

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 28

WCC No. 9304-6757

LaVERN F. BURNS

Petitioner

vs.

PLUM CREEK MANUFACTURING

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on October 13, 1993, in Kalispell, Montana. Petitioner, LaVern Burns (claimant), was present and represented by Mr. Dean K. Knapton. Respondent, Plum Creek Manufacturing (Plum Creek), was represented by Mr. Kelly M. Wills. Claimant was sworn and testified on his own behalf. Phil Wierz, Dorothy Burns and Pam Burns were also sworn and testified. Testimony of Gregory Luna, M.D., Joseph Knapp, M.D. and Charles Swannack, M.D. was presented by deposition. Exhibit Nos. 1 and 2 were admitted into evidence without objection.

Having considered the testimony, the demeanor and credibility of the witnesses appearing at trial, the exhibits and depositions, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 30 years old.
2. In January 1985, claimant suffered a right subclavian vein thrombosis following a skiing accident and was hospitalized twice during January and February 1985 for treatment of his condition.
3. In elementary terms a "thrombosis" is a blood clot which obstructs a blood vessel. "Subclavian" indicates that claimant's thrombosis was in a vein located beneath his clavicle. According to medical testimony, the thrombosis probably involved an injury to the intima of the vein. The intima is the innermost lining of a blood vessel. An injury to the intima may be followed by deposits of fibrin, leukocytes and erythrocytes, in other words, a blood clot.

4. Claimant went to work for Plum Creek in 1987. He passed a physical examination and began working on the plywood green chain. The green chain was heavy work.

5. In June 1991, the claimant began working on the "spreaders." Claimant was one of four individuals working as a team to assemble plywood sheets in layer-cake fashion. Pieces of wood called "core" are fed by one worker through a roller which applies glue to both sides of a piece and ejects it. Another worker (a "core layer") catches each ejected piece and places it on top of a larger thin sheet of veneer until the sheet is covered by core. Two other workers ("sheet turners") then place another large sheet of veneer on top of the newly laid core, and the process starts over again. When the plywood sheet reaches the proper thickness it is removed and a new one is started. At the time of claimant's alleged injury the core layer and sheet turners rotated their positions every two hours so that no worker laid core for more than two hours at a time.

6. Claimant worked Friday, March 13, 1992, and was off work the weekend of March 14 and 15, 1992. According to claimant and his wife, claimant did nothing strenuous over the weekend.

7. On March 16, 1992, the claimant worked the swing shift, starting work at 3:30 p.m. That evening the spreader crew laid down core pieces which are called "27s." The 27s are approximately 27 inches wide by 4 feet long and are heavier than other core pieces typically used in making plywood. Claimant had laid 27s on previous occasions.

8. Towards the end of claimant's shift, at approximately 11:30 p.m., he experienced a tingling sensation in his right hand and stopped work for a short time. He told his supervisor that his arm was bothering him and returned to laying core and finishing his shift. His supervisor confirms that claimant told him that his arm was bothering him. Claimant, however, did not report an injury or incident at that time.

9. Claimant complained of aching and numbness when he arrived home after work. By the following day his arm was swollen and painful. He sought medical care and was hospitalized. It is undisputed that he was suffering a recurrence of subclavian vein thrombosis.

10. Claimant relates the recurrence of his thrombosis ("rethrombosis") to his catching 27s on March 16. He testified on direct examination that he had fallen behind in core laying on March 16 and was trying to catch up. He further testified that if you are not watching, pieces of core can hit you in the chest or face, and that he was "hit a few times that night that way." However, during cross-examination, claimant acknowledged that the events at work on March 16 were not unusual and that in his previous deposition testimony he had not identified any specific bumping or traumatic event occurring on March 16th. The following cross-examination occurred:

Q. Okay. Now, your wife testified that you told her you were jarred or jolted somehow.

A. Well, on that job when a piece of core is curved, it comes through the rolls and it comes up at you and you get hit anywhere from the chest to the face. You can get hit with a piece of core if you're not watching it and fast enough to catch it. And I did get hit a few times that night that way.

