IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 105

WCC No. 9312-6970

MARK ALLEN PETERSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HEIGHTS CONOCO

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 25, 1994, in Helena, Montana. Petitioner, Mark Allen Peterson (claimant), was present and represented by Mr. Thomas J. Lynaugh. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Michael P. Heringer. Claimant testified on his own behalf. Exhibits 1 through 14 were admitted by stipulation. The parties agreed that the following depositions may be considered by the Court in reaching its decision: the claimant, Kenneth Lee Craig, Richard Agosto, Ph.D, Dr. James T. Lovitt, M.D. and Joseph K. McElhinny, Ph.D.

Nature of Dispute: The claimant in this matter seeks a determination that he is entitled to reinstatement of temporary total disability benefits on account of his psychological condition.

Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor of the witness, the exhibits, and the deposition testimony, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was thirty-five (35) years old. He has been married for eighteen years and has two children ages fifteen (15) and eighteen (18).

2. Claimant finished the tenth grade in school. He obtained his GED in 1980 or 1981.

3. Claimant began working while in high school. His first job was as a shop boy for a diesel company. Claimant then worked as an orderly at a nursing home prior to his marriage in

1975. Subsequently, he worked as a dishwasher, as an automobile parts runner and then as a warehouse foreman for Tri-State Wood Products.

4. In 1978, while working for Tri-State Wood Products, claimant injured his neck and lower back. The injury was work-related and claimant received workers' compensation benefits.

5. Claimant was off work for approximately five years. (Claimant was unable to provide a precise time frame.) (Peterson Dep. 12-13; Tr. 48.) During those years he completed his GED and studied business management at Billings Vocational Technical School. (Ex. 1 at 2 and 16.)

6. In approximately 1984, claimant went to work for Champion Auto (Champion) as a "partsman." (Peterson Dep. 12; Tr. 36, 48-49.) He was employed by Champion for five years. (*Id.*)

7. Claimant then worked as assistant manager for Heights Conoco for approximately a year. (Peterson Dep. 14; Tr. 50.) His job duties required him to do mechanic work, order parts and take care of pumps at a full service station. He also had minor supervisory duties. (Peterson Dep. at 9-13.) His immediate supervisor at Heights Conoco was Kenneth Craig (Craig), who testified that claimant had a good work ethic and attitude. Craig liked the claimant and trusted him to operate the business. (Craig Dep. at 2-5.)

8. Claimant suffered an industrial injury while working for Heights Conoco on January 22, 1990. The injury occurred as he was reaching up to grab a tire off a three tiered tire rack. A two-by-four brace for the rack slipped. Claimant fell backwards, landing on another tire rack and hitting his back and elbow. (Peterson Dep. at 18; Craig Dep. at 7.)

9. At the time of claimant's 1990 injury, Heights Conoco was insured by the State Compensation Insurance Fund.

10. Claimant gave timely notice of his injury. The State Fund accepted liability for the injury and paid temporary total disability benefits.

11. Claimant was initially treated at St. Vincent Hospital. He was diagnosed as suffering lumbar strain and a right elbow contusion.

12. On February 7, 1990, claimant was examined by Dr. James T. Lovitt, an orthopedic surgeon who had previously treated the claimant with respect to his 1978 low-back injury. Dr. Lovitt diagnosed acute low-back strain, bilateral carpal tunnel syndrome, traumatic tennis elbow and "[p]ossible bladder problems secondary to injury." (Lovitt Dep. Ex. 1.) X-rays and a CT scan revealed degenerative changes from L-3 down. (*Id.* Dep. at 13.) Dr. Lovitt believed the disc disease was preexisting and not related to the January 22, 1990 injury. He further opined that it had not been aggravated by the injury. He testified that claimant's injury appeared to be a back strain and that with rest and an exercise program most back strains heal within two to six weeks. (Lovitt Dep. at 17-18.)

13. Claimant's bladder symptoms resolved and are not a factor in this case. Similarly, carpal tunnel syndrome and elbow strain are not at issue.

14. During the six months following his injury, claimant attempted to return to work on two or three occasions. (Craig Dep. 14.) During his first attempt he was given light-duty tasks but couldn't "handle it." (Peterson Dep. at 21-22.) Craig testified "he basically couldn't stand up straight." (Craig Dep. at 8.) After additional time off, claimant again tried to return on a part-time basis. Eventually it became apparent to Craig that claimant could not perform the job on a part-time or light-duty basis. (*Id.* at 9.)

