IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 8

WCC No. 2004-1053

JANNA WEISGERBER

Petitioner

vs.

AMERICAN HOME ASSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant seeks permanent total disability benefits on account of an occupational disease arising out of her exposure to hair dye and other aerosolized chemicals at her workplace. The claimant's primary and most significant problem is vocal cord dysfunction where her vocal cords go into spasm and constrict her breathing.

Held: The claimant's employability must take into account her preexisting disabilities at the time her occupational disease arose. Under section 39-71-609(2), MCA (2001), upon the claimant reaching maximum medical improvement and the insurer's termination of temporary total disability benefits, the insurer has the burden of producing evidence that, taking into consideration not only the claimant's disability directly attributable to her occupational disease but also other disabilities existing at the time her occupational disease arose, the claimant is qualified for and physically capable of performing regular work. The failure of the insurer to do so, along with evidence tending to indicate that the claimant is not able to do the jobs identified by the insurer, requires the Court to find the claimant to be permanently totally disabled.

Topics:

> **Proof: Burden of Proof: Permanent Total Disability.** Upon termination of temporary total disability benefits, the insurer bears the burden of producing evidence showing that the claimant is not permanently totally disabled. As a part of that evidence it must identify jobs that are appropriate for the claimant and which have been medically approved by a physician

taking into consideration any preexisting conditions and disabilities the claimant had at the time the occupational disease arose.

Claimants: Preexisting Condition. The employer and its insurer take the claimant as they find her, with all of her preexisting conditions and disabilities. Thus, in determining whether a claimant is permanently totally disabled, the claimant's medical conditions and disabilities existing at the time of her injury or occupational disease must be taken into account in determining whether she is employable.

¶1 The trial in this matter was held in Helena, Montana, on October 25, 2004. The petitioner was present and represented by Mr. Norman H. Grosfield. Respondent was represented by Mr. Donald R. Herndon.

¶2 Exhibits: Exhibits 1 through 17 and 22 through 27 were admitted without objection. There were no exhibits numbered 18 through 21.

¶3 Witnesses and Depositions: Vickie Hirschi, Delane Hall, and the petitioner testified at trial. In addition, the parties submitted the depositions of Dr. John Schumpert, Dr. Walter Fairfax, and the petitioner to the Court for its consideration.

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

> ¶4a Whether Petitioner is permanently totally disabled and entitled to permanent total disability benefits as a result of her occupational disease; and
>
> ¶4b If it is determined Petitioner is not permanently totally disabled, what amount she would be entitled to in a permanent partial award.

(Pretrial Order at 2.)

¶5 Bench Ruling: At the close of trial, the Court ruled that if the petitioner is not permanently totally disabled then she is at least permanently partially disabled and sustained a wage loss in excess of $2 an hour. On that basis, and without deciding the degree of permanent disability, the Court authorized and directed the respondent to pay a twenty percent wage-loss benefit pursuant to section 39-71-703(5)(c), MCA (2001), said amount to be paid retroactively to the date the petitioner reached maximum medical improvement. Said amount is to be credited against the insurer's liability for permanent total disability benefits if the Court ultimately finds the petitioner permanently totally disabled.

¶6 Having considered the 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

¶7 The petitioner, Janna Weisgerber (hereinafter "claimant"), is 48 years of age. She is a high school graduate.

¶8 Her post-high school education consists of correspondence school training as a medical/dental office assistant in 1982 and attendance at Maddio's School of Cosmetology from September of 1991 until September 1992, where she trained as a hair stylist and manicurist.

¶9 From 1973 until 1982, the claimant worked primarily as a cook and waitress. In 1984, after completing the correspondence course for medical/dental office assistant, she went to work as a medical records technician. She worked in that position for approximately two years, then returned to waitressing.

¶10 In 1987 she began work as a stock clerk for the Hennessy's store in Helena, Montana. On March 16, 1988, while working at Hennessy's, she injured her low back while moving boxes. Following that back injury, she underwent multiple back surgeries and was off work for approximately four years.

¶11 Advised not to return to work as a stock clerk on account of her back injury, the claimant attended cosmetology school from September 1991 to September 1992. Thereafter, from 1992 until January 2002, she worked as a hair stylist and manicurist.

