

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 56

WCC No. 2002-0544

RITA MAIER

Petitioner

vs.

HOME INSURANCE COMPANY

Respondent/Insurer.

APPEALED 9/4/03

DISMISSED W/OUT PREJUDICED BASED ON SETTLEMENT AGREEMENT 3/24/04

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered from tendonitis or tenosynovitis after working a couple of days tailing wood from a molder at a wood mill. The job involved repetitive twisting of her arms. She lost several days of work but thereafter worked for fifteen years with one short period of any complaints regarding her arms recorded in 1995 in her medical records. In 2002 she petitioned for permanent partial disability benefits, claiming a loss of earning capacity on account of her 1981 injury.

Held: The claimant has failed to prove that she suffered any permanent harm. She does have a disabling arm condition that is job related but it is unrelated to her 1981 injury and is an occupational disease. The claimant's sole evidence for disability as a result of her 1981 injury was based on her reported self-treatment for many years using splints but the Court found that report incredible and untrue.

Topics:

Benefits: Permanent Partial Benefits. Claimant is not entitled to permanent partial disability benefits where medical evidence relating her disabling arm condition to her industrial injury was predicated entirely on claimant's unsubstantiated report that her condition had never cleared up and she had self-treated for many years. The Court found that report incredible and untrue. The persuasive medical evidence shows that her disabling arm condition is unrelated to her industrial accident and is the product of repetitive motion over many years, thus constituting an occupational disease.

¶1 The trial in this matter was held on August 13, 2002, in Helena, Montana. Petitioner, Rita Maier (claimant), was present and represented by Mr. Rex Palmer. Respondent, Home Insurance Company (Home), was represented by Mr. Steven S. Carey.

¶2 Subsequent to trial the parties agreed to take the deposition of Dr. Michael A. Sousa. That deposition was taken March 19, 2003, and submitted to the Court for consideration on March 27, 2003.

¶3 Exhibits: Exhibits 1 through 21 were admitted without objection. Exhibit 22 was admitted over objection. See footnote 1 regarding Exhibit 23.

¶4 Witnesses and Depositions: Rita Maier, Mark Schwager, Jack McCoy and Dr. John C. Schumpert testified at trial. Depositions of the claimant and Dr. Michael A. Sousa were also submitted for the Court's consideration.

¶5 Issue Presented: The issue in this case is whether the claimant is entitled to permanent partial disability (PPD) benefits with respect to a May 28, 1981 industrial injury. Claimant also seeks attorney fees and costs.

¶6 Having considered the Amended Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 The claimant was employed by Missoula White Pine Sash (White Pine) from 1976 until the company ceased operations in 1996, a period of twenty years. White Pine produced door and window parts and dimensional lumber.

¶8 During her years with White Pine, the claimant performed various jobs, including that of round table work (inspecting and stacking dimensional lumber), trim and feed molder work, and cleat saw operator.

¶9 In May 1981, the claimant was "tailing a molder." Her job was to take two pieces of wood coming out of a molder, inspect them, and stack them. The work was repetitive and involved turning the pieces over so she could inspect both sides. Thus, it involved rotation of her forearms.

¶10 After two or three days of work tailing the molder, the claimant's forearms became swollen and sore. She saw Dr. Allan B. Turner on June 2, 1981. Dr. Turner filed an initial treatment report which contained the claimant's description of events, as follows:

Tailing #1 Moulder in sash, my arms were sore after work. I took Friday off because my left arm was swollen and sore.

(Ex. 12-1.) Dr. Turner diagnosed "Acute tenosynovitis, left forearm" in his report. However, in a "To Whom It May Concern" note written the same day, he described her condition as "tendonitis." (Ex. 12-6.) He certified the claimant as "able to return to work on June 10, 1981." (*Id.*)

¶11 White Pine filled out an Employer's First Report listing a date of injury of May 28, 1981, and describing her condition as tendonitis of the left arm. The report was made on June 5, 1981, after the claimant's visit to Dr. Turner.

¶12 On May 28, 1981, White Pine was insured by Home. Home accepted liability for the injury and paid Dr. Turner's bill, which was \$18. (See Maier Dep. at 35-36.) That is the only medical payment it has made to date on account of the injury.

¶13 The claimant returned to work and continued working at White Pine until 1996.