Q. Well, isn't it true that in your deposition you told us that you didn't get bumped or suffer any trauma?

A. That happens --

Q. Is that what you testified to in your deposition?

A. Yes.

Q. Okay. And it's also true that in your deposition you testified that nothing unusual happen that day.

A. Not to get -- No.

Q. And that it was just a typical workday, nothing out of the ordinary happened?

A. Well, besides catching the 27's.

Q. And you do that regularly?

A. Yes.

Q. Now your testimony is that you got bumped or were struck by something?

A. No.

Q. Is that your testimony now?

A. No, I didn't say I got struck. I said I was catching 27's. When they hit me in the hand, that's when I felt the tingling in my hand.

Q. I don't mean to argue with you, but I thought you just testified you got hit in the chest with the 27's.

A. You do get hit in the chest with the 27. That happens quite regularly.

Q. Did you or didn't you?

A. Yeah, I got hit that night.

Q. So then what I would like to do just to clarify this for the Court is to have you read for me -- read to yourself if you would, please, the highlighted material on page 51 and 52 of your deposition.

A. Which part here?

Q. The highlighted portion. (Complies.) Did you read that?

A. Yes.

Q. Do you recall giving your deposition?

A. Yes.

Q. On September 7. You were under oath at that time?

A. Yes.

Q. And the question that was asked you is as follows: "When the latest problem with your right arm developed in March of 1992 was there any type of bumping or traumatic event that you recall?" And your answer, "I can't recall, no."

A. Well, not that caused my arm to swell. I was just saying that there was --

Q. Mr. Burns, is this the question that was asked and is that your answer?

A. Yes.

(Tr. at 83-85.) In response to questioning from the Court, claimant acknowledged that there was no specific bump or catch that he could identify as the cause of his rethrombosis.

11. Claimant's wife also testified that after work on March 16th the claimant told her "that he had slipped and got hit by two 27s that were coming off." According to her, the 27s hit him in the hand. I do not find credible either her testimony on this point, or the claimant's own augmented trial testimony.

12. Claimant is a weight lifter. He testified that he quit lifting weights in June 1991 when he began working the spreaders. "I didn't feel like going over and lifting weights after that" (Tr. at 73.) However, Dr. Knapp testified that when taking a medical history, claimant told him that he had done heavy weight lifting up to the time his subclavian vein thrombosis recurred. Having personally heard the claimant's testimony, and considered changes in his story regarding his work on March 16, I find it more likely than not that claimant did not give up his weight lifting activities in June 1991, as he now claims.

13. Claimant was treated in March 1992 by Dr. Ronald A. Miller, a family physician and Dr. Michael R. Oreskovich, a surgeon. In letters they wrote, both physicians concluded that the rethrombosis was caused by claimant's work at Plum Creek. In Dr. Oreskovich's words:

Due to the fact that it [the rethrombosis] followed a day of work and not a day of recreation in my mind it occurred as a consequence of an accident at work in which he had excessive use of his right arm.

(Letter of Dr. Oreskovich dated June 22, 1992, attached as Ex. C to Luna Dep.) Dr. Miller put it this way:

I think it is possible that a "thrombosis", such as LaVern's, could arise spontaneously in the absence of an unexpected traumatic incident or unusual strain. Any given individual who has had a documented thrombosis occur in the past has the likely possibility of venous damage already being present. I would, however, concur with Doctor Oreskovich that LaVern's thrombosis was work related due to the frequent, repetitive types of motion used when working on the spreaders, i.e. **an occupational disease**, or could even have resulted from a traumatic event occurring the day prior to his development of symptoms from an unrecognized blow to his arm. [Emphasis added.]

(Ex. No. 1 at 45.) Neither Dr. Oreskovich nor Dr. Miller testified at trial or by deposition.

14. Dr. Gregory Luna, a surgeon in Spokane, Washington, assumed claimant's care in May 1993. He testified by deposition.

15. Claimant was also examined by Dr. J.F. Knapp, a cardiologist and Dr. Charles J. Swannack, a surgeon whose practice consists of approximately twenty percent vascular surgery. Dr. Knapp examined claimant at the request of the Montana Department of Labor and Industry to determine if claimant is suffering from an occupational disease. Dr. Swannack examined claimant at the request of Plum Creek's attorney. Both doctors testified by deposition.

