

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 59

WCC No. 9403-7017

DAVID WILLIAMS

Petitioner

vs.

PLUM CREEK TIMBER

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on June 14, 1994 in Kalispell, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Mr. David Williams (claimant) was present and represented by Mr. David W. Lauridsen. Respondent, Plum Creek Timber Company (Plum Creek), was represented by Mr. Kelly M. Wills. Claimant was sworn and testified on his own behalf. Julie Anderson, Glen Flaget and Lee TenEyck were sworn and testified. The depositions of David Williams, Julie Anderson and George Ingham, M.D., were stipulated into the record by the parties and considered by the Court in reaching its decision. Exhibit Nos. 1 through 6 were admitted into evidence by stipulation of the parties.

At the close of trial, the Court issued a bench ruling finding that claimant is entitled to permanent partial disability benefits under section 39-71-703, MCA. However, the Court found that Plum Creek's denial of benefits was not unreasonable. It therefore denied claimant's requests for attorney fees and the penalty.

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

1. The claimant is 34 years old. He is married and has two children. He graduated from high school.
2. Claimant was employed for a number of years as a timber-faller or sawyer and also drove a logging truck for four years. On November 12, 1992, claimant was hired by Plum Creek to

work at its sawmill. His position was classified as an "extra board laborer." His primary job was pulling wood slabs off a conveyor belt.

3. On December 4, 1992, claimant injured his left foot while working for Plum Creek. He caught his foot in a chain and sprocket and suffered an amputation of the distal portion of his fifth toe (small toe) and a comminuted compound fracture of the great toe (big toe).

4. On December 4, 1992, Plum Creek was self-insured pursuant to Plan I of the Workers' Compensation Act. Plum Creek accepted liability for claimant's injury and paid temporary total disability benefits.

5. Claimant was treated by Dr. G.W. Ingham, an orthopedic surgeon. On August 2, 1993, Dr. Ingham assigned the claimant an impairment rating of one percent of the whole man. The rating was based on the partial amputation of the distal portion of the fifth toe and a deformity of the great toe.

6. Claimant has reached maximum healing.

7. Claimant was off work for approximately a month. He returned to his job at Plum Creek on January 6, 1993.

8. Claimant worked at Plum Creek for approximately another month, then went to work for Montana Mokko, another sawmill. At Montana Mokko, claimant operated equipment moving logs from the yard into the sawmill. He worked there for nine months and then accepted employment with the City of Kalispell as a truck driver. He is presently operating a street sweeper.

9. Claimant's injury to his foot does not interfere with his driving a truck or as a street sweeper. Although claimant testified that he quit his job at Plum Creek because he could not stand on his left foot for ten hours a day, he told his foreman that he quit to find a better job in Alaska. The Court finds that claimant's injury did not hinder or interfere with his work at Plum Creek. However, his foot does ache after continuous standing for three or four hours.

10. Claimant's foot is sensitive to cold as the result of his injury. Cold causes pain in his foot and toes. He wears two pairs of sock to keep his foot warm. Hunting bothers his foot since his foot becomes cold and sore. Claimant's testimony concerning the effect of cold was credible.

11. Claimant testified as to his belief that he cannot return to work as a sawyer due to his foot injury.

12. Dr. Ingham released claimant to return to work without specifically assigning claimant any restrictions, although on 1-28-93 he noted that the claimant "has some residual soreness over the great toe and 5th toe and hypersensitivity to cold." (Ex. 6 at 17.)

13. Dr. Ingham testified by deposition. He confirmed that claimant is affected by the cold and that his complaints of aching after standing for three to four hours are consistent with his injury. With regard to medical restriction, he testified as follows:

Q (by Mr. Lauridsen) What restrictions would you place on him, given the injury that he has got?

A (by Dr. Ingham) We didn't really talk about that too much. Obviously, I think if you worked in extremely cold climates for extremely long periods of time that that could be a restriction, if symptomatic.

(Ingham Dep. at 7-8.)

Q Okay. But does he have a physical restriction? What we need to show is a medically determined physical restriction.

A Yes, there is some physical restriction.

Q And what would that be?

A **Basically, he is not able to tolerate cold for long periods of time.** If you carefully analyze the foot in terms of his running ability and high sports performance, you would probably find some abnormalities, if you want to go to that extent, if you want to get very technical. The ends of his digits aren't there; it speaks for itself.

(*Id.* at 9-10; emphasis added.)

Q He talked about a problem he was having at one point pulling boards because he's left handed and when you pull, his left foot, which is-

A Slides in the boot and bangs against the boot.

Q Right.

A That could be a problem.

Q And also the pressure that he'd have to place on that pulling, because his-

A I think that speaks for itself, quite frankly. The digit's not normal.

