

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 55

WCC No. 9709-7823

COLIN G. PATERSON

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer

DICK ANDERSON CONSTRUCTION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 47-year old carpenter sought TTD benefits based on 1995 back injury at work. Following a 1996 nonwork back injury, he sought TTD and medical benefits based on the 1995 injury. Insurer argued claimant had reached MMI on the 1995 injury, which it characterized as minor, and that pursuant to section 39-71-407(5), MCA (1993) it was not liable for compensation or medical benefits caused by the subsequent nonwork-related injury.

Held: The 1995 injury was minor. Claimant reached MMI on that injury prior to July 4, 1996, when he permanently aggravated his back condition. The 1996 injury was much more serious than described by claimant, who was not forthright in his testimony. The insurer is not liable for TTD or medical benefits following the 1996 aggravation.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-407(5), MCA (1993). Where claimant reached MMI on a minor back injury prior to suffering a permanent aggravation of his back condition in a nonwork-related incident, section 39-71-407(5), MCA (1993) relieved the insurer of liability for compensation and medical benefits following the nonwork aggravation. [Note: WCC decision affirmed in [*Paterson v. Montana Contractor Compensation Fund*](#), 1999 MT 158.]

Injury and Accident: Aggravation: Generally. Where claimant reached MMI on a minor back injury prior to suffering a permanent aggravation of his back condition in a nonwork-related incident, section 39-71-407(5), MCA (1993) relieved the insurer of liability for compensation and medical benefits following the nonwork aggravation. [Note: WCC decision affirmed in [*Paterson v. Montana Contractor Compensation Fund*](#), 1999 MT 158.]

Injury and Accident: Subsequent Injury. Where claimant reached MMI on a minor back injury prior to suffering a permanent aggravation of his back condition in a nonwork-related incident, section 39-71-407(5), MCA (1993) relieved the insurer of liability for compensation and medical benefits following the nonwork aggravation. [Note: WCC decision affirmed in [*Paterson v. Montana Contractor Compensation Fund*](#), 1999 MT 158.]

Maximum Medical Improvement (MMI). Where claimant reached MMI on a minor back injury prior to suffering a permanent aggravation of his back condition in a nonwork-related incident, section 39-71-407(5), MCA (1993) relieved the insurer of liability for compensation and medical benefits following the nonwork aggravation. [Note: WCC decision affirmed in [*Paterson v. Montana Contractor Compensation Fund*](#), 1999 MT 158.]

¶1 The trial of this matter was held on April 20, 1998, in Great Falls, Montana. Trial was recessed that evening, and reconvened on April 24, 1998. Petitioner, Colin G. Paterson (claimant), was present and represented by Mr. Randall O. Skorheim. The respondent, Montana Contractor Compensation Fund, was represented by Mr. Bradley J. Luck.

¶2 Exhibits: Exhibits 1 through 32 were admitted without objection.

¶3 Witnesses and Depositions: The claimant, Jeff Albrecht, Rodney Lee "Gus" Brown, Jan Anderson, Gary Doerr, Larry Dravecky, Dr. Ronald M. Peterson, Terry Gibson, Pat Laabs, Scott Wilson and Greg Schermele were sworn and testified. The parties also agreed that the depositions of claimant and Jan Anderson could be considered part of the record.

¶4 Issues: As framed by the parties in the Pretrial Order, the issues in this case are:

1. Whether the Petitioner is temporarily, totally disabled as a result of his industrial injury of 4/13/95 and entitled to retroactive and ongoing bi-weekly compensation and payment of medical expenses.
2. Whether the Petitioner attained medical stability at any time prior to his exacerbation of 6/4/96. [sic]

3. Whether the Respondents denial of medical and bi-weekly compensation benefits was unreasonable, entitling Petitioner to a 20% penalty, attorneys fees and cost.

¶15 Having considered the 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

¶16 Claimant is 47 years old and resides in Sun River, Montana. He is married (common-law) to Jan Anderson since sometime in late 1995 or early 1996.

¶17 Claimant is a carpenter. Primarily he has worked as a residential carpenter.

¶18 Claimant has also worked as a full-time professional artist but testified that he lost his creativity following a divorce several years ago, causing him to return to carpentry.

