

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 28

WCC No. 2010-2457

ANTHONY HALE

Petitioner

vs.

LIBERTY MUTUAL MIDDLE MARKET

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered an injury to his left leg on January 2, 2006. He is currently off work and receiving temporary total disability benefits. Petitioner alleges that he is permanently totally disabled. He argues that his benefits should be converted to permanent total disability benefits and that it is in his best interest to receive those benefits in a lump sum. Petitioner further alleges that Respondent has unreasonably refused to convert his benefits and that he is entitled to his costs, attorney fees, and a penalty.

Held: Petitioner is not at maximum healing. Under § 39-71-116(25), MCA, a worker cannot be declared permanently totally disabled until after he reaches maximum healing. Therefore, Petitioner is not permanently totally disabled. Since this issue is dispositive of Petitioner's case, the Court does not reach the other issues presented.

¶ 1 The trial in this matter was held on April 27, 2010, in Great Falls, Montana. Petitioner Anthony Hale was present and represented by Sydney E. McKenna and Justin Starin. Larry W. Jones represented Respondent Liberty Mutual Middle Market.

¶ 2 **Exhibits:** Exhibits 1 through 10 were admitted without objection. Exhibits 11 and 12 were withdrawn. Exhibits 13 and 14 were admitted over Hale's relevancy and hearsay objections. Exhibits 15 through 20 were presented for demonstrative purposes only. Exhibits 21 through 26 were admitted over Hale's relevancy objections. Exhibit 27 was admitted over Respondent's relevancy and hearsay objections.

¶ 3 Witnesses and Depositions: The Court admitted the sworn statements of Anthony Hale and Donald P. Ericksen, M.D., and the depositions of Anthony Hale, John Harrison, Ph.D., Patrick E. Galvas, D.O., Ph.D., Michael Jensen, PT, and Anne Arrington. Michael Jensen, PT, Anthony Hale, Patrick E. Galvas, D.O., Ph.D., Arthur William Ovrum, Timothy Joe Pickering, Peter Arden Ropp, MS, CRC, and Sandra Ellen Scholl were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order¹ sets forth the following issues:

¶ 4a Is Petitioner permanently totally disabled and, if so, when did he become permanently totally disabled?

¶ 4b Is Petitioner entitled to permanent total disability benefits in a lump sum?

¶ 4c Is Petitioner entitled to attorney fees and costs?

¶ 4d Is Petitioner entitled to a penalty?

¶ 5 For the reasons set forth below, I concluded that the first issue is dispositive of this matter and therefore I do not reach the remaining issues.

FINDINGS OF FACT

¶ 6 Petitioner Anthony Hale testified at trial. I found him to be a credible witness. Hale is 25 years old and lives in Valier, Montana. Hale began working for his time-of-injury employer in 2005, performing freight handling and meat inspection duties. Hale typically worked 40 hours per week and earned approximately \$11 per hour.²

¶ 7 On January 2, 2006, Hale suffered an industrial injury while working for A N Deringer, Inc., in Sweetgrass, Montana. Respondent Liberty Mutual Middle Market (Liberty) accepted liability for Hale's workers' compensation claim.³ Hale filed a Workers Compensation - First Report of Injury or Illness on January 4, 2006, stating that he suffered an injury to his leg and ankle while loading boxes onto a truck.⁴

¶ 8 Hale's medical treatment in the immediate aftermath of his industry injury is not pertinent to the matter before the Court and will not be detailed here. Ultimately, Hale

¹ Pretrial Order at 2.

² Trial Test.

³ Pretrial Order, Uncontested Facts, at 1.

