

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 94

WCC No. 9307-6828

CARL LARSON

Petitioner

vs.

CIGNA INSURANCE COMPANY

Respondent/Insurer for

YELLOWSTONE FORD TRUCK SALES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on March 8, 1994, in Helena, Montana. Petitioner, Carl Larson (claimant), was present and represented by Mr. James G. Edmiston. Respondent, CIGNA Insurance Company (CIGNA), was represented by Ms. Sara R. Sexe. Claimant testified on his own behalf. Michelle Fairclough and Juanita Hooper also testified. The depositions of Robert Wilson, JoAnn Gordon, Elmer Kobold, M.D., Michelle Fairclough and William S. Shaw, M.D. were filed and considered by the Court. Exhibits 1 through 10 were admitted into evidence by stipulation of the parties. Exhibit 11 was admitted over CIGNA's objection.

At the end of the hearing the Court made preliminary findings of fact, as follows:

1. After his December 15, 1981 layoff from his employment, claimant considered himself unable to work on account of his heart condition. (Tr. at 121.)
2. CIGNA was made aware that claimant applied for Social Security disability benefits because of his heart condition. (Tr. at 118.) At least initially, CIGNA had no reason to know that the hernia was disabling.

The Court agreed to reexamine these findings in light of the post-trial proposed findings of the parties. Having done so, the Court affirms these preliminary findings and makes them final.

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

FINDINGS OF FACT

1. Claimant was seventy years old at the time of trial.
2. Until his last day of employment on December 15, 1981, the claimant worked in the truck parts business for approximately thirty years. From 1977 until December 15, 1981, he was parts manager for Yellowstone Ford Truck Sales in Billings, Montana. (Tr. at 11.)
3. On August 22, 1980, the claimant suffered a heart attack and was off work for several months thereafter. (Tr. at 38; Ex. 4 at 51.) On October 13, 1980, he underwent heart catheterization. (Ex. 12 at 52.) On October 16, 1980, he underwent open heart surgery involving a resection of a left ventricular aneurysm. (Ex. 7 at 157 and see generally Ex. 7 at 100 - 159; Tr. at 39.) In April of 1981, he had a second heart catheterization. (Tr. at 39; Ex. 7 at 72.) Claimant was unsure when he returned to work but agreed he probably went back to work full-time sometime during the Spring of 1981. (Tr. at 40.)
4. When he returned to work claimant assigned heavier tasks to other employees. (Tr. at 42, 56.)
5. On July 15, 1981, claimant suffered a left inguinal hernia when he lifted a one-hundred and fifty (150) pound truck spring. (Tr. at 40) The injury occurred in the course and scope of claimant's employment with Yellowstone Ford Truck Sales. (Ex. 2 at 24.)
6. At the time of the injury Yellowstone Ford was insured by CIGNA.
7. CIGNA accepted liability for claimant's injury and paid medical benefits and temporary total disability benefits.
8. On September 4, 1981, claimant had hernia repair surgery. (Ex. 3 at 24.)
9. The claimant returned to work in October 1981. At that time claimant's doctor considered his hernia one hundred (100 %) percent healed. (Kobold Dep. at 25.)
10. Claimant does not recall his hernia causing any particular problems or pain upon his return to work in October 1981.
11. Claimant's normal job duties included heavy lifting of parts and engines and running up and downstairs. Following his heart attack, claimant had difficulty performing his job.
12. On December 15, 1981, claimant was laid off work because of his inability to perform his job. (Tr. at 43; Wilson Dep. Ex. 3.) Robert Wilson, the president and general manager of Yellowstone Ford Truck Sales, wrote a letter stating in pertinent part: "Due to your present physical condition, we feel that you are unable to carry out your assigned duties; therefore,

Yellowstone Ford Truck Sales, Inc. is putting you on disability for 90 days, during which time you will be eligible for disability income from Transamerica Occidental Insurance Co."

(Wilson Dep., Ex. No. 3)

13. A December 18, 1981 note of one of the physicians treating claimant's heart condition noted:

SYMPTOMS: Shortness of breath, chest central right side more lately than before.

ASSESSMENT: He is more tired and short of breath than he was before and has lost his job because he is unable to produce. . . .

(Ex. 4 at 38.)