¶19 In March 1995, claimant was hired as a commercial carpenter for Dick Anderson Construction (Anderson). Claimant thereafter worked on commercial construction of the Mountain West Bank (Bank) in Great Falls.

¶110 Commercial carpentry is heavier work than residential carpentry. Testimony at trial established that commercial carpentry is heavy labor and that there are no light or medium- duty commercial carpentry jobs.

¶111 Claimants work on the Bank included carrying and placing steel forms for footings; unloading, setting and securing trusses; hauling and lifting materials; roof framing and sheeting; construction of building entrances; and wall framing.

¶112 On April 13, 1995, claimant suffered a back injury at work when he slipped as he was carrying two steel forms through the Bank building. Claimant did not fall but the slip caused him to twist and jerk in his effort to keep his balance.

¶113 Claimant experienced pain in his left buttocks, the back of his left thigh, and his lower back. He sought treatment from chiropractor Dr. Timothy Six. Dr. Six treated him five times on three separate days, April 13, April 14 and May 25, 1995.

¶114 Claimant did not miss work on account of his back pain. He continued to work for Anderson until he was laid off on April 24, 1995, due to lack of work. The only time claimant missed work during this time was due to sore feet.

¶115 Claimant thereafter did not seek medical care with respect to his back until July 4, 1996, over a year later. On July 4, 1996, claimant planned to work in his backyard. According to claimant, he walked out the back door of his house, bent over to pick up a shovel, and experienced a horrible pain in his back. Later that day he went to Columbus

Convenience Care where he was examined by Dr. Michael H. Terry. Dr. Terry diagnosed "back pain," prescribed an immediate shot of demoral, to be followed by oxycodone percocet every four to six hours, and physical therapy.

¶16 Following the July 4, 1996 incident, claimant continued to experience low-back pain. Subsequently, on November 27, 1996, an MRI disclosed that claimant had a "[m]oderate sized disc extrusion at the 4-5 level centrally causing compression of the thecal sac and creating a focal stenosis of the spinal canal." (Ex. 6.) Claimant has been treated conservatively with physical therapy and epidural steroids. (Exs. 2, 4, 8.) Surgery has been discussed but refused by claimant, at least at present. (Ex. 4.)

¶17 Claimant did not file a written claim for compensation with respect to his injury at Anderson until sometime after the July 4, 1996 incident. While the claim itself is not in evidence, Gary Doerr, the claims adjuster for the insurer testified that the claim was not received until December 3, 1996. The claim was initially denied in writing on December 30, 1996. (Ex. 15.)

¶18 At the time of the April 13, 1995 incident, Anderson was insured by the Montana Contractor Compensation Fund (Insurer). Although the Insurer initially denied the claim (Ex. 15) , it thereafter accepted liability and agreed it was liable for Dr. Six's chiropractic treatments in April and May of 1995, however, it disputed any further liability with respect to the injury and asserted that claimant's subsequent wage loss and medical treatment were the result of a new, subsequent injury or aggravation suffered on July 4, 1996 (Exs. 16, 23, 26).

¶19 Claimant testified that following his April 13, 1995 injury, he continued to have back pain which limited his ability to work. He asserted that his ability to work was severely impaired prior to the July 4, 1996 incident.

¶20 Dr. Ronald Peterson, who specializes in occupational and sports medicine, treated claimant beginning in January 1997. He was the only physician to testify at trial.

¶21 Dr. Peterson opined that the incident of July 4, 1996, permanently aggravated claimant's back condition. (Ex. 2 at 10; Tr. Test.) There is no serious dispute concerning this opinion and the Court adopts it.

¶22 The doctor also opined that, with respect to the April 1995 incident, claimant had not reached maximum medical improvement prior to the July 4, 1996 incident. His opinion involved a retrospective review based on claimant's medical history and claimant's statements regarding his back problems.

¶23 The factual basis for Dr. Peterson's MMI opinion is critical to the ultimate resolution of this case. Dr. Peterson agreed that if certain facts were established, then his opinion would

change and he would then find claimant did in fact reach MMI prior to the July 4, 1996 incident.

