IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 13

WCC No. 9403-7012

GEORGE FRISBIE

Petitioner

vs.

CHAMPION INTERNATIONAL CORPORATION

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Fifty-two-year-old mill worker sought permanent total disability benefits following back injury. In part, he claimed that his work injury exacerbated his drinking problem, but his primary contention was that disabling pain prevented him from all employment.

Held: Where claimant was not a credible witness, repeatedly underestimating his drinking problem, showing poor memory, and inconsistent testimony, the Court did not believe that his back pain disabled him from all employment, but rather found him lacking in motivation. Based on the testimony of two doctors that claimant was stable and should be able to work if he stopped drinking, and that of a vocational consultant who identified several typical available jobs within claimant's physical restrictions, claimant was not permanently totally disabled. The Court did believe that claimant's drinking exacerbated his perception of his pain, but did not find that the injury caused or aggravated his alcohol abuse.

Topics:

Benefits: Permanent Total Disability Benefits: Generally. Where claimant was not a credible witness, repeatedly underestimating his drinking problem, showing poor memory, and inconsistent testimony, the Court did not believe that his back pain disabled him from all employment, but rather found him lacking in motivation. Based on the testimony of two doctors that claimant was stable and should be able to work if he stopped drinking, and that of a vocational consultant who identified several typical available jobs within claimant's physical restrictions, claimant was not permanently totally disabled.

Benefits: Permanent Total Disability Benefits: Pain as Disabling. Where claimant was not a credible witness, repeatedly underestimating his drinking problem, showing poor memory, and inconsistent testimony, the Court did not believe that his back pain disabled him from all employment, but rather found him lacking in motivation.

Pain. Where claimant was not a credible witness, repeatedly underestimating his drinking problem, showing poor memory, and inconsistent testimony, the Court did not believe that his back pain disabled him from all employment, but rather found him lacking in motivation.

Witnesses: Credibility. Where claimant was not a credible witness, repeatedly underestimating his drinking problem, showing poor memory, and inconsistent testimony, the Court did not believe that his back pain disabled him from all employment, but rather found him lacking in motivation.

Physicians: Conflicting Evidence. Though treating physician believed claimant's pain was disabling and that his injury may have exacerbated his drinking problem, the Court found more convincing the testimony of two other physicians who believed claimant was capable of working, one noting non-organic pain behavior. This was based on the greater expertise of the latter two doctors and on the Court's observation of one of the doctor's testimony. A treating physician's opinion is not conclusively presumed to be correct; if it were, the factual inquiry conducted by the Court would be superfluous.

Proof: Conflicting Evidence: Medical. Though treating physician believed claimant's pain was disabling and that his injury may have exacerbated his drinking problem, the Court found more convincing the testimony of two other physicians who believed claimant was capable of working, one noting non-organic pain behavior. This was based on the greater expertise of the latter two doctors and on the Court's observation of one of the doctor's testimony. A treating physician's opinion is not conclusively presumed to be correct; if it were, the factual inquiry conducted by the Court would be superfluous.

Physicians: Treating Physician: Weight of Opinion. Though treating physician believed claimant's pain was disabling and that his injury may have exacerbated his drinking problem, the Court found more convincing the testimony of two other physicians who believed claimant was capable of working, one noting non-organic pain behavior. This was based on the greater expertise of the latter two doctors and on the Court's observation of one of the doctor's testimony. A treating physician's opinion is not conclusively presumed to be correct; if it were, the factual inquiry conducted by the Court would be superfluous.

Medical Conditions: Alcoholism. Where claimant's medical records are replete with reference to pre-injury alcohol abuse, and a physician credibly testified that claimant's pattern of drinking was the same before and after his work injury, claimant's alcohol abuse was neither caused nor aggravated by his back injury. While the Court did believe claimant's use of alcohol worsened his experience of pain, this was not the responsibility of the insurer where the injury did not cause or worsen claimant's alcohol abuse.

The trial in this matter was held on July 12, 1994, in Missoula, Montana. Petitioner, George Frisbie (claimant), was present and represented by Mr. Steve Fletcher. Respondent, Champion International Corporation (Champion), was represented by Mr. Bradley J. Luck. Claimant, Michael Lahey, M.D., James Wemple, Ph.D., Jerry E. Davis, and Margot Luckman-Hart testified. Additionally, the depositions of Aaron W. Sable, M.D., Jerry Davis, George Frisbie, and Donald Nevin, M.D. were submitted for the Court's consideration. Exhibits 1 and 3 through 24, were admitted by stipulation. Exhibit 2 was withdrawn. Exhibit 25 was objected to by Mr. Luck and admitted for limited purposes.

