

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 4

WCC No. 9404-7051

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DAVID ROBERTSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent

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***Affirmed in Robertson v. Aero-Power Vac, Inc. and  
Montana State Fund, 272 Mont. 85 (No. 95-089)***

DECISION AND ORDER

**Summary:** Claimant was hired for temporary clean-up work under contract stating that shifts would last twelve hours for up to five or six days. In fact, no employee worked more than 47 hours on the project and some worked less.

**Held:** When an employee's term of employment for the same employer is less than four pay periods, the employee's wages for purposes of workers' compensation benefits "are the hourly rate times the number of hours in a week for which the employee was hired to work." Although contract for temporary job stated that project could last 5 to 6 days, and shifts were 12 hours in length, claimant was told he would work for the duration of the project. Where no employee working on the project in fact worked more than 47 hours, claimant's request for weekly wage based on 72 hours per week was rejected, with Court determining his benefits should be calculated on the basis of a 47-hour work week. Claim for attorneys fees denied.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-123, MCA (1991).** When an employee's term of employment for the same employer is less than four pay periods, the employee's wages for purposes

of workers' compensation benefits "are the hourly rate times the number of hours in a week for which the employee was hired to work." Although contract for temporary job stated that project could last 5 to 6 days, and shifts were 12 hours in length, claimant was told he would work for the duration of the project. Where no employee working on the project in fact worked more than 47 hours, claimant's request for weekly wage based on 72 hours per week was rejected, with Court determining his benefits should be calculated on the basis of a 47-hour work week. Affirmed in *Robertson v. Aero-Power Vac, Inc. and Montana State Fund*, 272 Mont. 85 (No. 95-089).

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-612, MCA (1991).** Where insurer's position on average weekly wage had support in the record, claimant, whose own position did not entirely prevail, was not entitled to attorneys fees on a theory of unreasonable insurer conduct. Affirmed in *Robertson v. Aero-Power Vac, Inc. and Montana State Fund*, 272 Mont. 85 (No. 95-089).

**Attorneys Fees: Cases Denied.** Where insurer's position on average weekly wage had support in the record, claimant, whose own position did not entirely prevail, was not entitled to attorneys fees on a theory of unreasonable insurer conduct. Affirmed in *Robertson v. Aero-Power Vac, Inc. and Montana State Fund*, 272 Mont. 85 (No. 95-089).

**Wages: Average Weekly Wage.** When an employee's term of employment for the same employer is less than four pay periods, the employee's wages for purposes of workers' compensation benefits "are the hourly rate times the number of hours in a week for which the employee was hired to work." Although contract for temporary job stated that project could last 5 to 6 days, and shifts were 12 hours in length, claimant was told he would work for the duration of the project. Where no employee working on the project in fact worked more than 47 hours, claimant's request for weekly wage based on 72 hours per week was rejected, with Court determining his benefits should be calculated on the basis of a 47-hour work week. Affirmed in *Robertson v. Aero-Power Vac, Inc. and Montana State Fund*, 272 Mont. 85 (No. 95-089).

**Wages: Overtime.** When an employee's term of employment for the same employer is less than four pay periods, the employee's wages for purposes of workers' compensation benefits "are the hourly rate times the number of hours in a week for which the employee was hired to work." Although contract for temporary job stated that project could last 5 to 6 days, and shifts were 12 hours in length, claimant was told he would work for the duration of the project. Where no employee

working on the project in fact worked more than 47 hours, claimant's request for weekly wage based on 72 hours per week was rejected, with Court determining his benefits should be calculated on the basis of a 47-hour work week. Affirmed in *Robertson v. Aero-Power Vac, Inc. and Montana State Fund*, 272 Mont. 85 (No. 95-089).

This case is presented on an agreed statement of facts and agreed exhibits. The Court will therefore render its decision in narrative form.

### Nature of the Dispute

David Robertson (claimant), suffered an industrial accident on June 9, 1993. The respondent, State Compensation Insurance Fund (State Fund), accepted liability for the claim. The State Fund has since paid temporary total disability benefits of \$173.33 per week based upon a \$6.50 an hour wage and a forty (40) hour work week. Claimant contends that his disability benefits should be based on a seventy-two (72) hour work week. He also requests attorney fees and a penalty.

### Exhibits

Subject to relevancy objections, the parties stipulated to the authenticity and admission of the following exhibits:

- a. Employment Contract
- b. Attorney Retainer Agreement
- c. State Fund Field Investigative Report
- d. State Fund letter dated February 16, 1994, to Attorney Palmer
- e. Time records of other hourly employees working on the Stone Container project.

(Statement of Uncontested Facts 10.) The actual exhibits are attached to the respondent's Proposed Decision and Order filed July 22, 1994.

In its Proposed Decision and Order the State Fund argues that the field investigation report and its letter of February 16, 1994, are irrelevant. The investigative report contains information concerning the terms of claimant's hire. That information is relevant to the present dispute; therefore, the report is admitted. The February 16th letter sets out the State Fund's justification for its use of forty (40) hours in calculating claimant's disability rate. Since claimant has requested a penalty and attorney fees, the letter is relevant and admitted.

Neither party has pursued a relevancy objection with respect to any of the other exhibits. Therefore, the remaining exhibits are admitted.

### Facts

Claimant was hired by Aero Power Vac as a temporary employee to assist in cleaning the Stone Container plant in Missoula. At the time of hiring, the employer told claimant "that this project **could** last 5 to 6 days." (Uncontested Fact 6; emphasis added.) "Claimant was expected to work **the entire project**." (*Id.*; emphasis added.) He was provided with a set of work rules which provided that his work day was "12 hours, 4 P. M. to 4 A. M." (Ex. 3.) In an interview with a State Fund field investigator, a representative of the employer "verifie[d] that, at the time hired, claimant was told he would be working up to 12 hour shifts and that the job **might** last five to six days." (Ex. 3C; emphasis added.)

