

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 17

WCC No. 9304-6770

HARLEY T. ANKENY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BLACK MAGIC MOBILE WASH

Employer.

FINDINGS OF FACT, CONCLUSION OF LAW AND JUDGMENT

The trial in this matter was held on Wednesday, October 13, 1993. Respondent, State Compensation Insurance Fund, was represented by Charles G. Adams, who personally appeared. Pursuant to a written stipulation executed by the parties, the petitioner and his counsel, Philip M. Kleinsmith, participated by telephone. The petitioner and William Belston testified. Depositions of the petitioner and Dr. Robert J. Foster were received and considered by the Court. Exhibit Nos. 1 and 2 were admitted into evidence by stipulation. Pursuant to a bench order, Exhibit Nos. 3 and 4, which are medical reports of two neurologists were received subsequent to trial and admitted without objection by respondent. Having considered the pretrial order, the testimony presented at trial and through depositions, the demeanor of petitioner and William Belston, and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. The petitioner suffered an industrial injury on February 1, 1989, while employed by Black Magic Mobile Wash in Kalispell, Montana. The injury occurred at a Plum Creek sawmill.
2. At the time of the injury Black Magic was insured by the State Compensation Insurance Fund, which accepted liability for the petitioner's claim.
3. The written claim signed by petitioner a week after his injury indicates that "he slipped [sic] and fell and in trying to break his fall injured his wrist." He made a similar report to his employer, telling the employer that he had fallen while on top of the dryer and had caught

himself, injuring his wrist. He described his fall as occurring on top of the dryer, not as falling off the dryer. He gave no indication that he hurt anything other than his wrist.

4. The petitioner sought treatment of his wrist injury on February 6, 1989 with Dr. George W. Ingham. The doctor's report of that visit confirms an injury to the petitioner's left wrist and a resulting ganglion on the wrist.

5. The petitioner has since undergone several surgeries for ganglia on his wrist.

6. Petitioner is presently seeking a determination that "he is entitled to evaluation and treatment for shoulder pain and dizziness as a result of his February 1, 1989, industrial injury." (Pretrial Order E.) Specifically, he demands that the State Fund authorize and pay for a neurological examination. The State Fund has refused the request on the ground that petitioner's shoulder symptoms and dizziness are not related to his February 1, 1989 industrial injury.

7. Petitioner's request is based on a recommendation of Dr. Robert J. Foster, an orthopedic surgeon practicing in Colorado Springs, Colorado, where petitioner presently resides.

8. Dr. Foster first examined the petitioner on July 10, 1992, at which time petitioner was complaining of pain in his left shoulder and swelling in his left wrist. In subsequent visits petitioner also reported dizziness, headaches, wrist pain and numbness of the left wrist or hand. Petitioner also testified that he reported his neck "shaking", but the doctor could not recall petitioner ever reporting that symptom.

9. Dr. Foster recommended a neurological examination to evaluate the petitioner's reported dizziness, the possibility that petitioner may have suffered a head injury, and possible carpal tunnel syndrome. Petitioner's complaints of left shoulder pain were not a basis for the recommended referral. (*Foster Dep. 10:21-25; 11:1-5.*) Dr. Foster attributed those complaints to muscle strain.

10. Dr. Foster related petitioner's complaints of shoulder pain, dizziness, and headaches to his February 1, 1989 industrial accident. He did so, however, based on petitioner reporting that he had fallen from a significant height and hit his shoulder and head, as well as his wrist.

11. Petitioner in his testimony stated that he had fallen 20 to 23 feet from a ladder onto his left side, hitting his left wrist, left shoulder and his head.

12. Dr. Foster conceded that if the injury did not occur as described by petitioner then petitioner's symptoms are **not** consistent with his industrial injury. (*Foster Dep. 14-15.*) The doctor also agreed that a delay of four years between the injury and the onset of neck pain and dizziness "is out of sync with normal medical symptomatology" (*Foster Dep. 28:19-25; 29:1-3*), and that the four years passage of time would also be a "factor which would be against it being work related" (*Id. 21:18-19*). Thus, it is apparent that Dr. Foster's opinions,

that petitioner's symptoms and the need for referral to a neurologist were the result of his industrial accident, are predicated on petitioner's description of that accident.

13. The Court does not find petitioner credible and does not believe his claim that he fell 20 to 23 feet and hit his shoulder and head. Since the trial in this matter was by telephone and through depositions, the Court did not personally observe petitioner during his testimony. However, I have considered the matter and substance of his answers, as well as his conduct and concluded that petitioner is not believable and that he has fabricated and exaggerated. I have particularly taken note of the following:

a) Petitioner concealed from Dr. Foster, the State Fund and the Court important medical information relating to his petition. While seeking a court order for a neurological evaluation he failed to disclose that he had recently been examined by two different neurologists. Dr. Richard A. Bell examined him on March 10, 1993. Dr. Catherine Kenny Hughes examined him on January 7, 1993, in connection with a social security disability evaluation. The first indication of these neurological examinations occurred during petitioner's deposition taken October 6, 1993, during which he divulged that he had seen a neurologist who "was with Dr. Foster", but could not recall his name. (*Ankeny Dep. at 35:14-24; 36:1-2.*) During the hearing the petitioner initially asserted that he still could not remember the name of the neurologist he had seen. However, when pressed by the Court, he identified Dr. Bell. Petitioner was then ordered to provide Dr. Bell's reports but submitted reports not only of Dr. Bell, but also of Dr. Hughes.

