

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MT WCC 57

WCC No. 9804-7951

ROBERT DERLATKA

Petitioner

vs.

PACIFIC EMPLOYERS' INSURANCE COMPANY

Respondent/Insurer for

MISSOULA WHITE PINE SASH

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Mill worker with elbow problems (medial epicondylitis) sought additional temporary total disability benefits for period after mill closed and before surgery was scheduled, after surgery was scheduled and before operation, and between surgery and date of maximum medical healing.

Held: Claimant was not entitled to additional TTD for period between mill closure and scheduling of surgery. Although he had elbow problems, he was working prior to the mill closure. No doctor took him off work. While he may have become disabled at some point prior to the scheduling of surgery, he has not carried his burden of proving a date of disability to the Court. He is entitled, however, to TTD benefits from the date surgery was scheduled, when it was plain he had become totally disabled, and from the date of surgery to MMI, less periods he actually performed work for his daughter's cleaning company. The Court was not persuaded claimant's work for his daughter proved he was able to work in the labor market prior to MMI. As a matter of fact, the Court found claimant temporary totally disabled between the date of surgery and MMI.

Topics:

Benefits: Temporary Total Benefits. Mill worker who received surgery for elbow problems (medial epicondylitis) after mill closed was not entitled to additional TTD for period between mill closure and scheduling of surgery. Although he had elbow problems, claimant was working prior to the mill closure. No doctor took him off

work. While he may have become disabled at some point prior to the scheduling of surgery, he has not carried his burden of proving a date of disability to the Court. He is entitled, however, to TTD benefits from the date surgery was scheduled, when it was plain he had become totally disabled, to the date of surgery, and from the date of surgery to MMI, less periods he actually performed work for his daughter's cleaning company. The Court was not persuaded claimant's work for his daughter proved he was able to work in the labor market prior to MMI. As a matter of fact, the Court found claimant temporary totally disabled between the date of surgery and MMI.

Disability: Temporary Total. Mill worker who received surgery for elbow problems (medial epicondylitis) after mill closed was not entitled to additional TTD for period between mill closure and scheduling of surgery. Although he had elbow problems, claimant was working prior to the mill closure. No doctor took him off work. While he may have become disabled at some point prior to the scheduling of surgery, he has not carried his burden of proving a date of disability to the Court. He is entitled, however, to TTD benefits from the date surgery was scheduled, when it was plain he had become totally disabled, to the date of surgery, and from the date of surgery to MMI, less periods he actually performed work for his daughter's cleaning company. The Court was not persuaded claimant's work for his daughter proved he was able to work in the labor market prior to MMI. As a matter of fact, the Court found claimant temporary totally disabled between the date of surgery and MMI.

Vocational – Return to Work Matters: Available for Work. Mill worker who received surgery for elbow problems (medial epicondylitis) following mill closure was entitled to temporary total disability following surgery and before MMI even though he performed some work for his daughter's cleaning service prior to MMI. The Court was not persuaded claimant's work for his daughter proved he was able to work in the labor market prior to MMI. He was not entitled to TTD benefits, however, on the dates he actually worked for his daughter.

Vocational – Return to Work Matters: Employability. Mill worker who received surgery for elbow problems (medial epicondylitis) following mill closure was entitled to temporary total disability following surgery and before MMI even though he performed some work for his daughter's cleaning service prior to MMI. The Court was not persuaded claimant's work for his daughter proved he was able to work in the labor market prior to MMI. He was not entitled to TTD benefits, however, on the dates he actually worked for his daughter.

¶1 The trial in this matter was held on June 16, 1998, in Missoula, Montana. Petitioner, Robert Derlatka (claimant), was present and represented by Mr. Rex Palmer. Respondent, Pacific Employers Insurance Company (Pacific), was represented by Mr. Leo S. Ward .

¶2 Exhibits: Exhibits 1 through 8, 10 and 12 were admitted without objection. Exhibit 9, with the exception of pages 4, 16 and 17, were admitted without objection. Pages 4, 16, and 17 were admitted over the objection of the respondent. Exhibit 11 was withdrawn.

