IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 32

WCC No. 9811-8096

GERALD SHARP

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent/Insurer for

TOWN OF TERRY, MONTANA,

Employer.

JUDGMENT

Summary: 57-year old Injured worker claimed he was permanently totally disabled.

Held: In a bench ruling reported by transcript, WCC found claimant permanently totally disabled. Factors considered by the Court included (1) claimant had steady employment throughout his life; (2) claimant worked despite having pain over the years; (3) the Court was convinced claimant had serious pain despite taking heavy-duty pain medication; (4) Court was convinced claimant followed medical advice and tried to alleviate his pain; (5) chances were not good that an employer would hire claimant, even if he could work, given his limitations due to pain. Penalty and attorneys fees were not awarded where the case also contained facts pointing away from finding permanent total disability status making the insurer's position reasonable.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-702, MCA.** In a bench ruling finding claimant permanently totally disabled, Court notes that permanent total disability cases must be judged individually on their "gestalt," but notes the following factors indicating PTD status in this case: (1) claimant had steady employment throughout his life; (2) claimant worked despite having pain over the years; (3) the Court was convinced claimant had serious pain despite taking heavy-duty pain medication; (4) Court was convinced claimant followed medical advice and tried to alleviate his pain; (5) chances were not good

that an employer would hire claimant, even if he could work, given his limitations due to pain. Penalty and attorneys fees were not awarded where the case also contained facts pointing away from finding permanent total disability status making the insurer's position reasonable.

Benefits: Permanent Total Benefits. In a bench ruling finding claimant permanently totally disabled, Court notes that permanent total disability cases must be judged individually on their "gestalt," but notes the following factors indicating PTD status in this case: (1) claimant had steady employment throughout his life; (2) claimant worked despite having pain over the years; (3) the Court was convinced claimant had serious pain despite taking heavy-duty pain medication; (4) Court was convinced claimant followed medical advice and tried to alleviate his pain; (5) chances were not good that an employer would hire claimant, even if he could work, given his limitations due to pain. Penalty and attorneys fees were not awarded where the case also contained facts pointing away from finding permanent total disability status making the insurer's position reasonable.

Pain. In a bench ruling finding claimant permanently totally disabled, Court notes that permanent total disability cases must be judged individually on their "gestalt," but notes the following factors indicating PTD status in this case: (1) claimant had steady employment throughout his life; (2) claimant worked despite having pain over the years; (3) the Court was convinced claimant had serious pain despite taking heavy-duty pain medication; (4) Court was convinced claimant followed medical advice and tried to alleviate his pain; (5) chances were not good that an employer would hire claimant, even if he could work, given his limitations due to pain. Penalty and attorneys fees were not awarded where the case also contained facts pointing away from finding permanent total disability status making the insurer's position reasonable.

¶1 The trial in his matter was held on April 28, 1999, in Billings, Montana. Petitioner, Gerald Sharp (claimant), was present and represented by Mr. Marvin L. Howe. Respondent was represented by Mr. G. Andrew Adamek. Exhibits 1 through 10 were admitted into evidence without objection. Claimant, claimant's wife (Velva Jean Sharp), and Dennis McLuskie were sworn and testified. In addition the Court reviewed and considered depositions of claimant, Robert Zadow, and Dr. Roger S. Williams.

¶2 After all evidence had been presented, the Court deemed the matter submitted for decision and rendered its decision from the bench, holding that claimant is permanently totally disabled. It further held that the insurer's denial of his claim for permanent total disability was not unreasonable and accordingly declined to award attorney fees or a penalty.

¶3 The parties have agreed that a transcript of the Court's oral decision shall constitute its findings of fact and conclusions of law. A copy of the transcript is attached.

¶4 Accordingly, JUDGMENT is hereby entered as follows:

¶5 1. Since claimant is presently permanently totally disabled, Montana Municipal Insurance Authority (MMIA) shall pay him permanent total disability benefits retroactive to the date his temporary total disability benefits were terminated. The insurer is entitled to credit any permanent partial disability benefits, other than the impairment award, it has paid against its liability under this paragraph.

¶6 2. MMIA has not acted unreasonably, therefore claimant is not entitled to attorney fees or a penalty. §§ 39-71-611 and -2907, MCA (1995).

