IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 43

WCC No. 9805-7981

HARRY L. McGEE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

STATE OF MONTANA DEPARTMENT OF TRANSPORTATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 52-year old employee of Department of Transportation settled all claims mid-trial except whether his depression was related to the industrial injury and whether insurer acted unreasonably. Evidence from several psychologists and a psychiatrist suggested claimant had significant psychological disturbances pre-injury, but suffered depression following his injury when he was no longer able to cope "by working hard to 'work off' his aggravations."

Held: Even if claimant's depression was pre-existing to some extent, it was materially and permanently aggravated by his injury. As such, it is compensable. Insurer did not act unreasonably in failing to settle prior to commencement of trial where record contained evidence suggesting claimant was not PTD.

Topics:

> **Medical Conditions: Depression.** Evidence from several psychologists and a psychiatrist suggested claimant had significant psychological disturbances pre-injury, but suffered depression following his injury when he was no longer able to cope "by working hard to 'work off' his aggravations." WCC held that even if claimant's depression was pre-existing to some extent, it was materially and permanently aggravated by his injury and was thus compensable.

¶1 The trial in this matter was held on January 25, 26, and February 8, 1999, in Helena, Montana. Petitioner, Harry L. McGee (claimant), was present and represented by Mr. James

G. Hunt and Mr. William Dean Blackaby. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. G. Andrew Adamek. A transcript of the trial has not been prepared.

¶2 Exhibits: Exhibits 1 through 8 and 10 through 30 were admitted without objection. Exhibit 31 was admitted for demonstrative purposes only. Exhibit 9 was withdrawn.

¶3 Witnesses and Depositions: Claimant, Dr. Richard Emery, Michael Buckley, Carie Hester, and Will Selser were sworn and testified. The parties agreed that the Court may also consider the depositions of Harry L. McGee and Dr. Allen M. Weinert, Jr.

¶4 Issue Presented: On the third day of trial the parties announced that a settlement had been reached. The terms of the settlement were thereafter presented to the Court by a Consent Decree, which was approved on March 17, 1999. The Decree resolves all issues before the Court except whether the claimant's depression is related to his September 9, 1991 industrial injury, and whether the insurer unreasonably denied benefits. The Court now addresses the remaining issues.

¶5 Having considered the Final 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 was 52 years old at the time of trial. He is a single parent and he resides with his 12-year old daughter in Marysville, Montana.

¶7 Claimant suffered a work-related injury to his left knee on September 9, 1991, while working for the Department of Transportation (DOT). Claimant has undergone surgery on his knee but still suffers significant knee pain. He also suffers low-back pain, which is attributable to his knee injury and his resulting gait. Since all issues pertaining to claimant's physical condition have been resolved, no further discussion regarding the nature of his physical injuries is necessary.

¶8 Claimant returned to work for DOT in a sedentary position and worked approximately two and a half months. However, he failed to complete even a four-hour shift due to his pain behavior and ceased working for DOT on August 31, 1992. He also worked for a little over two years managing the Marysville landfill. (Uncontested Fact No. 6.) His job there did not exceed twenty hours a week. (Trial Test.)

¶9 Claimant contends he is suffering depression on account of his industrial injury and is therefore entitled to medical benefits to treat his depression. The State Fund disagrees, arguing that all of claimant's psychological problems, including any depression, pre-date his injury.

¶10 The evidence presented at hearing, and through depositions and exhibits shows that the claimant had significant psychological disorders antedating his 1991 injury. Pre-injury disorders include Post Traumatic Stress Syndrome (PTSD), apparently a consequence of his military service in Vietnam; alcoholism; a possible personality disorder, as evidenced by uncontrolled anger and difficulty in developing relationships with other people; and possible attention-deficit hyperactivity disorder (ADHD). (*See* Emery Test.; Exs. 15, 17, 19, and 20.)

