IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
2000 MTWCC 75
WCC No. 9908-8305

DALE J. BEYL

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

M & C BEVERAGE, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Case Summary: Claimant injured his elbow at work and was thereafter diagnosed as suffering from epicondylitis, which is an inflammation of bony or soft tissues in the elbow. Dr. Scott Ross, an occupational physician designated by the insurer to perform an IME, as well as the claimant's treating physician at that time, determined him to be at MMI without any impairment and released him to return to his time-of-injury job. Claimant found other temporary work but experienced continuing elbow pain. After his last job, he filed an occupational disease claim and was examined by Dr. Dean Sukin, an orthopedic surgeon designated by the Department of Labor and Industry. Dr. Sukin found that claimant needs surgery, is not at MMI, and unless surgery is performed cannot return to this time-of-injury job. However, Dr. Sukin is unwilling to do the surgery since he believes it would be a conflict of interest to serve as an IME evaluator and then become the claimant's treating physician. In any event, none of claimant's physicians on record have agreed to do the surgery

Held: Dr. Sukin's opinions were persuasive in light of his independence from both claimant and insurer, his specific medical expertise, his reasoned opinions, and the claimant's efforts to return to gainful employment. Claimant is therefore determined not to have reached MMI and is granted a reasonable time to seek surgery from an orthopedic surgeon who previously treated him or find a new surgeon who is willing to perform the surgery. He is entitled to retroactive TTD benefits, except for periods he was working, and to future benefits until he recovers from surgery or until a reasonable time for finding a willing surgeon expires. He is not entitled to permanent partial or rehabilitation benefits since he has no impairment rating.

Topics:

Medical Conditions: Epicondylitis. Medical evidence that claimant continues to suffer from epicondylitis is persuasive.

Proof: Conflicting Evidence/Medical. Testimony of an independent orthopedic surgeon that claimant continues to suffer from epicondylitis of his elbow and needs surgery is more persuasive than other medical evidence, including that of a physician specializing in occupational medicine, since (1) the surgeon has specific expertise in treatment of the condition under consideration; (2) the surgeon performed a truly independent medical evaluation, having been designated by the Montana Department of Labor and Industry to evaluate claimant for an occupational disease; (3) the surgeon was unwilling to compromise his independence by performing surgery and taking on the role of claimant's treating physician; (4) the claimant's continuing symptoms were validated by another orthopedic surgeon; and (5) the claimant attempted to return to gainful employment and, in fact, has attempted to work since his injury.

Remedies. Where a claimant presents persuasive evidence from an independent medical examiner that he needs surgery, but the IME physician is unwilling to do the surgery because he believes it would be a conflict of interest to assume the role of claimant's treating physician, and where no other physician has agreed to do the surgery, claimant shall have a reasonable, but not open-ended, time to find a surgeon willing to do the surgery.

Benefits: Temporary Total Benefits. Where a claimant needs surgery for a work-related injury, he or she is still temporarily totally disabled and has not reached maximum medical improvement. Such claimant is entitled to temporary total disability benefits during periods of unemployment until recovery from surgery or for a reasonable period of time in which to undergo surgery.

Evidence: Expert Testimony: Physicians. Some deference may be given to a specialist whose specialty encompasses treatment of the claimant's specific condition.

Terms: Maximum Medical Improvement. A claimant who needs surgery has not reached maximum medical improvement where he is willing to undergo the surgery.

Benefits: Medical Benefits: Surgery. Where persuasive medical evidence demonstrates that claimant's condition will be improved by surgery, the insurer must pay for the surgery.

Benefits: Permanent Partial Benefits. Under 1997 law, a claimant who does not suffer a rateable impairment is not entitled to permanent partial disability benefits.

Montana Code: 39-71-703 (1997). Under 1997 law, a claimant who does not suffer a rateable impairment is not entitled to permanent partial disability benefits.

Benefits: Rehabilitation Benefits. Under 1997 law, a claimant who does not suffer a rateable impairment is not entitled to rehabilitation benefits.

Montana Code: 39-71-1006 (1997). Under 1997 law, a claimant who does not suffer a rateable impairment is not entitled to rehabilitation benefits.