¶7 3. Claimant is entitled to his costs in an amount to be determined by the Court. He shall submit his memorandum of costs as provided in ARM 24.5.342.

¶8 4. This judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶9 5. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this judgment.

DATED in Helena, Montana, this 5th day of May, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. G. Andy Adamek
Date Submitted: April 28, 1999
Attachment: Bench Ruling

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1 WORKERS' COMPENSATION COURT

2GERALD SHARP, WCC No. 9811-8096

3 Claimant,

4 v.

5 MONTANA MUNICIPAL INSURANCE

6 AUTHORITY/TOWN OF TERRY MONTANA,

7 Insurer/Employer.

9The above-entitled matter came on for hearing before the

10 HONORABLE MIKE MCCARTER, Judge of the Workers' Compensation Court, commencing on Wednesday, April 28, 1999, at 8:00 a.m.

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12 APPEARANCES

13 For the Claimant: MARVIN L. HOWE

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15 For the Insurer: G. ANDY ADAMEK

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21 Reported by

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1 (Excerpt of Proceedings.)

2 THE COURT: I will tell counsel right now I'm

3 prepared to render a bench ruling in this case. I don't know

4 if that will shock either of you, but --

5 MR. ADAMEK: Ask me, am I shocked?

6 THE COURT: Do you want to take five minutes to

7 prepare yourself?

8 MR. HOWE: No. But I take it then if I ask the

Court if we can submit findings and conclusions, the Court would say, no, you can't do that or --

THE COURT: Well, first off, you're late, because the pretrial order required you to submit them in advance of trial. And, secondly, I don't think they are going to be --

MR. HOWE: Well, for future reference then, let me ask you this. There aren't any times you can submit them afterwards?

THE COURT: Only with my permission, and generally I do not grant that unless the case is unusual. I have in a couple of cases allowed it, or I think one case I have even requested it because the facts were so complicated, there is so much information, I have asked for it more for my purposes of a opinion writing to make sure that I have covered everything. But in most cases, I don't allow them unless they are provided to me in advance.

MR. HOWE: I guess this is mostly for future reference then, because I guess I'm just used to unfortunately divorce-type cases where we actually have to submit them beforehand and revamp them afterwards.

THE COURT: Right.

MR. HOWE: But what you are saying is, if you want them, you better get them in beforehand, which is fine.

THE COURT: Well, I'm a bit more active of a writer than a lot of district court judges. So, you know, if I have a -- if I have a good -- if the parties have set out their positions and they have identified where they think the case

ought to go and why, I can fill in the details pretty much myself.

MR. HOWE: Your Honor, I'm sure my client wants to go ahead and have the bench ruling now rather than a five-minute break or --

MR. ADAMEK: If you are ready to rule, I don't intend to offer any additional information.

THE COURT: Okay. Yeah. You know, in the beginning of the trial I sort of set out some of the stuff that I look for. And I am going to find him permanently totally disabled. Like I said at the beginning, you know, pain -- pain is a factor that I have to consider, and it's a factor that the docs, like Dr. Williams acknowledged that it's an individualistic thing, he can't judge.

I have seen cases in which we have psychological evaluations where there is a serious question as to whether or not the pain is of the degree that the claimant tenders, or trying to get at the root of why there is this much pain. And I have listened to psychological testimony on it in other cases, we don't have any in this case, we haven't had any in any of the cases that I have heard this week. But I do know that, you know, it's highly individualistic. I don't really need a psychologist to tell me that. But when they have testified, they have testified to that. Dr. Williams in this case certainly testified to that.

Different individuals tolerate different degrees of pain. Some of that has to do with motivation, very highly

motivated people, especially people with missions, can tolerate pain that other individuals don't or can't pain, and the pain threshold for different people is different. If it's a question of just they lack motivation, that is a different issue. If they -- you know, if they are just saying I hurt and they are -- they have a level of pain, but the real reason they are not working is because they are not motivated, I'm not going to be too sympathetic with that. And I think I have probably indicated that in prior cases. So motivation does play a role in my decision. If that is what is driving it as opposed to the pain, then they don't gain my sympathy.

