IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 3

WCC No. 9404-7033

MICHAEL BAILEY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HEAD & BAILEY CONSTRUCTION COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 36-year old construction worker claimed roofing work on a particular job caused his condition of eczema dermatitis. Medical records contained conflicting statements from claimant as to the onset of the disease.

Held: Claimant and his close relative witnesses were not credible in their testimony that skin condition arose during particular roofing job. Medical record stating condition arose several months prior was more credible. WCC also not persuaded roofing work triggered allergic reaction where board certified physicians testified such was not likely given the circumstances. At most, roofing work caused temporary aggravation of preexisting condition, not overall condition for which claimant sought compensation. Claim for injury under WCA denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-119, MCA (1991). 36-year old construction worker failed to persuade WCC that skin condition, diagnosed as eczema dermatitis, arose or was triggered on particular roofing job. No accident or injury occurred within WCA.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-119(5), MCA (1991). Subsection defining certain forms of alleged accidents as WCA injuries only if the accident is the "primary cause" of the physical harm applies to claim for compensation relating to eczema dermatitis condition. The subsection refers to

"cardiovascular, pulmonary, respiratory, or other disease." While the word "disease" is not defined in the WCA or ODA, the dictionary definition of the word is broad enough to encompass dermatitis caused by allergens or environmental conditions.

Injury and Accident: Accident. 36-year old construction worker failed to persuade WCC that skin condition, diagnosed as eczema dermatitis, arose or was triggered on particular roofing job. No accident or injury occurred within WCA.

Injury and Accident: Primary Cause. Subsection defining certain forms of alleged accidents as WCA injuries only if the accident is the "primary cause" of the physical harm applies to claim for compensation relating to eczema dermatitis condition. The subsection refers to "cardiovascular, pulmonary, respiratory, or other disease." While the word "disease" is not defined in the WCA or ODA, the dictionary definition of the word is broad enough to encompass dermatitis caused by allergens or environmental conditions.

Medical Conditions (By Specific Condition): Eczema Dermatitis. Subsection defining certain forms of alleged accidents as WCA injuries only if the accident is the "primary cause" of the physical harm applies to claim for compensation relating to eczema dermatitis condition. The subsection refers to "cardiovascular, pulmonary, respiratory, or other disease." While the word "disease" is not defined in the WCA or ODA, the dictionary definition of the word is broad enough to encompass dermatitis caused by allergens or environmental conditions. 36-year old construction worker failed to persuade WCC that particular roofing job was primary cause of skin condition, diagnosed as eczema dermatitis.

The trial in this matter was held on October 5, 1994, in Great Falls, Montana. Petitioner, Michael Bailey (claimant), was present and represented by Mr. Randall O. Skorheim. Respondent, State Compensation Insurance Fund, was represented by Mr. Charles G. Adams. The claimant, Martha Bailey and Patricia Bailey testified at trial. In addition, the depositions of Catherine Steele, M.D., Michael Keiley, M.D., Bruce W. Richardson, M.D., and Robert A. Neill, M.D. were submitted for the Court's consideration. Exhibits 1 through 12 were admitted by stipulation.

The parties sought and the Court permitted post-trial depositions and briefing. The case was submitted for decision on October 17, 1995, when the transcript of the final post-trial deposition was filed.

Issues Presented: The claimant seeks a determination that he suffered a compensable industrial injury on August 11, 1992, and is, therefore, entitled to permanent total, permanent partial, or temporary total disability benefits retroactive to that date. He also seeks attorney fees, costs, and a penalty.

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

FINDINGS OF FACT

1. At the time of trial, the claimant was 36 years old. He is married and resides in Havre, Montana.

2. Claimant is a high school graduate. He has no further formal education.

3. Claimant has been employed by Bailey & Head Construction for the last 15 years. The company is owned by his parents.

4. Claimant's job encompasses carpentry, roofing, and concrete work. He has no supervisory responsibilities.

5. In the summer of 1992, following a major hail storm in the Havre area, claimant did a large number of roofing jobs. By August 10, 1992, he had replaced eight or nine roofs. All of the roofs had asphalt composition shingles laid over tar paper and plywood sheeting. Claimant tore off the old shingles and tar paper and replaced them with new materials.

6. On August 11, 1992, claimant began a roofing job three or four miles out of town at a farm house known as the McLaughlin Place. (Ex. 2 at 8.) The McLaughlin Place was an older home. Its roof consisted of asphalt composition shingles over an older layer of wood cedar shake shingles. The claimant was required to remove both layers of the old roof before re-shingling it.

7. At trial the claimant testified that on the day he began work on the McLaughlin Place, the temperature reached approximately 85 to 90 degrees and that he was wearing work boots, socks, jeans and a T-shirt, but no gloves.

