IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 1

WCC No. 9311-6928

MICHAEL STERMITZ

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Fish, Wildlife and Parks field technician sought additional permanent partial disability benefits for lost earning capacity, and additional temporary total disability benefits for days taken as sick leave or vacation.

Held: Claimant is entitled to additional benefits under section 39-71-703, MCA (1985), an old law section, where his ability to perform his time-of-injury job has been diminished. Although he is now performing that job satisfactorily, he can no longer perform some aspects of the job and has suffered diminished capacity to compete for jobs within his usual field of employment. Under sections 39-71-116(19) and (20), MCA (1985), public employee is not entitled to temporary total disability benefits for paid days off work, whether taken as sick leave or vacation. Where claimant was advised that he could collect temporary total disability benefits, but chose to use sick leave and vacation, this is not a case where the insurer's denial of benefits gave claimant no alternative but to use other forms of paid leave. Cf. *44 Op. Att'y Gen. No. 33 (1992),* where Attorney General concluded that if annual leave benefits are being paid, there is no total loss of wages to render an employee eligible for workers' compensation benefits.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1985). The benefits provided under old law section 39-71-703, MCA, are for actual loss of earning capacity. Post-injury wages, while one

item of evidence in determining future earning capacity, are not conclusive; rather, the measure is whether there has been a loss of ability to earn in the open labor market. The loss must be permanent, with the Court taking into consideration not only pre-injury and post-injury wages but also the claimant's age, occupational skills, education, previous health and remaining number of productive years and degree of physical or mental impairment. While a worker may return to his time-of-injury job and earn more than before, there may still be a loss of earning capacity if the workers' performance is impaired and his ability to compete in the open labor market is lessened. Loss of efficiency in work decreases a worker's chances of finding employment in the open labor market and translates into a reduced earning capacity.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1985). Fish, Wildlife and Parks field technician was entitled to additional benefits under section 39-71-703, MCA (1985), an old law section, where his ability to perform his time-of-injury job has been diminished. Although he is now performing that job satisfactorily, he can no longer perform some aspects of the job and has suffered diminished capacity to compete for jobs within his usual field of employment.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-116(19) -- (20), MCA (1985). Under sections 39-71-116(19) and (20), MCA (1985), public employee is not entitled to temporary total disability benefits for paid days off work, whether taken as sick leave or vacation. Where claimant was advised that he could collect temporary total disability benefits, but chose to use sick leave and vacation, this is not a case where the insurer's denial of benefits gave claimant no alternative but to use other forms of paid leave. Cf. *44 Op. Att'y Gen. No. 33 (1992),* where Attorney General concluded that if annual leave benefits are being paid, there is no total loss of wages to render an employee eligible for workers' compensation benefits.

Benefits: Permanent Partial Disability Benefits: Lost Earning Capacity. The benefits provided under old law section 39-71-703, MCA, are for actual loss of earning capacity. Post-injury wages, while one item of evidence in determining future earning capacity, are not conclusive; rather, the measure is whether there has been a loss of ability to earn in the open labor market. The loss must be permanent, with the Court taking into consideration not only pre-injury and post-injury wages but also the claimant's age, occupational skills, education, previous health and remaining number of productive years and degree of physical or mental impairment. While a worker may return to his time-of-injury job and earn more than before, there may still be a loss of earning capacity if the workers' performance is impaired and his ability to compete in the open labor market is lessened. Loss of efficiency in

work decreases a worker's chances of finding employment in the open labor market and translates into a reduced earning capacity.

Benefits: Permanent Partial Disability Benefits: Lost Earning Capacity. Fish, Wildlife and Parks field technician was entitled to additional benefits under section 39-71-703, MCA (1985), an old law section, where his ability to perform his time-of-injury job has been diminished. Although he is now performing that job satisfactorily, he can no longer perform some aspects of the job and has suffered diminished capacity to compete for jobs within his usual field of employment.

Benefits: Temporary Total Disability Benefits. Under sections 39-71-116(19) and (20), MCA (1985), public employee is not entitled to temporary total disability benefits for paid days off work, whether taken as sick leave or vacation. Where claimant was advised that he could collect temporary total disability benefits, but chose to use sick leave and vacation, this is not a case where the insurer's denial of benefits gave claimant no alternative but to use other forms of paid leave.

