1995 MTWCC 78

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

BRAND E. CAEKAERT,

Petitioner, **WCC No. 9306-6809**

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

FRANK WILSON PLUMBING AND HEATING,

Employer.

FILED
OCT 12 1995
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ORDER AWARDING ATTORNEY FEES AND COSTS

Over two years ago, petitioner, Brand E. Caekaert (claimant), commenced this action seeking medical and temporary total disability benefits on account of his carpal tunnel syndrome.

His carpal tunnel syndrome was diagnosed in 1988 and he underwent bilateral carpal tunnel releases that year. He filed a CLAIM FOR COMPENSATION and that claim was accepted by respondent, State Fund, under the Occupational Disease Act. The State Fund paid for his 1988 surgeries and paid temporary total disability benefits during his convalescence.

On December 11, 1992, he had a second carpal tunnel surgery on his right hand. On February 12, 1993, he underwent a similar second surgery on his left hand. The State Fund, however, denied liability for the additional surgeries and for temporary total disability benefits during the additional periods of convalescence. It took the position that claimant's work butchering chickens had aggravated his syndrome, thereby relieving it from further liability. It also argued that claimant's testimony in a prior case judicially estopped him from asserting a claim for further benefits.

After trial this Court determined that claimant's work butchering chickens had aggravated his carpal tunnel syndrome and therefore ended the State Fund's liability for both medical and temporary total disability benefits. I further determined that claimant was judicially estopped from making any claim for temporary total disability benefits on account of his testimony in another court case. In that case he had testified that he was totally disabled on account of a back injury. Having denied claimant's substantive prayers, I also denied his request for attorney fees, costs and a penalty.

In *Caekaert v. State Compensation Ins. Fund,* 268 Mont. 105, 885 P.2d 495 (1994), the Supreme Court reversed and remanded. The Court held that my decision was not supported by substantial evidence. It pointed out that uncontroverted testimony by Dr. Jeffrey Hansen, claimant's treating physician, unequivocally established that his need for additional surgery was due to his 1988 condition and not to any subsequent permanent aggravation of that condition. It remanded "for the limited purpose of considering Caekaert's claim for attorney fees, costs, and the statutory penalty, and the duration of any temporary total disability benefits to which Caekaert is entitled." 268 Mont. at 117, 885 P.2d at 503.

The issues on remand have been narrowed by the parties. They have agreed to the amount due in temporary total disability benefits. In addition, claimant is not pursuing a penalty. Thus, the only unresolved issues are claimant's entitlement to costs and attorney fees.

Costs

Claimant filed his MEMORANDUM OF COSTS AND DISBURSEMENTS on December 12, 1994. The State Fund filed no objections to the costs itemized in the memorandum. Its only mention of costs in its brief is a statement that claimant is not entitled to either attorney fees **or costs** because the State Fund did not act unreasonably. (RESPONDENT'S REPLY BRIEF at 12.) Costs are not conditioned upon a finding of unreasonableness. §§ 39-71-611(1) and -612(1), MCA (1987). Therefore, claimant is entitled to his costs in the sum of $1007.65.

Attorney Fees

This is an occupational disease case. The only provision for attorney fees in the Occupational Disease Act is section 39-72-613, MCA. That provision, however, applies only to cases in which a hearing has been held by the Department of Labor; it does not apply to occupational disease cases over which this Court has original jurisdiction.

However, in *Vernon L. Ingebretson V. Louisiana-Pacific Corporation,* WCC No. 9403-7030 (December 14, 1994), which was an occupational disease case commenced directly in this Court, I held that the attorney fees provisions codified in the Workers' Compensation Act apply to occupational disease cases over which this Court has original jurisdiction. That holding was based on section 39-72-402(1), MCA, which is found in the Occupational Disease Act. The section provides that the "practice and procedure prescribed in the Workers' Compensation Act applies to all proceedings under this chapter." On appeal the Supreme Court affirmed my award of attorney fees under section 39-71-611, MCA.

