IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 18

WCC No. 2002-0522

FRANK OLENICK

Petitioner

vs.

EBI

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks wage loss benefits under permanent partial disability provisions. He suffered flash burns to his hands, primarily the backs of his hands and between his fingers, in a 1990 electrical explosion. His burns healed and he regained full movement of his hands. He returned to work and worked another eight and one-half years, however, over the years he developed stiffness, pain, and loss of strength in his hands, the latter more pronounced when repeatedly using his hands. He is diagnosed with osteoarthritis and carpal tunnel syndrome (CTS). The treating physician for his burns testified that in 1990 he probably suffered electrical shock causing nerve damage causing his current problems. IME doctors disagreed and attributed his problems to osteoarthritis and CTS which are unrelated to the accident. Claimant retired in 1999 and receives retirement benefits approximating his wages at retirement. He claims he retired because of his hands, however, he did not give that as a reason for retirement and no physician had ever restricted his work or recommended retirement. Moreover, an IME physician testified that his conditions could have been treated to allow him to continue working.

Held: Claimant has failed to establish an entitlement to wage loss or other permanent partial disability benefits. Opinions of his treating physicians as to the cause of his hand problems were unpersuasive in light of better reasoned opinions of IME physicians who were more qualified to address the causation issue. Moreover, he failed to persuade the Court that he retired because of his hand problems and failed to show what he could earn in some other job, thus he failed to provide essential evidence needed to establish a wage loss.

Topics:

Benefits: Permanent Partial Disability Benefits. Claimant, who suffered burns to his hands in a 1990 electrical explosion, is not entitled to wage supplement benefits under section 39-71-703, MCA (1989), where he failed to persuade the Court that he took early retirement on account of problems using his hands.

Benefits: Permanent Partial Disability Benefits. Claimant, who suffered burns to his hands in a 1990 electrical explosion, is not entitled to wage supplement benefits under section 39-71-703, MCA (1989), where he failed to persuade the Court that his hand problems which he claims motivated him to retire were in fact caused by his 1990 accident and where more credible medical evidence shows that they are due to aging and repetitive use of his hands over the years, thus constituting an occupational disease.

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Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-703, MCA (1999). Claimant, who suffered burns to his hands in a 1990 electrical explosion, is not entitled to wage supplement benefits under section 39-71-703, MCA (1989), where claimant fails to show what wages he can earn in his job pool.

Benefits: Medical Benefits. Where the medical evidence establishes that the claimant's ostoarthritis and Carpel Tunnel Syndrome of his hands are due to aging and repetitive use of his hands in his work and not on account of 1990 injuries he suffered in a flash fire caused by an electrical explosion, the insurer liable for his 1990 injuries is not liable for medical benefits for those conditions.

¶1 The trial in this matter was held on August 12, 2002, in Helena, Montana. Petitioner, Frank Olenick (claimant), was present and represented by Mr. Dolphy O. Pohlman. Respondent, EBI, was represented by Mr. Joe C. Maynard.

¶2 Exhibits: Exhibits A through I were admitted without objection.

¶3 Witness and Depositions: Claimant was the only witness at trial. In addition, the depositions of claimant and Drs. Catherine Capps, John M. Gallus, and Charles E. Buehler were submitted for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

> ¶4a Did Petitioner Frank Olenick receive injuries from an industrial accident while working for Montana Resources, Inc., on April 22, 1990?
>
> ¶4b Was Petitioner entitled to receive industrial accident benefits including medical and prescription costs paid by or on behalf of the employer, Montana Resources, Inc.?
>
> ¶4c When, if at all, did Petitioner reach maximum medical improvement of his medical condition resulting from his industrial accident of April 22, 1990?
>
> ¶4d Were Petitioners bilateral hand injuries of April 22,1990, the cause of his current condition?
>
> ¶4e Did Petitioner suffer an intervening occupational disease and/or any injury?
>
> ¶4f What is Petitioners entitlement to permanent partial disability benefits?
>
> ¶4g Is Petitioner entitled to relief under Montana law for the cessation of further medical treatment and/or prescriptions on and after July 9, 2002?

