

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 28

WCC No. 9712-7883

TOBY McADAM

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE

COMPANY OF PITTSBURGH

Respondent/Insurer for

SYSCO FOODS OF MONTANA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, who has a history of chronic low back pain, suffered injury involving left knee, neck, and back. TTD was paid, along with medical benefits. Approximately five months after the injury, claimant was found at maximum medical healing and given a 0% impairment rating relating to any new injuries. A doctor who had treated claimant pre-injury noted a 5% impairment for the chronic low back condition, but stated this condition was the same as before the injury. Claimant demanded PPD benefits, additional testing and treatment, and further TTD benefits.

Held: Under section 39-71-703, MCA (1995), claimant was not entitled to PPD benefits where he did not prove an impairment rating "more than zero." The low back condition was a chronic condition not permanently aggravated by the work injury. No doctor has recommended additional treatment; one doctor specifically noted claimant has been "adequately treated." Petition dismissed.

Topics:

Benefits: Permanent Partial Benefits: Generally. Under section 39-71- 703, MCA (1995), claimant was not entitled to PPD benefits where he did not prove an impairment rating "more than zero." Although claimant had a 5% impairment from a chronic low back condition, that condition pre-existed the injury.

¶1 The trial in this matter was held on Tuesday, March 10, 1998, in Helena, Montana. Petitioner, Toby C. McAdam (claimant), was present and represented himself. Respondent, National Union Fire Insurance Company of Pittsburgh (National), was represented by Mr. Kelly M. Wills.

¶2 Exhibits: Exhibits 1 through 4, as attached to the deposition of Dr. Thomas L. Schumann, were admitted without objection.

¶3 Witnesses and Depositions: The depositions of Thomas L. Schumann, M.D. and claimant were submitted to the Court for its consideration. No witnesses testified, rather the parties agreed that the matter is to be submitted for decision based on the depositions and exhibits. Mr. McAdam and Mr. Wills presented oral argument and the matter was then deemed submitted.

¶4 Issues: The issues as set forth in the Pretrial Order are as follows:

1. Whether Petitioner has a permanent impairment rating as a result of the injury he sustained to his cervical and upper upper [sic] thoracic regions of the body pursuant to § 39-71-703 (1) (b), M.C.A. (1995).
2. Whether Petitioner is entitled to any permanent partial disability [PPD] benefits as a result of the industrial injury pursuant to § 39-71-703, M.C.A. (1995).
3. Whether Petitioner suffered a permanent injury to his low back as a result of the June 1, 1997 industrial accident.
4. Whether Respondent should be required to authorize and pay for either a second opinion, MRI or CT scan to further assess the injury Petitioner sustained to the cervical and upper thoracic region of his body pursuant to § 39-71-704, M.C.A. (1995), and temporary total disability [TTD] benefits during the period such a second opinion, MRI or CT scan can be completed.
5. Whether Petitioner actually suffered a carpal tunnel syndrome as a result of the June 6, [sic] 1997 industrial accident.

* * * * *

¶5 Having considered the Pretrial Order, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant has a history of chronic lower back pain. (Uncontested Fact ¶ 3.) He has had back pain at least since a 1980 industrial injury he suffered in North Dakota.

¶7 Dr. Schumann treated claimant on or about February 27, 1995, and diagnosed him with chronic low-back pain, with worse pain in the area of the sacroiliac joint. Work limitations

were placed on claimant as follows: no lifting over 25 to 50 pounds; no repetitive bending or twisting of back; and permission to change posture regularly. A report by Dr. Singer on or about March 14, 1995, concurred with the findings of Dr. Schumann. (Uncontested Fact ¶ 5.)

¶8 In April 1997, a physician's assistant (PA) working for Dr. Schumann conducted a pre-employment physical of claimant prior to his going to work for SYSCO Food Services of Montana (SYSCO). The PA did not place any physical restrictions on claimant, and claimant went to work for SYSCO as a laborer.