Section 39-71-611, MCA (1987[1]), provides:

> **Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable.** (1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
>
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
>
> (b) the claim is later adjudged compensable by the workers' compensation court; and
>
> (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable. (2) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

I apply section 39-71-611 rather than -612, MCA, because the State Fund's denial of further liability and its refusal to pay further benefits was "tantamount to a 'termination of compensation benefits.'" *Allen v. Treasure State Plumbing*, 246 Mont. 105, 111, 803 P.2d 644, 647 (1990). Since the claim has been adjudged compensable, claimant is entitled to attorney fees if "the insurer's actions in denying liability or terminating benefits were unreasonable." § 39-71-611(1)(c), MCA.

The Supreme Court's directive on remand clearly negates any contention that my original decision renders the insurer's denial of liability per se reasonable. The instructions on remand require me to determine claimant's entitlement to attorney fees "after taking into consideration this [the Supreme Court's] decision, and all of the evidence." 268 Mont. at 117, 885 P.2d at 504.

The State Fund did not have Dr. Hansen's deposition, which became the pivotal evidence in the case, until 11 days prior to trial. And, as the Supreme Court held, Dr. Hansen, the only doctor to testify, unequivocally placed the blame for claimant's 1992 and 1993 surgeries on claimant's 1988 carpal tunnel disease. Therefore, I give significant weight to what the State Fund knew when it denied the claim and forced the matter to trial.

Medical information concerning subsequent aggravation was critical to this case. Whether claimant's subsequent hand activities permanently worsened his condition, thereby causing the 1992 and 1993 surgeries; whether his underlying disease was merely manifesting itself on account of his

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[1]Claimant's occupational disease claim was filed in 1988. The 1987 version of the law has therefore been applied.

hand activities; and whether his 1992 and 1993 surgeries were directly attributable to his 1988 condition and surgeries were predominantly medical questions.

The State Fund asserts that Dr. Hansen's medical records and a deposition given by Dr. Hansen in April 1991 in a different case, *Caekaert v. Empire Lath & Plaster,* Montana Thirteenth Judicial Dist., Yellowstone County, Cause No. DV 89-1483, justify its denial of benefits. The State Fund has identified portions of Dr. Hansen's deposition testimony and records which suggest that claimant's butchering of chickens may have exacerbated his condition. But there are other statements which indicate that additional surgery was warranted and recommended shortly after Dr. Frankel's unsuccessful surgeries in 1988. There are also statements which suggest that the magnitude of claimant's symptoms were directly related to the amount of hand activity done by claimant — his symptoms increased with hand activities, such as butchering, and decreased when he laid off such activities, a pattern which suggests that the underlying disease was producing symptoms proportionate to the activity and that the activity related exacerbations were temporary. Overall, Dr. Hansen's records and his 1991 deposition at best provide ambiguous evidence concerning the critical questions in this case. Dr. Hansen did not state that claimant's butchering was the cause of the subsequent surgeries, or that they permanently aggravated claimant's underlying carpal tunnel syndrome in any meaningful or significant way.

In *Shane Leonard Beckers v. State Compensation Ins. Fund,* WCC No. 9407-7098 (February 8, 1995), a penalty was imposed on the State Fund on account of its disregard of the medical opinions of the claimant's treating physicians and its failure to seek independent medical advice. That case, as does this one, involved a question of subsequent aggravation. Three doctors treating the claimant rendered opinions that claimant's condition was caused by his original industrial accident. The State Fund ignored those opinions and went to trial without its own experts. My decision in *Beckers* teaches that claims examiners and attorneys are not qualified to make medical judgments; where medical questions are involved, it is unreasonable for the insurer to disregard uncontroverted medical opinions.

Can the insurer's failure to seek medical guidance in this case be distinguished from *Beckers*?

