

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 20

WCC No. 9306-6809

BRAND E. CAEKAERT

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on Monday, September 13, 1993, in Billings, Montana. Petitioner, Brand. E. Caekaert, was present and represented by Patrick G. Frank. Respondent, State Compensation Insurance Fund by William J. Mattix. The petitioner was the only witness at the hearing. Exhibit Nos. 1, 2, 3, 4, 13, 14, 15, 19, 26, 27, 28, 32 and 33 were admitted by stipulation. Petitioner stipulated to foundation for Exhibits 5 through 12, 16 through 18, 20 through 25, 29 through 31, 34 and 35 but objected to those exhibits on the grounds that they were irrelevant and cumulative. Since all exhibits had to be reviewed in order to determine their relevance, the Court is admitting all of the exhibits. However, Ex. No. 12 provided no relevant information; Ex. Nos. 18, 22 to 24 did not provide any evidence directly relevant to the issues in the case; and most of the remaining exhibits were relevant only to whether petitioner is permanently totally disabled on account of his back injuries. The depositions of Brand E. Caekaert and Dr. Jeffrey N. Hansen were filed with the Court and admitted into the record. Having considered the pretrial order, the testimony presented at trial and through the depositions, the demeanor of Mr. Caekaert and the exhibits, the Court makes the following:

FINDINGS OF FACT

Employment History

1. Petitioner is a 41 year old plumber who lives in Billings, Montana. He began working as an apprentice plumber in approximately 1974 and became a journeyman plumber in approximately 1978. His employment as a plumber is summarized as follows:

9/8/75 to 6/15/79 Star Service, Inc.

6/22/79 to about 7/30/79 Combustion Engineering

7/31/79 to 9/14/79 Star Service, Inc.

2/7/80 to about 4/7/80 Phil Morrow Mechanical

5/4/83 to 10/21/83 Wagner Mechanical, Inc.

12/6/83 to 1/23/84 Ace Plumbing & Heating

4/18/84 to 9/10/86 Bingham Mechanical

1/21/88 to about 2/5/88 Frank Wilson Plumbing & Heating

6/27/88 to 9/15/88 Star Service, Inc.

2. During the early 1980's, petitioner also worked at various times building dog houses and kennels and performing power lawn raking.

3. Petitioner started a poultry business in late 1986 or early 1987. The business became operational in 1987. The operations include raising, butchering, processing and selling chickens. The business has operated continuously since 1987 and is known as *Brand's Poultry & Custom Processing* and also as *Brand's Hatchery and Game Farm*.

Claim for Compensation

4. Petitioner began experiencing difficulties with his hands in 1982. His principal symptoms at that time were discoloration, tingling and numbness of his hands.

5. In early February 1988, the petitioner was diagnosed as suffering bilateral carpal tunnel syndrome. Dr. S. Arthur Frankel performed a carpal tunnel release on petitioner's left hand on February 10, 1988 and on his right hand on March 2, 1988.

6. At the time of his carpal tunnel diagnosis, petitioner was working for Frank Wilson Plumbing and Heating, which was insured by the State Compensation Insurance Fund (State Fund) under Plan III of the Montana Workers' Compensation Act.

7. On November 14, 1988, petitioner filed a claim for compensation on account of his carpal tunnel syndrome.

8. The State Fund accepted liability for the claim under the Montana Occupational Disease Act. It paid petitioner total disability benefits at a rate of Two Hundred Ninety-nine Dollars (\$299) per week for periods of February 16, 1988 through May 1, 1988 and June 13, 1988 through June 26, 1988.

Return To Work and Back Injury

9. On June 27, 1988 petitioner returned to work as a plumber for Star Services, Inc.

10. On July 15, 1988, while working for Star Services on a job at St. Vincent Hospital in Billings, petitioner suffered a back injury when the employee of another contractor drove a forklift into the scaffolding on which petitioner was working. This was petitioner's second work related back injury. He suffered an earlier back injury on April 18, 1984 while working for Bingham Mechanical. He also re-injured his back in 1987 in a non-work-related incident.

11. Petitioner was off work for a week or two immediately following his 1988 back injury, then returned to work for Star Service. After his return to work he was transferred to a job site in Reedpoint, Montana, an hour and a half commute one way.

12. Petitioner terminated his employment with Star Service on September 15, 1988. He testified at trial that he quit because the commute to Reedpoint hurt his back and because "my hands would just start to go numb again. And I'd start to drop the fittings, I couldn't hold on to things very good." (Tr. at 23.)