16. None of the three testifying doctors were able to attribute claimant's rethrombosis to a single work shift on a more probable than not basis, and the two IME physicians both testified that it was more likely than not that the rethrombosis did **not** result from claimant's work on March 16th.

a) Dr. Luna initially testified that he concurred with Dr. Oreskovich's statement that the rethrombosis was the "result of an accident at work," but he did so with "qualifiers."⁽¹⁾ (Luna Dep. at 11.) He went on to testify that some thromboses can arise spontaneously but that in a majority of cases they arise "due to heavy activity or exercise or stress." (Luna Dep. at 12.) He attributed claimant's rethrombosis to "an episode of heavy lifting and straining at his job at a saw mill in Columbia Falls" (Luna Dep. at 17) "doing just normal work activities" (Id. at 19), and not to "a blow or being struck." (Id.) His conclusions were based on the history of physical activities provided by the claimant. (Id. at 42.) Upon cross-examination, Dr. Luna conceded that he could not state that claimant's rethrombosis arose during a single shift of work:

Q Is it also fair to conclude that the trauma which caused the occlusion, occurred over more than one work shift?

A It could have.

Q There's no way to tell, is there?

A No.

Q So to a reasonable degree of medical certainty can you not tell me that the occlusion which caused Mr. Burn's recurrent subclavian vein thrombosis arose as a result of his activities on a single work shift?

A No.

Q And in fact because some of his symptoms occurred on a Monday, it is reasonable to conclude that the injury to the intima to the vein which prompted the occlusion could have been caused by something other than a work activity?

A Sure.

(Luna Dep. at 34, emphasis added.) Then on redirect he said:

Q Yes. You did indicate that you agreed with Dr. Oreskovich, that the swollen arm following a day of work would indicate to you that the thrombosis had arisen as a result of that day of work?

A Given that no other heavy strenuous activity had occurred off-work, yes. If there was nothing else going on, and his only heavy strenuous activity during a three day time period prior to the arm swelling had been his laboring activity, I would make that **assumption**, yes.

(Luna Dep. at 42, emphasis added.) He was not asked to, and did not, put his "assumption" into an opinion expressed to a reasonable degree of certainty or as more probable than not, although he did do so with respect to his opinion that the rethrombosis did not arise spontaneously. (Luna Dep. at 42.) Finally, he further testified:

A Usually with stress thrombosis the activity precedes the symptomatic expression by **one to three days**; it can be longer, but typically you can see if somebody who had a heavy episode of exercising, straining, stress, and then **two days later** noticed the arm significantly swollen.

It can, these can present at protracted time periods, but usually its's within several days.

(*Id.* at 33, emphasis added.)

b) Dr. Knapp testified that there was no evidence to link the rethrombosis to claimant's employment and that there was only a 10 percent to 15 percent chance it

was related. He opined that it was more likely that it arose spontaneously as a consequence of the 1985 injury.

c) Dr. Swannack also testified that he was unable to relate the rethrombosis to a single day of work and said that it probably took several days to develop. Dr. Swannack testified that claimant's rethrombosis could be the result of a number of things other than injury, including dehydration, illness, infection, or simply a natural consequence of the earlier thrombosis.

17. Thus, the only firm medical opinion relating the rethrombosis to a single work shift is the letter of Dr. Oreskovich. In the face of the medical testimony presented by deposition, as well as Dr. Miller's expressed opinion that it was claimant's repetitive work ("i.e., an occupational disease") that caused his condition, I do not accept Dr. Oreskovich's opinion. Dr. Oreskovich was not deposed, and it is impossible to tell from his reports what information was available to him relating to claimant's condition. He was not subjected to cross-examination. The Court notes that cross-examination of Dr. Luna resulted in the doctor significantly qualifying his initial support of Dr. Oreskovich's opinion.

18. All of the testifying doctors agreed that symptoms of a subclavian vein thrombosis may not arise for several days. Even Dr. Luna conceded that the onset of claimant's symptoms on March 16th indicated that the thrombosis may have arisen prior to that date. The doctors identified a number of possible causes of a rethrombosis, including dehydration, infection, hypercoagulativity, spontaneous onset, sleeping with the arm in the wrong position, heavy activity or exercise (including weight lifting) and trauma. (Luna Dep. at 28-32; Knapp Dep. at 18-21; Swannack Dep. at 15-19.) Dr. Luna described someone "who sat for eight hours in this position crossing the Atlantic" as one example of stress which can trigger a recurrence of thrombosis. (Luna Dep. at 13.)