Wages: Vacation and Sick Leave. Under sections 39-71-116(19) and (20), MCA (1985), public employee is not entitled to temporary total disability benefits for paid days off work, whether taken as sick leave or vacation. Where claimant was advised that he could collect temporary total disability benefits, but chose to use sick leave and vacation, this is not a case where the insurer's denial of benefits gave claimant no alternative but to use other forms of paid leave. Cf. *44 Op. Att'y Gen. No. 33 (1992),* where Attorney General concluded that if annual leave benefits are being paid, there is no total loss of wages to render an employee eligible for workers' compensation benefits.

The trial in this matter was held on February 28 and March 1, 1994, in Kalispell, Montana. The petitioner, Michael Stermitz (claimant or Stermitz), was present and represented by Ms. Sydney E. McKenna. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Ken C. Crippen and Mr. Oliver H. Goe. Claimant, David Charles Gray, D.C., Anne Arrington, Lucinda Dixon and William Lynn testified. Additionally, the depositions of William Lynn, Anne Arrington, Dr. Dean Ross and claimant were submitted for the Court's consideration. Exhibit 1 was admitted with the exception of pages 38a and 38b. Exhibits 2 through 23, 25, 26, 27 and 29 through 35 were admitted. Exhibit 24 was withdrawn and Exhibit 28 was admitted over the objection of Ms. McKenna.

Transcript references: The trial transcript is in two parts, one for each day. Each transcript begins at page 1. Therefore references to the transcript will be in the form of Tr. I for the February 28, 1994 transcript and Tr. II for the March 1, 1994 transcript.

Issues Presented: This case involves Mr. Stermitz' claim that he is entitled to additional permanent partial disability benefits, temporary total disability benefits, attorney fees and costs. Other issues raised in the petition have been resolved. At the time of trial, counsel advised the Court that the claim regarding claimant's entitlement to per diem and mileage for physical therapy treatment (Pretrial Order, Page 1, Issued (sic) To Be Determined No. 7) had been settled. Also at trial, the insurer indicated that it had authorized payment of $139.85 to the claimant for reimbursement of expenses for medicine. (Tr. II at 211.) The controversy over payment for custom-made work boots was resolved by a bench ruling. The Court determined that Dr. Ross' deposition testimony concerning the necessity of the boots was equivocal but ordered payment for the boots if the doctor hereafter affirms the necessity of the boots. (*Id.* at 211, 212.) Additionally, the Court directed counsel to determine from Dr. Ross whether a sport's center membership would be beneficial for the claimant. If Dr. Ross determines the membership is needed the State Fund must pay that expense. Following trial, by letter dated April 15, 1994, the Court was advised that the parties have resolved all issues concerning the proper computation of the impairment award and all penalty issues.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was thirty-four years old. He was single and living in Stevensville, Montana.

2. Claimant graduated from high school in 1977. (Stermitz Dep. at 6.)

3. Following his high school graduation he held a number of different jobs. Initially, he worked for the Oregon State Highway Department as a laborer/flagger. He flagged traffic and spread and raked asphalt. (Tr. I at 6.) Later in 1977, he took a job with Intermountain Lumber, tailing lumber and working the dry chain. He continued to work for Intermountain through 1978. (Id.; Ex. 3 at 5.)

4. Claimant commenced his college education in 1979 at Northern Arizona University. He returned to Montana in 1980 and sometime thereafter enrolled at the University of Montana, earning a bachelor's degree in wildlife biology with a minor in zoology in 1985.

5. Between 1979 and his graduation from the University of Montana, claimant worked as a crew boss on a telephone crew, shoveling snow and cutting down telephone poles, and as a stock cutter at Missoula White Pine & Sash Company. He also held a variety of summer jobs. He worked for the Young Adult Conservation Corps, as a construction

laborer for the U. S. Park Service in Yellowstone Park, as a forest technician at Badlands National Park and as a fisheries technician for Montana Department of Fish, Wildlife and Parks (FWP). His jobs included work on a paving crew and on a crusher crew. He also built trails, hiked up streams and performed heavy lifting. His jobs between 1979 to 1985 were medium to heavy-duty positions.

