

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 77

WCC No. 9401-6985

LINDA Warburton

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

GARY & LEO'S IGA

Employer.

DECISION AND ORDER ON APPEAL

Petitioner, Linda Warburton (Warburton), appeals from Findings of Fact; Conclusions of Law; and Order entered on January 13, 1994, by Gordon Bruce, a hearing examiner for the Montana Department of Labor and Industry (DLI). The decision below was made pursuant to rehabilitation panel procedures found at section 39-71-1012 to 1018, MCA (1989), and determined that option (b) -- "return to [work in] a modified position" -- is the most appropriate rehabilitation option for Ms. Warburton. For the reasons set forth herein the DLI decision is reversed and the matter remanded for a new hearing.

Factual Background

Warburton is forty-two years old, has a tenth grade education and a work history consisting of thirteen years as a bartender and a few months as a deli worker. She strained her entire back on January 9, 1991, while employed as a deli worker for the IGA store in Havre, Montana. She thereafter developed "significant difficulty with neck as well as right shoulder and left shoulder pain." (Ex. H at 5.) She has been restricted from lifting more than twenty pounds and to occasionally (0-3 hours) doing such tasks as pushing - pulling, bending, kneeling, crawling and reaching. She suffers from chronic pain in her shoulders, neck and back.

After her industrial accident Warburton was also involved in an automobile accident. However, it does not appear that her injuries from that accident are a major factor in assessing her ability to return to work. (Id.)

Following her January 9, 1991 industrial accident, Warburton was initially treated by Dr. James E. Elliott. However, the record below does not include records of Dr. Elliott's initial treatment. The earliest medical record is for an April 10, 1992 examination by Dr. Terry Jackson, a specialist in physical and rehabilitation medicine, and that record indicates that Dr. Jackson had seen claimant previously. In addition to Drs. Jackson and Elliott, Warburton has also been examined by Dr. William Labunetz, a neurologist, and Dr. Susan Effertz, who specializes in internal medicine and rheumatology.

On April 10, 1992, Dr. Jackson determined that Warburton was at maximum medical improvement, gave her a sixteen percent impairment rating, and commented: "It would be appropriate for this woman to re-enter the job force in a position that is not going to put her at increased risk of recurrent injury." (Id. at 6.) None of the physicians examining Warburton found her to be totally precluded from working.

In June of 1992 the State Fund designated Vocational Resources Incorporated (VRI) to determine Warburton's return-to-work capabilities. VRI prepared a number of job descriptions, including one for a modified position as a shelf facer at the IGA store, and submitted them to Dr. Jackson for his consideration. Dr. Jackson approved the job descriptions for shelf-facer and desk clerk. He did not approve positions of host/hostess, short order cook or waitress.

Warburton did not return thereafter to work. The DLI therefore designated a rehabilitation panel in accordance with sections 39-71-1015(3) and 39-71-1016, MCA (1989). The panel conducted its evaluation and issued a report on May 14, 1993. The panel recommended "option (b), return to a modified position, as the first appropriate return to work option." The DLI adopted the panel recommendation in its Initial Order of Determination on June 10, 1993. Warburton took exception to the Order and requested a hearing as provided by section 39-71-1018(2), MCA (1989).

While awaiting a hearing, Warburton returned to work at the IGA in the modified position of shelf facer. She began work on August 9, 1993, and worked four hours a day with a 15 minute break. She worked for eight days. She testified that over the eight day span her pain increased and that by August 16, 1993 she "was hurting real bad." (Tr. at 13.) She called in sick on August 17th and 18th. On Thursday, August 19, 1993, she discussed her situation with one of the IGA owners, who told her not to come into work until she was examined by Dr. Elliott.

Dr. Elliott examined claimant on August 23 and September 13, 1993. He commented that he did not take care of back pain anymore and referred her back to Dr. Jackson. He provided her with a written excuse from work until she could see Dr. Jackson.

Dr. Jackson examined Warburton on October 6, 1993. He noted her unsuccessful attempt to return to work and recorded Ms. Warburton's statement that she believed herself to be

"totally disabled and unable to work." He disagreed. His office notes states, "I think that this woman is capable of performing either light or sedentary types of work." He repeated that opinion in a letter to the State Fund on November 18, 1994. (Ex. H at 3.) He recommended a home exercise program, which he believed would ameliorate Warburton's pain. Of great significance to the decision in this case, Dr. Jackson was not asked by either party whether he would still approve the job of shelf facer.