¶14 Between June 2, 1981 and February 20, 1995, the claimant's medical records contain no mention of any complaints or treatment for any arm condition. (Sousa Dep. at 17-22; see medical records in Exhibit Book.) The first mention of arm or elbow complaints after 1981 was on February 20, 1995, when the claimant saw Dr. Leea M. Pittenger. Among other complaints, claimant reported that she had persistent **right** elbow pain and had "also knocked her lt. [left] elbow." (Ex. 13-6.) Dr. Pittenger diagnosed "Bilat. [Bilateral] elbow problems. Tendinitis on the rt. [right], contusion on the lt. [left]." (*Id.*)

¶15 In a followup visit on February 28, 1995, Dr. Pittenger noted that claimant's "elbows are better. (Ex. 13-5.) In March 1995, "R [right] elbow pain" and "arms & fingers fall asleep" are mentioned in chiropractic records as two of six different complaints reported by claimant. (Ex. 16-1.) The other complaints were constant headache, upper back pain, neck stiffness, and occasional low-back pain. The claimant underwent chiropractic treatments until June 1, 1995.

¶16 Thereafter, there is no further mention of elbow complaints in the claimant's medical records until December 22, 1999, when the claimant saw Dr. Mark C. Paul "for consultation regarding industrial injuries that she suffered in 1981 and 1985." (Ex. 14-7.) The 1981 injury was, of course, the right arm tendonitis or tenosynovitis depending upon which note of Dr. Turner's you rely. The 1985 injury was a back injury.

¶17 Dr. Paul's office note indicates that claimant went with a list of "questions from her attorney" which she provided to the doctor. (Ex. 14-6.) The history Dr. Paul elicited from the claimant was either superficial or his office note inadequate. As to the claimant's elbow he wrote:

She states she has had chronic pain in her elbows, rt. worse than lt. . . . She states she is unable to do any repetitive motion with her arms due to the chronic tendonitis that began when she was working at the mill.

(Ex. 14-7.) On examination he noted, "There is tenderness with rt. lateral epicondyle, milder tenderness with the lt. Good ROM of elbow and no swelling or redness is noted." (*Id.*)

¶18 Following his examination of the claimant, Dr. Paul filled out a "Physician Statement of Condition" which set out a list of questions for him to answer. These are obviously the questions sent by claimant's attorney. With respect to the 1981 injury, he responded that claimant had reached maximum medical improvement in late 1981, advised against her doing repetitive or forceful gripping, and grasping, pushing or pulling with her arms, and opined that "[a]fter injury and before medical stability, Rita should have permanently stopped work with that type of strenuous work . . ." (Ex. 14-4.)

¶19 Dr. Paul did not testify. While he treated the claimant for various medical problems from 1992 to 1999, including back pain, there was no indication or mention that he ever treated claimant for elbow or arm complaints prior to December 22, 1999. There is also no indication that he reviewed her medical records. It appears that he relied solely on the history that claimant provided him, and that appears to be either superficial or he does not report it completely. In any event, in light of my finding concerning the claimant's credibility with respect to her history of arm and elbow problems, I give Dr. Paul's opinions no weight.

¶20 The claimant testified that both her arms swelled in May 1981. She was off work for approximately two weeks and testified that the swelling and soreness in her arms decreased but never went away. She further testified that thereafter she avoided the more demanding jobs at White Pine and self-treated by wearing braces on her wrists. According to the claimant, she obtained the braces from a medical supply company. She testified that she did not return to Dr. Turner in 1981 because she was "busy being a parent."

¶21 I do not believe claimant's testimony about continuing problems after 1981 and I was not impressed by the somewhat corroborating testimony of Jack McCoy, who has "dated" claimant since 1996 and known claimant for twenty years. I find it incredible that the claimant would go to the effort of securing wrist braces after the May 1981 incident but fail to return to Dr. Turner because she was busy being a parent. Her testimony simply does not ring true. I also find it incredible that she would not have reported continuing arm and/or elbow problems to the physicians and chiropractors who treated her thereafter. She suffered numerous maladies, including, periodically, a sore back and headaches, and reported and sought treatment for them.

