

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1996 MTWCC 54**

**WCC No. 9602-7507**

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**COLLEEN CONNERY**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CORPORATION,**

**Respondent/Insurer for**

**WINTER SPORTS, INCORPORATED**

**Employer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** Ski instructor was injured when another instructor ran into her while she stopped to wait for him. She was skiing prior to commencing classes assigned to her earlier that morning. Insured relied on section 39-71-118(2)(a), MCA (1995) to argue employee was engaged in recreational activity and injury was not compensable. Claimant argued she was engaged in warm-up run recommended by employer in training manual, which would have ended at the place where she was to begin the pre-assigned lesson.

**Held:** Section 39-71-118(2)(a), MCA (1995) requires a two-part analysis: first, whether activity leading to accident was recreational; second, whether injured person was relieved of and not performing duties of employment at the time of the accident, which involves a course and scope of employment analysis. Here, claimant was engaged in a recreational activity. However, she was engaged in a warm-up run specifically recommended by employer in training manual, from which both employee and employer benefitted, and she would finish her run at the place where she would begin a pre-assigned lesson. She was, therefore, not relieved of her duties and was within the course and scope of employment. Thus, the injury was compensable. (Note: WCC affirmed in *Colleen Connery v. Liberty Northwest Insurance Corp.*, 280 Mont. 115, 929 P.2d 222 (1996) (No. 96-448).)

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-118(2)(a), MCA (1995).** Section 39-71-118(2)(a), MCA (1995) requires

a two-part analysis: first, whether activity leading to accident was recreational; second, whether injured person was relieved of and not performing duties of employment at the time of the accident. Where ski instructor was engaged in warm-up run specifically recommended by employer in training manual, from which both employee and employer benefitted, and would finish her run at the place where she would begin a pre-assigned lesson, she was in course and scope of employment and injury was compensable. (*Note*: WCC affirmed in [\*Colleen Connery v. Liberty Northwest Insurance Corp.\*](#), 280 Mont. 115, 929 P.2d 222 (1996).)

**Employment: Course and Scope: Recreational Activities.** Section 39-71-118(2)(a), MCA (1995) requires a two-part analysis: first, whether activity leading to accident was recreational; second, whether injured person was relieved of and not performing duties of employment at the time of the accident. Where ski instructor was engaged in warm-up run specifically recommended by employer in training manual, from which both employee and employer benefitted, and would finish her run at the place where she would begin a pre-assigned lesson, she was in course and scope of employment and injury was compensable. (*Note*: WCC affirmed in [\*Colleen Connery v. Liberty Northwest Insurance Corp.\*](#), 280 Mont. 115, 929 P.2d 222 (1996).)

This case came on for trial on June 5, 1996, in Kalispell, Montana. Petitioner, Colleen Connery (claimant), was present and represented by Mr. David W. Lauridsen. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

Exhibits: Exhibits 1, 2, 5 through 8, and 10 were admitted without objection. Exhibit 3 was admitted over the objection of Mr. Jones. Exhibit 4 was withdrawn. Exhibit 9 was admitted but is legal material (statutory history) which is relevant only if the Court determines the statute applicable in this case is ambiguous.

Witnesses and Depositions: Witnesses at trial were claimant and Sydney Ryerson. In addition the parties submitted depositions of the claimant and Mark Roy for the Court's consideration.

Issues Presented: Whether claimant sustained injuries while in the course and scope of her employment as a ski instructor for Winter Sports, Inc. on December 10, 1995, and whether she is entitled to temporary total disability and medical benefits, costs, attorney fees, and a penalty.