Nature Of Present Controversy

13. Petitioner is seeking a determination that he is entitled to payment for additional carpal tunnel surgery performed on December 11, 1992 (right arm) and February 12, 1993 (left arm), and for 16 weeks of temporary total disability benefits during his recuperation period. Respondent opposes petitioner's request on two grounds. First, it contends that petitioner is judicially estopped from pursuing his present claim because of testimony and discovery answers he gave in earlier judicial proceedings. In those proceedings petitioner claimed that his July 15, 1988 back injury was permanently totally disabling. Second, it contends that the last injurious exposure doctrine bars the claim because petitioner's work in his poultry business between 1988 and 1992 aggravated his carpal tunnel syndrome.

Prior Testimony By Petitioner

14. On July 18, 1988, petitioner filed a workers' compensation claim on account of his July 15, 1988 back injury. He thereafter filed a petition in the Workers' Compensation Court claiming that he was permanently totally disabled or, in the alternative, permanently partially disabled as a result of either his 1985 or 1988 back injuries. (Ex. Nos. 9 and 35.)

15. Petitioner also filed a civil action for damages against the worker who drove the forklift into the scaffolding and that worker's employer. *Brand E. Caekaert v. Don Moseley and Empire Lathing & Plastering Co., Montana Thirteenth Judicial Dist. Court, Yellowstone County, No. DV-89-1483.*

16. In answers to interrogatories put to him in the workers' compensation proceeding, petitioner stated that his back injuries had rendered him totally disabled, leaving him with no earning capacity. He also claimed that but for his back injury he would have been

able to continue working as a plumber. He stated that he left his employment with Star Service because of his back injury, and that the back injury precluded him from working at any of the jobs he was qualified to perform. (Ex. No. 34.)

17. The workers' compensation litigation was settled by separate full and final compromise settlement agreements between petitioner and each of the two insurers. (Ex. Nos. 5 through 8.)

18. In answers to interrogatories put to him in his third party action, petitioner asserted that his inability to return to work as a plumber was the result of his July 15, 1988 back injury and that his back injury permanently disabled him from working as a plumber. (Ex. No. 11.) In his February 21, 1991 deposition, petitioner also testified that his carpal tunnel syndrome did not prevent him from working as a plumber and that his carpal tunnel symptoms had dramatically improved following his 1988 surgeries:

Q. Is it your opinion that had this back injury not occurred on July 15, 1988, that you could have continued to work as a plumber?

A. Very much so I could have.

Q. Is it your opinion that the carpal tunnel problems that you had would not have independently prevented you from being a plumber?

A. After the operations, and a period of time, my hands got better where they didn't bother me being a plumber at all. It took a while.

Q. When do you feel that you healed from those surgeries so that it didn't interfere with your ability to be a plumber?

A. They got better and better month after month. Six to eight months.

Q. From that point forward then, is it your opinion that you could have continued to do plumbing work with your hands and arms had you not had this back injury?

A. Yes.

Q. What problems, if any, do you have presently with your hands and arms?

A. Actually my hands and arms feel good. The operations, like I said, they were slow to--and maybe I thought it would be--work real fast. My hands and arms, the operations were very successful as far as I'm concerned.

...

Q. Has Dr. Jeffrey Hansen advised you to avoid repetitive use of your hands or any occupation that would require that?

A. Not to my knowledge. It took awhile for my hands to heal after the carpal tunnel. There was a period of time after I had the operations that I thought my hands should be better right now. You know, "You fixed them, why aren't they better." It took six, nine months, a year for me to get back the strength I lost having the operations of the carpal tunnels.

Q. Do you feel that your hands and wrists are in the same condition that they were before your surgery? Or are they better?

A. They're better.

(Ex. No. 15: February 21, 1991 Caekaert Dep. at 75-76, 126.)

19. Petitioner also testified in his third party action that his back injuries limited his ability to work in his poultry business. He claimed that the back injuries necessitated his hiring of employees to do labor he would have otherwise performed. (Ex. No. 15: Caekaert Dep. at 85-86.)

Medical Evidence Following 1988 Surgeries

20. Following his 1988 surgeries petitioner was examined at various times by Dr. Hansen, Dr. Patrick Cahill, Dr. Donald H. See, and Dr. Thomas R. Johnson. Dr. Hansen replaced Dr. Frankel as his primary treating physician with respect to the carpal tunnel syndrome.