¶11 Following his completion of high school, claimant entered the Army. (Ex. 15. at 4.) After six months he transferred to the Navy. He completed two twelve-month tours of duty in Vietnam. (*Id*.)

¶12 Claimant testified that he had some adjustment problems when he returned from the war. In the several years following his separation from service, he was involved in a number of fights and said he was an alcoholic. He acknowledged being charged with several misdemeanor assaults and DUIs. He also related that he had been married five or six times; he was unsure of the exact number. He described himself as a loner who has always had difficulties maintaining personal relationships.

¶13 Starting in the late 1970s, claimant asserted better control over his life. He earned a mechanic's certificate from the Helena Vo-tech in 1978, and an Associate's Degree in Mining from the University of Wyoming in 1985. He quit drinking and stopped fighting.

¶14 Prior to his employment at the DOT, claimant worked in a wide variety of jobs which were primarily labor intensive. His work history reflects frequent job changes and he had significant periods of unemployment. Claimant began working for the DOT in 1988 and worked there continuously until his injury in 1991.

¶15 Claimant testified, and his medical history reflects, that he did not seek any psychological counseling or treatment until after his work injury.

¶16 In June of 1993, claimant began treating with Dr. Allen M. Weinert for his chronic low-back pain. (Dr. Weinert Dep. Ex. 1 at 1.) In addition to chronic mechanical low-back pain, Dr. Weinert diagnosed both depression and symptom amplification. (*Id*. at 3.) After a visit in October of 1993, Dr. Weinert prescribed Prozac for depression. (*Id*. at 9.)

¶17 Dr. Weinert opined that claimant's psychological symptoms were multifactorial. First, he felt that claimant suffered from PTSD as a consequence of the Vietnam War. Second, that he was suffering depression on account of his chronic back pain and vocational displacement. (Dr. Weinert Dep., Vol. 1 at 11-12.) Dr. Weinert testified that it was his opinion that as of June 23, 1994, there was nothing further that could be done for the claimant from a physical standpoint. (*Id*. at 43.) However, he felt additional treatment was necessary from a psychological standpoint.

¶18 Dr. Weinert expressed his opinion to a State Fund claims adjuster in 1995. He wrote that while he suspected that claimant's psychological state was never entirely normal following the war, it was his observation that his psychological condition was more severe following his 1991 injury. (Dr. Weinert Dep. Ex. 1 at 51.) He reaffirmed this opinion in his deposition testimony. (Dr. Weinert Dep., Vol. 1 at 72-74.)

¶19 Since his 1991 industrial injury the claimant has been psychologically evaluated by Ph.D. psychologists Gregory Burns, Mary Kay Bogumill, Martin Cheatle, Mark Mozer, and Michael J. McLaughlin. He has been treated by Ph.D. psychologist Richard Emery. Finally, he has been seen by psychiatrist Terry L. Lanes, M.D., with respect to his PTSD and depression.

¶20 Drs. Burns and Bogumill (Dr. Burns) evaluated claimant on August 2, 1993, at Dr. Weinert's request. (Ex. 15 at 1.) Pursuant to a Beck Depression Inventory administered at that time, claimant scored in the moderate range of self-reported, depressive symptomatology. Dr. Burns also reviewed a Minnesota Multiphasic Personality Inventory-2 (MMPI-2) that claimant had completed in Great Falls, finding high scale scores consistent with a classic 'conversion V' profile common among patients with chronic pain. (Ex. 15 at 6.) Among the high scores were ones suggesting underlying anger, interpersonal anxiety, discontent, and confusion.

¶21 Dr. Cheatle saw claimant in 1994. He found claimant to be suffering from long-standing, unresolved psychological disorders and barriers, as well as from significant depression. (Ex. 19.) With respect to anxiety and depression, Dr. Cheatle noted:

> The patient presented as predominantly depressed and anxious, and his examination revealed numerous neurovegetative signs of depression including a 15 lb. weight gain over the past 3-4 months, constipation, sleep disturbance with recurrent nightmares, increased sense of helpless-ness/hopelessness, decreased libido, and difficulties with concentration and attention.