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

## FINDINGS OF FACT

1. The claimant is 27 years old. She is an experienced and certified ski instructor.
2. Claimant was employed by Winter Sports, Inc. as a ski instructor for the 1995-1996 ski season. Winter Sports operates the Big Mountain ski area near Whitefish, Montana.
3. The terms of claimant's employment called for her to be available eight hours a day to teach both group and individual (private) lessons. She was required to sign in when she reported to work. Sign-in included signing her name and recording the time of sign-in in a log maintained by her employer. On some days she was required to sign in by 8:00 a.m.
4. Group lessons were typically given from 9:30 a.m. to noon and 1:00 p.m. to 3:30 p.m. Private lessons were on an assigned basis and varied in the amount of time for the lessons. Lunch breaks were from noon to 1:00 p.m.
5. Instructors were assigned to lessons as needed and according to demand. A "lineup" was held at the beginning of both the morning and afternoon to hand out lesson assignments. If an instructor was not assigned a lesson, she was free to ski or engage in other activities. It was claimant's practice to attend the afternoon lineup even if not assigned any lessons in the morning.
6. Instructors could receive private lesson assignments at times other than at lineup. Thus, when claimant received no morning or afternoon assignments she could ski on her own and periodically check back with the ski school to determine if she was needed for a later private lesson. She would sometimes call the ski school from the top of a lift. On other occasions messages for instructors were left with the lift operator or on message boards adjacent to the lifts.
7. Claimant was paid only for the time of her actual lessons. She received \$8 an hour for teaching. When a skier specifically requested claimant as a teacher, she received fifty percent of the amount charged for the private lesson. Her employer required her to fill out a time card reflecting the actual hours she was giving lessons and the time card was used to compute her wages.
8. In addition to her pay, claimant received a season ski pass as part of her remuneration.
9. Big Mountain opened for skiing at approximately Thanksgiving time in 1995. Claimant began giving lessons on Thursday, December 7, 1995. She worked and was paid for two hours of lessons. She worked another two hours on Friday, December 8th, and five hours on Saturday, December 9th. Her limited hours were due to a limited number of skiers in the early part of the season, coupled with too many instructors for that time of the season.
10. As a matter of etiquette, instructors were expected to show up at the lesson site 15 minutes before the start of a lesson, however, they received no pay for that time.

11. On Sunday, December 10, 1995, claimant logged in for work at 8:45 a.m. She attended a lineup at approximately 9:15 a.m. Shortly after lineup, at approximately 9:45 a.m., she was assigned a private lesson commencing at 11:00 a.m. Claimant understood that the skier seeking the lesson was four years old and a novice skier, having skied perhaps on one other occasion, and that the lesson would take place on the bunny hill. The bunny hill at Big Mountain is served by the Platter Lift.

12. I am personally familiar with the bunny hill, having barely graduated from that hill. I am also familiar with the skills of some four-year olds, who have left me in the wake of the snow splayed by their skis as they pass me, and who have skills which surpass my meager, barely intermediate skills. But claimant in this case believed that the four-year old seeking the lesson was a beginner and that the lesson would be confined to the bunny hill. Her understanding is important in light of her testimony that instructors often took trial runs on ski trails prior to giving a lesson to check-out conditions and determine the suitability of the various trails for their students. In this case the claimant's understanding of her assignment is inconsistent with any claim that she had to check-out skiing conditions on other trails prior to the lesson.

13. Claimant was aware of her assignment by 9:45 a.m. Thereafter, she and a fellow ski instructor, Mark Roy, took the main ski lift to the top of Big Mountain. They skied down the backside of the mountain and took another lift back to the top. They then skied down the front of the mountain, starting on a run called *The Big Ravine*, traversing to another run called the *Interstate* until its intersection with the *Question Mark*. They then skied the *Question Mark* down to a point approximately 200 yards above the base of the Platter Lift.

14. Claimant was ahead of Roy and stopped to wait for him. Roy came upon claimant, tried to stop, but ran into her.

15. As a result of the collision, claimant suffered a severe fracture of her left leg.

16. At the time of the accident, claimant was 200 yards away from the place where she was to start her 11:00 a.m. lesson. She was nearly at the end of her run. She was wearing her personal ski jacket and planned to get her ski-school jacket and then proceed to the lesson site. She could not recall whether she left her ski-school jacket in the locker room or at the ski hut located at the base of the Platter Lift, which was not far away. She also had not determined which of two different routes to take to pick up her jacket. Her uncertainty is not significant to the decision in this case. What is important is that she was nearly at the end of her ski run and on her way to her lesson.

17. Following her injury claimant filed a workers' compensation claim. Liberty acknowledged the claim but denied it based on the recreational activity exception set forth in section 39-71-118(2)(a), MCA (1995).

18. According to claimant, whom I find credible, and not disputed by Liberty, Winter Sports recommended that its ski instructors take a *warm-up* run prior to giving lessons. A *warm-up* run was recommended to condition the instructors in preparation for lessons and also to familiarize them with the skiing conditions.

