

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 93

WCC No. 9309-6898

DONALD T. ROBINSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

ROCKY MOUNTAIN TEMPORARIES, d/b/a LABOR CONTRACTORS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on March 3, 1994, in Kalispell Montana. Petitioner, Donald T. Robinson (claimant), was present and represented by Ms. Laurie Wallace. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Todd A. Hammer. Claimant testified on his own behalf. Richard H. Schaus, Dr. Randale Sechrest, Kristen Heck, Charles Winsell, and Dean T. Moore, II, testified on behalf of the State Fund.

Fourteen exhibits, including claimant's medical records, were admitted into evidence. Exhibits 1 through 6 and 17 were admitted by stipulation. Exhibits 7 through 9, part of 10, and 14 were admitted over objection. Exhibits 15 and 16 were admitted after the objections to them were withdrawn. The Court refused Exhibit 11 on the basis of relevancy and hearsay. Exhibits 12 and 13 were not offered.

The parties stipulated that the following depositions can be considered by the Court in reaching its decision: Donald T. Robinson, Dr. Albert T. Joern, and Charles Eick.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor of the witnesses, the exhibits, and the pleadings of the parties, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was forty years old.
2. Claimant suffered an industrial injury to his back, right arm and shoulder while working for P.W. Berry Company on May 23, 1984. (Ex. 3.)

3. At the time of the 1984 injury, claimant's employer was insured by State Fund.
4. As a result of the 1984 injury, claimant had surgery on his lower back in July of 1988. (Tr. at 17)
5. While the surgery afforded him some initial relief, claimant's symptoms soon returned and were as severe as prior to surgery. Since 1988 he has had chronic pain in his neck, upper back, low back, left leg, and intermittently, right leg.
6. In November 1991, the claimant and the State Fund entered into a full and final compromise settlement agreement with respect to the 1984 injury. (Ex. 4-6; Tr. at 86-88.) In support of settlement claimant filed an affidavit stating that despite his surgery he "continued to suffer from low back pain, leg numbness, pain and tingling" and had "chronic pain." (Robinson Dep., Ex. No. 8 at 4, 13.)
7. Claimant alleges that he suffered another industrial injury on January 21, 1993, while working at Semitool as a temporary employee. His nominal employer was Rocky Mountain Temporaries d/b/a Labor Contractors, which furnished temporary employees to Semitool. (Tr. at 79-80.) At the time of the alleged industrial accident, Rocky Mountain was insured by the State Fund.
8. Claimant submitted a claim for compensation. The claim was denied. In this proceeding the State Fund disputes claimant's accident description and contends that no accident occurred. The State Fund also contends that claimant's current condition is due to his 1984 injury and not to any new injury or aggravation.
9. According to claimant, on January 21, 1993, he reinjured his back while he was installing a roller assembly in a furnace at Semitool. He testified that he had to stand in an awkward position on a 12 foot ladder and that the ladder constantly slid and skated around on a linoleum floor. He further testified that the ladder moved thirty to forty times, approximately two to three inches each time, and that on four of those occasions he felt "pops" in his back. (Tr. at 53-56.)
10. Claimant testified that he told his co-workers, Chuck Winsell and Charles Eick, that his ladder was moving and that Eick and Winsell then helped look for a different, safer ladder. (Tr. at 56-7.) Claimant also testified that by the end of the day his limp was "noticeably worse." (Robinson Dep. at 34; Tr. at 121-22.) Winsell testified at trial and Eick by deposition. Neither worker confirmed claimant's testimony. (Eick Dep. at 10-11, Tr. at 176.) Eick testified that he recalled working with claimant on January 21, 1993, but denied that claimant's ladder slid or skated on the floor and denied that claimant ever said anything about the ladder being unsafe. He recalled a search for another ladder, not because claimant's ladder was unsafe but because a taller ladder was needed. (Eick Dep. at 10-12.) Eick also denied that claimant was "walking with a noticeably worse limp" by the end of the day (*Id.* at 13) and stated that he did not see claimant limping or exhibiting any other sign of

injury on that day. (Eick Dep. at 13, 23.) Winsell testified that he could not recall claimant or anyone else complaining of a ladder skating or sliding and that he did not search for a substitute ladder for claimant. (Tr. at 178.) Claimant's supervisor, Dean Moore, was working in the same area as claimant on January 21, 1993. (Tr. at 159-160) He stated that he did not hear of any problems with the ladder and he did not see claimant limping. Moore and Winsell were credible witnesses. Eick has no present affiliation with any of the parties and he is now working for a different employer in Ohio.

11. Richard Schaus, a physics teacher with a masters degree, testified concerning the forces necessary to move a ladder horizontally with a person standing on it. (Tr. at 243-245.) In his opinion it was highly improbable from a physics standpoint that the ladder could have moved as claimant described. (Tr. at 243-45, 253, 256.) Mr. Schaus' testimony and opinions were reasoned and credible. They have been taken into account by the Court.