⁴ Ex. 1.

suffered from ongoing pain and other problems with his left leg and had a cyst drained on multiple occasions. On September 1, 2006, Donald P. Ericksen, M.D., surgically removed the cyst from Hale's left calf.⁵ Dr. Ericksen opined that the cyst was a direct result of Hale's industrial injury.⁶ Dr. Ericksen took Hale off work indefinitely.⁷

¶ 9 Hale returned to see Dr. Ericksen for a post-surgical follow-up appointment on September 13, 2006. Dr. Ericksen released him to light-duty employment up to four hours per day.⁸ Hale continued to progress and Dr. Ericksen gradually decreased Hale's work restrictions.⁹ On December 13, 2006, Dr. Ericksen noted that Hale was "doing pretty well" and that he had returned to "normal work." After an examination, Dr. Ericksen cleared Hale to return to his normal duties without restriction, placed him at maximum medical improvement (MMI), and determined that he had no impairment rating under the AMA Guide (5th ed.).¹⁰ Dr. Ericksen testified that when he released Hale to return to work without restrictions, he did not mean that Hale was at preinjury status, but rather that he could perform his job duties.¹¹ Dr. Ericksen further clarified that when he stated in his December 13, 2006, notes that Hale's pain was "fully resolved," he was referring only to Hale's posterior tibial tendon pain and not to his complete situation.¹²

¶ 10 On May 7, 2007, Hale helped his mother with yard work and operated a small rototiller in her garden.¹³ Hale stated that prior to the rototilling, he had been experiencing pain and pulling sensations in his left ankle.¹⁴ He also had swelling and numbness in his left calf.¹⁵ The day after he worked in his mother's garden, Hale woke up to increased symptoms in his left leg.¹⁶

⁵ Ex. 9 at 104-105.

⁶ Ex. 9 at 109.

⁷ Ex. 9 at 108.

⁸ Ex. 9 at 102.

⁹ Ex. 9 at 98-101.

¹⁰ Ex. 9 at 97.

¹¹ Ericksen Statement 8:9-18.

¹² Ericksen Statement 8:19 – 9:10.

¹³ Hale Statement 10:7-25.

¹⁴ Hale Statement 12:17 – 13:1.

¹⁵ Hale Statement 14:16 – 15:19.

¹⁶ Hale Statement 15:20-24.

¶ 11 Hale apparently did not return to work after May 7, 2007.¹⁷ Michele C. Marler, M.D., referred Hale to Marias Medical Center for physical therapy after Hale reported an increase in numbness and pain. At the time of his physical therapy appointment on May 9, 2007, Hale reported that while he was working full-time performing his regular job duties, his symptoms tended to be aggravated by the end of each workday, but they would subside by the following morning. At the May 9, 2007, appointment, the physical therapist noted that Hale had a significant increase in pain and swelling in his left leg since his last physical therapy appointment in November 2006. Hale was referred for ultrasound and soft tissue mobilization and was given instructions for home exercise.¹⁸

¶ 12 Dr. Ericksen saw Hale on May 25, 2007.¹⁹ Dr. Ericksen expressed concern that Hale's cyst may have recurred and recommended an MRI.²⁰ Dr. Ericksen opined that the yard work is a factor which likely aggravated Hale's underlying condition but that Hale generally experienced an exacerbation of his symptoms whenever he engaged in strenuous activities.²¹ On July 10, 2007, Dr. Ericksen noted that Hale continued to have pain with activity and occasional swelling of his left leg. An MRI revealed some scar tissue but no evidence of a recurrent cyst. Dr. Ericksen opined, "I think that he should continue to improve."²²

¶ 13 On September 6, 2007, Dr. Ericksen wrote to Hale's counsel and stated:

The diagnosis of note when I last saw this patient wh[ich] was on July 10, 2007 included residual pain in the left leg status post crush injury and residual weakness of the calf muscle. My recommended course of treatment at that point was to continue to work on calf strengthening, continue to work on maintaining flexibility, and avoid activities, which specifically exacerbate his pain. The MRI that was obtained on that day as well as the evaluation confirm that the problem that I saw [Hale] for on this date was in actuality related both to the original crush injury and to the posttraumatic hemorrhagic cyst. The posttraumatic hemorrhagic cyst was a direct result of the crush injury and thus the problems that the patient was noted to have as of July 10, 2007 were in fact related to both of these issues as I do not believe that they can be clearly separated from one another. At this point, I would concur with [Hale's] doctor's feeling

¹⁷ Ex. 9 at 61.

¹⁸ Ex. 9 at 63-64.

¹⁹ Ericksen Statement 9:11-13.

²⁰ Ex. 9 at 96.

²¹ Ericksen Statement 12:8-25.