(*Id*. at 11.) His overall clinical impression was:

> 1. Chronic pain syndrome;
>
> 2. Persistent musculoskeletal lumbar spinal pain without evidence of radiculopathy, with documented degenerative disc disease; complicated by depression, anxiety, and unresolved PTSD;
>
> 3. Major depression;
>
> 4. Anxiety disorder;
>
> 5. Probable mild to moderate PTSD;
>
> 6. Deconditioning.

(*Id*. at 13.) Further commenting, Dr. Cheatle said:

> The patient has numerous complicating psychological factors including depression, severe anxiety, probable mild to moderate PTSD, and possible mild ADHD. Given the relatively benign findings on his MRIs, bone scan, and EMG, theoretically, he should have substantially improved with the rehabilitation efforts provided to him. Although the patient's long-standing difficulties with PTSD, anxiety, and poor impulse control are unrelated to his work injury, they are clearly greatly contributing factors and probably account for his poor response to treatment.

(*Id*.)

¶22 Dr. Lanes, the psychiatrist who saw claimant at Dr. Cheatle's request, gave major depression and PTSD as his primary diagnoses. (Ex. 17.) Commenting on his findings, he said:

> He has signs and symptoms characteristic of major depression as well as post traumatic stress disorder related to his combat experience in Vietnam. Of note is the fact that he has not turned to substance abuse to manage his signs and symptoms. His overall coping and adjustment to his physical disability has been made more difficult at this time by signs and symptoms of post traumatic stress disorder and depression. **He has coped in the past by working hard to "work off" his aggravations.**

(*Id*. at 7.) The last, bolded sentence, is significant to the resolution of the issue presented herein.

¶23 Dr. Mozer, who did a social security disability evaluation in 1997, concluded that claimant "may have some antisocial personality difficulties and has depression develope [sic] and an apparent exacerbated PTSD since his industrial accident, about five years ago."

¶24 Dr. Emery, who treated claimant on a weekly basis between July 1994 and March 1995, opined that claimant's depressive disorder preexisted his work injury but was significantly and permanently aggravated by his 1991 injury. Dr. Emery stated that while there may be an overlap of symptoms between claimant's depression and his PTSD, that his depression was not a symptom of PTSD.

¶25 In an April 1995 letter, Dr. Emery wrote that claimant was unable to work. (Ex. 10 at 8.) He attributed claimant's inability to work to his depression, PTSD, and chronic pain condition; he further stated that claimant's condition had not returned to preinjury status and would "exist into the foreseeable future." (*Id.*)

¶26 Dr. Emery did not see claimant again until September of 1998. He testified that it was his understanding that claimant ceased treatment between 1995 and 1998 because workers' compensation was no longer covering the costs of treatment. He reaffirmed his

1995 diagnoses. He also noted that claimant reported he was drinking again. Dr. Emery testified that claimant told him he was drinking gin to medicate himself. He opined that claimant needs continued psychological treatment.

¶27 Claimant testified that when his medications were cut off in the summer of 1998, he began to drink again on account of his anxiety. The State Fund later resumed payment for claimant's medication and at trial he testified that he had not drank since December 15, 1998. Claimant feels for the most part that he has control over his emotions. He is not receiving counseling because he cannot afford to pay for it. (Trial Test.)

¶28 The psychological records and testimony persuade me that while claimant suffered significant psychological disturbances prior to his injury, he now suffers from depression which, even if preexisting, was materially and permanently aggravated by his injury. I note that prior to his work injury, claimant was able to hold regular employment and had not previously sought psychological evaluation or treatment. In the words of Dr. Lanes, whatever claimant's pre-morbid psychological problems, "**He has coped in the past by working hard to "work off" his aggravations.**" (Ex. 17 at 7.)