### CONCLUSIONS OF LAW

1. Claimant's injury is governed by the 1995 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. Section 39-71-118, MCA (1995), defines *employee*. It contains a specific exclusion regarding recreational activities, as follows:

(1) The term "employee" or "worker" means:

....

(2) The terms defined in subsection (1) do *not* include a person who is:

(a) participating in a *recreational activity* and *who at the time is relieved of and is not performing **prescribed duties***, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment. . . . [Italics and bold added for emphasis.]

The dispute in this case involves an application of the exclusion. Liberty argues that at the time of the accident claimant met the exclusion criteria because she was engaged in a *recreational activity* and was *relieved of and not performing prescribed duties*.

There is no Montana precedent interpreting the recreational exclusion. At the time of trial, I noted that other states, particularly those with a significant skiing industry, may have adopted a similar exclusion. I therefore asked both parties to supplement their arguments by surveying cases from other states. I want to compliment counsel, especially Ms. Laurie Wallace, for their research and briefs.

The starting point of the legal analysis in the present case is the general rule that where the terms of a statute are clear those terms must be applied as written. *Boegli v. Glacier Mountain Cheese Co.*, 238 Mont. 426, 429, 777 P.2d 1303, 1305 (1989). Where a statute is clear there is no leeway for judicial interpretation since the statute speaks for itself. *State v. Gould*, 273 Mont. 207, 219, 902 P.2d 532, 540 (1995).

Colorado has a law which is nearly identical to the Montana law at issue in this case. Section 8-40-301, C.R.S., which is part of Colorado's workers' compensation provisions, provides:

(1) "Employee" excludes any person employed by a passenger tramway area operator, as defined in section 25-5-702 (1), C.R.S., or other employer, *while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment, regardless of whether such person is utilizing, by discount or otherwise, a pass, ticket, license, permit, or other device as an emolument of employment.* [Italics added for comparison to the Montana statute.]

The provision, in its present form, was adopted by the Colorado legislature in 1989. A similar but somewhat differently worded provision was in effect prior to 1989. See *Karlin v. Conard*, 876 P.2d 64, 66-67 (Colo. 1993) and the legislative history to § 8-40-301(1), C.R.S.

Liberty argues that Colorado precedents do not apply since there is no indication in the legislative history of the Montana provision that the Montana legislature intended to borrow the Colorado provision. In a strict sense, Liberty is correct. The rule regarding statutes of sister states is:

When Montana's legislature adopts a statute from a sister state, Montana courts follow the general rule of also adopting the construction which has been placed upon that statute by the highest court of the sister state.

*State v. Tower*, 267 Mont 63, 67, 881 P.2d 1317, 1319 (1994). The minutes of the committee hearings in the Montana House and Senate committees on Labor and Employment Relations, which held hearings on the Montana provision, do not mention the Colorado statute, so it is not clear from the history that the Montana legislature intended Colorado precedents to apply. Nonetheless, Colorado case law provides guidance in interpreting and applying the Montana provision.

In *Dunavin v. Monarch Recreation Corp.*, 812 P.2d 719 (Colo. App., 1993), the Colorado Court of Appeals considered facts similar to those in the present case. In *Dunavin* the claimant was, as in this case, a ski instructor. He was, as in this case, paid for the actual hours he spent giving ski lessons. He was on a time clock: he was required to punch in on a time clock at the beginning of a lesson and punch out when the lesson was finished. He was provided with a lift pass which he could use for work and play.

The pre-accident circumstances leading up to Dunavin's accident were:

On the morning of his injury, claimant, attired in his work uniform, arrived at the ski area and first attended, for a brief period, a ski clinic at which he received instructions concerning his job. After the clinic ended, there remained a period of at least one and one-half hours before he was scheduled to punch in on the time clock and then give his first lesson of the day.

812 P.2d at 720. In the one and a half hour hiatus between his assignment and his actual lesson, Dunavin went skiing. Apparently lacking the stark terror and abundant caution that

accompanies my own skiing, he skied recklessly, fell and broke his arm. Thereafter he submitted a claim for workers' compensation benefits. His claim was denied and he sought the assistance of the agency which administers the Colorado workers' compensation laws, and, thereafter, of the Colorado courts.