²² Ex. 9 at 95.

that he should not be working at this time in any work situation that exacerbates his current pain.²³

¶ 14 Hale next returned to Marias Medical Center on September 26, 2007, after Dr. Ericksen referred him for physical therapy.²⁴

¶ 15 On February 27, 2008, Dr. Ericksen noted that Hale had been unable to regain his ability to perform his job duties in spite of his attempts at physical therapy. Dr. Ericksen noted:

At this point, I do not see anything specific or different to offer him. I do fully agree with the concept of seeking further or different opinions from either rehab-oriented individuals or possibly through pain management. I believe that the proposed referral to Dr. Stephens is an appropriate consideration. In terms of his work status, in my view he is not able to do his time of work [sic] activities.²⁵

¶ 16 During the taking of his sworn statement on July 22, 2008, Dr. Ericksen opined that Hale was still at MMI.²⁶ However, he further opined that it was more probable than not that Hale's condition could be improved with a comprehensive pain management program.²⁷ Dr. Ericksen testified that he did not believe active treatment would improve Hale's underlying conditions, but he believed a pain management program could help Hale's pain.²⁸

¶ 17 On December 10, 2008, Matthew D. McLaren, M.D., implanted a spinal cord stimulator in Hale for a one-week trial.²⁹ On December 17, 2008, Dr. McLaren removed the trial stimulator. Mark W. Collins, RN, recorded that Hale reported a greater than 50% reduction in his pain while using the stimulator. Collins explained to Hale that the stimulator was meant to improve his quality of life, but would not cure his pain. Hale stated that he wished to pursue having a spinal cord stimulator surgically implanted.³⁰

²³ Ex. 9 at 94.

²⁴ Ex. 9 at 60.

²⁵ Ex. 9 at 93.

²⁶ Ericksen Statement 20:10-14.

²⁷ Ericksen Statement 20:15-25.

²⁸ Ericksen Statement 21:3-14.

²⁹ Ex. 9 at 10.

³⁰ Ex. 9 at 9.

¶ 18 On January 7, 2009, Dr. McLaren implanted a spinal cord stimulator in Hale.³¹ At a follow-up appointment on April 19, 2009, Dr. McLaren adjusted the stimulator to improve pain relief. Dr. McLaren noted that Hale reported a 50% to 60% improvement in his pain although he still experienced some burning and shooting pain sensations in his left leg. Dr. McLaren noted that Hale had developed two cysts in his left calf which would need to be surgically removed.³² These cysts had been identified a few days previously during an ultrasound examination of Hale's left calf.³³

¶ 19 John Harrison, Ph.D., is a licensed psychologist specializing in neuropsychology.³⁴ Dr. Harrison conducted a neuropsychological evaluation of Hale on April 6-8, 2010. Dr. Harrison interviewed Hale about the history of his industrial accident, injury, and subsequent medical treatment. He obtained a personal and family history, and conducted a series of evaluative tests. Dr. Harrison concluded that Hale suffers from a chronic pain syndrome which is significantly exacerbated by depression, anxiety, and underlying somatoform characteristics. He further concluded that Hale has a learning disability which interferes in part with his ability to work. Dr. Harrison recommended clarification of Hale's learning disability and a review of early psychological testing. He "highly recommended" a psychiatric evaluation to establish a more aggressive treatment plan for Hale's depression and anxiety, and further suggested that Hale could benefit from more intensive pain management strategies, pain psychology, stress inoculation strategies, and smoking cessation.³⁵

¶ 20 Dr. Harrison opined that psychiatric treatment, combined with lifestyle changes, could improve Hale's overall perception of his pain.³⁶ Dr. Harrison opined that, if his recommendations are implemented, he reasonably anticipates an increase in Hale's physical functioning.³⁷

¶ 21 Patrick E. Galvas, D.O., Ph.D., testified at trial. I found Dr. Galvas to be a credible witness. Dr. Galvas is board-certified in psychiatry.³⁸ Dr. Galvas conducted an Independent Medical Examination (IME) of Hale and prepared a report on December 22, 2009.³⁹ The purpose of the IME was to determine "workability."⁴⁰ Dr. Galvas

³¹ Ex. 9 at 4.

³² Ex. 9 at 5.

³³ Ex. 9 at 42.

³⁴ Harrison Dep. 6:13-16.

