

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 11

WCC No. 9301-6685

GARY R. MOTICHKA

Appellant

vs.

PLUM CREEK TIMBER COMPANY

Respondent/Employer.

DECISION AND ORDER ON APPEAL

Appellant (claimant) appeals from **Findings Of Fact; Conclusions of Law; Order** entered by Stan Gerke, a hearing examiner for the Montana Department of Labor and Industry (DLI) on January 4, 1993. The decision determines that claimant suffers from an occupational disease as defined in section 39-72-102(10), MCA, and attributes 30 percent of claimant's disability to occupational factors and 70 percent to non-occupational factors. Having considered the grounds advanced by claimant, the decision is affirmed.

Factual Background

Claimant worked for Plum Creek Timber Company (Plum Creek) from July 13, 1971 until January 2, 1991 (Dep. of Claimant at 37, 86.) During that time he held the following jobs:

Green Chain Offbearer 1971-1972

Cleanup 1972-1973

Spreaders 1973-1982

Hyster Operator 1982-1988

Saw/sander Operator 1988-1991

(Tr. at 25-27.)

On January 2, 1980 claimant injured his back while at work. (Tr. at 28-29.) Plum Creek accepted the injury as compensable under the Workers' Compensation Act, Title 39, Chapter 71, MCA. Claimant was treated by Dr. Covill, who diagnosed the injury as lumbosacral strain (Exhibit No. C at 20) and noted in his "Attending Physician First Report" that it would not result in any permanent injury (Exhibit No. C at 21). Claimant was also

treated one time by a chiropractor, who also noted that the injury would not result in any permanent disability. (Burton Dep. Exhibit No. 3.)

Since the spring of 1983 or 1984, the claimant has also worked in a ranching operation he owns with his brother. (Dep. of claimant at 21.) The operation primarily involves growing and harvesting hay. Claimant estimated that on a yearly basis he has devoted 90 percent of his work hours to his job at Plum Creek and 10 percent to his haying operations. (Tr. at 36.)

After his January 2, 1980 injury, claimant did not report any further injuries to his back as a result of his employment at Plum Creek. However, he did suffer several injuries or aggravations to his back as a result of incidents occurring at home or during the haying operations. On March 25, 1985, claimant injured his back at home and had to take time off from his employment. (Hembd Dep. Ex. No. 1.) He was treated by chiropractor Wayne Jacobsmeyer and Dr. James Laidlaw. A CT scan on January 29, 1985 revealed a slightly bulging disc at L5-S1. (Laidlaw Dep. at 15 and Dep. Ex. No. 2 at 4.) Thereafter, claimant was treated by Dr. Jacobsmeyer for several back injuries or exacerbations sustained at home or in the ranch operations. (Jacobsmeyer Dep. at 6 and Dep. Exhibit No. 1.)

On December 31, 1990, claimant experienced an onset of low back pain while bending over to pick up a tool while performing maintenance work on some hay farming equipment. This was the last in a series of ranch and home-related incidents. Although claimant attempted to continue working for Plum Creek he was unable to do so. (Tr. at 43-44.)

When asked for an opinion apportioning claimant's disability between his occupational and non-occupational employment, Dr. Jacobsmeyer initially demurred. When pressed by claimant's attorney, who asked the doctor to assume he had a "gun to his head", Dr. Jacobsmeyer said his "wild guess", which he then qualified as a "tough guess", would be 70-30 percent, 80-20 percent, or 75-25 percent occupational versus non-occupational. (Jacobsmeyer Dep. at 11-14.) Dr. Jacobsmeyer testified that he was not aware of what claimant's physical duties were at his job. Jacobsmeyer is not a member of the Occupational Disease Panel for the State of Montana. (Id. at 15, 27.)

Dr. James Laidlaw, an orthopedic surgeon who treated claimant, declined to render any opinion apportioning claimant's disability. He did not feel that he had the information necessary to render an opinion. (Laidlaw Dep. at 12.)

