IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 27

WCC No. 9807-8015

BRUCE CROWELL

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

WAGER LOGGING

Employer.

DECISION AND JUDGMENT

Summary: Injured worker claimed he was permanently totally disabled.

Held: In a bench ruling reported by transcript, WCC found claimant permanently totally disabled. WCC believed there was some employment claimant could perform if he properly cared for himself and received work hardening and training, but claimant nevertheless found claimant permanently totally disabled because the evidence before the Court was that he would not find employment, given his physical condition, age, education, skills, and other factors employers consider.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-702, MCA. Even if claimant may be able to perform some employment after work hardening and training, he is nevertheless permanently totally disabled where evidence indicates he would not in fact be hired for any employment. For a claimant not to be permanently totally disabled, the statutes requires the existence of specific jobs for which claimant is qualified and competitive. Jobs for which he is theoretically qualified, but not competitive, do not argue against permanent, total disability status.

Benefits: Permanent Total Benefits. Even if claimant may be able to perform some employment after work hardening and training, he is nevertheless permanently totally disabled where evidence indicates he would not in fact be hired for any

employment. For a claimant not to be permanently totally disabled, the statutes requires the existence of specific jobs for which claimant is qualified and competitive. Jobs for which he is theoretically qualified, but not competitive, do not argue against permanent, total disability status.

Vocational – Return to Work Matters: Deconditioning. Even if claimant may be able to perform some employment after work hardening and training, he is nevertheless permanently totally disabled where evidence indicates he would not in fact be hired for any employment. For a claimant not to be permanently totally disabled, the statutes requires the existence of specific jobs for which claimant is qualified and competitive. Jobs for which he is theoretically qualified, but not competitive, do not argue against permanent, total disability status.

Vocational – Return to Work Matters: Employability. Even if claimant may be able to perform some employment after work hardening and training, he is nevertheless permanently totally disabled where evidence indicates he would not in fact be hired for any employment. For a claimant not to be permanently totally disabled, the statutes requires the existence of specific jobs for which claimant is qualified and competitive. Jobs for which he is theoretically qualified, but not competitive, do not argue against permanent, total disability status.

Vocational – Return to Work Matters: Typically Available Employment. Even if claimant may be able to perform some employment after work hardening and training, he is nevertheless permanently totally disabled where evidence indicates he would not in fact be hired for any employment. For a claimant not to be permanently totally disabled, the statutes requires the existence of specific jobs for which claimant is qualified and competitive. Jobs for which he is theoretically qualified, but not competitive, do not argue against permanent, total disability status.

¶1 This matter came on for trial in Kalispell on March 8, 1999. Petitioner, Bruce Crowell (claimant), was represented by Mr. Garry D. Seaman. Respondent, State Compensation Fund (State Fund), was represented by Ms. Carrie L. Garber. Exhibits 1 through 13 were admitted into evidence without objection. The claimant, his wife Judith Crowell, Mark Schwager, Roberta Smith, and Gail Martin testified.

¶2 Upon completion of the trial, the Court deemed the matter submitted and ruled from the bench. I found claimant permanently totally disabled, denied attorney fees, and determined that claimant is entitled to his costs.

¶3 The parties have agreed that a transcript of the Court's oral findings of fact and conclusions of law may take the place of written findings and conclusions. Accordingly, a copy of the transcript of the bench ruling is attached.

¶4 In accordance with the bench ruling, and based on claimant's memorandum of costs, to which no objection is filed, JUDGMENT IS HEREBY ENTERED AS FOLLOWS:

¶5 1. Claimant is presently permanently totally disabled. The State Fund shall pay claimant permanent total disability benefits retroactive to the date that it began paying him permanent partial disability benefits. The State Fund is entitled to a credit for permanent partial benefits it has paid to date. If the parties cannot agree as to the amounts due, they may request the Court to make the determination.

¶6 2. The parties agree that the State Fund is entitled to a social security offset for social security disability benefits paid to claimant in a lump sum and have indicated that they should be able to reach an agreement as to the amount of the offset. If they fail to do so, they may at that time request the Court to make the determination.

