

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9209-6580

HAROLD DALE FERGUSON,

Petitioner,

vs. County: Hill

AMERICAN STORES, d/b/a

BUTTREY FOODS,

Defendant/Employer.

**ORDER ADOPTING FINDINGS OF FACT AND CONCLUSIONS OF LAW OF HEARING
EXAMINER AND ENTERING JUDGMENT**

The above-entitled matter was duly heard by Court-appointed Hearing Examiner, ROBERT J. CAMPBELL who conducted the hearing, considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

Thereupon, the Court considered the record in the above-captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED the Judgment is to be entered as follows:

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Petitioner's current condition is the result of his August 9, 1986 industrial injury and he is entitled to the thoracic outlet syndrome surgery as diagnosed by his treating physician, Dr. Kobold.
3. Petitioner is entitled to reinstatement of temporary total disability benefits for his 1986 injury effective January 5, 1993. The insurer is entitled to a credit for any temporary total disability benefits it paid petitioner subsequent to January 4, 1993.

4. The Court cannot determine petitioner's entitlement to rehabilitation or permanent partial benefits until petitioner's surgery and his reaching maximum healing.
5. Petitioner is not entitled to a penalty pursuant to section 39-71-2907, MCA.
6. Petitioner is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.
7. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.
8. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 15th day of December, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Robert C. Melcher

Ms. Sara R. Sexe

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9209-6580

HAROLD DALE FERGUSON,

Petitioner,

AMERICAN STORES, d/b/a BUTTREY FOODS,

Defendant/Employer.

Presiding Hearing Examiner: ROBERT J. CAMPBELL

Counsel of Record:

Mr. Robert C. Melcher

ON BEHALF OF THE PETITIONER

Ms. Sara R. Sexe

ON BEHALF OF THE DEFENDANT/EMPLOYER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

AND PROPOSED JUDGMENT

1. Petitioner filed a petition to resolve a dispute between himself and the insurer under Title 39, Chapter 71, Part 29, MCA.
2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR TRIAL attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. Section 2-4-601, MCA.
3. Pretrial conferences were conducted on October 21, 1992 and December 30, 1992, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on January 26, 1993. Pertinent parts of the Pretrial Order are as follows:

STATEMENT OF JURISDICTION

The Worker's Compensation Court has jurisdiction over this matter pursuant to Sections 39-71-2901 - 2909, MCA (1985, 1989) and Rules 24.5.101 - 24.5.360 of the Administrative Rules of Montana.

UNCONTESTED FACTS

1. On August 9, 1986, Claimant suffered an industrial accident arising out of and in the course of his employment with Employer/Defendant. On September 22, 1989, Claimant suffered an aggravation of the August 9, 1986 injury. Claimant was earning \$9.57 per hour at the time of the aggravation.
2. Claimant's treating physicians are Dr. Robert Snider and Dr. Elmer Kobold.
3. Defendant has denied Claimant's request for thoracic outlet surgery.

4. American Stores, d/b/a Buttrey Foods, is self-insured in Montana under Plan I of the Workers' Compensation Act.

5. Other than the dates and times as set forth in the medical records, Claimant was not late for work and did not miss work due to his initial injury in 1986 or the 1989 aggravation. Claimant's personnel file is not relevant.

6. That all aspects of this case concerning mediation pursuant to statute have been satisfied and that all issues listed in this Pretrial Order are properly before the Court.

4. The parties have proposed and the Court adopts the following issues to be decided by the Court:

1. Whether Defendant is required to pay for thoracic outlet surgery pursuant to §39-71-704, MCA.

2. Whether Claimant is entitled to permanent partial benefits as a result of the August 9, 1986 injury.

3. Whether Claimant is entitled to permanent partial benefits as a result of the aggravation of the August 9, 1986 injury which occurred on September 22, 1989.

4. Whether Claimant is entitled to reinstatement of temporary total disability benefits under the 1985 Workers' Compensation Act.

