IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 4

WCC No. 2001-0359

JOHN D. WALKER

Petitioner

vs.

GREAT WEST CASUALTY COMPANY

Respondent/Insurer for

JIM PALMER TRUCKING/MIDWEST DRIVER SERVICES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

NOTE: Following the issuance of this Order, the parties entered into negotiations resulting in a settlement of the issues. A Nunc Pro Tunc Order Vacating Findings Of Fact, Conclusions Of Law And Judgment was issued and a new judgment incorporating the parties' settlement agreement was entered on 3/13/02.

Summary: Claimant, a truck driver, injured his shoulders while trying to remove a pin on his trailer and the insurer accepted liability with respect to the shoulders. Years later he filed a petition seeking a determination that he also injured his low back in the incident.

Held: Claimant failed to carry his burden of proof. He presented no medical opinions relating his low-back pain to his industrial accident; he had a long, pre-accident history of low-back pain; in claims with the Veteran's Administration he attributed his low-back pain to wounds suffered in the Vietnam War; and he did not mention his low back when seeking treatment for his accident.

Topics:

Proof: Burden of Proof: Generally. The claimant has the burden of proving that his medical condition is related to his industrial accident.

Proof: Burden of Proof: Preponderance. Where the claimant (1) failed to present medical opinions relating his low-back condition to his industrial accident, (2) had a long history of chronic low-back pain antedating his industrial accident, (3) had

related his low-back pain to wounds suffered in Vietnam when applying for VA benefits, and (4) had not mentioned low back pain when seeking treatment for his industrial accident, the Court finds that he failed to prove by a preponderance that he either injured or aggravated his low back in the industrial accident.

¶1 The trial in this matter was held on January 14, 2002, in Missoula Montana, Petitioner, John D. Walker (claimant), was present and represented himself. Respondent, Great West Casualty Company (Great West), was represented by Mr. Peter J. Stokstad.

¶2 Exhibits: Exhibits 1 through 10 were admitted without objection.

¶3 Witnesses and Depositions: Depositions of Walter Peschel, M.D., William R. Goodrich, and Michael J. Arnold, P.T. were submitted to the Court for its consideration. Claimant and Richard Horst were sworn and testified.

¶4 Issues Presented: The issue as set forth in the Final Pretrial Order is:

Whether Claimant suffered an injury to his low back on August 26, 1996.

¶5 Having considered the Final Pretrial 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

¶6 The claimant is 57 years old. He has been in the military and worked at various jobs over the years, including construction laborer, construction supervisor, motor parts store owner and manager, contractor, real estate broker, and over-the-road truck driver.

¶7 In April 1996 claimant went to work for Jim Palmer Trucking as a long-haul truck driver. The trucking company operates its fleet from Missoula, Montana.

¶8 On August 26, 1996, while attempting to unload his truck at Kroger Grocery in Hopkins, Minnesota, the claimant needed to slide his trailer axle but was unable to do so because of a stuck pin. He attempted to dislodge the pin by pounding on it with a five pound sledge hammer, then pulling on the pin. While pulling on the pin he felt a pop in his right shoulder.

¶9 The next day claimant had difficulty moving his right shoulder and called the dispatcher at Jim Palmer Trucking to notify him of the injury and his difficulty in shifting his truck on account of his shoulder pain. He was dispatched to pick up a load to Great Falls and thereafter returned to Montana.

¶10 Upon arriving in Missoula, claimant was referred to Dr. Walter Peschel, whom he had seen previously for a driver's physical examination. (Ex. 3 at 3 and 3a). Dr. Peschel examined claimant on August 29, 1996, noting "complaints in both shoulders and neck."

(*Id.* at 1.) He prescribed Daypro, which is a nonsteroidal anti-inflammatory drug. (Physicians' Desk Reference.)

¶11 Claimant thereafter filed a claim for compensation stating that he "injured both shoulders, my back and neck." (Ex. 1 at 1.) He did not specify which part of his back he alleged he injured.

¶12 At the time of the claimant's injury, Jim Palmer Trucking was insured by Great West. Great West initially denied liability for the claim but thereafter accepted it and paid indemnity and medical benefits.

¶13 There is no dispute that claimant suffered significant shoulder injuries as a result of his industrial accident. He subsequently underwent arthroscopic surgery on his right shoulder in February or early March 1998, and arthroscopic surgery on his left shoulder on June 3, 1999. (Ex. 7 at 8-10, 45.) Great West has accepted liability and paid benefits with respect to both shoulders.

¶14 The dispute in this case concerns his present claim that he also injured his low back on August 26, 1996. The low back was not listed in his claim for compensation and Great West has denied liability for any low-back condition.