Impairment: Impairment Ratings. Section 39-71-711 defines permanent impairment under the Workers' Compensation Act and must be followed in determining whether a worker is a disabled worker within the meaning of rehabilitation provisions, § 39-71-1011 (2) (1997).

Montana Code: 39-71-711 (1997). Section 39-71-711 defines permanent impairment under the Workers' Compensation Act and must be followed in determining whether a worker is a disabled worker within the meaning of rehabilitation provisions, § 39-71-1011 (2) (1997).

Montana Code: 39-71-1011(2) (1997). Section 39-71-711 defines permanent impairment under the Workers' Compensation Act and must be followed in determining whether a worker is a disabled worker within the meaning of rehabilitation provisions, § 39-71-1011 (2) (1997).

¶1 This matter is submitted upon depositions of Jackie Anderson, James Armstrong, Scott K. Ross, M.D., Jim Kimmell, Rhonda Shumway (two depositions -- Shumway Dep. I taken on April 14, 2000, and Shumway Dep. II taken on June 27, 2000), Dean Sukin, MD., the claimant, and in addition 25 exhibits.

¶2 Claimant was injured August 12, 1998, and his claim was accepted. At issue here is whether he is entitled to further benefits. The issues, as stated in the Pre-trial Order, are as follows:

A. Whether the Claimant is entitled to past temporary total disability benefits (from the date of termination) pursuant to section 39-71-701, M.C.A.

B. Whether the Claimant is entitled to rehabilitation benefits pursuant to section 39-71-1006, M.C.A.

C. In the alternative to issue B., above, whether the Claimant is entitled to permanent partial disability benefits pursuant to section 39-71-703, M.C.A.

D. Whether the Claimant is entitled to further medical benefits, including an operation to his right elbow, pursuant to section 39-71-704, M.C.A.

Issue E, requesting attorney fees and a penalty, has been withdrawn.

¶3 Having considered the Pre-trial Order, the briefs filed by the parties, the depositions, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

Claimant

¶4 Claimant is 31 years of age. (Ex. 6 at 2.) He graduated from high school. He was a C+ student. (Beyl Dep. at 21.)

¶5 Claimant has worked as a delivery merchandiser/route salesman, sanitation worker, grocery stocker, warehouse delivery person and manager, cashier/checker at a Cenex station, ditch rider, and farmer. (Ex. 16 at 15.)

Industrial Injury

¶6 Claimant was employed as a delivery person by M & C Beverage, Incorporated (M & C) in Miles City, Montana, from October 1996 to August 12, 1998. (Ex. 16 at 47.) His job entailed the delivery of cases and kegs of beer.

¶7 On August 12, 1998, while working for M & C, claimant was lifting a case of beer and felt a snap in his right elbow. (Ex. 14 at 1.) He was unable to continue working and never returned to his time-of-injury job.

Claim for Compensation and Acceptance

¶8 At the time of the injury, M & C was insured by Liberty Northwest Insurance Corporation (Liberty). Liberty accepted liability for the injury.

Medical Treatment

¶9 On the same day as his injury, claimant was treated in the emergency room of the Holy Rosary Health Center in Miles City. He was diagnosed with cellulitis[(1)] of the right elbow and forearm and given antibiotics. (Ex. 16 at 52.)

¶10 The following day -- August 13, 1998 -- claimant was examined by Dr. J.R. Grierson, a general surgeon practicing in Miles City. Claimant still had swelling in his right elbow and was complaining of an inability to grip objects, as well as tingling in his fingers. (*Id.* at 58 and Ex. 5 at 1.) Dr. Grierson reported:

> On examination there is a slight erythema measuring approximately 5 x 10 cm. around the lateral humeral epicondyle. There is point tenderness over the lateral humeral epicondyle. Feel this is a marked lateral epicondylitis with perhaps even a tear of the insertion of the supinators. Advised ice, tennis elbow band, sling, no work, Cataflam and recheck again in five days time.

(Ex. 16 at 59.)¶11 Claimant returned to Dr. Grierson for further evaluation on August 18, 1998. At that time he still had "considerable tenderness," but the redness and swelling were gone. (*Id.*) X-rays were taken but were normal. (*Id.*) This same date, Dr. Grierson provided a note for claimant to be off work until August 24, 1998. (Ex. 5 at 2.)