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witness, depositions, and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant worked as an electrician for mining companies for approximately 34 years, first for the Anaconda Company and thereafter for Montana Resources, Incorporated (Montana Resources.) (Olenick Dep. at 4-5.) At Montana Resources he was an electrical troubleshooter. (*Id*. at 4.) His work over the years involved repeated use of small hand tools, including a screwdriver.

¶7 On April 22, 1990, claimant suffered serious second and third degree burns on both of his hands in an electrical explosion. At the time of the accident, claimant was working on an electrical panel at Montana Resources.

¶8 At the time of his injury, Montana Resources was insured by EBI. EBI accepted liability for the injury and paid compensation and medical benefits.

¶9 The dispute in this case is over claimant's continued entitlement to medical benefits with respect to hand pain and his entitlement to permanent partial disability (PPD) benefits. Those disputes involve various subsidiary disputes concerning (1) the date of the claimant's maximum medical improvement (MMI); (2) the causes of his current hand conditions; (3) whether his 1990 injury involved electrocution as well as burns; and (4) the reason for his retirement in 1999.

I. Accident, Treatment and Return to Work.

¶10 Claimant described the 1990 accident in his testimony to the Court and in his deposition. He was working at a high voltage electrical panel with a screwdriver and apparently touched a 480 volt terminal with the screwdriver. A "big explosion, a big ball of fire" ensued. (Olenick Dep. at 18.) Claimant experienced immediate and severe pain. He was unable to say whether the pain was from electrical shock (electrocution) or from the burns he suffered in the explosion.

¶11 Claimant was taken to St. James Hospital with second and third degree burns to both his hands. (Ex. A.) Because of the severity of his burns, Dr. John Gallus, a general surgeon, was called to treat him. (*Id.*)

¶12 Dr. Gallus' notes of his treatment indicate that claimant suffered "f]lame burn wound injuries of both hands, electrical type explosion at work." *(Id*. at 4, 5.) The burns were primarily on the back of claimant's hands and between his fingers. (*Id.*; Olenick Dep. at 19.) Dr. Gallus debrided (removed burnt tissue) and dressed the wounds. (Ex. A at 5.) There is no indication in his records of entrance or exit wounds from electrocution, or any other mention of electrocution. (*See* Ex. A.)

¶13 Claimant's burns healed without incident. (*Id*.) He did not require skin grafting and did not suffer significant scarring. (Gallus Dep. at 8.) With physical therapy he regained full range of motion of his hands. On October 15, 1990, Dr. Gallus noted that "no contractures" were present. (Gallus Dep. at 18.) Skin "contractures" from burns is scarring which limits extension of the fingers. (Capps Dep. at 11.)

¶14 Dr. Gallus released the claimant to return to work on July 2, 1990. (Ex. B at 4.) Claimant in fact returned to work in his time-of-injury job.

¶15 Claimant continued working in his time-of-injury job until January 7, 1999, when he retired at age 59 from Montana Resources. At the time of his retirement, claimant was

earning more ($12.50 an hour) than at the time of his injury ($9.73 an hour). (Trial Test. and Ex. I.) His retirement benefits are approximately the same as what he was making prior to retirement. (Trial Test.)

¶16 Claimant testified that he retired because of continuing difficulty in using his hands. However, he was not advised to retire by his doctors and did not give his hand difficulties as the reason for his retirement. (Trial Test.; Olenick Dep. at 10; Buehler Dep. at 42; Gallus Dep. at 55.)

¶17 As of July and August 1990, claimant had no evidence of carpal tunnel syndrome (CTS), hand weakness, or arthritic changes in the hands. (Gallus Dep. at 18-19, 44-45.)

