

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 42

WCC No. 9609-7614

ELVINA MOLDENHAUER

Petitioner

vs.

LUMBERMENS MUTUAL

Respondent/Insurer for

BUTTREY FOOD & DRUG

Employer.

**ORDER DENYING PETITIONER'S ALTERNATIVE MOTIONS FOR REHEARING OR FOR
RECONSIDERATION**

Summary: On request for reconsideration, claimant argued the Court should have awarded her permanent partial disability benefits under section 39-71-703(3)(d), MCA (1993), because her doctor opined she could not engage in heavy lifting post-injury and the Court found she had engaged in heavy lifting pre-injury.

Held: The heavy lifting performed by claimant pre-injury involved carrying boxes of copy paper and bankers boxes a few times a year and once a week assisting in carrying a mail cart. While it stretches common sense to characterize her work as involving heavy lifting where such lifting was so infrequent, the Court did find her job to include heavy lifting because this lifting was performed on occasion. The Court reaffirms its original conclusion, that claimant is not entitled to PPD benefits for loss of heavy lifting capacity where she continued to perform similar heavy lifting post-injury. While medical opinion recommended against that performance, she continued to lift occasionally and did not quit work on account of lifting capacity.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703(3)(d), MCA (1993). Where claimant performed similar very infrequent heavy lifting both before and after injury, she was not entitled to

permanent partial disability benefits for loss of lifting capacity, even though her doctor opined she could not perform heavy lifting.

Benefits: Permanent Partial Benefits: Labor Capacity. Where claimant performed similar very infrequent heavy lifting both before and after injury, she was not entitled to permanent partial disability benefits for loss of lifting capacity, even though her doctor opined she could not perform heavy lifting.

The petitioner (claimant) has moved, in the alternative, for a rehearing or for reconsideration of the Findings of Fact, Conclusions of Law and Judgment entered by the Court on June 23, 1997. (Request for Rehearing/reconsideration and Supporting Brief.) However, as the text of her argument demonstrates, she is seeking reconsideration only. She asks the Court to reconsider (1) the 2% age factor, § 39-71-703(3)(a), MCA (1993), and (2) the finding that she was performing heavy labor after her injury.

In its response to the request, the respondent, Lumbermens Mutual (Lumbermens), acknowledges that the Court overlooked the 2% age factor requested by claimant but states that Lumbermens has agreed to pay the 2% age factor to claimant. (Respondent's Response to Petitioner's Request for Rehearing at 2.) It therefore urges that the age factor issue is moot and represents that "[p]etitioner's counsel has requested the Respondent to advise the Court that it does not need to address this issue as well." (*Id.*) Accepting Lumbermens' representation, the Court will consider only the second of the two issues raised by claimant.

Discussion

In its Findings of Fact, Conclusions of Law and Judgment, this Court determined that claimant is not entitled to compensation on account of a reduction in her laboring capacity. That determination was rooted in factual findings that claimant was performing heavy labor both before and after her injury, and therefore does not qualify for benefits under section 39-71-703(3)(d), MCA (1993). Petitioner challenges the determination on two grounds. First, she argues that the Court should be bound by her physician's opinion restricting her lifting to less than heavy. Second, she urges that the insurer never argued that she is performing heavy lifting post-injury and that the Court therefore went beyond the issues stated in the Pre-trial Order. I am unpersuaded by either argument.

This case involves the application of section 39-71-703(3)(d), MCA (1993), which provides that where a worker "was performing heavy labor activity" at the time of the injury and "can perform only medium labor activity" after the injury, she is entitled to 15% of 350 weeks of permanent partial disability benefits, i.e., 52.5 weeks of benefits.⁽¹⁾

Heavy labor is defined as "the ability to lift over 50 pounds occasionally or up to 50 pounds frequently." § 39-71-703(6)(a), MCA (1993).

The Court's findings of fact determined that prior to her injury the claimant occasionally, albeit infrequently, lifted more than 50 pounds. Specifically, three or four times a year she lifted boxes of copy paper which were just over 50 pounds. On occasion she also lifted bankers boxes exceeding 50 pounds. Finally, once a week she helped carry a cart of mail up a set of stairs. The cart generally weighed 100 to 120 pounds, thus claimant's load was 50 or more pounds. Post-injury, claimant's personal physician restricted claimant to lifting no greater than 50 pounds occasionally (ex. 1 at 1 and 4); however, following her return to work, and for approximately a year and one-half thereafter, claimant continued to lift the boxes of copy paper and bankers boxes, although she no longer helped carry the mail carts up the stairs. Thus, she continued to lift in excess of 50 pounds, but on a less frequent basis than before.