Dunavin's claim was denied by an administrative law judge. He then appealed to the Colorado Court of Appeals. The sole question on appeal was whether his accident occurred in the course and scope of his employment. The answer depended on the Court's construction of the recreational exclusion in effect at the time of his injury. That exclusion differed from the version of the recreational exception adopted by the 1989 Colorado legislature and therefore from the version adopted by the 1993 Montana legislature. The exclusion in effect at the time of Dunavin's accident contained language excluding coverage for recreational activity in which the individual was participating "on his own initiative." The exclusion stated in relevant part:

""[E]mployee' excludes any person . . . participating in recreational activity *on his own initiative*, who at such time is relieved of and is not performing any prescribed duties, regardless of whether he is utilizing, by discount or otherwise, a pass . . . as an emolument of his employment." [Quotes in original; emphasis added.]

*Id.* Construing the statute, the Court of Appeals said:

Under this statute, an employee who partakes of employer-sponsored recreation, *not of his own initiative, but because of pressure exerted by the employer*, is entitled to compensation benefits for injuries occurring during the activity. [Emphasis added.]

*Id.* But the claimant was out of luck since the Court then concluded that he was skiing on *his own initiative* and therefore within the exclusion.

The Colorado legislature eliminated the "own initiative" language in 1989 and adopted the language which is virtually identical to the present Montana statute. See *Karlin* 876 P.2d at 66-67 (Colo. App. 1993) and § 8-40-301(1), C.R.S. (1989). In *Karlin* the Colorado Court of Appeals considered the amended statute. It read the statute as a two part, conjunctive test:

[W]e interpret the exclusion under § 8-40-301(1) to mean that a person must be *both* (1) participating in a recreational activity and (2) relieved of and not performing any duties of employment.

876 P.2d at 67. The Court then focused on the second prong. It construed the second prong as requiring "traditional" course and scope analysis applicable in determining whether a recreational activity falls within the course and scope of employment. That test in Colorado is:

(1) Whether the recreational activity occurred during working hours; 2) whether it was held on or off the employer's premises; 3) whether employee participation was

required or encouraged; 4) whether the activity was financially sponsored by the employer; 5) whether the activity was initiated by the employer; and 6) whether the employer received tangible benefits from the activity . . . Courts may consider other factors as well which indicate that the activity was sufficiently related to the employment to make it incidental to employment.

*Id.* at 67 (quoting *City & County of Denver v. Lee*, 168 Colo. 208, 213, 450 P.2d 352, 355 (1969)).

The court in *Karlin* then applied the exclusion to the facts of the case. The claimant in that matter was a volunteer at a golf course. Although he was not paid wages, he received merchandise discounts and free, unlimited use of the golf course in return for his work. While participating in a recreational golf tournament sponsored by his employer he was thrown from a golf cart and injured. On those facts the court held that claimant met the six-factor test for determining whether a recreational activity is in the course and scope of employment. The facts relevant to its determination were:

that the golf tournament was sponsored and financed by the employer; that the tournament occurred during normal business hours on the employer's premises; that employee participation was encouraged; and that the defendant-employer derived benefit from its employees' participation in the tournament since it promoted the very recreational activity which the employer was in the business of providing.

*Id.* at 68. It concluded that the second prong of the exclusion was not met and that the accident was compensable

I find the approach of the Colorado Court of Appeals persuasive. Section 39-71-118(2)(a), MCA, plainly requires a two-part analysis, first focusing on whether activity leading to the accident was a recreational one. If it was, then a second criteria must be met, that being to wit: at the time of the activity the injured individual must have been relieved of and not performing duties of his employment.

I diverge somewhat from the Colorado Court of Appeals analysis in that it does not mention "duties" of employment. On its face the section requires a determination as to whether the particular recreational activity was a duty of employment. The Colorado Court of Appeals did not expressly state how traditional principles concerning course and scope of employment tie in with a determination of duties. However, such an express discussion was probably unnecessary since a course and scope determination, in essence, involves a determination of the duties of employment. I therefore concur with and adopt a course and scope analysis as appropriate for determining whether a worker involved in a recreational activity was nonetheless performing prescribed duties of employment at the time of an accident.