14. On December 21, 1981, claimant filed an application for Social Security disability benefits. (Ex. 7 at 179.) In his application he attributed his inability to perform his job to his heart condition, more specifically to an "aneurism, leaking heart valve, shortness of breath, bad circulation." He listed the onset of his disability as August 22, 1980, the date of his heart attack, and described the impact of his disability in the following terms:

I have been off work for 7 months since Heart Attack & heart surgery. See attached dismissal letter from Yellowstone Ford Tck Sales In [sic].

Before heart Attack & surgery I was preforming all duties of a Parts Dept. [sic] (Unloading Parts - stocking shelves - selling parts & Answering Phone.) Now I can't lift - run upstairs to check stock when on phone.

When I returned to work, I didn't work regularly. Also, I feel that I wasn't doing my job up to par & they were still paying for the full job.

(Id. at 180.) In a subsequent disability report dated April 22, 1981, he described his condition as follows:

After heart attack on above date and failing to recuperate it was decided to do a Heart Catheterization. I had to have open heart surgery. As part of my recuperation I did 12 weeks of therapy at St. V's Cardiac Treatment Ctr & there it was found I was short of breath. This problem still persists (is not corrected by medication) so I can't lift -- Climbing stairs or couping [sic] with stress.

(Ex. 7 at 21.) Claimant made no mention of his hernia as a contributing factor. He pursued his application for Social Security benefits solely on the basis of his heart condition. (Tr. at 55, 59; Ex. 7.)

15. On December 31, 1981, the physician treating claimant's heart condition wrote:

I treated Mr. Carl Larson for a large left ventricular aneurysm with open heart surgery on 10-15-80. He did well for a while and then had developed progressive shortness of breath and

had a repeat heart catheterization study performed which demonstrated a second aneurysm developing on the posterior wall. He, at present, is quite symptomatic from the above and his prognosis is guarded. It depends largely upon whether or not he can tolerate a second surgical procedure and this is being evaluated at the present time.

(Ex. 7 at 99, emphasis added.)

16. A December 28, 1981 medical note indicates in examining claimant's inguinal area, the left side was "ok", although burning in the *right* groin was noted. (Ex. 2 at 17.)

17. At trial the claimant testified that he did not put down his hernia as contributing to his disability because of "[t]he paperwork. Bad enough to fight one if not two" (Tr. at 63.) I do not find the explanation credible or believable. A preponderance of credible evidence persuades me that when claimant was laid off and he pursued Social Security disability benefits, he believed that he was disabled solely on account of his heart condition. His hernia was not a factor in his decision to pursue benefits nor in his belief that he was unable to work.

18. As of December 15, 1981, claimant considered himself unable to work and therefore retired. (Tr. at 54-55.) He presented no evidence indicating that he ever made a subsequent effort to find employment of any sort and a review of claimant's medical records concerning his heart condition provide convincing evidence that after December 15, 1981, claimant was in fact permanently totally disabled and unable to perform any sort of employment because of his heart condition. According to claimant, he was at one time considered a candidate for a heart transplant.

19. Claimant was in fact awarded Social Security disability benefits effective February 1981. (Ex. 7 at 47-51.) Those benefits continued until March 16, 1988, when he turned 65 and became eligible for Social Security retirement benefits. (Id. at 47.) Since March 16, 1988, he has received Social Security Retirement benefits.

20. In February of 1982, claimant had surgery for a second ventricular aneurysm and to replace a mitral valve in his heart. (See Ex. 6 at 154.)

21. In May 1982 some of the claimant's left inguinal hernia symptoms recurred. (Ex. 2 at 17; Ex. 3 at 23.) On June 17, 1982, a recurrence of the left inguinal hernia was diagnosed. (Ex. 2 at 17.) However, claimant received no further treatment for his hernia symptoms until December 1984.

22. The left inguinal hernia was surgically re-repaired in 1985, 1986 and, finally 1987.

23. There has been no recurrence of the left inguinal hernia since 1987. (Ex. 2 at 32.) However, claimant continues to experience localized pain in his left groin. (Shaw Dep. at 8.)

24. Sometime prior to 1987, CIGNA learned that claimant had "retired from yellowstone ford [sic] in 11/81 due to a heart condition." (Ex. 11 at 9.) A copy of the March 10, 1982 Social Security disability determination is contained in CIGNA's file. (Id. at 5.)

25. The claimant did not submit a claim for additional compensation benefits respecting his hernia until September 1992, almost 11 years after he returned to work. (Tr. at 62-3.) In all his correspondence with CIGNA, claimant never asked CIGNA about compensation benefits. (Tr. at 51.) Claimant also never told CIGNA that he was off work because of his hernia condition. (Id.)

