increases in salary, this still cannot be considered wages in subsequent years, irrespective of Petitioner's and Roush's intentions. The UEF points out that "in lieu of" means "instead of," not "in addition to."<sup>5</sup> Moreover, the UEF argues that nothing in the Workers' Compensation Act nor the Occupational Disease Act contemplates that an employee who takes a one-time payment, and invests it wisely is entitled to add his investment income from that original payment to his annual compensation in subsequent years in calculating his wages. This argument is well-taken.

¶ 8 Regardless of what Petitioner's and Roush's intentions were in striking the deal in the late 1980s for the twenty-five head of cattle, it would make no more sense to count the offspring of that cattle as wages years later than it would to count the interest from a one-time cash bonus as income years after the bonus was received. The original twenty-five head of cattle may well have constituted "a substitute for money" and therefore constituted wages in the year in which they were received and the sale of their calves obviously benefitted Petitioner economically in the ensuing years. However, this was the result of Petitioner's own efforts and wisdom in managing the cattle for his economic benefit, just as if he had prudently chosen to invest a cash bonus rather than spending it in the year it was received.

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<sup>3</sup> See, e.g., *Anderson v. Hammer and State Comp. Mut. Ins. Fund*, 252 Mont. 73, 826 P.2d 931 (1992) (Value of room and board included in calculating wages.); *Scyphers v. H&H Lumber*, 237 Mont. 424, 774 P.2d 393 (1989) (Truck driver's three cents per mile per diem included in calculating wages.)

<sup>4</sup> Agreed Facts, No. 12.

<sup>5</sup> Opening Brief of Uninsured Employers' Fund Regarding Average Weekly Wage Paid to Claimant at 3.

¶ 9 For the foregoing reasons, therefore, I find that the offspring from the cattle given to Petitioner in the late 1980s do not constitute wages within the meaning of § 39-71-123(1). My analysis does not end there, however. Although not addressed by either party, Petitioner and the UEF agree that “Roush provided pasture year around [sic], provided hay in the winter, medical supplies, veterinary services, and breeding bulls for the 25 head of mother cows.”<sup>6</sup> These services and supplies were provided by Roush to Petitioner as part of their employment agreement. There clearly was an economic benefit to Petitioner on an ongoing basis up to the time he left Roush’s employ due to his occupational disease since, if Roush had not been providing these supplies and services to Petitioner as part of their agreement, Petitioner would have had to procure them on the open market and pay for them out of his own pocket. They, therefore, constitute a substitute for money and are considered wages pursuant to § 39-71-123(1), MCA.

#### ORDER

¶ 10 The value of the calves born from the twenty-five head of cattle given to Petitioner by his employer in the late 1980s are not wages for the purpose of determining Petitioner’s total disability rate.

¶ 11 The value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls for the twenty-five head of mother cows provided to Petitioner by his employer are wages for the purpose of determining Petitioner’s total disability rate.

¶ 12 The parties shall calculate the actual value of the services and supplies enumerated in ¶ 11 for the year preceding Petitioner’s last day of work and factor that amount into the calculation for determining Petitioner’s total disability rate. If the parties cannot agree on the actual value of these services and supplies, they shall advise the Court and a hearing will be set for purposes of resolving this issue.

¶ 13 **IT IS SO ORDERED.**

DATED in Helena, Montana, this 26th day of July, 2007.

(SEAL)

/s/ James Jeremiah Shea  
JUDGE

c: Tom L. Lewis  
Mark E. Cadwallader  
Submitted: May 5, 2006

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<sup>6</sup> Agreed Facts, No. 11.