II. Subsequent Medical History Concerning Hands

¶18 On further examination of claimant in 1990 and 1991, Dr. Gallus noted:

> In 9 August 1990, well healed; 15 October 1990, well healed, some right hand stiffness, no contractures noted; 12 April '91, hand stiff in the normal, some loss of grip; 11 October '91, continues function of finger stiffness, skin friable [thin].

(Gallus Dep. at 18.) The examination of April 12, 1991, is the first mention of loss of grip strength.

¶19 In 1992 Dr. Gallus saw claimant on two occasions. On April 23, 1992, he noted only that the skin on claimant's hands was "thin, friable." On October 8, 1992, for the first time he also noted "some arthritic change beginning" in claimant's hands. (Gallus Dep. at 19.) At that time, Dr. Gallus prescribed Dolobid, which is a non-steroidal anti-inflammatory drug. Claimant has continued to take Dolobid to the present time.

¶20 Claimant saw Dr. Gallus once in 1993 - on November 2, 1993 -- at which time the doctor noted "continues same, some stiffness." (Gallus Dep. at 20.)

¶21 In 1994 claimant began having more trouble with his hands. On April 12, 1994, Dr. Gallus noted he had "increasing stiffness and endurance weakness in both hands since last being seen." (*Id*.) Claimant then saw Dr. Glen Sublette, a Butte neurologist, on May 9, 1994. Based on EMG and nerve conduction studies he administered, Dr. Sublette diagnosed:

> Carpal tunnel syndrome on the right based on a prolongation of the distal motor and sensory latencies. . . . . [and] in view of the patient's complaints he most likely has carpal tunnel syndrome on the left, as well.

(Ex. D at 4.)

¶22 In 1996 claimant underwent additional EMG and nerve conduction studies which were interpreted at that time as negative for CTS. (Ex. E.)

¶23 Meanwhile claimant continued working without a loss of time due to his hand problems. Indeed, he continued working without loss of time until his retirement in January 1999.

III. Reason for Retirement

¶24 Claimant testified he retired because of his continuing hand problems. However, he did not consult any physician regarding his employment or additional treatment that might allow him to keep working. Dr. Gallus did not restrict him and did not advise him to retire. (Gallus Dep. at 55.) Dr. Charles Buehler, who had treated claimant for low-back pain for years and who assumed care for claimant's hands after Dr. Gallus retired in 1999, did not restrict claimant or advise him to retire. (Buehler Dep. at 40-42.) At the time of his retirement, claimant did not cite his hands as the reason for his retirement and I note his retirement benefits approximated his earnings at the time of his retirement. Dr. Capps testified that claimant's CTS and osteoarthritis could have probably been treated sufficiently to allow him to continue working. (Capps Dep. at 26-27.) I am unpersuaded that he retired solely on account of his hand problems or that his hand problems forced him to retire.

IV. Causation

¶25 Claimant's primary hand complaints at the time of his retirement were of aching, joint pain, sensitivity to hot and cold, and loss of strength. (Olenick Dep. at 24, 27, 46.) Dr. Gallus related his complaints to his 1990 injury. Dr. Buehler provided some support for relating his current condition to his injury.

¶26 At the request of EBI, claimant underwent an independent medical examination (IME) by a medical panel consisting of Dr. Catherine Capps, an orthopedic surgeon who has special training in hand surgery; Dr. Lennard S. Wilson, a neurologist; and Dr. Henry H. Gary, a neurosurgeon. They disagreed with the opinions of Drs. Gallus and Buehler and opined that claimant is suffering from an occupational disease (OD) involving the repetitive use of his hands in his jobs.

