

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 66A

WCC No. 9701-7685

DAVID R. HOLCOMB

Appellant

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY &
SUBSEQUENT INJURY FUND

Respondents.

DECISION AND ORDER ON APPEAL

Summary: 46-year old former truck driver/laborer with the City of Missoula Street Department claimed wage supplement benefits under section 39-71-703, MCA (1987). Because the Subsequent Injury Fund was potentially liable, the matter was heard before a hearing officer of the Department of Labor pursuant to section 39-71-910, MCA (repealed in 1997). The hearing officer determined claimant was not entitled to wage supplement benefits and he appealed.

Held: Under section 2-4-704(2), MCA, this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court looks to whether the administrative findings, inferences, conclusions, or decisions are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The hearing officer's finding that claimant is presently qualified to earn the same wage as his time-of-injury wage, and is thus not entitled to wage-loss benefits, is supported by the record. With the exception of time off for brief lay-offs, and to recover from medical treatment, claimant remained in employment with the same employer from his injury in 1987 until he resigned in 1996, to move to Bozeman, where his wife accepted a promotion with her employer. Although claimant argued he retained employment with the City of Missoula at his time-of-injury wage rate, and higher rates, only because the employer accommodated his condition, evidence indicated otherwise. There was also evidence that claimant is competitive for similar jobs in Bozeman once those positions come open. Appeal denied.

Topics:

Appeals (To Workers' Compensation Court): Generally. A 46-year old former truck driver/laborer with the City of Missoula Street Department claimed wage supplement benefits under section 39-71-703, MCA (1987). Because the Subsequent Injury Fund was potentially liable, the matter was heard before a hearing officer of the Department of Labor pursuant to section 39-71-910, MCA

(repealed in 1997), then appealed to the WCC. Under section 2-4-704(2), MCA, this Court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court looks to whether the administrative findings, inferences, conclusions, or decisions are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." The hearing officer's finding that claimant is presently qualified to earn the same wage as his time-of-injury wage, and is thus not entitled to wage-loss benefits, is supported by the record.

Wages: Wage Loss. A 46-year old former truck driver/laborer with the City of Missoula Street Department claimed wage supplement benefits under section 39-71-703, MCA (1987). Because the Subsequent Injury Fund was potentially liable, the matter was heard before a hearing officer of the Department of Labor pursuant to section 39-71-910, MCA (repealed in 1997), then appealed to the WCC. The hearing officer's finding that claimant is presently qualified to earn the same wage as his time-of-injury wage, and is thus not entitled to wage-loss benefits, is supported by the record. With the exception of time off for brief lay-offs, and to recover from medical treatment, claimant remained in employment with the same employer from his injury in 1987 until he resigned in 1996, to move to Bozeman, where his wife accepted a promotion with her employer. Although claimant argued he retained employment with the City of Missoula at his time-of-injury wage rate, and higher rates, only because the employer accommodated his condition, evidence indicated otherwise. There was also evidence that claimant is competitive for similar jobs in Bozeman once those positions come open. Appeal denied.

Appellant, David R. Holcomb (claimant), appeals from the decision of the Department of Labor and Industry (Department) denying his claim for wage supplement benefits under section 39-71-703, MCA (1987).

Factual Background

1. Claimant is 46 years old and has received a Graduate Equivalency Diploma (GED). As a child, claimant injured his right hand in a gun accident. The accident left claimant with a deformed hand, significant scarring, and a fused wrist.
2. Claimant suffered a compensable industrial injury to his right hand on July 1, 1987, while employed by the City of Missoula Street Department. The injury occurred when claimant threw a heavy grating. He experienced pain over the ulnar aspect of his right wrist, tingling in the palm of his hand and numbness to the small and ulnar side of the ring finger. (MMIA Exs. 1, 4.)
3. Following his injury, claimant saw Dr. Mark F. Rotar, an orthopedic surgeon, on July 2, 1987, and Dr. Rotar was thereafter claimant's primary treating physician. Dr. Rotar treated claimant conservatively for approximately seven months. When claimant's wrist did not improve significantly, Dr. Rotar referred claimant to Dr. Donald E. Murray, a hand specialist, for a second opinion. (Claimant's Ex. 1, Dr. Rotar's Office Notes of February 9, 1988.) Dr. Murray performed surgery on claimant's right hand in February 1988 and again in October 1991.

