IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 63

WCC No. 9308-6870

WALTER J. CASAROTTO

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent/Insurer for

BUTTE - SILVER BOW GOV'T POLICE DEPARTMENT

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 18, 1994 in Butte, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Walter J. Casarotto (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent, Montana Municipal Insurance Authority, was represented by Mr. Leo S. Ward. Claimant was sworn and testified on his own behalf. Gary Henrich was also sworn and testified. Claimant was granted leave, over the respondent's objection, to take the post-trial deposition of Dr. James Murphy. Dr. Murphy's deposition has been submitted to the Court and was considered by the Court in reaching its decision. Exhibits 1 and 2 were admitted into evidence by stipulation of the parties.

The issue in this case concerns claimant's entitlement to permanent partial disability benefits pursuant to section 39-71-703, MCA (1991).

Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. The claimant was 46 years old at the time of trial. He has been a policeman with the Butte-Silver Bow County Police Department for approximately twenty years.

2. Claimant is a graduate of Butte High School. He attended Northern Montana College for one year. He then attended Dupage Horticulture School in West Chicago, Illinois for a year, where he received a certificate of completion. Claimant then worked as a horticulturist at Salem Nurseries for seven or eight months, where he was an assistant manager. This position involved lifting and moving plants around, and lifting above the head of up to sixty or seventy pounds.

3. Claimant served in the United States Army for two years, and then returned to Butte. After his return to Butte he worked as a stockroom manager in a department store for approximately two years. The job involved overhead lifting of up to sixty or seventy pounds, pushing and pulling, and stocking shelves. He also worked for a short period of time as a construction worker.

4. Claimant joined the Butte-Silver Bow County Police force in 1972 and has worked as a police officer since that time.

5. On October 6, 1991, claimant suffered a work-related injury to his right shoulder while subduing a suspect. He reached out to grab the individual when he felt something pull in his arm.

6. On October 6, 1991, the Butte-Silver Bow Police Department was enrolled under Compensation Plan I of the Workers' Compensation Act, and was self-insured through the Montana Municipal Insurance Authority (MMIA). The MMIA accepted liability for claimant's industrial injury.

7. Claimant initially sought treatment for his injury on October 10, 1991, from Dr. James Murphy, an orthopedic surgeon in Butte. Dr. Murphy took claimant off work until November 1, 1991 and prescribed physical therapy and cortisone medication.

8. Claimant continued to experience difficulty with his shoulder. An MRI of his right shoulder was performed on December 27, 1991. It disclosed a partially torn right rotator cuff of the right shoulder and a tear of the posterior glenoid labrum in the shoulder.[(1)] (Ex. 2 at 3, 6, 7.)

9. Dr. Murphy discussed surgery with claimant, but for the time being claimant has elected conservative treatment with non-steroidal anti-inflammatories. Dr. Murphy testified that claimant may need surgery in the future. (Murphy Dep. at 6.)

10. On December 31, 1991, Dr. Murphy provided an impairment rating for claimant's injury. The rating was 11 percent of the upper extremity, which translates to 7 percent of the whole person. Claimant's shoulder is impaired in abduction, external rotation and forward flexion. (Murphy Dep. at 8-10; Ex. 2 at 5, 10.)

11. Claimant was highly motivated to return to work and Dr. Murphy did approve his return, "with no limitations," in a letter to the insurer dated December 6, 1991. (Ex. 2 at 8.) He wrote

another letter to the insurer on May 5, 1992 which stated "Mr. Casarotto is able to do his job without limitations, although he does have pain on occasion and still has a permanent partial impairment of the whole person." (Ex. 2 at 2.)

12. Because of the physical limitations resulting from his injuries, Dr. Murphy has restricted him from doing overhead work. The nature of the restriction is set forth in a letter from Dr. Murphy dated June 1, 1993 stating in part:

> He does have limited motion, particularly on abduction and external rotation. It is my opinion that he does have permanent partial physical impairment. If he were to do any type of work that required overhead work, he would be unable to do this since he can only abduct to 90 degrees. He also has limited external rotation. Any work causing external rotation beyond 20 degrees, this patient would definitely be impaired. . . .