¶9 On June 1, 1997, claimant suffered an industrial injury arising out of and in the course of his employment with SYSCO, an employer enrolled under Compensation Plan No. II of the Montana Workers' Compensation Act and insured by National. Liability was accepted by National for injuries sustained by claimant to his left knee, upper back and neck. Claimant's lower back was also injured. Claimant suffers chronic low-back pain. (Uncontested Fact ¶1.)

¶10 Temporary total disability benefits were paid to claimant following his industrial injury. Thereafter, claimant returned to work with SYSCO in a light-duty position and was paid temporary partial disability benefits. Medical benefits have been paid for the treatment related to the industrial injury, except for the carpal tunnel that was diagnosed during the course of treatment. Insurer timely denied liability for the carpal tunnel condition. (Uncontested Fact ¶2.)

¶11 Claimant did state, while being treated for the upper thoracic and cervical injury, that he has always had low-back pain and he could not attribute additional low-back pain to the June 1, 1997 injury, since the low-back pain had been chronic for years. The only pain that claimant experienced in the back that he had not experienced prior to the injury of June 1, 1997, was the pain in the upper thoracic and cervical region and the radiation of it into the upper right arm. (Uncontested Fact ¶4.)

¶12 On or about October 22, 1997, claimant was found to be at maximum healing by his treating physician, Thomas L. Schumann, M.D. At that time Dr. Schumann gave claimant an impairment rating of 0% of the whole person based on the Fourth Edition of the AMA Guides. (Uncontested Fact ¶6.) In other words, there is no impairment rating.

¶13 Claimant has demanded payment of permanent partial disability (PPD) benefits. However, based on the 0% impairment rating. National denied claimant's demand for PPD benefits pursuant to section 39-71-701(1), MCA (1995). (Uncontested Fact ¶7.)

¶14 The Court has carefully reviewed Dr. Schumann's deposition and the exhibits attached. The exhibits include job analyses, correspondence, Dr. Schumann's medical records, and medical records of Drs. Singer, Cahill and Peterson.

¶15 Dr. Schumann did give a 5% impairment rating with respect to claimant's low back. However, that rating was wholly attributed to claimant's condition prior to his industrial accident at SYSCO. (Schumann Dep. at 10-11.) Dr. Schumann found that claimant's low-back condition in 1997, following the SYSCO accident was the same as he observed in 1995. (*Id.* at 9.) Moreover, he found no objective evidence of any low-back injury following the June 1, 1997 incident.

¶16 While claimant believes he is suffering a tumor of his thoracic or cervical spine, or a disk injury at those levels (Ex. 1, Schumann Office note of January 6, 1998), none of the doctors who examined him found any evidence of any neurological problem. At the present time, no doctor has recommended any further testing or evaluation of claimant. On January 23, 1998, Dr. Singer specifically noted that claimant has been "adequately treated."

¶17 Dr. Dale M. Peterson, a neurologist, examined claimant at Dr. Schumann's request. He did motor conduction studies of claimant's right arm and concluded that the "findings are in keeping with a right median neuropathy involving motor and sensory fibers." However, the doctor expressed uncertainty concerning the relationship of the condition to claimant's industrial accident and wrote that he "suspected [it is] something that has been in the background." (Ex. 1 - 7/30/97 Progress Report of Dr. Peterson.)

¶18 While there is medical evidence that claimant is suffering from mild carpal tunnel syndrome, no physician related that condition to claimant's June 1, 1997 industrial accident. Dr. Peterson felt that the condition existed prior to June 1, 1997. (Ex. 1, Peterson note of July 30, 1997.) Dr. Cahill held the same opinion. (Ex. 1, Cahill note of September 26, 1997.) Dr. Schumann, the only doctor to testify stated that in his medical opinion the carpal tunnel condition is **not** related to claimant's industrial injury. (Schumann Dep. at 30.)