¶12 On August 25, 1998, claimant was seen by Dr. Daniel C. Brooke, an orthopedic surgeon. Dr. Brooke noted that claimant was "exquisitely tender over the lateral epicondylar ridge, over the insertion of the extensor wad" and "mildly tender over the elbow joint proper laterally." (Ex. 16 at 59.) He described the situation as "unusual" and suggested an MRI, as well as testing to rule out gout. (*Id.*)

¶13 An MRI was done on August 26, 1998, and read by Dr. Mark N. Irion, a radiologist. Dr. Irion noted a small bony irregularity off of the proximal aspect of the olecranon process, which he said "may be due to a remote injury." (*Id.* at 54.) He noted "[n]o other significant abnormality." (*Id.*)

¶14 Following the MRI, Dr. Brooke diagnosed traumatic lateral epicondylitis. (Ex. 1 at 8.) "Epicondylitis" is "inflammation of an epicondyle or of adjacent tissues." Merriam-Webster Medical Dictionary (1997), online at www.medscape.com. The "epicondyle" is "any of several prominences on the distal part of a long bone serving for the attachment of muscles and ligaments: **a :** one on the outer aspect of the distal part of the humerus or proximal to the lateral condyle of the femur -- called also *lateral epicondyle* **b :** a larger and more prominent one on the inner aspect of the distal part of the humerus or proximal to the medial condyle of the femur -- called also *medial epicondyle*." (*Id.*) As apropos to this case, the epicondyle involved is that of the humorus, which is the upper arm bone above the elbow, and the end of that bone at the elbow.

¶15 Dr. Brooke prescribed intensive physical therapy and Indocin, which is an anti-inflammatory drug. (*Id.*) He expected claimant to fully recover within four to six weeks. (*Id.*)

¶16 On August 31, 1998, claimant began physical therapy at Holy Rosary Health Center. (Ex. 6 at 2.)

¶17 On September 9, 1998, claimant was seen by James E. Linderman, a physician's assistant working under Dr. Brooke. Mr. Linderman fitted claimant with a tennis elbow brace and limited claimant to no lifting over five pounds with the right upper extremity. (Ex. 16 at 58.)

¶18 By September 23, 1998, claimant's condition had improved. He reported to his physical therapist that "he's doing much better." (Ex. 7 at 1.) In a follow-up visit with Dr. Brooke, he indicated that he was improving and was at "full activity," however, the note also indicates that claimant was "under restrictions for lifting," thus indicating that the "full activity" was full activity *within* claimant's five-pound restriction. (Ex. 16 at 58.)

¶19 On November 10, 1998, claimant reported to Dr. Brooke that he was "still having trouble with his right elbow." Dr. Brook wrote, "When he tries to lift, he is uncomfortable." (*Id.* at 57.) Dr. Brooke recommended claimant see an elbow specialist. (*Id.*)

¶20 Thereafter, on December 10, 1998, claimant saw Dr. Curtis R. Settergren, an orthopedic surgeon who specializes in hand surgery. (Ex. 12 at 1-2.) Dr. Settergren did a physical examination and reviewed claimant's history. He found that claimant's "history [was] most consistent with lateral epicondylitis," which he felt was "in large part resolved." (*Id.* at 1.) He recommended a "work conditioning program with therapy to increase his strength," but also offered that "[i]f exercises were to flare it up some, consideration could be given to an injection." (*Id.* at 2.) He did not recommend surgery. (*Id.* at 1.)

¶21 On January 20, 1999, claimant returned to Dr. Brooke, reporting that he was doing well until he reinjured his elbow on January 15, 1999. (Ex. 16 at 57.) Dr. Brooke's clinical notes do not state how claimant reinjured himself, and the parties have not offered any additional information. Dr. Brooke recommended claimant continue with physical therapy and work hardening. (*Id.*)

¶22 On March 3, 1999, claimant returned to Dr. Brooke. At that time claimant reported that he was "making headway," however, he also reported continuing elbow discomfort. (*Id*.) Upon examination, Dr. Brooke noted that "claimant is tender over the lateral epicondylar ridge." He injected[(2)] the elbow. (*Id.*)

¶23 At the request of Liberty, Dr. Scott K. Ross, who specializes in occupational medicine, examined claimant on April 19, 1999. (*Id.* at 47.) At that time, claimant was still off work. He reported that activities such as lifting his children, carrying groceries, and performing routine household chores caused pain in his right elbow. (*Id.* at 48.)