Dr. James Burton, an orthopedic surgeon who regularly serves on the Occupational Disease Medical Panel of Montana, was selected to examine claimant pursuant to section 39-72-602(2)(a), MCA. Dr. Burton's initial opinion, based on his examination of claimant and the information claimant provided to him, was that claimant's disability was 100 percent occupationally related. (Burton Dep. at 10 and Dep. Exhibit No. 2.) However, according to Dr. Burton, he was not told of the home and ranch-related incidents which occurred after 1982. Subsequent to Dr. Burton's initial opinion, the attorneys for both

parties provided the doctor with additional information concerning claimant's history of back complaints. They also provided additional medical records and descriptions of claimant's jobs at Plum Creek. Dr. Burton re-evaluated claimant and concluded there was no direct causal connection between his employment at Plum Creek and his current disability (Burton Dep., Exhibit 5.) Claimant's attorney requested him to reconsider. Ultimately, Dr. Burton concluded that claimant did suffer from an occupational disease, and apportioned 30 percent of his disability to occupational related factors and 70 percent to non-occupational factors. (Burton Dep. at 24 and Dep. Exhibit No. 6.)

Based on Dr. Burton's first report, the DLI issued an order of determination concluding that claimant suffered an occupational disease and was entitled to benefits under the Occupational Disease Act. Plum Creek requested a hearing.

A hearing was held before a DLI hearing examiner on April 29, 1992, and FINDINGS OF FACT; CONCLUSIONS OF LAW; ORDER were issued on January 4, 1993. The hearing examiner found that claimant suffers from an occupational disease, and attributed 30 percent of claimant's disability to occupational factors and 70 percent to non-occupational factors.

Record On Appeal

On January 28, 1993, the claimant filed a NOTICE OF APPEAL with this Court. The record on appeal consists of the DLI file, including a transcript of the hearing and transcripts of depositions, the exhibits and the hearing examiner's decision.

Grounds For Appeal

Claimant's NOTICE OF APPEAL does not list any grounds for appeal. However, in subsequent briefs submitted in support of his appeal, the claimant states that the Department's determination was made upon "unlawful procedure, was affected by error of law, and was arbitrary and capricious." Claimant also states that the examiner's apportionment of his disability was erroneous. The issues presented have been rephrased as follows:

- 1) Whether the DLI erred in considering subsequent letters and opinions of Dr. Burton regarding claimant's condition.
- 2) Whether the apportionment of claimant's disability was arbitrary and capricious or otherwise erroneous.
- 3) Whether the findings erroneously characterized the claimant's back complaints occurring outside of work as injuries.

Standard Of Review

The standards for judicial review of the decision below are set forth in section 39-72-612 (2), MCA, which provides in relevant part:

(2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. The judge, after a hearing held pursuant to 39-71-2903 and 39-71-2904, shall make a final determination concerning the claimant's claim. The judge may overrule the department only on the basis that the department's determination is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Decision

1. Dr. Burton's Subsequent Opinions.

Dr. Burton was selected to examine claimant pursuant to section 39-72-602(2)(a), MCA, which provides:

- (a) The department shall direct the claimant to a member of the medical panel for an examination. The panel member shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. The panel member shall submit a report of his findings to the department.

The section further provides that within 20 days after the receipt of the report by the first panel member, either the claimant or insurer may request an examination by a second panel member.

Dr. Burton's first report, dated October 9, 1991, found that claimant suffered from a 100 percent work-related disease. Dr. Burton based his report upon his examination of claimant and the history claimant related to him. Plum Creek apparently felt that Dr. Burton had not been given complete or accurate information regarding claimant's various injuries and his jobs. The attorneys for both parties agreed to provide the doctor with information. After receiving additional information, Dr. Burton wrote a letter to Plum Creek, dated November 14, 1991 stating that "[a]t this point there appears to be no direct causal

connection between the conditions under which he worked at Plum Creek and the degenerative disc disease." (Burton Dep. Exhibit No. 5.) Dr. Burton was subsequently contacted by claimant's attorney, who asked him to reevaluate the case. (Burton Dep. at 22.) The doctor did so and issued his final opinion, dated January 2, 1992, apportioning disability as 30 percent occupationally related, giving claimant "the benefit of the doubt." (Burton Dep. at 27.)