¶3 Witnesses and Depositions: Claimant was sworn and testified. The parties agree that the Court may consider the depositions of the claimant and Dr. Stephen Powell.

¶4 Issues: Following elbow surgery on July 24, 1997, claimant was paid temporary total disability benefits from August 1, 1997 to October 14, 1997. He now seeks additional temporary total disability benefits for the periods of November 12, 1996 to July 24, 1997, and October 14, 1997 to December 15, 1997, except with respect to those days on which he was actually employed. Claimant also seeks a penalty and attorney fees.

* * * * *

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witness, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 46 years old. (Ex. 2). He is a high school graduate and attended one year of college. (Derlatka Dep. at 5.)

¶7 Claimant has worked as a factory worker, office worker, shipping clerk, salesclerk, and mill worker. (*Id.* at 5-6.)

¶8 In September of 1976, claimant went to work for White Pine Sash (White Pine), a mill which makes wood products. He worked at White Pine until the mill shut down on November 12, 1996.

¶9 At White Pine, claimant worked as a tally person, headloader, and double-end machine operator. (Derlatka Dep. at 8 through 12; Trial Test.)

¶10 Prior to August 1995, and extending back to at least June 1995, claimant worked as a headloader. That job was heavy work and involved repetitive use of the hands and arms. It required claimant to gather raw material for machining. He used a forklift to pick up pallets of wood. When a load was less than 500 pieces, he gathered additional pieces by the armload -- approximately 25 pieces -- and placed them on the forklift. Arm loads of wood weighed up to approximately 30 pounds. In addition to gathering the wood, claimant at times had to turn the wood over when placing it for machining. The job also required the claimant to lift other items, including a propane tank, which weighed as much as 65 pounds.

¶11 In August 1995, claimant bid into and transferred to a double-end machine operator position. The work was significantly easier than the job of headloader. It required claimant

to turn wheels which ranged in diameter from 2 to 10 inches. Claimant kept the wheels well oiled to make his work easier.

¶12 Claimant continued to work as a double-end machine operator until November 12, 1996, when the mill closed.

Diagnosis and Initial Treatment of Elbow Condition

¶13 During 1995 the claimant began experiencing pain in both of his elbows. By September 28, 1995, his pain was sufficiently severe to cause him to seek medical treatment from Dr. Michael A. Sousa, who is an orthopedic surgeon. Dr. Sousa's September 28 office note reflects that claimant was complaining of "medial elbow pain for some time in association with grabbing bundles of wood." (Ex. 4 at 1.) The pain was in both elbows, although worse in the left elbow. (*Id.*) Dr. Sousa diagnosed "medial epicondylitis"⁽¹⁾ and prescribed elbow bands, Naproxen,⁽²⁾ and stretching and strengthening exercises. (*Id.*)

¶14 Dr. Sousa's September 28, 1995 office note indicates that claimant did not relate his elbow pain to any specific incident at work, although he did relate his pain to his work activities.

¶15 Claimant returned to Dr. Sousa on November 21, 1995. Dr. Sousa's office note for that date reflects that claimant's condition had improved. (*Id.*)

¶16 Claimant continued under Dr. Sousa's care. He next saw the doctor on January 6, 1996, at which time Dr. Sousa noted that the claimant was working in a modified position:

He has modified his work schedule somewhat including:

1. Using more oil in the machinery.
2. Propping the heavy doors open that he had to yank on.
3. Performing more regular maintenance on various wheels and valves that he has to turn to prevent overuse of the forearm musculature.

(*Id.* at 2.) Dr. Sousa recommended continued conservative care, including the continued wearing of elbow braces and the continued use of nonsteroidal anti-inflammatory medications. (*Id.*)

¶17 On April 3, 1996, claimant again saw Dr. Sousa. Dr. Sousa's office note is extensive and merits quoting:

4/3/96: Mr. Derlatka was seen today. We spent approximately 30 minutes discussing his tendonitis problem.

Subjectively, his medial epicondylitis is somewhat better at this time. He is, however, continuing to wear his tennis elbow support braces. He has lubricated the

machines and gears that he works on at White Pine & Sash so that he is not putting a great deal of pressure upon the gear. He finds that with modifying his activities, keeping the machinery lubricated and cutting down on the force required to do his job, he has had a substantial decrease of his pain.