15. On May 4, 1990, claimant returned to Dr. Lovitt. Claimant described his condition as worsening. Dr. Lovitt observed the claimant's pain behaviors. He noted, "I think he is probably getting depressed." (Ex. 1 at 28.) The doctor instructed claimant to cease work, rest his back, use a thoracolumbar orthosis (a back support), and minimize his use of Darvocet, which is a narcotic analgesic agent[(1)]. Dr. Lovitt also prescribed Prozac, which is an antidepressant.[(2)] (Ex. 1 at 28.)

16. Dr. Lovitt next examined claimant on June 8, 1990, at which time he determined that "Mark is improving somewhat." (Ex. 1 at 28.) Dr. Lovitt further commented:

> . . . They may have a lighter job at his same place of employment coming open later on. If indeed this does happen he can of course try it and will keep us informed. **However until I see him again in July later, he is considered disabled. I wish to reiterate that this is a straightforward, reliable person.**

(*Id*.)

17. Dr. Lovitt then saw claimant on July 27, 1990. His office note for that date is found at Exhibit 1 at 28. Dr. Lovitt noted that claimant had been "back to work some" and that he reported having difficulty. The claimant had discontinued his Prozac and Dr. Lovitt gave him another prescription. The doctor again encouraged the claimant to return to work as long as he didn't do any lifting. (*Id*.)

18. Claimant's next visit to Dr. Lovitt was on August 27, 1990. At that time Dr. Lovitt noted that the claimant was "not improving at all" and that he had low-back pain and bilateral leg pain. (Ex. 1 at 26.) The neurologic exam did not reveal any significant abnormalities. (*Id.*) Dr. Lovitt's note for this date states in part:

> I had a long frank discussion with him. I advised him that I need to know his motives, his desires. **I have always known him in the past to be a straightforward, hardworking, well-motivated individual who had a back injury, went back to work for several years, reinjured himself and now has not gotten any better.** His pain diagram is not normal. Indeed it is rather significantly abnormal **but certainly not unbelievable or implausible. I think it may well be showing significant**

> **stress depression effect. . . . In any respect I do believe this man.** I think he could be helped by a three level lumbar decompression-arthrodesis. He is not getting anywhere now and I think before he undergoes some significant emotional changes we should consider doing something. . . . He has certainly shown good faith before in going back to work and also has not been smoking and has gotten himself off of the muscle relaxers. (**emphasis added**).

(*Id*.) Dr. Lovitt referred claimant to Dr. Maurice C. Smith for a second opinion. (Id.)

19. On September 11, 1990, Dr. William Shaw performed an independent medical examination on behalf of the State Fund. Dr. Shaw found that claimant had significant degenerative disc disease but without any obvious neurological effect. In his report Dr. Shaw went on to state:

> . . . I am a little perplexed at this man's significant complaints of pain as well as marked loss of extension in the face of a quite consistent exam **without evidence of fabrication.** (Emphasis added).

(Ex. 1 at 61.) Dr. Shaw also stated he did not know what to make of claimant's apparent reluctance to return to light-duty work. He withheld any decision regarding maximum medical healing until an MRI could be obtained.

20. On October 8, 1990, Dr. Lovitt concluded that claimant had reached maximum medical improvement and gave him an eighteen (18%) percent impairment rating. Based on the impairment rating, in January of 1991 the State Fund paid claimant an impairment award of $10,552.50. (Uncontested Fact 4.)

21. Dr. Smith evaluated claimant on October 16, 1990. (Ex. 1 at 64.) At that time claimant was complaining of "back pain and headache of equal severity," along with leg pain. Dr. Smith did not find any neurological defect or any basis for surgery. He increased the claimant's prescription for Prozac "to therapeutic levels." Additionally, he prescribed Feldene, a nonsteroidal anti-inflammatory, and Pepcid, which inhibits gastric secretions.[(3)] Dr. Smith also prescribed physical therapy to treat claimant's tension headaches. He recommended getting the claimant "back into the work force as soon as possible." (Ex. 1 at 66-67.)

