

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 43

WCC No. 2012-2939

JEFFREY L. DRIVDAHL

Petitioner

vs.

ZURICH AMERICAN INSURANCE COMPANY

Respondent/Insurer

and

BRENTWOOD SERVICES ADMINISTRATORS, INC.

Third Party Adjuster.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner contends that he is permanently totally disabled due to his industrial injury. Respondent contends that Petitioner is not entitled to permanent total disability benefits because his treating physician has approved several job analyses.

Held: The weight of the evidence supports Petitioner's entitlement to permanent total disability benefits.

Topics:

Constitutions, Statutes, Regulations, and Rules: **Montana Code Annotated: 39-71-609.** Although an injured worker ordinarily bears the burden of proving that he is entitled to the benefits he seeks, under § 39-71-609(2), MCA, the insurer bears the initial burden to produce evidence that the injured worker is not permanently totally disabled. Where Respondent met its initial burden of proof by introducing approved job analyses into evidence, the burden then shifts back to Petitioner to prove that, notwithstanding the approved job analyses, he is entitled to PTD benefits.

Proof: Burden of Proof: Permanent Total Disability. Although an injured worker ordinarily bears the burden of proving that he is entitled to the benefits he seeks, under § 39-71-609(2), MCA, the insurer bears the initial burden to produce evidence that the injured worker is not permanently totally disabled. Where Respondent met its initial burden of proof by introducing approved job analyses into evidence, the burden then shifts back to Petitioner to prove that, notwithstanding the approved job analyses, he is entitled to PTD benefits.

Proof: Conflicting Evidence: Vocational. The Court assessed the credibility of Petitioner and Petitioner's son, both of whom testified. However, the Court was unable to fully explore the bases for the opinions of two doctors and a physical therapist as only their reports and/or medical records were entered into evidence. While the treating physician approved several job analyses, his opinion differed significantly from the other experts in the case and differed from the live testimony. Since the Court had no insight into why this doctor's opinion differed, the Court did not give the opinion as much weight.

¶ 1 The trial in this matter occurred on August 31, 2012, at the Workers' Compensation Court. Petitioner Jeffrey L. Drivdahl was present and was represented by Bernard J. Everett. Todd A. Hammer represented Respondent Zurich American Insurance Company (Zurich) and Third Party Adjuster Brentwood Services Administrators, Inc. (Brentwood). Jim Putman, Senior Claims Examiner for Brentwood, also attended.

¶ 2 Exhibits: I admitted Exhibits 1 through 9 without objection.

¶ 3 Witnesses and Depositions: Drivdahl's deposition was submitted to the Court and is considered part of the record. Drivdahl, Putman, Bonnie L. Lyytinen-Hale, M.S., C.R.C., and Joel Drivdahl were sworn and testified.

¶ 4 Issues Presented: At trial, the Court restated the issues as follows:

Issue One: Whether Drivdahl is entitled to permanent total disability benefits; and

Issue Two: Whether Drivdahl is entitled to his costs.

FINDINGS OF FACT

¶ 5 On December 21, 2009, Drivdahl sustained injuries while in the course and scope of his employment as a driver for Kenco Group. Zurich insured Kenco Group at that time. Kenco Group also used Brentwood as a third-party administrator. Zurich accepted liability for Drivdahl's injuries and paid certain medical and indemnity benefits.¹

¶ 6 Drivdahl testified at trial. I found him to be a credible witness. Drivdahl testified that since his industrial accident, he has undergone three or four surgeries on his left shoulder. However, he has endured constant pain in his shoulder. He considers his shoulder to be his most significant problem.² Drivdahl further testified that his right elbow is "very tender" and he cannot tolerate having anything touch it. He has a poor grip with his right hand and he frequently drops things.³ His pain level worsens with activity.⁴