There is always the possibility of exaggeration and malingering as well in pain cases, because it's subjective and it's individualistic. There is also psychological factors that come into play, things like depression, things like that. Of course, we don't have a psychological work-up, so I can't comment on whether his pain is extraordinary for what he has got.

Obviously, he has some pretty serious conditions with his back. I think, you know, medically, there is ample evidence to verify that he ought to have some significant pain. You know, whether he can live with it, I think is -- only he can say. He has said he can't live with it on a basis where he can handle an eight-hour a day job, or any job at all, because activities -- you know, he gets a spin-off from activities.

15 The real question, you know, is his credibility,

16 and, you know, I think I said at the very beginning I look for

17 outside verification. We look for -- I look for internal

18 consistency and I also look for external indications.

19 You know, when I have talked about how I judge

20 credibility, I refer to it as a Gestalt, which is a great

21 psychological term, some psychologist created that term, but

22 it means you look at the whole picture and sometimes the whole

23 picture is greater than the sum of the parts.

24 I mean, you can't, you know, fit the pieces together

25 necessarily like a specific puzzle, but when you look at

1 everything that you have heard and you have seen at trial, you

2 get a clear picture. In this case I have a pretty clear

3 picture.

4 And let me comment on a number of these things.

5 Forgive me because, you know, I have made a number of notes,

6 but I ramble a little bit when I issue these bench rulings,

7 and that is why written findings are little bit better because

8 I organize better when I write and it becomes a little more

9 coherent, but at least you will know when you leave today what

10 is going through my mind when, you know, when I find him

11 permanently totally disabled.

12 One of the factors that influences me is the fact

13 that he has had steady employment over his work life.

14 And the another factor is that he has worked despite

15 having pain over the years. Andy, you tried to make that into

16 a negative factor against him because he had, but I think that

17 also operates as a positive factor because he was able to work
18 in pain, with those levels of pain, would indicate to me
19 that -- particularly an absence of anything else, that the
20 pain has now reached a level where he just can't tolerate it.
21 And I think that is in fact what is happening here.
22 His -- the number of medications that he is taking
23 is an indication that he has got some pretty heavy-duty pain.
24 He he is into pretty heavy-duty medication, painkillers.
25 And, you know, I compare that, because I've heard a
1 lot of these cases, and I hear, you know, claimants who come
2 in and I can see different -- you know, every case is
3 different. And, you know, I have had cases where they have
4 come in and they are taking a couple aspirin or four Ibuprofen
5 in a day or something like that and claiming they are in
6 intractable pain. Well, those two things are a little bit
7 incompatible. Although, I have heard them say, Well, I hate
8 medication. Apparently they like -- you know, some people
9 like pain more than they like medication. I don't know. But,
10 anyway, his medication levels are consistent with his
11 complaint levels.
12 His statement about the Social Security disability,
13 this is a negative factor for him, does bother me, did bother
14 me. And there is some other things that I think raise
15 legitimate issues about -- legitimate questions about, Does he
16 hurt as bad as he says he does? Is his pain level
17 incompatible with employment? Or is something else going on
18 here?

I think there is enough here to raise legitimate questions about those matters. One was the Social Security matter. He did lie about the Social Security matter. He -- we don't have anything to refute the phone call that he had with the Social Security person. And I don't know what to make of that. You know, it doesn't sound like somebody would tell him that, but I also have seen studies where Internal Revenue -- the people, when you call them, make mistakes in 80 percent of the cases. So I don't know think that is all that far fetched.

And I note, and this is a thing that is very positive in his favor, that after he talked to McKluskie, he immediately called Paula Patrine (phonetic) to tell her about it. McKluskie confirmed that she had told him that. So I don't have any doubt about that.

So I think that was probably more of a misunderstanding on his part than it was some sort of intention to defraud or conceal or to get benefits that he wasn't entitled to or something like that.

In looking at the medical records in this case, I don't see any significant evidence of symptom magnification. We don't have any witnesses, witness testimony to contradict his accounts about what he can and he can't do, or his particular pain levels.