22. Claimant returned to Dr. Smith on April 26, 1991. (Ex. 1 at 62.) Dr. Smith reported that claimant was substantially improved. His pain and headaches had disappeared while he was taking his medications. However, prior to the time of the examination, claimant had stopped taking his Prozac and Feldene. He noted that his leg pain had returned thereafter. Dr. Smith's medical note also mentions that claimant "has on his own decided to go into computer work and he is going to school starting in June, all of which is a very positive attitude." Dr. Smith renewed the prescriptions for Prozac, Feldene and Pepcid and referred claimant back to Dr. Lovitt.

23. Claimant stopped taking Prozac prior to the summer of 1992 because it made him feel moody. (Ex. 1 at 16.) It is unclear exactly when he discontinued the medication.

24. On December 14, 1991, Dr. Shaw approved job descriptions for cashier II and service manager/auto service. He disapproved the positions of parts person, dishwasher and automobile mechanic.

25. On January 6, 1992, a rehabilitation panel of the Montana Department of Labor and Industry determined that claimant could return to work under option (c) of section 39-71-1012, MCA (1989), which is a "return to a related occupation suited to the claimant's education and marketable skills." The Court takes judicial notice of the fact that the claimant requested and received a hearing regarding the option (c) determination. It also takes judicial notice of the fact that the determination was affirmed by a hearing examiner of the Department. On August 11, 1994, claimant appealed that decision to this Court. The appeal is presently pending and has not yet been briefed.

26. On February 27, 1992, the State Fund issued a fourteen day notice discontinuing claimant's temporary total disability benefits effective March 13, 1992. It reinstated those benefits on July 13, 1993, to allow for an independent psychological examination of claimant. Temporary total disability benefits were thereafter discontinued on December 20, 1993.

27. In the summer of 1992, claimant sought medical treatment for low-back pain at the emergency room of St. Vincent Hospital. He was seen by Dr. James Johnson who found the claimant to be neurologically intact. The doctor prescribed a medrol dosepak and then referred claimant to Dr. Healow, who administered caudal epidural steroid injections on at least two occasions. (Ex. 1 at 47, 49, 52.)

28. Dr. Donald See performed electodiagnostic studies on claimant on July 20, 1992. The results were normal.

29. Claimant returned to Dr. Lovitt on August 5, 1992, almost two years after his last examination. Dr. Lovitt had a "frank, albeit, not unpleasant, discussion" with claimant but declined to resume claimant's care. (Ex. 1 at 23-24.) In his medical note for that date, Dr. Lovitt states:

> This is a situation in which subjective complaints don't seem to be backed up by objective findings, show no evidence of any attempts on his own or otherwise to go back to any form of employment whatsoever. . . .
>
> I advised him that very frankly I run short of sympathy when I see people much worse than him gainfully employed and willing to follow my recommendations given to them in good faith so they can get better and help themselves.

> It would be my estimation basically that he has gotten as good as he is going to get. I can really not define any particular surgical or therapeutic approach otherwise to his problem other than rapid return to tolerable, gainful employment, and cessation of his smoking habit and a self performed exercise program for his back. He does indeed have underlying problem, but there is just not specifically a good treatment for this other than conservative . . . .

(*Id* .)

30. Dr. Lovitt testified that he believed the claimant did not want to return to work. He further testified that, in his opinion, claimant's depression did not preclude him from returning to work. (Lovitt Dep. at 72.)

31. On October 23, 1992, claimant sought emergency room treatment for "mid back pain." His condition was diagnosed as "[e]xacerbation of chronic back pain." (Ex. 1 at 45.) The emergency room physician prescribed medrol (an adrenocortical steroid) and Percocet (a semisynthetic narcotic analgesic plus acetaminophen).[(4)] (Id.)

32. Approximately five hours after his emergency room visit, the claimant slipped and fell at a Buttrey supermarket and returned to the emergency room. X-rays failed to demonstrate any change from previous x-rays. The emergency room diagnosis was "[a]cute neck and back strain secondary to a fall." (Ex.1 at 43.) No further medication was prescribed.

33. Claimant was treated by Dr. Vande Veegaete, a chiropractor, between November 2, 1992 and March 12, 1993. At the time of claimant's last visit, Dr. Vande Veegaete was of the opinion "that he [claimant] could not handle the jobs listed because of significant low back pain **and apparent mental health problems.**" (Ex. 1 at 82, emphasis added.)