¶24 Dr. Peterson agreed that it is reasonable "generally to assume" that if a heavy laborer returns to work following a twisting-type back injury and thereafter works 10, 12, 14 months with no medical intervention, then he reached medical stability. He qualified his agreement by saying, "depending on whether that person is in fear of losing his or her job if they complain." (Tr. Test.) He agreed that workers engaged in heavy labor do not generally return to heavy labor and continue to perform heavy labor without medical intervention unless they have reached medical stability. Finally, he agreed that if claimant had engaged in the sort of work described in a hypothetical question put to him, concerning claimant's repetitive lifting, bending, twisting, overhead activities, and a combination of bending and twisting at the same time, then he reached MMI prior to July 1, 1996 **if** he did not feel his job was in jeopardy and **if** he was aware that medical evaluation and treatment were available to him. Ultimately, Dr. Peterson agreed, subject to the foregoing qualifications, that if claimant performed heavy labor of the sort described in the hypothetical for a period of two to four weeks and was asymptomatic during that period, then he more likely than not had reached maximum healing.

¶25 As should be evident from the summary of Dr. Peterson's testimony, the issue of MMI turns on the Court's determination as to (1) whether the hypothetical facts tendered him at trial are in fact true; (2) whether claimant was in fact deterred from reporting back difficulties on account of fear of losing his job or not obtaining employment; and (3) whether, after his final May 1995 visit with Dr. Six, the claimant was aware that medical care was available to him. Ultimately, these determinations involve the credibility of the claimant and the other witnesses who testified at trial.

¶26 Claimant was the first witness at trial. I did not find him or his supporting witnesses credible.

Claimant's Work Subsequent to April 13, 1995

¶27 Initially, the evidence establishes that claimant continued to seek out and perform carpentry work following his April 13, 1995 injury.

¶28 Claimant took off work early on April 13, 1995. He then returned to work for Anderson and worked until he was laid off on April 24, 1995.

¶29 Claimant was then hired by Rosenbaum Construction (Rosenbaum) in May 1995 and worked there until May 25, 1995.

¶30 On May 29, 1995, claimant went back to work for Anderson and worked for Anderson continuously through late September 1995, when he was again laid off for lack of work. (Ex. 29.)

¶131 On October 10, 1995, claimant was hired by Talcott Construction (Talcott), which employed him until November 30, 1995, when he was laid off for lack of work.

¶132 Talcott reemployed claimant on July 1, 1996. Claimant worked three days prior to the July 4, 1996 aggravation of his back. He did not thereafter return to work for Talcott.

Claimant's Testimony as to Continuing Back Pain

¶133 Claimant testified that even though he continued to work, he suffered from back pain and limited his work to lighter carpentry.

¶134 According to claimant, after April 13, 1995, and continuing until July 4, 1996, he suffered constant back pain, although he had good and bad days.

¶135 According to claimant, his work after April 13, 1995, was light work and boring, consisting of tying rebar together with wire.

¶136 According to claimant, his work at Rosenbaum was light carpentry involving finishing work on the inside of a house, building a deck, and building a custom wall. Nonetheless, his back hurt. He said that his tool belt especially aggravated his pain in the buttocks and thigh and that he removed his tool belt whenever possible.

¶137 According to claimant, his work for Anderson following his reemployment on May 29, 1995, was light framing and did not involve heavy lifting. For approximately eight and a half weeks of his employment he helped set trusses, but his job was to nail the trusses down and involved little lifting. He testified that he did not work on sheeting the roof. He said that he continued to have pain in his back, with good and bad days, and that on some days he took his tool belt off and nailed it to a truss.

¶138 According to claimant, his work for Talcott in the fall of 1995 was mostly layout and the supervision of other carpenters, along with some framing.

¶139 According to claimant, while unemployed during the winter of 1995-96 and the spring of 1996, he continued to experience back pain.

¶140 According to claimant, before going to work for Talcott he told Larry Dravecky (Dravecky), Talcott's superintendent, that his back was bothering him. He testified that he agreed to work for Talcott on the condition that he work only three days a week and on the further condition that he be allowed to have an apprentice, Rodney "Gus" Brown (Brown), help him. Claimant testified that he insisted on those condition because his back was hurting him and he needed help.