4. At the time of his injury, claimant was working for the City of Missoula Street Department as a truck driver/laborer earning \$10.36 per hour. With the exception of brief layoffs in 1987 and 1988, time taken to heal from his wrist surgeries in February 1988 and October 1991, and time off for a couple of other work-related injuries, claimant was continuously employed by the City of Missoula Street Department as a truck driver/laborer from August 1982 until May 1996. Claimant's last position was as an assigned truck driver/laborer, a position he bid into under the union seniority system applicable to the Street Department.

5. In May 1996, claimant voluntarily resigned his position with the Missoula Street Department to move to Bozeman with his wife, who had received a job promotion that resulted in her transfer to Bozeman. At the time of his resignation, claimant was earning \$12.95 per hour, plus an additional \$48.00 per month longevity pay. Claimant presently resides in Bozeman.

6. Prior to his resignation from the City of Missoula, claimant contacted the City of Bozeman Department of Public Services, Street Division, to inquire into similar employment as he had in Missoula. No full-time positions were available. Claimant therefore applied for and was hired as a seasonal laborer with the Bozeman Street Department for the street maintenance season. He was rehired for and worked the 1997 season. His wages as a seasonal laborer are less than what he was earning as a permanent employee of the Missoula Street Department.

7. Further facts are set forth in the discussion part of this opinion.

Proceedings Below

Following his resignation from the Missoula Street Department and his move to Bozeman, the claimant sought wage-loss benefits under section 39-71-703, MCA (1987). His request was denied by the insurer and went to hearing on June 18, 1996, before a Department hearing officer. On December 9, 1996, the hearing officer issued Findings of Fact, Conclusions of Law, and Order, denying benefits. This appeal followed.

Record on Appeal

The record on appeal consists of a transcript of the hearing below, a deposition of claimant, the exhibits offered and admitted at hearing, and the Department's complete file.

Issue Raised on Appeal

The issue on appeal is whether the decision below is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

Jurisdiction

Ordinarily, benefits determinations are within the original jurisdiction of the Workers' Compensation Court. However, at the time the hearing was held below, the Workers'

Compensation Act provided that benefits disputes involving the Subsequent Injury Fund must be resolved by the Department. Section 39-71-910, MCA (1995), provided:

39-71-910. Procedure for resolving disputes as to liability under part. (1) If an employee was employed or retained in employment under the provisions of this part and a dispute or controversy arises as to payment of benefits or the liability therefor, the department shall hold a hearing and resolve all disputes. On motion made in writing by the insurer, the department shall join the fund as a party defendant.

(2) The department, within 5 days of the entry of an order joining the fund as a party defendant, shall give the fund written notice thereof not less than 20 days before the date of hearing and shall include the names of the employee and the insurer and the date of the alleged injury or disability. The fund named as a defendant has 10 days after the date of notification to file objections to being named as a party defendant. On the date of the hearing at which the liability of the parties is determined, the hearing examiner first shall hear arguments and take evidence concerning the joinder as party defendant. If the fund has filed timely objection and if argument and evidence warrant, the hearing examiner shall grant a motion to dismiss.

(3) At the time of the hearing, the insurer and fund may appear, cross-examine witnesses, give evidence, and defend both on the issue of liability of the insurer to the employee and on the issue of the liability of the fund.

(4) The hearing examiner shall make findings of fact and conclusions of law determining the respective liability of the insurer and the fund.

The section was repealed by the 1997 legislature, thus, presumably, original jurisdiction over benefits controversies involving the Subsequent Injury Fund now rests with the Court. However, since the hearing was held prior to the appeal, the Court's jurisdiction in this case is appellate jurisdiction. §§ 39-71-204 and -2401, MCA.

Scope of Review

Judicial review of a final Order of the Department is governed by section 2-4-704(2), MCA, which provides in relevant part:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

. . .

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

. . .

Discussion

The claimant's request for benefits is governed by section 39-71-703(1)(b)(I), MCA (1987), which provides:

39-71-703. Compensation for permanent partial disability -- impairment awards and wage supplements. (1) The benefits available for permanent partial disability are impairment awards and wage supplements. . . .

. . . .

