

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 42

WCC No. 9309-6880

DEAN THOMSON

Petitioner

vs.

WAUSAU INSURANCE COMPANIES

Respondent/Insurer for

APOLLO PIPING SUPPLY, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on January 31, 1994, in Billings, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Dean Thompson (claimant), was present and represented by Mr. Ira D. Eakin. Respondent, Wausau Insurance Companies (Wausau), was represented by Mr. Kelly M. Wills. Claimant was sworn and testified on his own behalf. Brenda Williams, Carlotta Hecker and Dennis Fettig were sworn and testified. Exhibit Nos. 1 through 4 and 7 through 11 were admitted into evidence by stipulation. Exhibit Nos. 5, 6 and 12 were withdrawn. Exhibit No. 13, consisting of 17 photographs, was marked for demonstrative purposes only. The testimony of Mary Gaddy, M.D., was taken in a post-trial deposition and submitted to the Court.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses appearing at trial, the exhibits and depositions, the Court makes the following:

FINDINGS OF FACT

1. Claimant was 29 years old at the time of trial.
2. On September 4, 1990, claimant suffered an industrial injury while working as a warehouseman, deliveryman and yardman at Apollo Piping Supply, Inc. (Apollo) in Billings, Montana. He was pulling a piece of pipe out of a grooving machine to put it on the stack of finished pipe when the pipe fell. Claimant leaned down to push the pipe away and felt something pop in his back.. (Tr. at 15.)

3. Claimant reported his injury to Dennis Fettig, manager of Apollo, who urged him to obtain treatment.
4. At the time of the claimant's injury Apollo was insured by Wausau, which accepted liability for his claim.
5. Wausau paid claimant temporary total disability benefits from the time of his injury until October 16, 1991.
6. Claimant never returned to his employment with Apollo but has continuously worked for a different employer as a cobbler's apprentice since May 18, 1992. Claimant's pay as an apprentice is \$5.00 an hour. His pay at Apollo at the time of his injury was \$5.75 an hour.
7. Through his present petition the claimant is seeking total rehabilitation benefits for the period of October 16, 1991 to May 18, 1992. (Petitioner's Proposed Findings at 12.)
8. Claimant was initially treated by Dr. Thomas C. Donahue, a chiropractor, who then referred claimant to Dr. Arturo Echeverri, a Billings neurologist, for consultation. Dr. Echeverri examined claimant and made an October 15, 1990 report in which he stated his impression that claimant suffered "[n]eck pain upper thoracic spine pain which could be muscle sprain". (Ex. No. 3 at 21.)
9. At Dr. Echeverri's request, an MRI on claimant's cervical spine was done on October 30, 1990. The MRI disclosed a mild, very minimal annulus bulge at C5-6 and a very focal central disc herniation at C6-7, which was also characterized as mild. (Ex. No. 3 at 14.)
10. Dr. Echeverri examined claimant again in January 1991. Thoracic x-rays taken at that time failed to disclose any specific abnormalities in that area of the back. Dr. Echeverri reported the results of his examination in a January 24, 1991 letter to Dr. Donahue, stating that he found no neurological deficits. Claimant's complaints were of pain between his shoulder blades and his left anterior chest wall. The report also noted "some give-away weakness which is not very consistent. Also when I check his reflexes, he made the left upper extremity jump more than normal but again objectively I found no neurological deficits." Thus, the examination failed to note any neurological symptoms which might be associated with nerve impingement. Dr. Echeverri recommended continued chiropractic and physical therapy. (Ex. No. 3 at 16.)
11. In the meantime, Dennis Fettig wrote claimant on September 12, 1990, advising him that he could return to work when he had a written doctor's release. (Tr. at 102.)
12. Dr. Donahue continued chiropractic treatments through at least April 1991. In November 1990 he had also referred claimant to a work hardening program. (Ex. No. 8.)
13. Claimant was ultimately referred for further evaluation to determine if he could return to his time-of-injury job or any other job. Vocational evaluations were performed for both

parties. Carlotta Hecker performed a vocational evaluation on behalf of the insurer. Brenda Williams performed a similar evaluation on behalf of claimant. Mary Mistal, a physical therapist, performed a functional capacities examination on June 20 and 21, 1991. Dr. Mary Gaddy, a neurologist, examined claimant on July 23, 1991. All of these examiners except Ms. Mistal testified at trial or by deposition. Claimant's treating physicians did not testify, although their medical notes are a part of the record in this case.

14. Dr. Gaddy's office notes of her July 23, 1991 examination reflect the following: "Patient with neck pain and headaches following an on-the-job injury, but with no neurological defect found today. I do not find a history or clinical evidence of a cervical radiculopathy or mononeuropathy." Dr. Gaddy suggested that claimant return to work and continue his back and neck exercises three times a day. (Ex. No. 4 at 32.) She diagnosed claimant's injury as a cervical strain. In her opinion, claimant's condition had stabilized and he did not need any additional medical treatment. (Gaddy Dep. at 6.)

15. Various job descriptions, including one for claimant's time-of-injury job, were prepared by Ms. Hecker and submitted to Mary Mistal and Dr. Gaddy.