12. Claimant testified that he was familiar with his employer's policy of immediately reporting an accident, but admitted that he did not report his accident to either Labor Contractors or Semitool until four days later. In the meantime, claimant worked for four hours on January 22, 1993; was not limping on January 22, 1993, because "I was thinking of my sister," who was ill; and drove from Kalispell to Bozeman and back to visit his sister; but "claims" that he was otherwise flat on his back and bedridden. (Tr. at 122-124; Robinson Dep. at 51-57.)

13. Having listened to and observed claimant at trial, and having considered his testimony and the testimony of other witnesses, I do not find claimant's testimony credible. I find that the ladder did not skid as he asserts and that claimant did not suffer an industrial accident on January 21, 1993.

14. Claimant has also failed to persuade me by a preponderance of credible evidence that his condition after January 21, 1993, was any different than before. In arguing that he suffered a new injury on January 21, 1993, claimant relies on Dr. Joern's opinion that he suffered an aggravation of his preexisting back condition. That testimony, however, assumed claimant's accident report to be true. Moreover, it was principally based on Dr. Joern's understanding that after January 21, 1993, the claimant was experiencing new complaints related to his right leg, whereas claimant's complaints prior to January 21, 1993, had predominately related to his left leg. In his deposition, Dr. Joern stated that after January 21, 1993, was the first time during his treatment of claimant that he complained of "sharp severe pain" in the right leg. (Joern Dep. at 98-99.) In his office note of February 8, 1993, Dr. Joern recorded:

Previously, Mr. Robinson had had predominantly left sciatica. Now, the more intense pain is in the right leg. This is in a posterior and lateral distribution. It is a sharp and intense pain going all the way down to his foot.

(Joern Dep. Ex. 1, 2/8/93 office note.) A similar comment was made in Dr. Joern's February 15, 1993 office note:

He was seen last week with severe pain and a complaint of increased back pain with radiation into both legs. As opposed to before the new accident, his problems had been predominantly left sciatica. Now he is having a bilateral sciatica with the more severe pain in the right leg posteriorly associated with numbness and tingling.

(*Id.*, 2/15/93 office note.) In a November 11, 1993 office note, Dr. Joern commented, "He [claimant] continues to have the new problems in terms of bilateral leg involvement, **which prior to January had not been present.**" (*Id.*, 11/11/93 office note; emphasis added.)

15. During his deposition the claimant provided the following history of his right leg pain:

Q. Okay. Prior to January 21 did you only have pain shooting down into one leg?

A. Yes, sir.

Q. Okay. And you're confident of that?

A. Yes, sir.

Q. Okay. And so after January 21 it's your testimony and recollection that you had pain in both legs shooting down?

A. Yes, sir.

Q. And that was something that was new and different, the fact that it was bilateral and it concerned both legs; is that correct.

A. Yes.

(Robinson Dep. at 47; Tr. at 90-91.)

Following his deposition claimant amended his testimony and inserted the following correction to the first question quoted above:

Ms. Wallace: After the first Question which was: "Okay. Prior to January 21, did you only have pain shooting down into one leg?"

Answer: "Yes, sir, except for the period of time when Dr. Stephens treated me for increased pain complaints in my right leg. Otherwise, my right leg complaints were limited to intermittent burning and aching from the time following the surgery until the accident of January 21 when again I began to experience severe pain in the right leg. Except for these two incidents, the right leg complaints have always been less severe than the left."

(Tr. at 91-92.)

16. According to his own testimony, claimant impressed upon Dr. Joern that his problems after January 21 were different and that he had bilateral pain as opposed to the left side pain he had before. (Robinson Dep. at 48; Tr. at 95.)

17. Dr. Joern did not begin treating claimant until September 1, 1992. (Joern Dep. at 1.) Prior to that time claimant had been treated by Dr. Laidlaw, who performed the 1988 surgery, and Dr. John V. Stephens. He was also seen in consultation by other physicians.

18. In addition to the medical records of Drs. Laidlaw and Stephens and the consultative reports, the medical records submitted to the Court in this case include physical therapy reports. (Ex. 7.) Those records show that claimant had a history of right leg pain long before January 21, 1993. In a May, 1989 report, claimant's physical therapist wrote that claimant reported "bilateral leg and foot pain." (Ex. 7 at 2151.) The physical therapy report for June and July 1989 states, "He [claimant] continues to report bilateral leg and foot pain . . ." (Ex. 7 at 2181.) The report of October 1989 states: "He continues to note . . . low back pain with referral into the left lower extremity. Toward the end of this month patient states he is also noting leg discomfort in his right lower extremity." (Ex. 7 at 2177.) Dr. Stephen's office note of November 2, 1989, states: "He has continued to experience pain in his back, neck, headaches, and pain in the lower back radiating to the legs, left more so than right." (Ex. 7 at 2180.) A physical therapy note for November 1989 notes that claimant "continues to note low back pain with referral now into the right lower extremities as well as continued headaches." (Ex. 7 at 2188.) A November 2, 1989 physical therapy note indicates, "Pt. reports an increase in bilateral leg pain along with increased pain throughout his entire back and neck." (Ex. 17 at 1017.) A note of November 14, 1989 indicates, "Pt. continues to suffer from increased pain throughout his entire back and neck especially through his low back and down into his legs." Ex. 17 at 1016.) Other physical therapy reports for November and December 1989 indicate that claimant continued to report leg pain in both legs (Ex. 17 at 1012, 1015), and in a November 27, 1989 office note, Dr. Stephens records that claimant "continued to have significant discomfort in his back and neck, and pain from the back radiating into his legs." (Ex. 7 at 2187.) In a physical therapy note of April 9, 1990, the therapist noted that claimant "has constant pain in the left leg and intermittent pain in the right. Over the last 1 1/2 months he has noted weakness in his legs and has trouble going down stairs." (Ex. 7 at 2201.)