(b) The following procedure must be followed for a wage supplement:

(I) A worker must be compensated in weekly benefits equal to 66% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.

The hearing officer found that claimant is presently qualified to earn the same wage as his time-of-injury wage; thus, he is not entitled to wage-loss benefits. Claimant challenges that conclusion and argues that the hearing officer overlooked or disregarded evidence to the contrary.

Under the clearly erroneous standard of subparagraph (2)(a)(v) of section 2-4-704(2), MCA (1995), the hearing officer's findings of fact may be overturned on judicial review only if they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA). The Court cannot reweigh the evidence, *Nelson v. Semitool, Inc.*, 252 Mont. 286, 288, 829 P.2d 1 (1992); or reverse simply because there may be sufficient evidence to support contrary findings, *Little v. Structural Systems*, 188 Mont. 482, 486, 614 P.2d 516 (1980). The conclusions of the fact finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson*, 252 Mont. at 289, 829 P.2d at 1 (1992).

In his brief on appeal, the claimant argues that the hearing officer failed to consider the overall record when he reached his conclusion that claimant was not entitled to wage supplement benefits. He argues that the hearing officer disregarded (1) the notes of his treating physician, Dr. Rotar; (2) testimony at the hearing that he alleges demonstrated that he cannot perform the requirements of jobs within his job pool without assistance; and (3) the functional capacity evaluation and findings of Dr. Coward, an examining physician.

Claimant insists that from the time of his injury in 1987 until his resignation in 1996, the City of Missoula Street Department modified his job in such a way as to accommodate his injury. He further argues that lacking such modification the position of truck driver/laborer was not within his job pool. Citing *Dilling v. Buttrey Foods*, 251 Mont. 286, 825 P.2d 1193 (1991), he urges that he is entitled to wage supplement benefits to compensate him for the difference between his earning ability in his current job pool and his earning ability in his preinjury job pool.

The claimant's arguments are without merit. The hearing officer's findings of fact are well written and complete. They show that he considered all of the evidence in this case, weighed it carefully, and simply resolved factual issues contrary to claimant's contentions.

As to claimant's contention that the hearing officer disregarded the notes of claimant's treating physician, Dr. Rotar, the Findings of Fact, Conclusions of Law, and Order affirmatively show that the hearing officer not only considered Dr. Rotar's medical findings but used them to support his ultimate determination. The hearing officer found that claimant was treated by Dr. Rotar over a period of years (Findings 13-14). In Findings 16 and 17, he cited Dr. Rotar's release following claimant's final surgery in 1991. On December 2, 1991, Dr. Rotar released claimant to full duty after the completion of four weeks of light duty. (Finding 16.) Dr. Rotar's office note placed no restrictions on claimant:

Dave returns today. I think his hand is as good as it is going to get. I have released him for light duty work for four weeks and then full duty after that. I also recommended that he be assigned an Air Ride seat for his back condition. I will see Dave on a p.r.n. basis.

(December 2, 1991 office note of Dr. Rotar, found at Claimant's Ex. 1 and MMIA Ex. 3, cited in Finding 16.) In a "To Whom It May Concern" letter of December 2, 1991, Dr. Rotar reiterated that claimant was released to full duty without restrictions after four weeks: "Mr. Holcomb is released to light duty for four weeks and then to regular duty after four weeks." (MMIA Ex. 2, cited in Finding 17.)

Claimant next argues that the hearing officer disregarded testimony which demonstrated his inability to perform the requirements in his job pool without assistance. His contention ignores contrary testimony on which the hearing officer relied. Dale Clark (Clark), claimant's supervisor at the City of Missoula Street Department since 1993 and a co-worker since 1990, testified that claimant performed the same work as everyone else who was an assigned truck driver. (Finding 26-27.) He said that claimant did an above average job in performing his duties (*id.*); shoveled as well and sometimes better than other workers (Finding 27); did an "excellent" job raking asphalt (*id.*); and did as much physical labor as the other truck drivers and probably more. Clark testified that he (Clark) was not requested to provide, nor did he provide, any special accommodations for claimant. (*Id.*) Ed Clay (Clay), City of Missoula Street Department Superintendent, testified concerning his last performance appraisal of claimant. (Finding 29.) The appraisal, done on December 29, 1995, describes claimant's duties with the Street Department. Clay testified that the duties were not modified to

accommodate claimant and that the duties described in the appraisal were consistent with claimant's duties all the way back to 1987. (*Id.*)