¶7 3. Claimant is not entitled to attorney fees since he has failed to persuade the Court that the State Fund acted unreasonably.

¶8 4. Claimant is entitled to costs in the sum of $808.20, which the State Fund shall pay.

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

¶10 6. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Decision and Judgment.

DATED in Helena, Montana, this 14th day of April, 1999.

(SEAL)

Mike McCarter
JUDGE

c: Mr. Garry D. Seaman
Ms. Carrie L. Garber
Date Submitted: March 8, 1999
Attachment: Transcript of Bench Ruling ***(See Below)***

BRUCE CROWELL V. STATE COMPENSATION INSURANCE FUND

WCC NO. 9807-8015

PARTIAL TRANSCRIPT OF BENCH RULING

March 8, 1999

Kalispell, Montana

18 THE COURT: Okay. All right. You

19 may step down.

20 I can tell both of you right now I want to

21 bench rule on this. It's pretty clear in my mind

22 where this case is at, and I don't think I need

23 further argument on it. On the other hand, if you

24 want to say something before I do it that you think

25 might change where I'm at this point, I would

1 hear you on it. No?

2 MS. GARBER: I waive, your Honor.

3 THE COURT: Okay. All right. I'm

4 going to permanently totally disable him out and no

5 attorney fees. That's the bottom line.

6 Get retroactive -- Let me explain to you

7 what my logic is here, and I think it's pretty good

8 logic on both counts.

9 The definition of permanent total

10 disability is a physical condition resulting from

11 injury after the worker reaches maximum medical

12 healing and which the worker does not have a

13 reasonable prospect of physically performing regular

14 employment. And that Statute I think -- All right.

15 Firstly, I think Mr. Crowell is physically

16 capable of working if there was regular employment

17 out there. I'm not persuaded that he's not.

18 There's a couple of things that persuade me of that

19 fact.

Secondly, I understand he has to lay down a couple of times, but he's testified here very specifically that that comes after he washes dishes, and there's maybe something that concerns his leaning over that sink. So I mean, the answer to that is quit washing dishes, number one.

The second thing is that he is deconditioned, and there's a physical therapy recommendation, and I think with those and perhaps curtailing the activities that are bothering his back, that he could do it.

I'm not hearing -- I mean, I hear -- I've been hearing a lot of permanent total cases lately. I don't know. There's a run on them for some reason and I don't know what it is because some years I don't hear very many, and this last few months I'm hearing lots of these.

And the magnitude of his complaints are -- I mean, they're real for sure, there's no question about that, and I think he hurts, but they're not of the same magnitude of many cases that I'm hearing.

He indicated that he is able to do some walking and do some activities, and he is doing quite a bit of activity, probably not as much activity as with a job, but I think if he got -- if he did his exercises, lost some weight, got some

physical therapy and tried to avoid activities like washing the dishes and other things that may specifically bother his back, I think he may be capable of returning.

Now, the proof of the pudding in that is

getting a job, doing those things and finding out for sure. So I don't think he's physically -- At this point I'm not persuaded he's physically unable to do light work, but the other component of that is there has to be regular employment. And there's another sentence that goes with that. It says, The lack of immediate job openings is not determinative. It says, Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

So you put those two together, and that's why I can't find their position unreasonable because of the fact that he didn't find a job within those 12 weeks is not determinative that he's permanently totally disabled, and the Statute is very specific on that, number one.