19. Dr. Ronald Vincent, a Spokane, Washington neurosurgeon, examined claimant on May 16, 1990. With respect to low back and leg pain he reported:

The pain is located in the low back, radiating down the buttock, across the posterior thigh, into the calf and heel. It does radiate now on the right side down to about the knee.

(Ex. 7 at 2204.)

20. On September 14, 1990, claimant was examined by Dr. Bill J. Tacke, a physiatrist, as part of a pain clinic evaluation. Dr. Tacke noted at that time:

He has pain in his lower back in both legs which does include some numbness. . . .

Don reports that he has lower back pain which radiates into both legs and feels like "sciatic pain". This is more common on the left than the right. He describes numbness in his legs at times.

(Ex. 7 at 2220.)

21. In December 1990, the physical therapist reported that claimant "continues to have chronic low back pain and tightness with pain and spasm into both legs with the left leg often giving out on him." (Ex. 7 at 2236.)

22. In a physical therapy evaluation in early 1990, the therapist reported: "The patient describes his back pain as constant with exacerbations of activity. He has radiating pain into both legs which again is constant." (Ex. 7 at 2250.) Claimant reported bilateral leg symptoms to his physical therapist on April 11, May 7, May 16, May 24, May 28, June 4, June 18, June 20, and July 9, 1991, and again on April 29, September 14, October 23 and October 27, 1992. (Ex. 7 at 2275, 2277, 2280, 2282, 2284, 2285, 2289, 2299, 2318, and 2333.) The May 24, 1991 physical therapy report states: "*He [claimant] feels like the intensity of pain in his right leg is now increased and is equal to that of the left side.*" (Ex. 7 at 2282; italics added.) On June 18, 1991, claimant reported, "*The right leg seems to be as bad as the left one now.*" (Ex. 7 at 2285; italics added.)

23. In late 1991 and 1992 claimant experienced at least three specific exacerbations of his back condition, one just before Christmas of 1991, another on April 29, 1992, and a third in August 1992. (Ex. 7 at 2293, 2299, and 2308.)

24. On January 13, 1993, just eight days prior to claimant's alleged injury, claimant received physical therapy. The therapist's note for that date states: "Pt. reports **exquisite pain** in his low back **and into both of his legs.**" (Ex. 7 at 2346; emphasis added.)

25. Dr. Randale Sechrest, an orthopedic surgeon, examined claimant and reviewed his medical records. (Tr. at 184-191.) Dr. Sechrest testified that since claimant's 1984 injury and 1988 surgery, his condition was both chronic and deteriorating. (Tr. at 196-197.) He further opined that claimant's current problem and condition is attributable to his original injury. (Tr. at 200.)

26. In light of the claimant's medical history, including a clear report of exquisite pain in both legs just eight days prior to his alleged injury, and claimant's lack of candor concerning his prior history, I find Dr. Sechrest's testimony persuasive. I conclude, as a matter of fact, that claimant's preexisting condition was progressively deteriorating and that his condition after January 21, 1993, was no different than before that date.

CONCLUSIONS OF LAW

1. Claimant has the burden of proof to show that he sustained an injury and that the injury occurred while he was on the job. ***Gerlach v. Champion International***, 254 Mont. 137, 836 P.2d 35 (1992). He failed to carry that burden. As found by the Court, claimant's assertions concerning the occurrence of an industrial accident on January 21, 1993, were not credible. A preponderance of credible evidence persuades the Court that no accident in fact occurred.

2. The claimant also has the burden of proving by a preponderance of the evidence that there is a causal connection between the industrial accident and his/her disabling condition. ***Id.*** Assuming for purposes of argument that some incident occurred on January 21, 1993, the Court is not persuaded that claimant's current condition is any way attributable to such incident or that he suffered an aggravation of his underlying and preexisting condition. A preponderance of evidence indicates that claimant's condition after January 21, 1993, is attributable to a natural progression of his preexisting condition and was no different than before January 21, 1993.

3. Since claimant has not prevailed in this action, he is not entitled to twenty percent penalty, § 39-71-2907, MCA, or to attorney fees, § 39-71-611, MCA.

JUDGMENT

1. Claimant did not suffer an industrial injury on January 21, 1993, and the State Fund is not liable for the alleged injury.

2. Claimant is not entitled to attorney fees and costs.

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

4. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

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

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace

Mr. Todd A. Hammer