We talked a little bit about videos. And I think Andy said that there is no rototilling incident in this case. And video is -- it has good things and it has bad things that

21 I have seen. Sometimes they are absolutely worthless. You
22 have to look at each of them individually. Sometimes they
23 boomerang and actually support the claimant's case, as it
24 did -- and it may have been in that Disjardin's (phonetic)
25 case that that occurred, where you see pain activity, where
1 the claimant is unaware that he is being filmed and shows
2 clear pain activity. That sort of operates in the claimant's
3 favor. And sometimes it shows activities that are completely
4 inconsistent with what a claimant says he can do and what he
5 has told other people that he can do.
6 So, you know, those are sort of double-edged swords
7 in a way, but we don't have that in any event, and we don't
8 have any eyewitness testimony indicating that his daily
9 activities are anything different than what he says they are.
10 There is some -- perhaps some internal
11 inconsistencies. Andy, you have picked up on some nits here
12 as far as what he has reported, but my impression of this is,
13 you know, you never -- never have anything that is perfect in
14 any event. If you have everything lining up perfectly in a
15 case, then somebody is probably lying.
16 MR. ADAMEK: No one would be here.
17 THE COURT: Or no one would be here, one or the
18 other.
19 MR. ADAMEK: Right.
20 THE COURT: But, basically, in looking at the
21 medical records and looking at his reports to his physicians
22 and what he said, my impression is, is that they are pretty

consistent with what he has testified. They are more consistent than inconsistent. And cumulatively the nits don't change my mind about that in the ultimate assessment.

His declining the work hardening concerned me a little bit, it does concern me. I guess from my point of view I think people ought to try. And if I was -- if I was convinced that there was some value in trying, I might just send him back and say, Before you come to me and ask for permanent total disability, you've got to go out there and try that work hardening program and then we will see.

In this case I am persuaded that that is probably a waste of time. I just don't see it. I don't see any evidence from the medical point the view that the work hardening program presents some sort of special, unique activity that he could do that would alleviate his pain, given the -- what the level is. I think it's a good idea. I think the doctors had good intentions about it, and I think it's generally good advice. But I think in this case that it would be a waste of time.

I understand his reaction. I would have preferred that he tried it and failed than his not trying it at all. But I think his pain level is such that I can understand that he did refuse it.

His receiving more being disabled than when he works is always a concern because it always creates the potential that it decreases motivation, and maybe that decrease in motivation is what is driving the case.

25 And I don't know how our system works to do that,

1 because it doesn't seem to make any sense to me that if you

2 can't work you get paid more than -- you know, taking home

3 more than what you got when you were working. It's almost a

4 penalty to work. And yet the system in some cases may create

5 that. But that is not his fault. It is not our fault. It's

6 just a fact of life. And I do have to factor it in in making

7 my determination of whether that is driving the case. And I'm

8 convinced it's not.

9 I don't think he is doing this just to get money. I

10 think he's indeed -- and, you know, this fellow is -- Mr.

11 Sharp, you are 57 years old. He has had a long work life.

12 And as I said, it has been steady work. It has been

13 consistent work. He has had a lot of jobs, but that is the

14 nature of what he has undertaken to do and what his skill

15 level has been during his lifetime, except for breaks between

16 employment. And for various reasons he has gone from one job

17 to another job, and he has been consistently employed and

18 supported his family.

19 And in the process of that his overall physical

20 condition at his age and given the problems he has, isn't that

21 great. And we have superimposed a fairly bad back at multiple

22 levels. It is not just a singular problem, it's a

23 multiple-level problem.

24 And there is a little bit of disagreement, I

25 suppose, about the motion segments, the motion and various

1 segments about that, but I don't think there is any

2 disagreement that he has a really bad back. And I think that

3 makes it a lot more difficult.

4 The relocation issue, I know he made some statements

5 about relocation, that certainly raises a bit of a red flag.

6 But Dennis McKluskie confirmed that he was saying, I can't

7 work, before that issue ever came up. And, again, you know,

8 if it was just a matter, I'm not going to work because I don't

9 want to relocate, I wouldn't be sympathetic to that, but I

10 think this is a case that has a lot more than that.

11 I guess the standard I have to look at is whether or

12 not there is a reasonable prospect of regular employment. And

13 the pattern that he has laid down, and I think he -- I think

14 realistically he has tried. I mean, he had the exercise

15 bicycle, he is going for walks.