Objectively, he is only mildly tender over the epicondyles and has no pain on passive stretch.

I have informed Mr. Derlatka that he has medial epicondylitis which is, at this time, resolving. However, the prognosis is somewhat guarded, particularly in his line of work. I have recommended that he continue to use his support braces for three to six months and then he can gradually wean off of them if he remains asymptomatic.

If he has increasing pain, I feel that it is likely that further assessment and treatment including conservative or possible operative intervention may be indicated for this problem.

It is my opinion that this epicondylitis or medial tendonitis is most likely, from a medical point of view, probably related to an on-the-job overuse syndrome in that it is fairly common in mill workers, millwrights and other individuals who heavily use their hands working with tools, wrenches, etc.

Mr. Derlatka informed me that his employer's Worker's Compensation carrier did not picture this as an occupational disease. They were, in his words, not taking care of his claim. As this is probably an occupationally related disease from overuse, I have stated that I do not agree with the carrier.

The patient will be seeking outside help pursuant to this problem and will get back to us subsequently. He has requested and filled out a release so that the information can be sent to Rex Palmer, Attorney at Law.

MS/lb

cc: Rex Palmer, Attorney at Law

(Ex. 4 at 3.)

The Present Dispute

¶18 On July 1, 1996, claimant telephoned Pacific and notified it that he was seeking workers' compensation benefits. (Ex. 2.) He reported that he had strained his elbow on June 16, 1995, while feeding stock into a double-end machine. (*Id.*) This is the first time that there is any written record that claimant was asserting that his condition arose as a result of a specific incident.

¶19 Pacific accepted the claim as an occupational disease. (Ex. 8 at 6, 7.) Pacific did not, and to this date has not, conceded that claimant's condition was the result of an industrial injury.

¶20 Since both parties agree that claimant's entitlement to temporary total disability benefits is the same under the Occupational Disease Act (ODA) as under the Workers' Compensation Act (WCA), claimant has not sought a determination as to whether he in fact suffered an industrial accident. The Court must therefore date his occupational disease from September 28, 1995, the date on which he first sought medical care for his epicondylitis.

Unemployment Benefits and Efforts to Find a Job

¶21 Following the November 12, 1996 closure of the White Pine mill, claimant was unemployed for more than six months. He qualified for and collected unemployment insurance benefits for 26 weeks following the closure of the mill. (Ex. 6 at 2.) As required by the Unemployment Insurance Division, each week the claimant certified, either by stopping at the office or by card, that he could work. (Derlatka Dep. at 45-46; Trial Test.) During the time he received unemployment benefits, claimant diligently looked for work.

¶22 During his unemployment claimant submitted employment applications to Costco in both Missoula, Montana, and in Kirkland, Washington, and also to Gart Sports and Ultrafem in Missoula. (Derlatka Dep. at 50-52; Trial Test.) He was offered a job by Costco in Kirkland, Washington, and turned it down because he wished to return to Missoula. Ultimately, claimant was employed by Costco on June 27, 1997. (Derlatka Dep. at 61; Ex. 7 at 9.)

Continued Elbow Problems

¶23 Meanwhile, claimant continued to experience pain in his elbows.

¶24 On December 23, 1996, more than a month after he had ceased working for White Pine, the claimant reported to Dr. Sousa that he had a "significant flare-up over the last month" which "occur out of the blue, often just associated with normal ADLs [activities of daily living]." (Ex. 4 at 4) The doctor recommended continued use of Naproxen, a stretching program, icing, and the use of elbow braces. (*Id.*)

¶25 On February 20, 1997, Dr. Sousa referred the claimant to Dr. Stephen Powell, M. D., for an evaluation and possible treatment. (*Id.* at 5.)

¶26 Dr. Powell, an orthopedic surgeon, first examined claimant on April 7, 1997. (Powell Dep. at 4; Ex. 3 at 4.) Claimant reported "elbow pain" as a result of "overuse at work, partially it was because of the hand problem that he had which caused him to be a little bit protective of that hand."⁽³⁾ (*Id.*) Dr. Powell noted his impressions as:

1) Chronic lateral epicondylitis, work induced.

