

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 6

WCC No. 9507-7349

DONALD BONAN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

IKE & SUSAN'S LOUNGE & CASINO

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: A 44-year old bartender claimed a cut to his finger at work gave rise to a potentially life-threatening necrotizing fasciitis, for which he was hospitalized for almost a month.

Held: WCC was not persuaded claimant cut his finger at work. Emergency room record indicates infection followed crack in thumb after claimant pulled a hangnail. Bar manager testified claimant had called her after hospitalization asking her to consider the injury as a workers' compensation injury because he did not have other insurance, conceding during that conversation that he had not been injured at work.

Topics:

Injury and Accident: Accident. WCC denied claim of 44-year old bartended relating to necrotizing fasciitis, a potentially life-threatening infection, which claimant alleged arose after he cut his thumb at work. Emergency room record indicates infection followed crack in thumb after claimant pulled a hangnail. Bar manager testified claimant had called her after hospitalization asking her to consider the injury as a workers' compensation injury because he did not have other insurance, conceding during that conversation that he had not been injured at work.

The trial in this matter came on October 10, 1995, in Great Falls, Montana. Petitioner, Donald Bonan (claimant), was present and represented by Mr. Richard J. Martin. Respondent, State Compensation Insurance Fund, was represented by Mr. Daniel J. Whyte.

Exhibits 1, 2, 4 through 7, 10, 19 and 21 were admitted without objection. Exhibits 9 and 16 through 18 were admitted over the claimant's objection. Exhibits 3, 8, 20, 22 and 23 were refused. Exhibits 11 through 15 were withdrawn. The claimant, Gail Honkomp, Dr. Raymond A. Geyer, Katherine Kyle, Carlene Torick and Lila Stortz were sworn and testified. The parties agreed the depositions of claimant and Katherine Kyle may be considered by the Court.

Issues presented: The claimant seeks a determination that he suffered a compensable injury to his right thumb while in the course and scope of his employment; that he gave timely notice of the injury to the employer; and that he is entitled to compensation and medical benefits. The State Fund denies that the accident occurred. It further denies that he reported any accident to his employer within the 30 days provided under section 39-71-603, MCA.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition of claimant and exhibits, and the parties' arguments, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 44 years old. He has a high school education, attended a trade school for carpentry, and is a certified nurses aide. He has worked as a bartender, general laborer, construction worker, and nurses aide.
2. On February 19, 1994, claimant began working as a bartender for Ike & Susan's Lounge & Casino. He was required to prepare drinks, serve customers, wait on casino patrons, perform cleaning duties, and make payouts to casino customers.
3. In the early morning hours of April 11, 1994, claimant went to the emergency room of Columbus Hospital in Great Falls, Montana, for treatment of severe swelling and pain in his right hand and forearm. He was examined by Dr. W.L. Gorsuch, who diagnosed a massive infection of the right hand and forearm. Dr. Gorsuch took a history concerning the onset of claimant's painful condition. That history was as follows:

He [claimant] describes having a **crack on the tip of his right distal thumb approximately a week ago after pulling a hangnail**. This crack was painful and he describes having an infection in it. He kept it covered with a rubber glove. He noted that it improved some. However, approximately 48 hours ago on 4/9/94 he noted increasing pain in the forearm and hand with swelling. He stated that he worked all day as a bartender until approximately 3 o'clock in the morning on Sunday morning. Apparently last evening 4/10/94 he reports falling dancing and hurting his wrist. During the night the pain worsened and he finally came to the Emergency Room and noted severe pain. By this time there was such swelling of the hand and forearm that

he could not move the fingers and he had blebs raised. He was noted to have fever and shaking chills. (Ex. 4 at 4; emphasis added.)

4. Claimant's condition was diagnosed as necrotizing fasciitis (Ex. 4 at 6), popularly referred to as "flesh eating bacteria." Necrotizing fasciitis is an explosive infection. Unless aggressive treatment, consisting of debridement of dead flesh and massive doses of antibiotics, is initiated immediately, it is life threatening. (Ex. 6 at 5.)