34. Claimant was examined by Dr. John Dorr, an orthopedic surgeon, on January 27, 1993 and February 18, 1993. Dr. Dorr requested and obtained a MMPI through referral of claimant to Dr. Richard Agosto, a psychologist. Dr. Agosto reported that the MMPI was "markedly abnormal." (Ex. 1 at 19a.) Dr. Dorr stated, "I then explained to Mark that, in his case, we found minimal organic pathology and significant reaction to his symptoms and that the most efficacious treatment would be to work on his reaction to pain. He will schedule this with Dr. Agosto."

35. The evidence in this case shows that claimant is not physically disabled from returning to some sort of employment. Claimant's pain is out of proportion to his physical condition. However, the medical doctors who examined claimant gave no indication that his pain was consciously exaggerated. To the contrary, some of the medical notes indicate that claimant's perception of pain was genuine.

36. Claimant was seen by Dr. Agosto on February 5, 1993. Subsequently, the State Fund arranged for an independent psychological evaluation by Dr. McElhinny. That evaluation

was done on October 19, 1993. Both psychologists conducted a number of tests and interviewed claimant. Both considered claimant's responses to testing to be valid.

37. Both psychologists agreed that claimant is currently unable to work on account of his psychological condition.

38. Dr. Agosto diagnosed claimant as suffering from depression and a somatoform pain disorder. (Agosto Dep. at 21.) A somatoform pain disorder is a condition where an individual overreacts, or displays emotional concerns which are inconsistent with apparent physical findings. (*Id*. at 21.) Dr. Agosto stated, "I felt that he was exaggerating emotionally the difficulties; that his perception of pain was not consistent, perhaps, with the physical findings." (*Id*.) A somatoform pain disorder does not involve intentional exaggeration:

> . . . It's rather an unconscious process. Unconscious in the sense it's an interaction between the stress and the physical involvement. Your nervous system will respond in a way which will actually exaggerate the perception of pain, heighten the sensation of pain, as one level of tension increases. And that is a rather unconscious process that goes on.

(*Id*. at 22.) Dr. Agosto ruled out either malingering or a factitious disorder. (*Id*. at 23-24.)

39. Dr. McElhinny diagnosed claimant as follows: 1) psychotic disorder NOS (schizo-affective vs. bipolar disorder) (probable somatic delusions); 2) dysthymia (chronic); and 3) factitious disorder NOS secondary to the psychotic disorder. (Ex. 1 at 8.) He also indicated "probable mixed personality disorder with schizoid and passive aggressive features." (*Id.*) NOS indicates "not otherwise specified" and dysthymia is another term for depression.

40. Dr. McElhinny's diagnosis of a psychotic disorder was tentative. (McElhinny Dep. at 70.) Dr. McElhinny recommended a Rorschach ink blot test to confirm the diagnosis. Dr. Agosto later administered such a test and found that it did not indicate a psychotic disorder. The Court finds that the tentative diagnosis was not confirmed.

41. With regard to the factitious disorder, Dr. McElhinny testified:

> Q. Is your diagnosis of factitious disorder secondary to the diagnosis of psychotic disorder?
>
> A. Yes.
>
> Q. Okay.
>
> A. In other words, the factitious disorder is being fueled -- being fueled by that psychotic disorder. And that's a common pattern.

(*Id.* at 90.) He also did not rule out the possibility that claimant is suffering from a somatoform disorder. (*Id.* at 89-90.)

42. Dr. Agosto attributed claimant's psychological condition and symptoms to his industrial accident in 1990.

43. Dr. McElhinny saw no causal relationship between claimant's psychological disorders and his 1990 injury. He found that the claimant's problems were chronic and longstanding, predating any work-related injury. (McElhinny Dep. at 67.) He testified, "Work related injuries don't cause psychotic disorders." He further testified that the 1990 injury did not cause claimant's depression, but he had no opinion as to whether it may have exacerbated or aggravated that condition. (*Id*. at 84-87.)