Claimant went to work on June 8, 1993. During his first work shift he fell and injured his shoulder.<sup>1</sup> He was apparently unable to continue working and was credited with working only seven (7) hours. (Ex. 3E.) He did not return to work at the Stone Container plant after his injury.

Nine other Aero employees worked on the Stone Container cleaning project. The parties have stipulated that they worked the following hours on the project:

- |    |                 |            |
|----|-----------------|------------|
| a. | Joe Nogle       | 47.0 hours |
| b. | Brett McCloney  | 37.5 hours |
| c. | David Robertson | 7.0 hours  |
| d. | Tim Anglow      | 3.0 hours  |
| e. | Marco P. Ortiz  | 37.5 hours |
| f. | Jeffrey Johnson | 47.0 hours |
| g. | Stephen Knudson | 12.5 hours |
| h. | Scott Duprey    | 47.0 hours |
| i. | Charles Frazier | 37.5 hours |

(Agreed Fact 8.)

A review of the payroll records (Ex. 3E) provides additional information concerning the work of these employees. Those records show that all but one (Knudson) began work

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<sup>1</sup>Claimant's time record indicates that he began work at 4:30 p.m. on June 8th. As a result of his injury, he clocked out at 11:30 p.m. It therefore appears that the injury occurred on June 8, 1993, rather than on June 9, 1993, as stipulated. However, the actual date of injury is immaterial to the present dispute.

on the project on June 8, 1993. One employee (Anglow) was sent home after three (3) hours of work on June 8th because he was wearing contact lenses rather than glasses and the work was in a dusty environment. The employee did not return to work. The employee (Knudson) who began work after June 8th worked only one (1) day, June 10th. The three (3) employees who worked forty-seven (47) hours all worked until June 11, 1993. No employee worked beyond June 11th.

### Discussion

Claimant was injured on June 9, 1993. Therefore, the 1991 version of the Workers' Compensation Act governs his entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986).

Temporary total disability benefits are based on the claimant's wages at the time of injury. Section 39-71-701(3), MCA (1991) provides:

(3) Weekly compensation benefits for injury producing temporary total disability shall be 66 ⅔% of the **wages received at the time of injury**. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury. [Emphasis added.]

The issue raised in this case concerns the manner in which claimant's wages should be calculated.

Ordinarily, wages for purposes of benefits is the "average actual earnings for the four (4) pay periods immediately preceding the injury." § 39-71-123, MCA (1991). This case involves an exception to the general rule. Section 39-71-123(3), MCA, more fully provides in relevant part:

(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.

Since claimant was hired on a temporary basis for less than four (4) pay periods, his wage is his hourly rate of pay (\$6.50) times the number of hours he was hired to work during the week for which he was hired.

The claimant argues that he was hired to work twelve (12) hours a day for six (6) days and that he is entitled to benefits based on a seventy-two (72) hour work week. He would be correct if he had been hired to work seventy-two (72) hours a week or had been guaranteed that many hours. The agreement, however, did not assure claimant of seventy-two (72) hours a week. He was hired to work until the project was **completed**, and told that the project "**could** last 5 or 6 days." Uncontested Fact 6 states:

At the time Aero Power-Vac, Inc., hired the Petitioner, the Employer agreed orally that this project **could** last 5 to 6 days. Subject to satisfactory performance, **Claimant was expected to work the entire project.** [Emphasis added.]

On the face of the agreement, the five (5) to six (6) days of work was the outside estimate of the duration of the project. The employer's only commitment to claimant was that he would work the entire project.

In fact the project lasted only four (4) days, from June 8 to 11, 1993. No employee worked on the project beyond June 11th and the employees who worked every day until completion put in forty-seven (47) hours each. Since claimant was hired for the duration of the project and started work on the first day of the project, he is similarly entitled to credit for forty-seven (47) hours of work. Therefore, claimant's temporary total disability benefits should be based on a forty-seven (47) hour week. Accordingly, he is entitled to two-thirds of \$305.50 ( $\$6.50 \times 47 \text{ hours}$ ), which equals \$203.67 weekly.

Claimant is not entitled to a penalty or attorney fees. Both awards require a finding of unreasonableness. §§ 39-71-612 and -2907, MCA. The State Fund's position in this matter was not unreasonable. Many of the workers on the project worked less than forty (40) hours. The State Fund argued that crediting claimant with more than forty (40) hours would be speculative. On the average, employees who worked on the project worked less than forty (40) hours. While the Court has rejected the State Fund's contentions, they were not beyond the pale of legitimate advocacy. Moreover, claimant was demanding far more than the amount to which he is entitled. The Court's ultimate resolution is far closer to that advocated by the State Fund than the position claimant advocated.

### Judgment

1. Claimant's temporary total disability rate is \$203.67 a week. The State Fund shall pay claimant the difference between this rate and amounts already paid claimant in

temporary total disability benefits. All future temporary total disability shall be paid at the rate of \$203.67 a week.

2. Claimant is not entitled to attorney fees or a penalty.
3. Claimant is entitled to costs in an amount to be determined by the Court. Within twenty (20) days of this decision claimant shall submit an affidavit of costs. The State Fund shall thereafter have ten (10) days in which to file its objections, if any.
4. This JUDGMENT is certified as final for appeal purposes pursuant to ARM 24.5.348.
5. Any party to this dispute may have twenty (20) days in which to request a hearing from this DECISION and ORDER.

Dated in Helena, Montana, this 23rd day of January, 1995.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Rex Palmer  
Mr. Daniel J. Whyte