(Ex. 2 at 1.) Dr. Murphy confirmed the restrictions in his deposition. (Murphy Dep. at 11-14.) He advised against claimant working construction. When asked if claimant could work, as he had 20 years ago, as a stockroom manager who lifts boxes and objects above his head, Dr. Murphy stated, "He can't do it. He can only abduct to 90 degrees." (Id. at 13.)

13. Dr. Murphy further testified that claimant is "taking a chance" by continuing to work as a policeman:

> Q Did you have some concerns about the fact that he could hurt himself in doing that when you released him there?
>
> A Yes, I think that he's going to have some impairment if he's going to have to wrestle somebody because he doesn't have the full range of motion with his shoulder.
>
> Q What kind of impairment would that create for him?
>
> A Oh, he's going to have pain.
>
> Q Is there more damage that can be done with that as well?
>
> A It's possible.
>
> Q What kind of damage is there that's possible?
>
> A I suspect with a weak shoulder, somebody could even break his arm, increase the tear of his rotator cuff, because of weakness and loss of motion.
>
> (Murphy Dep. at 7-8.)
>
> Q If Mr. Casarotto was anxious to return to his work as a policeman, would you have cautioned him against this kind of work knowing what you know about his injury?
>
> A Yes. I think he's taking a chance.

Q Why is that?

A Because of having to wrestle drunks and wrestle people around the jail and stuff like that with a shoulder that doesn't move completely. I think he's taking a definite chance of further injury.

(Id. at 14.)

A (by Dr. Murphy) What happened is the man wanted to go back to work as a police officer. If I would have said, "Wally, you can go back but you've got these restrictions," then they wouldn't let him go back to work, and he wanted to work.

Q (by Mr. Ward) So you represented to his employer and to the insurance company that he had no physical restrictions related to his work; is that correct?. . .

A He does have impairment and he does have restrictions, but you can still work if you want to. Some people like to work and they'll go ahead and work even in pain.

(*Id*. at 21; objection omitted.)

14. Claimant has reached maximum medical healing.

15. Since returning to work claimant has experienced pain in his shoulder in performing certain activities. He described several incidents in which he experienced shoulder pain when making an arrest or physically restraining a suspect. (Tr. at 21-22.) He took time off work on one occasion in November of 1992 due to the resulting pain in his shoulder.

16. After his injury, claimant sought and was granted a change from the graveyard workshift to the day workshift. Claimant testified that he did so because "[d]ay shift was more lenient as far as the serious calls are concerned, where you are not wrestling around with a lot of drunks -- a lot of people, whether drunk or not. Graveyard shift has the most and afternoon shift is in between." (Tr. at 24.) The claimant's testimony throughout trial was credible and the Court finds that claimant did in fact change work shifts to reduce his exposure to work-related incidents which could be more difficult for him to handle and could lead to further injury.

17. Due to a wage differential, police officers working the day shift are paid less than those who work the graveyard shift.

18. Prior to his injury claimant worked extra shifts or "call out" shifts, for which he was paid at one and a half times the regular pay rate. Since his injury he has ceased working those shifts since they are non-day shifts and therefore have an increased risk of incidents which would involve use of claimant's shoulder.

19. As a result of his injury claimant has modified the way he holds a shotgun when firing it. He can no longer fire the shotgun in the "correct position." However, he can successfully handle and fire the shotgun from a modified position.

20. Claimant also experiences pain in his shoulder when making sharp turns while driving his patrol car.

21. Claimant is nearing the date on which he can retire from the police department at half pay. Prior to his injury claimant had considered returning to nursery work upon retirement. He does not believe that he can now do so because of the heavy lifting involved in nursery work.