6. After graduation from college in the spring of 1985, claimant took an entry level position with FWP as a field technician in Libby, Montana. In 1987 he took a job as a FWP game warden in Glasgow, Montana, where he worked for two years. He was then transferred to Stevensville, Montana, where he continues to work.

7. Claimant suffered an industrial injury on March 26, 1987, while working for FWP. At the time of the injury he was working as a field technician. He was pulling up a concrete and rebar boat anchor when he felt a pop in his back. By the next day his back and buttocks were sore. His pain increased over the next few days.

8. At the time of the accident, FWP was insured by the State Fund. The State Fund accepted liability for claimant's March 26, 1987 injury and has paid various disability and medical benefits.

9. Following his injury the claimant was treated by Dr. Ethan Russo. The doctor first examined claimant on April 10, 1987. (Ex. 1 at 4.) Dr. Russo recommended bed rest for a week, but noted claimant resisted the idea. Dr. Russo therefore prescribed back exercises and Clinoril, which is a non-steroidal anti-inflammatory drug (Physician's Desk Reference, 1994 Ed.), and advised claimant to return in a month if his condition did not improve. (*Id.)*

10. Claimant missed work on April 10, 14, 15, 16 and 17, 1987, and received sick leave pay for these days. (Ex. 25.)

11. Claimant returned to Dr. Russo on May 26, 1987, for a further evaluation of his back, which had not improved. Electrodiagnostic tests were negative and a CT scan was scheduled. Dr. Russo renewed his prescriptions for physical therapy and Clinoril. (Ex. 1 at 8.)

12. A CT scan performed on May 29, 1987 revealed:

> Bulging centrally & to the right of the L5-S1 disc approximately 3-4 mm with possible entrapment of the left S1 root and the lateral recess.

> Focal near-herniated disc at L5-S1 centrally and to the right effacing the anterior and right lateral aspect of the thecal sac, perhaps involving the right L5 root.

(*Id.* at 40.*)*

13. On June 27, 1987, claimant was again seen by Dr. Russo. Physical therapy and Clinoril had not altered his symptoms. Dr. Russo prescribed an epidural block and noted that if the block was unsuccessful, a surgical opinion would be pursued. *(Id.* at 10.*)* The epidural block in fact did not provide claimant with relief. (*Id.* at 11.*)* However, at that time the claimant did not return to Dr. Russo for any follow-up regarding a surgical opinion.

14. Claimant continued to work as a game warden for the next four and one-half years.

15. On April 20, 1992, he returned to Dr. Russo due to worsening pain in his lower back. He had suffered varying degrees of pain continuously since the date of his injury.
16. On April 20, 1992, the claimant sought emergency room treatment due to severe back pain. At that time an "EMG confirmed left S1 radicular involvement." (Ex. 1 at 23.)

17. On April 28, 1992, claimant was examined by Dr. Robert Moseley, who diagnosed a "[h]erniated nucleus pulposus, L5-S1 left." Claimant was treated with epidural cortisone injections, but did not experience any lasting relief from his pain. *(Id.* at 24.*)*

18. On May 27, 1992, Dr. Moseley performed a L5-S1 surgical diskectomy. (*Id.* at 29.*)* Claimant's post-operative course was complicated by L5 nerve root dysfunction and a second surgery was performed by Dr. Moseley and Dr. Henry Gary on June 2, 1992. (*Id.* at 35.*)*

19. Claimant worked off and on from April 20, 1992 until his surgery. He received sick leave or vacation pay for the days he missed during this period. (Ex. 25.) A claims examiner for the State Fund advised the claimant of his entitlement to temporary total disability benefits but claimant elected to take sick leave or vacation pay since the amounts were greater than temporary total disability benefits. (Tr. I at 75-76.) The claimant was advised by the claims examiner that he could not receive temporary total disability benefits for his days off unless he reimbursed FWP for the sick leave he had used. (Exs. 13, 18.)

20. Following his second surgery, claimant's rehabilitation was monitored by Dr. Dean Ross, a specialist in physical medicine and rehabilitation. Dr. Ross treated claimant until July 13, 1993. He prescribed aggressive physical therapy to strengthen claimant's lower back and left lower limb; an ankle foot brace to be used by claimant when working on rough ground; and a membership in a health club so claimant could continue an exercise program.