2) Bilateral medial epicondylitis, left more so than right.

...

(Ex. 3 at 4.)

¶27 Claimant returned to Dr. Powell a second time on April 22, 1997, for another injection. He was still experiencing pain laterally. The doctor told him to continue his stretching and strengthening exercises and suggested that if he was not better in three weeks he should probably consider a tenotomy, which is "a release of the tendon from the lateral aspect of his elbow." (Powell Dep. at 6.)

¶28 Claimant's employment at Costco, which commenced on June 27, 1997, was cut short by elbow pain. His job, which was in the Costco meat department, involved grinding meat and clean-up and was especially stressful on his elbows. He quit work after two days (Ex. 7 at 10), and on July 22, 1997, he returned to Dr. Powell, who recommended surgery (Ex. 3 at 4).

¶29 A tenotomy was done on July 24, 1997.

¶30 Claimant failed to present medical evidence that he could not have continued to work as a double-end machine operator after November 12, 1996. His elbow condition did not cause him to miss work at White Pine. At no time was he taken off work.

MMI and Subsequent Employment

¶31 Claimant reached maximum medical improvement on December 15, 1997. (Ex. 3 at 10.)

¶32 Even though claimant did not reach MMI until December 15, 1997, he worked for several days at Academy Cleaning Service, Incorporated, a cleaning business owned and operated by his daughter. He worked as follows:

<u>Dates</u>	<u>Earnings</u>	<u>Work Description</u>
10/14/97	\$270.00	Window cleaning and light janitorial
10/16/97		
10/23/97		
11/10/97		Window cleaning and light janitorial
11/12/97		

11/13/97		
11/14/97	\$165.90	
11/15/97		
11/17/97		Window cleaning and light janitorial
11/18/97		
11/19/97		
11/20/97	\$264.25	
11/21/97		

(Ex. 9 at 9.) The work was light-duty janitorial work involving vacuuming and window cleaning. It did cause elbow pain. The work was not steady.

¶133 Claimant did not continue working for his daughter as she hired a full-time employee who could handle other tasks, as well as the work claimant was doing.

Benefits Paid

¶134 Claimant's temporary total disability (TTD) benefits rate is \$291.29 per week.

¶135 The insurer paid TTD benefits for 10 4/7 weeks of benefits for the period from August 1, 1997 through October 13, 1997. This reflects payment of benefits based on a period of TTD commencing on the day of claimant's surgery and ending on the first day he worked for his daughter. The insurer has declined to pay further TTD benefits.

Insurer's Conduct

¶136 The insurer did not act unreasonably. There are debatable factual and legal issues in this case.

CONCLUSIONS OF LAW

I.

¶137 The claimant's entitlement to TTD benefits is governed by the law in effect on the date his claim arose. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). While claimant alleges an injury on June 16, 1995, his claim was accepted as an occupational disease based on an occupational disease diagnosis by Dr. Sousa on September 28, 1995, and the request for benefits is presented to the Court under the ODA. Therefore, the 1995 ODA statutes will apply, although applicable provisions are the same under the 1993 ODA.

II.

¶138 Section 39-72-701 (1), MCA (1995), governs TTD benefits under the ODA, providing in relevant part:

39-72-701. Compensation for total disability or death due to occupational disease other than pneumoconiosis. (1) The compensation to which an employee temporarily totally disabled or permanently totally disabled by an occupational disease other than pneumoconiosis, or the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis, are entitled under this chapter shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time as is provided in cases of temporary total disability, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act.

As provided in the section, the provisions of the WCA govern TTD benefits payable under the ODA.

¶139 Section 39-71-701, MCA (1995), is the applicable provision governing WCA TTD benefits.

39-71-701. Compensation for temporary total disability -- exception. (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

(a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

¶140 Applying these criteria to the facts of the present case, I find (1) that claimant is not entitled to benefits prior to July 22, 1997, when Dr. Powell scheduled him for surgery, (2) that he is entitled to an additional two days of benefits since he should be deemed TTD from the date the surgery was scheduled rather than the date of surgery, and (3) that he is entitled to TTD benefits for the period of October 14, 1997 through December 14, 1997, less the 13 days he actually worked during that time.

