

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 31

WCC No. 9702-7698

STEVE CHURCH

Petitioner

vs.

TRAVELERS INDEMNITY COMPANY OF ILLINOIS

Respondent/Insurer for

FOOD SERVICES OF AMERICA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Warehouse loader/stocker with back injury returned to work with restriction against lifting more than 20 pounds. Although the insurer paid him an impairment award and PPD benefits based on the age and education factors, it initially refused to pay for loss of ability to perform heavy labor. After input from a vocational consultant and a functional capacity evaluation, the insurer paid 17.5% for the labor factor, based on its decision to "split" the difference between 20% and 15% where claimant was performing post-injury labor that fell "between" medium and light duty.

Held: There is no statutory basis for "splitting" the labor factor portion of PPD benefits. Where claimant credibly testified he was not lifting 25 pounds or more frequently, he is entitled to PPD benefits for reduction of lifting capacity from heavy to light duty. The insurer's position was unreasonable where its statutory interpretation was without basis and its assertions at trial regarding claimant's lifting capacity were without factual support. The fact that the insurer required trial over \$1,631.88 in benefits magnifies its unreasonableness.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-703, MCA (1993). Insurer paid PPD claimant benefits corresponding to 17.5% of 350 weeks for the labor factor under section 39-71-703, MCA (1993), representing a "split" between 15% and 20% on the theory that claimant went from

the ability to do heavy lifting to an ability falling somewhere between medium and light duty. WCC held there is no statutory basis for "splitting" the labor factor portion of PPD benefits. Where claimant credibly testified he was not lifting 25 pounds or more frequently, he is entitled to PPD benefits for reduction of lifting capacity from heavy to light duty. The insurer's position was unreasonable where its statutory interpretation was without basis and its assertions at trial regarding claimant's lifting capacity were without factual support. The fact that the insurer required trial over \$1,631.88 in benefits magnifies its unreasonableness.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

Section 39-71-2907, MCA (1993). Insurer paid PPD claimant benefits corresponding to 17.5% of 350 weeks for the labor factor under section 39-71-703, MCA (1993), representing a "split" between 15% and 20% on the theory that claimant went from the ability to do heavy lifting to an ability falling somewhere between medium and light duty. WCC held there is no statutory or factual basis for "splitting" the labor factor portion of PPD benefits, making the insurer's position unreasonable. The fact that the insurer required trial over \$1,631.88 in benefits magnifies its unreasonableness. Penalty and attorneys fees awarded.

Attorney Fees: Unreasonable Denial of Delay of Payment. Insurer paid PPD claimant benefits corresponding to 17.5% of 350 weeks for the labor factor under section 39-71-703, MCA (1993), representing a "split" between 15% and 20% on the theory that claimant went from the ability to do heavy lifting to an ability falling somewhere between medium and light duty. WCC held there is no statutory or factual basis for "splitting" the labor factor portion of PPD benefits, making the insurer's position unreasonable. The fact that the insurer required trial over \$1,631.88 in benefits magnifies its unreasonableness. Penalty and attorneys fees awarded.

Benefits: Permanent Partial Benefits: Labor Capacity. Insurer paid PPD claimant benefits corresponding to 17.5% of 350 weeks for the labor factor under section 39-71-703, MCA (1993), representing a "split" between 15% and 20% on the theory that claimant went from the ability to do heavy lifting to an ability falling somewhere between medium and light duty. WCC held there is no statutory basis for "splitting" the labor factor portion of PPD benefits. Where claimant credibly testified he was not lifting 25 pounds or more frequently, he is entitled to PPD benefits for reduction of lifting capacity from heavy to light duty. The insurer's position was unreasonable where its statutory interpretation was without basis and its assertions at trial regarding claimant's lifting capacity were without factual support. The fact that the insurer required trial over \$1,631.88 in benefits magnifies its unreasonableness.

Penalties: Insurers. Insurer paid PPD claimant benefits corresponding to 17.5% of 350 weeks for the labor factor under section 39-71-703, MCA (1993), representing a "split" between 15% and 20% on the theory that claimant went from the ability to do heavy lifting to an ability falling somewhere between medium and light duty. WCC held there is no statutory or factual basis for "splitting" the labor factor portion of PPD benefits, making the insurer's position unreasonable. The fact that the insurer required trial over \$1,631.88 in benefits magnifies its unreasonableness. Penalty and attorneys fees awarded.

The trial in this matter was held in Billings, Montana, on May 13, 1997. Petitioner, Steve Church (claimant), was present and represented by Mr. James G. Edmiston. Respondent, Travelers Indemnity Company of Illinois (Travelers), was represented by Mr. Dylan E. Jackson.