44. On balance, Dr. Agosto's opinions regarding claimant's psychological condition and causation are more persuasive. The following factors are determinative:

a. The existence of a psychotic disorder was not proven.

b. Both psychologists agreed that claimant is severely depressed.

c. While claimant had a preexisting and predisposing psychological condition, he had no significant prior history of debilitating depression or of any other debilitating psychological condition. He has sustained a long-term relationship with his wife and family. While he was off work for a significant time during the late 1970's and early 1980's due to a prior back injury, there is scant evidence to explain the long duration of disability and his activities during that time. There is no evidence indicating that he was psychologically debilitated. Moreover, he returned to work and worked successfully for six or seven years without apparent difficulty.

d. The onset of claimant's pain occurred at the time of his 1990 injury. His depression was initially recorded by Dr. Lovitt three months after the 1990 injury. Dr. Lovitt's notes of the 1990 treatment state that claimant is a "straightforward" person and that his abnormal pain diagram "**may well be showing significant stress depression effect.**"

e. During the first part of 1990 claimant attempted on several occasions to return to work.

f. Claimant responded to Prozac and Flexeril. While taking those drugs he experienced a remission of his pain and headaches. He also became motivated and began planning a return to school to retrain. He regressed when he stopped taking his medications.

g. While off work in the late 1970's and early 1980's, claimant obtained a GED and additional technical business training.

In sum, the Court is persuaded that claimant is not consciously exaggerating his pain; that he is severely depressed over his present situation; that his depression amplifies his pain;

and that he is currently unable to return to any sort of work on account of his depression and perceived pain.

45. Both Dr. Agosto and Dr. McElhinny agree that claimant may benefit from antidepressant drug therapy. Dr. McElhinny recommended that claimant be seen be a psychiatrist, while Dr. Agosto stated only that claimant may benefit from antidepressant medication and psychotherapy. (Agosto Dep. at 17 and Ex. 1 at 7.) In light of these recommendations, as well as claimant's prior improvement while on Prozac and Flexeril, a psychiatric referral is appropriate if not essential.

CONCLUSIONS OF LAW

1. The law in effect at the time of the claimant's injury applies in determining his entitlement to benefits. ***Buckman v. Montana Deaconess Hospital,*** 224 Mont. 318, 321, 730 P.2d 380 (1986).

2. Section 39-71-116(28), MCA (1990), defines temporary total disability as "a condition *resulting from an injury as defined in this chapter* that results in total loss of wages and exists until the injured worker reaches maximum healing." (Italics added.) The claimant has the burden of proving that he is entitled to such benefits, ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 512 P.2d 1304 (1973),* and he must prove his entitlement by a preponderance of the probative, credible evidence. ***Dumont v. Wicken Bros. Construction Co.****, 183 Mont. 190, 598 P.2d 1099 (1979).* That burden extends to proof that "the injury was the proximate cause of his disabling condition." ***Eastman v. Transport Ins.,*** *255 Mont. 262, 843 P.2d 300 (1992).*

3. 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.

4. A preponderance of credible evidence has persuaded the Court that claimant is temporarily totally disabled due to depression and a somatoform pain disorder. While claimant may have been predisposed to those conditions, the conditions were triggered or at least exacerbated by the physical injuries he suffered January 22, 1990. Claimant is therefore entitled to the reinstatement of temporary total disability benefits retroactive to March 14, 1993, less the benefits paid between July 13, 1993 and December 20, 1993.

5. Claimant is entitled to reasonable psychological and psychiatric treatment.

6. Claimant has an obligation to follow reasonable medical and psychological advice. That obligation extends to taking medications which are reasonably prescribed for him by his doctors, including antidepressant medication. The Court specifically notes the apparent improvement in claimant's condition when he was taking Flexeril and Prozac, and a return of both pain and depression when he unilaterally discontinued these medications, reportedly because they made him moody. It is not clear to the Court how moodiness is worse than the conditions the medications helped treat. Moreover, alternate antidepressants with lesser side-affects may be available.

The Court expects that claimant will be further evaluated to determine if he can benefit from antidepressant and/or other medication and treatment. The continuation of his temporary total disability benefits is expressly conditioned on claimant following reasonable medical and psychological advice.

7. Claimant is entitled to costs.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Claimant is entitled to temporary total disability benefits retroactive to March 14, 1993, less benefits paid by the insurer between July 13, 1993 and December 20, 1993.

3. Claimant is entitled to payment for reasonable psychological treatment and services.

4. Claimant is entitled to costs. He shall submit an affidavit of costs within twenty (20) days. Respondent shall have ten (10) days in which to respond.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have twenty (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 November, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Thomas J. Lynaugh
Mr. Michael P. Heringer

1. Physicians' Desk Reference (1994 Edition).

2. *Id*.

3. Physicians' Desk Reference (1994 Edition).

4. Physicians' Desk Reference (1994 Edition).