Issues Presented: Claimant asks the Court to determine that he is permanently totally disabled. The insurer argues that claimant is permanently partially disabled.

Having considered the PRETRIAL ORDER, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was fifty-two years old. He is a high school graduate and attended one year of college. (Ex. 15.)

2. Claimant worked at Champion for at least twenty (20) years prior to an industrial accident which occurred on September 22, 1992. He worked for a period of time as a wagoner driver, but primarily he was a debarker operator. Before going to work for Champion he was employed by the Anaconda Company for approximately ten years, working in the box factory. He operated a saw and made small wood products. (Frisbie Dep. at 19-21.)

3. On September 22, 1992, claimant hurt his low back while attempting to move a jammed log with a Pevee and the "chain" started up. (*Id.* at 30.) He finished his shift, but the next day he experienced pain in his lower back and down his legs and was unable to urinate. He was hospitalized the following day. (*Id.* at 30-31.)

4. At the time of the accident Champion was self-insured. It accepted liability and has been paying claimant temporary total disability benefits.

5. The claimant contends that he has now reached maximum healing and is permanently totally disabled. Champion agrees that he is at maximum healing but contends that he is only permanently partially disabled on account of his injury.

Preinjury Medical Problems

6. Claimant suffers from a number of physical conditions that preexist his industrial injury. As reported by the claimant, those conditions include hypertension, heart problems, cirrhosis of the liver, fainting/blackout spells and alcoholism. (*Id*. at 10-12.) He also suffers from a seizure disorder which he believes was caused or aggravated by his industrial injury. *(Id*. at 14-15.) This contention has apparently been abandoned. It is not argued in the CLAIMANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT, and in any event is not supported by medical evidence.

7. In September of 1976, the claimant was hospitalized for twenty days for low-back pain . (Ex. 6, A48-80.) Medical records indicate that in 1987 he reported pain radiating into both legs and into his groin following an incident while cutting wood. He received chiropractic care for this incident. (*Id.* at I2-18; Tr. at 26.) In 1992 he fell at work, breaking some ribs. (Tr. at 26-27.) Despite the medical records verifying these incidents, the claimant testified at his deposition and again at trial that he had no back problems prior to his injury.

8. In the months immediately preceding his industrial accident, claimant missed work on a number of occasions. He missed work due to episodes of light-headedness, dizziness, blackouts and falling. (Ex. 6 at B7-10; L1-4; O1-3.) He was hospitalized in June 1992 for blackouts, kidney and liver problems. (Nevin Dep. at 13-14.) Notwithstanding this history, claimant initially testified at trial that he had not missed work because of physical problems and that he could not remember being off work in the weeks prior to the industrial injury. (Tr. at 31, 34.)

Injury and Treatment

9. On September 23, 1992, the day after the industrial injury, the claimant was admitted to St. Patrick Hospital with complaints of low-back pain radiating down both legs and an inability to urinate. (Ex. 6 at A163.) A CT scan done at this time revealed "[a]t L4-5, the patient has central bulge/herniation of the disc." (*Id.* A173.)

10. Dr. David Nevin, a family practitioner (Ex. 6 at B37), was claimant's treating physician during the September hospitalization. At Dr. Nevin's request, Dr. D.L. Woolley

provided a consultation concerning claimant's back condition. Dr. Woolley concluded that claimant's "chances for success with surgery are extremely questionable." (Ex. 6 at A167.) Dr. Woolley recommended that all other conservative modalities be tried. (*Id.*)

11. Claimant was discharged from St. Patrick Hospital on October 1, 1992. The DISCHARGE SUMMARY reflects diagnoses of acute back sprain-strain with disc herniation, chronic alcoholism, and hypertension.

12. Dr. Nevin has treated claimant since 1987 for a host of ailments, including hypertension, alcoholism, cirrhosis, fainting episodes, high blood pressure, seizures and injuries caused by falls. He continues to be claimant's treating physician.