On appeal the claimant objects to the hearing examiner's consideration of Dr. Burton's second and third reports, contending that the first report was the only report allowable by statute. The argument ignores claimant's own participation in obtaining the subsequent reports. The record below indicates that claimant agreed that the parties could provide Dr. Burton additional information. Moreover, during the deposition the claimant agreed to the admission of the reports. (Burton Dep. at 15, 17 and 24.) At no point in the DLI proceeding did claimant object to the reports or to Dr. Burton's testimony. An issue cannot be raised for the first time on appeal. ***Bengala v. Conservative Savings Bank***, 250 Mont. 101, 108, 818 P.2d 371 (1991); ***Keller v. Dooling***, 248 Mont. 535, 540, 813 P.2d 437 (1991). A lower tribunal will not be held in error for a procedure to which appellant acquiesced at trial and to which he has not timely objected. ***See Martinez v. Montana Power Co.***, 239 Mont. 281, 779 P.2d 917 (1989). Claimant's contention is belated and cannot be considered.

Claimant next contends that he was prejudiced by the subsequent reports because section 39-72-602(b), MCA, allows a request for an examination by a second panel member to be made within 20 days of receipt of the first panel member's report. He claims that he was denied this opportunity because he relied on Dr. Burton's first report and allowed the 20 day time period to elapse prior to receiving the second and third reports. As with his first argument, claimant is precluded from raising this issue because he failed to raise it at the DLI hearing. Dr. Burton's subsequent reports also had the effect of rescinding his prior ones. Thus, the 20 day period for requesting a second examination was not triggered until Dr. Burton issued his final report.

Claimant also alleges error because the letter written to Dr. Burton by Plum Creek "did not relate the entire history of 41 chiropractic visits. The seven visits enumerated in F.F. 13 only constitute some 17% of visits." (Petitioner's Brief at 5.) However, claimant had the opportunity, in his correspondence to Dr. Burton and during Dr. Burton's deposition to supply the doctor with the omitted information.

Finally, claimant argues that Plum Creek's letter to Dr. Burton unfairly narrowed Dr. Burton's focus to a single job in claimant's career, the position of sander/saw operator. However, claimant had the opportunity to inform Dr. Burton of the other positions he worked while at Plum Creek. In fact the claimant's attorney did so in a letter to Dr. Burton. (Burton Dep. Ex. No. 4.) Claimant also had the opportunity to fully explore and impeach Dr. Burton's opinions during his deposition.

2. Apportionment.

Claimant argues that the hearing examiner's apportionment was erroneous both as a matter of fact and as a matter of law. He asserts that his disability should be apportioned 90 percent to his occupation.

The argument is on its face disingenuous in light of the request by claimant's counsel at hearing that the hearing examiner "split the baby so to speak and arrive at about a 50-50 figure." (Tr. at 14.) However, claimant has since changed counsel.

Claimant argues that his disability should be apportioned based on the strenuousness of his activities, and that the examiner's apportionment was erroneous in light of the relatively short haying season, claimant's minimal physical involvement in that the haying operation, and his constant employment at heavy physical labor at Plum Creek. He argues that his disability should have been apportioned based on the strenuousness of his work, a method which he contends Dr. Laidlaw supported. Although Dr. Laidlaw did testify that the strenuousness of claimant's activities was one factor to consider, he also testified that other factors must be considered, including what claimant was doing at the time of each flare up of his back condition. Dr. Laidlaw agreed with the testimony of other medical experts that repeated trauma can contribute to degenerative disc disease. (Laidlaw Dep. at 11-12, 26.) He refused to apportion claimant's disability. (Laidlaw Dep. at 12.) Other testimony tended to prove that claimant's home and ranch activities were at times strenuous and that claimant suffered a number of aggravations to his back condition as a result of his home and ranch work. Claimant's medical records show that he suffered flare ups while lifting bales of hay, falling out of a hay wagon, lifting a snow blade, moving a wheelbarrow load of dirt and doing other ranch work. The records also undermine claimant's contention that his ranch work was seasonal, showing that he was hurt in non-work related incidents in February, May, July, August, October and December.

Additionally, there was evidence that claimant's work at the mill subsequent to 1982 was less strenuous than at the time of his 1980 injury. As a sander/saw operator claimant primarily worked a control panel, where he either sat or stood.

