

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 11

WCC No. 9407-7098

SHANE LEONARD BECKERS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

VALLEY EXCAVATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffering neck and arm problems following 1987 CAT rollover sought ongoing medical coverage and indemnity benefits. Pointing to information about subsequent temporary aggravations, insurer denied coverage.

Held: Where medical evidence linked claimant's ongoing need for treatment for his neck condition to industrial injuries, insurer's reference to subsequent temporary aggravations of claimant's condition did not sever its liability. Indeed, insurer's denial of liability in absence of medical opinion that later incidents constituted permanent aggravation was unreasonable, justifying imposition of penalty and attorneys fees.

Topics:

Causation: Medical Condition. Where medical evidence linked claimant's ongoing need for treatment for his neck condition to industrial injuries, insurer's reference to subsequent temporary aggravations of claimant's condition did not sever its liability. Indeed, insurer's denial of liability in absence of medical opinion that later incidents constituted permanent aggravation was unreasonable, justifying imposition of penalty and attorneys fees.

Benefits: Medical Benefits: Surgery. Where medical evidence linked claimant's ongoing need for treatment for his neck condition to industrial injuries, insurer's reference to subsequent temporary aggravations of claimant's condition did not sever its liability. Indeed, insurer's denial of liability in absence of medical opinion that later incidents constituted permanent aggravation was unreasonable, justifying imposition of penalty and attorneys fees.

Penalty: Insurers. Where insurer offered no medical opinion demonstrating that any post-injury incidents permanently aggravated claimant's compensable neck condition, its refusal to pay medical and indemnity benefits was unreasonable. The insurer neither sought nor obtained an independent medical opinion, choosing rather to disregard and second guess the medical opinions which had been furnished to it.

Attorneys Fees: Reasonableness of Insurers. Where insurer offered no medical opinion demonstrating that any post-injury incidents permanently aggravated claimant's compensable neck condition, its refusal to pay medical and indemnity benefits was unreasonable. The insurer neither sought nor obtained an independent medical opinion, choosing rather to disregard and second guess the medical opinions which had been furnished to it.

The trial in this matter was held on January 13, 1995, in Helena, Montana. Petitioner, Shane Leonard Beckers (claimant), was present and represented by attorney Ms. Janice S. VanRiper. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams. The claimant testified on his own behalf. Diane Pedersen also testified. The depositions of Dr. Max Iverson, Dr. Ronald Covey and Dr. Kenneth Stein were submitted for the Court's consideration. Exhibits 1 through 3 were admitted by stipulation of the parties. Exhibit 4 was admitted over the State Fund's objections.

Issues: The issue presented in this case is whether the claimant's neck and arm conditions were caused by his industrial accident of July 13, 1987. At stake are wage loss compensation benefits and medical expenses. Claimant also seeks attorney fees and a penalty.

Bench Ruling

At the close of trial the Court ruled in favor of claimant on all issues. The Court held that the claimant's current neck and right arm conditions were caused by his 1987 industrial injury and that the State Fund is liable for payment of medical expenses incurred by

claimant for treatment of those conditions and for temporary total disability benefits commencing in 1994. It further determined that the State Fund's denial of these benefits was unreasonable and ordered it to pay attorney fees and a penalty.

The rationale of the Court's decision was provided orally to the parties. The following Findings of Fact, Conclusions of Law and Judgment more fully reflect the Court's decision.

FINDINGS OF FACT

1. Claimant is 31 years old and lives in Helena, Montana.
2. As a chronological aid to the reader of this decision, the following is a summary of claimant's work history and the places he has lived since 1984.

1984 - 9/87	Worked for Valley Excavating, Helena, Montana.
9/87 - 6/88	Resided in Moses Lake, Washington.
7/88 - 8/90	Returned to Montana. Initially worked on a ranch and later returned to Valley Excavating.
8/90 - 10/91	Resided in Alabama during flight training.
10/91 - 7/92	Returned to Montana. Worked for Valley Excavating and later for Poverty Well Service. He was also unemployed for various periods.
10/92 - 2/93	Returned to Alabama for additional pilot training.
3/93 - 4/27/93	Visited parents in Miles City, Montana.
4/27/93 - 5/1/93	Moved to Boulder, Montana.
5/1/93 - 1/94	Worked for Pegasus Gold near Boulder, Montana.
1/4/94	Claimant quit work at Pegasus Gold at Dr. Iverson's direction.