Exhibits: Exhibits 1 through 7 and 9 through 10 were admitted without objection. Claimant's objection to Exhibit 8 was withdrawn and the exhibit was admitted.

Witnesses and Depositions: Claimant, Kevin Malley, Patricia Hink, and Diane Nelson were sworn and testified. No depositions were submitted.

Issue Presented: The sole issue regarding benefits is whether claimant is entitled to an additional 2.5% in permanent partial disability benefits for loss of labor capacity. In addition, claimant is seeking attorney fees and a penalty.

Prior Rulings: The Court previously denied a motion for summary judgment filed by claimant. However, in its Order denying the motion, the Court determined that section 39-71-703(3)(d), MCA (1993), does not allow the insurer to "split the difference" between medium and light labor where the claimant does not meet the criteria for medium labor but nonetheless exceeds the minimum definition of light labor. I held that if the claimant does not satisfy the minimum criteria for medium labor then payment of benefits must be based on the percentage specified for light labor. I further held that Travelers' interpretation of the statute was unreasonable. The only matters reserved for trial were whether claimant in fact was performing heavy labor before his injury and whether in fact he has been doing only light labor after the injury. I also reserved judgment as to whether Travelers' factual defense is reasonable.

Bench Ruling: Following trial the Court ruled from the Bench, finding that claimant is entitled to an additional 2.5% for loss of labor capacity. The Court further found that Travelers' denial of the 2.5% was unreasonable and that claimant is therefore entitled to attorney fees and a penalty. The Court stated the factual and legal basis supporting the rulings at the end of trial. Those findings and conclusions are reaffirmed and supplemented by this written decision.

Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. On January 17, 1995, claimant injured his back while working in the course and scope of his employment with Food Services of America (Food Services).
2. At the time of his injury, the claimant was employed at a Food Services' warehouse in or near Billings, Montana. He was employed as a "loader/stocker."
3. At the time of the injury, Food Services was insured by Travelers, which accepted liability with respect to the injury.
4. Travelers paid temporary total disability and medical benefits. Those benefits are not at issue in this case.
5. As a result of his back injury, claimant suffered a disk herniation at the L5-S1 level. He developed a radiculopathy and on May 23, 1995, Dr. Steven J. Rizzolo, an orthopedic surgeon, performed a microdiscectomy at the L5-S1 level. (Ex. 1 at 8.)
6. Claimant's time-of-injury job required him to load pallets of food products into truck trailers and to stock palletized loads coming into the warehouse. He used a forklift and pallet jack in his job but was also required to pick up and move pallets, as well as boxes which fell from pallets or which could not be moved by forklift or pallet jack. According to the employer's job description for the job, he was required to lift up to 75 pounds, which some pallets and boxes weighed. Prior to his injury, claimant lifted boxes and pallets in excess of 50 pounds on a daily basis.
7. On July 20, 1995, Dr. Rizzolo released claimant to return to work but limited claimant to lifting no greater than 10 pounds. (Ex. 1 at 25-26.) At the time, claimant was still experiencing "severe right S I [sic] radiculopathy." Despite his pain, claimant wanted to return to work. (*Id.*)
8. Claimant returned to work in the latter part of July and, at his request, drove a forklift without any lifting restrictions. He continued in that position through the summer but the bumping of the forklift over uneven warehouse floors caused him back pain. He was then assigned to receive and log in incoming goods to the warehouse. Since January 1996, he has worked alternate weeks driving the forklift and receiving goods.
9. Following his return to work, claimant continued to be treated by Dr. Rizzolo, who prescribed various medications, physical therapy and exercise at a health club. (Ex. 1 at 28-43.)

10. Claimant's symptoms improved following his return to work. On January 5, 1996, Dr. Rizzolo concluded that he had reached maximum medical improvement and gave him a 15% whole person impairment rating. (Ex. 1 at 44.) He permanently restricted claimant to lifting no more than 20 pounds. (Ex. 1 at 42.) In a May 15, 1996 letter to Travelers, Dr. Rizzolo noted that claimant was still suffering a significant amount of pain. The doctor went on to note that despite his pain claimant was motivated and hard working and "has continued working and has no obvious secondary gain or abnormal illness behavior." (Ex. 1 at 43.)

11. On January 30, 1996, Travelers paid claimant a 15% impairment award. It also paid him 2% each based on the age and education factors set out in section 39-71-703(3)(a)-(b), MCA. The total award was 19% of 350 weeks, or 66.5 weeks of benefits. Claimant's permanent partial disability rate is \$186.50. Travelers paid a total of \$12,402.25 to claimant on January 30, 1996. Nothing was paid under section 39-71-703(6), MCA, for a loss of labor activity.