¶141 Brown corroborated claimant's testimony. However, Brown is a good friend of the claimant and I did not find his testimony believable.

¶42 Overall, claimant painted a picture of continuing pain and of limiting his work to lighter carpentry. If claimant were telling the truth, then he did not reach MMI and is entitled to benefits.

Testimony Undermining Claimant's Credibility

¶43 Claimant's testimony was undermined in cross-examination and contradicted by numerous witnesses whom the Court found more credible.

¶44 During cross-examination, claimant was confronted with the fact that he had worked on a remodel at the Silver Spur Bar after he was laid off by Talcott in November 1996. He was also confronted with reports that he had helped perfatape and paint a house during the winter and spring of 1996. He admitted those jobs, claimed that he had forgotten about them when previously testifying about his work, and claimed that his work on the house was for a friend and did not amount to much since he had difficulty doing the work.

¶45 Larry Dravecky (Dravecky) testified as to his hiring of claimant on behalf of Talcott in 1996. Dravecky is no longer employed by Talcott.

¶46 Dravecky denied that claimant told him in 1996 that his back was bothering him. He denied that he hired claimant for three days work. He denied that he hired Brown as an apprentice to help claimant. He testified that he hired both claimant and Brown as full-time, journeyman carpenters. Brown was paid journeyman wages. Brown confirmed that he was hired full-time, which is inconsistent with claimant's testimony that Brown was hired as an apprentice or helper. Even though claimant did not work after July 4, 1996, Brown continued to work full-time for Talcott for the remainder of the summer, earning journeyman's wages.

¶47 After hearing claimant's, Brown's and Dravecky's testimony, I reached a firm belief that claimant's and Brown's testimony concerning the work arrangements at Talcott in July 1996 was fabricated and false, and I so find.

¶48 Dravecky also testified that claimant told him he was tired of carpentry and of working for big companies and was more interested in pursuing his painting. The Insurer presented additional evidence concerning claimant's completion of a painting of a bobcat in 1996 and his arrangements for the sale of lithographs of the painting. While the Insurer failed to establish that claimant was successful in the artistic venture, the evidence is consistent with Dravecky's testimony. In any event, I found Dravecky's testimony credible.

¶49 In his own testimony, claimant expressed extreme dislike for commercial carpentry. His dislike for commercial carpentry and his renewed interest in his artwork, explain his lack of diligent effort to find carpentry work during the remaining winter months and the spring of 1996. I am unpersuaded that he failed to seek work on account of back pain.

¶150 The only corroborating evidence offered by claimant concerning continued back pain was through testimony of his common-law wife, Jan Anderson and Jeff Albrecht (Albrecht), who was a superintendent for Anderson.

¶151 I did not find Jan Anderson's testimony convincing. I note that she has been financially supporting the claimant and has an interest in the outcome of this case. More importantly, however, I found her description of claimant's complaints and their effect on her relationship with him unconvincing.

¶152 Albrecht's testimony offered only weak support for claimant's assertion that he had ongoing, significant back pain as a result of his April 1995 injury. He testified that claimant indicated his back bothered him. However, he acknowledged that claimant did not complain any more than other carpenters, particularly carpenters of his age. Albrecht's testimony indicates two things which undermine claimant's testimony. First, it indicates that claimant, contrary to his testimony, did complain about his physical woes and did not conceal them. Second, it indicates that his complaints were typical for workers of his occupation and age. Nothing in Albrecht's testimony indicated that claimant was continuing to suffer from his injury or suffering any greater discomfort than commonly arising from the nature of his work.

¶153 Albrecht's testimony, and that of other witnesses, also contradicted claimant's assertion that after April 13, 1995, he did not engage in heavy labor. Albrecht characterized framing work done by claimant as heavy work. Terry Gibson (Gibson), a working foreman for Anderson, testified that claimant's job involved heavy labor and that claimant performed the same tasks as other workers. He testified that claimant performed strenuous, sometimes heavy labor. Contradicting claimant's testimony, he testified that claimant worked on sheeting the roof, which involved picking up four foot by eight foot sheets of five eighth's inch plywood, carrying and setting them into place, hand nailing them to secure them, then using a nail gun to finally affix them to the trusses. His testimony was corroborated by Scott Watson, a carpenter/laborer employed on the project. Gibson described other strenuous work done by the claimant. He did not hear claimant complain about the work.

