1995 MTWCC 72

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CARL LARSON,

Petitioner,

vs.

CIGNA INSURANCE COMPANY,

Respondent/Insurer for

YELLOWSTONE FORD TRUCK SALES, INC.,

Employer.

WCC No. 9307-6828

FILED
SEP 19 1995
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
FOLLOWING REMAND

Petitioner, Carl Larson (claimant), suffered a work-related inguinal hernia on July 15, 1981. On December 15, 1981, he retired because of a permanent totally disabling heart condition. The heart condition began prior to his hernia injury but was not disabling until December 1981.

Nearly 12 years later, on July 2, 1993, the claimant filed a petition seeking permanent total disability benefits on account of his hernia. On October 19, 1994, this Court entered its FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT determining that he was not entitled to the requested benefits because he was already permanently totally disabled on account of his preexisting, non work- related heart condition.

On May 4, 1995, the Supreme Court reversed my decision, holding that

> . . . if the evidence shows that Larson's inguinal hernia produced a permanent total disability, he is entitled to receive total disability benefits under the Workers' Compensation Act regardless of the fact that his preexisting non work-related heart condition may also be considered a cause of that permanent total disability.

Larson v. Cigna Ins. Co., 52 St.Rptr. 369, 371 (1995). Despite comments in the next to last paragraph of Justice Gray's specially concurring opinion, I read the majority's decision as holding that the recurrences of claimant's hernia between May of 1982 and claimant's final hernia surgery

in 1987, as well as his current, residual hernia condition, are attributable to his 1981 industrial accident. I do so because of the specific holding quoted above and the fact that the majority reversed my decision despite my express finding, which is quoted in the majority opinion, that I was "not persuaded that the hernia would have recurred absent the totally disabling heart condition." *(Id.* at 370; quoting FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT, October 19, 1994, Conclusion of Law 4.) Certainly, without the recurrences claimant was not totally disabled since claimant's treating physician performed surgery in September of 1981 and returned claimant to work "one hundred percent healed" in October of 1981. *(Id.* at 369.)

Thus, my task upon remand is to determine whether claimant's hernia condition is in itself permanently totally disabling. If I find that claimant is not due permanent total disability benefits, I do not need to go on to determine claimant's entitlement to permanent partial disability benefits since Cigna has already paid 500 weeks of permanent partial disability benefits. *(Id.* at 369.)

The parties addressed the permanent total disability issue in their original proposed findings of fact and conclusions of law. However, following remand we queried the parties' attorneys to determine if they wished to submit additional briefs. They responded that they did not.

Having considered the parties' original arguments, the evidence already presented, and the directions of the Supreme Court, I make the following

Additional Findings of Fact

33. The following findings of fact taken from this Court's original findings are important to the resolution of the permanent total disability benefits issue.

> 21. In May 1982 some of the claimant's left inguinal hernia symptoms recurred. (Ex. 2 at 17; Ex. 3 at 23.) On June 17, 1982, a recurrence of the left inguinal hernia was diagnosed. (Ex. 2 at 17.) However, claimant received no further treatment for his hernia symptoms until December 1984.
>
> 22. The left inguinal hernia was surgically re-repaired in 1985, 1986 and, finally 1987.
>
> 23. There has been no recurrence of the left inguinal hernia since 1987. (Ex. 2 at 32.) However, claimant continues to experience localized pain in his left groin. (Shaw Dep. at 8.)

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29. Dr. Shaw testified that claimant's recovery time for the second hernia repair surgery in 1985 was approximately two months, and approximately ten weeks to three months for the 1986 and 1987 surgeries. (*Id.* at 14.) Dr. Kobold gave a similar estimate for the normal healing period but commented, "It doesn't seem that Carl ever healed it very well." (*Id.* at 39.) Ultimately he testified, "I don't know if he ever completely healed the thing or not." (*Id.* at 42.) He noted, however, that there has been no evidence of a hernia since 1987.

(FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT at 5-6.)