³⁵ Ex. 7.

³⁶ Harrison Dep. 24:6-16.

³⁷ Harrison Dep. 29:10-20.

³⁸ Galvas Dep. 4:2-9.

³⁹ Ex. 3.

interviewed Hale and reviewed medical records in addition to performing a physical examination. Dr. Galvas noted that Hale had been diagnosed with Complex Regional Pain Syndrome (CRPS) in the distribution of the left sural nerve.⁴¹ At his deposition, Dr. Galvas testified that he withdrew the CRPS diagnosis because he does not believe Hale's level of functionality is consistent with CRPS.⁴² He further testified that, in light of his doubts about the CRPS diagnosis, he would recommend an EMG nerve conduction study.⁴³ Dr. Galvas believes that Hale may have neuropathic pain rather than CRPS. Dr. Galvas testified that at the time he examined Hale, he accepted the CRPS diagnosis and did not order diagnostic testing. However, now that he has doubts as to whether the CRPS diagnosis is correct, he believes further diagnostic testing is warranted.⁴⁴

¶ 22 Dr. Galvas testified that a more accurate diagnosis of Hale's condition could lead to additional beneficial treatment. If Hale's condition is neuropathic pain rather than CRPS, Dr. Galvas believes some different medications and counseling could improve Hale's condition. Dr. Galvas opined that an EMG nerve conduction study would allow medical providers to determine if Hale's nerve conduction has been damaged. Dr. Galvas also opined that a triple-phase bone scan and thermography of Hale's leg would help medical providers reach an accurate diagnosis of Hale's condition.⁴⁵

¶ 23 Dr. Galvas reviewed Dr. Harrison's report and agreed that Dr. Harrison's recommendations for treatment might increase Hale's physical abilities.⁴⁶ Dr. Galvas further testified that he believes counseling would be beneficial for either CRPS or neuropathic pain.⁴⁷ Dr. Galvas stated that counseling often helps patients accept their condition and learn relaxation techniques and other strategies which help them adjust to their limitations. Dr. Galvas opined that counseling could help Hale deal with his industrial injury and its effects and help him return to being a productive member of society.⁴⁸

⁴⁰ Ex. 3 at 1.

⁴¹ Ex. 3 at 3-6.

⁴² Galvas Dep. 80:1-5.

⁴³ Galvas Dep. 84:3-9.

⁴⁴ Trial Test.

⁴⁵ Trial Test.

⁴⁶ Galvas Dep. 72:15-25.

⁴⁷ Trial Test.

⁴⁸ Trial Test.

¶ 24 Dr. Galvas stated that without a diagnosis, he cannot calculate Hale's impairment rating under the 6th edition of the AMA Guide.⁴⁹

¶ 25 Sandra Ellen Scholl works for Liberty Northwest Insurance. Scholl testified at trial. I found her to be a credible witness. Scholl had been adjusting Hale's claim in December 2006 when Dr. Ericksen found Hale to be at MMI with no restrictions or permanent impairment. She then terminated Hale's temporary total disability benefits. Scholl testified that, although Hale was found at MMI in December 2006, he received further medical treatment for his condition in May 2007. Since that time, Hale has continued to seek medical treatment for his injury, including a surgically-implanted spinal cord stimulator in January 2009. Scholl testified that Liberty has paid for Hale's ongoing medical treatment.⁵⁰

¶ 26 Scholl testified that she does not have the opinion of another doctor after December 2006 specifically stating that Hale is not at MMI; rather, she concluded Dr. Ericksen's opinion that Hale was at MMI was no longer valid in light of Hale's subsequent and ongoing medical treatment. Scholl knows that Dr. Galvas had recommended additional diagnostic tests for Hale in addition to the recommendations which Dr. Harrison had made. Scholl testified that Liberty is prepared to pay for the medical treatment recommended by Drs. Galvas and Harrison.⁵¹

¶ 27 Hale's current medical treatment for his industrial injury includes the use of a spinal cord stimulator and medical marijuana for pain. Hale testified that he previously used other pain medications but had side effects which he does not experience from medical marijuana. Hale testified that the spinal cord stimulator reduces his leg pain by approximately 50%.⁵²

CONCLUSIONS OF LAW

¶ 28 This case is governed by the 2005 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Petitioner's industrial accident.⁵³

⁴⁹ Trial Test.

