

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 41

WCC No. 2008-2201

DAVID BAGLEY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

Summary: Petitioner moved the Court to reconsider its decision, arguing that the Court should not have found him incredible and further arguing that evidence presented at trial does not support the Court's findings regarding his modified job duties, his attendance at a learning center, and the severity of his underlying medical condition.

Held: Petitioner has not persuaded the Court that it misapprehended his credibility. While Petitioner would prefer that the Court make different findings, the findings Petitioner has objected to are all supported by evidence found in the record submitted for the Court's consideration.

Topics:

Procedure: Reconsideration. Where Petitioner attempted to reargue his case in a motion for reconsideration, he presented nothing in his brief to lead the Court to conclude that the Court's findings were not based on evidenced submitted in the record. Petitioner's motion was therefore denied.

¶ 1 Petitioner David Bagley (Bagley) moves this Court to reconsider its Findings of Fact, Conclusions of Law and Judgment issued regarding his claim.¹ Bagley asserts that the Court neither appreciated the severity of his arm pain nor the alleged misdiagnosis of his

¹ *Bagley v. Montana State Fund*, 2009 MTWCC 29.

condition by his treating physician. Bagley further contends that the Court's findings regarding his attendance at the learning center were incorrect, and that the Court incorrectly gave more weight to one doctor's opinion over another in determining whether Bagley could return to work with restrictions.² Respondent Montana State Fund (State Fund) responds that while it agrees the Court should clarify the time period for which its findings relating to the learning center attendance apply, it believes the Court correctly decided the case and further asserts that the Court's findings are supported by evidence in the record and should not be overturned.³

¶ 2 In the underlying decision, I did not find Bagley's testimony at trial to be credible.⁴ Bagley disagrees with this finding, and asserts that he "has always been very forthright and open" and "communicated openly and candidly with his employer."⁵ Bagley focuses on my findings concerning his attendance, or lack thereof, at the learning center after he asked his employer for permission to report there instead of to his workplace.⁶ Although this issue is discussed in greater detail below, this was not the sole reason for my findings regarding Bagley's credibility. Among other findings, I noted that Bagley testified that he was unable to complete his coursework due to side effects from his pain medication even though he was not taking pain medication during the time he alleged it affected his abilities.⁷ Bagley also stated that his supervisor, Ray Richards (Richards), did not offer him a transcriptionist to complete his coursework, yet the evidence demonstrates that Richards did so in writing on August 13, 2008.⁸

¶ 3 In his Reconsideration Brief, Bagley once again denies that Richards offered him a transcriptionist and even goes on to imply that Richards' letter was somehow fabricated.⁹ However, at trial Bagley presented no evidence, nor even suggested that this letter was anything other than what it was represented to be. Bagley also asserts, "no one testified

² Brief in Support of Petitioner's Motion for Reconsideration to Revise This Court's Findings of Fact, Conclusions of Law and Judgment, Docket Item No. 38 (Reconsideration Brief).

³ Montana State Fund's Response Brief in Opposition to Petitioner's Motion for Reconsideration, Docket Item No. 39 (Response Brief).

⁴ Bagley, ¶ 6.

⁵ Reconsideration Brief at 1.

⁶ Bagley, ¶ 22.

⁷ Bagley, ¶ 15.

⁸ Bagley, ¶ 20.

⁹ Reconsideration Brief at 5, in which Bagley states, "No transcriptionist was provided before or after that letter was *purportedly* written." (Emphasis added.)

[Bagley] was “unable” to write with his right hand.”¹⁰ Yet at trial, Bagley testified that he told Richards that it was “impossible” for him to use his right arm for writing.¹¹ Simply put, Bagley’s Reconsideration Brief has done nothing to persuade me that I mischaracterized his credibility.

¶ 4 In the underlying decision in this matter, I noted that Bagley’s misrepresentation to his employer that he was attending the learning center was the paramount fact in my determination that he lacked credibility.¹² Bagley now argues that he attended the learning center for months and that after his May 2008 surgery he told both Richards and Arnold Lilly (Lilly), his employer, that his severe pain “limited his ability to do workbooks and continue to attend the learning center.”¹³ Notably, Bagley does not assert that he informed Richards and Lilly of the truth – that he was not attending the learning center *at all* following his surgery. Bagley asserts only that he told them that he was “limited” in his ability to do so. Lilly did not testify at trial and therefore I have only Bagley’s word that this conversation occurred. Richards, who I found credible, testified that he learned Bagley was not attending the learning center only because he called the learning center to inquire about Bagley’s attendance.¹⁴

¶ 5 In its Response Brief, State Fund states that my findings concerning Bagley’s lack of attendance at the learning center are unclear as to the time period during which this occurred.¹⁵ State Fund points out that it always understood that Bagley attended the learning center prior to his May 21, 2008, surgery, and that the time period for which Bagley led his employer to inaccurately believe he was attending the learning center occurred during the time after his surgery until August 4, 2008, when Richards confronted Bagley and Bagley admitted that he had not been attending the learning center.¹⁶ While my findings relating to Bagley’s non-attendance at the learning center do not reference a specific time period, State Fund is correct that the time period at issue is from the time after Bagley’s surgery until August 4, 2008, when Richards confronted Bagley about his attendance. To the extent that this chronology required clarification, I do so now; however,

¹⁰ Reconsideration Brief at 7. (Emphasis in original.)

¹¹ Trial Test.; *See also Bagley*, ¶¶ 13, 20.

¹² *Bagley*, ¶ 22.

¹³ Reconsideration Brief at 5.

¹⁴ *Bagley*, ¶ 30.

¹⁵ Response Brief at 5.

¹⁶ Response Brief at 5; *see Bagley*, ¶ 30.

this does not change my assessment of Bagley's credibility. For more than two months, Bagley told his employer that he was attending the learning center when he was not. Bagley only acknowledged his misrepresentation after being confronted about it by his employer. The fact that prior to his surgery, Bagley actually did what he told his employer he was doing does not mitigate his later deception.

¶ 6 Bagley further argues that his medical condition was misdiagnosed and that the Court did not give enough weight to his complaints of pain and its effect on his ability to perform his modified job duties. In the face of substantial evidence to the contrary, Bagley continues to insist that his modified job duties required him to do a significant amount of writing with his right hand which exceeded his physical capabilities or caused him undue amounts of pain. My findings regarding the nature of Bagley's modified job duties speak for themselves and will not be reiterated here.¹⁷ While Bagley attempts to reargue his case, nothing in his Reconsideration Brief leads me to conclude that my findings were not based on evidence submitted in the record.

ORDER

¶ 7 Petitioner's motion for reconsideration is **DENIED**.

¶ 8 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 31st day of December, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Pyfer
Daniel B. McGregor

¹⁷ See, e.g., *Bagley*, ¶¶ 16, 20, 26, 32, 39, 44, 46.

Submitted: September 21, 2009