21. Although he returned to work as a plumber during the summer of 1988, petitioner did not obtain a satisfactory result from his 1988 carpal tunnel surgeries. He was never symptom free following the surgery and his right hand symptoms actually worsened during the months immediately following the surgeries.

22. On January 15, 1989, Dr. Hansen concluded that petitioner had not yet reached maximum healing and declined to rate his impairment.

23. However, on May 18, 1989, Dr. Hansen gave an impairment rating. In his deposition the doctor confirmed that petitioner had reached "medical stability" on that date. He defined "medical stability" as meaning "they have gotten as good as I think they are going to get." (Hansen Dep. at 92-93.)

24. Between 1988 and 1992 the petitioner continued to complain of pain and numbness in his hands. He also developed "bilateral medial forearm pain near the elbow." That pain, suggesting additional nerve impingement along the medial nerve, was initially noted by Dr. Patrick Cahill on August 5, 1988. (Ex. No. 28 at 4.)

25. Because of the apparent poor result of Dr. Frankel's surgeries, further surgery was considered as early as the summer of 1988. However, Dr. Hansen adopted a conservative "wait and see" course of action at that time.

26. Between 1988 and 1992 the petitioner continued to butcher chickens and do other manual labor for his poultry business. In his trial testimony the petitioner minimized the amount of work he did during this time. However, the petitioner's testimony in this regard was not credible. I find that the manual labor he performed, including the butchering of chickens, was substantial.

27. Dr. Hansen examined the petitioner on January 12, 1990, and noted that the petitioner "is gradually getting worse, with pain in the arms and more numbness and more loss of grip strength and more dropping of things." (Ex. No. 33.) In his deposition Dr. Hansen agreed that he would expect such worsening had petitioner continued to butcher chickens. (Hansen Dep. at 98.)

28. In September of 1990, Dr. Hansen noted some improvement in petitioner's symptoms. In his office notes he commented: "Interesting since I last saw him, he has backed off substantially in his work activities and as long as he doesn't overdo it, [he] does not have too much in the way of the pronator tear [sic] symptoms." He also noted that petitioner was "no longer butchering the chickens." (Ex. No. 33 at 14.)

29. Approximately a year later, on October 3, 1991, petitioner's symptoms were reported by Dr. Hansen to include "two hours of effective life of use of the hands." He noted that petitioner "can't even hold onto a glass or a piece of silverware after he's used his hands repetitively for about two hours." (*Id.*) In his deposition, Dr. Hansen agreed that petitioner's symptoms were worse than they had been on May 18, 1989, when he had reported that petitioner could butcher and care for chickens for "3 hours before he starts to get aching and numbness in his hands" and could work up to 6 hours before he could no longer hold on to objects. (Ex. No. 33 at 18.)

30. By November 30, 1992, the petitioner's symptoms had significantly worsened. Petitioner's thumbs were constantly numb. Dr. Hansen also observed a pronounced degree of atrophy and loss of strength since his previous examination. His office notes make specific mention that petitioner "works with the birds on a constant basis." (Ex. No. 33.)

31. Dr. Hansen thereafter performed two surgeries. On December 11, 1992, he performed a carpal tunnel release with a neurolysis of the median nerve and exploration and decompression of the median nerve at the elbow of the right arm. On February 12, 1993, he performed a median neurolysis of the left elbow and a left carpal tunnel release. The surgeries have significantly reduced petitioner's symptoms.

32. In the surgery on the left hand and arm, Dr. Hansen found scar tissue surrounding the median nerve in the same area of petitioner's first surgery. He also determined that the nerve was entrapped in the pronator teres muscle of the left forearm. He found similar scar tissue and muscle involvement in the right hand and forearm surgery. (Hansen Dep. at 39-40.)

33. Dr. Hansen testified that had he performed the second round of operations in 1988 he believed he would have found the same conditions. (Hansen Dep. at 42.) He expressed the further opinion that the 1993 surgeries were necessary to relieve the conditions and symptoms that existed in 1988 immediately following the first surgeries.

