

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 47

WCC No. 9803-7935

TAMI WAITE

Petitioner

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

DICK IRVIN, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 35 year old claimant sought permanent total disability benefits due to severe, debilitating pain in her low back, hips and legs following fall on ice at work. She suffers tremors in her low body; the pain is always present; and she is on numerous medications, including controlled release morphine. There is no serious dispute that her tremors and pain are real, evidently the result of damage to her sacroiliac joint and/or interspinous ligaments. She tried to return to work twice, but each time suffered debilitating pain.

Held: Claimant is PTD because she has reached maximum medical healing according to physicians and is presently unable to work. While IME physician opined the tremors could be eliminated by learning and distraction, which is supported to some extent by video, WCC gives greater weight to treating physician where their expertise appears similar. Treating physician knows claimant better; his opinion is bolstered by claimant's apparent desire to return to work. But, WCC notes it does not find claimant will never be able to work and urges both parties to remain open to options for further treatment that may improve claimant's condition and employability.

Topics:

Benefits: Permanent Total Benefits: Generally. 35 year old claimant with severe, debilitating pain in low back, hips, and legs following fall on ice, found permanently totally disabled. She suffers tremors in her low body; the pain is always present; and she is on numerous medications, including controlled release morphine. There is no serious dispute that her tremors and pain are real, evidently the result of damage to her sacroiliac joint and/or interspinous ligaments. She tried to return to work twice,

but each time suffered debilitating pain. While IME physician opined the tremors could be eliminated by learning and distraction, which is supported to some extent by video, WCC gives greater weight to treating physician where their expertise appears similar. Treating physician knows claimant better; his opinion is bolstered by claimant's apparent desire to return to work. But, WCC notes it does not find claimant will never be able to work and urges both parties to remain open to options for further treatment that may improve claimant's condition and employability.

Physicians: Treating Physicians: Weight of Opinions. WCC found claimant permanently totally disabled, relying in part upon opinion of treating physician, a physiatrist, over IME physiatrist. WCC gives greater weight to treating physician where both doctors' expertise appears similar. Treating physician knows claimant better; in addition, his opinion is bolstered by claimant's apparent desire to return to work and credibility in her pain reports.

¶1 The trial of this matter was held on May 27, 1998, in Kalispell, Montana. Petitioner, Tami Waite (claimant), was present and represented by Mr. David W. Lauridsen. The respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams.

¶2 Exhibits: Exhibits 1 through 12 were admitted without objection.

¶3 Witnesses and Depositions: The claimant and Larry Goroski testified. The parties also submitted depositions of Drs. Patrick Galvas and James D. Hinde.

¶4 Issues: Claimant asks the Court to find her permanently totally disabled. She also requests a penalty, attorney fees and costs.

¶5 Bench Ruling: After hearing the trial testimony and reviewing the depositions and exhibits, the Court found claimant to be permanently totally disabled. However, I held that the State Fund did not act unreasonably and that claimant is not entitled to either attorney fees or a penalty. Because she prevailed, claimant is entitled to costs.

* * * * *

¶6 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 The claimant is presently 35 years old. She has worked as a waitress, bartender, in an auto shop, and as a receptionist.

¶8 Claimant was employed by Dick Irvin, Inc. (Irvin), for approximately three years, with a one-year interruption in her employment. Irvin is a trucking firm. Claimant worked primarily

as a receptionist, answering the phone and entering information from truckers' log books into a computer database. The latter activity employed some sort of electronic wand. She also carried messages back and forth to dispatchers. Her job was sedentary.

¶9 On January 8, 1997, claimant slipped and fell on ice while working for Irvin. She injured her low back.

¶10 At the time of claimant's injury, Irvin was insured by the State Fund, which accepted her injury as compensable.

¶11 As a result of her injury, claimant has experienced severe, debilitating pain in her low back, hips and legs. The pain is always present. She is on numerous medications, including MS Contin, which is controlled release morphine.

¶12 As a result of her pain, claimant suffers from tremors (shaking), principally in her lower body.

¶13 Since her injury, claimant has been seen by numerous doctors. She was initially treated by Dr. Robert Clary, who is apparently her family physician. She has also been seen or treated by Dr. Dale Schaefer, a neurosurgeon; Dr. Patrick Galvas, a board certified physiatrist; Dr. Paul Gorsuch, another neurosurgeon; and Dr. Terry L. Jackson. At the request of the State Fund, claimant was also seen by Dr. James Hinde, a board certified physiatrist.

¶14 Dr. Galvas has been claimant's primary treating specialist with regard to her condition.

¶15 I have reviewed the medical records submitted by the parties. I have also reviewed Dr. Galvas' and Dr. Hinde's depositions.

¶16 I need not go into a detailed analysis of all of the medical evidence in this case. There is no serious dispute that claimant suffers serious pain. There is no serious dispute that her tremors are real and a consequence of her pain. The best evidence concerning the origin of her pain is that she suffered injuries to her sacroiliac joints and/or her interspinous ligaments.

¶17 Claimant attempted a trial return to work on two occasions. On the first, which occurred in 1997, she worked for two hours and was sent home by her employer because of her pain. The second occurred approximately a month ago with the approval of both Drs. Hinde and Galvas. Claimant worked two hours on one day. Her two hours of work caused an increase in her pain. She saw Dr. Clary, who took her off work altogether. Dr. Clary wrote the State Fund on May 6, 1998, as follows:

This young lady, who has suffered from chronic back pain and tremor for approximately 1.5 years, was seen on 4/24/98 stating that she had been released by her physiatrist to return to work and she had done so. She tried to resume her job as

a receptionist at Dick Irvin Trucking. She stated that from apparently sitting for too long of a period of time, she began to experience severe back pain. She was present in the office, tearful, complaining of pain.