¶27 There is no disagreement that claimant suffers from osteoarthritis in the joints of his wrist, hand, and fingers, however, the medical evidence fails to demonstrate that the osteoarthritis is attributable to the 1990 injury. Dr. Buehler, who assumed care for claimant's hands following Dr. Gallus' total retirement in 1999, conceded that osteoarthritis can be a product of repeated trauma and that he was not aware of any studies finding a correlation between electrical shock and osteoarthritis. (Buehler Dep. at 29-30.) Dr. Gallus opined that the claimant's injury caused the osteoarthritis but testified that he is not all that familiar with osteoarthritis or its causes. (Gallus Dep. at 36, 46, 50.) Dr. Capps provided the most direct and reasoned testimony concerning the condition. She identified the potential causes of osteoarthritis as idiopathic (cause unknown), overuse,

and aging. (Capps Dep. at 6.) She testified that claimant's using a screwdriver would not contribute to osteoarthritis in his hands since use of a screwdriver places additional load on the wrist and elbow, not the hand. (*Id*. at 7.) She also noted that a number of studies indicate development of osteoarthritis in cases of electrocution where "there's more direct thermal trauma to the joint itself." (*Id*. at 8.) She opined that claimant did not suffer an electrocution, an opinion which I find persuasive and discuss in more detail later on in these findings. Ultimately, she noted that claimant's arthritis was mild, consistent with his age and the use of his hands, and not disabling. (*Id*. at 16, 23, 26.)

¶28 In preferring Dr. Capps' opinions, I note that she has specific training in hand surgery - a one-year residency in hand surgery - which was in addition to a five-year residency in standard orthopedics. (Capps Dep. at 5.) In her deposition, she also demonstrated greater familiarity with osteoarthritis and CTS than either Dr. Gallus or Dr. Buehler.

¶29 With respect to CTS, Dr. Capps testified that despite contradictory reports of EMG and nerve conduction studies in 1994 and 1996, claimant in fact suffers from CTS. Her opinion was based upon her physical examination of claimant and also upon a reexamination of the 1994 and 1996 testing by Dr. Wilson, a neurologist, who compared the raw data from the testing and concluded that both showed mild CTS. (Capps Dep. at 44.) Drs. Gary and Wilson agreed with the conclusion in the panels written report that claimant suffers from CTS. (Ex. G at 12.) Moreover, claimant has other physical findings pointing directly to CTS. Specifically, he has "nodular tenosynovitis" which is caused by the same process that causes CTS. (*Id*. at 23, 41.)

¶30 Dr. Gallus opined that all of claimant's hand problems are attributable to his 1990 injury. He opined that claimant suffered scarring of the nerves of his hands due to a combination of flash burns and electrocution in 1990, which in turn caused both claimant's CTS and osteoarthritis. (Gallus Dep. at 38-39, 41, 47, 50.)

¶31 Dr. Buehler testified that the 1990 injury caused some nerve injury to claimant's hand maybe due to electrical shock. (Buehler Dep. at 22-23.) He disagreed with the panel finding that claimant suffers from an OD because "if the injury is in any way responsible for the symptoms that he's got, that's immediately taken us out of the occupational disease category. . . . He didn't have any problem with it prior to this injury." (*Id*. at 51-52.)

¶32 Despite Dr. Buehler's logic, the fact that claimant did not have hand problems prior to his injury does not *ipso facto* mean that all of his post-injury hand problems are due to his injury. To demonstrate this point, one only need to read subsequent injury decisions of this Court and the Supreme Court. Moreover, other than the vague notion that claimant suffered some sort of nerve injury and that his problems arose after 1990, Dr. Buehler's other testimony provides little support for his conclusions. He agreed that osteoarthritis can be a product of repetitive trauma and was not aware of any studies finding a correlation between electrical shock and osteoarthritis. (*Id*. at 29-30.) He also agreed that

most healing of nerve injuries occurs during the first year after the injury. (*Id.* at 32.) The pain and loss of grip strength which claimant alleges are now debilitating did not appear immediately as would be expected with a nerve injury, but arose after the usual one-year healing period identified by Dr. Buehler. The first mention of loss of grip strength was in April 1991, a year after the injury. (Gallus Dep. at 18-19.) While there is a notation of hand stiffness after claimant was released to return to work, there is no mention of pain in the year after his injury. Dr. Buehler also conceded that if claimant suffered only burns and not electrocution, the claimant's injury "would not affect the joints as significantly." (Buehler Dep. at 45-46.) Finally, he conceded claimant's osteoarthritis and CTS could be due to a combination of factors. (*Id.* at 51.)

