

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 18

WCC No. 9303-6731

GEORGE BEMENT

Petitioner

vs.

MONTANA POWER COMPANY

Respondent/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on Monday, September 13, 1993, in Billings, Montana. Petitioner, George Bement, was present and represented by Victor R. Halverson. Respondent, Montana Power Company, was represented by Robert T. O'Leary. The petitioner was sworn and testified. Exhibit Nos. 1 through 16 were admitted by stipulation. Claimant withdrew Exhibit No. 4 at time of trial. The original depositions of petitioner and Dr. Robert Cadoff were admitted into evidence.

Having considered the pretrial order, the testimony presented at trial and through the depositions, the demeanor of Mr. Bement, and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. Petitioner is 42 years old and has a high school education. He is married and has three children.
2. On November 21, 1986, petitioner suffered an industrial injury arising out of and in the course of his employment with Montana Power Company in Colstrip, Rosebud County, Montana. Petitioner injured his left testicle when the hydroblaster gun he was operating kicked back and struck him in the groin.
3. At the time of injury, Montana Power Company was enrolled under Compensation Plan One of the Workers' Compensation Act and was self-insured.
4. Following his industrial accident the petitioner continued to work off and on for a couple weeks and was thereafter off work until March 20, 1987.

5. Respondent accepted liability for petitioner's claim for compensation and has paid medical and temporary total disability benefits to petitioner. Temporary total benefits were paid from December 17, 1986 through March 19, 1987.

6. At the time of his injury, petitioner was employed by Montana Power Company as a utility man at an hourly wage of \$13.00 per hour. (The wage for that position is now \$16.18 an hour.) He performed general labor but most of his work was cleaning scrubbers at Montana Power Company's Colstrip units. The job required him to operate a high pressure water gun called a hydroblaster, which he used to wash down the scrubber walls. Petitioner shovelled the debris washed off the walls into buckets, which he then carried out. The buckets often weighed 60 to 80 pounds. The job required squatting, some crawling, climbing stairs and standing on grating.

7. After his return to work on March 20, 1987, the petitioner continued working for 16 months. Petitioner testified that during this time he missed 6 to 8 days of work due to his pain. However, he acknowledged that he did not request workers' compensation benefits for those days.

8. During his continued employment with Montana Power Company, the petitioner was able to adequately perform his duties. He received excellent performance appraisals.

9. The petitioner terminated his employment in July, 1988. He submitted a letter of resignation which stated:

I've very much enjoyed working for MPC and the guys on Crew 4. I may regret leaving, but I stated once that I have other irons in the fire and my plans weren't to stay with MPC to [sic] long.

At this time I've taken a partnership in a business that will need both of us running it.

I thank you and MPC for giving me this opportunity to work.

Again, thanks.

10. At the time of his resignation the petitioner and another individual were planning to purchase a cafe or restaurant and had applied for a business loan. The loan fell through shortly after petitioner's resignation.

11. The petitioner went to work at the St. Labre Mission print shop on July 25, 1988, and has been continuously employed there since that time. He started work as a folder and is now employed as a pressman. His starting wage was \$6.50 an hour and he currently earns \$10.10 per hour. The work is not as physically demanding as his work for Montana Power Company and it does not require climbing, stooping or crawling.

12. Petitioner is now claiming that he resigned from Montana Power Company because his injury prevented him from continuing to work as a utility man. He seeks 500 weeks of

permanent partial disability benefits based on the difference between the wages for a utility man and his current wages, yielding his maximum rate of \$149.50.

13. In the months following his injury, petitioner was examined and treated by Drs. Chris Lantz, Ronald Mow and Robert E. Stockdale.

14. Petitioner saw Dr. Ronald Mow in Miles City on November 29, 1986 and again on December 8, 1986. Dr. Mow initially prescribed bed rest and Motrin, which is an anti-inflammatory drug with analgesic properties. On December 8th he noted that petitioner was "essentially pain free" and released him to return to work.

15. Petitioner then saw Dr. Lantz at the Lame Deer Health Center sometime in December. The doctor noted an atrophied left testicle and gross hematuria (blood in urine). On December 23, 1986, he referred petitioner to Dr. Stockdale, a urologist, for further examination.