¶ 7 Drivdahl owns and maintains a residence in Whitehall, Montana. He described it as a two-acre piece of property with an approximately 1100 square foot home.⁵ The property also includes a shop building and two garages.⁶ Drivdahl performs his own housekeeping and home maintenance,⁷ but he relies upon his son to complete some tasks for him to avoid increasing his pain, including changing oil or performing other automobile maintenance and repairing the property's fence.⁸ Drivdahl stated that he can usually tolerate 10 to 15 minutes of household activities such as vacuuming before he needs to rest his shoulder.⁹

¶ 8 Drivdahl testified that he enjoys playing the guitar as a hobby, but he is no longer able to play for more than five to ten minutes at a time because of his shoulder condition.¹⁰ Drivdahl also testified that prior to his industrial injury, he enjoyed recreating with an ATV, but he can no longer comfortably operate an ATV.¹¹ Drivdahl testified that

¹ Pre-Trial Order at 2.

² Trial Test.

³ Trial Test.

⁴ Drivdahl Dep. 63:17-19.

⁵ Drivdahl Dep. 44:21 – 45:24.

⁶ Drivdahl Dep. 46:8-14.

⁷ Drivdahl Dep. 66:4-13.

⁸ Drivdahl Dep. 65:2-18.

⁹ Trial Test.

¹⁰ Drivdahl Dep. 48:2-10.

¹¹ Drivdahl Dep. 48:22 – 49:8.

he is able to drive his personal automobiles and pick-up truck locally, but he is no longer able to tolerate driving longer distances because of his shoulder condition.¹² Drivdahl testified that he is able to tolerate standing for approximately 10 to 15 minutes at a time before his shoulder pain becomes intolerable.¹³

¶ 9 Nicholas DiGiovine, M.D., treated Drivdahl for his injuries. The treatment included multiple surgeries on Drivdahl's left shoulder and elbow.¹⁴

¶ 10 On April 19, 2011, Dr. DiGiovine indicated that Drivdahl was unable to return to work at that time, and that he was scheduled for a follow-up appointment in three weeks.¹⁵ However, the medical records submitted do not indicate that Drivdahl saw Dr. DiGiovine until September 8, 2011.

¶ 11 Drivdahl testified that he discontinued taking prescriptive pain medications in mid-2011.¹⁶ Drivdahl testified that Dr. DiGiovine initially prescribed him pain medications after his surgeries, but Dr. DiGiovine later ceased prescribing the medications and told Drivdahl he would have to learn to live with his shoulder pain.¹⁷

¶ 12 Drivdahl testified that he currently alleviates his shoulder pain by lying down and resting his shoulder on a pillow. Drivdahl stated that this lessens his pain but does not eliminate it. Drivdahl testified that standing, walking, and sitting all exacerbate his shoulder pain because of the weight of his arm hanging on it. He further testified that he has tried using a sling, but it aggravates his pain as well.¹⁸

¶ 13 On September 8, 2011, Dr. DiGiovine evaluated Drivdahl and noted that Drivdahl's complaints remained unchanged "since his last visit." Dr. DiGiovine diagnosed Drivdahl with status post right arm cubital tunnel, carpal tunnel and ulnar tunnel releases and revision lateral epicondyle; status post left shoulder SLAP repair; post-operative frozen shoulder; biceps tenodesis left shoulder; and status post manipulation and debridement left shoulder. Dr. DiGiovine noted that he believed Drivdahl had "plateaued" and, "I am still concerned about the possibility of some secondary gain with regards to his complaints." Dr. DiGiovine recommended an

¹² Drivdahl Dep. 50:5-19.

¹³ Drivdahl Dep. 70:1-4.

¹⁴ Pre-Trial Order at 2.

¹⁵ Ex. 1 at 16.

¹⁶ Drivdahl Dep. 59:8-23.

¹⁷ Trial Test.