¶15 A review of claimant's medical history shows that he has long-standing complaints relating to his low back. He testified that since he was a teenager he has suffered from pain in his tail bone (coccyx), especially when sitting. He insisted that this tail bone pain is the sort of pain that he suffered prior to his August 26, 1996 injury most often related to his riding horses and snowmobiles. His medical records, however, tell a different story.

¶16 Claimant is a Vietnam veteran. In 1969 in Vietnam he was wounded by a grenade and was hit by shrapnel in several parts of his body, including his low back. (Ex. 8 at 1 - 4.) He still has shrapnel in his lumbar area. (*Id.* at 7, 30, 47A.)

¶17 As shown by medical history, since his service in Vietnam he has suffered from chronic low-back pain. His Veterans Administration medical records document the following history:

> ¶17A A 1975 VA orthopedic examination noted that claimant complained of a nagging ache between his shoulder blades and states that "he believes that this causes strain on the lower part [of his back]." (*Id.* at 4.) Physical examination of the low back disclosed seven scars on his low back (*id.* at 5), apparently the result of shrapnel wounds.
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> ¶17B A November 22, 1980 Veteran's Administration (VA) note indicates claimant "has had chronic back problems x [times] 10 yrs [years]." (*Id.* at 8.)

¶17C A VA medical certificate dated November 23, 1982, states that claimant has had "Chronic LBP [low back pain] since GSW [gun shot wound]." (*Id.* at 9.)

¶17D On December 7, 1982, a medical note indicates that claimant had not been able to sit for a month, had "severe back spasms", and had "sciatic irritation" in the right leg upon straight leg raising. (*Id.* at 10.) The assessment was "Sciatic pain in R [right] Lower Extremity." (*Id.*; sic.)

¶17E On January 20, 1983, an orthopedic clinic doctor at the VA noted, "Low back pain continues." (*Id.* at 11.) The doctor noted separately, "*Also* has [illegible] sacral tenderness." (*Id.*)

¶17F On February 12, 1983, claimant was admitted to a VA hospital. (*Id.* at 12.) The discharge summary noted "a history of being shot multiple times in the back with back pain radiating down his right paraspinal muscles and right buttock for some time now." (*Id.*)

¶17G A VA Orthopedic Clinic note of March 26, 1985, indicated that claimant was complaining of low back pain "worse than usual." (*Id.* at 24.) The note went on to say that claimant "had [illegible] GSW [gun shot wound] in '69 and chronic LBP [low back pain] since." (*Id.*) A clinic note on May 2, 1985, stated that the low-back pain "persists." (*Id.* at 25.)

¶17H Nearly a decade later, on July 28, 1994 and August 22, 1994, VA notes recite claimant's complaints as chronic low-back pain present for 30 years and radiating down both legs. (*Id.* at 28 and 31.) The note indicated that the low-back pain had increased. (*Id.* at 29.) Plain x-ray films of the lower back taken on July 28, 1994, showed slight degenerative changes of the lumbar spine. (*Id.* at 30.)

¶17I On January 6, 1995, VA records reflect that claimant was complaining of low-back pain with radiation into his legs and was having "difficulty that includes standing up and walking." (*Id.* at 32.)

¶17J In a VA visit on May 28, 1996, just three months prior to his industrial accident, claimant reported chronic pain in his neck, left arm, shoulder, left foot, **and** lower back, saying that he was doing "terrible." (*Id.* at 33.)

¶18 Following his industrial injury, claimant's complaints to civilian medical providers were predominantly of shoulder, neck, and upper back pain. As previously noted (¶ 10), claimant's initial complaints were of shoulder and neck pain. (Ex. 3 at 1-2.) According to Dr. Peschel, claimant did not complain of low-back pain. (*Id.* at 5; Peschel Dep. at 15-16.) On September 16, 1996, claimant went to Dr. Max Iverson, an orthopedic surgeon practicing in Helena, Montana. Dr. Iverson recorded claimant's complaints as pain in his shoulders. (Ex. 4 at 1.) According to Dr. Iverson, claimant did not mention any low-back complaints. (*Id.* at

6.) Dr. Iverson prescribed a short course of physical therapy for the shoulders. Physical therapy notes for October 1996 do not record any low-back complaints or low back therapy. (Ex. 5.)

¶19 Meanwhile, claimant continued to see VA doctors for his other problems, including low-back pain. A VA note of September 5, 1996, states that claimant continued to complain of "aching all over" and of chronic low-back pain. (Ex. 8 at 34.) There is no mention of any exacerbation due to the industrial accident. On January 14, 1997, a VA note indicates that claimant was still hurting "all over," including his legs, which he attributed to his being overweight. (*Id*.) He also mentioned that he had hurt his right shoulder in a work accident. (*Id*.) There is no mention of hurting his back in the accident. (*Id*.)