21. Dr. Ross testified at deposition that claimant will never have a normal back. He explained:

> Well, because he has had this surgery, not once, but twice, that diminishes in everyone the native or original strength of the supporting tissues of the low back, those ligament and muscle tendon structures that stabilize the low back.

(Ross Dep. at 29.) The doctor limited the claimant to medium work, meaning "exerting 20 to 50 pounds of force occasionally and/or 10 to 25 pounds of force frequently and/or greater than negligible up to ten pounds of force constantly to move objects." (*Id.* at 37.)

22. Dr. Ross expressed concerns about the claimant's ability to move quickly or run, climb, crouch, hike in snow and physically restrain individuals when performing law enforcement duties. He noted that claimant had suffered a loss of endurance, balance, speed, and efficiency. (*Id.* at 28, 29, 39, 40.)

23. Between the time of his injury in 1987 and the surgery in 1992, claimant successfully worked as a game warden. His duties included, among other things, law enforcement, game damage control, and fencing. Fencing required him to carry bundles of snow fence weighing as much as eighty pounds.

24. Claimant returned to his job as a game warden following his surgeries. He apparently returned to work one month after surgery, ignoring recommendations for a two to three month convalescent period. (Tr. I at 26, 27.) Since his surgery he has followed a prescribed rehabilitation plan and worked diligently to improve the strength in his back and left lower extremity.

25. Claimant was a credible witness and testified that his ability to perform his job as a game warden has diminished. Because of his injury he is now unable to reach geographical areas he would have worked previously. He has difficulty crossing streams and walking on slopes due to ankle weakness. Thus, his ability to check on fishermen and to retrieve evidence, such as a deer carcass, is impaired. He cannot hike long distances. He is unable to snowmobile over rough terrain or in powder snow because bumping of the snowmobile bothers his back. He is thus limited in his ability to check snowmobilers' registrations, which is one of his job duties. Claimant also has difficulty driving on rough roads and feels his safety is compromised in physical confrontations associated with his law enforcement functions. He described his ability to be a game warden as follows:

> It's a matter of degrees. Am I as good as I was before? No. Absolutely not. Am I better than some guys? Yeah, even with the injury, but I'm certainly not as good as I was before or as

> good as I would like to be. It's really put brackets on what I can and can't do.

(Tr. I at 43.) Claimant does not fear losing his job on account of his physical limitations and believes he could continue working in the position until he reaches retirement age. (Tr. II at 115, 256.) He continues to receive good performance appraisals from his superiors. (Ex. 28 at 106-112.) He does not view his condition as preventing his advancement in rank as a game warden, although he has received indications from within his department that his injury may preclude him from employment as an undercover agent. (*Id*. at 69.)

26. Initially there was a dispute regarding the claimant's impairment rating, but the parties have reached agreement on this issue.

27. Ms. Anne Arrington (Arrington) was retained by the claimant as a Vocational Rehabilitation Consultant. Mr. William Lynn (Lynn) was retained by the State Fund as its consultant. Arrington met with claimant on two occasions and had a number of telephone contacts with him. Lynn did not interview or meet with the claimant and relied on Arrington's report for information regarding claimant's work history and some job analysis information.

28. At the time of his injury claimant's wage as a field technician was $6.66 per hour. (Ex. 5.) His current wage as a game warden is $12.70 an hour.

29. In evaluating claimant's preinjury labor market, Arrington included heavy-labor construction jobs and law enforcement positions.

30. Lynn did not agree and concluded that claimant's preinjury labor market was for medium duty jobs which he could continue to perform even after his injury.

> [I] believe that his pre-injury work experience, at least in terms of his viable professional career path, was primarily medium duty. According to Dr. Ross's deposition he is still at medium duty. So I don't see that he's suffered any loss of access to the open labor market.
>
> I think his labor market is there today just as it was before his injury.

(Tr. II at 255-256.)

31. The Court finds Arrington's analysis of claimant's preinjury labor market the more persuasive.

a. Prior to and during college claimant worked heavy-labor jobs. His post-college jobs of field technician and game warden have both involved physical labor. It is not inconceivable that, if physically able, the claimant might seek relatively high-paying employment in a heavy-labor job if he were otherwise precluded from employment as a game warden.

b. While claimant has expressed a disinterest in traditional law enforcement jobs (Tr. II at 158) he has applied for undercover positions in law enforcement (Stermitz Dep. at 48-50.); to at least that extent he has an interest in law enforcement positions. In his current job he also has law enforcement responsibilities. While he has not attended the law enforcement academy, his other education and employment experience qualify him for law enforcement positions.

