

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 75

WCC No. 9310-6924

DALE WOOD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

PIERCE'S DODGE CITY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on February 9, 1994, in Helena, Montana. Petitioner, Dale Wood (claimant), was present and represented by Randall O. Skorheim. Respondent, State Compensation Insurance Fund (State Fund), was represented by William O. Bronson. Claimant and Randy Jackson testified. Exhibits 1 through 35 were admitted into evidence by stipulation. The depositions of Michael Luckett, M.D., and Patrick E. Galvas, O.D., Ph.D., have been submitted to the Court for its consideration in reaching its decision.

Nature of dispute: The Pre-trial Order listed three issues. However, two of the three were withdrawn, leaving only the first issue. That issue, as framed by the Pre-trial Order, is:

Whether the Claimant suffered a compensable industrial injury on July 29, 1992, and is entitled to the appropriate temporary total, permanent partial, permanent total or retraining and other benefits.

Opening statements made at trial, and the post-trial memoranda of counsel, put a somewhat different cast on the issue the parties wish the Court to decide. No specific benefits are requested by claimant and the State Fund does not dispute claimant's contention that he suffered a compensable injury. As presently presented, the issue for the Court's decision is whether the claimant is permanently disabled on account of his July 29, 1992 injury. The parties also seek a determination as to whether his injury is to the same part of the body as a previous industrial injury.

Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is forty-three years of age. He worked as a mechanic for Pierce's Dodge City (Pierce's), an auto dealership, for approximately sixteen years prior to 1990.
2. Claimant injured his lower back on June 15, 1990, while working for Pierce's.
3. At the time of the 1990 accident Pierce's was enrolled under Plan III of the Workers' Compensation Act and was insured by the State Compensation Insurance Fund.
4. Claimant was initially treated on June 15, 1990, at the Montana Deaconess Medical Center Emergency Room. His symptoms at that time included sharp pain in the lower left lumbar area and pain and numbness of the left leg. The record of the physical examination conducted at the ER notes exquisite tenderness of the left side in the area of the L4-S1 vertebrae and "tight and swollen" para spinous muscles of the left side. (Ex. 1)
5. Claimant was first examined by Dr. Michael Luckett, an orthopedic surgeon, on June 20, 1990. Dr. Luckett continued to treat claimant over the next three and one-half years.
6. At the time of Dr. Luckett's June 20, 1990 examination, claimant was complaining principally of pain in his low back and left buttock and leg. Dr. Luckett noted claimant was "unable to ambulate secondary to severe bouts of pain which lead to giving way of his left lower extremity." His preliminary diagnosis was: "I think that this gentleman has a lumbar disc herniation with S1 radiculopathy based on his dermatomal pain complaints." (Ex. 2 at 1.)
7. Subsequent evaluation did not confirm Dr. Luckett's preliminary diagnosis, and the doctor ultimately diagnosed claimant as suffering from "degenerative disk disease with back and lower extremity pain." (Luckett Dep. at 6.) He treated claimant conservatively, prescribing physical therapy, medication, and use of an exercise pool.
8. On January 29, 1991, Dr. Gorsuch examined claimant at Dr. Luckett's request. At that time claimant gave a history of "pain from the center of the back into the buttock, thigh, lateral calf and foot of both legs, left greater than right." (Ex. 2 at 15.) Dr. Gorsuch also noted that claimant was "currently [he is] walking about 1500 yards at a time."
9. At Dr. Luckett's request a functional capacities evaluation of claimant was performed at Columbus Hospital in Great Falls on April 9, 1991. The physical limitations noted at that time included:
 - Reduced flexibility in the trunk, neck and legs.

- Weakness noted in the legs, especially in the lower left extremity.
- Maximum walking distance without resting is 3/4 miles.
- Sustained standing tolerance is 15 minutes without support.
- Sustained sitting tolerance in a cushioned office chair is 45 minutes.
- Pushing and pulling limited to 50 lbs. as increased weight significantly increases pain.
- Unilateral reaching is limited to under 3 lbs. with the left hand and reaching across midline with left increases pain significantly.
- Bilateral lifting should be limited to under 25 lbs.
- Pain is present and increases with walking, climbing, pushing, pulling, squatting, standing and reaching with left hand across midline.