13. The claimant has reached maximum medical improvement. (Ex. 6 at B25.)

Alcoholism

14. Dr. Nevin's records are replete with references to claimant's preinjury alcohol abuse. These records make note of claimant's drinking as early as January 1989, at least three years prior to the injury. (Ex. 6 at B1.) The claimant had two DUI's before the injury, resulting in his placement in alcoholism programs. (Frisbie Dep. at 27-28.) Dr. Nevin noted upon claimant's discharge from the hospital:

> During the admission I offered the patient the option of a referral to the Alcohol Treatment Center for treatment. I had done this in the past and once again attempted to convince the patient that he needed this therapy for his alcoholism. He refused, saying that he could control this on his own.

(Ex. 6 at A234.)

15. Claimant argues that his drinking increased after his injury. He attributed his increased drinking to his pain. Dr. Nevin "wondered" about that possibility:

> Although, I **wondered** at some times if George might have been drinking to relieve some of the back pain that he had after the injury, [he] may have actually increased his alcohol consumption as a way of trying to deal with the pain. And we talked about that a couple of occasions. [Emphasis added.]

(Nevin Dep. at 26.)

16. James Wemple, Ph.D, a clinical mental health counselor, testified at trial. Dr. Wemple first saw the claimant in December of 1992 for "an evaluation to determine his level of emotional functioning and the relationship to pain he was feeling and the need for treatment . . . ." (Tr. at 151.) Dr. Wemple treated claimant between December 1992 and March 1993.

17. Dr. Wemple testified that claimant had a significant preexisting alcohol condition and that his alcohol abuse was not worsened by the injury:

> Q. Based on your examination and treatment, is any disability that Mr. Frisbie has presently, attributable to alcoholism, any greater now as a result of his industrial injury?
>
> A. I don't believe so, no. . . . I basically see a pattern with George prior to and after the injury that seemed the same.

(*Id.* at 178-179.)

18. Dr. Michael Lahey, who examined claimant on two occasions, also concluded that claimant's alcoholism was neither caused nor aggravated by the industrial injury. (*Id.* at 80.)

19. Dr. Aaron Sable, who examined the claimant in March of 1993 and April of 1994, testified that in his opinion claimant was a chronic alcoholic prior to his injury. (*Id.* at 33.)

20. Until and unless claimant quits drinking, it is unlikely that he will return to work. (Tr. at 99, 183, 187.)

21. The claimant has a chronic and long-standing alcohol problem that existed prior to his injury. After considering all of the evidence in this case, including claimant's testimony, the Court finds that claimant's alcoholism was neither caused nor aggravated by his injury. Claimant was clearly on a downhill slide prior to his accident and was drinking heavily. His testimony that after the injury his drinking increased as a form of self-medication was not credible. Any disability attributable to alcoholism is not related to the industrial injury.

Pain

22. Claimant is suffering from "a lumbosacral strain with underlying disc bulge at L4-5 which may represent discogenic injury." (Ex. 6 at C6.) He contends that his back pain is permanently totally disabling.

23. Dr. Nevin has seen and treated claimant numerous times since the injury. His office notes indicate that the claimant consistently reports that he is experiencing back pain. Claimant uses a TENS unit and has taken various pain medications prescribed by Dr. Nevin. Dr. Nevin's records indicate that claimant has fallen on several occasions since his industrial injury, bruising or otherwise hurting his back. (Ex. 6 at B10-B29.)

24. Dr. Nevin testified by deposition. In his opinion the claimant is totally disabled and unemployable as a result of his chronic low-back pain. He testified, "I don't think that he is capable of that based on his back condition alone." (Nevin Dep. at 22.)

25. Dr. Aaron Sable is a specialist in physical medicine and rehabilitation. Part of his specialty is the treatment of chronic back disorders. (Sable Dep. at 6.) He first examined claimant in March of 1993. At that time he reported that the claimant's primary impairment was chronic alcoholism which was not work-related. (*Id.* at 16.) Dr. Sable concluded that claimant's back condition was "medically stable" and approved a number of job analyses for jobs he believed the claimant could perform if he were sober. (*Id*.)