The hearing examiner's findings of facts must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." **State Compensation Mutual Ins. Fund v. Lee Rost Logging**, 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA). On the other hand:

If there is substantial credible evidence in the record, the findings are not "clearly erroneous." . . . If the record contains support for the factual determinations made by the agency, the courts may not weigh the evidence. They are bound by the findings of the agency.

City of Billings v. Billings Firefighters Local No. 521, 200 Mont. 421, 651 P.2d 627, 632 (1982).

Dr. Burton's testimony provided substantial credible evidence for apportioning claimant's disability as 30 percent related to occupational factors. Dr. Burton is an orthopedic physician and 75 percent of his practice consists of treating low back problems. He is a frequent member of the Occupational Disease Medical Panel. He examined claimant and he comprehensively reviewed claimant's medical and work histories. Dr. Laidlaw declined to give an opinion. Chiropractor Jacobsmeyer, who rendered opinions apportioning claimant's disability between 75 percent and 90 percent occupationally related, does not serve on the Occupational Disease Medical Panel, was not aware of claimant's physical duties at Plum Creek, and gave an opinion apportioning disability only after claimant's attorney figuratively put a gun to his head. (Jacobsmeyer Dep. at 11.) Even then he characterized his opinion on a "wild guess" or a "tough guess." (*Id.* at 14.) All three medical witnesses also supported the view that repeated trauma contributed to claimant's condition, lending credence to apportioning the lion's share of disability to home in light of the greater number of home incidents.

Even reviewing the medical depositions de novo, **see Stangler v. Anderson Meyers**, 229 Mont. 251, 255, 746 P.2d 99 ("[w]here crucial testimony is taken by deposition, the court will examine findings more closely, as it is in as good a position as the lower court to assess such evidence), this Court cannot say that it would have reached any different conclusion than did the hearing examiner. The hearing examiner's finding that claimant's disability is 30 percent related to his occupation is not clearly erroneous and is supported by substantial evidence.

Claimant's contention that the apportionment is erroneous as a matter of law similarly fails. An agency's conclusions of law will be upheld if the agency's interpretation of the law is correct. **State Pers. Div. v. Bd. of Pers. Appeals**, 255 Mont. 507, 511, 844 P.2d 68 (1992). The examiner's conclusion of law regarding apportionment of claimant's disability is supported by the record, as discussed above, and logically follows the findings of fact. Section 39-72-706(1), provides:

Aggravation. (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death.

The examiner found that claimant's disability was related 30 percent to work activities and 70 percent to non-work activities. He correctly applied the facts in this case to the law in determining the conclusions of law.

3. Characterization Of The Non-work Related Incidents.

Claimant alleges error in the hearing examiner's characterization of his non-work related incidents of back pain as injuries. (Finding Of Fact No. 12.) He claims that in each of the incidents he was performing activities that a person with a normal back could perform and that it was error to consider the incidents as "injuries". Irrespective of the label used, the record is clear that a number of non-work related incidents triggered low-back flare-ups. In his notes, Dr. Jacobsmeyer described incidents in such terms as: "New injury. Fell off bale wagon at home;" "L.B. pain exacerbated by wheel-barrowing dirt and planting;" and "L.B. pain exacerbated by working in his hay field." (Jacobsmeyer Dep. Ex. No. 1.) Plum Creek also documented an incident in 1985 where "Gary asked if he could go home at 3:00 a.m. He said he hurt his back at home". (Hembd Dep. Ex. No. 1.) That such incidents occurred during "normal activities" does not preclude them from being deemed either injuries or aggravations of a preexisting condition. There is substantial evidence to characterize the incidents as traumatic ones which at least aggravated claimant's low back condition. They were properly considered in apportioning claimant's disability.

4. Claimant's Petition For Workers' Compensation Benefits.

This case involves judicial review of the DLI decision. The Court expresses no opinion concerning a separate petition filed by claimant in which he seeks additional workers' compensation benefits based on his 1980 back injury.

ORDER

The January 4, 1993 Decision of the Montana Department of Labor and Industry is **affirmed**.

DATED in Helena, Montana, this 14th day of February, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Dean K. Knapton
Mr. Kelly M. Wills