12. On January 31, 1996, claimant wrote Diane Nelson (Nelson), who was adjusting his claim on behalf of Travelers. In his letter he pointed out that prior to his injury he had been performing heavy labor and that he was now restricted to lifting a maximum of 20 pounds. He wrote, "The Workers Compensation guidelines show that my labor benefits should be 20%, instead of the 0% that you have indicated on the claim sheet." (Ex. 5 at 2.)

13. On February 13, 1996, Nelson wrote to Kevin Malley (Malley), the Director of Operations in charge of the food services warehouse in Billings. She informed him of claimant's contention concerning the labor factor and asked Malley to provide a job description.

14. On February 14, 1996, Malley replied:

This is the job description that Steve was doing at the time of his injury and it is also the description of the job he is doing right now. It was news to me that he had any limits in lifting put on him or he was due any permanent partial benefits. I guess that it is time to have a Certified Rehabilitation Consultant do a job analysis. As in past cases we only do jobs that require "heavy labor". Please let me know where to proceed from here.

(Ex. 5 at 4.) He enclosed a job description which stated that claimant's job required "[f]requent lifting 1-75 lbs., occasionally up to 100 lbs. throughout 8 hour shift." (*Id.* at 5.)

15. Following receipt of Malley's letter, Nelson employed Patricia Hink (Hink), a certified rehabilitation consultant, to perform a job analysis. (Ex. 5 at 8.) Hink visited the job site, conducted an evaluation of claimant's job, and concluded that claimant's preinjury job was indeed a heavy labor job, but also concluded that there was a discrepancy between the lifting requirements set forth in the employer's job description and the lifting claimant was actually performing after his injury.

16. Claimant testified credibly that he modified his job duties after his return to work. He has limited his lifting to 35 to 40 pounds. When claimant is required to lift heavier objects, he gets help from co-employees.

17. Paul Delmar-Marks (Delmar-Marks), a physical therapist, performed a functional capacities examination on June 25, 1996. Delmar-Marks also reviewed job analyses provided by Hink. In a report to Dr. Rizzolo, he noted that claimant "was very cooperative throughout the test and performed to his maximum abilities on each test item." (Ex. 2 at 7.) He concluded that claimant "can perform the physical demands of work in the ***light***, work category." (*Id.*; bold and italics in original.) He further concluded that claimant could perform the duties of stocker/forklift operator "***with modification***" and "provided the lifting limits were limited to the occasional amount of 35 lbs. for floor to waist and 45 lbs. for waist to waist lifts." (*Id.*; bold and italics in original.)

18. Delmar-Marks forwarded job descriptions and his report to Dr. Rizzolo. On July 10, 1996, Dr. Rizzolo modified his restrictions for claimant, stating that claimant "should be able to lift up to 35 pounds occasionally and 10 pounds frequently." (Ex. 2 at 14.) He further stated that claimant can "perform his old job **if modified** but the new job is certainly better for him." (*Id.*; emphasis added.)

19. In follow-up, Hink requested Mark Amendola (Amendola), another physical therapist, to review the FCE. She asked his review because Delmar-Marks was no longer working in the Billings area. Amendola reviewed the matter and reported that claimant "is one of those patients who is not quite at the medium category level, but the light category does not seem to apply to this patient either." (Ex. 2 at 15.) A copy of his report was sent to Diane Nelson. (*Id.*)

20. Hink concluded that claimant's laboring activity level fell between light and medium. She reported her conclusion to Nelson. (Ex. 5 at 11-12.) On July 29, 1996, Nelson wrote to claimant advising him that Travelers was awarding him 17.5% for the labor factor. The 17.5% was based on Nelson's and Travelers' determination that since claimant could perform more than light labor but could not perform medium labor, claimant was entitled to benefits based on the difference between the light and medium categories. This Court has previously found that section 39-71-703(3)(d), MCA, does not allow the difference to be split and that the insurer's interpretation of the statute as permitting it to do so was not reasonable. (Order Denying Motion for Summary Judgment, April 28, 1997.)

21. Later on, Hink later asked Ronald Conley (Conley), another vocational consultant, to perform a second job analysis. He did so on February 25, 1997, and his findings are found at Exhibit 8. He found that claimant's post-injury job lifting was as follows:

- 1) Frequent 4 pounds to 13 pounds.
- 2) Occasional 14 pounds up to 35 pounds.

3) Rarely 35-41 pounds. Accommodations are available for lifting heavy items with assistive equipment or help.

(Ex. 8 at 1.) That report was provided to the insurer.