5. Whether Claimant in [sic] entitled to a reinstatement of temporary total disability or total rehab benefits under the 1989 act.

6. Whether the Claimant is entitled to reasonable attorney fees and expenses from Defendant.

7. Whether the Claimant is entitled to a 20% penalty for refusal to pay medical, temporary total, total rehab or permanent partial benefits to Claimant.

5. The trial in this matter came on May 24, 1993, in Great Falls, Montana, before Hearing Examiner Robert J. Campbell. Petitioner, Harold Dale Ferguson, Kelly O'Neal Ferguson, Norman W. Johnson and John Patrick Shevlin were sworn and testified. The depositions of petitioner, Ed Coonse, Mick Golie, Juanita Hooper, Elmer Kobold and Kathy Rogers were taken before trial and admitted into evidence by stipulation of the parties. After trial, the deposition of Terry Cross was taken and submitted to the Court and is deemed part of the Court's record. Exhibit Nos. 1 through No. 16 and No. 19 were admitted into evidence by stipulation. Exhibit Nos. 17, 20, 23, 25 and 26 were admitted into evidence without objection. Proposed Exhibit Nos. 18, 21, 22 and 24 were withdrawn. Upon filing of the proposed findings of fact and conclusions of law, this matter was deemed submitted when the last deposition was received on August 25, 1993.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Proposed Judgment:

FINDINGS OF FACT

1. The uncontested facts are found as fact and adopted as fact.

Petitioner

2. At the time of trial, petitioner was 31 years old, married and living in Havre, Montana. (Dep. of Petitioner at 3-4.)

3. Petitioner received a GED in 1979. He worked in various minimum wage jobs before he was employed by Buttreys. (Tr. at 24.)

Injuries

4. On August 9, 1986, petitioner injured his back and neck when cases of paper towels and toilet paper fell on his head, neck and back. (Ex. No. 1.) Petitioner completed his shift but had continuing pain and stiffness. This included a sharp pain between his shoulders, back, and down his left arm, elbow and wrist. (Ex. No. 2 at 1, 2 and 5.)

5. On September 22, 1989, petitioner suffered a second injury which aggravated the symptoms existing from the August 9, 1986 injury. Petitioner reported almost identical symptoms in his claim form and stated "the problems I am having now are the same as after the accident in 1986." (Ex. Nos. 4, 5 at 1, 7 and 8.) Petitioner told Jon Rogers, claims adjuster for Intermountain Claims, that he rehurt his back at that time. (Ex. No. 7 at 9.)

Medical Evidence

6. Petitioner consulted with chiropractor James Pardis on August 21, 1986. He received a total of six treatments and was released to return to his position as a stock clerk on September 2, 1986. (Tr. at 26.)

7. Because petitioner continued to suffer the same symptoms after he returned to work, he consulted with Dr. Michael Nolan of the Havre Clinic on September 12, 1986. Dr. Nolan performed the examination, took X-rays and released petitioner to return to work on September 15, 1986. (Tr. at 26-27.) Dr. Nolan did not make a finding that the petitioner had reached maximum healing. (Ex. No. 3.)

8. At trial petitioner testified that he had continuing problems after the 1986 injury and that things got progressively worse. (Tr. at 27.) When testifying about the incident on September 22, 1989 he stated, "the problems I had been having accelerated, like a burning sensation

right up my spine between my shoulder blades... but it was the same symptoms, same problems from 1986 to that point, just worse. (Tr. at 32; Emphasis added.)

9. Petitioner's wife testified that petitioner's condition slowly got worse after he returned to work on September 15, 1986. (Tr. at 195.)

10. After the September 22, 1989 incident petitioner sought attention from chiropractor Curtis L. Kostelecky, who concluded that it appeared to be a "a re-aggravation of condition from accident in 1986." (Ex. No. 5 at 1.)