The Montana test for determining whether an employee was injured in the course and scope of employment is set out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984). The factors to be considered are:

Controlling factors repeatedly relied upon to determine a work-related injury include: (1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefited from the activity. The presence or absence of each factor, may or may not be determinative and the significance of each factor must be considered in the totality of all attendant circumstances. *Shannon v. St. Louis Board of Education* (Mo.1979), 577 S.W.2d 949, 951-2.

These criteria are still viable. See *Dale v. Trades Street, Inc.*, 258 Mont. 349, 355, 854 P.2d 828, 831-32 (1993).

Now the hard part -- applying the law to the facts in this case. The first step is actually easy because claimant concedes that she was involved in a recreational activity at the time of her accident. The first part of the two-part analysis under section 39-71-118(2)(a), MCA, is therefore satisfied.

The second prong of the analysis is more difficult. Initially, I conclude that a single, warm-up ski run just prior to teaching a lesson was within the course and scope of claimant's employment and part of her duties of employment. A warm-up run was recommended by her employer, thus the first *Courser* factor is met. It is also reasonable to assume that both the employer and claimant benefitted from a warm-up run in that claimant unlimbered her muscles and joints and generally familiarized herself with snow conditions. The fact that the employer recommended a warm-up run indicated its belief that such runs directly or indirectly contributed to ski lessons. Thus, the fourth *Courser* factor is met. By requiring instructors to sign-in and attend lineup, and assigning lessons at odd times, such as occurred in this case, the employer also indirectly contributed to claimant's warm-up run on December 10. There was insufficient time for her to leave the ski area or engage in other substantial activities, whereas she was dressed and ready for skiing and had sufficient time to make a warm-up run. Thus, the second factor appears to be met, although weakly. The third factor -- control or participation of the employer -- is not met. Nonetheless, on balance a single warm-up run was within the course and scope of claimant's employment and part of her duties.

Based on the foregoing analysis, this case could be neatly resolved if claimant had taken the main lift to the top of Big Mountain then skied down the front side and back to the Platter Lift. That would amount to a single warm-up run. On the other hand, had she not

had a lesson that morning and simply spent the morning skiing, the accident would fall outside her duties and within the recreational activity exclusion.

But the facts of this case fall between these two extremes. She did more than a single warm-up run, in essence two ski runs. No evidence was presented indicating that the employer recommended more than a single warm-up run provided any additional benefit to either claimant or her employer.

Thus, this case turns on whether the extra run down the backside of Big Mountain precludes her claim. I conclude that it does not. At least one of the two runs was recommended by her employer, benefited her employer, and was within the course and scope of her employment. The question is which run? After much rumination, I find that the run on the backside of the mountain was the recreational run subject to the exclusion under section 39-71-118(2)(a), MCA. That run did not end in the vicinity of her lesson and required another lift trip, whereas the second run down the front of the mountain terminated in the immediate vicinity of her lesson and terminated shortly before the lesson was to begin. The exclusion is therefore inapplicable to the second run and her accident is compensable. Claimant is entitled to compensation and medical benefits.

3. Since claimant has prevailed she is entitled to her costs. § 39-71-611, MCA.

4. Claimant is not entitled to attorney fees or a penalty. A finding of unreasonable conduct on the part of the insurer is required to award either. §§ 39-71-611 and -2907, MCA. The insurer's denial of this claim was not unreasonable. The recreational activity exclusion has never before been construed in Montana. The determination reached in this case is not free from doubt and may be reasonably debated.

5. The parties have not requested any determination concerning the amount of benefits which may be due claimant.

#### JUDGMENT

1. Claimant suffered a compensable industrial accident while skiing on December 10, 1995, and is entitled to compensation and medical benefits on account of that accident.

2. The parties have not requested any determination concerning the amount of benefits which may be due claimant. If they are unable to agree on the amounts due they may petition the Court for such determination.

3. The claimant is entitled to costs in an amount to be determined by the Court. Claimant shall submit her memorandum of costs within 10 days of this decision. Liberty shall then have 10 days in which to file its objections, if any. The Court will then assess costs.

4. The claimant is not entitled to attorney fees or a penalty.

5. 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.

6. This JUDGMENT is certified as final for purposes of appeal.

DATED in Helena, Montana, this 22nd day of July, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Larry W. Jones

Submitted: July 1, 1996