34. Dr. Hansen testified in his deposition that the activity required in butchering chickens was aggravating to carpal tunnel syndrome. (Hansen Dep.; Ex. No. 19 at 40:22-25 and 41:1-14.) On May 18, 1989, Dr. Hansen advised petitioner to change his occupation. (*Id.* at 32.) On his January 12, 1990 examination of the petitioner, Dr. Hansen concluded: "He is now developing anterior interosseous syndrome or pronator teres syndrome . . . I think that the work that he does causes progressive endangerment of the arms to the point of further cumulative trauma or nerve compression problems." (Ex. No. 33 at 16.)

In an office note of May 27, 1993, Dr. Hansen acknowledged: "Obviously, there is some progression of the situation that has occurred in recent years, but he's always had symptoms and finally decided to have the surgery." (Hansen Dep. Ex. No. 13, Emphasis added.) In his deposition Dr. Hansen was at times equivocal about the additional damage caused by the petitioner's continued butchering of chickens. He testified initially that he did not know whether petitioner's work in the poultry business worsened his condition or just caused a "temporary manifestation" of symptoms:

Well, he would certainly get more symptoms if he did things that were real repetitive.

Now the question is, does manifesting symptoms really truly worsen the condition, or is it just simply a temporary manifestation of the symptoms that are already there? I don't have the answer to that, and nobody does.

Nobody really knows what that is.

But in general, I think overusing the extremities over a period of time would be the one thing that I know of that could potentially make them worse. [Emphasis added.]

(Hansen Dep. at 66-67.)

Dr. Hansen later testified that petitioner's poultry work, especially his butchering, increased his symptoms. He agreed that "it probably is a contributing factor to his condition," but again expressed the view that he could not state whether petitioner's activities caused a temporary or permanent worsening of his condition. (Hansen Dep. at 75.) However, when questioned further, Dr. Hansen, conceded that petitioner's continued repetitive use of the hands probably caused a progression of his carpal tunnel syndrome:

Q. Can continued use, or continued repetitive use or static holding of hands and wrists in a case such as this where the patient experiences symptoms as a result lead to progression of the symptoms, of the condition?

A. Oh, I think it can certainly.

Q. And how does it to [sic] that?

A. Well, that's hard to explain, you know, on a physiologic basis exactly also, but I think it simply causes thickening of the -- recurrent thickening of the tendon lining tissues, which then take up any extra available space for the nerve and push the nerve up against a rigid immovable structure, and in this case, scar tissue in the previously unoperated case, that ligament that goes over the top or some combination of both of those.

...

A. So you are exactly right, what he has been doing during this period of time probably has some incremental addition, as does the plumbing and things that have happened over a long period of time.

So it becomes very difficult in these causation questions. You know, like I said, I think it is probably just like throwing grains of sands in a bucket, they just gradually accumulate over time. [Emphasis added.]

(Hansen Dep. at 84-85.)

35. Dr. Hansen's testimony, taken together with petitioner's work in his poultry business and the worsening of his symptoms between 1989 to 1992, persuade me that petitioner's butchering and other work in his poultry business aggravated and permanently worsened his carpal tunnel syndrome.

Petitioner's Disability from Working as a Plumber

36. On September 15, 1988, petitioner quit his job as a plumber, solely on account of his back injuries. His back injuries were disabling and precluded him from working as a plumber.

CONCLUSIONS OF LAW

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

It is undisputed that petitioner suffered from an occupational disease for which the State Fund accepted liability in 1988. Since the insurer in this case has already accepted liability for petitioner's claim, the procedures set out in section 39-72-602, MCA, are inapplicable. Those procedures apply only where the insurer denies the initial demand for benefits. Thus, the obligation of the State Fund, if any, to pay for the 1992 surgeries is properly before the Court.

2. The petitioner's work in his poultry business aggravated and worsened his carpal tunnel syndrome. Because of that aggravation the respondent is not responsible for his 1993 surgeries or any temporary total disability benefits.

The petitioner is entitled to wage benefits and medical benefits for conditions and treatment related to his occupational disease. Section 39-72-704, MCA (1987), provides:

Medical and hospital expenses. In addition to the compensation provided by this chapter, an employee who becomes either totally or partially disabled from an occupational disease is entitled to receive for treatment of the occupational disease, without limitation as to length of time or dollar amount, reasonable medical services, hospitalization, medicines, and other treatment approved by the division.

