

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 63

WCC No. 9501-7224

SAMUEL J. GRENZ

Appellant

vs.

FIRE AND CASUALTY OF CONNECTICUT

Respondent.

DECISION ON APPEAL

AFFIRMED IN *GRENZ v. FIRE AND CASUALTY OF CONNECTICUT*, 278 Mont. 268 (1996)

Summary: DOL hearing examiner found that claim for occupational disease benefits relating to degenerative arthritis was barred by two-year statute of limitations in section 39-72-403, MCA (1989).

Held: Substantial evidence supports the hearing examiner's conclusion where claimant testified that in 1985 and 1986 a doctor felt the type of work he was performing aggravated his condition and had diagnosed arthritis.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-403, MCA (1985). Substantial evidence supported DOL hearing examiner's conclusion that 1992 occupational disease claim relating to degenerative arthritis was barred under the two-year statute where claimant testified that in 1985 and 1986 a doctor felt the type of work he was performing aggravated his condition and had diagnosed arthritis.

Limitations Periods: Claim Filing: Occupational Disease. Substantial evidence supported DOL hearing examiner's conclusion that 1992 occupational disease claim relating to degenerative arthritis was barred under the two-year statute (section 39-72-403, MCA (1985) where claimant testified that in 1985 and 1986 a doctor felt the type of work he was performing aggravated his condition and had diagnosed arthritis.

This is an appeal by Samuel J. Grenz (Grenz) from a decision entered December 30, 1994, by a hearing examiner of the Montana Department of Labor and Industry (Department). The hearing examiner determined that Grenz's claim for occupational disease (OD) benefits is time-barred.

Procedural Background

This is the second appeal by Grenz respecting an occupational disease claim he filed on February 7, 1992. (Ex. A.) Initially, without a hearing, the Department summarily dismissed Grenz's claim as time-barred. On April 24, 1994, this Court reversed the Department and remanded the case for an evidentiary hearing. A hearing was held on September 19, 1994. On December 30, 1994, the hearing examiner entered his Findings of Fact, Conclusions of Law; Order again dismissing Grenz's claim as untimely.

Facts

The evidence presented below consisted of numerous exhibits, the testimony of Grenz and Mary Park, and prior court decisions concerning Grenz's claims. A transcript of the testimony was prepared and has been considered by the Court. While Grenz alleges in an affidavit filed with this Court on April 11, 1995, that in some places the transcript is inaccurate, a comparison of the tape recorded testimony with portions of the transcript identified by Grenz fails to disclose any significant or substantive errors in transcription.

The facts, as found by the hearing examiner, disclose that on August 22, 1984, Grenz injured his right elbow while employed with American Stud Company as a side edger. He filed a claim for benefits within a week of the injury. (Ex. 1.) The insurer accepted liability for the right elbow injury and paid compensation and medical benefits.

Grenz was initially examined for his right elbow injury by Dr. Ken McFadden on August 23, 1984. Late in 1984, Dr. Ronald A. Miller examined and treated Grenz for discomfort in both elbows, both wrists, both hands, and his cervical, thoracic, and lumber spine. Dr. Miller diagnosed Grenz as suffering degenerative arthritis of his fingers, wrists and shoulders with recurrent bursitis and epicondylitis of his elbows. On November 18, 1985, he gave Grenz a note, which Grenz gave to his employer, that restricted claimant from lifting. (Ex. 4 at 2.) Grenz did not work thereafter. (*Id.*)

On February 7, 1992, Grenz filed two claims with respect to his degenerative arthritis. The first was a workers' compensation claim alleging micro-trauma. (Ex. 2.) In *Grenz v. Fire & Casualty of Connecticut*, 260 Mont. 60, 857 P.2d 730 (1993), that claim was finally determined to be time-barred. The second claim was for OD benefits. (Ex. 4.) The second claim is the subject of the present litigation.