(Ex. 4 at 41-44.) The report of the examination also noted that claimant's range of motion in the trunk was very limited in all planes; and cervical motion was moderately to severely limited. The examiners concluded that "[b]ased on physical demand characteristics of work, we recommend no more than light duty employment for Mr. Wood." (Ex. 4 at 31.)

10. On April 23, 1991, Dr. Luckett examined claimant and determined that his condition was medically stable. Dr. Luckett conducted an impairment rating evaluation, and assigned claimant an impairment rating of seven percent. Dr. Luckett utilized the Third Edition of the Guide to the Evaluation of Permanent Impairment but did not utilize the "range of motion" criteria specified in the Guide. In his opinion those criteria "boost up impairment ratings considerably on the order of 20 percent where people weren't even that impaired." (Luckett Dep. at 21.)

11. Dr. Luckett's office note of April 23, 1991, summarized his opinions concerning the nature of claimant's condition and his ability to return to work:

[I]t would be reasonable to go ahead and proceed with vocational rehab as his functional capacity assessment is done, and this would qualify him at best for light duty work. . . . I have explained to Mr. Wood that I feel his back pain is very probably discogenic in nature and might respond to a lumbar spine fusion. At this point, Mr. Wood is not interested in a surgical option and feels that he can modify his lifestyle to accommodate his pain. . . . He may possibly have worsening of symptoms in the future which may require consideration of surgical treatment. Based on his functional capacity assessment, he will tolerate only light duty type work and will have significant postural constraints as his functional capacity assessment would

suggest that a standing tolerance is about 15 minutes at best without external support. Similarly, his sitting tolerance is very poor, tolerating only about 45 minutes of sitting. Lifting recommendations have been limited to under 25 pounds.

(Ex. 2 at 20; emphasis added.)

12. On September 23, 1991, the claimant entered into a settlement agreement with respect to his 1990 injury. The settlement was for \$43,000.00, which represented the discounted and negotiated value of 500 weeks of wage loss benefits, less the amount the State Fund had already paid on account of the impairment rating. (Exs. 32-35.)

13. On November 1, 1991, Dr. Lockett again examined claimant. His office note states, among other things:

He [claimant] notes that about three weeks ago, he had exacerbation of his pain, however, this has resolved over the last several days.

(Ex. 2 at 20.) Dr. Lockett recommended that claimant return to work but warned claimant to avoid lifting more than thirty pounds. He also told claimant to "avoid repetitive bending, lifting and twisting if possible." (Id.)

14. Claimant returned to work at Pierce's on a part-time basis in November of 1991. He was assigned only lighter jobs and was assisted by other employees in tasks requiring lifting which exceeded his limitations.

15. Dr. Lockett saw claimant again on January 24, 1992. Claimant reported continuing back and lower left extremity pain aggravated by activity. He also stated that he is only able to work a couple of days a week. Dr. Lockett told claimant that "he has given his current work situation an adequate trial, however, if he wants to continue to attempt to work for a couple more months, this is not unreasonable." Dr. Lockett went on to say:

I think that he needs to attempt to re-train for a light duty type job and see if this is not a situation where he can work full time. If he is unable to maintain employment in a light duty type job, then I think that we should consider a surgical option.

(Ex. 2 at 21; emphasis added.)

16. Dr. Lockett saw claimant again on May 14, 1992. Claimant did not feel his symptoms had changed significantly although he reported he was working twenty-eight to thirty-six hours per week. On the other hand he reported that he could only ambulate about 400 yards before his lower left leg began bothering him. (Ex. 2 at 21.)

17. Claimant suffered a second injury to his low back on July 29, 1992, while working for Pierce's. He was pushing a twenty pound engine block up a rack when he felt pain in his back and in both legs. This injury is the subject of the present litigation.

18. At the time of the injury, Pierce's was insured by the State Fund, which accepted liability and paid temporary total and medical benefits.

19. Dr. Luckett examined claimant on August 4, 1992. At that time, claimant had severe low-back pain and pain which radiated into both buttocks and lower extremities. The radiating pain was predominately in the left leg. Claimant also reported that just prior to his injury he could walk a mile to a mile and a half but could now "only ambulate about ½ block." (Ex. 2 at 22.)