¶12 During her cosmetology schooling, the claimant suffered an allergic reaction to a particular hair dye. Her reaction was in the form of itching, a rash, and shortness of breath. (Ex. 14 at 1.) Over the ensuing years she had similar, occasional reactions while working. (*Id*. 1-2.)

¶13 In 1997 the claimant began working as a manicurist and hair stylist at the JC Penney beauty salon in Helena, Montana. She continued to work there until January 2002, avoiding hair dyes and confining her work to hair styling and manicures.

¶14 While working for JC Penney, the claimant was paid an hourly wage of $5.15 plus commission. A review of pay stubs furnished for December 1999 and December 2000 show that in 1999 she worked 1600 hours through December 18, 1999, or approximately 32 hours a week, and that in 2000 she worked 1637 hours through December 16, 2000,

or approximately 32.75 hours a week. (Ex. 27 at 6-7.) That equates to approximately four days per week.

¶15 On January 5, 2002, the claimant began wheezing and coughing at work upon smelling fumes from hair dye being used by another stylist. She had difficulty breathing and was taken to the emergency room of St. Peter's Hospital in Helena. (Ex. 6 at 50.)

¶16 The claimant was off work for several days. Upon returning to work on January 16, 2002, she suffered a similar reaction, again upon smelling hair dye. (Weisgerber Dep. at 24; Ex. 6 at 53.) She did not return to work thereafter.

¶17 On February 14, 2002, the claimant filed a First Report of Injury and Occupational Disease based on her reaction to fumes at work. At the time of her occupational exposure, JC Penney was insured by American Home Assurance Company (American Home). Following an Occupational Disease Panel evaluation, American Home accepted her claim as an occupational disease.

¶18 The parties agree that the claimant has reached maximum medical improvement with regard to her workplace exposure and American Home has paid a five percent impairment award. However, they disagree as to her disability. The claimant asserts that she is permanently totally disabled. American Home asserts that she is only permanently partially disabled.

¶19 The claimant's physician for her respiratory problems is Dr. William Krause, a pulmonologist. At American Home's request, the claimant has also been evaluated by Dr. John C. Schumpert, a specialist in occupational disease and environmental medicine, and Dr. Walter Raymond Fairfax, another pulmonologist. All agree that the claimant is suffering from an occupational disease related to her exposure to chemical fumes at work, especially fumes from hair dyes.

¶20 The claimant's primary problem is "vocal cord dysfunction," where the vocal cords "go into spasm" and "close tightly," thus restricting the airway (larynx) and making it difficult to breathe. (Fairfax Dep. at 34.) Dr. Fairfax described the feeling as "like you are being strangled" (*id*. at 23) and as "one of the most terrifying experiences that an individual can have" (*id*. at 34). The terrifying nature of the condition may result in "a strong emotional overlay." (*Id*. at 23.)

¶21 Dr. Fairfax also testified that the claimant may also be suffering from a restrictive lung disease – a condition restricting inhalation – due in part to her occupational exposure to chemical fumes. (*Id*. at 20, 26-27, 33; Dep. Ex. 2 at 4-5.) Dr. Krause opined that claimant's preexisting, underlying asthma may also have been aggravated by her work exposure. (Ex. 15 at 3.)

¶22 The claimant's main difficulty has continued to be throat tightening and difficulty breathing, i.e., the vocal cord dysfunction. She has undergone instruction by a speech therapist in techniques she can use to combat the onset of vocal cord dysfunction. (Ex. 13.) She testified that she still has episodes of throat tightening, for example, when she shops for groceries. She has been able to employ the techniques she learned to stop some but not all of the episodes. (Weisgerber Dep. at 48-51.) Perfume especially bothers her. (*Id*. at 50-51.)

¶23 Drs. Fairfax, Krause, and Schumpert agreed that the claimant should not return to her time-of-injury job and should avoid work environments where she would be exposed to significant chemical fumes. Dr. Fairfax testified that as a result of her prior exposures, the claimant has "a much lower tolerance for" aerosolized irritants. (Fairfax Dep. at 45.) He recommended she avoid smoking environments, ammonia, pesticides, herbicides, fungicides, paints, petroleum products, perfumes, aftershaves, and colognes, among other things. He also indicated that her tolerance for such fumes may be a matter of degree, meaning that exposures to small amounts of fumes may not affect her. (*Id*. at 45-48.) Dr. Schumpert recommended she avoid "all kinds of pulmonary irritants and corrosive chemicals, dyes, strong odorants, automobile exhaust, cigarette smoke" (Schumpert Dep. at 37) and, as did Dr. Fairfax, indicated that trivial exposures to irritants should not trigger a reaction. (*Id*. at 42-43.)