26. However, medical bills for claimant's subsequent hernia repairs were submitted to CIGNA and paid. (Tr. at 66; Ex.10 at 17-107.)

27. On account of his heart condition, as of December 15, 1981, the claimant was no longer available for work in the open labor market. Thus, claimant's total wage loss and loss of earning capability was due to a prior, totally disabling condition and was not attributable to his hernia.

28. Claimant has also failed to persuade the Court that, absent his heart condition and termination of employment, his inguinal hernia would have recurred. Dr. Elmer Kobold, a surgeon who treated claimant for his hernias, testified that decreased physical activity and a weakening of muscles increases an individual's susceptibility to developing hernias. When specifically asked about the increased susceptibility of "an individual who has recently stopped working and had been in a physically declined state because of that," Dr. Kobold responded, "Yes. I'm sure with his cardiac surgery he was severely physically limited for months, and that would give him more of a chance for muscle weakness and recurrence." (Kobold Dep. at 30.)

29. Dr. Shaw testified that claimant's recovery time for the second hernia repair surgery in 1985 was approximately two months, and approximately ten weeks to three months for the 1986 and 1987 surgeries. (Id. at 14.) Dr. Kobold gave a similar estimate for the normal healing period but commented, "It doesn't seem that Carl ever healed it very well." (Id. at 39.) Ultimately he testified, "I don't know if he ever completely healed the thing or not." (Id. at 42.) He noted, however, that there has been no evidence of a hernia since 1987.

30. Based on Dr. Shaw's testimony, on January 24, 1994, CIGNA agreed to pay claimant eight months of temporary total disability benefits. (Ex. 10 at 16.) That amount had been paid by the time of trial. (Tr. at 24.)

31. Dr. Shaw gave claimant an impairment rating of twenty-five (25%) percent of the whole person based on the inguinal hernia. (Shaw Dep. at 19.)

32. At the time of trial, counsel for CIGNA represented to the Court that CIGNA had agreed to pay an additional six (6) months of temporary total disability benefits "for purposes of

retraining" and five hundred (500) weeks of permanent partial disability benefits, including amounts due for the impairment rating. The check for the balance due had not been tendered at that time, but claimant's post-trial briefs indicate that payment was made shortly after trial. According to CIGNA's counsel the five hundred (500) weeks of benefits was being tendered "under a reservation of rights." (Tr. at 22.) However, in further colloquy with the Court, CIGNA's counsel indicated that the "reservation of rights" was only a reservation of the defenses CIGNA is asserting with respect to claimant's request for permanent total disability benefits or further temporary total disability benefits; the payment was without other strings attached and without further recourse against claimant. (Tr. at 22-25, 74.)

CONCLUSIONS OF LAW

1. The statutes in effect on the date of injury must be applied in determining benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 321, 730 P.2d 380 (1986). Claimant suffered an industrial injury on July 15, 1981. Thus, the 1979 law applies.⁽⁴⁾
2. Claimant is seeking a permanent total disability award pursuant to section 39-71-116(13), MCA (1979), which defines permanent total disability as follows:

(13) "Permanent total disability" means a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market.
3. Claimant has the burden of establishing his entitlement to permanent total disability benefits. ***Metzger v. Chemetron Corp.***, 212 Mont. 351, 355, 687 P.2d 1033 (1984). He has the burden of "showing that the work injury rather than other causes resulted in his disability." ***Snyder v. Anaconda Co.***, 231 Mont. 198, 203, 757 P.2d 740 (1988).
4. Claimant has failed to carry his burden of proof. A preponderance of credible evidence establishes that as of December 15, 1981, claimant was permanently totally disabled by a pre-existing heart condition that was not work-related. The heart condition preceded claimant's industrial injury and the permanent disability was the result of a natural progression of that condition. It does not appear that claimant ever returned to full duties after his August 1980 heart attack. During the short periods he did return to work he had difficulty performing his job. Ultimately, he could not perform his job at all, even though he had successfully recovered from his hernia operation. While claimant's left inguinal hernia subsequently occurred, he was already permanently disabled.

The Court is also not persuaded that the hernia would have recurred absent the totally disabling heart condition. The heart condition, and the inactivity it caused, increased claimant's risk of recurrence.

As a result of his heart attack claimant sustained a "total loss of wages" and had no "reasonable prospect of employment of any kind in the normal labor market." Thus, claimant had nothing else to lose on account of his industrial accident. He does not meet the criteria for permanent total disability and is therefore not entitled to permanent total disability benefits.