11. Petitioner was next examined by Dr. Robert Snider of Billings on October 24, 1989. (Ex. No. 6.) Dr. Snider allowed petitioner to continue working but advised him to return if the symptoms worsened. Petitioner saw Dr. Snider on February 7, 1991 and February 21, 1991. Dr. Snider concluded that the petitioner might be suffering from thoracic outlet syndrome and noted some desiccation at L5, S1 and disc protrusion. Petitioner was referred to Dr. Kobold, who confirmed the diagnosis and recommended an exercise program. Dr. Kobold related petitioner's thoracic outlet syndrome to petitioner's 1986 injury. Surgery was not recommended at that time. (Ex. No. 12 at 3-4.)

12. Dr. Kobold first recommended surgery for petitioner's right side in April 1992, but it was cancelled after defendant refused to pay for the procedure. Dr. Kobold reiterated his recommendation in September 1991 and March 1993. (Tr. at 46-47; Ex. No. 12 at 6, 7 and 9.)

13. Defendant requested that the petitioner be evaluated by a panel of physicians at the Billings Clinic on June 2, 3, 4, 11 and 15 of 1992. (Ex. No. 15.) The panel found maximum medical improvement had been reached, that petitioner had a two percent impairment rating and concluded that petitioner would not benefit from decompression.

14. Dr. Kobold again examined the petitioner on September 14, 1992, and on March 3, 1993, noting the long history of pain in petitioner's right arm and the severity of his symptoms which required surgery to enable him to return to gainful employment. (Ex. No. 12 at 6-7.)

Medical Opinions

15. Dr. Kobold found that it was more probable than not that petitioner's 1986 injury was a proximate cause of his current disability. (Dep. of Dr. Kobold at 19-22.) Petitioner was examined by Dr. Kobold in September of 1992. The Adson Maneuver and Allen Test were positive and provided new objective evidence not previously elicited supporting Dr. Kobold's diagnoses of thoracic outlet syndrome. Dr. Kobold's examination of petitioner on March 3, 1993, elicited the same findings. Chiropractor Kostelecky also related petitioner's symptoms to the 1986 injury. (Ex. No. 5 at 1.) Dr. Johnson was inconclusive on the issue.

(Ex. No. 14.) Dr. William Shaw of the panel did not offer an opinion concerning the cause of petitioner's current condition in relation to the 1986 or 1989 incident. (Ex. No. 15.)

Temporary Total Disability Benefits

16. Petitioner was taken off work on December 12, 1991 by Dr. Robert Snider pending a functional capacities exam. Dr. Snider thereafter referred petitioner to Dr. Kobold on January 30, 1992, for evaluation of his thoracic outlet syndrome. (Ex. No. 6 at 7-8.)

17. Following Dr. Snider's December 12, 1991 note taking petitioner off work, the insurer began paying petitioner temporary total disability benefits.

18. Temporary total disability benefits were discontinued on or about January 4, 1993. They were thereafter reinstated for a 49- day period, pursuant to section 39-71-610, MCA.

19. On March 20, 1992, Dr. Kobold concluded, "I really feel that without surgery he [petitioner] probably won't be able to continue his present employment." (Ex. No. 12 at 5.) That has remained Dr. Kobold's opinion. (Kobold Dep. at 22.)

20. On January 30, 1992, Dr. Snider recommended that petitioner undergo training into an alternate type of work "if his job description does not match his PCE [Physical Capacities Evaluation]." (Ex. No. 6 at 8.)

21. Norman Johnson, a certified rehabilitation counselor, prepared a job description for petitioner's job as a stock clerk. In early 1993, the description was disapproved by Dr. Kobold, Dr. Snider and a physical therapist. (Ex. No. 17.)

