

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 86

WCC No. 9712-7886

WESLEY HALE

Petitioner

vs.

ROYAL LOGGING

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Logging worker filed petition to obtain permanent partial disability benefits based on 1976 back injury. Claimant had continued work in the logging industry for 20 years after the 1976 injury, but argued he lost earning capacity as the result of that injury and was entitled to PPD benefits on that basis under applicable law.

Held: Claimant did not prove entitlement to permanent partial disability benefits under section 92-703.1, RCM (1975) where he testified he worked in pain, but worked smarter to keep up, and did not quantify any amount of lost earning capacity. [Note: WCC reversed on this determination in [Hale v. Royal Logging, 1999 MT 302.](#)]

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 92-703.1, RCM (1975). Claimant did not prove entitlement to permanent partial disability benefits under section 92-703.1, RCM (1975) where he testified he worked in pain, but worked smarter to keep up, and did not quantify any amount of lost earning capacity. [Note: WCC reversed on this determination in [Hale v. Royal Logging, 1999 MT 302.](#)]

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Claimant did not prove entitlement to permanent partial disability benefits under section 92-703.1, RCM (1975) where he testified he worked in pain, but worked smarter to keep up, and did not quantify any amount of lost earning capacity. [Note: WCC reversed on this determination in [Hale v. Royal Logging, 1999 MT 302.](#)]

¶1 The trial in this matter was held on September 1, 1998, in Kalispell, Montana. Petitioner, Wesley Hale (claimant), was present and represented by Ms. Laurie Wallace. Respondent, Royal Logging (Royal), was represented by Mr. Andrew J. Utick.

¶2 Exhibits: Exhibits 1 through 8 and 10 were admitted without objection. Exhibit 9 was objected to and admitted. Additional exhibits attached to depositions were also admitted without objection.

¶3 Witnesses and Depositions: Wesley Hale, Michael Helms and Mark J. Schwager were sworn and testified. In addition, the parties agreed the Court may consider the depositions of the claimant, Michael Helms, Mark J. Schwager and Dr. John W. Hilleboe.

¶4 Issues Presented: The following issues, as restated by the Court, are raised in the Pretrial Order:

1. Whether claimant is entitled to permanent partial disability benefits pursuant to section 39-71-703, MCA (1975).
2. Whether claimant is entitled to a penalty.
3. Whether claimant is entitled to reasonable attorney fees and costs.

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

FINDINGS OF FACT

¶6 Claimant is presently sixty-three years old. He has a high school education.

¶7 Except for a four-year period following high school, claimant has worked his entire adult life in the timber industry, mostly as a sawyer. He ceased working in 1997, when he was 62 years old.

¶8 Claimant began working in the timber industry in 1958, in Northern California. He initially worked setting chokers and then bucking lumber. He continued in that line of work until approximately 1964.

¶9 In 1964 he moved to Whitefish, Montana, and went to work for Orville Parker (Parker). He was hired by Parker as a sawyer and continued working for Parker for about three years.

¶10 Parker laid claimant off in 1967. Shortly after his layoff, claimant was hired by Royal. Claimant worked as a sawyer for Royal for close to twenty years.

¶11 While working for Royal, on February 12, 1976, claimant suffered a work-related injury. He injured his back when he slipped and fell off of a log.

¶12 Claimant was treated by Dr. John W. Hilleboe, who is a board certified orthopedic surgeon. (Dr. Hilleboe Dep. at 4.) In March of 1976, Dr. Hilleboe performed a laminectomy and discectomy at 4-5. (*Id.* at 6-7.)

¶13 The surgery was successful and claimant was released to return to work in June of 1976. At the time of the release, Dr. Hilleboe did not place any restrictions on him. However, Dr. Hilleboe testified that he understood that in order to return to work the claimant could not have medical restrictions. (Dr. Hilleboe Dep. at 23.) Claimant confirmed that understanding, testifying that his employer required an unrestricted release before it would allow him to return to work.