16. The job analysis of claimant's job at Apollo was prepared from information supplied by claimant's manager, Dennis Fettig. The analysis indicated lifting 60-70 pounds frequently from waist level to waist level, lifting 150 pounds occasionally from waist level to waist level, and carrying 100 lbs. 3-5 feet frequently/occasionally. However, under "GENERAL COMMENTS" the analysis states that "Equipment is available to lift heavy pipe (over 50 pounds). Assistance is available." (Ex. No. 9 at 95-96.)

17. When presented with the analysis for claimant's time-of-injury job, Ms. Mistal approved claimant's return to the job but with the comment "modification of assistance for lifting" under her signature. Ms. Mistal also inserted the following comment in the section entitled *PHYSICIAN'S COMMENTS*: "Client is limited in waist level lifting to 50 pounds max & to 45 pounds in carrying a weight precluding his ability to safely perform these activities without equipment and/or assistance." (Ex. No. 9 at 95-96; Gaddy Dep. at 10.) Ms. Mistal's approval was dated June 21, 1991.

18. The same analysis was then provided to Dr. Gaddy, who approved the analysis on July 23, 1991.

19. On August 5, 1991, Dennis Fettig was advised by Ms. Hecker that Dr. Gaddy had approved claimant's return to work at his job with Apollo. Mr. Fettig asked Ms. Hecker to have claimant contact him to discuss his plans to return to work. Apollo had not permanently filled claimant's position in the eleven months following his injury and the position remained available to claimant.

20. Claimant was informed by Dr. Gaddy's nurses that he was approved to return to work at Apollo. Ms. Hecker also informed claimant on August 5, 1991, that Dr. Gaddy had approved

his return to work. She sent him a copy of Dr. Gaddy's medical report. (Tr. at 91-92.) Claimant testified that he did not dispute that he was approved to return to work, but wasn't sure what restrictions he had.

21. Claimant called Mr. Fettig on August 5, 1991, however, he was unwilling to make a commitment to return to work. Mr. Fettig asked claimant to state his intentions regarding his return to work in writing.

22. On August 19, 1991, claimant visited Mr. Fettig at Apollo. Mr. Fettig asked the claimant about his plans regarding a return to work at Apollo. Claimant again refused to commit himself to returning to work because "I still had not actually talked to Dr. Gaddy, and so I did not have a definite opinion directly from her, no, sir. And I still did not have transportation." (Tr. at 48.) At the time he met with Mr. Fettig, claimant did not have a working automobile or a reliable way to get to work. Mr. Fettig also received a letter from claimant on August 19, 1991. (Ex. No. 10; Tr. at 106-107.) Even though claimant's letter stated that he wished to return to Apollo when Mr. Fettig asked him if he were willing to return back to work, claimant told him "I just don't know." (Tr. at 48.)

23. Having listened to the testimony of claimant and Mr. Fettig, and considered claimant's actions, I find that the principal obstacle to claimant's return to work was his lack of transportation rather than his concern with Dr. Gaddy's opinions.

24. The key issue in this case concerns the physical requirements of claimant's job. That controversy is due in part to the ambiguous job description prepared by Carlotta Hecker, which left unclear how much claimant was required to lift unassisted.

25. Dr. Gaddy provided the sole medical testimony concerning limits on claimant's lifting ability. She set those limits at 50 pounds on a regular basis, but approved lifting of greater weights five percent (5%) of the time. She testified:

A: (by Gaddy) Once again, I thought that he could lift 50 pounds regularly.

Q: Okay.

A: But that if he had to lift something in excess of 50 pounds occasionally, five percent or less of the time, that's what I thought he could do.

Q: That would be appropriate?

A: Yes.

....

Q: Just so that I understand things correctly, since this is the key issue, doctor, it was your intention in approving this job that Mr. Thompson generally be limited to lifting

up to 50 pounds, but that if on occasion, five percent of the time, he is required to lift more than 50 pounds, that would be appropriate?

A: That's correct.

(Gaddy Dep. at 10-12.)

26. Claimant's job at Apollo was to receive pipe and related materials at its yard, put it away, categorize it, alter the materials as needed, and deliver the materials to buyers. (Tr. at 96-98.) His position included "grooving pipe," a job which required him to move lengths of pipe weighing up to 150 pounds from a pipe stand to a grooving machine, and then to metal sawhorses. However, he was not required to lift the pipe unassisted. He was provided a forklift to put the pipe on a stand; the stand and sawhorses provided a fulcrum for moving the pipe around during grooving and stacking. (Tr. at 111-115; 125-129.)

27. Apollo supplied equipment to assist with lifting. The equipment included two forklifts, pallet jacks, shopping carts and two-wheeled carts (Tr. at 98; 110) available on site so that workers were not required to lift more than 50 pounds. (*Id.* at 116.) Mr. Fettig testified that when lifting pipes weighing 150 pounds, pivot devices were used as fulcrums, so that the claimant and other workers lifted no more than 45 or 50 pounds. (*Id.* at 115.) Mr. Fettig acknowledged that in lifting one end of a length of pipe, "[if] the fulcrum effect was not in the proper position, you could be lifting more than 75. I mean if it was something in that order." (*Id.* 129-130). The Court found Mr. Fettig to be a sincere, earnest and credible witness.