The Department initially took no action regarding the OD claim, apparently because Grenz was actively litigating his micro-trauma claim under the Workers' Compensation

Act. See *Grenz v. Fire and Casualty of Connecticut*, WCC No. 9310-6922, Decision on Appeal; Order Reversing and Remanding (April 21, 1994). On August 23, 1993, three days after the Supreme Court affirmed dismissal of the micro-trauma claim as time-barred, the respondent/insurer filed a motion with the Department seeking dismissal of the OD claim as similarly time-barred. The contested case hearing was limited to that single issue; the Department did not consider the merits of the claim.

Grenz asserted below that he did not recognize that his degenerative arthritis and disability were occupationally related until less than two years prior to the filing of his claim. (Pre-hearing Conference Outline (by Grenz), Claimant's Contention 3.) However, reviewing the evidence presented at hearing, the hearing examiner found that at least as early as 1985 Grenz knew he was suffering from degenerative joint disease, "felt the cause of these problems was his employment", and had been told by his physicians that his joint disease was unrelated to his elbow injury. (Conclusions of Law, ¶ 2.A at 11.) The hearing examiner concluded, "The Claimant, at least as early as 1988, and more probably from the time he began receiving treatments in 1984/85, knew or should have known his condition possibly met the criteria for an occupational disease claim." (*Id.* ¶ 2.D at p. 12.)

In reaching his decision the hearing examiner relied on the following facts, among others:

On December 31, 1984, Dr. Miller stated that Grenz's work was aggravating his degenerative joint disease. (Finding 9; Ex. 25 at 4.)

On March 24, 1988, claimant wrote a letter acknowledging that he was aware of Dr. Miller's opinion relating his degenerative joint disease to his employment. He wrote as follows:

In August 1984, Dr. Ronald A. Miller, M.D., diagnosed "degenerative joint disease" of my "elbows, fingers, cervical and lumbar spine, shoulders and wrists." **Dr. Miller at that time concluded that my condition was work related** along with the degenerative changes lower back L4-5, L5-S1, L3-4.

(Ex. 14 at 12 of the exhibits presented at hearing.⁽¹⁾) None of claimant's physicians could attribute his degenerative arthritis to his 1984 elbow injury. (Findings 3-4.)

Standard of Review

Section 39-72-612(2), MCA (1979), provides for a direct appeal to the Workers' Compensation Court from the Department's final order in an occupational disease case. The section further provides:

The judge may overrule the department only on the basis that the department's determination is:

(a) in violation of constitutional or statutory provisions;

- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court will not reweigh the evidence; the findings and conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool Inc.*, 252 Mont. 286, 289, 829 P.2d 1 (1992). Conclusions of law, however, must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601 (1990).

Discussion

The time for filing an occupational disease claim is governed by section 39-72-403, MCA, which currently provides:

Time when claims must be presented. (1) When a claimant seeks benefits under this chapter, his claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 2 years from the date the claimant knew or should have known that his total disability condition resulted from an occupational disease. . . .

(2) The department may, upon a reasonable showing by the claimant or a decedent's beneficiaries that the claimant or the beneficiaries could not have known that the claimant's condition or the employee's death was related to an occupational disease, waive the claim time requirement up to an additional 2 years.

The current statute incorporates amendments enacted in 1989 and 1985. The 1989 amendments merely replaced references to the Division of Workers' Compensation with references to the Department of Labor and Industry. 1989 Montana Laws, ch. 613, §64. The 1985 amendments made substantive changes. First, they extended the limitations period from one year to two. Second, they repealed subsection (3), which had provided an absolute bar as to any claim filed more than three years after the last day of employment with the employer against whom compensation is claimed. 1985 Montana Laws, ch. 112, §2.

The 1985 amendments were made applicable to "claims arising from exposures occurring on or after the effective date of this act." 1985 Montana Laws, ch. 112, sec. 6. Thus, pursuant to section 1-2-201(a), MCA, the amendments took effect October 1, 1985.

Claimant's employment terminated after the effective date of the amendments. Since he continued to be exposed to occupational conditions until his last day of employment, the 1985 amendments must be applied to his claim.