¶24 Dr. Ross ordered a functional capacity examination (FCE), which was done by physical therapist Todd Dundas (Dundas) on April 19, 1999. In a handwritten note to Dr. Ross, Dundas noted:

> Mr. Beyl's results are very inconsistant [sic], **between his lifting capacities & his pn [pain] reports.** [Emphasis added.]

(Ex. 3 at 1.) Dundas appears to be saying that claimant was over-reporting his pain for what he was doing.

¶25 Dr. Ross noted inconsistencies between claimant's lifting capacities and his pain report; he questioned claimant's effort on parts of the FCE exam. (Ross Dep. at 9-10.) He found claimant to be at maximum medical improvement (MMI), concluded that claimant suffered no permanent impairment, and released claimant to his time-of-injury job with recommendations that claimant get assistance, if possible, when moving or handling kegs of beer and use handcarts and pallet jacks when available. (Ex. 16 at 50.)

¶26 Claimant continued to experience elbow pain. On May 5, 1999, he returned to Dr. Brooke and reported he occasionally had numbness in his arm upon awakening in the morning. (*Id.* at 56.) Dr. Brooke was unable to reproduce these symptoms objectively during the office visit. Dr. Brooke agreed with Dr. Ross that claimant had reached MMI and could return to his time-of-injury job "with modifications to be appropriate for the patient." (*Id.*)

Return to Work

¶27 Following the releases to return to work, claimant worked for a sanitation (garbage) company in Coeur d'Alene, Idaho, from June 28 through August 28, 1999. (Ex. 23-2; Beyl Dep. at 9.) In later employment applications, claimant indicated that he left that job to return to Montana (Exs. 23 at 2; 25 at 2), however, he thereafter moved to Rapid City, South Dakota and took a job for Coca Cola Bottling. He started that job on September 20, 1999, however, he quit one week later and moved back to Montana. (Anderson Dep., Ex. 1.) During November 1999, claimant worked at County Market in Miles City for

about two weeks. (Beyl Dep. at 8.) Also during 1999, claimant intermittently drove a farm tractor for his uncle. (*Id.* at 7.) During his periods of unemployment, claimant has cared for his three children, who are all under the age of four, and has performed household chores. (*Id.* at 12, 23.) Beginning in April 2000, claimant has volunteered at his children's preschool. (*Id.* at 6.)

Further Medical Treatment and Evaluation

¶28 After going to work for County Market in November 1999, claimant experienced recurrent pain in the lateral epicondyle of the right elbow whenever lifting boxes. He returned to Dr. Grierson for consultation. (Ex. 16 at 56.) At that time, Dr. Grierson recorded:

> He has point tenderness over the lateral epicondyle, diffused tenderness over the supinators of the hand. I am at a loss to explain the chronicity of his symptoms. Advised neurology consult, nerve conduction, EMG, and bone scan. We will give him a trial of Vioxx for discomfort. Also advised him to quit working at any activity that requires lifting or straining.

(Ex. 16 at 56.)

¶29 Thereafter, claimant filed an occupational disease claim with respect to his work at County Market. On February 10, 2000, Dr. Dean C. Sukin, an orthopedic surgeon, performed an independent medical evaluation (IME) at the request of the Montana Department of Labor and Industry. (Ex. 14 at 1.) Dr. Sukin is board certified in orthopedic surgery and is a member of the Occupational Disease Panel. (Sukin Dep. at 4-5.)

¶30 Dr. Sukin's examination of claimant's elbow revealed discrete point tenderness of the lateral epicondyle. (Ex. 14 at 3.) Claimant also had discrete pain with forced dorsiflexion of the wrist and MP joints, referred to the level of the elbow. (*Id.*) Dr. Sukin concluded that claimant "does have lateral epicondylitis which has been resistance to appropriate medical care." (*Id.* at 4.) He recommended "a surgical lateral epicondylar release. I do think he should consult with an orthopedic surgeon to discuss this treatment option." (*Id.*) He further opined that if claimant "underwent a lateral epicondylar release and a lateral epicondylectomy, he would have significant and permanent improvement, and would be able to return back to work in an unrestricted manner." (*Id.* at 5.) Lastly, he concluded that claimant's condition was related to his employment in August 1998 with M & C. (*Id.* at 6.)

