IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 3

WCC No. 2003-0912

DAVID EARL BERGUM

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was seriously injured in a motorcycle accident while on an errand to retrieve burn cream for a fellow employee. The insurer denied his claim for compensation.

Held: The claimant's errand was not authorized by the employer and does not meet the statutory criteria for covered travel. § 39-71-407(3), MCA (2003). Therefore, he is not entitled to benefits.

Topics:

Employment: Course and Scope: Travel. A round-trip of three miles on a motorcycle constitutes travel within the meaning of section 39-71-407(3), MCA (2003). Carrillo v. Liberty Northwest Ins., 278 Mont. 1, 922 P.2d, 1189 (1996) distinguished.

Cases Discussed: Carrillo v. Liberty Northwest Ins., 278 Mont. 1, 922 P.2d, 1189 (1996). Carrillo involved a short walk during an authorized coffee break. It's holding that the walk was not travel within the meaning of section 39-71-407(3), MCA, has no application to a three mile motorcycle trip which did not occur on a coffee break.

Employment: Course and Scope: Travel. A round-trip of three miles on a motorcycle is not covered under the Workers' Compensation Act where the transportation was not furnished by the employer, the employee was not compensated for the travel, and the travel was not authorized by the employer. § 39-71-407(3)(a), MCA (2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-407(3)(a), MCA (2003). A round-trip of three miles on a motorcycle is not covered under the Workers' Compensation Act where the transportation was not furnished by the employer, the employee was not compensated for the travel, and the travel was not authorized by the employer. § 39-71-407(3)(a), MCA (2003).

Employment: Course and Scope: Travel. An injury suffered during travel which is not authorized by the employer is not compensable. § 39-71-407(3)(a), MCA (2003).

¶1 The trial in this matter was held in Bozeman, Montana, on December 8, 2003. Petitioner, David Earl Bergum, was present and represented by Mr. Christopher R. Angel. Respondent, Montana State Fund, was represented by Mr. Kelly M. Wills and Mr. Randall J. Colbert.

¶2 Exhibits: Exhibits 1, 3, 4, and 6 through 13 were admitted without objection. Exhibits 2 and 5 were admitted over objection.

¶3 Witnesses and Depositions: David Bergum, Christine Cox, Matt Dorzok, Justin Craig, James Loeffelholz, M.D., Suzanne Walker, Mike Hayter, and Roxy Walker testified at trial. In addition the depositions of David Bergum, Justin Craig, Matt Dorzok, Roxy Walker, and Suzanne Walker were submitted for the Court's consideration.

¶4 Issues Presented: The sole issue presented for decision is whether the claimant was in the course and scope of his employment when injured in a motorcycle accident on July 27, 2003, thus entitling him to benefits under the Montana Workers' Compensation Act.

¶5 Having considered the Final Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Santa Fe Red's is a restaurant in Bozeman, Montana. At the time relevant to the present claim, it was insured by the Montana State Fund.

¶7 On Saturday, July 26, 2003, Justin Craig (Justin), a cook for Santa Fe Red's, burned his left forearm while working on his motorcycle. The accident occurred at home and was unrelated to his work for Santa Fe Red's.

¶8 The burn was approximately two inches long and about three-quarters of an inch wide. There is some dispute as to how bad the burn was, however, I am persuaded there was no break in the skin and there was no fluid filled blister. It was probably a first degree burn but could have been a second degree burn.

¶9 After burning his arm, Justin went to work. He showed the burn to Suzanne Walker, who was his immediate supervisor. Together they checked the medicine kit in the kitchen and

found no burn cream in the kit. Aloe Vera was available and with Suzanne's help Justin put that on his burn and put a bandage over it. Justin then worked his full shift for that day.

¶10 On Sunday, July 27, 2003, Justin went to work at 10:00 a.m. Suzanne was again his immediate supervisor.

¶11 According to Justin, his burn was bothering him and he bandaged it with gauze. Suzanne did not recall seeing his arm bandaged that day.

¶12 Claimant, who also worked for Santa Fe Red's as a line cook, arrived at work at approximately 12:00 noon on July 27th. Shortly thereafter he noticed Justin's burn. He suggested to Justin that he use a burn cream he, the claimant, had at home. The burn cream was a prescription cream that the claimant had obtained from the emergency room of the hospital after he had burned his hand a few weeks previous. Claimant offered to go home and retrieve the burn cream.

¶13 Claimant left the workplace and traveled to his home, a mile and a half away, on his own motorcycle. He retrieved the burn cream, and then started back to work on his motorcycle. On his way back to work he was involved in an accident with a car and sustained serious injuries.

¶14 Claimant testified that he sought and obtained Suzanne's permission to go home and retrieve the burn cream. Suzanne denied that he did so. I found Suzanne's testimony the more credible and therefore find that claimant did not obtain her permission to leave work to obtain the burn cream and was absent from work without permission.

¶15 Claimant also offered evidence in an attempt to prove that his errand benefitted the employer even if it was not approved by the employer. The evidence was unpersuasive. The burn cream which the claimant retrieved was a prescription drug prescribed for claimant; it should not have been transferred to Justin. Moreover, proper use of the cream may well have violated health codes governing cooks at restaurants.

CONCLUSIONS OF LAW

¶16 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶17 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. Ricks v. Teslow Consolidated, 162 Mont. 469, 512 P.2d 1304 (1973); Dumont v. Wicken Bros. Construction Co., 183 Mont. 190, 598 P.2d 1099 (1979).

¶18 Section 39-71-407(3)(a), MCA (2003), governs travel-related accidents. The subsection provides:

(3) (a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(ii) the travel is required by the employer as part of the employee's job duties.

Subsection (3)(a)(i) is inapplicable to this case since the employer did not provide the transportation or reimburse claimant for his travel. Subsection (3)(a)(ii) is also inapplicable since the travel was not required by his employer, indeed his supervisor did not authorize the trip and was unaware claimant had left work.

¶19 Claimant cites three cases as supporting his claim. The cases are Carrillo v. Liberty Northwest Ins., 278 Mont. 1, 922 P.2d. 1189 (1996); Strickland v. State Compensation Mutual Ins. Fund, 273 Mont. 254, 901 P.2d 1391 (1995); and Courser v. Inter-Mountain Ins. Company, 214 Mont. 13, 692 P.2d 417 (1984). All three cases are inapposite.

¶20 Carrillo involved a short walk to a nearby establishment during an authorized coffee break. The Court determined that a short walk during an authorized coffee break does not constitute "travel" as that term is used in section 39-71-407, MCA. In this case, claimant was not on a break and travel was clearly involved as he used his motorcycle to undertake a three mile round-trip.

¶21 In Strickland this Court's determination that the claimant was not on an errand for her employer was affirmed on appeal even though the employer permitted the claimant to leave work and go on a personal errand. Unlike the situation in Strickland, the employer in this case did not authorize claimant to leave work even for a personal errand.

¶22 In Courser the employer authorized claimant to attend courses which benefitted both the claimant and the employer. In this case, the employer did not authorize the errand.

¶23 I therefore conclude that the claimant is not entitled to workers' compensation benefits since his travel was outside the scope and course of employment under the provisions of section 39-71-407(3), MCA.

JUDGMENT

¶24 Claimant was not injured in the course and scope of his employment and is not entitled to workers' compensation benefits. His petition is dismissed with prejudice.

¶25 This JUDGMENT is certified as final for purposes of appeal.

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

DATED in Helena, Montana, this 14th day of January, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Christopher R. Angel
Mr. Kelly M. Wills
Mr. Randall J. Colbert
Submitted: December 8, 2003