3. In addition to his civilian employment, the claimant has served in the Montana National Guard since 1986. He began his service in the Air National Guard but later on transferred to the Army National Guard. He has been trained as a helicopter pilot.
4. The Court finds claimant to be a credible witness.
5. On March 28, 1986, claimant suffered an industrial injury while working for Valley Excavation. (Ex. 2-R.) His job duties included digging basements, grading roads, loading gravel and equipment repair and maintenance. At the time of his injury he was driving a CAT on a side hill. He backed over a rock, which caused the CAT to tip over. Claimant had his seat belt on at the time and he landed on the ground. The initial impact was to his right arm and shoulder. (Ex. 2-R at 46.)

6. Following claimant's 1986 industrial injury, he was treated for neck, back, right shoulder and right arm complaints by Dr. Michael Pardis, a local chiropractor. (Ex. 2-R at 31-46.) Claimant's condition improved and his treatment ended December 29, 1986. (*Id.*) His 1986 industrial accident did not result in permanent injuries or disability.

7. On July 13, 1987, while still working for Valley Excavation, claimant suffered a second industrial injury. (Uncontested Fact No. 3(a).) He was welding on the upper deck of a gravel screening plant. A cable broke and claimant fell several feet onto the screening plant. He then fell several more feet to the ground. He hit the ground with his head, right shoulder and neck.

8. Following the accident claimant experienced sharp pain in the right side of his neck and aching in his right shoulder and arm.

9. Following the 1987 accident, claimant was initially treated by Dr. Pardis. Claimant's testimony and medical records from Dr. Pardis show that his primary symptoms were cervical pain and pain in the right shoulder and arm. (Ex. 2-R at 1-2.)

10. Claimant moved to Moses Lake, Washington in August of 1987, where Dr. Ronald Covey, a chiropractor, picked up his treatment. Dr. Covey treated claimant from September of 1987, until June of 1988. (Ex. 2-H.) On June 7, 1988, he wrote a letter to the State Fund concerning claimant's condition: "The condition of the above-named claimant has shown a positive response to treatment. Mr. Beckers has reached pre-injury status and was released from care effective 6-7-88." (*Id.* at 2.)

11. Notwithstanding his June 7, 1988 report, Dr. Covey treated claimant on two more occasions in June for his neck complaints. (Covey Dep. at 17-18.) At that time, claimant had returned to National Guard duty. The doctor viewed claimant's Guard duties as precipitating the onset of renewed symptoms and, therefore, did not directly attribute the symptoms to claimant's prior injuries. (*Id.* at 17.) However, Dr. Covey testified in his deposition that "had I continued to treat this man and found that he continued to experience symptoms related to these same areas of the spine, my opinion could be different." (*Id.* at 18.) When asked to elaborate, he said further:

Well, if we found that we had a continuation of the same type of problem and it carried on for another month or two or three, then I'm not sure that Guard duty activities would have been the total cause of the problem. I would have then been more of the feeling that it could have related to his industrial accident given the fact that there was still a residual weakness in the soft tissue.

(Covey Dep. at 18.) In fact, the claimant did continue to seek treatment for the same symptoms after June of 1988.

12. Claimant moved back to Helena in July 1988. He again sought treatment for neck pain. (Ex. 2-R at 2.) His first treatment was by Dr. Pardis on October 19, 1988. (Ex. 2-R at 22.) Dr. Pardis continued to treat claimant until August of 1990. (Ex. 2-R.) Although most of Dr. Pardis' office notes are illegible, the word "neck" is legible in his October 19, 1988 note (Ex. 2-R at 22) and Dr. Pardis confirmed in a December 8, 1993 letter that treatments from 1988 to 1990 "were for complaints of the neck and upper back pain" (*Id.* at 2.) There was no regularity to the treatments. There was a two and a half month interval between the claimant's first, October 19, 1988 treatment and the next treatment. During some months he received two or three treatments. (Ex. 2-R at 21-22.)

13. Between August 1990 and October 1991, the claimant attended flight school in Alabama. The schooling was in conjunction with his National Guard service.

14. While living in Alabama, claimant was treated by Drs. Alan Conrad and Howell, who are chiropractors. (Ex. 2-F and N.) Claimant completed a "CONFIDENTIAL PATIENT INFORMATION" form during his first visit to the chiropractic clinic. (Ex. 2-F at 3-4.) On that form, he stated that his current chief complaint was a stiff neck and pain turning to the right. (*Id.*)

15. Between August 1990 and October 1991, claimant was also treated on three occasions by Dr. Kenneth Stein, a chiropractor in Miles City, Montana. (Ex. 2-W.) Claimant saw Dr. Stein when he was home visiting his parents. Dr. Stein treated claimant for neck and shoulder pain. (*Id.*)

16. Claimant returned to Montana in October of 1991 and again worked for a time for Valley Excavating in Helena and for Poverty Well Service in Great Falls.