32. Claimant is no longer able to perform heavy-labor construction jobs (Tr. II at 107) and some law enforcement jobs. (Tr. II at 74.)

33. Arrington provided various estimates of wages for heavy-labor construction jobs and law enforcement positions.

a. With respect to construction jobs she initially testified:

> [T]he construction workers are typically going to earn anywhere from eight up to -- I should say maybe seven fifty to seventeen fifty, eighteen dollars an hour. *Now, typically you're going to see more like thirteen, fourteen, fifteen, sixteen dollars an hour there.*

(Tr. II at 107; italics added.) In Arrington's opinion, which the Court found persuasive, claimant could obtain entry level employment in construction at a wage of "eleven fifty, eleven or twelve dollars an hour" if physically able. (*Id*. at 155, 183.) While Arrington expected claimant to move up in wages if employed in construction, to obtain wages at the top end of the wage scale claimant would have to acquire additional skills (*Id*. at 155-56), such as those provided through an apprenticeship program (*Id*. at 181).

b. With respect to law enforcement positions Arrington provided a range of wages as follows:

> [W]ith the law enforcement work, generally you're going to see wages ranging anywhere from -- Typically twelve to fifteen dollars an hour you're going to see for those kind of law

> enforcement type positions, and there's some potential for law enforcement positions up to eighteen dollars an hour that's documented in the data bases.
>
> But generally if I think we're sticking to just Missoula or Ravalli County, I think that bringing that more around the fifteen would be more realistic in terms of that specific local market.

(*Id.* at 109.)

34. Claimant's current wage as a game warden of $12.70 must also be included in determining his preinjury earning capacity because the job was within the claimant's education and skill and on his career track.

35. In including construction jobs in her wage projections, Arrington assumed the claimant would seek out and obtain special training which would lead to the high end jobs. On the other hand she did not consider the prospect of claimant obtaining a master's degree in biology to further his employability, a prospect which the Court finds just as likely in light of claimant's education and interest. However, since the additional training is in either case speculative, the Court finds that the best measure of claimant's post-injury earning capacity should be based on his current education and training. It, therefore, is not persuaded that the high-end construction wages provided by Arrington are realistic.

36. The Court is also unpersuaded that claimant is capable of earning the high end wage, i.e., $18 an hour, in law enforcement. Arrington identified that wage from a database but provided no testimony regarding the availability of such high paying positions or claimant's qualifications for them.

37. Having considered Arrington's testimony, and lacking any precise measure of preinjury earning capacity, the Court finds that the best measure of claimant's preinjury earning capacity is the average of the highest entry level construction wage ($12) and the mid-range upper level wage ($14.50 or *$13 + $16 ÷ 2*) identified by Arrington, which amounts to $13.25 an hour *($12 + $14.50 ÷ 2)*. The Court has used the upper entry level wage based on claimant's work experience and Arrington's testimony that claimant could obtain work at $11 to $12 an hour, thus indicating the current availability of $12 an hour jobs. The average of higher level wages is used to reflect prospective wage increases with normal advancement but without additional specialized training. The $13.25 an hour figure is also in the mid-range of law enforcement wages.

38. Claimant's post-injury earning capacity also includes claimant's "actual" wages of $12.70 an hour as a game warden. In this case the Court gives significant weight to those wages. Claimant is satisfactorily performing his job and expects to be able to continue to

do so until he reaches retirement age. As claimant testified, he is performing his job better than many other game wardens. While the job description for the position *may* involve some duties which claimant has difficulty performing, claimant's testimony and evaluations establish that the difficult functions are not essential ones and that the demands of the position are flexible.

39. In her evaluation of other potential jobs within claimant's post-injury labor market, Arrington testified that his earning capacity was limited to around $8.50 per hour. She testified:

> A: My evaluation of his employment in the open labor market is that he has the potential for earnings around that eight fifty an hour category. . . . There are some jobs that may pay nine or would move up to nine or ten dollars an hour. But in terms of the general research that I did, eight fifty seemed reasonable . . . .