⁵⁰ Trial Test.

⁵¹ Trial Test.

⁵² Trial Test.

⁵³ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 29 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁵⁴

¶ 30 In order to be considered permanently totally disabled, a worker must be at maximum healing, or MMI.⁵⁵ Before I consider whether Hale meets the other statutory criteria, I first must question whether he is at MMI.

¶ 31 Hale argues that he reached MMI on December 13, 2006, when Dr. Ericksen cleared him to return to his normal work duties without restriction, placed him at MMI, and determined that he had no impairment rating under the AMA Guide (5th ed.). However, Hale further argues that the Court should find him permanently totally disabled. Hale asks the Court to rely on that part of Dr. Ericksen's opinion in which he concluded Hale is at MMI, but to disregard the part of Dr. Ericksen's opinion where he concluded Hale has no restrictions and no permanent impairment. Hale argues that the Court should conclude he is at MMI because no doctor has explicitly said he is not at MMI. Hale alleges that Liberty previously asked a doctor to give him an impairment rating, and did not ask Dr. Galvas to opine whether he is at MMI and that it is "too late" for Liberty to assert that he is not at MMI.

¶ 32 Liberty argues that Hale is not at MMI given the recommended treatment by Dr. Harrison and Dr. Galvas' trial testimony. Liberty argues that treatment options exist which could reasonably be expected to improve Hale's physical functioning.

¶ 33 Maximum healing, or MMI, means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.⁵⁶ As this Court previously held in *Burtell v. State Compen. Ins. Fund*, an injured worker may reach MMI and may no longer be at MMI if the injured worker's condition deteriorates such that additional medical treatment may improve the injured worker's condition.⁵⁷

¶ 34 In the present case, Dr. Ericksen found Hale to be at MMI on December 13, 2006. On that date, he released Hale to return to his time-of-injury employment, with no restrictions. However, in May 2007, Dr. Ericksen found Hale's condition to have deteriorated. In September 2007, he wrote to Hale's counsel and opined that Hale should not be working if his work conditions exacerbate his pain, and he referred Hale

⁵⁴ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

⁵⁵ Section 39-71-116(25), MCA, states, in pertinent part, "Permanent total disability' means a physical condition . . . after a worker reaches maximum medical healing. . . ."

⁵⁶ Section 39-71-116(18), MCA.

⁵⁷ 2002 MTWCC 18, ¶ 64.

for physical therapy. In February 2008, while Dr. Ericksen was at a loss as to how to treat Hale, he believed it was appropriate to refer him elsewhere for treatment and he further opined that Hale was unable to work.

¶ 35 In spite of these developments, on July 22, 2008, Dr. Ericksen opined that he still believed Hale was at MMI. Inconsistent with that opinion, however, Dr. Ericksen further opined that Hale's condition could be improved with a comprehensive pain management program. Under the statutory definition, it is impossible for Hale to be simultaneously at maximum healing and expected to improve with further treatment. In fact, Hale's condition did improve with better pain management obtained via the implantation of a spinal cord stimulator in 2009.

¶ 36 In addition to the uncertainty of Dr. Ericksen's opinion and the substantial medical treatment Hale received subsequent to Dr. Ericksen's initial MMI finding and his reiteration of that opinion in July 2008, I further note that Dr. Harrison and Dr. Galvas have both opined that Hale could improve with further diagnosis and treatment. Since I have concluded that Hale is not at MMI, I cannot conclude he is permanently totally disabled.

¶ 37 Since Hale is not permanently totally disabled, the other issues presented are moot.

JUDGMENT

¶ 38 Petitioner is not permanently totally disabled.

¶ 39 Petitioner's entitlement to a lump sum payment of permanent total disability benefits is moot.

¶ 40 Petitioner is not entitled to attorney fees and costs.

¶ 41 Petitioner is not entitled to a penalty.

¶ 42 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.

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DATED in Helena, Montana, this 13th day of September, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Sydney E. McKenna
Justin Starin
Larry W. Jones
Submitted May 3, 2010

Findings of Fact, Conclusions of Law and Order - 11