¶24 The claimant has not worked for wages since she terminated her employment with JC Penney. She provides daily, full-time care for her three grandchildren, ages 3, 5, and 6. She cares for them in her own home. She is not paid for her care and not all of the children are present all of the time; the 6-year-old attends school, thus she cares for him only part of the day. She is receiving social security disability benefits.

¶25 Vocational consultants designated by American Home identified various jobs which they opined were appropriate for the claimant in light of physical restrictions attributable to her occupational disease. Job descriptions were submitted to both Dr. Fairfax and Dr. Schumpert, however, only Dr. Schumpert reviewed and commented on the job descriptions. He approved the following jobs: shuttle driver for car dealership, medical transcriptionist, and day-care aide. (Ex. 16 at 75-81.) He also approved motel desk clerk with the proviso that the claimant do no dusting, vacuuming, cleaning, or similar tasks. He also approved barber, so long as no hair dye is used in close proximity to the claimant's workspace.

¶26 Delane Hall, one of the vocational consultants designated by American Home, prepared an employability and wage-loss report and also testified at trial. In addition to the jobs approved by Dr. Schumpert, he identified the following positions as possible employment for claimant: cashier, telephone sales representative, receptionist, people greeter (i.e., Wal-Mart), and medical records clerk. (Ex. 24 at 4; Trial Test.) However, he

specifically noted that the positions were subject to medical approval. (*Id*.) None of these positions were reviewed and approved by a physician.

¶27 Dr. Schumpert approved job descriptions based solely on physical restrictions arising from the claimant's occupational disease and without consideration of the claimant's preexisting limitations. (Schumpert Dep. at 44.) Similarly, while Dr. Fairfax opined that the claimant is able to work, he did not evaluate the claimant in light of non-occupational disease restrictions and noted that she should be evaluated by a physiatrist or orthopedic surgeon. (Fairfax Dep. Ex. 2 at 6.) He did limit her to twenty-five pounds lifting but that appears to be based on her breathing difficulties rather than orthopedic limitations. (*Id*.)

¶28 At the time of her January 2002 reaction to chemicals, the claimant had numerous physical limitations which affected her ability to work. She had a significant and painful low-back condition and had undergone numerous back surgeries. Her back pain had been so painful that she had undergone implantation of a spinal cord stimulator, which failed to provide relief. In January 2002 she was under the care of Dr. Ronald K. Hull, a pain specialist, for her back pain. (Ex. 8.) She was taking numerous medications for her ailments, including narcotic drugs for pain and antidepressants for depression. (*Id*. at 5-12.) Dr. Fairfax testified that the medications the claimant was taking at the time he examined her could affect her ability to function. (Fairfax Dep. at 42-43; *and see* Schumpert Dep. at 48-52.) He conceded that the medications "could potentially make it difficult for her to hold a job." (Fairfax Dep. at 43.) Given the multiple medications she was taking at the time of her occupational disease, I am skeptical that she would have been then, or is now, employable as either a shuttle driver or day-care provider. In light of her depression and vocational testimony indicating that telemarketing is a stressful job, I am skeptical that she could successfully perform a telemarketing job. In light of the claimant's back pain and her reaction to odors in public settings, I am further skeptical that she could perform the other identified jobs on a sustained and regular basis. Employment as a barber presents a possibility but the evidence is insufficient for me to conclude that there are barbering opportunities which would not utilize chemicals or allow the claimant to alternate positions as she did when working as a hair stylist. The most suitable job identified for her appears to be that of medical transcriptionist, a job that can sometimes be done at home, but she neither has the present skills nor training for that job.

