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Workmen's Compensation—Effect of Post-Injury Wages on Eligibility for Payments—Preserving the Right to Compensation While Ineligible to Draw Payments

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pretation, the Montana court could be expected to reach a result contrary to that of the present case.

Perhaps a contrary result is conceivable,[13] but it would appear much more likely that the Montana court would follow the instant case. This is because the Kansas court which rendered that decision itself adheres to the modern liberal trend,[14] and because every limitation statute using the word *accident* which has been construed, with the exception of Nebraska's, has been held to require that the period of limitation begins to run from the happening of the accident. Thus it would seem that although the acts are to be liberally construed, when a court is confronted with the word *accident* there is no room for construction and that holding *accident* to mean *manifestation of injury* would be unwarranted judicial legislation.[15]

That courts generally construe limitation statutes using *injury* to refer to manifestation of injury furnishes no authority for a statute which reads *accident,* since *injury* refers to effect while *accident* refers to occurrence.

The issue here involved has not yet been litigated in Montana,[16] but the probability of a result like that in the instant case should be avoided by legislative action, substituting the word *injury* or *discovery of injury* for the word *accident* in Montana's limitation statute. No workman should be denied relief merely because the injury he receives is not discoverable at the outset, if it later appears and causes a disability the act was intended to make compensable.

JOHN P. ACHER.

WORKMEN'S COMPENSATION — EFFECT OF POST-INJURY WAGES ON ELIGIBILITY FOR PAYMENTS — PRESERVING THE RIGHT TO COMPENSATION WHILE INELIGIBLE TO DRAW PAYMENTS—In December, 1948, claimant suffered an industrial accident. After filing a timely claim for compensation, he continued working at full pay until July, 1952. In October, 1953, the Montana Industrial Accident Board heard and denied the claim but was re-

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a need for liberal construction in order to effectuate the humane purpose of the legislation.

In Yurkovich v. Industrial Accident Board, 314 P.2d 866 (Mont. 1957), an employee was injured and requested from the Industrial Accident Board information on procedure to be followed in obtaining compensation. The Board failed to inform him of the necessity of filing a claim under oath. The workman did not file a claim until later when he became aware of this requirement, after the statutory period had expired. The court allowed compensation, stating that the Industrial Accident Board stands in a fiduciary relationship to the injured workmen, and will not be heard to assert the running of the time limitation when its own inaction caused the claim to be filed too late.

[13]Keenan v. Consumers Public Power District, 152 Neb. 54, 40 N.W.2d 261 (1949).

[14]In fact, in 1944 the words "injury arising by accident" were construed by that court to include injury sustained in the performance of usual tasks performed in the usual manner even though there be no event in the nature of an outside or intervening cause. Murphy v. I.C.U. Const. Co., 158 Kan. 541, 148 P.2d 771 (1944). With this compare Murphy v. Anaconda Company, 321 P.2d 1094 (Mont 1958).

[15]See the language of the Idaho Supreme Court in Moody v. State Highway Department, 56 Idaho 21, 48 P.2d 1008, 1110 (1935), set out in the text at note 10 *supra.*

[16]But note the reference in Gaffney v. Industrial Accident Board, 324 P.2d 1063, 1064 (Mont. 1958), 19 MONTANA L. REV. 173 (1958), to a distinction between "accident" and "injury."

versed by the Montana Supreme Court, which awarded "such compensation as is provided by statute."[1] The Board then awarded compensation for a period of 500 weeks commencing as of July, 1952. Claimant petitioned for rehearing, contending that payment should be made commencing as of the date of accident (1948) rather than from the date claimant's employment and salary terminated in 1952. Rehearing was denied. In the district court the issues were resolved in favor of the claimant. On appeal to the Montana Supreme Court, *held,* reversed. A claimant is not entitled to compensation payments until the date he suffers actual monetary loss from inability to work due to the accident. *Gaffney v. Industrial Accident Board,* 324 P.2d 1063 (Mont. 1958).

This decision changes Montana law with regard to the effect of post-injury wages on eligibility for compensation payments. The former rule was that announced in *Shaffer v. Midland Empire Packing Co.*[2] Shaffer was injured in a fall from a loading dock and after a brief hospitalization he returned to work at the same salary as he earned prior to his injury. The Board denied his claim for partial disability compensation giving as its reason that the "claimant has failed to show any loss of earnings as required by the statute." The Supreme Court upheld the decision for failure of proof but with respect to the ruling of the Board requiring monetary loss said:

> The board seemingly took the view that since claimant received as much or more from his employer after the injury as before, that fact precluded any recovery because claimant failed to show any loss of earnings. The test, however, is not whether there has been a loss of earnings or income caused by the injury, but rather has there been a *loss of earning capacity*—a loss of ability to earn in the open labor market.
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> . . . .
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> The board was in error in determining that claimant's rights were dependent upon a showing of loss of earnings rather than upon a showing of loss of ability to earn.[3] (Emphasis added).

