

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 40

WCC No. 9609-7614

ELVINA MOLDENHAUER

Petitioner

vs.

LUMBERMENS MUTUAL

Respondent/Insurer for

BUTTREY FOOD & DRUG

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: After suffering knee injury at work, 47-year old food store transportation clerk demanded permanent partial disability benefits for loss of labor activity. Evidence showed her job included the following activities: moving banker's boxes, some weighing more than fifty pounds, approximately six to eight times a year; lifting copy paper boxes weighing over fifty pounds three or four times a year; and lifting a 100-120 pound mail cart approximately once a week, with another person. Claimant's vocational expert testified the term "occasionally" means "up to one-third" of the time; respondent's vocational expert testified he considered activity taking less than six percent of work time to be defined as "rarely," but acknowledged that most people in the field consider "occasionally" to mean from 0 to 33 percent of work time. WCC found claimant quit her job due to conflict with a coworker and performed the same duties post-injury, with the exception of moving the mail cart.

Held: Section 39-71-703(3)(d), MCA (1993), provides an increase in permanent partial disability benefits if "a worker, at the time injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity." Section 39-71-703(6)(a), MCA (1993), in turn defines "heavy labor activity" as "the ability to lift over 50 pounds occasionally or up to 50 pounds frequently." Problematically, "occasionally" is not defined in the WCA. Considering the context in which the word is used, the WCC concluded the "occasionally" must be construed as understood by vocational professionals. While testimony on that question diverges in this and other WCC cases, the evidence in this case is that "occasional" includes activity taking between 0 and 33% of the worker's time.

Because claimant lifted some items over 50 pounds, it must be concluded that she performed heavy labor pre-injury. Her demand is denied, however, where the WCC finds she also performed heavy labor after her injury.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-703(3)(d), MCA (1993). 47-year old food store transportation clerk with knee injury demanded permanent partial disability benefits for loss of labor activity. Evidence showed her job included: moving banker's boxes, some weighing more than fifty pounds, approximately six to eight times a year; lifting copy paper boxes weighing over fifty pounds three or four times a year; and lifting a 100-120 pound mail cart approximately once a week, with another person. Section 39-71-703(3)(d), MCA (1993), provides an increase in permanent partial disability benefits if "a worker, at the time injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity." Section 39-71-703(6)(a), MCA (1993), in turn defines "heavy labor activity" as "the ability to lift over 50 pounds occasionally or up to 50 pounds frequently." Problematically, "occasionally" is not defined in the WCA. Considering the context in which the word is used, the WCC concluded the "occasionally" must be construed as understood by vocational professionals. While testimony on that question diverges in this and other WCC cases, the evidence in this case is that "occasional" includes activity taking between 0 and 33% of the worker's time. Because claimant lifted some items over 50 pounds, it must be concluded that she performed heavy labor pre-injury. Her demand is denied, however, where the WCC finds she also performed heavy labor after her injury.

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Benefits: Permanent Partial: Labor Capacity. 47-year old food store transportation clerk with knee injury demanded permanent partial disability benefits for loss of labor activity. Evidence showed her job included: moving banker's boxes, some weighing more than fifty pounds, approximately six to eight times a year; lifting copy paper boxes weighing over fifty pounds three or four times a year; and lifting a 100-120 pound mail cart approximately once a week, with another person. Section 39-71-703(3)(d), MCA (1993), provides an increase in permanent partial disability benefits if "a worker, at the time injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity." Section 39-71-703(6)(a), MCA (1993), in turn defines "heavy labor activity" as "the ability to lift over 50 pounds occasionally or up to 50 pounds frequently." Problematically, "occasionally" is not defined in the WCA. Considering the context in which the word is used, the WCC concluded the "occasionally" must be construed as understood by vocational professionals. While testimony on that question diverges in this and other WCC cases, the evidence in this case is that "occasional" includes activity taking between 0 and 33% of the worker's time. Because claimant lifted some items over 50 pounds, it must be concluded that she performed heavy labor pre-injury. Her demand is denied, however, where the WCC finds she also performed heavy labor after her injury.

The trial in this matter was held on February 21, 1997, in Great Falls, Montana. Petitioner, Elvina Moldenhauer (claimant), was present and represented by Mr. Thomas J. Murphy. Respondent, Lumbermens Mutual (Lumbermens), was represented by Mr. Thomas A. Marra. No transcript of the trial has been prepared.

Exhibits: Exhibits 1 through 8 were admitted without objection.

Witnesses and Depositions: Claimant, Michelle Rowe, Margie Gardipee, David Axtman, Bruce Jeffrey, and Rita Mee-Sauke were sworn and testified. In addition the parties submitted depositions of claimant, Rita Mee-Sauke, Michelle Rowe, and David Axtman to the Court for its consideration.