Claimant bears the burden of demonstrating a causal relationship between his disabling condition and the initial injury or occupational disease, *see Lee v. Group W Cable TCI of Montana,* 245 Mont. 292, 295, 800 P.2d 702, 705 (1990). Once he has done so, the burden shifts to the insurer to prove that the claimant suffered a subsequent injury or exposure which permanently aggravated his condition. *See Caekaert,* 268 Mont. at 112, 885 P.2d at 499 (1994); *Walker v. United Parcel Service,* 262 Mont. 450, 456, 865 P.2d 1113, 1116 (1993). The shifting burdens are described in *Walker* as follows:

> It is the claimant's burden of proof to present a preponderance of the evidence to show that he has sustained an injury and that the injury occurred while he was on the job. *Gerlach v. Champion International* (1992), 254 Mont. 137, 836 P.2d 35; § 39-71-119, MCA. The claimant must also prove by a preponderance of the evidence that a causal connection exists between his work accident and his current condition. *Brown v. Ament* (1988), 231 Mont. 158, 752 P.2d 171.
>
> . . .
>
> Because we determine that the claimant has met his burden of proof that his injuries sprang from a 1985 accident, the burden of proof concerning any post-1985 accidents which permanently damaged claimant's back must fall upon the carrier.

262 Mont. at 454, 456, 865 P.2d at 1116-17.

In the present case Dr. Hansen's medical notes and 1991 deposition establish a clear and unmistakable link between claimant's 1988 carpal tunnel syndrome and his 1992 and 1993 surgeries. On February 12, 1993, he wrote to a State Fund claims examiner regarding the surgeries:

> I have literally been following him [claimant] for almost five years now for persistent or recurrent carpal tunnel syndrome bilateral with double crush phenomenon or entrapment of the median nerve at the pronator teres. That is the problem for which we are currently treating him and, in fact, have just proceeded with surgery. **The problem is a work related problem and is part of his original Workers Compensation claim. He has never gotten improvement from his carpal tunnel surgery initially . . . .**

(Ex. 33 at 3; emphasis added.) In a December 10, 1992 letter to claimant's attorney, a copy of which was received by the State Fund on December 23, 1992, Dr. Hansen noted, referring back to 1988:

> The problem has never reached a satisfactory conclusion and he continues to live with symptoms today, as he has over the last several years. **He has an ongoing problem and not a new problem.**

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

Thus, the State Fund should have been aware that it would shoulder the burden of proof. Imposition of the burden of proof on the insurer for the first or original injury or exposure is not a new concept. It has been more than a decade since the Montana Supreme Court fixed that burden:

> We hold that the burden of proof is properly placed on the insurance company which is on risk at the time of the accident in which a compensable injury is claimed. This holding assures that claimant will always know which insurer he can rely on to pay the benefits. It is the duty of the insurance company on risk to pay the benefits until it proves, or until another insurance company agrees, that it should pay the benefits. If it is later determined that the insurance company on risk at the time of the accident should not pay the benefits, this insurance company, of course, has a right to seek indemnity from the insurance company responsible for the benefits already paid out to the claimant.

Belton v. Carlson Transport, 202 Mont. 384, 392, 658 P.2d 405, 410 (1983).

Upon reviewing Dr. Hansen's medical records, letters and 1991 deposition, it should have been reasonably clear to the State Fund that Dr. Hansen's opinions were at best ambiguous and did not provide sufficient evidence for the State Fund to carry its burden.

Dr. Hansen's records and 1991 testimony did not provide affirmative proof of a permanent aggravation; at best they were equivocal concerning the role of claimant's use of his hands after 1988. Dr. Hansen's notes mention claimant's butchering of chickens as producing or aggravating his symptoms. For example, in a note of November 30, 1992, Dr. Hansen wrote:

> Certainly, his recent work in the poultry business has **contributed**, but this is clearly a problem that **started back several years ago, when the carpal tunnel releases were done and he simply has not had satisfactory improvement.**

(Ex. 33 at 12; emphasis added.)