And number 2, there's a controversy about there -- the job with RMB Lumber, and I'll tell you why. You know, I asked the question about that, and I was told that that was a hurdle, and I need to

22 explain to you why I end up with it not being a
23 hurdle, because in my mind, from the very beginning,
24 I thought, Gee, that's a problem with this
25 particular case. I said that right up front to all

1 of you, which probably also will show you how
2 frazzled my mind is. I can be persuaded and I do
3 listen to evidence, and I did change my mind on that
4 point.
5 But in any event, there has to be
6 employment out there. Now, what does that mean?
7 Does it mean there's any -- You know, there's jobs
8 out there that fit into the light-duty category?
9 Does that mean that's regularly available in
10 employment? And I don't think that's what it
11 means. I think it means that there are jobs out
12 there that he's competitive for and specific jobs
13 out there that he's qualified and competitive for.
14 If there aren't any jobs -- If there are jobs out
15 there that theoretically he could do, I mean,
16 physically he might be able to be a lawyer or judge,
17 but so what? He's not competitive for those jobs.
18 So we have to identify jobs that he's
19 competitive for, and what I heard Roberta say is
20 there aren't any jobs that he's going to get in the
21 Flathead Valley. And maybe that was a surprise to
22 you and, you know, sometimes I ask questions and

23 sometimes those things pop out. But I think she's
24 probably right, at least given his training and
25 background at this point, the chances of his getting

1 a job in the Flathead Valley are nil to none.
2 There's probably some specific reasons for
3 that, and I think the reasons are his age, number
4 one. And I don't think the age is always a
5 determining factor, but you have to put that
6 together with number two, which is, he does not have
7 a great deal of education, it's been a long time
8 since he's been to school, which affects his ability
9 to learn something new. And the third factor is
10 that all he has done in his life is work in the
11 woods, so that's pretty limited.
12 Employers are going to look at that, and
13 what I heard her telling me was, when those
14 employers look at that, the likelihood of his
15 getting one of those jobs, even though it might
16 theoretically be available to him, is very small, if
17 nonexistent, in the Flathead Valley.
18 Now, during the break I asked you about
19 where the market is statewide. Even if the market
20 is statewide, and we can look it up, we still
21 haven't identified jobs statewide. She indicated
22 she thought he had better prospects, but we haven't
23 gone through that process at this point, and I think

you would have to go through that process and identify statewide jobs if that's what we were going

to look at.
That hasn't been done at this point, and the only test I have is the rehab. plan that specifically looked at the Flathead Valley, and I've got testimony here he isn't going to get a job up here, you know, based on his current education and training that he has. I also heard Roberta say that she didn't think that was going to be helpful because it wasn't going to increase his wage potential that much, but of course, if it gets him a job, retraining might make a difference because if he doesn't have a job, he doesn't have any wage. So maybe retraining will make a difference.
Mark Schwager said that he thought that we ought to take another look at that. And I leave that up to you. You may want to take another look at this and see what else might be done, and maybe do some of that testing that Mark Schwager talked about. I don't think that's a bad idea, by the way. I think that's probably a good idea to do the testing that he has suggested.
So anyway, that's where I'm at on the permanent total.
Now, let me take you back. Let's go back

25 to that RMB job. Here's the problem with the RMB

1 job. Firstly, we don't have a job. It was sort of
2 in negotiation, and there was no job offer there
3 that was made. All that we had was they were
4 interested and they wanted to know whether he was
5 interested in the job, but we don't have a
6 commitment that they were going to hire him. That's
7 number one.
8 Number two, and if it had been and it had
9 been a full-time job, I would have a big problem at
10 this point, at least, with his not trying it. I
11 think people should try things. You know, when they
12 come in and, say, write it off without even trying,
13 that bothers me a lot. I know what I think of this
14 at this point.
15 The second thing is his concerns were
16 legitimate. It's only a part-time job, it's at a
17 wage that is approximately half of what he had been
18 earning in the woods, a little bit more than half
19 what he had been earning in the woods, but it's a
20 big loss. And you put those together, the part
21 time, I don't think it's unreasonable to say, Boy, I
22 got questions about this job.
23 Then the fact that he's going to be laid
24 off. I understand that his work may have been
25 seasonal, but at least he had the higher wage. Now

we've got a part-time job at this lower wage and it's still seasonal. So that's a legitimate concern.

So, what do you do in that situation?

Well, what happened here in fact was they looked at other stuff, they developed a different plan. And it wasn't a matter that they presented him this plan and he refused it and now we're here disputing that plan. The plan wasn't developed, the rehabilitation counselor went on to look at other things, and so we've got another plan.