¶31 Finally, on April 21, 2000, Dr. James F. Schwarten, an orthopedic surgeon, examined claimant. (Ex. 15 at 1.) Dr. Schwarten noted that "claimant was exquisitely tender over the lateral epicondylar area. Provocation tests for lateral epicondylitis are positive." (Id.) He injected claimant with Aristocort and Marcaine, which provided immediate pain relief. (*Id.* at 2.) Dr. Schwarten recommended that claimant use a neoprene sleeve and resume eccentric strengthening exercises, however, he did not recommend surgery since claimant rated his pain as 2.5 on a scale of 10. (*Id.*)

Medical Testimony

¶32 Both Dr. Ross and Dr. Sukin testified by deposition.

¶33 Dr. Ross noted inconsistencies in claimant's efforts, specifically with regard to grip strength. (Ross Dep. at 11-14.) He testified that grip strength testing should be a "bell curve" of grip strengths, whereas claimant's curve was flat (*id.* at 13), and that rapid alternation of grip exercises showed a doubling to quadrupling of grip strength, suggesting that claimant was not using 100% effort. (*Id.* at 14.) He further explained that Dundas' note about a discrepancy in lifting capacities and pain reports was based on claimant's ability to lift up to 86 pounds in one portion of the test and claimant's more limited abilities during later testing. (*Id*. at 21-22.) But on cross examination, he conceded it was possible that claimant experienced increasing pain during the FCE because of the lifting he was doing (*id*. at 22), which may explain decreased lifting as the day progressed.

¶34 Dr. Ross reaffirmed his observation that claimant had "[s]ubjective complaints of right lateral epicondyle pain without objective correlation." (*Id*. at 17.) He stated there was no evidence of atrophy in musculature or loss of bone density which might provide objective evidence of disuse of a limb. (*Id.* at 18.) He reaffirmed his opinion that claimant could return to his time-of-injury job, but he reiterated his recommendation that claimant obtain mechanical assistance in moving heavy objects. (*Id*. 15-16.)

¶35 In his deposition, Dr. Sukin reiterated his opinion that claimant is suffering from lateral epicondylitis and found ample objective evidence supporting his diagnosis (Sukin Dep. at 37), testifying:

> [T]he key part of this examination is the fact that the patient has discrete tenderness over the prominence of the lateral epicondyle, and he also has pain referred in that region when he resists force, lifting his wrist into an extended position or his fingers into an extended position, and those are, you know, extremely reliable tests, indicating that this is a lateral epicondylitis that's causing pain.

(*Id.* at 17.) Dr. Sukin then addressed the possibility that claimant was faking his responses during the examination:

> [T]he only way a person would know to fake that and be that specific would be if they had read a medical textbook, because you would have to be very specific when we are examining any part of the body to know the right answers to every test we've done.

(*Id.*)

¶36 Dr. Sukin refuted Dr. Ross' suggestion that a lack of atrophy or weakness was significant, testifying:

> Tennis elbow [epicondylitis] is an inflammatory process involving the lateral epicondyle of the humerus which is essentially where a large mass of muscles that make your wrist extend and make your fingers extend originate. A patient can have normal strength, but hurt when they use those muscles so basically all

> this - I think this means that the patient does [not] have a neurologic underlying problem -- in other words, there isn't a nerve that is causing the muscles to disappear or waste away . . . .

(*Id.* at 16-17.)

¶37 Dr. Sukin related claimant's lateral epicondylitis to his August 1998 injury. He thought that in August 1998 claimant not only developed tendinitis of his elbow but also

> partially ruptured that extensor tendon, and that's why he swelled, that's why he became acutely inflamed and red in that area, and **I think that's also why he's been - he's been more resistant to treatment.**

(*Id*. at 36, emphasis added.)

¶38 Finally, Dr. Sukin affirmed his recommendation that claimant have surgery. He testified that 85% to 90% of epicondylitis cases respond to conservative therapy but that the other 10% to 15% require surgery. (*Id.* at 14-15.) He put claimant in the latter category. (*Id*. at 15.) Concerning the prospects of surgery, he testified:

> Surgery is very successful, and I think that there's no reason to expect that he wouldn't have 100 percent recovery and absolutely no functional loss or disability subsequent to that surgery.