20. Although Dr. Luckett suspected herniation at L4-L5, an MRI examination did not bear out his suspicion and "really didn't show anything very dramatic." (Luckett Dep. at 8.) It revealed degenerative disc disease involving L4-L5 and L5-S1 with small annular bulges but no significant neural encroachment. There also appeared to be some degeneration at L3-L4. Dr. Luckett testified that claimant's radiating pain "probably represented referred leg pain from his degenerative disc disease, rather than true radicular type leg pain, or claudication." (Id.) "I think, basically, what he has, he has referred pain, and maybe referred from several sources, you know, degenerative disk, facets, muscles, tendons, ligaments." (Id. at 9.) Dr. Luckett treated claimant with medication, chiropractic manipulation and physical therapy.

21. Dr. Luckett testified that the MRI findings did not establish that claimant had suffered a separate, independent injury on July 29, 1992. He pointed out that an MRI was not done after claimant's first injury and that it shows a different type of detail than the CT scan which was performed after the first injury. (Luckett Dep. at 8-11.) Moreover, Dr. Luckett testified that he was unable to identify a specific structure or vertebral level as the source of claimant's pain. He noted that "[r]eferred pain patterns in the back are very non-specific, and I am not certain where it is coming from." (Id. at 9.) He further commented: "Because the referred nature, or referred pain in the low back is so non-specific and vague you can get the same pain patterns from several levels." (Id. at 11.)

22. Claimant's condition improved following the July 29, 1992 injury. On November 20, 1992, Dr. Luckett noted that:

[O]verall he [claimant] appears markedly improved over his past clinic visits here. . . . His primary complaint now is low back pain. He only occasionally has pain radiation to the lower extremities. . . .

(Ex. 2 at 26.) On January 15, 1993, he noted:

He has no new complaints. He has no lower extremity related complaints, bowel or bladder disturbance. Clinically, he does continue to have an antalgic gait with some hip flexed posture and slight trunk list. His examination shows no dramatic changes really, although he does appear to move with a little bit more of a fluid motion than he has in the past.

(Id.) On February 26, 1993, Dr. Luckett noted that claimant "remains unchanged with regard to his symptoms" and that "[h]is clinical examination remains unchanged." (Id.)

23. On April 6, 1993, Dr. Luckett concluded as follows:

I would say that he [claimant] is approximately back to his previous baseline at the time of his impairment rating. . . .

I think that he is as good as he is likely to get, and he evidences no further impairment over his initial impairment rating.

(Unnumbered Exhibit to Luckett Dep.)

24. Dr. Luckett's medical records show that claimant has suffered numerous exacerbations of his pain after he reached maximum healing from his first injury (April 23, 1991), and prior to his second injury. On September 3, 1991, he reported that:

[Claimant] notes that he mowed his lawn yesterday, and his back pain is exacerbated somewhat. Overall, he notes that he tends to be about the same, except that he has an exacerbation of back and leg pain the [sic] last couple of days once or twice per month.

(Ex. 2 at 20, emphasis added.) On November 1, 1991, Dr. Luckett reported that claimant "notes that about three weeks ago, he had exacerbation of his pain, however, this has resolved over the last several days. (Id.) On January 24, 1992, claimant reported "that he continues to have back and left lower extremity pain that is aggravated with activity." (Id. at 21; emphasis added.)

25. In Dr. Luckett's opinion the claimant's impairment did not increase as a result of the second injury. (Ex. 2 at 28.) As to his "functional level", Dr. Luckett said: "I think he is about the same as he was, his functional level. He waxes and wanes, you know." (Luckett Dep. at 25.)

26. The claimant's arguments in support of his contention that he is permanently disabled on account of the 1992 injury are based on a second functional capacity examination conducted after his second injury and on the testimony of Dr. Patrick E. Galvas, who specializes in rehabilitation medicine.

27. Dr. Luckett referred claimant to Dr. Galvas on July 16, 1993 (unnumbered exhibit to Luckett Dep.), in the hope that Dr. Galvas might provide some further, helpful treatment. As set forth in an October 5, 1993 letter to the State Fund:

I have referred Dale Wood to Dr. Galvas in spite of the fact I feel he is at maximum medical improvement as he is not asymptomatic. He, in fact, remains very symptomatic, and I am hopeful that Dr. Galvas might possibly have something to

offer him from a therapeutic standpoint which may help to ameliorate some of his symptoms. I personally feel that it is unlikely that Dr. Galvas will have anything new to offer Dale Wood, but I think that, in all fairness, the patient should be given the benefit of the doubt.