17. Between October of 1991 and July of 1992, claimant was treated by Dr. Pardis. (Ex. 2-R.) Claimant's last documented visit was in July of 1992. (*Id.*) The treatments were billed to the State Fund under a separate industrial injury claimant suffered on May 16, 1990. That injury occurred when claimant was carrying a hydraulic cylinder and slipped and fell in the mud. He fell on his buttocks and the cylinder hit him in the waist. Dr. Pardis treated claimant for low-back pain. (Ex. 2-R at 8-10.) However, claimant testified that some of the treatments also included specific therapies for his neck and shoulder. Dr. Pardis' handwriting is illegible, but the Court found claimant's testimony credible and consistent with the overall, long-term pattern of chiropractic treatment of his neck.

18. Claimant returned to Alabama in October of 1992 for additional flight training and remained there until February 1993. He testified that during that time he was again treated

by Dr. Howell. Although, the visits are not documented with records from Dr. Howell, continued chiropractic treatment is consistent with the pattern of treatments over the preceding years, and the Court found claimant's testimony in this regard to be believable.

19. Dr. Stein treated claimant again on March 18, 1993, for his neck. (Ex. 2-W at 3.)

20. Claimant started treating with chiropractor Forrette, on April 27, 1993, in Boulder, Montana. (Ex. 2-K at 5.) Dr. Forrette treated claimant for his right arm and neck. (*Id.*) Claimant's last recorded visit with Dr. Forrette was in December of 1993. (*Id.*)

21. Because of continuing pain in his neck, right shoulder and right arm, claimant was referred by Dr. Forrette to Dr. Max Iverson, an orthopedic surgeon, in Helena, Montana. (Ex. 2-0 at 18.) Dr. Iverson first examined claimant on November 8, 1993. A cervical MRI taken November 9, 1993 disclosed protruding discs at C5-6 and C6-7, disc space narrowing at C5-6 and C6-7. On January 4, 1994, Dr. Iverson recommended that claimant stop working due to his symptoms. (*Id.* at 10.) Dr. Iverson's office note for that day reads in part:

The patient, I feel at this point in time, warrants a 3 to 4 weeks period of [sic] off work. If while he is doing traction and other modalities during this time still continues to complain of discomfort, then I think he realistically is going to have to be retrained into a lighter duty type job. This problem has been going on for quite sometime [sic] and I feel the chance of him being able to continue as a heavy equipment operator and fueler is becoming more remote all the time.

(*Id.*)

22. On September 14, 1994, Dr. H.C. Chandler, who is a neurosurgeon in Missoula, performed posterior cervical laminoforaminotomy surgery at the C5-6, C6-7 and C7-T1 vertebral levels. (Ex. 2-U at 6.)

23. Three medical practitioners have provided opinions that claimant's neck condition and consequent surgery are attributable to claimant's 1987 injury.

a. On October 24, 1994, Dr. GaleWyrick, wrote a letter to claimant's attorney in which he stated:

It is my medical opinion that Shane's current disabling problems related to his neck, right shoulder, arm and headaches are related to his accident of July, 1987.

(Ex. 2L.) Dr. GaleWyrick based his opinion on his review of medical records and claimant's verbal reports over the years about his on-going problems. In reaching his opinion, Dr. GaleWyrick provided the following analysis:

You will note that on the medical evaluations of the last year and studies including MRI, CT, myelograms and consultations from specialists, Iverson of Orthopedics and Chandler of Neurosurgery, and finally from the surgical reports of September of 1994, that Shane had **significant osteophyte formation**. This involves a calcification of injured ligaments, in this case about the cervical spine, **this process requires several years to lay down** significant new bone in the form of osteophytes. **This would indicate that the surgically approachable areas would have been developing over greater than five years.** [Emphasis added.]

(*Id.*) In reviewing this letter, the Court has taken into consideration the fact that Dr. GaleWyrick is claimant's uncle. However, his opinion and comments were corroborated by Dr. Iverson and unrefuted by any other medical opinion.

b. On June 28, 1993, Dr. Forrette wrote to the State Fund, requesting permission to treat claimant with respect to his 1987 industrial injury. (Ex. 2-K at 2.) He expressed his opinion that claimant's condition is attributable to his 1987 injury.

c. On March 30, 1994, Dr. Iverson wrote a letter to claimant's attorney, stating in part:

In reviewing the history again with Mr. Beckers, it appears that the symptoms that occurred at the time of the work related injury in 1987 has [sic] been present since that time. **True, he has had various activities that have tended to temporarily aggravate the problem, but the basic neck discomfort and radicular symptoms have persisted since the onset of his injury.**

I feel it is more probable than not that the patient's current symptoms, based on history and review of the records of the treating health providers, indicates that his current problem is directly related to his work injury of 1987. [Emphasis added.]