She is on chronic medications for her pain in the form of MS Contin augmented with Vicoprofen. She has seen numerous specialists for her problems and she has had numerous therapies. All have unfortunately met with failure. At that time, I recommended that she not attend work until her exacerbation of her severe and chronic back pain had improved.

(Ex. 10 at 8a.)

¶18 Both Dr. Galvas and Dr. Hinde agree that claimant has reached maximum medical improvement. While this Court has some reservations concerning that view, and in particular whether further treatment might benefit claimant and increase the level of her functioning, their opinions are the best evidence regarding her healing status.

¶19 In his deposition, Dr. Galvas opined that claimant is unable to return to even sedentary employment and that she is permanently totally disabled. Dr. Hinde is more optimistic. He believes that claimant can learn to overcome her tremors and can return to sedentary work through a program involving a gradual return to work.

¶20 Claimant bears the burden of persuading me, on a more likely than not basis, that she has reached maximum medical improvement and is presently unable to work. On that basis, I find that she is in fact permanently totally disabled. Her pain is not seriously disputed. Her tremors are documented and not disputed, although Dr. Hinde believes that they can be eliminated by learning and distraction. There is some evidence supporting his opinion in the surveillance video of claimant.

¶21 In this case, the "treating physician" rule requires that I give greater weight to Dr. Galvas' opinion. Both Dr. Galvas and Dr. Hinde are physiatrists. There is no evidence that one is more qualified in their specialty than the other. Dr. Galvas has treated claimant over a longer time and is more familiar with her condition. His opinion is bolstered by claimant's apparent motivation to return to work if she were able to do so. Claimant had a good relationship with her employer, and I am persuaded that if she could return to work she would do so.

¶22 Certainly, as Dr. Hinde indicated in his testimony, there may be psychological factors contributing to claimant's ability to overcome her tremors, deal with her pain, and return to work. Serious injuries and severe pain invariably have an impact on the injured worker's psyche, but there is no suggestion that claimant's physical symptoms and pain are in any way feigned or exaggerated.

¶23 Judges determine facts and apply law, but they are not insensitive robots. This judge is convinced that neither the claimant nor the State Fund should take this decision as the final word. In finding claimant to be presently permanently totally disabled, I do not find that her condition will never improve or that she will never be able to return to work. I am inclined to agree with Dr. Hinde's more optimistic assessment that claimant can overcome her tremors and learn to live with her pain. While I am persuaded by a 51% probability that claimant is presently permanently totally disabled, I am also persuaded that there is a 49% probability that she can overcome her current disability. Her disability does not just affect her employability, it affects every aspect of her life. It affects her family and friends. I therefore urge both claimant and the State Fund to explore further evaluation and treatment which might increase claimant's level of functioning and enable her to return to work.

¶24 The State Fund has not acted unreasonably in its handling of this claim. While it refused to concede that claimant is permanently totally disabled, it has continued to pay her total disability benefits. Dr. Hinde's opinions also furnished a reasonable basis for the State Fund's assertion that the claimant is employable and not permanently totally disabled.

CONCLUSIONS OF LAW

¶25 The claimant was injured on January 8, 1997. Her claim is therefore governed by the 1995 version of the Workers' Compensation Act in effect at that time. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

¶26 Permanent total disability benefits are governed by section 39-71-702, MCA (1995). That section provides in relevant part:

39-71-702. Compensation for permanent total disability. (1) If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits. Permanent total disability benefits must be paid for the duration of the worker's permanent total disability, subject to 39-71-710.

(2) The determination of permanent total disability must be supported by a preponderance of objective medical findings.

...

Permanent total disability is defined in section 39-71-116, MCA (1995), as follows:

(23) "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for

remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

¶27 Claimant has carried her burden of proof. She has established that she has reached maximum medical improvement or healing. She has further established, by a preponderance of medical evidence, that she does not have a reasonable prospect of physically performing regular employment. This does not mean that her condition will never improve or that she will never be able to return to work. It means only that at present she cannot work and that on a more likely than not basis her medical condition is stable. In my findings of fact I have indicated my view that claimant may benefit from further treatment and that her condition may improve, and I reiterate that view here.

¶28 Claimant is not entitled to a penalty or attorney fees. Both require that she prove that the insurer has acted unreasonably. §§ 39-71-611, -612, -2907, MCA (1995). I have found that the State Fund's actions in this case were not unreasonable. It has continued to pay total disability benefits and did not threaten any immediate cut-off of those benefits. Its position that claimant can return to work was supported by Dr. Hinde's opinions.

¶29 Since claimant has prevailed, she is entitled to her costs.

JUDGMENT

¶30 1. Claimant is presently permanently totally disabled and entitled to permanent total disability benefits.

¶31 2. The State Fund has not acted unreasonably in adjusting this claim. Claimant is not entitled to a penalty or attorney fees.

¶32 3. The claimant is entitled to her costs. She shall submit a memorandum of costs in accordance with rule 24.5.342.

¶33 4. This JUDGMENT is certified as final for purposes of appeal. ARM 24.5.348.

¶34 5. 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 5th day of June, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Charles G. Adams

Date Submitted: May 27, 1998