In an office note of January 12, 1990, Dr. Hansen commented, "I think that the work that he does causes progressive **endangerment** of the arms to the point of further cumulative trauma or nerve compression problems." (*Id.* at 16; emphasis added.) In his 1991 deposition, Dr. Hansen also said:

> Q. It appears from Dr. Johnson's history which he took on January 31 of 1990 that, "The patient was reporting that he had increased complaints of pain in his arms and hands and numbness in the arms and hands and decreased strength. Comes on with repetitive activity involved in the chicken business. After he works one to two hours, his hands get weaker and he drops things and they go numb and he's not able to function over long periods of time," end quote. Do you see that history?

A. That's right.

Q. That's consistent with the type of history that you were getting?

A. That's consistent, yes.

Q. So would it be correct for me to say that he was getting worse?

A. I think so, yes.

Q. And would that be consistent with the fact that he continues to work?

A. Yes.

(Ex. 19 at 34-35.)

But Dr. Hansen's records and letters also questioned whether the claimant's activity was causing any significant, permanent worsening of the condition. On December 10, 1992, in a letter also received by the State Fund, he addressed that issue when writing to claimant's attorney:

> He has continued to use his arms during the period when we first saw him and the present. The use that has occurred in those years **has not necessarily worsened his symptoms,** but the use of his arms does cause a continued manifestation of the symptoms.

(Ex. 33 at 11; emphasis added.) The records also reflect that Dr. Hansen had repeatedly considered and recommended surgery ever since 1988. On October 3, 1991, he wrote, "Once again, I've suggested to him that he consider a median nerve decompression . . . ." (*Id.* at 14.) Earlier, on March 26, 1990, he wrote, ". . . I think we should keep a close eye on things and release the ulnar nerve with a medial epicondylectomy if he continues to have recurrent episodes of this numbness." (*Id.* at 15.) On May 18, 1989, he wrote that claimant's carpal tunnel syndrome "really does preclude him from effectively doing any kind of work where he has to do repetitive use of the hands or have his hands in a sustained contracted position." (*Id.* at 17.) So by mid-1989, Dr. Hansen already considered claimant disabled from performing hand activities which might exacerbate his symptoms. On January 5, 1989, Dr. Hansen wrote, "Brand had a carpal tunnel release by Dr. Frankel and it turns out that his carpal tunnel syndrome is not better, in fact is worse, since the surgery." (*Id.* at 22.) On September 16, 1988, Dr. Hansen wrote:

> He had a carpal tunnel release done about six months ago and has worsening median nerve symptoms post op. I suspect he has median nerve scarring and **may end up needing more surgery**.

(*Id.* at 30; emphasis added.) Even before Dr. Hansen became claimant's treating physician, Dr. Frankel, who performed the original surgeries, commented on July 6, 1988:

> Brand returns. His EMG results show some worsening.
>
> I think that this will need to be re-explored. This was discussed with him. He may have some flexor tenosynovitis which is causing increased pressure on his carpal tunnel. **I discussed with him that repeat carpal tunnel surgery is not always as reliable or predictable in its results as the first surgery. However, with the worsening of his EMG, I think it is worthwhile to re-explore this.** I would also like to have a second opinion by Dr. Hansen.

(*Id.* at 31.) Dr. Frankel's office note of July 7, 1988, shows that he was still actively considering further surgery on claimant. (*Id.*)

During his 1991 deposition, Dr. Hansen was asked to discuss his January 12, 1990 examination of claimant. It was in his office note for that examination in which he commented that "the work that he [claimant] does causes progressive endangerment of the arms . . . ." (*Id.* at 16.) Dr. Hansen testified:

> A. My feeling at that point in time, he was getting more problems of an upper level entrapment of the median nerve, that is the pronator teres, with [sic] is an upper forearm muscle. Also an activity or over-use related type condition. And as I see it, it's not so much a new condition but just a progression of this multiple nerve entrapment, cumulative trauma disorder, whatever one wants to call it. Because that's been the nature of it. It's just gradually progressed in his upper extremities. And that's how I would see it.
>
> Like I said, I just don't think this is a totally separate brand-new problem, I think it's a progression of an over-use condition in his upper extremities.
>
> (Ex. 19 at 32-33)