¶14 Following his June release, claimant returned to Royal. Royal initially assigned claimant to light-duty work supervising a brush crew. Claimant's testimony established that the lighter-duty position was an accommodation by Royal on account of his recent surgery. Claimant worked as a brush crew supervisor from June until approximately November, 1976. Although claimant could not recall his exact wages during that period, he recalled that he made less than he did as a sawyer. (Trial Test.)

¶15 Claimant's recollection was that he supervised the brush crew until approximately November of 1976 and that after that he returned to his normal duties as a sawyer. He continued to work as a sawyer for Royal until 1987 when Royal ceased logging operations in the area where claimant was employed.

¶16 Between Royal's cessation of business in 1987 and 1989, claimant worked as a sawyer for Marvin Meyer and Wayne Turner. He had no difficulty finding employment and testified that he did not miss more than a couple of days of work during the 1987 to 1989 time frame, and that his time off from work was not due to problems with his back.

¶17 In 1989 claimant was hired by St. Ogne, another timber company. He was steadily employed by St. Ogne from 1989 until 1997.

¶18 While employed by St. Ogne, claimant occasionally worked as a sawyer for other logging contractors, including Ronald Foster, James Norvell, and Schlegel and Sons Contractor. (*Id.* at 20-21.)

¶19 Claimant ceased working in 1997 because his knees became swollen and he was unable to walk. Claimant has an occupational disease claim pending against St. Ogne for his knee condition. He has not worked since.

¶20 Claimant acknowledged that he remained competitively employable after his 1976 injury and that all of his employers were satisfied with his work. He testified that sawyers were paid by the piece so his employers were not that concerned if he worked slower than other employees as long as he could put in a decent days work, which he felt that he could.

He also testified that although he frequently worked in pain, he never lost any actual time from work due to his back other than the time he lost recuperating after his surgery.

¶21 Claimant's request for benefits under section 39-71-703, MCA [actually 92-703.1, R.C.M. (1975)], is based on 1998 deposition testimony by Dr. Hilleboe as to restrictions he would have placed on claimant had claimant not been eager to return to his work as a sawyer. In fact, Dr. Hilleboe did not place any restrictions on claimant when he released him to return to work in 1976.

¶22 After unconditionally releasing claimant to return to work in 1976, Dr. Hilleboe occasionally examined claimant until 1978. His final examination was in March 1978, at which time he noted that claimant complained of some pain in his left hip, numbness along the lateral aspect of the right leg, and frequent charley horses on his posterior right side. He also noted that claimant continued to have weakness of dorsiflexion of the right foot. (Hilleboe Dep. at 9.)

¶23 Thereafter, Dr. Hilleboe did not see claimant again until 1993, some 15 years later. In the meantime, claimant continued working full time as a sawyer.

¶24 In 1993, when Dr. Hilleboe examined claimant, he noted claimant's chief complaints as weakness associated with his right dorsiflexors, and the right foot drop. He further noted that these were the same complaints claimant had prior to his surgery in 1976.

¶25 In 1993 Dr. Hilleboe ordered an MRI, which revealed a scar at the L4-5 level where the surgery had been performed. The MRI also indicated degenerative changes. Dr. Hilleboe testified that he could not conclusively link the degenerative changes to claimant's back surgery. He opined that anyone who had worked in claimant's profession for a similar period of time would develop some degenerative changes even without surgery. Nonetheless, Dr. Hilleboe, on a "best guess" basis, indicated that 70% of claimant's present condition is related to his injury. (*Id.* at 28-29.)

¶26 Twenty years after releasing claimant to return to work, in deposition testimony, Dr. Hilleboe retrospectively placed claimant at maximum medical improvement in 1978, and testified that he informed claimant that working as a sawyer was not conducive to good back function. He further testified that he "would" have restricted claimant to lifting no more than 30 pounds on a frequent basis, would have restricted claimant to no lifting involving torsional twisting, would have recommended that claimant avoid lifting on un-level ground, and would have restricted claimant from prolonged sitting or standing. (*Id.*) (Dr. Hilleboe Dep. at 10-12.)