(*Id.* at 19.) If claimant does not have surgery, Dr. Sukin anticipates he will have continued pain and that activity requiring "repetitive use of the wrist and power grip is going to cause aggravation of these symptoms . . . from a pure pain standpoint . . . . " (*Id.* at 20.) Dr. Sukin has not agreed to do the surgery because he sees a conflict of interest between his IME role and assuming care of the claimant. (*Id.*) He recommends claimant find an orthopedic surgeon who will treat him.

¶39 As to Dr. Schwarten's reasons for recommending against surgery, Dr. Sukin disagreed:

> Q. Okay. Now, Dr. Schwarten indicates, "I would not recommend surgery as he rates his pain as 2 and a half on a scale of 10"; obviously, that is different than your opinion, isn't it?
>
> A. That's different than my conclusion, and obviously when it comes to discussing surgery, especially surgery that is elective -- and this is elective -- you have to look at a lot of factors, and, you know, I can't disagree with Dr. Schwarten's evaluation, because at the time he did the examination on April 21st of 2000, that's obviously what the patient told him is his pain was 2 and a half over 10 which isn't very bad; however, if you go back and look at Page 1, Dr. Schwarten, under "Physical Examination," his second sentence says, "He is exquisitely tender over the lateral epicondyle area," and to me, "exquisitely" means fairly severe; and therefore, the patient may not be feeling pain at rest, but when the lateral epicondyle which is the source of pain is touched, he has fairly significant symptoms so I think we are saying the same thing, but the

> conclusion is different, for whatever reason, and I can't give you an opinion on what Dr. Schwarten's exact reasoning behind that is.

(Sukin Dep. at 24-25.)

¶40 Without surgery, Dr. Sukin has precluded claimant from returning to his time-of-injury job and restricted him from heavy lifting with the following, additional restrictions:

> I would recommend that he avoid anything that requires powerful grip with that extremity, anything that requires bringing the wrist into and up or an extended position against resistance so operating any type of machinery or controls that would require that, and I think those would really be the major restrictions.

(*Id.* at 22.)

¶41 Claimant wishes to have the surgery recommended by Dr. Sukin.

Impairment Rating

¶42 No physician has found that claimant has a permanent impairment rating. Dr. Sukin agreed that under the 4th Edition Guides to Impairment the claimant does not have a rateable impairment. (*Id*. at 20.) However, he testified that "despite the fact that the Fourth Edition doesn't give a patient impairment for pain, I think he does [have an impairment]." (*Id.* at 21.)

Retraining Evidence

¶43 In January 2000, the claimant applied for vocational retraining assistance with the Vocational Rehabilitation Program of the Montana Department of Public Health and Human Services (DPHHS). (Ex. 16 at 8-11.) On February 3, 2000, the Department found him eligible for the program. (*Id.* at 18.) A counselor with the Department assisted claimant in developing an "Individualized Plan of Employment" (IPE) calling for claimant to return to school to pursue a Bachelor's degree in electronics. (*Id.* at 26; Shumway Dep. II at 7.)

¶44 Rhonda Shumway (Shumway), a rehabilitation counselor for DPHHS, assisted claimant in developing the plan. She testified that claimant's goal is to become an electronics technician for computers. (Shumway Dep. II at 9.) However, claimant tested low in mathematics and was referred to an Adult Basic Education Lab for remedial work. (*Id.* at 10-11.) Shumway's deposition raises questions concerning claimant's ability to succeed in the program, nonetheless, she is of the opinion that he is motivated and can succeed. (*Id.* at 16, 22.)

Resolution

¶45 I find Dr. Sukin's testimony persuasive, therefore, I find that claimant has not reached MMI, that he will benefit from surgery, and that at present he cannot return to his time-of-injury job. The following factors, among others, influence my findings:

- Dr. Sukin provided a truly independent medical examination. He was not enlisted or chosen by either the insurer or the claimant. His determination that it would be a conflict of interest to perform surgery and thereby become claimant's treating physician demonstrate that his opinions are truly independent.

- Drs. Sukin and Schwarten have examined claimant more recently than Dr. Ross. Both agree that claimant continues to suffer symptoms from lateral epicondylitis.