34. Dr. Kobold testified at his deposition that as of December 1981 he would have "probably limited what he [claimant] did again and told him he couldn't lift again, which he hadn't been able to do anyway [on account of the heart condition]. . . ." (Kobold Dep. at 16.) However, he further stated, "[B]etween December of '81 and June of '82, I didn't have any reason not to let him work as far as his hernia was concerned at that time." (*Id.* at 17.) With respect to claimant's ability to work after 1982, Dr. Kobold said:

> Now, following June of '82, when we started on the recurrent hernia thing, from there on I think he's had trouble with the hernia forever, and I don't think he's ever been able to go back to full employment, but as I say, all of these years, I couldn't decide whether or not some of this wasn't his heart, so I didn't know what his heart would let him do, so it was -- It's hard to decide what to write down somebody can do in terms of physical activity when I'm not totally -- well, not sure of how much his heart would let him do.
>
> Some of his history was that he needed a heart transplant. He couldn't do anything from the heart anyway, so **I probably didn't feel like the hernia problem was that major a thing, except it was painful, but I'm sure I would have told him he couldn't do any heavy lifting, so from . . . '82 on, I would not have let him do any work that required any heavy lifting.** [Emphasis added.]

(*Id.* at 17-18.)

35. Two certified rehabilitation counselors testified in this proceeding. JoAnn Gordon testified by deposition. Juanita Hooper testified at trial. Having personally heard Ms. Hooper, I found her testimony persuasive, and adopt her analysis of claimant's residual job market. Specifically, I find as follows:

a. Claimant's hernia precludes him from returning to any sort of job in the auto parts field. (Tr. at 83.)

b. Claimant has a number of transferable skills. He has experience in sales, cashiering, working with retail customers, inventory control, planning and organization, and supervising other workers. He also has woodworking skills. (*Id.* at 82, 85-86.)

c. With his skills claimant is qualified to perform general retail sales and telemarketing jobs which involve minimal lifting. Ms. Hooper gave as examples sales positions at Coast-to-Coast and convenient stores, and telemarketing sales for insurance and real estate agencies, and for retail stores like Sears. (*Id.* at 85.) There are a multitude of these types of positions available in the normal job market. (*Id.* at 87-88.)

d. Claimant is also qualified to perform light-duty wood-working jobs, but those jobs do not appear to be available in significant numbers. (*Id.* at 83-84.)

e. Claimant has a good work history and excellent references. (*Id.* at 86-87.) He does not have employment barriers which many other disabled persons his age have, e.g., low education, poor work history. (*Id.* at 98.)

f. While claimant's age and hernia would have made it more difficult for him to find employment, with job placement assistance he has had a reasonable prospect for employment since 1982. With rehabilitation support services he has had at least an "average" prospect of employment. (*Id.* at 96-97, 108-109.)

36. Dr. Kobold testified that, based on claimant's hernia, since 1982 he would have restricted claimant to 30 pounds maximum lifting and would have restricted lifting of 30 pound objects to an occasional basis, perhaps a couple of times an hour. (Kobold Dep. at 19.) On a frequent basis, Dr. Kobold limited claimant to 10 pounds. The jobs identified by Hooper were within those restrictions. (Tr. at 80.) Dr. Kobold testified that as of June 1982 he would have approved claimant working at a position of general salesperson positions with a maximum 20 pound lifting requirement. (Kobold Dep. at 21.) He stated that from 1985 on, claimant was employable but not in jobs requiring heavy lifting. (*Id.* at 24.)

37. Claimant did not consider his hernia condition permanently totally disabling until years after he had withdrawn from the labor market. (FINDING OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, October 10, 1994, Findings 14, 15 and 17.)

38. Based on the testimony and findings cited above, I find that claimant's recurring left inguinal hernia did not, and does not, preclude him from working as a retail sales clerk or telemarketer, jobs for which he is qualified. I further find that those jobs were readily available in the open labor market and that claimant had a reasonable prospect of securing employment in those positions. Finally, while claimant's additional surgeries removed him from the labor market during his

recuperation from those surgeries, his hernias did not otherwise preclude him from working as a sales clerk or telemarketer.

Additional Conclusions of Law

1. In my original Conclusion of Law 1, I noted that 1979 law applies to claimant's entitlement benefits. In 1979, permanent total disability was defined as

> . . . a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market.