¶154 Greg Schermele (Schermele) worked as a superintendent for Anderson. He testified that he observed claimant on a daily basis and that his work involved heavy labor, including the erection of fourteen foot walls, lifting and nailing into place wall sheeting for eight to ten hours a day, and other strenuous work. Schermele was a credible witness.

¶155 Pat Laabs (Laabs) was the general superintendent for the Talcott job on which the claimant worked in the fall of 1995. He contradicted claimant's testimony that his work primarily involved layout and supervision. He did talk to claimant about being a "lead" carpenter, but testified that a lead carpenter does the same work as other carpenters. He testified that claimant's job involved framing, erection of trusses, sheeting of walls, and

other work which was strenuous and heavy. Claimant worked 10-hour days. Laabs testimony was credible and convincing.

¶156 Finally, I am persuaded that claimant was not forthright in his testimony concerning the incident of July 4, 1996. As previously stated, he testified that he merely walked out of his house and bent over to pick up a shovel when he experienced horrible pain in his back. However, the medical note at Columbus Convenience Care, where he sought treatment on July 4, records that he "was digging [sic] at home." (Ex. 4 at 4.) A physical therapy note on the next day recorded that he "was digging in the dirt at home. Bent over and injured LB [lower back]." (Ex. 3 at 2.) Those notes reflect that his activity level at the time of the incident was far greater than he acknowledged in his testimony.

Availability of Medical Care

¶157 Claimant has failed to persuade me that he did not seek medical care after May of 1995 because of the cost or unavailability of care. After going back to work for Anderson at the end of May 1995, he qualified for medical benefits which would have covered his medical care. He had medical insurance coverage from August 1, 1995 through April 1, 1996. Moreover, his obtaining medical care in April and May of 1995, and again seeking Dr. Six's chiropractic care in July of 1996, shows that he sought medical care when he needed it. I am convinced that had claimant experienced the ongoing back pain he claims he suffered after May 1995, he would have sought treatment.

Fear of Losing Employment

¶158 I am also unpersuaded that the claimant was deterred from reporting back pain to his current or prospective employers on account of any fear that he might lose employment or might not be able to obtain employment. Claimant's own testimony provides the most damning evidence against him on this point. According to him, in seeking employment with Talcott in 1996, he reported that he had a back condition which precluded him from full-time work and required a helper to do the heavy labor. Dr. Peterson's concern that he might not have reported his problems on account of employment concerns was unfounded and unsupported.

Resolution

¶159 I find that claimant suffered a minor back injury on April 13, 1995, that he reached maximum medical improvement prior to July 4, 1996, and that the July 4, 1996 incident was a permanent aggravation of his back condition.

CONCLUSIONS OF LAW

I.

¶60 The 1993 version of the Workers' Compensation Act applies in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶61 Section 39-71-407(5), MCA (1993), governs subsequent non-work related aggravations to a work-related injury. It provides:

(5) If a claimant **who has reached maximum healing** suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury. [Emphasis added.]

¶62 Claimant suffered a subsequent nonwork-related injury to his back on July 4, 1996. The question presented to the Court for resolution is whether, at the time of the reinjury, he had reached maximum medical improvement with respect to his April 13, 1995 work-related injury.

¶63 A preponderance of the evidence persuades the Court that claimant in fact reached MMI prior to the July 4, 1996 incident. Under the express and plain terms of the statute, the insurer is not liable for his subsequent medical care or compensation benefits.

III.

¶64 Since claimant has not prevailed in this action, he is not entitled to attorney fees, costs or a penalty. §§ 39-71-611, -612, -2907, MCA.

JUDGMENT

¶65 1. The claimant is not entitled to further medical or compensation benefits. His petition is **dismissed with prejudice**.

¶66 2. The claimant is not entitled to attorney fees, costs or a penalty.

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

¶68 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 22nd day of June, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Randall O. Skorheim

Mr. Bradley J. Luck

Date Submitted: April 24, 1998