5. Claimant was hospitalized immediately and aggressively treated. During an almost month long hospitalization, claimant required several surgeries, as follows:

1. April 11, 1994: right hand and forearm decompressive fasciotomy of ulnar and median nerves, excision of fascia, and open packing.
2. April 12, 1994: right hand and forearm re-debridement, irrigation of all flexor tendon sheaths and open packing.
3. April 13, 1994: right upper arm fasciotomy, radical debridement of skin and fascia of hand and forearm and open packing.
4. April 14, 1994: right arm and forearm re-debridement and partial closure.
5. April 18, 1994: right arm and forearm re-debridement, closure of upper arm, and open packing of lower forearm and hand.
6. April 20, 1994: right arm split thickness skin grafting of forearm, palm and dorsum of hand with donor site left thigh (approximately 500 cm²).

(Ex. 4 at 106-107.) Additionally, the claimant was treated with multiple antibiotics. He was discharged on May 6, 1994. (*Id.* at 108.)

6. The bacteria causing necrotizing fasciitis enters the body through a cut or abrasion; it is unable to enter through intact skin. After breaching the skin, the bacteria then multiplies, producing toxins. Cells exposed to the toxins die; the bacteria do not "eat" flesh as the popular name of the infection implies.

7. Dr. Raymond A. Geyer, an osteopathic physician who is board certified in internal medicine, board eligible in infectious disease, and specializes in infectious diseases, testified that necrotizing fasciitis is extremely rare; in fact, only two cases were reported in North Central Montana in 1994.

8. In the claimant's case, the infecting bacteria was group A Streptococcus or Streptococcus Pyogenes (Strep A), the same bacteria which causes strep throat. (Ex. 5 at 4.)

9. Symptoms of necrotizing fasciitis appear within four to six hours after exposure to the bacteria. The initial symptoms include pain, swelling, redness, and pus.

10. The claimant testified that he cut his thumb at work on April 5, 1994, on a knife that had just been sharpened by a bar customer. The knife belonged to the bar and was used to cut lemons and limes. According to claimant, after the knife was sharpened, he held it in his right hand, blade side up, and ran his right thumb over the edge. He testified that he did not immediately realize he had cut himself, rather, a bar patron told him that his thumb was bleeding. He described the cut as parallel to the right side of the right thumb nail and slightly to the side. He demonstrated the cut to the Court, showing the cut as essentially extending outward from the edge of the nail on the median side of the thumb. He felt it was a minor injury and said that he wrapped the thumb in a paper towel for the remainder of his shift. He testified that the thumb continued to hurt and that over the course of the next week he applied Neosporin to the cut and kept his thumb covered with rubber finger cots.

11. On April 9, 1994, claimant worked from 10:00 a.m. to 6:00 p.m. He went out dancing later in the evening and apparently fell on the dance floor, injuring his wrist. The claimant testified that he is a recovering alcoholic but fell off the wagon on April 5, 1994, the same day as he allegedly cut himself. He was drinking on the evening of April 9-10, and his memory of that evening is vague. He did not recall falling down but was told that he had done so.

12. Claimant testified that when he arose on the morning of April 10, 1994, his right arm was swollen from the forearm to his fingers. Thinking his arm was broken, he wore a sling throughout the day. Claimant went to work with his sling and worked a normal shift, closing the bar at 2:00 a.m., April 11th. He counted his tip money, had a drink, and then went home. The pain in his right arm increased until he finally went to the hospital emergency room at 5:00 a.m.

13. The claimant contends that the streptococcus bacteria which caused his infection entered through the cut on his thumb and that the necrotizing fasciitis was therefore caused by an industrial accident.

14. Assuming the claimant cut his thumb on April 5th as he claims, Dr. Geyer testified that he did not contract the infection at that time. On the other hand, it was his opinion that the location of the infection was consistent with infection entering a cut on his thumb at a later time. Dr. Geyer testified in person and I found his opinions persuasive.