Standard of Review

Section 39-71-1018(4), MCA provides for an appeal to the Workers Compensation Court from the Department of Labor and Industry's final order in this case. Warburton asserts that the decision below is "not supported by the evidence and is clearly erroneous." (Appeal from Final Decision.) The applicable standard of review set forth in section 2-4-704(2), MCA, which provides in relevant part:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

...

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

The hearing examiner's findings of fact may be overturned only if they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA).

Discussion

The Court must determine whether the hearing examiner's findings are clearly erroneous in view of the reliable, probative, and substantial evidence as a whole. It cannot reweigh the evidence, *Nelson v. EBI Orion Group*, 252 Mont. 286, 288, 829 P.2d 1 (1992); or reverse simply because there may be sufficient evidence to support contrary findings, *Little v. Structural Systems*, 188 Mont. 482, 486, 614 P.2d 516 (1980).

The hearing before the DLI was held on November 22, 1993. The only live testimony presented was of the State Fund's claims examiner, who offered little more than a reprise of various records in the claim file. The remaining evidence presented to the hearing examiner consisted of telephone testimony by Warburton, her husband and a friend, and various exhibits, including the panel report, medical records and vocational reports. No medical or vocational testimony was presented. The total absence of medical testimony and the absence of in-person testimony by claimant and her witnesses, along with the

failure of either party to ask Dr. Jackson whether he still approved the shelf facer job after Warburton's unsuccessful work trial, are pivotal to the resolution of this appeal.

Warburton insists in this appeal that her pain precluded her from continuing to work as a shelf facer and that she is not capable of performing that job. On the other hand, in January of 1993, Dr. Jackson approved the positions of desk clerk and shelf facer. At that time he was well aware of Warburton's pain. And, following Warburton's trial return-to-work in August of 1993, he specifically found that she is not totally disabled and is capable of sedentary to light work. He also recommended that claimant engage in a home exercise program to ameliorate her pain.

Warburton's testimony concerning pain as preventing her from continuing to work as a shelf facer is not conclusive but was entitled to consideration by the hearing examiner. Similarly, disability is not simply a medical determination. See § 39-71-116(9), MCA (1993). Thus, physicians are not the final arbiters in determining a worker's ability to return to work.

The State Fund cites to *Baker v. State Compensation Insurance Fund*, WCC No. 9005-5822 (December 6, 1990) for the proposition that Warburton's claim that her pain is disabling was not supported by a preponderance of the credible medical evidence. In *Baker*, the claimant failed to prove by a preponderance of the "probative credible evidence" that her pain was so severe that it prevented her from working at all. The Court held,

It is true that subjective complaints of pain should not be ignored when making a determination of disability, but a claimant's complaint of pain is only one factor. In this case, the claimant's claim of severe disabling pain was not supported by a preponderance of the credible medical evidence nor indeed by any such evidence. [Emphasis added.]

However, the claimant in *Baker* never attempted to return to work. Moreover, in this case Dr. Jackson did not specifically comment on claimant's ability to perform the specific duties of a shelf facer following her unsuccessful attempt to work at that job.

In cases where pain is alleged to be the key factor, the hearing examiner must assess a claimant's credibility concerning pain. That assessment may involve consideration of matters gleaned from other evidence. In this case there were indications in the medical records that Warburton had not complied with exercise recommendations which might ameliorate her pain and increase her capacity to work. There were also hints that at times Warburton exaggerated symptoms and may not be motivated to return to work. Dr. Jackson's report of June 25, 1992 noted that Warburton's physical responses to strength testing of her upper extremities was "somewhat inconsistent in that in observing her in the examining room with her husband, she is able to lift her purse as well as other clothing items, however, when I try to test her strength with manual muscle testing, she has difficulty holding her arms up" (Ex. 6.) Dr. Labunetz, who performed a neurological

evaluation, said, "Cortical testing is difficult to interpret, she is inconsistent, no clear objective findings." (Ex. G, emphasis added.) Dr. Effertz noted that "she says lifting makes her sick to her stomach, and she does not feel strong enough to lift. She cannot give specific reasons why she otherwise has trouble lifting." Dr. Effertz also noted that Warburton was not doing her exercises "because they cause her pain" and explained to her that they "cause pain if one is not doing them regularly." (Ex. F.) Finally, she commented that Warburton:

needs to take the bull by the horns and decide what she is going to do with her life. If she is willing to go back to work and there seems to be any reasonable chance that she can succeed, we need to get a letter from someone, myself or Dr. Jackson or someone, stating that she is released to go back to work. [Emphasis added.]