22. Claimant has a "medically determined physical restriction" as a result of his injury. Although he was able to return to work, the restriction impairs his "ability to work." § 39-71-116(15), MCA (1991). He satisfies the definition of permanent partial disability and is entitled to the benefits specified by section 39-71-703, MCA (1991).

23. Claimant is entitled to an award based on a 9 percent disability (7 percent for his impairment rating and 2 percent for his age).[(2)]

24. The parties did not present evidence regarding claimant's permanent partial disability rate.

25. The insurer's denial of permanent partial disability benefits was not unreasonable. A genuine issue existed concerning the application of section 39-71-116 (15), MCA (1991), which defines permanent partial disability, in cases where the claimant returns to his full pre-injury duties. Additionally, Dr. Murphy's written release to return to work stated that the release was with no physical limitations or restrictions.

CONCLUSIONS OF LAW

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

2. The statutes in effect on the date of injury must be applied in determining benefits. ***Buckman v. Montana Deaconess Hospital****, 224 Mont. 318, 321, 730 P.2d 380 (1986).* Claimant was injured on October 6, 1991, and the 1991 version of the Workers' Compensation Act applies.

3. The claimant is seeking a permanent partial disability award pursuant to section 39-71-703, MCA (1991). Subsection (1) provides that:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.

Unlike the situation presented in ***David Williams v. Plum Creek Timber,*** *WCC No. 9403-7017 (June 28, 1994) (hereinafter "Williams*"), the claimant in this case agrees that the quoted provision requires that he meet definition of permanent partial disability set forth in section 39-71-116(15), MCA (1991), as a prerequisite to any award of benefits under the section, and this Court so held in ***Williams.*** However, the parties disagree as to whether claimant satisfies that definition.

Section 39-71-116(15), MCA (1991), provides:

> (15) "Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:
>
> (a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and
>
> (b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.

The two prongs of the definition are in the conjunctive, so both must be met. Claimant bears the burden of proving that he is entitled to benefits. ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 512 P.2d 1304 (1973).* That burden is by a preponderance of the credible probative evidence. ***Dumont v. Wicken Bros. Construction Co.****, 183 Mont. 190, 598 P.2d 1099 (1979)*.

The first prong of the test requires the existence of a "medically determined physical restriction as a result of an injury." § 39-71-116(15)(a), MCA (1991). Since the subsection does not qualify "medically determined restriction", **any** medically determined restriction is sufficient to meet this criteria. ***Williams.*** Dr. Murphy's testimony verifies that claimant suffers from a "medically determined physical restriction" arising from his injury, and the insurer does not contend otherwise. In its proposed findings, the MMIA states: "There is no dispute Casarotto suffered a physical restriction as a result of his injury; the entire issue is whether that restriction impairs his ability to work." (montana municipal insurance authority's proposed findings of fact, conclusions of law, and order at 8-9.) Thus, we must determine if claimant's ability to work has been impaired.

In a recent decision this Court held that that "ability to work" refers to the worker's ability to work in his or her normal, pre-injury labor market. ***Williams*** *at 6.* The claimant's ability to work his past jobs has been impaired on account of his physical limitations. He can no longer do the overhead lifting required of a stockroom manager, a position he held prior to becoming a policeman. Dr. Murphy also testified that he cannot perform heavy lifting, a restriction which will preclude claimant from returning to nursery work upon his retirement from the police department.

Claimant's ability to work as a policeman has also been impaired even though he continues to perform his job in exemplary fashion. Specifically, claimant has had to change work shifts and decline extra shifts in order to reduce his exposure to physical encounters with unruly civilians. He injured his shoulder in one such encounter and each further encounter carries with it a substantial risk of further injury. At the time of his injury claimant was working the graveyard shift, which is the shift during which most encounters occur. Thus, the change to day shift and the declination of extra shifts has reduced claimant's exposure to such encounters. These changes, however, have also resulted in a loss of extra pay he received for working graveyard and extra shifts. Clearly, claimant's ability to work as a policeman has been impaired.