5. For the same reasons expressed in the previous conclusion of law, claimant has also failed to prove entitlement to any further temporary total disability benefits. Temporary total disability is defined as "a condition resulting from an injury as defined in this chapter that *results in total loss of wages* and exists until the injured worker is as far restored as the permanent character of the injuries will permit." § 39-71-116 (19), MCA (1979). Claimant reached maximum healing with respect to his initial hernia in October 1981. Dr. Kobold's testimony that claimant had reached one hundred (100 %) percent improvement when released to return to work in October of 1981 firmly establishes that fact. Although claimant suffered a later recurrence, the recurrence does not change that fact. By the time of the later recurrence claimant had no wages because he was totally disabled on account of his preexisting heart condition.

Even if claimant is deemed *not* to have reached maximum healing following his initial hernia, he most certainly reached maximum healing within three months after his final surgery in 1987. While claimant continues to suffer pain in the left inguinal area, he has suffered no recurrence of a hernia. His condition has been static in the last seven years. Dr. Shaw's testimony that maximum healing should have been achieved within three months following that surgery was unrebutted. Thus, his alleged entitlement to temporary total disability benefits would in any event have ended in 1987.

6. Claimant argues that he is entitled to a continuation of temporary total disability benefits because CIGNA did not comply with the requirements set forth in ***Coles v. Seven Eleven Stores, WCC No. 2000, decided November 20, 1984, aff'd 217 Mont. 343, 704 P.2d 1048*** (1985). The ***Coles*** criteria were formally embraced by the Supreme Court in ***Wood v. Consolidated Freightways, Inc., 248 Mont. 26, 30, 808 P.2d 502*** (1991); *accord* ***Ness v. Anaconda Minerals, 257 Mont. 335, 339-40, 849 P.2d 1021*** (1993); and govern a termination of temporary total disability benefits. The prerequisites to termination are:

"(1) a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit;

"(2) a physician's determination of the claimant's physical restrictions resulting from an industrial accident;

"(3) a physician's determination, based on his knowledge of the claimant's former employment duties, *that he can return to work, with or without restrictions, on the job on*

which he was injured or another job for which he is fitted by age, education, work experience, and physical condition;

"(4) notice to the claimant of receipt of the report attached to a copy of the report."

Wood, 248 Mont. at 30 (*italics in original*). In this case the **Coles** criteria were met in October 1981 when Dr. Kobold determined claimant to be one hundred (100 %) percent and released him to return to work without restrictions. Claimant was aware of the release and in fact returned to work. Moreover, the **Coles** criteria are clearly intended to apply to cases where the claimant has **not** in fact returned to work. Where there is a return to work, as in this case, there is no longer a "total loss of wages" and temporary total disability status ends. Thus, claimant's temporary total disability benefits were properly terminated in 1981.

Claimant argument that **Coles** applies because he again became temporarily totally disabled at a later date is unpersuasive. **Coles** applies only where the claimant is receiving benefits. Since temporary total disability benefits were properly terminated in 1981 and never reinstated, **Coles** is inapplicable.

7. CIGNA argues that the claims made in this case are barred by the doctrine of laches. In light of the Court's determination that claimant is not entitled to further benefits, the issue is not addressed.

8. Since claimant has not prevailed, claimant is not entitled to attorney fees and costs, or to a penalty, with respect to his claim for permanent total and temporary total disability benefits. Claimant also is not entitled to either attorney fees or a penalty with respect to the permanent partial disability benefits paid after trial because claimant's Petition for Hearing did not request the Court to adjudicate any entitlement to permanent partial disability benefits. Claimant's Petition for Hearing requested temporary and permanent *total* disability benefits. The specific disability issue phrased in the pretrial order was, "2. Whether Petitioner has been temporarily/permanently totally disabled since his last day of work on December 15, 1981."

9. It is unnecessary to address CIGNA's contention concerning claimant's residual labor market.

JUDGMENT

1. Claimant is not entitled to further compensation benefits.
2. Claimant is not entitled to attorney fees, costs or a penalty.
3. The JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 19th day of October, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Ms. Sara Sexe

1. The 1981 legislature amended the Workers' Compensation Act via chapters 21, 47 and 90 of the 1981 Montana Laws. None of the chapters contained an effective date. Therefore, the amendments took effect on October 1, 1981. § 1-2-201 (1)(a), MCA.