(*Id.* at 10.)

Q Okay; so he can work. But is it your opinion that he does have a medically determined physical restriction, self imposed or by you, as to what he can do in the workplace?

A Well, in some environmental circumstances.

Q And that you may - I'm sorry if I'm asking you to repeat this, but what would those be?

A I think things with very cold climates for prolonged periods of time are going to be very difficult for this fellow to work in long periods. He can, but it's going to hurt. And when they get to hurting, sometimes they hurt themselves again.

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

14. As a result of his industrial injury claimant would have difficulty working in cold environments; thus, it would be difficult and ill-advised for him again work as a timber faller, which required outdoor work in a variety of conditions, including cold weather. He has a "medically determined physical restriction" as a result of his injury. Although he was able to return to work, the restriction impairs his "ability to work." § 39-71-116 (15), MCA(1991). He meets the definition of permanent partial disability and is entitled to the benefits specified by section 39-71-703, MCA.

15. Claimant's permanent partial disability rate is \$174.50, as stipulated by the parties. The parties also agreed that if the claimant is entitled to permanent partial disability benefits, he is entitled to an award of \$3,053.75 based on a 5 percent disability (2 percent for his education, 2 percent age, and 1 percent the impairment rating).

16. Julie Anderson is a workers' compensation claims adjuster with Putnam Associates, the third- party administrator of Plum Creek's workers' compensation claims. She testified that claimant was denied permanent partial disability benefits because Dr. Ingham did not indicate in his office notes that the claimant had any physical restriction which would impair his ability to work. She also testified that Putnam Associates contacted both the City of Kalispell and Montana Mokko to determine if the claimant experienced any problems in his work, and that the employers' answers supported the decision not to pay claimant permanent partial disability benefits. Anderson's testimony was credible.

17. A valid dispute existed over the statutory interpretation of section 39-71-703, MCA (1991). There was also a factual dispute as to whether claimant has a medically determined physical restriction.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The statutes in effect on the date of injury must be applied in determining benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 321, 730 P.2d 380 (1986). Claimant was injured on December 4, 1992, thus the 1991 version of the Workers' Compensation Act applies.

The claimant is seeking a permanent partial disability award pursuant to section 39-71-703, MCA (1991). The parties agree as to the amount of claimant's entitlement if he is entitled to anything at all. However, they disagree over claimant's eligibility for benefits. Claimant argues that he is entitled to benefits by the mere fact of his 1 percent impairment rating. (The rating is not disputed.) Plum Creek argues that the impairment rating is insufficient in and of itself, and that claimant must also meet the definition of permanent partial disability, section 39-71-116 (15), MCA (1991). The Court adopts Plum Creek's position but finds that claimant meets the definition of permanent partial disability.

In interpreting statutes, the intent of the legislature is controlling. ***Darby Spar, Ltd. v. Department of Revenue***, 217 Mont. 376, 705 P.2d 111 (1985). Legislative intent, however, must be ascertained from the plain meaning of the words used in the statute, if possible. ***Missoula County v. American Asphalt, Inc.***, 216 Mont. 423, 701 P.2d 990 (1985). No interpretation is required if the statute is plain and clear on its face. ***Montana Talc Co. v. Cyprus Mines Corp.***, 229 Mont. 491, 748 P.2d 444 (1987).

Section 39-71-703(1), MCA (1991), provides in relevant part:

39-71-703. Compensation for permanent partial disability. (1) If an injured worker **suffers a permanent partial disability** and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award. [Emphasis added.]

"Permanent partial disability is expressly defined in another section of the Workers' Compensation Act, section 39-71-116 (15), MCA (1991)⁽¹⁾, as follows:

(15) "Permanent partial disability" means a condition, after a 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.]

The sections of an act must be construed together so that all sections are given effect, if possible. ***Dale v. Trade*** 258 Mont. 349, 351, 854 P.2d 552 (1993); § 1-2-101, MCA. Since the legislature has defined permanent partial disability for purposes of the Workers' Compensation Act, that definition must be followed and applied. The Court cannot omit specific terms of a statute. Section 1-2-101, MCA states "*In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.*"

Thus, to be eligible for the permanent partial disability benefits prescribed in section 39-71-703, MCA, claimant must first meet the two prong test set out in 39-71-116(14), MCA

(1991). Since the prongs are in the conjunctive, both must be met. The burden of persuasion, by a preponderance of the evidence, lies with the claimant. **Dumont. v. Wicken Bros. Construction Co.**, 183 Mont. 190, 598 P.2d 1099 (1979).