The hearing officer also considered claimant's current job in determining that claimant can perform job requirements in his job pool without assistance. Patricia Berg (Berg), Personnel Director for the City of Bozeman, testified that claimant reviewed the job description for a seasonal laborer and advised Berg that he was capable of performing the physical requirements of the laborer's job. (Finding 34.) According to Roger Sicz (Sicz), claimant's supervisor with the City of Bozeman Department of Public Services, Street Department, claimant is doing a great job. He testified that if a full-time position opens up, claimant has a very good chance of getting the position based on his past experience, a positive recommendation from Clay, and his good work with the City of Bozeman. (Finding 35.)

The claimant contends that the hearing officer erred in rejecting a 1988 functional capacity evaluation (FCE) and the findings of Dr. Coward, who first saw claimant in October 1995. The FCE was performed over three years prior to claimant's second surgery, prior to determination of maximum medical healing, and prior to release to work without restriction by claimant's treating physician, Dr. Rotar. (Finding 37.) It was therefore not erroneous for the hearing officer to give little weight to the FCE in reaching his decision. Nor was it error for the hearing officer to give little weight to Dr. Coward's opinions. Dr. Coward did not review the medical records concerning claimant's injury, surgeries, or progress until the day before the hearing. (Finding 36.) He concurred with Dr. Rotar's opinion that claimant had sustained an impairment rating of 40 percent (Finding 37), but at the time he rendered his opinion he had not seen claimant's prior medical records and was unaware that claimant's injury accounted for only 2 percent of the 40 percent impairment rating, with the remaining 38 percent the result of the wrist injury claimant had suffered as a child. (*Id.*) The hearing officer found Dr. Coward's opinion that claimant's condition had deteriorated since 1991 especially unpersuasive:

38. Dr. Coward opined that due to the number of office visits Holcomb had with Dr. Rotar since 1991 that his condition was deteriorating. Although he stated that Holcomb had seen Dr. Rotar in excess of 200 times, in fact, there had been a gap in treatment from December 2, 1991 until September 8, 1994 and then again to August 1, 1995. And then, the office visits were primarily related to Holcomb's back and knee as opposed to the wrist with Dr. Rotar still stating that he would place no firm limits on Holcomb. Further, on October 30, 1995, when Holcomb suggested that he might take some time off, Dr. Rotar stated "I strongly discouraged this approach." (MMIA Ex. 26.)

(Finding 38.) Not mentioned by the hearing officer, are the facts that Dr. Coward does not perform orthopedic or any other surgery, is not board certified in any medical specialty, and has not had hospital privileges for ten years. (Tr. at 127.) The hearing officer had good reason to prefer the treating physician's (Dr. Rotar's) opinions, see *Pepion v. Blackfeet Tribal Industries*, 257 Mont. 485, 489, 850 P.2d 299 (1993), especially in light of other evidence indicating that claimant, after his 1991 surgery, performed, without modification, the identical job as he had performed prior to his injury.

The hearing officer also considered the unrefuted testimony of Gerry Blackman (Blackman), a certified rehabilitation consultant. Blackman testified that claimant is

employable in the work he was performing for the City of Missoula (Finding 21); that the approximately \$13 per hour that claimant was earning with the City of Missoula is a wage that he is qualified to earn in his job pool (Finding 22); and that considering factors such as age, education, and work experience, in his job pool claimant is qualified to earn a wage equal to or in excess of the wage he was earning at the time of his injury (Finding 25).

The final decision of the Department's hearing officer is supported by substantial evidence and is not clearly erroneous.

ORDER

1. The December 9, 1996 Findings of Fact, Conclusions of Law, and Order of the Department of Labor and Industry are **affirmed**.
2. The Decision and Order on Appeal herein is certified as final for purposes of appeal.
3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 2nd day of December, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Douglas J. Skjelset
Mr. Oliver H. Goe
Mr. Kevin Braun
Ms. Christine L. Noland
Ms. Charlotte Payne -- E-mailed
Ms. Anne L. MacIntyre -- E-mailed
Date Submitted: July 25, 1997