8. He further testified that while working he developed a rash:

I'd say it was probably 1:00 or 2:00 in the afternoon I really started itching real bad, and I started getting these little clear blisters on me, on my sides . . ., on my legs, on my hands. None on my face.

(Tr. at 21.)

9. In response to questions by the Court, claimant indicated the blisters first appeared on the anterior side of both arms between the wrist and elbow. He testified the blisters also developed down both sides of his trunk, on the front and side of both legs between the knee and ankle, and between his fingers. (Tr. at 22, 49-53.) However, in response to cross-examination he testified that the rash first developed on his legs and sides, and later spread to his hands. (Tr. at 38.)

10. Claimant testified that he finished the McLaughlin Place in approximately five days but that the blisters and rash persisted. He further testified that he scratched the blisters, causing sores to develop, and that he finally consulted a physician when he "couldn't take it anymore." (Tr. at 22.)

11. Claimant first consulted with Dr. Bruce W. Richardson, a family practitioner, on October 13, 1992. He was initially examined by Mike Kadrmas, a medical student working under Dr. Richardson. Kadrmas recorded the history given to him by claimant. Dr. Richardson testified that although he was not personally present during Kadrmas' examination and dictation of the note, he personally examined claimant and took a history, and that he agreed with the note dictated by Kadrmas. (Richardson Dep. of February 15, 1995 at 4-5.)

12. The office note for October 13, 1992, states in relevant part:

Mr. Bailey comes in with a pruritic rash located mainly on his trunk and on both legs below his knee and on his feet. **The rash on his legs has been present for approximately the last 6 months and the rash on his trunk has been there for about 5 weeks**. . . . This gentleman works as a construction worker and has been working for the past 4 or 5 months doing a lot of roofing jobs. **The rash began before he started roofing.**

(Ex. 5 at 2; emphasis added.) Dr. Richardson diagnosed claimant's condition as probable eczema and prescribed Vistaril for his itch.

13. After biopsy Dr. Richardson confirmed his preliminary diagnosis of chronic dermatitis. (Ex. 5 at 2.) He prescribed a course of Medrol, which is an adrenocortical steroid.[(1)] The Medrol provided significant relief but the dermatitis worsened after claimant ran out of the drug. (Ex. 3 at 4.)

14. Dr. Richardson referred claimant to Dr. Baldridge, a specialist in dermatology. (Ex. 5 at 2; Richardson Dep.of February 15, 1995 at 2.) Claimant apparently never saw Dr. Baldridge.

15. Claimant was next seen by Dr. Thomas Gormley, a dermatologist with the Billings Clinic, on November 30, 1992. At that time claimant was reporting that his condition began only two to three months previous. Dr. Gormley suggested bathing restrictions, lubrication of the areas of rash, and Prednisone, which is also an adrenocortical steroid. Dr. Gormley instructed claimant to return for reexamination in two weeks but claimant did not do so and never saw Dr. Gormley again. (Ex. 3 at 4.)

16. Claimant next sought treatment from Dr. Catherine Steele, who practices in Great Falls. Dr. Steele thereafter became claimant's treating physician.

17. Dr. Steele specializes in allergy and dermatology. She is board eligible for specialty certification in dermatology and environmental medicine but is not board certified in either specialty. (Steele Dep. at 5, 27.) She is not board eligible for specialty certification in allergy. (*Id*. at 27.)

18. Dr. Steele first examined claimant on February 23, 1993. Claimant told her at that time that his dermatitis had begun in October 1992. (Ex. 11 at 6; Steele Dep. at 7.)

19. It is apparent from the charts of the three physicians who examined claimant up to this point that claimant is not a reliable historian. The three histories show that claimant reported the onset of his dermatitis at three different times. The history reflected in Dr. Richardson's chart is particularly at odds with claimant's trial testimony. I also note, in contrast to his trial testimony, that in giving a history of his condition to all three doctors, claimant did not identify any specific event as precipitating his dermatitis. After considering claimant's testimony at trial, as well as the supporting testimony of his mother and wife, I did not find claimant or his close relatives credible regarding the onset of the rash. Rather, I am persuaded that Dr. Richardson's office note of October 13, 1992, which provides the earliest history and is very specific and precise regarding what claimant said regarding the onset of the rash, is accurate. I further find that the rash came on over a period of time and was not precipitated by the McLaughlin roofing job or any other specific event.

20. In assessing claimant's credibility I considered his demeanor and his testimony on other subjects. Claimant was not forthright in his testimony. I specifically note that he testified that he lost 40 weeks of work the previous year without disclosing that during many of those weeks his parent's construction company had no work. He then testified that he could have worked for other construction companies during those times but when further queried admitted that he had never worked for another company. (Tr. at 54.)