¶27 Claimant testified that while he continued to work as a sawyer after his 1976 injury, he did so despite his physical limitations and back pain. He testified, and Dr. Hilleboe's testimony confirms, that he continued to experience right foot drop. Claimant was conscious of his disability and was careful how he stepped.

¶128 While leading a vigorous life in the woods, claimant suffered persistent low-back pain following his injury. Following a day in the woods, he slept in a fetal position because of his back pain and experienced pain and stiffness the next morning. While he did not take prescription drugs on a regular basis, he took aspirin every night.

¶129 Claimant had difficulty sitting or standing for prolonged periods of time. When driving to a job site his right leg went numb and his back ached.

¶130 On the other hand, because of his problems with prolonged standing or sitting, the walking aspect of his sawyer job actually helped his condition. Lifting and bending, however, were painful and he had to straighten his back more often while he was cutting timber.

¶131 While claimant testified that he never worked at 100% after his injury, he also conceded that he worked smarter, paying more attention to how he exerted himself, and that his working smarter gave him an advantage in cutting timber. On the other hand, he felt that on some days he felled less trees than he otherwise would have felled.

¶132 Michael Helms (Helms), a vocational rehabilitation counselor, testified on behalf of the claimant. In his opinion, claimant suffered a loss of earning capacity as a result of his 1976 injury. However, in arriving at his opinion, Helms relied on the retroactive, hypothetical restrictions Dr. Hilleboe articulated more than 20 years after unconditionally releasing claimant to return to his work as a sawyer. Helms' opinion ignored claimant's actual work history for the twenty years following his injury.

¶133 The respondent's vocational testimony came from Mark Schwager (Schwager). Schwager testified that it was his opinion that claimant had not suffered a loss of earning capacity. His opinion was based on claimant's post-injury work history, including the fact that claimant successfully competed for jobs without any evident wage loss.

CONCLUSIONS OF LAW

I.

¶134 Claimant was injured on February 12, 1976, and his entitlement to benefits is governed by the 1975 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶135 Claimant must prove by a preponderance of the evidence that he is entitled to disability benefits. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

III.

¶136 Claimant is seeking additional permanent partial disability benefits under section 92-703.1 R.C.M. (1975).

92-703.1. Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be sixty-six and two-thirds percent (66%) of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half (½) the state's average weekly wage.

(2) The compensation shall be paid during the period of disability, not exceeding however, five hundred (500) weeks in cases of partial disability; provided, however, that compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in section 92-709 for the loss of the member.

Since claimant suffered an unscheduled back injury, the 500 weeks limitation applies.

¶137 Sections 92-703.1, 92-709, and 92-709.2, R.C.M. (1975), were subsequently codified as sections 39-71-703, -705 and -709, MCA. Subsequent decisions of the Supreme Court held that a worker may elect benefits under section 39-71-703, MCA, for *actual* loss of earning capacity or indemnity benefits under sections 39-71-703, -708, MCA, for *possible* prospective loss in earning capacity. *McDanold v. B.N. Transp., Inc.*, 208 Mont. 470, 679 P.2d 1188 (1984).

¶138 The benefits provided in 92-703.1, R.C.M. (1975) are for actual loss of earning capacity. *McDanold v. B.N. Transport, Inc.*, 208 Mont. 470, 476-77, 679 P.2d 1188 (1984). While "one item of evidence to be considered in the determination of future earning capacity," the claimant's actual wages post-injury are not conclusive evidence of his post-injury earning capacity, rather the measure is whether there has been a "loss of ability to earn in the **open labor market**." *Fermo v. Superline Products*, 175 Mont. 345, 348, 574 P.2d 251 (1978) (emphasis added). Any loss must be a permanent one, and in determining the loss the Court must take into consideration not only pre-injury and post-injury wages but also the claimant's age, occupational skills, education, previous health and remaining number of productive years, and degree of physical or mental impairment. *Chagnon v. Travelers Ins.*, 259 Mont. 21, 855 P.2d 1002 (1993).