- Dr. Sukin's expertise (orthopedic surgery) is specific to the claimant's condition.

- Dr. Sukin's testimony was more reasoned and was more persuasive. My extensive quotation of his testimony highlights the points he made which I find convincing.

- Following Dr. Ross' release, claimant sought and obtained employment, indicating that he has made a good faith effort to return to work. His activities, including his return to school, also indicate that he is making good faith efforts to undertake activities consistent with his medical condition and to ultimately return to employment. I am persuaded that he is not exaggerating either his condition or disability.

CONCLUSIONS OF LAW

¶46 Claimant's entitlement to benefits is governed by the 1997 version of the Workers' Compensation Act, which was the law in effect at the time of his injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶47 Claimant bears the burden of proving by a preponderance of evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶48 Claimant has pleaded his case in the alternative. He asks for temporary total disability (TTD) benefits but also seeks rehabilitation or permanent partial benefits. I consider each of the requests separately.

¶49 Temporary total disability benefits are governed by section 39-71-701, MCA (1997), which provides in relevant part:

> **39-71-701. Compensation for temporary total disability -- exception.** (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

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

I have found as fact that claimant has not reached maximum medical healing. I have further found that he is presently unable to return to this time-of-injury job. Finally, I have found that with respect to his latest post-injury employment with County Market, he was unable to continue that employment due to arm and elbow pain.

¶50 Based on the facts found and section 39-71-701, MCA, claimant is entitled to retroactive TTD benefits for the periods of May 18, 1999 to June 27, 1999, when he secured employment with a sanitation company in Idaho. He is entitled to further benefits from November 19, 1999, when he was unable to continue working for County Market to present, continuing until he reaches MMI, returns to work, or otherwise becomes ineligible for TTD benefits. Claimant is not entitled to benefits between June 29, 1999 to November 18, 1999 when he quit at County Market, since he was working during much of that time and the evidence is insufficient to show that he quit the jobs in Idaho and South Dakota on account of his industrial injury.

¶51 Claimant is entitled to medical benefits for surgery should claimant find a physician willing to perform the surgery. However, in light of the unique nature of the evidence in this case, reasonable time limitations must be placed on any surgery. No physician treating claimant has agreed to perform the surgery. Claimant's latest treating physician - Dr. Schwarten - determined that surgery is not warranted, but Dr. Sukin, for reasons I find persuasive, disagrees. But Dr. Sukin will not perform the surgery because of his role as an IME. Claimant must therefore convince Dr. Schwarten, as he has the Court, that surgery is reasonable and necessary. If he cannot do so, then he must find another treating physician who will agree to the surgery. Theoretically, he might run through several orthopedic surgeons before he finds one willing to do the surgery, or he might take years to find one, or he might expend years searching and never find one. Consequently, limits must be placed on his search for a willing surgeon.

¶52 Dr. Schwarten was the last orthopedic surgeon to evaluate claimant for treatment. Lacking other evidence, I assume that claimant selected him and he is claimant's treating orthopedic surgeon. Claimant must return to Dr. Schwarten and ask him to review his case in light of Dr. Sukin's opinion and this Court's decision. If Dr. Schwarten agrees that surgery is appropriate, then Liberty shall pay for such surgery and pay claimant TTD benefits until he reaches MMI from the surgery. If Dr. Schwarten does not agree that surgery is appropriate, then claimant shall designate another orthopedic physician practicing in Montana to evaluate him and determine whether surgery is appropriate. Liberty shall pay for the consultation. If that surgeon agrees that surgery is appropriate, then Liberty shall pay for the surgery. Thus, claimant has two opportunities to secure surgery. If the second physician recommends against surgery, then that is the end of it and at that point claimant shall be deemed at MMI and Liberty's liability for TTD benefits shall end.

¶53 The claimant shall have two months in which to obtain a reevaluation by Dr. Schwarten unless he demonstrates he is unable to do so. If Dr. Schwarten recommends against surgery, then claimant shall have another two months to designate and secure an evaluation by another orthopedic surgeon.

¶54 Claimant's requests for rehabilitation benefits or, in the alternative, permanent partial disability benefits are premature in light of my decision concerning TTD benefits. If not premature, claimant has failed to demonstrate an entitlement to either benefit since claimant has failed to prove he has a rateable permanent impairment.