19. The onset of symptoms on March 16 was more indicative of a causative factor occurring prior to March 16.

20. Considering all of the evidence presented in this case, the Court is not persuaded that claimant's rethrombosis arose on March 16th or during a single work shift.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the present controversy pursuant to section 39-71-2905, MCA.

2. The claimant has the burden of proving that he is entitled to benefits. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 512 P.2d. 1304 (1973). The burden is "by a preponderance of the probative credible evidence." ***Dumont v. Wickens Bros. Construction Co.*** 183 Mont. 190, 201, 598 P.2d 1099 (1979). Claimant in this case has failed to carry his burden.

The law in effect on March 16, 1992 (the time of claimant's alleged injury), applies in determining whether he suffered a compensable work-related injury. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 321, 730 P.2d 380 (1986). The criteria for determining whether an injury is compensable is found in section 39-71-119, MCA (1991). Under the section "there must be an `injury' and an `accident,' and the injury must be `caused by' the accident." ***Welch v. American Mine Services, Inc.***, 253 Mont. 76, 81, 831 P.2d 580 (1992). The section provides in relevant part:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

- (a) internal or external physical harm to the body;
- (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
- (c) death.

(2) An injury is caused by an accident. An accident is:

- (a) an unexpected traumatic incident or unusual strain;
- (b) identifiable by time and place of occurrence;
- (c) identifiable by member or part of the body affected; **and**
- (d) **caused by a specific event on a single day or during a single work shift.** [Emphasis added.]

It is unnecessary for claimant to prove that his condition arose as the result of a single trauma on a single day. In a 1992 decision applying the quoted statute, the Supreme Court found that blisters caused by new shoes worn over the period of a single work shift satisfied the statutory requirements. ***Welch v. American Mine Services, Inc.***, *supra*. In that case the claimant wore a brand new pair of ill-fitting boots at work. Over the period of one work shift, rubbing from the boots caused open sores on the claimant's toes. The sores then became seriously infected and at least one toe was amputated. The testimony of claimant established that the sores arose during a single work shift. The medical testimony then established that the infection arose from the sores. Every link required under section 39-71-119 was forged.

This case, however, is distinguishable from ***Welch***. Claimant herein did not suffer a readily identifiable blister, wound, lesion or other injury. The tingling of his hand was not associated with any particular trauma. The tingling occurred at a location (the hand) which was remote from the place of the actual thrombosis, which was in the subclavian vein beneath the clavicle of the shoulder. Moreover, the tingling was a symptom of an obstruction which, in the medical opinions of two doctors, had its genesis on a previous day. Even Dr. Luna, whose testimony tended to support claimant's injury theory, conceded

that symptoms of a thrombosis typically do not appear for a day or more, and that the expression of symptoms on March 16 indicated an onset of the thrombosis at an earlier date. Thus, the temporal significance of the tingling presents a peculiar medical issue outside the experience of ordinary individuals, and is different from blisters, **e.g., Welch**; physical trauma to an eye when followed by rapidly degenerating sight, **e.g., Plainbull v. Transamerica Ins. Co.**, No. 93-432, slip op. (Mont. March 10, 1994); and an onset of acute back pain during lifting, **e.g. Prillaman v. Community Medical Center**, No. 93-283, slip op. (Mont. March 11, 1994).

Dr. Oreskovich's letter opinion is of little value in deciding this case. As already found, he did not testify and was rebutted by the testimony of two other physicians. The doctor was not subjected to cross-examination, and such examination proved important during the deposition of Dr. Luna.