We've got testimony that he used a good faith effort. She was satisfied that he was using a good faith effort and was satisfied that he's not going to find jobs out in the Flathead Valley even if we extend the time. That's why I asked her that question about, you know, What if we gave him more time? And basically the answer I got back was probably doesn't make any difference how much time we give him, he's not going to find a job in the Flathead Valley.

But I think that complicated, convoluted history there with that job, whether he was offered something that he refused or just said, I'm not going to do that sort of thing, as well as the

1 Statute the way it's written, the way it talks about
2 lack of immediate job openings, is not a factor to
3 be considered.
4 And also some controversy about what he
5 can do physically here made the State Fund's -- I
6 think reasonable people could disagree. This wasn't
7 a slam dunk. Although, you know, today when I get a
8 complete picture, I'm sitting here and I get a
9 complete picture from both sides and I hear this
10 evidence, it's a little bit easier for me to make
11 judgments probably than somebody sitting on one side
12 or the other. So that's why I'm making this
13 judgment, and I didn't want this to linger any
14 longer.
15 Costs. I award costs. And is there
16 anything I haven't covered that I need to cover?
17 MR. SEAMAN: There's one other
18 thing. He was converted to permit partial during
19 that period of time and that's being reduced off of
20 any settlement he may get into the future.
21 THE COURT: Yeah. You have to credit
22 for -- Well --
23 MR. SEAMAN: He should be getting at
24 least temp. total during that period of time;
25 shouldn't he?

1 THE COURT: No.

MR. SEAMAN: Permanent total during

that period of time.

THE COURT: Should be permanent total

from the date that they converted him to permanent

partial.

Now, you're going to have -- the State

Fund is entitled to offset parts of that. The

impairment award I think is payable in any event.

But since he doesn't qualify for the rest of that,

they'll be entitled for some sort of credit for the

payments they've made. They'll basically be picking

up the difference here retroactively. And I think

you probably can figure that out. I don't think you

need me to compute that.

MR. SEAMAN: No. We can figure it

out.

THE COURT: Okay. Anything further?

MS. GARBER: No. Just there is an

issue with regard to the Social Security

overpayment. We'll also have to figure that out.

MR. SEAMAN: Yeah, he's received

Social Security Disability benefits and they've paid

that in a lump sum. There is that overpayment. And

then you figure out the offset and then you go back

and you have to figure out the difference between

that permanent total rate and the temp. total rate

with the offset and so forth, and I think we decided
it was only a few dollars, wasn't it, between the
two?
MS. MARTIN: Four dollars between the
two.
MR. SEAMAN: We can work the
numbers. We've already done that, in fact, when we
attempted the settlement claim.
THE COURT: I'll let you work the
numbers and I'm not going to do anything with that.
If for some reason you can't work it out, you can
come back and see me about that.
The only question I have for you, we can
write these as findings if you want them or we could
let what I've said, if you're satisfied with it,
stand and just generate a judgment. However you
want to do it. We can certainly do the findings if
you think that would be helpful.
MR. SEAMAN: I don't think it's
necessary from my point of view.
THE COURT: Carrie?
MS. GARBER: I guess I'm not
certain. This is the first time I've had one of

these.
THE COURT: All right. Why don't you
just let me know. If you want them, we'll give it

4 to you.

5 MS. GARBER: And I apologize.

6 THE COURT: It's probably going to be

7 a bit more organized and more articulate than what

8 I've said here.

9 MS. GARBER: It's probably

10 sufficient, but let me go back and ask my

11 supervisor.

12 THE COURT: You bet. Okay.

13 MR. SEAMAN: Thank you.

14 THE COURT: We'll adjourn.

15 (Hearing concluded at 3:15 p.m.)

CERTIFICATE

I, BETH GILMAM, RPR, do hereby certify that the foregoing is a true and correct transcript of the proceedings held in the above matter on the 8th day of March, 1999.

DATED this 18th day of March, 1999.

BETH GILMAN, RPR