21. Dr. Steele confirmed the prior diagnosis of dermatitis, characterizing claimant's condition as "eczema dermatitis." (Steele Dep. at 18; Ex. 11 at 15.) Another IME allergist diagnosed the condition as "eczematous dermatitis." (Keiley Dep. at 11.) "Eczema" is "a pruritic papulovesicular dermatitis . . . characterized in the acute stage by erythema, edema associated with a serous exudate between the cell of the epidermis . . . and an inflammatory infiltrate in the dermis, oozing and vesiculation, and crusting and scaling . . . ." "Eczematous" means "affected with or of the nature of eczema." Dorland's Illustrated Medical Dictionary (27th Ed.).

22. Dr. Steele did allergy testing. Claimant reacted to a host of potential allergens. He tested positive for molds, dusts, weeds, grasses, and clover, as well as a significant number of other substances. (Steele Dep. at 9, 28.)

23. Dr. Steele attributed claimant's dermatitis to an allergic reaction. She treated him with topical medication and allergen injections. (*Id*. at 10-11.) She also gave claimant an epinephrine kit to use if his breathing becomes severely restricted. (Claimant testified that approximately two months after seeing Dr. Richardson, he began having breathing problems and that he "can't get no air in, and I can't get no air out." (Tr. at 34.)) The claimant did not indicate whether he had used the kit, but at the time of trial he had not had

breathing problems for six or seven months. In any event claimant failed to present medical evidence linking his breathing problems to his work on the McLaughlin Place.

24. Claimant's rash has also improved with the injections, however, he testified his condition deteriorates when he returns to work.

25. Dr. Steele testified that if claimant's rash arose on August 11, 1992, as he claims, then the most likely cause of his dermatitis was an allergic reaction to dust and mold present in the cedar roof of the McLaughlin Place. (Steele Dep. at 15-16.) She pointed out that an allergic reaction may occur suddenly in response to a single exposure because the individual has previously been sensitized to the allergen. (*Id*. at 11-12.) Sensitization occurs when the individual has been exposed to an allergen on enough occasions for the body to develop a reaction to it. (*Id*.) According to Dr. Steele, once claimant's dermatitis condition had been "triggered" by an exposure he would continue to have dermatitis. (*Id*. at 16.) She described the allergens present at the time claimant's symptoms arose as a "triggering mechanism" for continuing reactions. (*Id*. at 15-16.)

26. Dr. Steele conceded that if claimant's dermatitis arose prior to his working on the McLaughlin Place, then she would not attribute his dermatitis to the cedar shingles. (*Id*. at 22, 29.)

27. The claimant filed a claim for compensation in April of 1993. The State Fund treated the claim as one under the Occupational Disease Act. The claim was ultimately denied as an occupational disease.

28. On August 11, 1993, claimant was examined by Dr. Robert A. Neill, who is a member of the Occupational Disease medical panel. Dr. Neill is board certified in dermatology. The doctor found that claimant suffered severe dermatitis of his lower legs. (Neill Dep. at 5.) He also noted areas of pigmentation on claimant's trunk, indicating a previous rash on that part of the body. (*Id*. at 7.)

29. Dr. Neill generally agreed with Dr. Steele's explanation of sensitization but disagreed with her opinion that claimant's dermatitis was caused by his exposure to allergens at the McLaughlin Place. (Neill Dep. at 11.) In his opinion, it was not. Assuming that claimant developed dermatitis prior to August 11, 1992, he further opined that heat and sweat on that day temporarily aggravated claimant's condition. (*Id*. at 7,11, 21.) Finally, in his opinion, once claimant developed dermatitis he would continue to have exacerbations of his condition every time he is exposed to the allergens which triggered the dermatitis in the first place. (*Id*. at 23.)

30. Claimant was also examined by Dr. Michael Keiley on January 15, 1994, in conjunction with the occupational disease evaluation. (Keiley Dep. at 6.) Dr. Keiley is board certified in allergy and immunology. (*Id*. at 5.)

31. Dr. Keiley testified that skin tests indicate that claimant is sensitive to numerous allergens which are common to the Havre area. (*Id*. at 9-10.) In his opinion, however, claimant's dermatitis was not caused by his exposure to allergens present at the McLaughlin Place. (*Id*. at 11, 25.) He did feel that heat, sweat and pressure on claimant's legs during the job at the McLaughlin Place would have exacerbated claimant's rash on his legs but that any such exacerbation would have only been temporary. (*Id*. at 27.)