¶29 Claimant has presented insufficient evidence that the State Fund has acted unreasonably in denying that his depression is related to his injury. Claimant testified that the State Fund initially paid for psychotropic drugs but cut off payments for those medications in the summer of 1998, then resumed paying for them. He has not presented evidence concerning the dates of the cutoff, what exactly was denied, or the reasons for the denial. There is conflicting evidence whether anything more than psychotropic medications is appropriate to treat his depression and other psychological disorders. While Dr. Emery, the psychologist providing psychotherapy, testified that psychotherapy is needed, the psychiatrist who examined and treated claimant recommended psychotropic drugs and that claimant seek further evaluation of his PTSD at a veterans' hospital. He did not recommend psychotherapy or counseling for depression. (Ex. 17.) Dr. Cheatle's note of August 18, 1994, also indicated that claimant was resistive to treatment:

> We discussed the potential for him to improve with further rehabilitation and his comment was "I'm as good as I'm going to get". The patient was not interested in further treatment, and I believe that an attempt at more rehabilitation would not be efficacious.

(Ex. 19 at 3.) Claimant also stopped seeing another counselor, Carol Jenkins, who was treating him for PTSD because the counselor only wanted to talk about Vietnam.

¶30 Claimant has also failed to persuade me that the State Fund unreasonably denied his request for PTD benefits. The Court notes that the Consent Decree does not provide for such benefits. Moreover, there is substantial evidence that the claimant is capable of working. Claimant was in fact employed for over two years managing the Marysville landfill,

even while doing some metal work on the side. He was hired in early January 1996 and resigned effective mid-April 1998. (Ex. 1.) While he worked only 20 hours a week, he satisfactorily performed his duties. (*Id*.) His March 26, 1998 resignation letter states that he was resigning because of physical difficulty in doing the job, but his statement is suspect. He had last seen his treating physician, Dr. Weinert on February 5, 1998. Dr. Weinert's office note indicates improvement over a previous visit on January 15, 1998, during which claimant had related "off and on flare-ups." (Weinert Dep. Ex. 1 at 63-66.) Claimant's next visit to Dr. Weinert was on August 6, 1998, more than four months after his resignation letter. (*Id*. at 68.) In neither the January 15 or February 5, 1998 visit to Dr. Weinert did claimant voice specific complaints about his work. (*Id*. at 63-66.)

¶31 During his trial testimony, claimant also indicated that he was dissatisfied with his job because of its low status, essentially he was a "garbage man." His testimony, as well as his reports to Dr. Emery, show that he distained working for or with others and wished to devote his time to a metal sculpture business he was doing on the side. His negative attitude is further illustrated by his reply to a question upon cross-examination as to why he had not applied for other jobs, to which he replied, "Why should I." I am persuaded that claimant quit his job at the Marysville landfill more on account of his attitude than any physical problem. The State Fund was certainly justified in questioning his motives for quitting and in arguing that he can work.

¶32 There is also some question as to claimant's earnings in his metal sculpture business. Unfortunately, he did not keep good records so it is difficult to determine his net earnings, if any. His own testimony establishes that he had sales. His poor recordkeeping shifts the burden back to him to show that his business expenses exceeded his sales, thus leaving him with no earnings.

CONCLUSIONS OF LAW

¶33 The 1991 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 September 9, 1991 injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶34 Claimant has the burden of proving, by a preponderance of the probative, credible evidence, that his depression is related to his industrial injury. *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).

¶35 Mental conditions caused by stress are not compensable under the Workers' Compensation Act. § 39-71-119(3), MCA (1993); *Stratemeyer v. Lincoln County*, 259 Mont. 147, 855 P.2d 506 (1993). In *Yarborough v. Montana Municipal Insurance Authority*, WCC No. 9505-7309, Findings of Fact, Conclusions of Law and Judgment (June 28, 1996), *aff'd*. 282 Mont. 475, 483, 938 P.2d 679, 684 (1997), this Court found that a firefighter's PTSD was

not compensable where it was caused by the mental shock of an explosion and was unrelated to minor burns he suffered on his face.