(Ex. 2 at 28.)

28. Dr. Galvas first saw claimant on August 6, 1993, and continued to treat him through February, 1994. He investigated the possibility that claimant's condition might include sacroiliac joint dysfunction but ultimately concluded that claimant's pain is due to a myofascial pain disorder involving the soft tissues of the low back. (Galvas Dep. at 11, 13.) He described the diagnosis as follows:

Myofascial pain is a diagnosis that is pain generated from myofascial structures. In other words, soft-tissue structures, rather than an anatomical structure like a disc, where you show on an MRI or CT that it's pressing on nerve roots or, let's say, a fracture or something.

It's a soft-tissue pain generator, would be the diagnosis, would explain the diagnosis.

(Id. at 13-14.)

29. In Dr. Galvas' opinion the second accident caused claimant's myofascial pain syndrome. (Id.) He explained the basis for his opinion as follows:

Okay. It appears, if I listened to the history and the notes, that Dale returned to work; and at that time he was able to execute his job and was doing so, until the second accident. That accident, then, since he was able to execute his job and return to work, in my mind, he didn't have or I see no evidence in the documentation that he had myofascial pain.

It was only after the second incident that we then find him unable to execute his job and then have the complaints that he has. So I would say that that second accident caused myofascial pain syndrome.

(Id. at 26.) He also noted that Dr. Luckett had not made any reference to myofascial pain syndrome following the first injury.

30. I am not persuaded that Dr. Galvas' testimony establishes that the second injury caused a new and different condition or that claimant's condition is attributable to myofascial pain as opposed to discogenic pathology. Dr. Luckett did not diagnose myofascial pain syndrome after either the first or second industrial accident; his diagnosis is that claimant is suffering from degenerative disc disease and that his pain may be multifactorial in the sense that the pain may be originating from a degenerative disc, the facets, muscles, tendons and/or ligaments of the low back. The claimant's symptoms at

maximum healing following his second injury were essentially the same symptoms he had following his first injury. The limitation of claimant to light-duty work was imposed following the first accident and was unchanged following the second accident. While claimant returned to his job, Dr. Luckett had reservations about his ability to perform the job; the job was modified to accommodate his restrictions; and his condition fluctuated even after his return to work. The evidence concerning his return to work fails to establish long-term success at a full-time position. In summary, there is no reason to prefer Dr. Galvas' diagnosis over that of Dr. Luckett. Both physicians are well qualified in their fields and there is no evidence that Dr. Galvas is any more qualified than Dr. Luckett to diagnose or rule out degenerative disc disease and other causes of low-back pain. Dr. Galvas did not identify any specific objective evidence which would specifically support his diagnosis over that of Dr. Luckett's and Dr. Luckett had the advantage of treating the claimant following both of his injuries.

31. Dr. Galvas also performed a second impairment rating based on claimant's condition following his second injury. However, that rating does not establish that claimant suffers any additional impairment as the result of the second injury, nor does it contradict Dr. Luckett's opinion that claimant's impairment was the same following both injuries. While Dr. Galvas' rating is significantly higher than the rating given by Dr. Luckett following the first injury, Dr. Galvas used a different edition of the AMA Guide to Impairment, which in and of itself could lead to a different rating. Dr. Luckett also did not use range of motion considerations specified by the AMA Guide, while Dr. Galvas did. Finally, Dr. Galvas did not identify any specific impairment factor which was greater after the second injury.

32. Dr. Galvas testified that based on a December 20, 1993 functional capacity evaluation, it appeared that claimant's lifting capability, sitting tolerance and standing tolerance declined since the original functional capacities evaluation was performed. A comparison of selected results discussed in the depositions are as follows:

First Second

Pushing & Pulling 55 lbs. 50 lbs.

Sitting 45 minutes 30 minutes

Lifting 25 lbs. 20 lbs.

Standing 15 minutes 30 minutes

Reaching 3 lbs. 5 lbs.

Walking 3/4 mile 670 ft.

Lido Lift 20 lbs. Unable to participate

(Ex. 4 at 41-44, 71-77.)