¶20 On May 19, 1997, claimant was examined at the VA in connection with an application to increase his disability rating. (Ex. 8 at 39-40, 44, 48; ¶ 6.) The application, which was made June 21, 1996, preceded claimant's industrial injury and listed his "lower back pain" as one of the bases for his request. (Ex. 8 at 48.) At the time of the May 19th examination he complained of pain in multiple areas, including his shoulder and low back, however, his only mention of his industrial injury was with respect to "a pulling injury of the left shoulder of 8/96, covered under workers' compensation . . . . " (*Id*. at 39.) As a result of his application, on November 24, 1997, he received a 40% disability rating attributable to "shell fragment wound with retained foreign bodies lumbar spine." (*Id*. at 46, capitalization in original.)

¶21 In September 1997, claimant sought treatment for his shoulders from Dr. William F. Binder, an orthopedic surgeon in Lake Havasu City, Arizona. Dr. Binder examined claimant on September 10, 1997. Following that visit, he wrote a lengthy letter to Great West's attorney. (Ex. 7 at 1-4.) The letter concerned claimant's bilateral shoulder pain and did not mention any low back complaints. Between September 10, 1997 and May 26, 1998, Dr. Binder saw claimant on numerous occasions and performed surgery on his right shoulder. (*Id*. at 1-22.) His office note of May 26, 1998, for the first time mentions low- back complaints. His note reads in relevant part:

> As far as other problems, over the last ten days or so, he has had soreness in his low back post exercising in an effort to get his weight down. The back was *apparently an original injury as well*.

(*Id*. at 22, emphasis added.)

¶22 On July 1, 1998, claimant told Dr. Binder he "would like direction in the near future toward two other problems that he thinks are both industrially related. The first is the left shoulder which continues to bother him. The second is the lower back area." (*Id*. at 24.) Dr. Binder noted he did not have records pertaining to the low back. (*Id*.) On August 5, 1998, Dr. Binder examined claimant with respect to both the left shoulder and low back. (*Id*. at 26.)

Significantly, he noted, "My information indicates that the low back has been a problem for **two** years." (*Id.*, emphasis added.) Following examination he proposed to treat him "mechanically." (*Id.* at 27.) Between August 5, 1998 and November 16, 1999, Dr. Binder saw claimant on numerous occasions, however, his examinations and treatment during that period were almost entirely with respect to the left shoulder. (*Id.* at 28 through 52.) On November 16, 1999, Dr. Binder's notes return to claimant's back problems, stating that claimant's "problem now is his back" and right leg. (*Id.* at 53.)

¶23 There is no indication that Dr. Binder ever received and reviewed claimant's VA medical records or his prior history of back pain and ultimately he rendered no opinion concerning the relationship between claimant's back complaints and his industrial accident. (*Id.* at 58.)

¶24 On November 3, 2000, a CT myelogram of the lumbar spine disclosed mildly bulging disks at the L4-5 and L5-S1 levels without any evidence of nerve root encroachment. (Ex. 8 at 58.) However, the records do not indicate that the bulging disks are responsible for claimant's complaints or that they are a product of his industrial injury.

¶25 No physician has related claimant's current back condition to his industrial accident. While claimant asserted that his pre-accident back pain had been tail bone pain and not the kind of low-back pain he suffered after the accident, his testimony is inconsistent with his medical records and I did not find him believable. In light of the utter lack of supporting medical opinion; the claimant's long, pre-industrial accident history of low-back pain, including pain radiating into his legs; the claimant's lack of complaints concerning his low back when seeking care for his industrial accident; and the claimant's own statements to VA officials indicating that his low-back pain was long standing and attributable to his Vietnam wounds, I am unpersuaded that claimant injured or aggravated his low back on August 26, 1996. I find it more likely that his post-August 26, 1996 back pain is simply an expected continuation of his chronic, pre-existent back problems.

CONCLUSIONS OF LAW

¶26 This case is governed by the 1995 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).

¶27 Claimant bears the burden of proving by a preponderance of the evidence that he suffered a low-back injury on August 26, 1996, or that he materially and materially aggravated a preexisting low-back condition at that time. See *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). He has failed to carry his burden of proof.

JUDGMENT

¶28 Claimant did not injure his low back or aggravate a preexisting low back condition on August 26, 1996. Great West is therefore not liable for his low-back condition.

¶29 The petition in this matter is **dismissed with prejudice**.

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

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

DATED in Helena, Montana, this 25th day of January, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. John D. Walker
Mr. Peter J. Stokstad
Submitted: January 14, 2002