(Ex. 2-O at 7.)

24. Dr. Iverson testified by deposition. He reiterated his opinion that claimant's neck condition was caused by his 1987 injury. As did Dr. GaleWyrick, he specifically noted the nature of the interval between the accident and the degenerative changes in claimant's cervical spine were significant:

Q. (By Ms. VanRiper) What causes you to think as you have expressed your opinion previously, that these degenerative changes were likely caused by that '87 trauma as opposed to any other incidents you've seen referred to in the other medical information, if I'm making my question clear?

A. I don't see any significant trauma that has occurred. I mean, he has had some minor flares, some things that he has done that has caused his neck problem to flare; however, the initial trauma, a fall backwards landing on the neck and shoulder, is certainly a lot more trauma [sic] than anything he has had subsequently, at least that I'm aware of. Degenerative changes do take a little while to occur, so the interval between '87 and '93 or '94 would be about right as far as showing degenerative changes. They don't occur within weeks or a few months. They would take a little longer time to occur.

(Iverson Dep. at 14.)

25. The State Fund insists, however, that these opinions should be disregarded because they do not fully take into account the claimant's true medical history and other injuries he has suffered along the way. The State Fund points to references to various incidents that may have triggered increased symptoms in the claimant and argues that either these individual incidents, or all of them together, are responsible for claimant's current symptoms. The incidents referred to include:

- a. Extensive use of claimant's right arm in helicopter training. (Ex. 2-W at 2.)
- b. Pain in low neck related to National Guard training. (Covey Dep. at 16; Ex. 2-H at 1.)
- c. Claimant was pushed by a bull. (Ex. 2-F at 2.)
- d. A cylinder, weighing 250 pounds, fell on claimant while he was carrying it up a hill. (Ex. 2-F at 2.)
- e. Claimant fell while running. (Ex. 2-N at 3.)

- f. Claimant was wrestling. (Ex. 2-N at 2-3.)
- g. Claimant lifted heavy barrels while working for Pegasus Gold. (Ex. 2-O at 10.)

26. The State Fund has offered no medical opinions demonstrating that any of these incidents permanently aggravated claimant's neck condition. Many of them occurred outside the time frame for the degenerative changes in claimant's neck to have occurred. Dr. Iverson was vigorously cross-examined about the incidents and their effect on his opinions. He stood by his original opinion. In response to questions by the State Fund's attorney, he testified:

Q. These incidents that I referred to, we covered them in just kind of a passing fashion early on, but I just want to talk a little bit about the mechanism of an injury such as through wrestling. Isn't that something that could cause permanent degenerative changes?

A. It's possible **if there was no antecedent trauma.**

Q. And the same could hold true for being pushed around by a bull in the rodeo arena?

A. It's possible.

Q. It's also possible that falling onto the pavement while you're jogging could do the same thing?

A. It's possible.

Q. But your opinion concerning the causation goes back to his history and his relationship of the nature of those events and their significance; is that correct?

A. Well, his history and the fact that he had treatment records, the fact that he had basically a normal spine except for acute muscular spasm evidenced and then subsequent degenerative changes, the fact that he has had aggravation of his neck problem by different types of trauma in the integral time period.

Q. You do feel that there was some aggravation through these other traumas?

A. Yes, that's what I said earlier. That's what usually led him into seeking some treatment. That's what he told me, that he's tried to maintain a job. He has tried to maintain an active lifestyle and he has been unable to do so without getting flares.

(Iverson Dep. at 27-28; emphasis added.) In redirect examination, he said:

Q. I have two things, Doctor. There was a question put to you by Mr. Adams with respect to the incidents that were described in the medical records, for example the helicopter incident and wrestling, rodeo clown, etcetera, and I believe you indicated that these were among the things that may have aggravated Mr. Beckers's condition. I'm wondering if it's your opinion whether those things aggravated his condition temporarily or permanently given what you know.

A. That would have to be based, again, on the history and record review. I don't think that there's any one incident that seemed to significantly cause his symptoms to deteriorate. I don't know if that answers your question or not.

Q. After the '87 accident, you mean?

A. Yes.

(Iverson Dep. at 29-30.)