¶33 Dr. Gallus' opinions that the 1990 injury caused nerve damage is based on his further opinion that claimant suffered not only burns but electrocution in the 1990 accident. (Gallus Dep. at 38.) He concedes he did not see any entry or exit wounds which characterize electrocution, nonetheless he still felt that claimant was electrocuted as well as burned. (*Id.* at 38-39.)

¶34 I did not find Dr. Gallus' or Dr. Buehler's electrocution testimony persuasive. Initially, I note that there is no indication of entry and exit wounds in Dr. Gallus' records of his treatment of claimant, and Dr. Gallus did not testify that such wounds were present. Moreover, there is not even a hint in the records of a suspicion that claimant suffered electrocution in addition to burns. Dr. Capps testified that when claimant was initially treated for his accident it was important if not critical to determine if claimant had been electrocuted since electrocution could have caused major organ failure. (Capps Dep. at 9-10.) Nothing in the medical records of claimant's hospitalization following his accident indicates any concern for electrocution. I am, therefore, unimpressed and unpersuaded by Dr. Gallus' testimony that in hindsight he believes claimant suffered nerve damage from electrocution.

¶35 Moreover, Dr. Capps testified unequivocally that the claimant's CTS findings are incompatible with electrocution injury of the nerve:

> If he [claimant] had an electrocution injury, what happens there, the nerve damage is along the entire nerve, between the entrance and the exit wound because, you know, your nerve's like a little electrical cable. What they would see on nerve tests wouldn't be focal lesion at the carpal tunnel. It would be slowed or they couldn't get much conduction all along the entire course of the nerve. It's a different problem. It's internal scarring inside the nerve all along the course of the nerve between the entrance and exit points.
>
> The carpal tunnel people just have focal carpal tunnel findings, where the external compression is at the carpal tunnel, where, you know, it obviously always is in carpal tunnel. So it's a totally different thing.

(*Id*. at 13-14.)

¶36 The medical panel, including Dr. Capps, attributed claimant's CTS to repetitive trauma from his job and opined his condition is an OD. She attributed his loss of grip strength to his CTS. (*Id*. at 18.) Dr. Capps' and the panels' opinions are persuasive.

V. MMI

¶37 On December 5, 2001, Dr. Gallus signed an affidavit stating that claimant did not reach MMI until January 1996. (Ex. B at 18.) However, his affidavit was in response to a request by claimant's attorney. Dr. Gallus testified in deposition that claimant did not reach MMI until January 1996. (Gallus Dep. at 11-12).

¶38 I am unpersuaded. Dr. Gallus' affidavit and deposition testimony are inconsistent with his records. On August 2, 1990, Dr. Gallus' office provided EBI with a report indicating that claimant had reached MMI and had no permanent restrictions. (Ex. B at 5.) In response to a question concerning need for future treatment, the report also indicated, "[N]ot at this time." (*Id*.) In his deposition he disavowed the 1990 report, testifying that he did not sign it. (Gallus Dep. at 11.) I am wholly unimpressed by Dr. Gallus' attempt to disavow the 1990 report. The report obviously came from his office even though not personally signed by him. He did not explain how an unauthorized report could have been sent from his office. Moreover, his own contemporaneous records do not indicate any need for further treatment of the claimant's hands.