¹⁸ Trial Test.

independent medical examination (IME) and functional capacity evaluation (FCE) prior to making a maximum medical improvement (MMI) determination.¹⁹

¶ 14 On October 4, 2011, Drivdahl underwent an IME conducted by Catherine C. Capps, M.D. Dr. Capps prepared an IME report on November 6, 2011, in which she summarized Drivdahl's medical history, her examination impressions, and her interview of Drivdahl. She opined that Drivdahl suffered from a ruptured left bicep, discomfort over his left acromioclavicular joint, and some dysconjugation of left shoulder motion. Dr. Capps also found Drivdahl to have an irritable ulnar nerve near his right elbow.²⁰ Dr. Capps suggested that transposing Drivdahl's ulnar nerve at the elbow might provide him some relief.²¹ Dr. Capps further suggested that injections into Drivdahl's left acromioclavicular joint might alleviate his left shoulder symptoms.²²

¶ 15 On October 13 and 14, 2011, Drivdahl submitted to an FCE conducted by physical therapist Kevin Stenson. Stenson noted that Drivdahl "fully participated" in the FCE and his responses were consistent with maximal effort.²³ Stenson opined that Drivdahl's left shoulder, right elbow, and right wrist problems, along with other diagnoses including left knee pain "prevents a match between client's physical abilities and return to work."²⁴

¶ 16 On November 18, 2011, Dr. DiGiovine wrote to Jim Putman, Senior Claims Examiner for Brentwood, in response to questions Putman posed on November 14. Dr. DiGiovine opined that Drivdahl was not at MMI and explained that he intended to treat Drivdahl with a cortisone injection and local anesthetic into the left acromioclavicular joint to determine if this treatment would give Drivdahl pain relief.²⁵

¶ 17 On January 12, 2012, Dr. DiGiovine saw Drivdahl for a follow-up appointment. Dr. DiGiovine noted that the shoulder injections did not relieve Drivdahl's symptoms and that Drivdahl did not wish to pursue ulnar nerve surgery. Dr. DiGiovine did not recommend further treatment. Dr. DiGiovine found Drivdahl to be at MMI and calculated Drivdahl's impairment rating as an 11% whole person impairment.²⁶

¹⁹ Ex. 7 at 1.

²⁰ Ex. 3 at 11.

²¹ *Id.*

²² Ex. 3 at 12.

²³ Ex. 4 at 2.

²⁴ Ex. 4 at 3.

²⁵ Ex. 1 at 36.

²⁶ Ex. 7 at 3-4.

¶ 18 On February 15, 2012, Dr. DiGiovine approved job analyses Bonnie L. Lyytinen-Hale, M.S., C.R.C., prepared for hotel / motel desk clerk, pit stop service advisor, auto parts clerk / delivery driver, cashier, and convenience store clerk. Dr. DiGiovine disapproved job analyses for Drivdahl's time-of-injury position and for sales clerk / sales floor associate.²⁷

¶ 19 Drivdahl testified that Dr. DiGiovine never discussed the job analyses with him.²⁸ Drivdahl testified that he does not believe he could perform the convenience store clerk position because he cannot carry things and he cannot tolerate being on his feet for long periods of time "where that shoulder hangs all the time."²⁹ Drivdahl further testified that he would not be able to tolerate the repetitive lifting and the amount of driving which an auto parts clerk / delivery driver position would require.³⁰ Drivdahl testified that he also did not believe he could perform the hotel / motel desk clerk position because he could not tolerate being on his feet for a significant length of time and he could not use his arms to complete the job duties.³¹

¶ 20 On February 21, 2012, Lyytinen-Hale prepared an Employability and Wage Loss Analysis regarding Drivdahl at Putman's request.³² Lyytinen-Hale testified at trial. I found her to be a credible witness. Based upon the Employability and Wage Loss Analysis which she prepared and Dr. DiGiovine's approval of several job analyses, she opined that Drivdahl has a reasonable prospect of performing regular and competitive employment in the labor market.³³ In her Employability and Wage Loss Analysis, Lyytinen-Hale found that Drivdahl was not able to return to his time-of-injury position and that his time-of-injury employer did not have a permanent modified or alternate position available to him.³⁴ Lyytinen-Hale opined that Drivdahl would experience an actual wage loss as a result of his industrial injury. She noted that Drivdahl would be entitled to rehabilitation benefits and requested that he contact her if interested in vocational rehabilitation services.³⁵

²⁷ Ex. 5.