And, counterpoising Dr. Hansen's testimony concerning claimant's work and the worsening of his condition (Ex. 19 at 34-35), quoted at pages 6-7, Dr. Hansen later testified in his deposition:

Q. And the last time you saw him September 6th of 1990, you note that, "Since I last saw him, he has backed off substantially in his work activities and as long as he doesn't overdo it, does not have too much in the way of the pronator teres symptoms. The nerve is still tender to palpation but I think it shows what happens when someone with acute trauma disorder finally gets a handle on the over-use situation and backs off," end of quote. Are you saying in layman's terms that if he doesn't work and use his hands repetitively, that he won't have as much pain, numbness and weaknesses?

A. That's right. Exactly.

Q. So what's your prognosis here?

A. My prognosis is that he has a permanent condition where his upper extremities won't tolerate a lot of heavy repetitive manipulations, gripping, twisting, sustained static positioning. But at least as of the last visit, he is responsive to resting and backing off on the activities. The responsiveness being diminished in his symptoms.

(Ex. 19 at 37-38.)

Having carefully reviewed the information available to the State Fund, I conclude that, lacking any independent medical support for its position, the State Fund's denial of further benefits was unreasonable.

The State Fund alternatively argues that it reasonably denied the claim based on the doctrine of judicial estoppel. While it did not ultimately prevail on that theory, it argues that its position was reasonable.

Where a legal position taken by an insurer is reasonably debatable it is not unreasonable to litigate the matter even though the insurer may not ultimately prevail. *David Williams v. Plum Creek Timber,* WCC No. 9403-7017, FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT at 7 (June 28, 1994); *Bruce Marcotte v. Louisiana Pacific Corporation,* WCC No. 9408-7104, FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT at 3 (December 7, 1994). By reasonably debatable I mean that the law or legal proposition may be reasonably debated by reasonable attorneys. In this case, was judicial estoppel reasonably debatable?

In analyzing the reasonableness of the State Fund's judicial estoppel argument, I first note that the State Fund is not pursuing the judicial estoppel position I adopted in my original decision. The State Fund asserted before the Supreme Court, and asserts on remand (RESPONDENT'S REPLY

BRIEF at 11), that I misapprehended its argument. The basis for its argument, as I now understand it, is claimant's earlier testimony in the matter that his 1988 surgeries had been successful and that he had a successful recovery from the surgeries. The State Fund argued that this testimony precluded claimant from asserting in this action that he did not successfully recover from his 1988 surgeries.

Even at first blush, it should be apparent that opinions of a plumber and chicken farm operator regarding the success of his surgery are lay opinions. They do not constitute expert medical opinions or statements of fact. Moreover, medical conditions change and sometimes deteriorate. I find that the position taken by the State Fund was unreasonable.

* * * * *

In summary, I find that the State Fund's denial of medical and temporary total disability benefits was unreasonable and that claimant is entitled to attorney fees. As found earlier, he is also entitled to his costs. Therefore,

IT IS HEREBY ORDERED as follows:

1. Claimant is entitled to his costs in the sum of $1,007.65, which shall be paid by the respondent, State Compensation Insurance Fund.

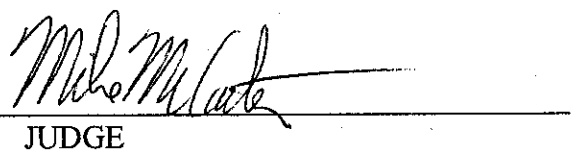
2. Claimant is entitled to attorney fees in an amount to be determined by the Court.

3. Within 20 days of this Order, the claimant shall submit a verified statement of his claim for attorney fees.

4. Respondent shall thereafter have 10 days in which to file objections to the statement. If the objections raise factual issues, the Court will then schedule an attorney fee hearing.

Dated in Helena, Montana, this 12th day of October, 1995.

(SEAL)



JUDGE

c: Mr. Patrick G. Frank
Mr. William J. Mattix