¶39 Moreover, Dr. Gallus' explanation for his opinion that claimant did not reach MMI shows a lack of understanding of the meaning of MMI. When asked about MMI on direct examination, he testified:

> Well, I think my impression is that term has to be individualized. And I think the type of injury that Frank Olenick sustained and his periodic ongoing problems that he's experienced certainly leads one to realistically anticipate that he's going to have continuing problems of some type with his hands in the future and that maximum healing, as I understand the term, really can't be anticipated in his instance.
>
> I believe that for the life of the patient he is going to be subjected to occasional, maybe even more frequent, problems related to his injury of April of 1990. He's certainly manifested some problems I think that are directly attributable to that injury already over the past ten to twelve years and that he will also have some injury problems in the future related to that. So that maximum healing, I don't think that that's a term that can be applied here.

(Gallus Dep. at 26-27.) When asked on cross-examination as to whether in the summer of 1990 the claimant was as good as he was going to get from his injury, Dr. Gallus responded:

> I don't think you can say that. I don't.

. . . .

> I don't think that you can anticipate it. And I think that he's going to have episodes of, like I said, of remission. But at the same time, if you take out the summer of 1990, why don't you take out the summer of 1994 or something? It doesn't make any difference. He's had a problem since April of 1990. That's the date of his injury. And he's been in problems since that time.

(*Id*. at 53-54.) As discussed in the conclusions of law, MMI means that there is no reasonable expectation that claimant's condition will improve with further medical treatment. The fact that claimant's condition may worsen with time, spontaneously get better on occasion only to regress again does not mean that claimant had not reached MMI. Dr. Gallus' own testimony and the report referred to in paragraph 34 establishes that by the summer of 1990, he did not anticipate any further treatment for the claimant's condition. The subsequent deterioration of claimant's hands, even if attributable to his injury, only lends credence to a finding of MMI at that time.

¶40 Physicians who examined claimant at the request of the insurer opined that claimant reached MMI on July 1, 1990. Dr. John Vallin, a physiatrist who examined claimant on October 26, 1999, did so in his report found in Exhibit F. A medical panel consisting of Dr. Capps, who is an orthopedic surgeon; Dr. Gary, a neurosurgeon; and Dr. Wilson, a neurologist, also opined that claimant reached MMI on July 1, 1990. Dr. Capps in her deposition testimony observed that she "had a different idea of what maximum medical improvement is [sic] compared to Dr. Gallus" and commented that his opinion that it took claimant six years to reach MMI was "interesting to note." (Capps Dep. at 14.)

¶41 I find that claimant reached MMI on July 1, 1990.

VI. Wage Loss

¶42 Even if claimant's hand problems forced him to retire, and even if those hand problems are attributable to his 1990 injury, he has presented no testimony showing that he was unable to do other work. In seeking PPD benefits, claimant implicitly admits he can do other work, however, he has presented no evidence showing what he might earn in other jobs and has failed to establish any wage loss.

VII. Dolobid

¶43 Dolobid was first prescribed by Dr. Gallus in October 1992 for osteoarthritis. The drug continues to be prescribed for that condition. There is no indication that it has been prescribed as treatment for his burns.

VIII. Impairment

¶44 The only impairment rating in evidence is one given by Dr. Vallin on October 26, 1999. (Ex. F at 4.) That impairment rating is based on loss of grip strength, which Dr. Capps attributed to claimant's CTS. There is no indication that any part of the rating was attributable to the claimant's burns, thus there is no evidence of impairment attributable to claimant's 1990 injury.

CONCLUSIONS OF LAW

¶45 This case is governed by the 1989 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶46 Claimant bears the burden of proving by a preponderance of the 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).

¶47 Claimant is seeking PPD benefits. His request is governed by section 39-71-703, MCA (1989), which was the provision governing PPD benefits at the time of his 1990 injury. That section provides in relevant part:

> (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:
>
> (a) The following procedure must be followed for an impairment award:
>
> (i) Each percentage point of impairment is compensated in an amount equal to 5 weeks times 66 2/3% of the wages received at the time of the injury, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.
>
> (ii) When a worker reaches maximum healing, an impairment rating is rendered by one or more physicians as provided for in 39-71-711. Impairment benefits are payable beginning the date of maximum healing.
>
> (iii) An impairment award may be paid biweekly or in a lump sum, at the discretion of the worker. Lump sums paid for impairments are not subject to the requirements set forth in 39-71-741, except that lump-sum conversions for benefits not accrued may be reduced to present value at the rate set forth by the department in 39-71-741(5).
>
> (iv) If a worker becomes eligible for permanent total disability benefits, the insurer may recover any lump-sum advance paid to a claimant for impairment, as set forth

in 39-71-741(5). Such right of recovery does not apply to lump-sum benefits paid for the period prior to claimant's eligibility for permanent total disability benefits.