Dr. Oreskovich's opinion, as well as Dr. Luna's support for that opinion, was based upon the history given by claimant, and especially claimant's assertion that he had engaged in virtually no physical activity over the weekend preceding March 16. As a result of the 1985 event, and his multiple hospitalizations at that time, the claimant was undoubtedly aware of the seriousness of his condition when it recurred on March 16, 1992. As found earlier in these findings, at trial the claimant augmented his earlier testimony by claiming that on March 16 he recalls being hit a number of times by pieces of wood, testimony that I do not find credible. There was also inconsistency between claimant's testimony concerning weight lifting, which is a possible cause of a recurring thrombosis, and what he reported to Dr. Knapp. Ultimately, the Court is left with the conviction that claimant and his wife have not been totally truthful in reporting the events leading up to the rethrombosis. While there was no direct evidence presented rebutting their testimony about the weekend, I am left with doubts about claimant's weekend activities.

After assessing all of the evidence, I am not persuaded that the recurring subclavian vein thrombosis arose at work on March 16, 1992. While not overwhelming, the evidence indicates that the thrombosis more likely arose a day or more prior to March 16, 1992.

In reaching my opinion, I have paid special attention to the Supreme Court's recent decisions in **Plainbull** and **Prillaman**. In both cases, the Supreme Court reversed decisions of this Court which required proof of the occurrence of an accident and a compensable injury by medical evidence based on a "more probable than not" standard. The basis of the overturned decisions was section 39-71-407, MCA (1989), which provides in relevant part:

(1) Every insurer is liable for the payment of compensation . . . to an employee of an employer it insures who receives an injury arising out of and in the course of his employment. . . .

(2) (a) An insurer is liable for an injury as defined in 39-71-119 if the claimant establishes it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) a claimed injury aggravated a preexisting condition.

(b) **Proof that it was medically possible that a claimed injury occurred or that such claimed injury aggravated a preexisting condition is not sufficient to establish liability.** [Emphasis added.]

The Supreme Court, however, held that subsection (2) "does not require that a claimant establish that the injury occurred through medical testimony." *Plainbull* at 9. Similarly, it does not require medical proof of a causal connection between the occurrence of an accident and an injury. *Prillaman* at 7; *Plainbull* at 9. A claimant's burden "is met when, **with or without** medical evidence, he establishes that it is 'more probable than not' that his injury occurred out of and in the course of his employment." (Emphasis added). *Plainbull* at 9.

That does not mean, however, that medical evidence is always unnecessary or that it is unimportant. Quoting *Plainbull*, the Court in *Prillaman* at 7, pointed out:

"[W]hile the occurrence of the injury may be susceptible of proof without medical evidence, the **causation** of the claimant's condition may very well require medical evidence if the claimant is to meet his burden of proof, especially in the face of contrary medical evidence presented by the carrier." **The facts of each case must dictate the degree to which medical evidence is needed, if at all.** Here, where both facts surrounding the "occurrence" and conflicting view as to medical opinion of "causation" are at issue, **it is essential that all testimony, including medical, be considered by the Workers' Compensation Court. . . .** [Underlining in the original; emphasis added.]

The teaching of these two cases can be summarized simply as follows: each case must be considered on its own unique facts; the Court must consider and weigh **all** testimony, both medical and non-medical, in determining whether a claimant has carried his burden of proof; and a lack of "medically more probable than not" testimony is, in and of itself, **not** fatal to a claimant's case.

In this case, I have given consideration to all of the testimony. The medical evidence in this case was especially important because of the nature of the condition involved, however, it was the totality of the evidence, including consideration of the claimant's credibility, which has ultimately led me to conclude that claimant failed to sustain his burden of proof.

3. Petitioner is not entitled to an award of attorney fees and costs.

4. Petitioner is not entitled to the assessment of a 20 percent penalty against respondent.

JUDGMENT

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

2. Petitioner is not entitled to benefits under Montana's Workers' Compensation Act, as he has failed to prove that he suffered a compensable work-related injury or that his present condition is the result of an injury.

3. Petitioner is not entitled to an award of attorney fees and costs.

4. Petitioner is not entitled to a 20 percent penalty against respondent.

5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Pursuant to ARM 24.5.344, any request for rehearing or for amendment of the Court's decision shall be filed within 20 days.

DATED in Helena, Montana, this 18th day of March, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Dean K. Knapton

Mr. Kelly M. Wills

1. Due to testimonial digressions, Dr. Luna's testimony is not all that clear, however, it appears that in his direct examination he was agreeing with Dr. Oreskovich.