4. The amount of claimant's entitlement is determined under section 39-71-703, MCA (1991), which provides in relevant part:

> (2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.
>
> (3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:
>
> (a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;
>
> (b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;
>
> (c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of $2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than $2 an hour as a result of the industrial injury, 20%; and
>
> (d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing

medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

(4) The weekly benefit rate for permanent partial disability is 66% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

Under subsection (2) claimant is initially entitled to a 7 percent disability rating on account of the 7 percent impairment rating. In addition, under subsection (2)(a) he is entitled to an additional 2 percent disability rating since he was over 30 years of age and under 56 years of age at the time of the injury. Claimant does not seek any award based on either education or wage loss (subsections (2)(b) and (2)(c)),[(3)] so those criteria have not been considered by the Court.

Claimant is not entitled to any award under subsection 2(d). While Dr. Murphy indicated that claimant can no longer perform heavy labor, claimant did not tender evidence showing that the job of policeman is classified as a heavy labor position, or for that matter even as a medium labor position. Dr. Murphy was also unable to render an opinion as to whether claimant was limited to medium or light duty work. Finally, whether or not a policeman is classified as a heavy duty job, claimant returned to his job and is capably performing it. Thus, the claimant failed to carry his burden of proof with respect to the benefits available under subsection 2(d).

Claimant is therefore entitled only to benefits based on the impairment rating and age. The disability percentage for these two factors is 9 percent. Multiplied by 350 weeks (section 39-71-703(2), MCA (1991)), claimant is entitled to 31.5 weeks of benefits at the rate provided in section 39-71-703(4), MCA (1991). Since the parties did not present evidence which would allow that rate to be determined the Court will retain jurisdiction of this case in the event the parties are unable to agree on the rate.

5. The claimant is not entitled to attorney fees or a penalty. Sections 39-71-611 and 39-71-612, MCA (1991), both require a finding of unreasonableness as a prerequisite to awarding attorney fees. Similarly, section 39-71-2907(1), MCA, permits the award of a penalty only where the insurer "unreasonably delays or refuses" payment of benefits. The insurer's refusal to pay a permanent partial disability award was not unreasonable. A legitimate factual dispute existed as to whether claimant had a medically determined physical limitation which impaired his ability to work. Dr. Murphy released claimant to return to work without restrictions. Claimant in fact returned to his time-of-injury job and has successfully performed his duties. Under these circumstance the insurer validly questioned claimant's entitlement to benefits.

6. Since claimant has prevailed, he is entitled to costs.

JUDGMENT

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

2. Claimant has established a 9 percent disability and is entitled to 31.5 weeks of permanent partial disability benefits at a weekly rate to be determined by the parties. Within 20 days of this judgment the parties shall notify the Court in writing of the appropriate rate. If they cannot agree on the appropriate rate, then they shall inform the Court in writing that they disagree, in which event the Court will set a date for a hearing concerning the rate.

3. Claimant is not entitled to attorney fees or a penalty.

4. Claimant is entitled to reasonable costs to be determined by the Court. Claimant shall have ten days from the date of this judgment in which to submit his affidavit of costs. The insurer shall then have ten days in which to file objections, if any, to claimant's request.

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

6. 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 8th day of July, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Mr. Leo S. Ward

1. The glenoid labrum is a ring of cartilage surrounding the shoulder joint socket. See Schmidt's Attorneys' Dictionary of Medicine.

2. Claimant concedes that he is not entitled to any percentage based on education or lost wages. In his proposed conclusion of law number 8, he states: "Based upon his educational training claimant is not entitled to education impairment. He is also not entitled to wage loss impairment since he returned to his former job." petitioner's proposed findings of fact, conclusions of law and proposed judgement.

3. See footnote 2.