Lumbermens, which insured claimant's employer, strenuously urged that claimant's written job description did not require her to lift more than 50 pounds and that she was therefore not performing heavy labor prior to her injury. The Court was unsympathetic to Lumbermens' position, holding that claimant's labor activity is determined by what she was actually doing rather than by a job description.⁽²⁾ However, in reaching my decision in this case, I must acknowledge that it was a stretch of my common sense and experience to find that claimant's infrequent lifting of more than 50 pounds constituted "heavy labor." In traveling the State of Montana to try cases, my staff and I lug around large, heavy briefcases filled with files, exhibits, notebooks, and supplies. I often carry two of those briefcases and their combined weight sometimes exceeds 50 pounds, yet I hardly think of myself as performing heavy labor; my primary job duties involve activity of the mind, pressing the keys on the computer keyboard, and pushing a pen around when I sign my decisions.

Nonetheless, claimant, through expert testimony, persuaded me that heavy labor encompasses **any** lifting of objects weighing in excess of 50 pounds, no matter how infrequently the lifting occurs. That argument, however, was a double-edged sword since I found that post-injury the claimant continued to lift objects exceeding 50 pounds.

In requesting reconsideration, the claimant cites section 39-71-703(3)(d), MCA, which entitles her to benefits if she "can perform only medium labor activity." She emphasizes the word "can" and urges that she "can" only perform medium labor because she was restricted from heavy labor by her physician. (Request for Rehearing/reconsideration and Supporting Brief at 4.) She points out that her physician's opinion was uncontradicted. She also urges that the Court's determination ignores the fact that workers sometimes push themselves beyond their reasonable physical limits:

We all have seen the "gotcha journalism" reports about workers' compensation claimants by the national news magazines. In these reports, it is often ignorantly contended that a claimant who does something heavy one time post accident proves that she can do the same thing over again 40 hours all year. In reality, and as

the Court knows, claimants often get frustrated with their situations and exceed the reasonable boundaries placed on them by medical professionals. Sometimes frustration drives claimants beyond their boundaries, sometimes their pain medications give them false security, and sometimes a claimant's physical condition waxes and wanes lulling her into believing that she is indeed better. None of these real life events should dissuade this Court from following the law which is based on a medical determination rather than on a factual eyewitness/"gotcha" type of evidence.

(*Id.* at 3-4.)

Claimant's contention that her physician's restriction should be conclusive is unpersuasive. Medical opinions are just that -- opinions. Expert opinions are not binding on a court even where uncontradicted, see *Talifson v. Secretary of Health & Human Servs.*, 554 F.Supp. 575, 582 (D.Mont. 1982), although uncontradicted opinions should not be rejected arbitrarily, *id.* and see also *Carroccia v. Todd*, 189 Mont. 172, 176, 615 P.2d 225, 227 (1980)(citing *Berger v. City of Billings*, 186 Mont. 326, 330, 607 P.2d 558, 560 (1980)). The rule is one of common sense: where a physician opines that a stroke patient will never walk again, and in fact the patient does, the walking speaks for itself and is the best evidence of the patient's ability.

In this case, there was uncontradicted evidence that claimant continued, on occasion, to lift in excess of 50 pounds. Had there been evidence that she did so only with difficulty and significant suffering, I would agree with her contention that post-injury she cannot perform heavy labor. Her argument that workers sometimes exceed their reasonable physical boundaries is a persuasive one. But the facts in this case just do not support a finding that she did so. She ultimately terminated her employment with Buttrey due to a conflict with another employee, not on account of any difficulty in continuing to lift the bankers boxes or boxes of copy paper.

Claimant argues that her post-injury lifting ability was never at issue and the Court therefore went beyond the issues stated in the case. While this argument deserves consideration, I nonetheless do not find it meritorious. The issues stated in the Pre-trial Order were:

(a) Whether, at the time of the Petitioner's injury, she was engaged in a "heavy labor" job pursuant to § 39-71-703(3)(d), M.C.A. (1993).

(b) Whether the Petitioner is entitled to a PPD award calculated at 18% for 1% impairment, 2% age, and 15% for lifting restrictions.

(c) Whether the Claimant is entitled to attorneys fees pursuant to § 39-71-612, M.C.A. (1993), for the Respondent's failure to pay the full PPD award.

(Pre-trial Order at 2, emphasis added.) While Lumbermens' theory of the case was that claimant was performing only light labor before and after the injury, it consistently denied that claimant suffered a loss of laboring capacity and denied that she was entitled to benefits under the loss of laboring capacity subsection. The Court did not adopt Lumbermens' theory as to claimant's pre- and post-injury labor, but Lumbermens' denial of liability put the issue of claimant's entitlement squarely before the Court and placed the burden on her to prove her entitlement. Lumbermens' concession that claimant's physician limited her to medium labor (Pre-trial Order at 3) did not amount to a concession that claimant is incapable of performing the heavy-labor tasks she was in fact performing post-injury. It was merely a concession as to the fact that claimant's physician imposed the restriction.

The motions are **denied**.

DATED in Helena, Montana, this 4th day of September, 1997.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas J. Murphy
Mr. Thomas A. Marra
Submitted: August 11, 1997

1. Section 39-71-703, MCA (1993) provides in relevant part:

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.

(2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American [M]edical [A]ssociation Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

....

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%. . . .

2. There was no evidence indicating that claimant was prohibited from lifting more than 50 pounds or that her supervisor disapproved of her doing so.