b) Petitioner did not report a fall from a ladder or any trauma to his shoulder or head to either his employer or his initial treating physicians. The first mention of any claim that he fell off the dryer was in rehabilitation records on December 20, 1991, when petitioner reported he had fallen "15-18 feet" but made no mention of hitting his head or shoulder.

c) The first indication found in medical records of petitioner reporting shoulder pain occurred two full years after his accident. According to a February 14, 1991 note of Dr. Powell, petitioner's left shoulder started bothering him "about five weeks ago" and "is related probably to use of the arm after it has been deconditioned and then the strain of trauma to Work Hardening flaring this up." Dr. Powell specifically noted, "**There is no direct history of trauma to the shoulder however.**"

d) Petitioner testified that he had suffered dizziness ever since his injury. However his medical records indicate that he first reported dizziness to Dr. Foster and even then it was not one of the symptoms he reported to Dr. Foster on his first visit.

e) In his deposition testimony petitioner asserted that his physical problems prevent him from driving. He then qualified his statement by testifying that he drives only when he has to. But when confronted at trial with the fact that he had been under surveillance,

petitioner reluctantly admitted to specific instances of his driving both a car and a motorcycle under non-essential circumstances.

f) Petitioner's statements regarding his physical complaints suggest exaggeration. His claims that "its possibly even too late to even help me, you know, from the nerve damage" (*Ankeny Dep. at 28*), and that "I was getting real bad, so I was concerned about literally dying . . . I couldn't even get up . . . not even being able to walk. . ." (*Id. at 30*), are unsupported by any medical or other corroborative evidence.

g) He claims to have told Dr. Murphy, who treated him in 1989 and 1990, about his "head, headaches and stuff" and "[p]ain in my arms, shoulder, whatever" (*Ankeny Dep. 27*), but Dr. Murphy's records do not corroborate that testimony.

h) The two neurologists who saw petitioner in 1993 were unable to find a satisfactory explanation for petitioner's complaints. In her report Dr. Hughes states that petitioner's "neurological examination was normal". She observed that his headaches "sound like muscle contraction headaches" and his dizziness "like orthostatic⁽⁴⁾ light headedness." She expressed skepticism that a MRI of the head would show anything significant. She also observed:

What I see on his examination and by talking to him is an **unusual reaction** to an injury where he indicated that he felt he was damaged on the job and wasn't properly treated and is trying to explain all the symptoms he is having by this ganglion cyst, indicating that it could have had a poison which could have caused these other symptoms. He was even trying to explain the problems with dribbling after urination on this basis."

(Emphasis added.) Dr. Bell also had difficulty in assessing petitioner's complaints and made no specific findings. He specifically commented on petitioner's seeming "emotional distress" and his "rather desperate frustrated manner."

14. Neurologist, Dr. Richard Nelson, from Billings, also examined petitioner on March 9, 1992. Dr. Nelson did not testify but his medical report was an exhibit in the case. The doctor recommended a follow up MRI of the neck to rule out a possible herniated cervical disc. His report does not, however, discuss the relationship of that possible condition to petitioner's industrial accident, and in any event Dr. Nelson was similarly told by petitioner that he had fallen 23 feet when injured.

15. Petitioner is not entitled to evaluation and treatment for shoulder pain and dizziness. He has not demonstrated any credible connection between those complaints and his February 1, 1989 industrial accident. The Court does not believe his claim that he fell several feet or that he hit his head and shoulder.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The petitioner is not entitled to evaluation and treatment for his shoulder pain and dizziness. He has the burden to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were caused by his industrial accident. ***Hall v. Atlantic Richfield Co., 248 Mont. 484, 487, 812 P.2d 1262 (1991)***. He has failed to carry that burden. Petitioner's shoulder pain and dizziness are **not** related to his February 1, 1989 industrial accident. Dr. Foster's recommendation of a neurological follow up was predicated on petitioner's statements that he had fallen several feet, hitting his arm and head, as well as his wrist. As found herein, those statements were untrue. Moreover, Dr. Foster did not recommend a neurological follow up regarding the shoulder pain, which he opined was muscular in nature. While Dr. Nelson, a neurologist who saw petitioner on March 9, 1992, recommended an MRI of the neck to rule out a herniated cervical disc, he did not specifically address the relationship of that possible condition to the industrial accident and was similarly relying on petitioner's report that he had fallen 23 feet when injured in 1989.

3. Petitioner has not requested and in any event is not entitled to, attorney fees and costs.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The petitioner's request that the Court order the State Fund to authorize and pay for evaluation and treatment of petitioner's shoulder pain and dizziness is denied, and his petition is dismissed with prejudice.

3. Petitioner is not entitled to attorney fees, costs, or a penalty.

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

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

DATED in Helena, Montana, the 18th day of November, 1993.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Philip M. Kleinsmith

Mr. Charles G. Adams

1. Orthostatic is defined as "pertaining to or caused by standing erect." *Dorland's Illustrated Medical Dictionary*.