22. In his current condition petitioner cannot return to work at his old position of stock clerk.

23. While earlier opinions and evidence may have indicated that petitioner had reached maximum healing, Dr. Kobold opined that petitioner will benefit from surgery. Dr. Kobold's opinion is persuasive. Therefore, petitioner has not yet been "as far restored as the permanent character of the injuries will permit." *Wilson v. Glacier General Assurance Co.*, 206 Mont. 63, 71, 670 P.2d 931 (1983).

24. Since January 4, 1993, petitioner has suffered a total loss of wages on account of his injuries.

CONCLUSIONS OF LAW

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

2. Petitioner's current condition is the result of his August 9, 1986 industrial injury and he is entitled to the thoracic outlet syndrome surgery as diagnosed by his treating physician, Dr. Kobold.

The preponderance of the medical evidence supports the conclusion that petitioner has thoracic outlet syndrome. All but the Yellowstone Valley Medical Evaluation Panel concluded that surgery would be necessary. Dr. Kobold is a thoracic specialist as well as the petitioner's treating physician. His expertise in treating thoracic outlet syndrome is given greater weight than a panel of doctors retained for a limited examination for evaluation purposes only. *Stanley v. Alexis*, WCC No. 9203-6399 (November 6, 1992).

The insurer has a duty to provide reasonable primary medical services for conditions arising from the injury. Section 39-71-704(1)(a), MCA. If the medical evidence is not in dispute and reasonable treatment is requested by the treating physician, it would be unreasonable for an insurer to refuse payment. However, in this case a medical dispute did exist as a result of the evaluation by the Yellowstone Valley Medical Evaluation Panel concluding that the petitioner would not benefit from surgery. Although the weight of the evidence supports the conclusion that the surgery is reasonable, a legitimate medical dispute existed, and the defendant was not unreasonable in refusing to authorize the surgery.

3. Petitioner is entitled to reinstatement of temporary total disability benefits.

Petitioner returned to work following his 1986 and 1989 injuries. The three year interval between the 1986 and 1989 injuries would indicate that he had reached maximum healing with respect to the 1986 injury. However, the subsequent progression of symptoms, which resulted in a diagnosis of thoracic outlet syndrome, along with the probability that petitioner's condition will be improved by surgical intervention, demonstrates that as of January 4, 1992, petitioner had not yet been "as far restored as the permanent character of his injuries will permit." *Wilson v. Glacier General Assurance Co.*, 206 Mont. 63, 71, 670 P.2d 931 (1983). A preponderance of medical evidence shows that surgery will improve his condition. Since the evidence also establishes that petitioner cannot return to his old job pending his surgery, he is suffering a total wage loss and is entitled to temporary total disability benefits until such time as he undergoes surgery and thereafter reaches maximum medical improvement, unless he refuses to undergo surgery within a reasonable time.

4. The Court cannot determine petitioner's entitlement to rehabilitation or permanent partial benefits until petitioner's surgery and his reaching maximum healing.

5. Petitioner is not entitled to a penalty pursuant to section 39-71-2907, MCA. A legitimate medical dispute existed concerning the appropriateness of surgery and whether petitioner has reached maximum medical healing. Therefore, the insurer did not act unreasonably.

6. Petitioner is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.

PROPOSED JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Petitioner's current condition is the result of his August 9, 1986 industrial injury and he is entitled to the thoracic outlet syndrome surgery as diagnosed by his treating physician, Dr. Kobold.
3. Petitioner is entitled to reinstatement of temporary total disability benefits for his 1986 injury effective January 5, 1993. The insurer is entitled to a credit for any temporary total disability benefits it paid petitioner subsequent to January 4, 1993.
4. The Court cannot determine petitioner's entitlement to rehabilitation or permanent partial benefits until petitioner's surgery and his reaching maximum healing.
5. Petitioner is not entitled to a penalty pursuant to section 39-71-2907, MCA.
6. Petitioner is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.

DATED in Helena, Montana, this 15th day of December, 1993.

(SEAL)

\s\ ROBERT J. CAMPBELL

Hearing Examiner