¶139 While a worker may return to his time-of-injury job and earn more than before, there may still be a loss of earning capacity if the worker's performance is impaired and his ability to compete in the open labor market is lessened. *Fermo, supra; Hafer v. Anaconda Aluminum Co.*, 198 Mont. 105, 643 P.2d 1192 (1982). The loss is "determined by comparing [claimant's] earning capacity absent injury with earning capacity given the injury." *McDanold*, 208 Mont. at 479, 679 P.2d at 1188 (1984).

¶40 Working in pain or with physical impediments that do not materially affect job performance or the worker's ability to compete in the open labor market is not a sufficient basis for an award of benefits under section 92-703.1, R.C.M. (1975). In *Dunn v. Champion Int'l Corp.*, 222 Mont. 142, 720 P.2d 1186 (1986), the Supreme Court considered a claim for lost earning capacity similar to the claim in the present case. The claimant in that case injured both of her knees at work, one in May 1980, and one in June 1981. *Id.* at 144, 720 P.2d at 1187. Champion accepted liability for both injuries and paid temporary total disability benefits. *Id.* She returned to her time-of-injury job after both injuries but then filed a petition seeking benefits for loss of earning capacity. *Id.*, 222 Mont. at 144, 720 P.2d at 1187.

¶41 The Supreme Court held that the evidence did not support a finding of lost earning capacity. It pointed out that while the claimant testified that she felt pain in her knees while working, she was able to continue working; her doctor had not restricted her work activity; her employer was satisfied with her work; she was trained for and could perform seven different jobs for her employer; and her vocational expert had ignored possible earnings for the alternative jobs which she was trained for and physically qualified. *Id.* at 149-50, 720 P.2d at 1190-91. The Court concluded that Dunn had failed to prove that her injury had reduced her ability to compete in the open labor market for jobs.

¶42 *Dunn* is controlling in this case. Although claimant testified that he worked with discomfort and pain, and that he had to "work smarter", other than his belief that he might have been able to work at a faster pace and earn more, he provided no evidence of lost earning capacity. Moreover, he could not quantify any loss and acknowledged that his working smarter contributed to his ability to do his job, thus offsetting his loss of physical ability. After returning from his 1976 surgery, claimant lost no time from work due to his back injury. His employers were satisfied with his work. He sought and immediately secured jobs in the open labor market with no apparent penalty.

¶43 Claimant did not carry his burden of proof under 92-703.1 R.C.M. (1975).

¶44 In rejecting the claimant's present claim, the Court makes no determination as to his entitlement under the indemnity provisions of 92-709, R.C.M. (1975). The Court's discretion to award indemnity benefits is much broader than under 92-703.1, R.C.M. (1975). See *Stuker v. Stuker Ranch*, 251 Mont. 96, 822 P.2d 105 (1991); *Ryles v. Springhill Ranch Eggs*, 247 Mont. 276, 806 P.2d 276 (1991); *Carrol v. Wells Fargo Armored Car Serv.*, 240 Mont. 151, 783 P.2d 387 (1989); *Hartman v. Stanley Continental*, 236 Mont. 141, 768 P.2d 1380 (1989); *Holton v. F.H. Stoltze Land Lbr. Co.*, 195 Mont. 263, 637 P.2d 10. (1981); and *Ramsey v. Duncan and Baier* 174 Mont. 438, 571 P.2d 384 (1977).

¶45 Claimant has not prevailed in this action and is not entitled to either attorney fees or costs. § 39-71-611, MCA (1975).

JUDGMENT

¶46 1. Petitioner is not entitled to permanent partial disability benefits under 92-703.1 R.C.M. (1975). His petition under the cited section is **dismissed with prejudice**.

¶47 2. Petitioner is not entitled to attorney fees or costs.

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

¶49 4. 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 1st day of December, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace

Mr. Andrew J. Utick

Date Submitted: September 1, 1998