32. After weighing the conflicting medical testimony, and considering the time of onset for claimant's condition, I find that claimant's dermatitis was not caused nor triggered by his work at the McLaughlin Place. As previously found, claimant's dermatitis began several months prior to his work on the McLaughlin Place. Even Dr. Steele conceded that if claimant's dermatitis began prior to August 11, 1992, then it was unlikely that his work on that date caused it. Furthermore, for the following reasons, the opinions of Drs. Richardson, Neill and Keiley are more persuasive than the opinion of Dr. Steele:

a. Both Drs. Richardson and Keiley are board certified in their specialty fields while Dr. Steele is not.

b. Dr. Richardson was claimant's initial treating physician.

c. Drs. Richardson, Neill and Keiley all agreed that the places where the dermatitis appeared were inconsistent with an allergic reaction caused by either direct contact with allergens or exposure to air borne allergens. (Richardson Dep. of November 12, 1994 at 4-5, 8-9; Keiley Dep. at 11; Neill Dep. at 7-8.) If exposure to allergens triggered his dermatitis then the dermatitis should have occurred in the first instance on the exposed portions of claimant's body instead of areas which were covered by clothing (legs and trunk). In fact, the dermatitis primarily occurred in areas covered by clothing.

d. Dr. Neill also pointed out that contact dermatitis does not occur immediately upon exposure; rather, it develops several hours or even days after the exposure. (Neill Dep. at 19.) According to claimant, the dermatitis developed as he was working.

33. The medical testimony, however, does establish that heat and sweat, as well as further exposure to the precipitating allergens temporarily exacerbate claimant's dermatitis.

34. Claimant's scratching of his rash may also be prolonging and worsening his condition. (Keiley Dep. at 29-30.)

35. The State Fund's denial of this claim was reasonable.

CONCLUSIONS OF LAW

1. The claimant has the burden of proving that he sustained an injury and that the injury occurred in the course and scope of his employment. *Gerlach v. Champion International,* 254 Mont. 137, 836 P.2d 35 (1992). He must also prove by a preponderance of

the evidence that a causal connection exists between the injury and his current condition. *Brown v. Ament,* 231 Mont. 158, 752 P.2d 171 (1988).

2. The claimant contends he was injured within the meaning of section 39-71-119(1), MCA (1991), of the Workers' Compensation Act. Section 39-71-119 provides:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm.

Claimant argues that his symptoms arose as a result of his work on August 11, 1992, and that the injury definition is satisfied. However, he failed to persuade me that his symptoms began on August 11, 1992. Rather, I am persuaded that claimant's symptoms arose several months previous.

Moreover, claimant has failed to persuade me that even if his condition emerged on August 11, 1992, it was triggered or caused by his work. There are three persuasive medical opinions to the contrary.

3. Claimant relies on *Gaumer v. Montana Department of Highways*, 243 Mont. 414, 795 P.2d 77 (1990), in alternatively arguing that his work on August 11, 1992, permanently aggravated a preexisting condition.

In *Gaumer,* the claimant was exposed to an unknown chemical or allergen at work on May 10, 1988. She suffered a severe respiratory attack which ultimately led to total disability. While she suffered from preexisting respiratory ailments, she had been able to work up to that time. In affirming a finding for claimant, the Supreme Court focused on section 39-71-119(5), MCA, and held that the primary cause of claimant's condition was the work-place exposure as evidenced by the drastic change in her condition.

Although the claimant in this case suffers from dermatitis rather than a respiratory ailment, section 39-71-119(5), MCA, is applicable. The subsection refers to "cardiovascular, pulmonary, respiratory, **or other disease**." The word disease is not otherwise defined in either the Workers' Compensation Act or the Occupational Disease Act, although the latter defines "**occupational** disease" as "harm, damage, or death . . . arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift." § 39-72-102(10), MCA (1991). However, the dictionary definition of the word is broad enough to encompass dermatitis caused by allergens or environmental conditions. "Disease" is defined as:

1. [A] disordered or incorrectly functioning organ, **part, structure**, or system of the body **resulting from** the effect of genetic or developmental errors, infection, **poisons**, nutritional deficiency or imbalance, toxicity, or **unfavorable environmental factors**; illness; sickness; ailment. [Emphasis added.]

Random House Unabridged Dictionary (2nd Ed.).

Under section 39-71-119(5), MCA, in addition to satisfying the accident definition, claimant must also prove that his work conditions were "the primary cause of the physical harm in relation to other factors contributing to the physical harm." At best he proved that his condition may have been temporarily aggravated his underlying condition. Such proof falls short of the "primary cause" standard set forth in the statute. *Gaumer* is distinguishable because the exposure in that case triggered permanent total disability.

4. The claimant is not entitled to attorney fees or a penalty. The State Fund's denial and defense of this claim was reasonable since the case presents serious medical and credibility issues.

5. Claimant is not entitled to costs since he did not prevail.

JUDGMENT

1. Claimant did not suffer an industrial injury on August 11, 1992, and is not entitled to workers' compensation benefits.

2. Claimant is not entitled to attorney fees, a penalty or costs.

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

4. 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 January, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Randall O. Skorheim
Mr. Charles G. Adams
Date Submitted: October 17, 1995

1. Physician's Desk Reference (48th Ed. -- 1994) at 2431.