¶36 However, this Court has also held that where a psychological condition is caused or aggravated by **physical injuries** suffered in an industrial accident, the statutory exclusion is inapplicable and the psychological condition is compensable. In *Mark Allen Peterson v. State Compensation Ins. Fund,* WCC No. 9312-6970, Findings of Fact, Conclusions of Law and Judgment (November 23, 1994) at 10-11, I wrote:

> In 1987 the Montana Legislature amended the definition of injury to exclude mental conditions "arising from: (a) emotional or mental stress; or (b) a non physical stimulus or activity." Section 39-71-119, MCA (1987). The exclusion was in effect on the date of claimant's injury. Claimant alleges, however, that he suffers from a disabling psychological condition that arises from, or was aggravated by, the physical injuries he suffered on January 22, 1990.
>
> Under pre-1987 law, a psychological condition caused or aggravated by a work-related physical injury was compensable. In *O'Neil v. Industrial Accident Board, 107 Mont. 176, 183, 81 P.2d 688 (1938),* the Supreme Court held that "neurosis resulting from a physical injury suffered in an industrial accident is compensable." In *Schumacher v. Empire Steel Manufacturing, 175 Mont. 411, 574 P.2d 987 (1977)*, it held that there was coverage for psychological conditions aggravated by work-related physical injuries. In *McMahon v. Anaconda Company, 208 Mont. 482, 486, 678 P.2d 661 (1984)*, the Court, citing *Schumacher,* said, "This Court has held that psychological disability stemming from a work-related injury is compensable under the Workers' Compensation Act." In *O'Neil* the claimant suffered a physical injury to his back. After his healing period ended he continued to suffer pain, but his physicians could find no physical cause for the pain and attributed it to post-traumatic psychoneurosis. In *Schumacher* the claimant suffered physical injuries to his neck, shoulder and arm. The injuries healed but claimant continued to suffer pain. Finding no physical basis for his continued pain, claimant's physicians attributed it to hypochondriacal neurosis. In each of the Supreme Court cases the psychological condition was a direct consequence of a compensable physical injury.

The 1987 amendment of the injury definition does not exclude mental conditions caused or aggravated by physical injuries which otherwise meet the injury definition. The pre-1987 cases therefore control the decision in this case.

¶37 In this case, I have found credible, persuasive medical evidence that claimant's depression was caused, or at least materially and permanently aggravated, by his September 9, 1991 injury. Therefore, his depression is a compensable condition.

¶38 The findings of fact and conclusions of law in this decision are limited to the sole issue of whether the claimant's depression is related to his injury. The Court has not been asked to determine, and has not determined, what, if any, additional medical benefits are due as a result of the determination, or what, if any, further treatment is necessary.

¶39 Attorney's fees and a penalty may be awarded only if the insurer's conduct is unreasonable. §§ 39-71-611, -612 and -2907, MCA (1991). Since I have determined as a matter of fact that the claimant has failed to carry his burden of showing unreasonableness, his request for attorney's fees and a penalty must be, and is, denied. He is, however, entitled to his costs since he has prevailed in this action.

JUDGMENT

¶40 1. The Consent Decree previously approved by the Court on March 17, 1999, is incorporated as a part of this final judgment

¶41 2. Claimant's depression is related to his industrial injury and is a compensable medical condition. The claimant has not requested the Court to determine what benefits are due with respect to his condition, and the evidence in any event fails to show that he is being denied appropriate medical care for the condition.

¶42 3. Because claimant prevailed, he is entitled to his costs in an amount to be determined pursuant to the Court's rules.

¶43 4. Claimant is not entitled to his attorney's fees or a penalty since he failed to carry his burden of proving that the insurer acted unreasonably.

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

¶45 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 22nd day of July, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Hunt
Mr. William Dean Blackaby
Mr. G. Andrew Adamek
Date Submitted: March 17, 1999