CONCLUSIONS OF LAW

I

¶19 The 1995 version of the Workers' Compensation Act applies in this case as it is the law which was in effect at the time of claimant's June 1, 1997 industrial injury. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II

¶20 Claimant must prove his entitlement to benefits by a preponderance of the evidence. *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

¶21 Claimant's request for permanent partial disability benefits (issues 1 and 2) is governed by sections 39-71-703 and -116(22), MCA (1995). Section 39-71-703(1)(b)

provides that a worker is entitled to permanent partial disability benefits only if he or she has an actual wage loss as a result of the injury and an impairment rating that "is established by objective medical findings" and "is more than zero."⁽¹⁾ Section 39-71-116(22), which defines permanent impairment, also requires a permanent impairment established by objective medical findings.⁽²⁾

¶22 Claimant is not entitled to permanent partial disability benefits because he has failed to present evidence that he suffered any impairment as a result of his June 1, 1997 industrial injury. With respect to claimant's upper back and neck, there was no impairment rating and no objective findings upon which to base an impairment rating. The 5% impairment rating assigned by Dr. Schumann for claimant's lower back is unrelated to claimant's June 1, 1997 injury. He rendered the rating after claimant informed Dr. Schumann that North Dakota workers' compensation had given him a zero rating for a 1980 industrial injury and asked Dr. Schumann for his rating with regard to that injury. (Ex. 1, Schumann note of November 6, 1997.) Dr. Schumann provided the 5% impairment rating with respect to claimant's low-back condition based on preexisting factors and not on any injury he suffered on June 1, 1997. He noted in his deposition that claimant's low-back symptoms were the same before and after the 1997 injury.

IV

¶23 The answer to claimant's request that the Court find he suffered a permanent injury of his low back (issue 3) is the same answer as given for his request for permanent partial disability benefits. As set out in the foregoing paragraph, the medical testimony fails to support the existence of any permanent injury. The 5% impairment rating preexisted the 1997 injury and is unrelated to it. He is not entitled to benefits on account of his low-back condition.

V

¶24 Claimant has also failed to carry his burden of proof with respect to his request for an additional medical evaluation respecting his cervical and thoracic region. He is not a medical doctor. He cannot prescribe medical tests for himself. While he may genuinely believe that he is suffering from a herniated disk or tumor in that area, the doctors have found no evidence supporting that belief or warranting further testing. Since claimant's request for reinstatement of temporary total disability benefits is associated with his request for further evaluation, that request must also be denied.

VI

¶25 Claimant failed to carry his burden of proof with respect to his carpal tunnel claim. Dr. Schumann provided an unequivocal opinion that it is not related the industrial accident. His opinion was supported by statements in both Dr. Cahill's and Dr. Peterson's medical records.

JUDGMENT

¶26 1. The claimant is not entitled to permanent partial disability benefits, temporary total disability benefits or further medical testing and evaluation with respect to his cervical and thoracic areas.

¶27 2. Claimant's June 1, 1997 industrial injury did not cause any permanent injury to his back.

¶28 3. Claimant's carpal tunnel syndrome is not related to his June 1, 1997 industrial injury.

¶29 4. The petition in this matter is **dismissed with prejudice**.

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

¶31 6. 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 23rd day of March, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Toby C. McAdam - Certified Mail

Mr. Kelly M. Wills

Date Submitted: March 10, 1998

APPENDIX A

39-71-703. Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (4) by 350 weeks.

(4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;

(b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;

(c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%. Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 5%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 3%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 2%.

(6) The weekly benefit rate for permanent partial disability is $66 \frac{2}{3}\%$ of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(7) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(8) If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable under this section must be calculated based on the wages that the worker earns or would be qualified to earn following the completion of the rehabilitation plan.

(9) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

1. See Appendix A for the full text of section 39-71-703(1), MCA (1995).

2. 39-71-116(22) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:

(a) has a permanent impairment established by objective medical findings;

(b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and

(c) has an actual wage loss as a result of the injury.