¶55 Section 39-71-703, MCA (1997), provides in relevant part:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
> . . . .
> (b) has a permanent impairment rating that:
> (i) is established by objective medical findings; and
> (ii) is more than zero as determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

Claimant has not offered any evidence of an impairment rating rendered under the AMA Guides, indeed, the evidence is that he has no rateable impairment under the Guides. Thus, he does not satisfy the criteria for permanent partial disability benefits.

¶56 Section 39-71-1006, MCA (1997), governs rehabilitation benefits, providing in relevant part:

> **39-71-1006. Rehabilitation benefits.** (1) A worker is eligible for rehabilitation benefits if:
>
> (a)(i) the worker meets the definition of a disabled worker as provided in 39-71-1011;
>
> Section 39-71-1011, MCA (1997), defines "disabled worker" as follows:
>
> (2) "Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury.

Impairment is governed by section 39-71-711, MCA (1997), which provides in relevant part:

> **39-71-711. Impairment evaluation -- ratings.** (1) An impairment rating:
> (a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(**b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American Medical Association**;
(c) must be expressed as a percentage of the whole person; and
(d) must be established by objective medical findings.

¶57 Claimant argues that since "§ 39-71-1011(2) does not state that a worker must have a permanent impairment rating pursuant to the JAMA Guide," some other measure of impairment may be used, thus Dr. Sukin's testimony that claimant has an impairment under some other criteria is sufficient. (Petitioner's Response Brief at 2.) That argument ignores the principle of statutory construction requiring that "[a] statute must be construed in a way that gives effect to all of its provisions." *Taylor v. Matejovsky,* 261 Mont. 514, 520, 863 P.2d 1022, 1026 (1993). The reference to "permanent impairment" in section 39-71-1011, MCA, must be construed in light of the definition of impairment in section 39-71-711, MCA. Thus, to be entitled to rehabilitation benefits, the claimant must show that he had an impairment as defined by section 39-71-711, MCA. He has not done so and is not entitled to rehabilitation benefits.

JUDGMENT

¶58 1. Claimant is entitled to, and Liberty shall pay, TTD benefits for the periods of May 18, 1999 to June 27, 1999, and from November 19, 1999, when claimant was unable to continue working at County Market, to the present. He is entitled to, and Liberty shall pay, TTD benefits from the date of this Judgment until he reaches MMI, returns to work, or otherwise becomes ineligible for TTD benefits as provided by the further judgment of this Court.

¶59 2. Claimant is entitled to medical benefits for surgery on his right elbow should a treating physician determine that surgery is reasonably necessary and claimant agrees to undergo the surgery. However, in light of the unique nature of the evidence supporting surgery, claimant must return to Dr. Schwarten for him to reevaluate his need for surgery in light of Dr. Sukin's opinion and this Court's decision. If Dr. Schwarten agrees that surgery is appropriate, then Liberty shall pay for such surgery and pay claimant TTD benefits until he reaches MMI following surgery. If Dr. Schwarten does not agree that surgery is appropriate, then claimant may select another orthopedic surgeon to evaluate him. If that surgeon agrees to undertake the surgery, the Liberty shall pay for it, otherwise that is the end of it and at that point claimant shall be deemed at MMI and Liberty's liability for TTD benefits shall end.

¶60 3. The claimant shall have two months in which to obtain a reevaluation from Dr. Schwarten unless, for good cause, he demonstrates he is unable to do so. If Dr. Schwarten recommends against surgery, then claimant shall have two months in which to designate another orthopedic surgeon to evaluate him and obtain an evaluation.

¶61 4. If either Dr. Schwarten or a second surgeon agree to perform surgery, claimant must submit to the surgery within a reasonable time, otherwise he shall be deemed to be at MMI and his entitlement to TTD benefits shall cease. The Court retains jurisdiction to determine what is a reasonable time should a controversy arise.

¶62 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶63 6. 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 21st day of December, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. Larry W. Jones
Date Submitted: October 23, 2000

1. Cellulitis is the "diffuse and especially subcutaneous inflammation of connective tissue." Merriam-Webster Medical Dictionary (1997), found at www.medscape.com.

2. Dr. Brooke's medical note does not set out any further details regarding the nature of the injection.