(v) If a worker suffers additional injury, an impairment award payable for the additional injury must be reduced by the amount of a previous award paid for impairment to the same site on the body.

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66 2/3% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. A worker's failure to sustain a wage loss compensable under subsection (1)(b)(i) does not extend the period of eligibility. However, if a worker becomes eligible for temporary total disability, permanent total disability, or total rehabilitation benefits after reaching maximum healing, the eligibility period for wage supplement benefits is extended by any period for which a worker is compensated by those benefits after reaching maximum healing.

¶48 As an initial matter, claimant must show that his medical care and disability are causally related to his 1990 injury. "Causation is an essential element to benefit entitlement." *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993); *and see Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994).

¶49 Claimant has failed to persuade me by the evidence that he suffers from an impairment attributable to his 1990 injury. The impairment rating by Dr. Vallin was for loss of grip strength. A preponderance of evidence establishes that the loss of grip strength is due to CTS, which in turn is an OD attributable to claimant's repetitive use of hand tools over the many years he was employed as an electrician.

¶50 For the same reason, even assuming he retired because of pain and weakness in his hands, he has failed to show any connection between those conditions and his 1990 injuries. Thus, he has failed to establish any causal connection to any wage loss.

¶51 Even assuming a causal connection, claimant still has failed to establish a basis for benefits based on wage loss. Initially, he failed to persuade me that he retired on account of his hand condition. No doctor recommended retirement. Dr. Capps testified that his

conditions could have probably been treated so as to allow him to continue his employment. Finally, I am unpersuaded that his hand problems were his primary motivation to retire.

¶52 Even assuming claimant retired on account of his hand condition and that his hand condition was caused by his 1990 injury, there are further problems with his request for wage supplement benefits. As set out in subsection (1)(b)(i) of section 39-71-703, MCA, any wage supplement benefits are based upon the "difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool." He must establish what he is "qualified to earn in the worker's job pool" in order to demonstrate his entitlement to wage supplement benefits. He has offered no evidence of what his job pool is or what he could earn.

¶53 Moreover, under 1989 law, a worker unable to return to his time-of-injury job is subject to the rehabilitation panel provisions found in section 39-71-1017, MCA. Neither counsel in this matter has addressed the applicability of the sections; they would have to be addressed if all other obstacles were hurdled.

¶54 Further, the wage supplement benefits available under section 39-71-703(b), MCA (1989), are available only for the five hundred calendar weeks following the claimant reaching MMI. Claimant in this case reached MMI on July 1, 1990. He retired January 7, 1999, which was 442 weeks later. Therefore, he would be entitled to only 58 weeks of wage supplement benefits.

¶55 Finally, claimant is entitled to further medical care for his burns only, not for osteoarthritis or CTS. His burns are the only condition that he has shown are related to his injury. Since Dolobid is prescribed for his osteoarthritis, it is not covered.

¶56 Since claimant has not prevailed in this action, he is not entitled to costs or attorney fees.

JUDGMENT

¶57 Claimant is not entitled to PPD benefits or to medical benefits for osteoarthritis and CTS of his hands. His petition is **dismissed with prejudice**.

¶58 Claimant is not entitled to costs or attorney fees.

¶59 This JUDGMENT is certified as final for purposes of appeal.

¶60 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 10th day of March, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Dolphy O. Pohlman
Mr. Joe C. Maynard
Submitted: August 12, 2002