Respondent contends, however, that it is not responsible for the 1992 surgery because petitioner's condition was aggravated by his work in his poultry business between 1988 and 1992. Respondent cites the "last injurious exposure doctrine" as one of its defenses.⁽¹⁾ The doctrine has been applied in workers' compensation cases. The leading Montana case is *Belton v. Hartford Accident and Indemnity Co.*, 202 Mont. 384, 658 P.2d 405 (1983), which held that "once a claimant has reached maximum healing or a medically stable condition, the insurer at risk is no longer responsible for any subsequent injuries or conditions," *EBI/Orion Group v. State Compensation Ins. Fund*, 249 Mont. 449, 452, 816 P.2d 449 (1991). The doctrine applies, however, only where a second injury causes additional disability. The limits of the doctrine are discussed in *Allen v. Treasure State Plumbing*, 246 Mont. 105, 109-10, 803 P.2d 644 (1990):

We disagree with ECU's application of *Belton* to the facts in this case. In *Belton*, it was undisputed that an injury suffered by the claimant in 1979 aggravated a prior injury sustained in 1977. *Belton*, 202 Mont. at 386, 658 P.2d 405. The 1979 injury rendered the claimant permanently, totally disabled. In the case now before us, however, Mr. Allen's doctor testified that his back condition was not permanently aggravated by his second injury. Rather, as stated by the Workers' Compensation Court, this second injury only temporarily aggravated his pre-existing injury.

246 Mont. at 110.

The rule is codified in the Montana Occupational Disease Act, which provides in relevant part:

39-72-303. Which employer liable. (1) Where compensation is payable for an occupational disease, the only employer liable shall be the employer in whose employment the employee was last injuriously exposed to the hazard of such disease.

While this statute has not been interpreted by the Montana Supreme Court, *Larson's Treatise on Workers' Compensation Law* states:

Recurrences of disability in occupational disease cases are treated the same as recurrences in accidental injury cases.

(Larson's Treatise on Workers' Compensation Law § 95.27.)

The **Larson** treatise continues:

Thus, when disability has once resulted from occupational disease, a second disability occurring under a different carrier will be chargeable to the first carrier if it is a recurrence of the first disability. The persistence of symptoms in the meantime, and the failure to demonstrate an incident that can independently explain the second onset, are strong grounds for finding a mere recurrence. [Emphasis added.] . . .

[I]f the later exposure should increase the degree of disability caused by the initial exposure, the second carrier might become responsible; but in such a case it would be necessary to distinguish carefully between the increased disability resulting from natural progress of the disease and that resulting from the added exposure.

(Id.)

Based on cases sampled from other jurisdictions, it appears that in occupational disease cases other jurisdictions apply the **Allen** distinction between temporary aggravations of a preexisting condition and aggravations which permanently worsen existing conditions. In **Eisnach v. Industrial Commission of Colorado**, 633 P.2d 502 (1981), for example, benefits were denied to a worker suffering from Chronic Obstructive Pulmonary Disease which had been aggravated by a work-related exposure to chemical fumes. The claim was rejected because the claimant's condition was only temporarily aggravated and had returned to its pre-exposure state within a month after the exposure. But in **James River Corp. v. Youngblood**, 722 P.2d 1286 (1986), the Oregon Court of Appeals held the claimant's last employer responsible for her long standing occupational disease based on testimony which established that her duties at her last job caused a worsening of her condition. The claimant in that case had filed claims in 1978, 1979, 1982 and 1983 on account of thoracic outlet syndrome. The insurer disputed the later claim on the grounds that the last incident of pain was "merely an increase in symptoms of the same underlying condition." (*Id.* at 1287) The court held that the 1983 incident was responsible for the recurrence of her condition because medical testing showed that her work activities in 1983 "caused increased compression and the worsening of her underlying condition, which resulted in increased pain and discomfort." (*Id.* at 1288.) In a carpal tunnel syndrome case, the Oregon Court of Appeals indicated that the last of three employers was responsible for the syndrome where the syndrome began with the first employer but had worsened during each successive employment. **Overbey v. Kaiser Health Plan**, 6761 P.2d 547 (1988). It reached its conclusion even though the condition had not advanced to the point of requiring surgery or other medical intervention.