15. Claimant's testimony concerning the work-related cause of the cut on his thumb was not credible, and I find that he did not cut himself at work as he claims. My finding in this regard is based not only upon my observation of his testimony and demeanor at trial, but also upon the following findings:

- a. The emergency room and hospital records do not mention any report of a cut occurring at work.

b. The emergency room record for April 11th reflects, "1 week ago dev. [developed] crack with infection R [right] distal thumb after **pulling a hang nail** [sic]. Improved some. 48 hours ago (SAT) noted increase severe R [right] forearm & hand pain with swelling" ⁽¹⁾ (Ex. 4 at 1.)

c. Dr. Gorsuch reported, "He describes having a crack on the tip of his right distal thumb approximately a week ago after pulling a hangnail. This crack was painful and he describes having an infection in it." (Ex. 4 at 4.)

d. Dr. Geyer's first report states, "History is that 1 week ago there was a slit in the skin of the right distal thumb adjacent to the nail." (Ex. 4 at 8.) Dr. Geyer testified at trial that he noted the cut on claimant's thumb and had a vague recollection that at some point of time the claimant told him he cut it at work. However, his medical notes do not mention any incident at work and he had no specific recollection of when claimant may have told him about it.

e. Claimant was seen by Dr. Jake J. Allen on April 14, 1994. Dr. Allen's report states that claimant "was admitted on the 11th of April 1994 after having a crack in the tip of the right distal thumb approximately one week after pulling a hangnail" (Ex. 4 at 35.)

f. Claimant received physical therapy while at Columbus hospital. In the progress record for April 14, 1994, the therapist notes "necrotizing fasciitis . . . due to cut in thumb obtained from a nail approx. 1 WK ago." (Ex. 4 at 121.)

g. Claimant was seen by Dr. M.K. Cannon on May 5, 1994. Dr. Cannon reported, "[A]dmittted April 11 after having a crack into his right distal thumb after pulling a hang nail [sic]." (Ex. 4 at 100.)

h. While the Court recognizes that some of the later descriptions found in the medical records could be based on chart review by the individuals making the notes, the first entries are very specific concerning the cause of the cut and contradict claimant's present story.

i. Claimant testified that he did not know what a hangnail is. I did not believe that testimony.

j. Claimant testified that he vaguely remembers calling Katherine Kyle, the manager of Ike & Susan's, from the hospital to inform her of the injury to his thumb. The call was made on April 19, 1994, the same day as the hospital's counselor met with claimant to determine how he was going to pay for his hospitalization. Kyle confirmed that claimant did in fact call her on that day but testified that claimant asked her to consider the injury as a workers' compensation claim because he had no insurance and was worried about his medical bills. She testified that during the

conversation the claimant conceded that he was not in fact injured at work. Her testimony was credible and I adopt her version of the conversation.

k. While it is possible for claimant to have cut his thumb in the manner he claims, it is implausible that he did so. He would have had to have bent his thumb essentially upside down and then run it along the edge of the knife in that inverted position to have cut himself in the location he identified.

16. I am persuaded that at the time of his admission to the hospital, claimant in fact told medical personnel he cut his thumb pulling out a hangnail, and that in fact, is what occurred.

CONCLUSIONS OF LAW

1. A workers' compensation insurer is liable only for injuries "arising out of and in the course of employment." § 39-71-407(1), MCA.

2. The 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, 484, 512 P.2d 1304, 1309 (1973). He must therefore establish that his condition arose from an injury which he suffered in the course of his employment.

3. Claimant has failed to carry his burden. While I am persuaded that the bacteria causing necrotizing fasciitis entered claimant's body through a cut near his right thumb, I am not persuaded that the cut occurred at work. To the contrary, I am persuaded that the cut was the result of claimant's pulling a hangnail.

4. Since claimant has failed to persuade the Court that he suffered a work-related injury, he is not entitled to compensation or medical benefits.

5. In light of the foregoing, it is unnecessary to address the notice issue.

JUDGMENT

1. Claimant is not entitled to compensation or medical benefits, or to any other relief.

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

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

Dated in Helena, Montana, this 12th day of January, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Richard J. Martin

Mr. Daniel J. Whyte

Submitted: October 24, 1995.

1. Original contains medical abbreviations for the words "with" and "after."