33. Dr. Luckett did not consider the differences in the functional capacity evaluations to be significant. The Court agrees with Dr. Luckett for several reasons. First, the results are

mixed. If the differences are attributed solely to the second injury then the second injury improved some of claimant's physical capacities, while reducing others. Second, there is clear evidence that claimant's condition fluctuated: Prior to the 1992 injury claimant had good days and bad days, and experienced periodic exacerbations of his pain. Third, the tests are to some degree subjective since they depend on claimant's effort and his reports of pain. Fourth, other evidence suggests that the comparisons may be affected by factors other than the second accident. Referring specifically to the 3/4 mile versus 670 foot walking comparison, the Court notes that approximately two months prior to the claimant's second accident the claimant reported that he could walk "about 400 yards before his left lower extremity starts to bother him" (Ex. 2 at 21), while just following the accident he reported that he had been able to walk one and a half miles (Ex. 2 at 22).

34. Both functional capacity examinations resulted in a finding that the claimant was capable of only light-duty work. In this regard there was no difference in the results of the two examinations.

35. Both Dr. Galvas and Dr. Lockett agreed that the 1992 injury was to the same part of the body as the 1990 injury, and the Court so finds. The low back was involved in both injuries. The injuries manifested themselves in the same manner. While Dr. Galvas and Dr. Lockett disagreed as the specific medical etiology of the pain, they both agree that the etiology is in the low back.

36. Claimant's 1992 injury was a temporary aggravation of his preexisting condition. He has failed to persuade the Court by a preponderance of the evidence that his condition and disability were materially different following the 1992 industrial accident than before the accident.

CONCLUSIONS OF LAW

1. The claimant is not presently seeking any particular benefits. Rather, he asks the Court to determine that he has met the threshold definition of permanent disability which would entitle him to either permanent total or permanent partial disability benefits. The law in effect at the time of claimant's injury governs that determination. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

Permanent total disability benefits are available to "permanently totally disabled" workers, section 39-71-702 (1), MCA, while permanent partial disability benefits are available to workers who suffer a "permanent partial disability." § 39-71-703(1), MCA. "Permanent total disability" and "permanent partial disability" are defined. Section 39-71-116(16), MCA (1991), provides in relevant part:

(16) "Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum healing, in which a worker has no

reasonable prospect of physically performing regular employment. . . . [Emphasis added.]

Section 39-71-116 (15), MCA (1991), provides:

(15) "Permanent partial disability" means a condition, after the worker has reached maximum healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work. [Emphasis added.]

In both instances the disabling condition must be the result of the industrial accident.

"Causation is an essential element to benefit entitlement. The claimant has the burden to prove a causal connection by a preponderance of the evidence." *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981 (1993). Thus, the insurer is not liable for permanent disability benefits where a claimant suffers only a temporary aggravation of a preexisting condition. *Id.*

The claimant in this case has failed to carry his burden of proof. His condition waxed and waned before the second injury. As Dr. Luckett testified, claimant's impairment was essentially the same following the second injury as it was before. While Dr. Luckett approved claimant going back to work as a mechanic after the first injury, he did so with restrictions which required modification of the position. Dr. Luckett clearly had reservations about claimant's ability to perform the job and specifically determined that he should be limited to light-duty work. Claimant returned to work initially on a part-time basis, and with difficulty. He never established a record of a long-term return to work on a full-time basis. There are also indications that he experienced exacerbations of his pain along the way. This history is consistent and supportive of Dr. Luckett's opinions, which the Court finds are the more persuasive.

Since the claimant has not persuaded the Court that his condition is materially different following the second injury than it was prior to that injury, he has also failed to persuade the Court that he suffered any permanent disability or physical restriction as a result of the second injury. The aggravation of his underlying low-back condition was a temporary aggravation. He is not entitled to either permanent total or permanent partial disability benefits.

2. The July 29, 1992 injury was an injury to the same part of the body that claimant injured in the June 15, 1990 industrial accident.

JUDGMENT

1. Claimant did not suffer permanent disability as the result of his July 29, 1992 industrial accident and is not entitled to permanent total or permanent partial disability benefits.

2. Claimant is not entitled to costs.

3. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 24th day of August, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Randall O. Skorheim

Mr. William O. Bronson