27. The State Fund has refused to pay for claimant's surgery. It has also denied liability for disability benefits.

28. The State Fund's refusal to pay medical or compensation benefits was unreasonable. Claimant orally requested payment for chiropractic services of Dr. Forrette. On June 30, 1993, the State Fund received Dr. Forrette's letter specifically relating claimant's current symptoms to the 1987 industrial injury. (Ex. 2-K at 2.) The State Fund initially authorized treatment, but once it discovered Dr. Covey's June 7, 1988 letter in which he stated that claimant had reached "pre-injury status" it denied further treatment. It later received Dr. Iverson's March 30, 1994 letter in which he related claimant's condition to his 1987 injury. The State Fund never sought nor obtained an independent medical opinion, choosing

rather to disregard and second guess the medical opinions which had been furnished to it.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1987 version of the Workers' Compensation Act governs claimant's entitlement to benefits.

2. Claimant seeks temporary total disability benefits from January 4, 1994, until he is released to return to work. He also seeks payment of his medical bills relating to his neck.

Claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); ***Dumont v. Aetna Fire Underwriters***, 183 Mont. 190, 201, 598 P.2d 1099 (1979). Claimant has met his burden. A preponderance of the evidence demonstrated that claimant has had recurring neck, shoulder and arm pain since his 1987 injury. The medical evidence establishes that he suffered a degeneration of his cervical vertebrae, that the degeneration was consistent with his 1987 trauma, and that it could ordinarily be expected to develop over a several year period. The State Fund's theory that his condition was due to his 1986 accident or to subsequent permanently aggravating injuries was unpersuasive. While subsequent incidents caused his symptoms to flare-up, the State Fund failed to prove that the incidents permanently worsened claimant's underlying condition. Indeed, the frequency of the flare-ups and the nature of some of the incidents, e.g., flying a helicopter, suggest that the underlying condition was the root of claimant's problems, and that his activities merely made his underlying condition more symptomatic.

Once a claimant meets this initial burden of proof, the burden shifts to the insurance carrier to show that claimant suffered a permanent aggravation. ***Walker v. United Parcel Service***, 262 Mont. 450, 456, 865 P.2d 1113 (1993). The State Fund did not introduce evidence to show that any of claimant's subsequent incidents permanently aggravated his condition. Dr. Iverson viewed subsequent incidents as temporary aggravations of his underlying condition. Dr. Iverson's and Dr. GaleWyrick's opinions establish that claimant's neck condition in 1987 was the product of trauma many years past.

3. Maximum medical healing does not cut-off the future liability of an insurance carrier. The Montana Supreme Court stated in 1987:

We hold that under the law of Montana, the fact that a claimant has reached maximum healing does not eliminate the em-

ployer's future liability for temporary total disability benefits where, as here, a subsequent non-employment related event causes aggravation of the first injury. Such a case is not comparable to a case where there is a second industrial injury covered by workers' compensation.

Guild v. Rockwood Insurance, 229 Mont. 466, 470, 747 P.2d 217 (1987). In this case, claimant's condition deteriorated after the initial maximum healing determination. Ultimately, his condition deteriorated to the point that he could no longer work and surgery was necessary. At that point he returned to temporary total disability status and could no longer be considered maximally healed.

4. The State Fund's refusal to pay benefits was unreasonable. Claimant presented medical evidence to the State Fund in support of his claim that his neck condition was caused by his 1987 injury. While the State Fund may have had good reason to explore alternative causes, it failed to seek out independent medical advice. Instead, without any medical support of their own, the State Fund's claims examiners decided to simply reject the medical opinions provided to them. The claimant is, therefore, entitled to a twenty percent (20%) penalty pursuant to section 39-71-2907, MCA, and attorney fees and costs pursuant to section 39-71-611, MCA.

JUDGMENT

1. Claimant's current condition and need for surgery is a result of his 1987 industrial injury.

2. The State Fund shall pay claimant temporary total disability benefits commencing January 4, 1994, and continuing until the date claimant reached maximum healing following his surgery.

3. The State Fund shall pay the cost of claimant's medical treatment and surgery on his neck. If the parties cannot agree on what is due, they may request the Court to make that determination.

4. Claimant is entitled to a twenty percent (20%) penalty on all amounts payable under paragraphs 2 and 3.

5. Claimant is entitled to attorney's fees and reasonable costs in an amount to be determined by the Court. Claimant shall submit and affidavit of costs and attorney fees within twenty (20) days. Respondent shall have ten (10) days to respond.

6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 8th day of February, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Janice S. VanViper
Mr. Charles G. Adams