A.

¶141 Claimant is not entitled to additional benefits prior to his scheduling for surgery because he failed to persuade me that he was unable to perform the duties of a double-end machine operator prior to July 22, 1997. He worked in that position without a loss of time on account of his elbow condition until White Pine closed and laid him off. The immediate cause of his loss of wages was the closure of the mill, not his elbow condition.

Thus, at the time of the layoff he did not satisfy the requirement that his total loss of wages be the "result of an injury" or occupational disease. § 39-71-701 (1)(a), MCA (1995).

¶42 Claimant may satisfy the causation element if at a later time he became unable to perform his job as a double-end machine operator at White Pine. In that case, his elbow condition would be an independent, concurrent cause of his loss of wages. *Larson v. Cigna Ins.*, 271 Mont. 98, 894 P.2d 327 (1995). However, while claimant felt that at some point he became unable to perform the job at White Pine, he offered no evidence of when that occurred. No doctor took him off work. No doctor testified that he was unable to do the job as of any particular date.

B.

¶43 The date when TTD began is firmly fixed on July 22, 1997. On that date, Dr. Powell scheduled claimant for surgery two days hence. By that time it was plain that claimant's condition had sufficiently deteriorated and that work was no longer possible.

C.

¶44 While claimant worked several days following his surgery and prior to his reaching MMI, he is entitled to benefits for those days on which he did not work. Section 39-71-701, MCA (1995), plainly provides for TTD benefits from the time a worker is taken off work by his or her physician until the worker reaches MMI, provided the worker has a total loss of wages as a result of his or her being taken off work. In this case, claimant was taken off work on account of his surgery. He was not released to return to any job prior to December 15, 1997, and did not reach MMI until December 15, 1997. That he worked a few days for his daughter in October and November 1997 does not disqualify him from receiving benefits for the days he did not work in October, November and December. His employment was not at arm's-length, and he was constrained by his physical condition in seeking employment on the open labor market. Indeed, had he not sought out work with his daughter, the insurer could not even argue that his entitlement to benefits ended prior to December 15, 1997. As a matter of fact, on those days of unemployment between October 14, 1997 and December 15, 1997, his loss of wages was the result of his industrial condition.

III.

¶45 Claimant is not entitled to attorney fees since he has failed to persuade the Court that the insurer's refusal to pay the additional benefits he requests was unreasonable, §§ 39-71-611, -612, MCA.

IV.

¶46 Since he has prevailed by obtaining additional benefits, the claimant is entitled to his costs.

JUDGMENT

¶47 1. The Court has jurisdiction in this case. §§ 39-71-2401, -2905, MCA.

¶48 2. Claimant is entitled to two days additional TTD benefits attributable to TTD on June 22 and 23, 1997.

¶49 3. Claimant is entitled to TTD benefits for the period of October 14 through December 14, 1997, less the 13 days he actually worked.

¶50 4. Claimant is not entitled to any further TTD benefits.

¶51 5. Claimant is entitled in his costs in an amount to be determined pursuant to the Court's Rule 24.5.342.

¶52 6. The claimant is not entitled to attorney fees.

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

¶54 8. 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 20th day of July, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. Leo S. Ward

Date Submitted: June 16, 1998

1. Epicondylitis is an inflammation of the epicondyle or adjacent tissues. As pertains to the elbow, the epicondyle is one of the prominence of the distal end of the humerus, which is the upper bone of the arm, i.e., it is part of the end of the upper arm bone at the elbow. 1997 Merriam-Webster Medical Dictionary found online at <http://www.medscape.com>.

2. Naproxen is a nonsteroidal anti-inflammatory drug.

3. Claimant injured his left hand in an industrial accident in 1987 when his left hand was partially crushed resulting in loss of the ring finger distal to the PIP joint and limitation of flexion in the small finger. (Powell Dep. at 4, Ex. 3 at 4.)