¶29 In fact, **no** job has been medically approved taking into consideration the claimant's preexisting conditions and disability as they existed at the time her occupational disease was diagnosed and became disabling. Dr. Brooke Hunter, an orthopedic surgeon who has treated the claimant over the years for her low-back condition, noted on November 15, 2002, that in light of her low-back and knee conditions, principally the low-back condition, "it would be very difficult to find a work environment that would allow her to work full-time." (Ex. 7 at 18.) The claimant testified without contradiction that she was able to work at JC Penney because her job enabled her to frequently change positions, i.e., from standing to

sitting and vice versa. Thus, it is evident at the time of her occupational disease that she was already limited in the jobs she could perform. Those limitations should have been taken into consideration.

CONCLUSIONS OF LAW

¶30 This case is governed by the 2001 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 Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶31 The claimant is seeking permanent total disability benefits. "'Permanent total disability' means a physical condition resulting from injury . . . after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment." § 39-71-116(24), MCA (2001).

¶32 Ordinarily, the claimant bears the burden of proof. *See Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). However, that burden must be viewed in light of section 39-71-609(2), MCA (2001), which provides:

> (2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary total disability benefits or temporary partial disability benefits to permanent partial disability benefits:
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> (a) must have a physician's determination that the claimant has reached medical stability;
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> (b) must have a physician's determination of the claimant's physical restrictions resulting from the industrial injury;
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> (c) must have a physician's determination, based on the physician's knowledge of the claimant's job analysis prepared by a rehabilitation provider, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;
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> (d) shall give notice to the claimant of the insurer's receipt of the report of the physician's determinations required pursuant to subsections (2)(a) through (2)(c). The notice must be attached to a copy of the report.

Subsection (2)(c) puts the burden on the insurer to, in the first instance, obtain a physician's approval of one or more jobs suitable for the claimant. Thus, it bears the initial burden to produce evidence showing that the claimant is not permanently totally disabled.

¶33 The insurer in this case failed to comply with subsection (2)(c). It is not enough that the insurer obtain a physician's approval based on physical limitations arising solely out of the occupational disease or injury at issue. It is an elementary rule of workers' compensation law that the employer and the insurer take the claimant as they find her. "[A]n employer takes its employee as it finds her, and . . . if her disability is aggravated by an underlying physical or emotional condition, . . . the employer is liable for disability which results from that aggravation." *Satterlee v. Lumbermen's Mut. Cas. Co.,* 280 Mont. 85, 91, 929 P.2d 212, 216 (1996). As claimant aptly points out in her proposed conclusions of law:

> ¶20 Larson, in his treatise on workers' compensation, addresses the precise situation now before the Court. The full responsibility rule addresses situations in which two physical disabilities result in a greater disability condition than considering either one alone. Larson states that "the loss of a leg, which would ordinarily mean only partial disability to a normal person, results in total disability to the man who has already, from whatever cause, lost the other leg." Larson further states, "In the absence of an apportionment statute, the general rule is that the employer become liable for the entire disability resulting from a compensable accident." *Larson's Workers' Compensation Law, Section 90.01.* There is no longer any apportionment rule in Montana. *Schmill v. Liberty Northwest Ins. Co.*, 2001 MT WCC 36.

(Petitioner's Proposed Findings of Fact, Conclusions of Law, and Judgment, ¶ 20.)

¶34 Thus, in evaluating the claimant's ability to work, consideration should have been given to her physical and psychological disabilities existing at the time of her occupational disease. Since the insurer failed to produce any evidence as to the claimant's employability in light of both her occupational disease and her other medical conditions existing at the time of the occupational disease, and since the claimant has provided testimony consistent with her medical records indicating that she cannot work at the jobs identified by American Home's vocational consultant, I conclude that the claimant is permanently totally disabled and entitled to permanent total disability benefits retroactive to the date her temporary total disability benefits were terminated.

¶35 Since the claimant is entitled to permanent total disability benefits, American Home is entitled to a credit for permanent partial benefits I provisionally ordered it to pay at the conclusion of the trial.

JUDGMENT

¶36 The claimant is permanently totally disabled and entitled to permanent total disability benefits retroactive to the date her temporary total disability benefits were terminated. American Home shall pay such benefits after offsetting amounts it has paid in permanent partial disability benefits pursuant to the Court's oral order at the conclusion of trial.

¶37 The claimant is entitled to her costs in accordance with this Court's rules.

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

¶39 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 14th day of February, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Donald R. Herndon
Submitted: October 25, 2004