Issues Presented: Claimant seeks a determination that she is entitled to 15% permanent partial disability benefits for loss of labor activity. She also seeks attorney fees and costs.

Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 47 years old and resides in Great Falls, Montana. She has an associate degree in Business Administration from Montana State University, Northern.
2. Claimant began working for Buttrey Food and Drug (Buttrey) in November of 1992. In February 1994 she became a transportation clerk in Buttrey's transportation department. The transportation department oversees a fleet of semitrailer trucks that delivers products to Buttrey stores in Montana, North Dakota, and Wyoming.

[Numbered incorrectly.]

9. On December 14, 1994, claimant was injured in the course and scope of her employment with Buttrey. She was going down a flight of stairs when her left knee gave out.

10. At the time of claimant's injury, Buttrey was insured by Lumbermens. Lumbermens accepted liability for her claim and paid temporary total wage-loss and medical benefits. (Pre-trial Order at 2.)

11. Dr. Paul M. Melvin diagnosed claimant with an anterior cruciate ligament deficient knee. (Ex. 7 at 1.) Dr. Gregory S. Tierney performed anterior cruciate ligament reconstruction and partial medial meniscectomy on January 26, 1995. (*Id.*) Post-operatively, Dr. Tierney restricted Elvina to working in the medium-labor activity category. (Ex. 1 at 1 and 4.)

12. Dr. Tierney rendered a 1% impairment for claimant's left knee (*Id.* at 2.) Lumbermens paid the 1% impairment award. (Claimant's Proposed Findings of Fact and Conclusions of Law at 3.)

13. Shortly after her surgery, claimant returned to her time-of-injury job. She continued working for Buttrey until November 1996, when she quit on account of friction between herself and a co-employee, Rita Mee-Sauke. She so testified on direct examination and I found that testimony credible.

14. The present case involves a dispute under section 39-71-703(3)(d), MCA (1993), which provides:

(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, 20%; 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, 15%; 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, 10%. . . .

Claimant contends that prior to her injury she was performing heavy labor and that after her injury she was performing medium labor, thereby entitling her to a 15% award.

15. As a transportation clerk, claimant entered data from truck trip sheets and maintenance records into a computer. After entering the information, claimant filed the written documents in a banker's box kept under her desk. Often there were two banker's boxes under the desk, one stacked on top of the other. If claimant had to retrieve information from the bottom box, she had to lift off the top box.

16. Full banker's boxes were stored in a storage trailer. Approximately six to eight times a year, claimant had to retrieve one of the stored boxes. Dave Axtman (Axtman), claimant's supervisor, generally lifted the boxes for her, but on occasion claimant lifted boxes by herself. Some of the banker's boxes weighed in excess of 50 pounds. Claimant continued to lift the banker's boxes after returning to work following her injury.

17. Claimant stocked copy paper for the copy machine three or four times a year. This task required her to lift boxes of copy paper onto and off of a cart. The boxes were labeled as weighing fifty pounds. Michelle Rowe (Rowe), a vocational consultant hired by claimant, weighed one box of copy paper and found it to be fifty and one-half pounds. Claimant continued to stock the copy paper after her injury.

18. Claimant moved her computer equipment three or four times in the course of her employment with the Buttrey transportation department. However, she failed to show that the computer equipment weighed more than 50 pounds.

19. Claimant also took mail to the coupon desk. The mail was transported in a cart. Claimant had to take the mail cart up a set of five or six steps of stairs. While a co-employee, Rita Mee-Sauke (Mee-Sauke), and claimant's supervisor testified that a ramp could have been used rather than the stairs, use of the ramp would have required an indirect route through the warehouse. The ramp was in fact never used. Indeed, both Axtman and Mee-Sauke testified that they requested claimant to help them take the mail cart up the stairs.

20. The mail cart weighed between 100 and 120 pounds. Generally, two people carried it up the stairs. Thus, the weight carried by claimant was up to 60 pounds.

21. Prior to her injury, claimant took the mail to the coupon desk only once a week, on a Wednesday or Thursday. After her injury claimant no longer assisted in carrying the mail cart up the stairs.

22. Relying on the Dictionary of Occupational Titles, Rowe testified that "occasionally" means "up to one-third of time."

23. Bruce Jeffrey (Jeffrey), a certified rehabilitation counselor hired by Lumbermens, testified that he defines "occasional" as six to thirty-three percent. Less than six percent is "rarely." However, Jeffrey testified that Rowe's definition of occasionally as encompassing zero to thirty-three percent is "used a lot" in the vocational field. When questioned by the Court as to whether there is a recognized standard for "occasional," Jeffrey replied:

See, I don't - more than not, they probably use the 0 to 33. But I am not sure that there is a written standard per se by the Department of Labor or anybody else. But I seen [sic] the 0 to 33 more than anything. I have also seen 0 to 20. Like I say, we use the 0 to 6. I am seeing the rarely come more and more often now than I have before.