16 This isn't a person who, you know, hasn't tried to

17 do anything to help himself out. He attempted the exercises.

18 And by the way, there is some medical support for a couple of

19 those exercises when he went to one of the physicians, I

20 remember, I remember when he was describing bringing his legs

21 up when he is laying on his back and that hurt. There is a

22 medical note in there verifying that, that -- in the doctor --

23 when they tried that in the doctor's office, that that

24 produced some pretty severe pain.

25 So, you know, I think he has tried, and I think he

1 continues to try to keep his physical condition as best he can

2 and I think he is having a real problem doing it.

3 I think he does have to lay down periodically. I

4 think he has to change position. I did watch him today during
5 the trial, he did exhibit pain behavior and he exhibited pain
6 behavior that I did not think was exaggerated and I did not
7 think it was being consciously produced.
8 And I think I am fairly perceptive of that. I have
9 had some cases where I'm absolutely persuaded that some of the
10 pain behavior in this courtroom is for my benefit. And I
11 didn't see any of that in this case at all.
12 I think his discomfort -- I think he was
13 uncomfortable. I noted that he got irritated as the
14 examination progressed, I didn't think that was entirely
15 because of Andy's questions, I think he was uncomfortable. It
16 may have been in part because he was getting irritated at
17 Andy's questions, but I also think he was becoming
18 uncomfortable as well.
19 So I just -- you know, I think McKluskie, as I said,
20 I think he was honest and frank in his answers to the Court,
21 and I think he was. I mean, I think he was honest when he
22 said if he has to lay down as much as he had, having those
23 kinds of problems, no employer is going to take him. I think
24 that is an honest answer. And I think that is the bottom line
25 in the case. I just don't -- I don't think he can do it.
1 I'm not going to award penalty, I'm not going to
2 award attorneys fees. We have got -- you know, all the docs
3 have basically medically released him and said from a medical
4 point of view he can do it. There is enough internal
5 inconsistencies in this case and enough questions to question,

you know, whether or not the pain level is, he did not keep --
he refused the work hardening program when it was offered.
He could -- I mean it's agruable that, you know, he
didn't really cooperate with the physical therapy. I think he
didn't because I think -- I think he was in too much pain, and
I credit that, but again, that goes to his credibility.
And we had jobs that were identified that with the
medical releases he could do unless his pain was everything as
he claims it is. And I am finding it is. But still I think
there were legitimate questions that were raised by the
insurer. So this isn't a case where it was an absolute
slam-dunk, the insurer should have looked at this case and
said, Benefits right now. I think they had a legitimate
argument. I'm not persuaded by their arguments, but I think
nonetheless they are entitled to their day in court.
Have I said enough?
THE COURT REPORTER: Yes.
(Laughter.)
THE COURT: I guess, I think I've exhausted it. And
unless counsel have any questions, we will just adjourn the
trial.
MR. ADAMEK: The decision regarding permanent total
disability benefits, do you envision that that can be
revisited in the future, or is that just a finding now that he
is permanently totally disabled?
THE COURT: Well, it can only be a finding that he
is presently permanently totally disabled, but if his

condition doesn't change. You know, in order to challenge that, his condition would have to change. If you can find a way to alleviate his pain, he will be happy, I will be delighted, and everybody will be better off.

MR. ADAMEK: The world will be a better place.

THE COURT: That's right. Okay?

MR. ADAMEK: Thank you.

THE COURT: All right. Thank you.

(Proceedings concluded.)

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CERTIFICATE OF REPORTER

I, STEPHANIE MICHELS, Registered Professional Reporter and a Notary Public of the State of Montana, Do hereby certify that I reported in machine shorthand the foregoing proceedings at the time, place and with the appearances of counsel hereinbefore noted.

I further certify that the transcript transcribed from my original shorthand notes by means of computer-assisted transcription, is a full, true, and correct transcript of the oral testimony adduced therein, to the best of my ability.

I further certify that I am not of counsel for, nor in any way related to, any of the parties in this matter, nor am I in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this 29th day of April, 1999.

\s\STEPHANIE MICHELS

Registered Professional Reporter, and Notary Public of the State of Montana, residing at Billings, Montana. My commission expires September 26, 2002.