(Id.) The evidence does not demonstrate malingered or even deliberate exaggeration of symptoms. Lacking further explanation of the physicians, it is inconclusive with respect to whether claimant's pain precludes her from working as a shelf facer.

The final assessment of a witness' credibility in a case like this is based in large part on the fact-finder's actual observation of the witness' testimony in the physical presence of the fact-finder. In a recent case involving a dissolution of marriage, the Supreme Court commented on the importance of witnesses being physically present in cases which involve serious credibility issues:

Requiring a witness to testify personally at trial serves a number of important policies and purposes. A witness' personal appearance in court:

1. assists the trier of fact in evaluating the witness' credibility by allowing his or her demeanor to be observed firsthand;
2. helps establish the identity of the witness;
3. impresses upon the witness, the seriousness of the occasion;
4. assures that the witness is not being coached or influenced during testimony;
5. assures that the witness is not referring to documents improperly; and
6. in cases where required, provides for the right of confrontation of witnesses.

In *re Marriage of Bonamarte*, 263 Mont. 170, 174, 866 P.2d 1132 (1993). Commenting on the telephone testimony given by one of the parties in the case, the Court said:

Here, it was impossible for the court to make a determination as to the relative credibility of the party-witnesses because it did not have an opportunity to observe the testimony of both Mark and Judith. The parties in a dissolution action often deliver conflicting evidence, and it is the court's role to determine who is the more credible witness. This can be accomplished most effectively by observing each party's demeanor during testimony. [Emphasis added.]

Id. at 175-76.

In this case Warburton's credibility concerning her pain and ability to work were on the line, but the hearing examiner had to consider her credibility without physically observing her testimony. That procedure apparently worked to her detriment since, although the hearing examiner made no specific finding concerning her credibility, he determined that her pain did not disable her from working as a shelf facer.

Bonamarte by itself does not require reversal in this case. The Court in Bonamarte expressly permitted the use of telephonic testimony where the parties and the Court agree, at least in cases "where rights of confrontation and cross-examination are not substantially compromised or are otherwise adequately preserved, where the identity and credibility of a witness are not critical and where there is no need to use documentary or tangible exhibits in examining the witness." (Id. at 177, emphasis added.) Also, it has not specifically extended its ruling to contested case hearings held by administrative agencies.

In this case the parties apparently agreed to the telephonic testimony. At least the record below does not indicate that there was any objection to it. Nonetheless, Warburton's personal absence left the hearing examiner without information critical to his measuring her credibility. Her absence was compounded by the failure of either party to obtain Dr. Jackson's opinion concerning the shelf facer job in light of Warburton's return-to-work trial. Warburton, who shouldered the burden of proof, *Chagnon v. Travelers Ins.*, 259 Mont. 21, 30, 855 P.2d 1002 (1992), left the matter hanging. The State Fund, which wrote to Dr. Jackson following the work-trial to ask, "Is Ms. Warburton currently totally disabled," asked the wrong question, and left the matter hanging. By failing to ask Dr. Jackson the question which is paramount in this case, both parties left the hearing examiner hanging and this Court hanging.

The issue presented to the hearing examiner for decision was not whether Warburton is capable of returning to some sort of work but whether she can work as a shelf facer. Dr. Jackson's post-work-trial opinion is strong evidence that Warburton is capable of returning to some sort of work. However, after reviewing all of the evidence in this case, and considering the absence of critical evidence, I am left with a firm conviction that the evidence presented was insufficient to make the determination the hearing examiner was asked to make, and that by making the decision the hearing examiner erred. While the party bearing the burden of proof must ordinarily bear the consequence of evenly balanced or insufficient evidence, in this case both parties acquiesced to and participated in the procedures and omissions which have led me to conclude that hearing examiner was not in a position to accept or reject claimant's testimony concerning her ability to work as a shelf facer. That being the case, the appropriate relief is to remand this case for a new hearing.

Warburton also asks the Court to order reinstatement of total rehabilitation benefits. However, she has failed to present any evidence that she is entitled to such benefits. See State Compensation Insurance Fund v. Mark Allen Peterson, WCC No. 9404-7039, decided July 5, 1994.

ORDER

The January 13, 1994 decision of the Department of Labor and Industry is reversed. This matter is remanded to the Department for a new hearing in accordance with the Court's opinion herein.

DATED in Helena, Montana, this 26th day of August, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Donald R. Marble

Ms. Susan C. Witte

Ms. Melanie A. Symons