16. In late December 1986 or early January 1987, Dr. Stockdale examined petitioner and performed a cystoscopy, which was normal. Dr. Stockdale noted that petitioner had a mildly atrophied left testicle and no abnormalities. His assessment of petitioner was that he had increased testicular pain of "unknown etiology."

17. Petitioner again saw or had telephonic contact with Dr. Lantz on January 20, February 2 and 18, March 18, April 27, June 3, and August 5, 6 and 17, 1987. The January, February and March visits were prior to his return to work. The April 17 contact was a telephone call wherein petitioner indicated he was "having intermittent pain but able to work"; the doctor prescribed 25 tablets of Darvocet N-50 for pain. The June 3 contact was a visit during which petitioner reported insomnia and stated he was "working long shifts", was "wound up & anxious" and continued to have "some chronic testicular pain." A sleeping medication (Halcion), but no pain medication, was prescribed. The August contacts were for dysuria (difficult urination), hematuria, a yellow discharge, odoriferous urine, testicular pain and other symptoms. He was treated with antibiotics (Vibramycin, Septra and Macrodantin), suggesting an infection, a urinary analgesic (Phenazopyridine) and pain medication (Darvocet).

18. Petitioner was seen by Dr. Stockdale again on September 9, 1987. At that time the doctor noted "some discomfort" of the left testicle which "is intermittent in nature." The physical examination determined that petitioner's left testicle was "mildly atrophic" (smaller), but otherwise normal. Dr. Stockdale could find no cause for the testicular pain.

19. Petitioner did not seek further medical attention until July 15, 1991, when he was examined by Dr. Richard Melzer, a urologist. The doctor noted that petitioner was complaining of "left sided testicular pain on and off and comes in to get it checked to make sure there is not an abnormality." The examination was normal and Dr. Melzer could find no other reason for petitioner's testicular pain.

20. Petitioner's next medical visit was to Dr. Cadoff, a urologist who examined petitioner in June of 1992. The doctor could not find any reason for petitioner's testicular pain and made a diagnosis of left "testalgia," a term for "unexplained" pain of the testicle. Dr. Cadoff related the petitioner's pain to his injury because he could find no explanation for it.

21. At least by September 25, 1992, petitioner had sought out and obtained counsel to represent him in this matter. (See September 25, 1992, letter of Dr. Robert E. Cadoff to Victor Halverson. Ex. No. 3 at 31.)

22. In December, 1992, petitioner underwent a *functional capacities evaluation*. The physical therapist conducting the examination reported limitations of petitioner's physical abilities and physically restricted him from performing certain activities. However, the physical testing leading to those conclusions was affected by petitioner's "consistent self-limiting pain behavior throughout testing on both days" and was based on petitioner's reports of pain. Ex. No. 3 at 37.

23. None of the five physicians who saw the petitioner were able to identify an objective medical reason for petitioner's continuing testicular pain.

24. Petitioner's most recent physician, Dr. Cadoff, has not placed any limitations on petitioner's work related activities. When questioned, Dr. Cadoff did agree that activities such as squatting could be a type of activity that would aggravate testalgia. He also agreed that activities which increase or aggravate the symptoms should be avoided. None of petitioner's other physicians restricted his physical activities or work.

25. There is no objective medical evidence of any continuing medical affliction resulting from petitioner's November 21, 1986 injury. Plaintiff's claim of disability is supported solely by his complaints of pain and his assertions as to the effect of that pain on his activities and physical abilities. His credibility is therefore critical to his claim.

26. The Court does *not* find petitioner's reports concerning the degree and effect of testicular pain to be credible. While I am persuaded that he suffers occasional pain and discomfort, I find that the pain and discomfort are not of the degree claimed by petitioner; are not disabling; and do not preclude him from returning to work as a utility man or in any other occupation. In reaching my conclusion, I have considered the petitioner's demeanor and the circumstances surrounding the claim. Among the circumstances I have considered are petitioner's continued work for 16 months, during which time he received excellent performance evaluations; the lack of any medical care for his condition for a period of almost three years, and his reports to his doctors of only intermittent pain. I do not find his present assertion that he quit work on account of his pain credible, and am persuaded that the reasons given in his resignation letter were true. I do not find credible his claim at trial that he quit seeing doctors because they could do nothing other than give him pain pills which he could obtain without prescription from his relatives. I also find that

the physical capacities examination tendered to support his claim was done in apparent preparation for this litigation and the results depended entirely on petitioner's reported pain and self-limiting behavior.