§ 39-71-116(13), MCA (1979). On its face the statute requires that the claimant's injury results in his "having no reasonable prospect of finding regular employment **of any kind** in the normal labor market." *Id.* (emphasis added).

2. Prior precedent establishes a shifting burden of proof in determining whether a claimant is permanently totally disabled. Initially, the claimant must introduce substantial credible evidence of what jobs constitute his normal labor market and his complete inability to perform those jobs on account of his industrial injury. *Metzger v. Chemetron Corp.*, 212 Mont. 351, 355, 687 P.2d 1033, 1035 (1984). "[O]nce claimant has presented evidence affirmatively showing that he cannot return to a job in his normal labor market", the "burden of proof shifts to the employer to show that suitable work is available" to the claimant. *Metzger,* 212 Mont. at 356, 687 P.2d at 1036. Whether this shifting of burdens merely shifts the burden of producing evidence to the insurer, or shifts the ultimate persuasion to the insurer, is not clear from the decisions of the Supreme Court. However, in this case the distinction in burden shifting is immaterial to my decision since I am persuaded that the evidence preponderates in favor of the insurer.

At trial claimant's counsel argued in his opening statement that claimant is an "odd-lot" employee. (Tr. at 11.) The odd-lot employee doctrine is described by Professor Larson as follows:

> [T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.

2 Larson, Workers' Compensation Law (Desk Ed.), § 57.51 at 10-54, 55. Determination that a worker is an odd-lot employee, however, does not end the Court's inquiry since such a determination merely excuses the worker from presenting affirmative evidence that he is unable to perform

employment in his normal labor market, thus it immediately shifts the burden of proof to the insurer. *Metzger*, 212 Mont. at 356-57, 687 P.2d at 1036.

Claimant is not an odd-lot employee. As noted by the Supreme Court in *Metzger*, the rule on odd-lot employees is

> . . . gleaned from cases involving, among others, a sixty-one-year-old claimant suffering severe mental deficiency, a previously injured illiterate diabetic, a forty-year-old laborer with one month of formal education, and a seventy-year-old arthritic laborer.

Metzger, 212 Mont. at 357, 687 P.2d at 1036 (citing Larson, §§ 57.51 n.96 and 57.61 n.25.) The basis for claimant's odd-lot argument is his heart condition. Certainly, his education and intelligence are not deficient. His heart condition, however, is in itself totally disabling and must be factored out from the disability determination to be made in this case. Moreover, the odd-lot doctrine does not add anything to claimant's case since, through testimony of his vocational counselor (JoAnn Gordon) and other evidence, he presented a prima facie case for permanent total disability.

However, Cigna has satisfied its burden of proof both by producing evidence and by persuading me that claimant was employable despite his industrial accident. Juanita Hooper's and Dr. Kobold's testimony are persuasive concerning claimant's ability to work in spite of his hernia. In Dr. Kobold's opinion, the hernia was not disabling and did not preclude claimant from returning to work in general retail sales. In Ms. Hooper's opinion, claimant had a reasonable prospect of finding a job in retail sales or telemarketing despite his hernia and his age. I am persuaded that claimant had a reasonable prospect of employment, especially with job placement assistance which would have assisted him in emphasizing his positive employment factors rather than his age and impairments. His education, job history and skills were positive factors in his finding employment. While his age and hernia were certainly negatives, I am convinced that if motivated, and especially with job placement assistance, he could have marketed himself in a manner which would have resulted in employment. I am unpersuaded that his pain from his hernia would have deterred him from finding employment and from working had he not been disabled by his heart condition.

Therefore, I find that claimant's July 15, 1981 industrial injury is not permanently totally disabling and that he is not entitled to permanent total disability benefits.

JUDGMENT

1. Claimant is not entitled to permanent total disability benefits.

2. Other issues raised in this case have already been resolved.

3. This JUDGMENT 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, Conclusions of Law and Judgment Following Remand.

DATED in Helena, Montana, this 19th day of September, 1995.

(SEAL)

JUDGE

c: Mr. James G. Edmiston
Ms. Sara Sexe
Submittted: June 1, 1995