¶22 Dr. Michael A. Sousa, an orthopedic surgeon whose practice is limited to independent medical examinations (IME), provided the only medical testimony supporting claimant's assertion that she suffered PPD as a result of her 1981 injury. (Sousa Dep. Ex. 1 at 2.) He examined the claimant on December 3, 2002, at the request of claimant's attorney. (Sousa Dep. at 68; Trial Ex. 23.⁽¹⁾) Dr. Sousa's report indicates a diagnosis of both bilateral elbow tendinitis and bilateral epicondylitis. (Ex. 23 at 7.) In his deposition he testified that he

believe[d] this patient [claimant] probably had an overuse syndrome or a tendonitis involving both forearms from the elbow to the wrist area, which had an onset of June of 1981, as per the record of Dr. Turner, and have persisted to this date with some findings present on my examination of 12/3 of 2002, and I feel is probable that the onset of the symptoms are related to the ongoing symptoms which she had through the years and are currently present.

(Sousa Dep. at 8.) In other words he felt that the 1981 incident was the "triggering event" for her current condition.

Q. And as I understand your report, the triggering event was that event in 1981?

A. I believe so, yes, I think it's more probable than not.

(*Id.*)

¶23 However, Dr. Sousa testified that the claimant's condition more resembled an occupational disease than an injury and that her present condition is likely the accumulation of twenty years of repetitive use. (*Id.* at 26.) He conceded that his opinion that the 1981 injury was the triggering event for her current condition was based on the history she gave him concerning her self-treatment with braces over the years. (*Id.* at 30.) He conceded there was no substantiation in the medical records of what the claimant told him. (*Id.* at 28-30.)

¶24 Dr. John C. Schumpert, who specializes in occupational medicine, testified at trial. He conducted an IME at the behest of the insurer.

¶25 Dr. Schumpert examined the claimant and reviewed her medical records. In his physical examination he found evidence of bilateral carpal tunnel syndrome, epicondylitis of both arms, and chronic myofascial pain of the exterior muscles of the forearm. He testified that the claimant's current arm conditions were not caused or precipitated by her 1981 injury and that indeed her current problems are different from those she experienced in 1981. He pointed out that epicondylitis involves the elbow, whereas the claimant's complaints in 1981 were with respect to her forearms.

¶26 Dr. Schumpert did opine that claimant's current arm problems are occupationally related, however, they are the product of years of use rather than any incident in 1981.

¶27 I found Dr. Schumpert's testimony and opinions persuasive. His opinions were reasoned and supported. I therefore find that claimant's current arm condition was not caused or triggered by her 1981 injury and that any disability she suffers with respect to her arms is not the consequence of the 1981 injury.

¶28 Finally, claimant provided testimony by Mark Schwager, a vocational consultant, concerning her loss of earning capacity. However, in reaching his opinions he relied on Dr.

Paul's opinions. As I have found earlier, Dr. Paul's opinions are not entitled to any weight in view of the other evidence in this case.

CONCLUSIONS OF LAW

¶129 This case is governed by the 1979 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶130 Claimant is seeking PPD benefits. At the time of her injury, those benefits were governed by section 39-71-703 and -705, MCA (1979). Section 39-71-703, MCA (1979-81), provides PPD benefits based on "the actual diminution in the worker's earning capacity." Section 39-71-705, MCA (1979-81), provides for indemnity benefits for loss of body members. For either to be applicable there must be a permanent injury which gives rise to the loss.

¶131 The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *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). Included in that burden is the burden of persuading the Court that she suffered permanent physical harm and disability as a result of her 1981 industrial accident.

¶132 The claimant has failed to provide persuasive medical evidence that the injury she suffered in 1981 caused her permanent impairment, harm, or disability. Therefore, she is not entitled to PPD benefits.

¶133 Since the claimant has not prevailed in this action she is entitled to neither costs nor attorney fees.

JUDGMENT

¶134 Claimant is not entitled to PPD benefits. Her petition is **dismissed with prejudice**.

¶135 This JUDGMENT is certified as final for purposes of appeal.

¶136 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 8th day of August, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Rex Palmer

Mr. Steven S. Carey

Submitted: March 27, 2003

1. Trial Exhibit 23 is an IME Report prepared by Dr. Sousa. It was forwarded to the Court post-trial by respondent's attorney. Although it is referenced in Dr. Sousa's deposition it is not attached as an exhibit to the deposition. However, the use of the report in the deposition and the correspondence between the attorneys make it clear they intended it to be an exhibit. In a February 7, 2003 letter to claimant's counsel, a copy which was lodged with the Court, respondent's attorney stipulated to consideration of the report. There was no objection lodged by claimant's attorney, who retained and deposed Dr. Sousa. I have therefore marked it as Exhibit 23 and included it in the trial exhibit notebook.