27. Prior to his employment by Montana Power in 1986, petitioner had worked two years in a print shop, six years as a construction worker, eight years as a heavy equipment operator and 11 years as a tribal councilman and program director.

28. Petitioner offered no evidence concerning wages for any of these positions, except the actual wages for his job at the St. Labre Mission print shop.

29. The only evidence tendered by petitioner concerning his physical ability to work as a construction worker, heavy equipment operator or tribal councilman and program evidence was his own testimony that he would have difficulty operating heavy equipment because of the "bouncing." The Court did not find this testimony persuasive.

CONCLUSIONS OF LAW

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

2. Petitioner is not entitled to permanent partial disability benefits.

He has elected to proceed under lost earning capacity provisions of section 39-71-703, MCA. Under this section he must show not only a loss of earning capacity but also relate the loss to the industrial injury. *Kuenning v. Big Sky of Montana*, 231 Mont. 1, 750 P.2d 1091 (1988). The test is 'whether the industrial accident caused "a loss of ability to earn in the open labor market."' *Sedlack v. Bigfork Convalescent Center*, 230 Mont. 273, 277, 749 P.2d 1085 (1988)(quoting from *Shaffer v. Midland Empire Packing Co.*, 127 Mont. 211, 213-214, 259 P.2d 340, 342 (1953)); *Taylor v. National Fire Ins. Co.*, 243 Mont. 464, 467, 795 P.2d 433 (1990). That burden arises from statutes defining "permanent partial disability" and "disability." At the time of petitioner's injury, section 39-71-116(12), MCA (1985) defined "permanent partial disability" in relevant part as follows:

"Permanent partial disability" means a condition resulting from injury as defined in this chapter that **results** in the actual loss of earnings or earning capability [Emphasis added.]

"Disability" was defined in section 39-71-122, MCA (1985), and provided in relevant part:

Disability defined. A worker is disabled when his ability to engage in gainful employment is diminished **as a result** of impairment [Emphasis added.]

Petitioner has failed to establish a loss of earnings or earning capacity caused by his November 21, 1986 industrial accident. Petitioner's case depends entirely upon his credibility. The only objective physical findings of the physicians who examined the petitioner was a somewhat atrophied left testicle. However, the physicians did not identify

that condition as a cause of his pain and could find no objective medical reason for petitioner's continued pain. None of the doctors expressed an opinion that testicular pain prevents petitioner from working as a utility man. Dr. Cadoff's testimony that pain could affect petitioner's ability to perform certain tasks, and that he should avoid activities that exacerbated his pain, assumed that petitioner's reports concerning his pain are true. Petitioner also reported off and on incidents of hematuria but neither petitioner nor any of his physicians contend that hematuria was a disabling condition.

The Court does not find the petitioner's claims concerning pain and his inability to perform certain physical tasks convincing. While it is persuaded that petitioner suffers some sporadic discomfort and pain, it is not persuaded that it is as severe as he claims, or that it precludes him from performing the physical requirements of a utility man or any other job within his labor market. The petitioner terminated his employment with Montana Power because he was about to embark on a business venture. According to his resignation letter, his tenure at Montana Power was deliberately short because of his plans to start his own business. His outstanding job performance during the 16 months following his return to work; the interval of three years without medical care; and his reports to his doctors of only sporadic pain provide objective evidence that his pain was and is not as extreme as he now claims.

Although petitioner earns less at his present job than he earned while working at Montana Power, his loss of earnings is attributable to his deliberate choice to leave Montana Power and establish his own business and not because of any disability resulting from his industrial accident. Moreover, the petitioner has not provided persuasive evidence that he is precluded from working at other jobs in his labor market, such as driving heavy equipment, nor has he established the wage levels of those jobs are less than the wages of a utility man.

3. Petitioner is not entitled to recover reasonable attorney's fees and costs.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Petitioner is not entitled to permanent partial disability benefits from his November 21, 1986 injury.
3. Petitioner is not entitled to attorney fees and costs.
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 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 30th day of November, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Victor R. Halverson

Mr. Robert T. O'Leary