26. The claimant was again seen by Dr. Sable on April 13, 1994, in connection with a medical panel examination. The panel consisted of Drs. Sable, Lahey and Wemple. At that time Dr. Sable reaffirmed his opinion that claimant's back condition was medically stable. (*Id.* at 21-22.) Dr. Sable felt that the claimant had a low tolerance for pain. (*Id.* at 35, 38.)

27. In Dr. Sable's opinion, the claimant is physically capable of working despite his back pain and is not totally disabled:

> Q: Now, Dr. Nevin has indicated that he believes that George is totally disabled as a result of this back pain. Do you agree with that conclusion?
>
> A: No.
>
> Q: Okay. Why not?
>
> A: Because I believe he could work in a light duty or sedentary capacity due to his back condition.

> Q: Okay. And why is that?
>
> A: Because he should not have any anatomic abnormality that would cause him greater problems if he worked in that capacity [light duty or sedentary].

(Id. at 47.)

28. Dr. Lahey, an orthopedic surgeon who specializes in spinal problems, examined the claimant on January 6, 1993. At that time he reported his impression as "[l]ow back pain, acute, becoming chronic." (Ex. 6 at C2.) Dr. Lahey examined claimant again in April of 1994. The claimant's complaints were generally the same but of greater magnitude. Dr. Lahey performed a series of tests which strongly indicated that claimant's pain was non-organic in origin:

> A. Those tests are uniformly used by spinal practitioners to simulate, distract or bring out pain behaviors that are not based upon known painful stimuli to either nerves or the spinal column, and if those tests are positive, then that is an indication that the patient perceives these to be painful tests and, because of that, they are painful - - reported as painful and are suggestive of nonorganic painful behaviors that the patient truly believes are painful, but, in fact, with regard to spinal pathology have no known correlation with a specific painful structure.
>
> Q. In layman's terms, they report pain on movements or touching that shouldn't generate pain.
>
> A. That's correct.

(Tr. at 88-89.) During the April examination, all five of the specific tests for non-organic pain behavior were positive. During the 1993 examination, only three of the five had been positive. (*Id.* at 88.)

29. On behalf of the three panel members who examined claimant in April 1994, Dr. Lahey reported:

> There is nothing in his condition at this time that would indicate that he has had any progression or recurrence of his symptoms related to his industrial injury. He continues with back pain which is felt to be stationary. Permanent partial impairment rating for a discogenic injury, nonoperated with medically

> documentable pathology, is in the neighborhood of five to seven percent (5% to 7%).

(Ex. 6 at C6.) The report noted that claimant suffers from a number of medical conditions, including seizure disorder, alcoholism, and hypertension, but concluded that none of those conditions is attributable to the industrial injury. The panel members further concluded that incidents of claimant falling down were probably due to alcoholism or seizures, and that the falls "may precipitate episodes of back pain which are unrelated to the industrial injury." (Ex. 6 at C6.) The panel noted that, generally, patients with lumbosacral strain and discogenic-type pain are able to work within a light to sedentary capacity and specifically determined that "Mr. Frisbie is capable of doing so within the context of his industrial injury." (*Id.*) Finally, the report cautioned that other medical conditions, especially alcoholism and seizures, may nonetheless preclude claimant from returning to work.

30. At trial Dr. Lahey concurred in Dr. Sable's job approvals for claimant. (Tr. at 98-99.) He also agreed that claimant must be sober to work and recommended an increase in the claimant's activity level. (*Id.*)

31. While Dr. Nevin is claimant's regular treating physician, the Court nonetheless gives greater weight to the opinions of Drs. Sable and Lahey. Both doctors specialize in the treatment of low-back conditions, whereas Dr. Nevin is a family practitioner. The Court notes that when claimant was hospitalized in September 1992, Dr. Nevin asked for a consultation concerning claimant's back condition. I also had the opportunity of personally hearing Dr. Lahey's testimony. I found his testimony credible and persuasive.

32. I am also persuaded that claimant's pain is magnified by his alcoholism and his lack of motivation. Dr. Wemple testified at trial:

> A. I think George had determined he no larger [sic] was going to work. He expressed it to me, he didn't see that in his future. He --
>
> Q. Was that caused by his industrial injury at Champion International?
>
> A. I don't believe so, no.

(Id. at 185.)

33. Dr. Wemple has released claimant to return to work from a psychological standpoint. (Tr. at 177.) He agreed with Drs. Lahey and Sable that claimant should be sober when working. (*Id*. at 183.)