(Tr. II at 104.) Arrington virtually excluded professional wildlife and forestry positions from claimant's post-injury labor market (Tr. II at 106-107), including even that of game warden (Ex. 3 at 6). She even excluded jobs which carry designations of "medium duty" in the Dictionary of Occupational Titles based on her experience and inquiries showing that some of the positions within the DOT categories required heavy labor. (Tr. II at 139-142.)

40. Lynn determined that claimant's post-injury earning capacity is between $9 and $13 per hour. His opinion covered state and federal jobs in a nationwide labor market and for the most part assumed entry level professional positions. (Tr. II at 259, 287.) Some of the positions he identified as part of claimant's post-injury labor market were in the claimant's area of interest, such as biologist, wildlife biologist, wildlife refuge manager and fisheries technician. (Tr. II at 260.) Others, such as water resource specialist, employment specialist and workers' compensation claims examiner, took claimant's education and transferrable skills into consideration. (Tr. II 258-259.) Many jobs are available locally or statewide.

41. Lynn's extension of claimant's labor market to a nationwide one was based on claimant's application for jobs in Alaska. The applications were made after claimant became a game warden and were for jobs as an undercover agent and a job at a fishery. (Tr. I at 87.) Claimant also testified in his deposition that he would like to move into a management position related to his profession and would be willing to relocate if he could find a position in the U.S. Park Service or some other federal agency. (Stermitz Dep. at 54.) His job history demonstrates his willingness to relocate.

42. The Court finds Lynn's assessment of claimant's post-injury labor market the more persuasive. The existence of flexibility in claimant's job duties as game warden and the "medium" DOT classification for positions excluded by Arrington undermined her testimony virtually excluding professional wildlife and forestry positions from claimant's post-injury labor market.

43. Lynn testified that claimant's post-injury earning capacity is from $9 an hour to $13 an hour.

44. Considering all of the evidence, including consideration of claimant's physical limitations in his current position and the effect of those limitations on his job market, and taking into consideration claimant's age, his college degree, and good work history, the Court finds that claimant's post-injury earning capacity is best expressed by relying on an average of the figures provided by Lynn, i.e., $11 an hour *($9 + $13 ÷ $2)*.

45. Claimant's loss of earning capacity is $2.25 per hour *($13.25 - $11:00 = $2.25)*.

46. In this case, loss of percentage of labor market does not aid the Court in reaching its decision. Lynn did not believe the claimant suffered any loss, while Arrington did not provide any specific estimate. In any event significant numbers of jobs remain available to claimant.

CONCLUSIONS OF LAW

1. Claimant was injured on March 26, 1987. The 1985 version of the Workers' Compensation Act therefore applies. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986)*.

2. Claimant seeks additional permanent partial disability benefits under section 39-71-703, MCA (1985). The section provides:

> **39-71-703. Compensation for injuries causing partial disability.** (1) Weekly compensation benefits for injury producing partial disability shall be 66 2/3% of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.
>
> (2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of partial disability. However, compensation for partial disability resulting from the loss of or injury to any member shall not be

payable for a greater number of weeks than is specified in 39-71-705 for the loss of the member.

The benefits provided under old law section 39-71-703, MCA, are for actual loss of earning capacity. ***McDanold v. B.N. Transport, Inc.,*** *208 Mont. 470, 476-77, 679 P.2d 1188 (1984).* Post-injury wages, while "one item of evidence to be considered in determination of future earning capacity" are not conclusive evidence of a claimant's post-injury ability to earn; rather, the measure is whether there has been a "loss of ability to earn in the open labor market." ***Fermo v. Superline Products,*** *175 Mont. 345, 348, 574 P.2d 251 (1978).* The loss must be a permanent one, and the Court must take into consideration not only preinjury and post-injury wages but also the claimant's age, occupational skills, education, previous health and remaining number of productive years and degree of physical or mental impairment. ***Chagnon v. Travelers Ins.,*** *259 Mont. 21, 855 P.2d 1002 (1993).*