22. Nelson testified that the basis of the insurer's refusal to pay claimant 20% for the labor factor was the fact that post-injury his ability to lift fell between the light and medium category. She agreed that preinjury claimant was performing heavy labor and that post-injury he was performing labor which fell between light and medium. Nelson's and Travelers' payment of 17.5% and its refusal to pay 20% was based on their interpretation of the statute as allowing the insurer to split the difference. It was **not** based on any belief that the claimant was performing less than heavy labor prior to the accident or that he was performing medium or heavy labor after the accident.

23. Nonetheless, in responding to a summary judgment motion filed by claimant, and then at trial, Travelers has contended that post-injury the claimant has performed at least medium labor. In effect it has taken the position that the 17.5% paid to claimant was an overpayment and that even that amount was not due him.

24. In support of its position, Travelers presented testimony by Malley, the warehouse director, that in the past year he has from afar observed claimant lift pallets weighing in excess of 50 pounds. Malley testified that some warehouse pallets weigh as little as 25 pounds and others as much as 75 pounds. He observed claimant lifting the heavier pallets approximately 5 times over the last year. He said he saw claimant lift 50 pounds on a total of approximately 10 occasions during the past year but did not identify what else, other than the pallets, he saw claimant lift.

25. Malley also testified to his belief that claimant has, as a matter-of-fact, modified his job and that American Foods would not fire claimant on account of his being restricted to lifting 35 pounds or less.

26. Hink produced the only testimony concerning what is considered to be "occasional." She testified that occasional means up to 20% of the workday lifting. Lifting a particular weight 2% or less a day is "rarely."

27. The insurer's position at trial was unreasonable and factually unsupported. Malley appeared sincere in his belief that he has seen claimant lift 50 pounds or more on approximately 10 occasions in the last year, but he supervises 40 employees, does not supervise claimant directly, and saw claimant working from a distance. The Court finds claimant's testimony the more accurate and credible. Even if Malley's observations were accurate they utterly fail to establish that claimant was lifting 50 pounds or more "occasionally." § 39-71-703(6), MCA (1993). Travelers presented no evidence whatsoever which would permit the Court to find that he was lifting 25 pounds or more "frequently." *Id.*

Moreover, prior to this litigation, Travelers never disputed that post-injury the claimant could not meet the medium-labor lifting criteria.

28. The 2.5% at issue in this case amounts to \$1,631.88. For this amount the insurer forced claimant to hire an attorney and proceed to trial. The value of the time expended by Travelers' attorneys has far exceeded the amount that it has sought to save by refusing to pay the 2.5%. The amount in controversy magnifies its unreasonableness.

CONCLUSIONS OF LAW

1. The 1993 version of the Workers' Compensation Act governs claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. As found by the Court, prior to his industrial injury claimant was performing heavy labor. His entitlement to permanent partial disability benefits based on his inability to perform heavy labor as a result of his industrial injury is governed by section 39-71-703, MCA (1995).

3. In its Order Denying Motion for Summary Judgment (April 28, 1997), this Court found that if claimant was performing heavy labor prior to his injury and that post-injury he can only perform labor which falls between the light and medium definitions set forth in section 39-71-703(6), MCA (1993), then he is entitled to a 20% permanent partial disability award. It reserved for trial the insurer's contention that claimant was in fact performing medium or heavy labor following his injury. At trial the insurer failed to present even a *prima facie* case for its contention. Therefore, in accordance with the Court's prior ruling, the claimant is entitled to 20%. The insurer has already paid 17.5%, therefore the claimant is entitled to an additional 2.5% or \$1,631.88, which Travelers shall pay forthwith.

4. For claimant to recover attorney fees and a penalty he must show that the insurer's refusal to pay the 2.5% award was unreasonable. § 39-71-612, MCA. As found by the Court, Travelers' refusal to pay the 2.5%, was in fact unreasonable. Claimant is therefore entitled to both attorney fees and a penalty.

JUDGMENT

1. Travelers shall pay claimant the sum of \$1,631.88 forthwith.

2. Travelers shall pay claimant an additional \$326.38 as a penalty for its unreasonable conduct.

3. Travelers shall pay claimant's attorneys fees in an amount to be determined by the Court at a later time.

4. Travelers shall pay claimant's costs in an amount to be determined by the Court. Claimant shall have 10 days in which to submit his affidavit of costs. Travelers shall have 10

days thereafter in which to submit its objections, if any, to the costs enumerated by claimant. The Court will then determine the amount to be awarded.

5. This JUDGMENT 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, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 27th day of May, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Mr. Dylan E. Jackson

Submitted Date: May 13, 1997