In the present case there is considerable and convincing evidence that petitioner's 1988 carpal tunnel surgeries were unsuccessful and that he was never symptom free thereafter. On the other hand, there is persuasive evidence that petitioner's continued work butchering chickens between 1988 and 1993 exacerbated and accelerated his carpal

tunnel syndrome. He was able to tolerate his symptoms in 1988, and even worked for a time as a plumber. By 1992 his symptoms had worsened significantly. The numbness in his hands had expanded into his thumbs, which were continually numb, and the length of time he was able to use his hands had diminished significantly. Atrophy and muscle weakness had also increased. The increased symptoms, which led ultimately to petitioner's decision to undergo new surgery, cannot be attributed solely to a natural progression of his 1988 condition. Dr. Hansen testified that repetitive use of the hands has a cumulative effect in carpal tunnel syndrome. During the four year period following his initial carpal tunnel syndrome the petitioner continued butchering chickens. He was specifically warned against doing so. Petitioner may ultimately have needed additional surgery even had he avoided repetitive hand use during that time. However, the preponderance of evidence demonstrates that his work in his poultry business worsened his condition and was a significant contributing factor to the need for surgery in early 1993. Petitioner had reached maximum medical healing or stability. His subsequent work aggravated his preexisting condition. The **Belton** criteria are therefore met.

The last injurious exposure rule is employment based, not insurance based. Thus, it is immaterial in this action whether claimant in conducting his poultry business carried workers' compensation coverage for himself or had elected to forego coverage.

3. For the reasons set forth in the previous conclusion of law, petitioner is not entitled to temporary total disability benefits.

4. The petitioner's claim for temporary total disability benefits is also barred by the doctrine of judicial estoppel. Petitioner commenced both workers' compensation and third party actions based on his July 15, 1988 back injury. In both of those actions he certified under oath that his back injury permanently and totally disabled him from working as a plumber or in any other occupation for which he was qualified to work. He testified that as a result of his back injury his earning capacity was zero. He also testified that his carpal tunnel syndrome was not disabling.

The doctrine of judicial estoppel was adopted by the Montana Supreme Court in *Rowland v. Klies*, 223 Mont. 360, 726 P.2d 310 (1986). In *Rowland*, the controversy was about the rightful ownership of a cabin. Initially, the plaintiff alleged he was entitled to ownership on a life estate theory. He filed a sworn affidavit disclaiming any employment relationship. When the district court rejected the life estate argument, the plaintiff changed his position, claiming he was an employee and that a violation of the employer/employee relationship had occurred. The district court noted that this "seemed to work a fraud upon the court for plaintiff to now claim damages from any sort of employment status." The Montana Supreme Court agreed, stating:

"The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions, and while this rule is

frequently referred to as 'judicial estoppel,' it more properly is a rule which estop a party to play fast-and-loose with the courts. . . ." [Emphasis added.]

(*Rowland* at 367.)

The Court went on to state that the rule, although a form of estoppel, "partakes rather of positive rules of procedure based on manifest injustice and, to a greater or lesser degree, on considerations of the orderliness, regularity, and expedition of litigation . . . In order to work a judicial estoppel, the position first assumed must have been taken knowingly and free of inducement by the opposite party." The Court also noted that the "doctrine of judicial estoppel applies with particular force to admissions or statements made under sanction of oath." *Id.* at 367-368, 726 P.2d at 315 quoting 31 C.J.S. *Estoppel*, § 117(b), pp. 623-627 (1964).

The petitioner argues that judicial estoppel should be limited to positions and testimony of a party in the same action. The argument is rejected. The decision in ***Rowland*** establishes the rule as one to protect the judicial process and is not limited to statements or positions taken in the same action. See ***Roessel v. Rivendell of America, Inc., C.V. 89-48-BLG-JFB (1991)***.

Applying the doctrine to this case, petitioner is estopped from seeking temporary total disability benefits. The doctrine requires that he be taken at his word when he testified in the other proceedings. Taking him at his word, his back injury was permanently totally disabling and reduced his earning capacity to zero. He therefore suffered no loss of wages when he underwent his surgeries in 1993.

However, petitioner is not judicially estopped from seeking medical benefits. His earlier testimony and discovery answers fall short of representing that his 1988 carpal tunnel surgeries were 100% successful or that his hands had returned to normal. It was not inconsistent with the possible need for future medical care. The doctrine of judicial estoppel applies only where the earlier position of a party is incompatible with his or her present position.

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

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Petitioner's requests for temporary total disability benefits and medical benefits are denied.
3. Petitioner is not entitled to attorney fees, costs, or a penalty.
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 10th day of December, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick G. Frank

Mr. William J. Mattix

1. Its other defense to payment for the 1992 surgeries is judicial estoppel. That defense will be addressed in the next section.