The "earning capacity" test of the *Shaffer* case is abstract. Its application requires that evidence be taken of all the factors which will in the future influence the ability of the claimant to make a living, either at his former trade, or at another to which he might become adapted. The inquiry under the *Shaffer* case is not concluded by a finding that the claimant is still drawing the same pay as before the accident. On the other hand, the test applied by the court in the instant case is concrete. If the claimant is in fact earning as much after the accident as before, the issue is foreclosed; he is not entitled to compensation payments.

The abstract standard of the *Shaffer* case is applied by the majority of states which have passed on the question and there are strong arguments

[1]Gaffney v. Industrial Accident Board, 129 Mont. 394, 287 P.2d 256 (1955).

[2]127 Mont. 211, 259 P.2d 340 (1953). An intermediate case is Greenfield v. Industrial Accident Board, 320 P.2d 1000 (Mont. 1958), where the Board applied the rule later affirmed in the instant case and the court failed to reverse though it stated the abstract test of the *Shaffer* case. Counsel in the Greenfield case conceded the issue in his brief, probably unintentionally.

[3]*Id.* at 341-42.

in its favor.[4] Yet, in view of the policy of the compensation statutes to provide certainty in measuring recovery, a more workable rule is provided by the instant case. Computing the award under this rule is a matter of simple arithmetic and litigation over the amount of an award will be reduced. Under the *Shaffer* rule many difficult evidentiary problems would be presented, both before the Board and before the courts on appeal, and much of the evidence offered would necessarily be speculative in nature.

Though rigid, the new rule appears fair to both the employer and employee. As to the employer or insurance carrier, the losses which will be incurred for injuries are predictable because they are influenced by only one factor rather than the vague and unreliable criteria of the *Shaffer* case. Fairness to the employee requires only that his right to payments be preserved for the possible contingency that his condition degenerates and causes him financial loss. It does not require that he be paid compensation in addition to his regular wage. The compensation acts are designed to protect the worker and his family from the insecurity caused by industrial hazard, and this is as well done by the new rule as by the *Shaffer* rule.

Deferring payments until the workman has suffered monetary loss will not impair his right to compensation should the need arise. The claimant is required to notify the employer or the insurance carrier within sixty days of the accident and within a year he must file a claim.[5] Upon completing these preliminary steps, he may wait to see what development takes place in his disability. So long as these actions are taken within the required time, the claim is never outlawed.[6] In the instant case there was a four year interval between the filing of the claim and the first hearing. In most cases the injury will manifest itself much sooner than it did here, but nevertheless there is no necessity to press the claim until it does.

Delaying the commencement of the payments will not cause the employee to lose any of the total amount he is entitled to collect. Although the statutes say there shall be no payment made after 500 weeks from the "date of injury,"[7] in the instant case the court read "injury" as a word of art and found the "date of injury" for this purpose to be the date on which the claimant ceased to draw his regular salary.[8] This avoids an internal contradiction in the statutes, for they also say that the compensation "shall be paid during the period of disability."[9] Under the court's

[4]For an extensive treatment of this subject in general see Ann., 149 A.L.R. 413 (1944).

[5]REVISED CODES OF MONTANA, 1947, §§ 92-601, 92-807. For a discussion of a problem raised by these sections, see Recent Decision at 172 *supra*.

[6]The four year limitation within which the Board may modify final orders as provided by section 92-826, R.C.M. 1947, does not apply to the contemplated case since no orders will have been entered at all.

[7]REVISED CODES OF MONTANA, 1947, § 92-702: "Such compensation shall be paid during the period of disability, but for the period not exceeding five hundred (500) weeks from the date of injury." Section 92-703 provides: "such compensation shall be paid during the period of disability not exceeding, however, five hundred (500) weeks in cases of permanent partial disability. . . ." For the present purpose there would appear to be no tenable distinction between partial and total disability. The basic concept is the same for awarding payments under either situation.

[8]For another situation in which courts treat the word *injury* as a term of art, see Recent Decision at 171 *supra*.

[9]REVISED CODES OF MONTANA, 1947, §§ 92-702, 92-703.

construction, the 500 week limitation in conjunction with the prescribed weekly amounts is only a method of expressing the maximum monetary total of the payments provided by the act. Because of this approach to the problem, a claimant is safe in waiting until his disability has cost him all or part of his salary before pressing his claim, so long as he files his claim and notice within the statutory period.

The court has in the instant decision rejected the abstract test of "earning capacity" established in the *Shaffer* case; in the future it will look to the wages which the disabled employee is actually bringing home each week and compute his award on that basis. If the claimant has not suffered an immediate diminution of earnings it is possible to preserve his right to compensation until such time as he needs the money. The decision which makes this possible is a step forward in the certain, and therefore sound, administration of the workmen's compensation law of Montana.

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