Vocational

34. At the behest of the claimant, Jerry Davis (Davis), a vocational consultant, did an assessment of the claimant's employability. His assessment did not include an analysis of light-duty positions but rather focused on heavier jobs which claimant was capable of performing prior to his injury. (Davis Dep. at 31.) Along with his personal observation of the claimant, Davis relied on the opinion of Dr. Nevin in concluding that the claimant was non-employable. (*Id.* at 21; Tr. at 194.)

35. During his deposition, Davis agreed that some of the jobs identified by Margot Hart-Luckman were vocationally appropriate for the claimant. (Davis Dep. at 37.) Davis further agreed that a work restriction requiring sobriety was as appropriate before the injury as it was following the injury. (Tr. at 208.)

36. Margot Hart-Luckman was Champion's vocational consultant. She identified a number of jobs which are typically available and which are within claimant's physical restrictions. As previously mentioned in these findings, Dr. Sable medically approved several of those jobs (Exs. 7-14) and Dr. Lahey concurred in those approvals.

37. I found Ms. Hart-Luckman's analysis more persuasive than that of Mr. Davis.

Credibility of Claimant

38. The claimant was not a credible witness. He repeatedly understated his drinking problem. His testimony was inconsistent. His memory was poor.

CONCLUSIONS OF LAW

1. The claimant has the burden of proving that he is entitled to workers' compensation benefits, ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 512 P.2d 1304 (1973),* and he must prove his entitlement by a preponderance of the probative, credible evidence. ***Dumont v. Wicken Bros. Construction Co.****, 183 Mont. 190, 598 P.2d 1099 (1979).* That burden extends to proof that the injury was the proximate cause of his disabling condition. ***Eastman v. Transport Ins.,*** *255 Mont. 262, 843 P.2d 300 (1992).* The claimant has not carried his burden.

2. The law in effect at the time of the claimant's injury applies in determining his entitlement to benefits. ***Buckman v. Montana Deaconess Hospital,*** 224 Mont. 318, 321, 730 P.2d 380 (1986). Since the injury occurred in 1992, the 1991 version of the Workers' Compensation Act applies in this case.

3. Section 39-71-116(16), MCA (1991), defines permanent total disability as "a condition *resulting from injury as defined in this chapter*, after a worker reaches maximum healing, in which a worker has no reasonable prospect of physically performing regular employment." (Italics added.) The claimant has failed to prove that he is permanently totally disabled on account of his September 22, 1992 injury.

The claimant testified that he is unable to work due to disabling pain. In support of this contention he offered the medical records and deposition of his regular treating physician, Dr. Nevin. Dr. Nevin's opinion, however, was contradicted by the opinions of Dr. Sable and Dr. Lahey, who testified that claimant's back condition does not prevent him from working. I have resolved the conflicting medical testimony in favor of Drs. Sable and Lahey. I have done so based on the greater expertise of those two doctors and my personal observation of Dr. Lahey's testimony. As discussed in ***Kloepfer v. Lumbermen's Mutual Casualty Co.,*** WCC No. 9305-6796, decided January 18, 1994, "a treating physician's opinion is not conclusively presumed to be correct, if it were, the factual inquiry conducted by the Court would be superfluous."

I also did not find credible claimant's assertion that he cannot work. He indicated to Dr. Wemple that he wasn't going to work and I have found that he is lacking motivation. His pain behavior has been amplified and may be consciously or subconsciously aimed at gaining disability status.

The vocational testimony in this case established that claimant is capable of performing a number of jobs which are typically available. Drs. Sable and Lahey medically approved several of those jobs.

Claimant's ability to work is clearly affected by his alcoholism. Drs. Lahey, Sable and Wemple all agreed that sobriety should be a condition of claimant's employment. However, they would have imposed that condition even before the accident. Claimant failed to show that his alcoholism was either caused or aggravated by his injury. His alcohol abuse was both chronic and severe before the injury.

4. Since claimant has not prevailed he is not entitled to costs.

JUDGMENT

1. The claimant is not permanently totally disabled and is not entitled to permanent total disability benefits.

2. The JUDGMENT in this case is certified as final for purposes of appeal pursuant to ARM 24.5.348.

3. 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 10th day of February, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Steve Fletcher
Mr. Bradley J. Luck