²⁸ Drivdahl Dep. 67:15-23.

²⁹ Drivdahl Dep. 68:2-10.

³⁰ Drivdahl Dep. 68:21 – 69:2.

³¹ Drivdahl Dep. 69:3-12.

³² Ex. 8.

³³ Trial Test.

³⁴ Ex. 8 at 5.

³⁵ Ex. 8 at 16.

¶ 21 Drivdahl testified that he has not looked for work since his industrial injury.³⁶ Drivdahl testified that when Lyytinen-Hale discussed the possibility of retraining, he was interested in the idea, but he did not know how to go about pursuing vocational rehabilitation. He stated that he could not recall seeing a letter Lyytinen-Hale sent to his attorney in February 2012 which asked Drivdahl to contact her if he was interested in vocational rehabilitation.³⁷

¶ 22 Joel Drivdahl testified at trial. I found him to be a credible witness. Joel is Drivdahl's son. Joel resides in Belgrade, Montana, and travels to Whitehall to visit Drivdahl approximately three times per month. Joel testified that prior to Drivdahl's industrial injury, they enjoyed recreational activities together. Joel testified that Drivdahl was an active person with no physical limitations.³⁸

¶ 23 Joel testified that Drivdahl's activity level dropped dramatically after his industrial accident. Joel now cuts Drivdahl's firewood and performs vehicle maintenance for him.³⁹ Joel has helped Drivdahl with housecleaning which involves reaching overhead and moving furniture. Joel testified that he has observed Drivdahl tire quickly with activities and he lies down on the couch frequently to rest his shoulder.⁴⁰ Joel testified that he has not observed Drivdahl being active for more than half an hour or 45 minutes without resting his shoulder.⁴¹

CONCLUSIONS OF LAW

¶ 24 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Drivdahl's industrial accident.⁴² Ordinarily, an injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁴³ However, under § 39-71-609(2), MCA, the insurer bears the initial burden to produce evidence showing that the injured worker is not permanently totally disabled.⁴⁴

³⁶ Drivdahl Dep. 55:18-20.

³⁷ Drivdahl Dep. 43:17 – 44:9.

³⁸ Trial Test.

³⁹ Trial Test.

⁴⁰ Trial Test.

⁴¹ Trial Test.

⁴² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁴³ *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).

⁴⁴ See *Weisgerber v. American Home Assurance Co.*, 2005 MTWCC 8, ¶ 32.

¶ 25 Section 39-71-609(2), MCA, states:

Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary total disability benefits or temporary partial disability benefits to permanent partial disability benefits:

(a) must have a physician's determination that the claimant has reached medical stability;

(b) must have a physician's determination of the claimant's physical restrictions resulting from the industrial injury;

(c) must have a physician's determination, based on the physician's knowledge of the claimant's job analysis prepared by a rehabilitation provider, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;

(d) shall give notice to the claimant of the insurer's receipt of the report of the physician's determinations required pursuant to subsections (2)(a) through (2)(c). The notice must be attached to a copy of the report.

¶ 26 In the present case, there does not appear to be any dispute that Zurich has met its initial burden; while the parties disagree as to whether Dr. DiGiovine's approval of several job analyses is correct, neither disputes that Dr. DiGiovine made a determination that Drivdahl can return to work. Therefore, the burden shifts back to Drivdahl to prove that, notwithstanding the approved job analyses, he is entitled to permanent total disability (PTD) benefits.

Issue One: Whether Drivdahl is entitled to permanent total disability benefits

¶ 27 A worker is permanently totally disabled if, after reaching MMI, he has a physical condition resulting from an injury in which he does not have a reasonable prospect of physically performing regular employment.⁴⁵ The determination of entitlement to PTD benefits must be supported by a preponderance of objective medical findings.⁴⁶

¶ 28 The facts of Drivdahl's case are largely undisputed and are readily apparent. It is the Court's job to weigh them. On the one hand, Drivdahl's treating physician approved several job analyses. It is clear from Dr. DiGiovine's medical notes that he had

⁴⁵ § 39-71-116(25), MCA.