The first prong of the test requires the existence of a "medically determined restriction as a result of an injury," § 39-71-116 (15)(a), MCA (1991). The subsection does not qualify "medically determined restriction", and the Court will not write in a qualification. **Russette v. State Compensation Insurance Fund**, 51 St.Rptr. 414, 415 (1994). Thus, **any** medically determined restriction will meet this criteria. Dr. Ingham's testimony provides credible, persuasive evidence that claimant has a medically determined physical restriction. Dr. Ingham confirmed claimant's testimony that cold temperatures cause his toes and foot to ache and that claimant will therefore have difficulty working in very cold environments for prolonged periods of time. Dr. Ingham characterized the difficulty in working in a cold environment as a medical restriction related to such environment. The Court infers from the doctor's testimony that claimant should avoid working in very cold environments for prolonged periods of time.

The second prong of the test requires an ability "to return to work in some capacity but the physical restriction impairs the worker's ability to work." § 39-71-116 (15)(b), MCA. Since the claimant is working he has satisfied the return to work element. The sole remaining issue is whether his physical restriction impairs his "ability to work."

Initially, we reject an interpretation of the "ability to work" language as referring **only** to a claimant's ability to work in the job to which the claimant returns, or is able to return. The section contains no such qualification, and the Court may not insert one. **Russette**, 51 St.Rptr. at 415. Moreover, inserting such a requirement would lead to an absurd construction, for example in a case where a heavy laborer with high wages is disabled from returning to his previous occupation but is able to work at minimum wage as a convenience store clerk without physical difficulty. If the focus is solely on the claimant's ability to work at the job to which the claimant ultimately returns, or is capable of returning, then such a worker would not be entitled to permanent partial disability benefits despite an obvious disability and wage loss. A statute should be interpreted to achieve, not defeat, the purpose for which it was enacted, **Maney v. State**, 255 Mont. 270, 274, 842 P.2d 704 (1992), and to avoid absurd results whenever a reasonable construction can avoid it, **Darby Spar Ltd. v. Department of Revenue**, 217 Mont. 376, 379, 705 P.2d 111 (1985). We therefore decline to write in or infer any requirement that a claimant's "ability to work" be considered only with regard to his post-injury job or labor market. We construe the term in its usual and broad sense as meaning the ability to work in the worker's normal, pre-injury labor market.

In this case, the physical restriction impaired claimant's ability to work. "'Impaired' means to make worse, to lessen the power, to weaken, to enfeeble, to deteriorate." **Mieyr v.**

Federal Surety Co. v Davenport, 94 Mont. 508, 520-1, 23 P.2d 959 (1933). One of the jobs claimant held prior to his injury was as a logger or sawyer. The job is performed exclusively outdoors and, depending on the time of year, in cold weather. The medical evidence, as well as claimant's own testimony establishes that it would be difficult for claimant to return to and perform the work of a sawyer. Thus, he has satisfied the second prong of the permanent partial disability definition.

Accordingly, claimant is entitled to a permanent partial disability award based on a 5 percent disability in the amount of \$3,053.75, as stipulated by the parties.

3. Claimant is entitled to attorney fees and a penalty only if the insurer's conduct in denying benefits was unreasonable. Sections 39-71-611 and 612, MCA (1991), both require a finding of unreasonableness as a prerequisite to awarding attorney fees. Section 39-71-2907 (1), MCA, permits the award of a penalty only where the insurer "unreasonably delays or refuses" payment of benefits.

The insurer's refusal to pay benefits in this case was not unreasonable. The refusal was based on the insurer's interpretation of a statute. The Court is unaware of any prior decision of this Court or the Supreme Court interpreting the sections at issue, and the insurer's interpretation was not preposterous. Indeed, the Court has adopted a substantial part of the insurer's statutory interpretation argument.

There was also a legitimate dispute concerning the application of the statutes to the facts of this case. Dr. Ingham's office notes did not indicate any physical restriction concerning claimant's work. In a deposition taken only five days before trial, Dr. Ingham confirmed that claimant would have difficulty working in very cold environment for prolonged periods of time, but his testimony on that point was not as clear as it could have been and in any event did not resolve the disputed legal issues.

Since this is a case of first impression, and the insurer's position was colorable and at least partially correct, claimant's requests for attorney fees and a penalty are denied.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant has established a 5 percent disability and is entitled to 17.5 weeks of permanent partial disability benefits at a weekly rate of \$174.50. He is entitled to a total of \$3,053.75.
3. Claimant is not entitled to attorney fees or a penalty.
4. Claimant is entitled to costs in an amount to be determined by the Court. **Claimant shall have ten days from the date of this judgment in which to submit his affidavit of**

costs. The insurer shall then have ten days in which to file its objections, if any, to claimant's request.

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

6. 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 28th day of June, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Kelly M. Wills

1. The definition of permanent partial disability is now found in section 39-71-116 (18), MCA (1993). The definition, however, remains unchanged.