While a worker may return to his time-of-injury job and earn more than before, there may still be a loss of earning capacity if the worker's performance is impaired and his ability to compete in the open labor market is lessened. ***Fermo,*** *supra****; Hafer v. Anaconda Aluminum Co.,*** *198 Mont. 105, 643 P.2d 1192 (1982).* Loss of efficiency in work decreases a worker's chances of finding employment in the open labor market and "translates into a reduced earning capacity." ***Sedlack v. Bigfork Convalescent Center,*** *230 Mont. 273, 278, 749 P.2d 1085 (1988).*

The claimant must prove that in fact he has suffered an actual loss in earning capacity and he has done so. His ability to perform his time-of-injury job has been diminished. Although he is performing it satisfactorily and with good performance evaluations, he can no longer perform all of the functions he performed prior to his injury, and has suffered some diminished capacity to compete for jobs within his usual field of employment. He has also lost his ability to return to heavy laboring jobs, which are relatively high paying, and to some law enforcement positions. While claimant has made a deliberate choice to pursue work in a field which pays less than construction work, lost earning capacity must be analyzed in terms of the claimant's open labor market, including positions which may not be his first choice of employment. As found in Finding of Fact No. 31, it is not inconceivable that claimant, if physically able, would return to construction work if work as a game warden or in some other fish and wildlife position was unavailable to him. Construction positions constitute part of his preinjury labor market.

While the evidence concerning the amount of claimant's preinjury and post-injury earning capacity was in terms of a "range" of wages, the Court is persuaded that claimant has suffered a loss of earning capacity in the amount of $2.25 per hour, or $90 per week. To determine the amount of benefits due claimant pursuant to section 39-71-703, MCA (1985), this loss must be multiplied by 66⅔ percent, thus entitling claimant to $60 per week

of lost-earning capacity for 500 weeks. Thus, the insurer's total liability for permanent partial disability benefits is $30,000, less all permanent partial disability benefits already paid.

3. Claimant is not entitled to temporary total disability benefits for paid days off work. Temporary total disability is defined at section 39-71-116(19), MCA (1985).

> "Temporary total disability" means a condition resulting from an injury as defined in this chapter that results in **total loss of wages** and exists until the injured worker is as far restored as the permanent character of the injuries will permit. A worker shall be paid total disability benefits during a reasonable period of retraining. Disability shall be supported by a preponderance of medical evidence. [Emphasis added.]

Section 39-71-116(20), MCA (1985), defines wages as:

> [T]he average gross earning received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered. **Sick leave benefits accrued by employees of public corporations, as defined by subsection (16) of this section, are considered wages.** [Emphasis added.]

Section 39-71-116(16), MCA (1985), includes the State of Montana in its definition of public corporations.

This is not a case where an insurer's denial of benefits gave claimant no alternative but to use his sick leave. He elected to take sick leave rather than seek benefits because the taking of sick leave resulted in his receipt of his normal wage. Since he received wages for those days he did not suffer the prerequisite wage loss.

The Court reaches a similar conclusion with respect to the vacation leave taken by claimant. As with the sick leave, claimant elected to take vacation time even though advised that he could collect temporary total disability benefits for those days off. In a formal opinion, the Montana Attorney General considered vacation pay as affecting the payment of workers' compensation benefits:

> It stands to reason that if annual leave benefits are paid, then the employee is not suffering a total loss of wages and is not eligible for workers' compensation benefits pursuant to section 39-71-701, MCA. Therefore, <u>supplementation of workers'</u>

> compensation benefits by annual leave payments would not be consistent with the statute. [Emphasis added.]

44 Op. Att'y Gen. No. 33 *(1992)*. The Attorney General's analysis is persuasive. Thus, since claimant received his regular wages for vacation days he elected to take, he did not suffer a wage loss on those days.

4. Claimant is entitled to recover reasonable attorney fees and costs pursuant to sections 39-71-611 and -612, MCA (1985).

JUDGMENT

1. Claimant is permanently partially disabled. Pursuant to section 39-71-703, MCA (1985), the insurer shall pay claimant benefits of $60 per week for 500 weeks, less all permanent partial benefits already paid by the insurer.

2. Claimant is not entitled to temporary total disability benefits for days on which he took sick leave or vacation leave.

3. Claimant is entitled to attorney fees and costs in an amount to be determined by the Court.

4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

5. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 12th day of January, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Ms. Sydney E. McKenna
Mr. Oliver H. Goe