⁴⁶ § 39-71-702(2), MCA.

concerns about the extent of Drivdahl's reported pain complaints. Dr. DiGiovine noted that he believed secondary gain may be a factor in Drivdahl's stalled recovery. At some point, Dr. DiGiovine also ceased prescribing pain medication to Drivdahl.

¶ 29 On the other hand, from the objective medical evidence there is no doubt that Drivdahl suffered significant injuries in his industrial accident and that he has ongoing limitations due to those injuries. Dr. Capps noted several findings in her IME report and made additional treatment recommendations which were unfortunately not successful in improving Drivdahl's condition. Stenson, the FCE evaluator, found Drivdahl to exert maximal effort during the FCE and ultimately concluded that Drivdahl's physical limitations were incompatible with gainful employment.

¶ 30 I heard Drivdahl's testimony, had the opportunity to observe him at trial, and I found him credible. I further heard the testimony of Joel Drivdahl, which was likewise credible, and which corroborated Drivdahl's account of his physical limitations.

¶ 31 I do not know why Dr. DiGiovine viewed Drivdahl's complaints with some skepticism. As Drivdahl's treating physician, Dr. DiGiovine was intimately familiar with the details of Drivdahl's condition, including multiple surgeries and various other treatments. As noted in the findings above, Dr. DiGiovine requested that Drivdahl undergo an FCE prior to making MMI and impairment rating determinations. However, for reasons not readily apparent to this Court, Dr. DiGiovine disregarded the FCE evaluator's opinion that Drivdahl's physical limitations precluded employability. Since Dr. DiGiovine did not testify either at trial or by deposition, I have no insight into his rationale in approving these particular job analyses and I do not know what role, if any, his apparent skepticism about the extent of Drivdahl's complaints played in his decision.

¶ 32 As a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses. However, a treating physician's opinion is not conclusive. To presume otherwise would quash the role of the fact finder in questions of an alleged injury. As the finder of fact, this Court remains in the best position to assess witnesses' credibility and testimony.⁴⁷

¶ 33 In the present case, I am able to assess the credibility of Drivdahl and his son Joel. Since Dr. Capps, Dr. DiGiovine, and Stenson did not testify, I have only their respective reports and medical records from which to glean information. Both Dr. Capps and Stenson found Drivdahl's reported pain complaints and limitations credible. Stenson clearly believed Drivdahl's limitations were too severe for him to return to gainful employment. Drivdahl's testimony, corroborated by Joel, likewise indicates that he is physically able to engage in physical activity for, at the very most, 45

⁴⁷ *EBI/Orion Group v. Blythe*, 1998 MT 90, ¶¶ 12-13, 288 Mont. 356, 957 P.2d 1134.

minutes at a time. Given this limitation, I cannot find that Drivdahl would be able to perform any of the positions which Dr. DiGiovine approved. I note that Lyytinen-Hale's opinion regarding Drivdahl's employability is based upon Dr. DiGiovine's approval of the job analyses. With no insight into why Dr. DiGiovine was of a different opinion than the other experts in this case, I cannot give his opinion as much weight.

¶ 34 Reviewing the evidence in its entirety, I conclude that the preponderance of the evidence weighs in Drivdahl's favor and he has met his burden of proof. He is therefore entitled to the PTD benefits he seeks.

Issue Two: Whether Drivdahl is entitled to his costs

¶ 35 Since Drivdahl is the prevailing party, he is entitled to his costs.⁴⁸

JUDGMENT

¶ 36 Petitioner is entitled to permanent total disability benefits.

¶ 37 Petitioner is entitled to his costs.

¶ 38 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 16th day of November, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Bernard J. Everett
Todd A. Hammer
Submitted: August 31, 2012

⁴⁸ § 39-71-611, MCA.