(Trial Test.)

CONCLUSIONS OF LAW

1. Claimant's entitlement to benefits is governed by the 1993 version of the Montana Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).
2. Claimant has the burden of proving that she is entitled to workers' compensation benefits by a preponderance of the probative, credible 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).
3. The 1993 Workers' Compensation Act provides for permanent partial disability benefits in section 39-71-703, MCA. As pertains to the issue in this case, the section provides:

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.

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

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American [M]edical [A]ssociation Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

....

(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, 20%; 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, 15%; 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, 10%. . . .

Heavy-labor activity is defined as "the ability to lift over 50 pounds occasionally or up to 50 pounds frequently." § 39-71-703(6)(a), MCA (1993).

"Occasionally" is not defined in the Workers' Compensation Action and that lack of a statutory definition presents a dilemma for the Court. The Random House Unabridged Electronic Dictionary © 1966-1994 defines occasionally as: "at times; from time to time; now and then." Using the dictionary definition, the word can be construed as meaning anything occurring even one time. The dictionary defines "rarely" as "1. on rare occasions; infrequently; seldom. 2. exceptionally; in an unusual degree. 3. unusually or remarkably well; excellent." *Id.* In a comparative analysis, "occasional" must mean more than "rare." But arguably, by failing to refer to "rare" or "rarely," the legislature intended to use "occasionally" in its broadest sense, thus encompassing labor activities which occur even once.

In resolving the dilemma, I must consider the context in which the terms are used. "Occasional" is a term used by vocational professionals in analyzing and classifying jobs. In the context of job duties, and workers' compensation issues, it is a technical term. Therefore, it must be construed in accordance with section 1-2-106, MCA, which states:

Construction of words and phrases. Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law or are defined in chapter 1, part 2, as amended, are to be construed according to such peculiar and appropriate meaning or definition.

Therefore the word must be construed as it is commonly understood by vocational professionals.

In *Church v. Travelers Indemnity Co. of Ill.*, WCC No. 9702-7698 (May 27, 1997), a certified rehabilitation counselor testified that occasionally means up to 20% of the workday and that "rarely," a term also used by vocational professionals, encompasses up to 2% of the workday. *Id.* at 6. In that case the testimony established a "rare" labor category as distinguished from "occasional." "Occasional" was defined as 2% to 20%, "rare" less than 2%. In this case, the evidence is different. Rowe testified that "occasionally" includes *any amount* up to 33%. Although Jeffrey offered testimony concerning "rare," he testified that

the occasional definition employed by Rowe is "used a lot" and that he has seen that definition used in the vocational rehabilitation field "more than anything." Thus, the evidence presented in this case establishes that "occasional" means anything more than zero and up to 30%.

The divergent testimony in this and the Church cases illustrates the folly of leaving critical words undefined. A court must render decisions based upon the facts presented in the particular case. It ordinarily cannot glean facts from other cases it may have heard. Perhaps the term occasional is so widely accepted among vocational professionals that I might take judicial notice of such definition, Rule 201, Mont. R. Evid., but neither party has directed my attention to material which would allow judicial notice. Therefore, I must conclude that claimant performed heavy labor prior to her injury. My conclusion is based on the facts, as found, that she occasionally lifted banker's boxes and copy paper weighing in excess of 50 pounds and that in helping carry the mail cart up the stairs she also lifted in excess of 50 pounds. While Lumbermens argues that claimant's lifting duties should be defined by her job description, the statute refers to duties the claimant was "performing." What claimant was actually lifting is the measure of her loss, at least where the activity is not prohibited by the employer.

However, to prevail, claimant must prove that after her injury she can no longer perform heavy labor. It is with respect to this element that claimant's case fails. Following her injury, she performed all of her previous laboring activities with the exception of helping carry the mail cart up the stairs. She did so for a year and a half. Among those activities was lifting banker's boxes and copy paper which weighed in excess of 50 pounds. When she quit her job, she did so because of what she perceived as harassment from Mee-Sauke. She did not quit because of difficulty in lifting banker's boxes and copy paper. Section 39-71-703, MCA (1993), does not distinguish between heavy labor activities. Since claimant continued to perform some heavy labor after her injury, she is not entitled to benefits under section 39-71-703(3)(d), MCA (1993).

JUDGMENT

1. Claimant is not entitled to further permanent partial disability benefits.
2. Claimant is not entitled to attorney fees or costs.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
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 23rd day of June, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas J. Murphy

Mr. Thomas A. Marra

Date Submitted: February 21, 1997