28. Claimant, on the other hand, testified that he had to lift in excess of 50 pounds "lots of times". (Tr. at 27-28.) He disagreed that assistance is always available for lifting over 50 pounds, because:

[I]n order to have assistance you have to have either -- if you are talking about a person, you have to have that person available and there, or if you are talking about mechanical assistance, you have to have that particular item there and usable. And for that situation it is not always the case.

(Tr. at 27-28.) He testified that the forklift might be broken down, or for some unforeseen reason, might be out of propane, or that he might be unable to get the forklift or pallet jack in far enough to reach the place where the item was to be placed. Claimant further testified that when using the two-wheeled cart and the shopping basket, the employee still had to lift the item off to put it on the shelves.

29. The Court finds Mr. Fettig's testimony concerning lifting requirements, and the availability of lifting aids, credible. Many of claimant's examples of situations requiring lifting of more than 50 pounds were unusual, and could have been avoided by following procedures outlined by Mr. Fettig.

30. The claimant failed to persuade the Court that his job required him to lift weights in excess of 50 pounds more than 5% of the time. Dr. Gaddy, who provided the only medical testimony in this case,⁽¹⁾ set those limits, and they are not exceeded.

31. Claimant was and is able to return to his time-of-injury job.

CONCLUSIONS OF LAW

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

2. Claimant's injury occurred on September 4, 1990. The law in effect at that time governs his entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). The workers' compensation laws as amended in 1989 therefore govern his petition for benefits.

Section 39-71-1023, MCA (1989), provides for total rehabilitation benefits beginning on the date of maximum healing for a worker who is no longer temporarily totally disabled but who meets the definition of a disabled worker. Claimant has not alleged or argued that his date of maximum healing occurred later than the termination of his temporary total disability benefits. Therefore, the issue presented is whether claimant was a "disabled worker" after October 16, 1991.

A disabled worker is defined as follows: "Disabled worker means one who has a medically determined restriction resulting from a work-related injury that **precludes the worker from returning to the job the worker held at the time of injury.**" Section 39-71-1011 (1989) (Emphasis added.) Thus, claimant must show that his job requirements at Apollo exceeded his medically determined restrictions. He has the burden of proof, ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 512 P.2d 1304 (1973), by a preponderance of the probative, credible evidence, ***Dumont v. Wickens Bros. Construction Co.***, 183 Mont. 190, 201, 598 P.2d 1099 (1979). The claimant has failed to carry his burden.

Dr. Gaddy provided the only medical testimony in this case. She testified that claimant can lift up to 50 pounds on a regular basis, and can lift more than 50 pounds 5% of the time. She approved of claimant returning to his job as described in the job analysis presented to her. While her opinion was dependent on the actual lifting requirements of the job, a preponderance of credible evidence persuades the Court that Dr. Gaddy's assumptions in rendering her opinion were factually correct. While claimant testified about instances of lifting more than 50 pounds, Mr. Fettig credibly testified claimant was not required to lift or carry weights in excess of 50 pounds without mechanical assistance. The situations identified by claimant were not common and claimant could have avoided them. For example, claimant testified that on one occasion, a load of material was delivered in a way that it could not be reached with a forklift or pallet jack. However, Mr. Fettig testified that it is the responsibility of the freight company to get the material in a position to unload it. Thus, claimant could and should have insisted that the freight company fulfill its delivery

responsibilities. Claimant also testified that he had unloaded boxes in excess of 50 pounds from UPS delivery vans. (Tr. 19-20.)⁽²⁾ Mr. Fettig, however, testified that employees are not allowed into UPS trucks, and that the UPS driver does his own unloading. He also testified that if a box weighing 50 or 60 pounds arrives, the employee does not have to lift the 60 pound box, but is allowed to break down the individual component parts to stock them on shelves.

Claimant testified that the pipe he was working with could weigh up to 150 pounds. However, as Mr. Fettig testified, Apollo provided various mechanical devices to lift the pipe. Mr. Fettig testified credibly that claimant was not required to lift more than 45 or 50 pounds when working with the pipe.

While claimant may have on occasion been required to lift more than 50 pounds, he did not provide convincing testimony which would persuade the Court that he was required to lift more than 50 pounds more than 5% of the time.

Claimant has failed to persuade the Court by a preponderance of evidence that he is a disabled worker as defined under section 39-71-1011, MCA. He has not shown that the physical requirements of his time-of-injury job were greater than his medical restrictions. Accordingly, claimant is not entitled to rehabilitation benefits.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant is not entitled to rehabilitation benefits for the time period between October 16, 1991 and May 18, 1992.
3. Claimant is not entitled to attorney fees and costs.
4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 22nd day of April, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Ira D. Eakin
Mr. Kelly M. Wills

1. While other medical evidence has been submitted in the form of exhibits, that evidence does not substantially undermine Dr. Gaddy's sworn deposition testimony.
2. Claimant testified that UPS has a limitation of 70 pounds on their shipping. (Tr. at 19.)