Grenz states the issue on appeal as follows: "[W]hether or not there is credible and substantial evidence on the whole record from the proceedings below to support a finding that the appellant knew or had reason to know that his total disability condition resulted from an occupational disease, 2 years before [sic] he filed his claim for benefits on February 7, 1992?" (Appellant's Opening Brief at 3.)

During this proceeding Grenz has consistently insisted that prior to mid-1990 he attributed his degenerative arthritis to his elbow injury and was not aware that it was caused, more generally, by his occupation. In reviewing the evidence below, I could find nothing which specifically contradicted his assertion. The medical opinions referenced by the hearing examiner regarding the lack of a causal relationship between claimant's wrist injury and his degenerative arthritis were given in depositions which were taken in the summer of 1990, less than two years before the February 7, 1992 OD claim. (Ex. D, ¶ 5 at p. 5.) We do not have the medical depositions and, therefore, do not know what claimant's physicians said they told him at the time of their examinations.

However, there is other substantial evidence supporting the hearing examiner's conclusion that claimant had sufficient information to put him on notice that his degenerative arthritis was an occupational disease. Claimant testified that he "knew in '85 and '86 that Dr. Miller felt that the **type of work** I was doing was aggravating my condition." (Tr. at 137; emphasis added.) He said that he did not know whether the aggravation was the result of his 1984 elbow injury "or just the job description", and felt no need to inquire. (*Id.* at 137.) He just assumed that the elbow injury was the cause. (*Id.* at 83-84.) But, on further inquiry, it is apparent that his assumption was groundless and unreasonable. He conceded that he never lost work due to his elbow injury and required no further care after the initial treatment of his elbow. (*Id.* at 142.) He requested lighter work from his employer only after his December 1984 visit to Dr. Miller, after which he told the employer that "Dr. Ron Miller had diagnosed that I had arthritis and that this condition was being aggravated **by the type of work that I was doing.**" (*Id.*) And, in a Brief in Support of Appellant's Motion for Reconsideration filed with the Montana Supreme Court on November 11, 1991, Grenz adamantly insisted that there was "absolutely NO evidence Grenz went to see Dr. Miller because of an August 22, 1984 injury to his right elbow nor that he reported to his employer that such was the case." (Ex. 25 at 4, 6.) If he did not see Dr. Miller on account of the elbow injury, but rather on account of his more generalized joint complaints, then it is difficult to see how he could have reasonably assumed that his degenerative arthritis was attributable to his elbow injury. Finally, prior to 1990, claimant knew that the medical panel which examined him in 1988 at the insurer's request had limited its examination to his elbow and low back and had not considered his other joint complaints. (Tr. at 88-89.) Indeed, in 1988

Grenz specifically complained to Dr. Herbert Gray that the panel had failed to considered "severe physical disability resulting from damage to other bodily structures than were covered in the panel exam" (Ex. 33 at 7), and on January 29, 1990, he sued the panel doctors alleging that their failure to consider his other conditions violated his rights. (Ex. 21)

The foregoing facts should have put Grenz on notice of the tenuousness of his assumption that his arthritis was attributable to his elbow injury. Instead, Grenz put his head in the sand and never even discussed the matter with his physicians. Whether or not he actually knew that his total disability was caused by an occupational disease, he should have known. The decision below is supported by substantial, credible evidence and is therefore **affirmed**.

ORDER

The December 30, 1994, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER of the Department of Labor and Industry are **affirmed**.

Dated in Helena, Montana, this 24th day of August, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Samuel J. Grenz - Certified

Mr. Terry Spear

Submitted Date: May 31, 1995

1. Exhibit 14 at hearing consisted of Grenz's brief on appeal in Supreme Court No. 89-283 and **attached** exhibits. The brief was filed June 27, 1989. Attached Exhibit 12 is a letter claimant wrote to Ed Eberly, a claims examiner for EBI/Orion Group. The letter is dated March 24, 1988, although EBI/Orion's date stamp indicates it was received on March 16, 1988.