

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 58

WCC No. 9804-7945

DEBRA COPLEY

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

WAYNE AND MARY ELLEN BUNTING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Head waitress for a steakhouse claimed she injured her back lifting a tray from the salad bar on December 2, 1996, a date on which the steakhouse was uninsured. Claimant did not report the injury to her employer until December 16, after she had visited a doctor, but she filed a timely claim for compensation, which was forwarded to the UEF. The UEF denied the claim on the ground that claimant did not hurt her back as she claimed.

Held: Although the UEF and employer did not affirmatively prove claimant injured her back in another way, their evidence regarding claimant's snowmobiling, care for her husband after hernia surgery, and activity moving to a new home, along with the Court's observation and evaluation of the testimony of claimant and her witnesses, leads the Court to include claimant was not injured during employment. Factors considered by the Court include: claimant in fact worked after the claimed injury and did not complain of pain; claimant complained to numerous people about the burdens of assisting her husband after surgery, which occurred after her own claimed injury, but failed to mention her own alleged back injury; credible evidence indicated claimant packed belongings and participated in the move of her household after the alleged injury and before reporting it; her employers were also her friends and co-workers, making it unlikely she would not have mentioned a back injury.

Topics:

Injury and Accident: Accident. Head waitress for a steakhouse claimed she injured her back lifting a tray from the salad bar on December 2, 1996, a date on which the steakhouse was uninsured. Although the UEF and employer did not affirmatively prove claimant injured her back in another way, their evidence regarding claimant's snowmobiling, care for her husband after hernia surgery, and activity moving to a new home, along with the Court's observation and evaluation of the testimony of claimant and her witnesses, leads the Court to include claimant was not injured during employment. Factors considered by the Court include: claimant in fact worked after the claimed injury and did not complain of pain; claimant complained to numerous people about the burdens of assisting her husband after surgery, which occurred after her own claimed injury, but failed to mention her own alleged back injury; credible evidence indicated claimant packed belongings and participated in the move of her household after the alleged injury and before reporting it; her employers were also her friends and co-workers, making it unlikely she would not have mentioned a back injury.

Witnesses: Credibility. Head waitress for a steakhouse claimed she injured her back lifting a tray from the salad bar on December 2, 1996, a date on which the steakhouse was uninsured. Although the UEF and employer did not affirmatively prove claimant injured her back in another way, their evidence regarding claimant's snowmobiling, care for her husband after hernia surgery, and activity moving to a new home, along with the Court's observation and evaluation of the testimony of claimant and her witnesses, leads the Court to include claimant was not injured during employment. Factors considered by the Court include: claimant in fact worked after the claimed injury and did not complain of pain; claimant complained to numerous people about the burdens of assisting her husband after surgery, which occurred after her own claimed injury, but failed to mention her own alleged back injury; credible evidence indicated claimant packed belongings and participated in the move of her household after the alleged injury and before reporting it; her employers were also her friends and co-workers, making it unlikely she would not have mentioned a back injury.

¶1 The trial in this matter was held on Monday and Tuesday, June 8 and 9, 1998, in Great Falls, Montana. Petitioner, Debra Copley (claimant), was present and represented by Mr. David W. Lauridsen. Respondents Wayne and Mary Ellen Bunting were represented by Mr. Cameron Ferguson. Respondent Uninsured Employers' Fund was represented by Mr. Mark E. Cadwallader.

¶2 Exhibits: Exhibits 1 through 5 and 7 through 14 were admitted without objection. Exhibit 6 was refused. Exhibit 15 was admitted over the objection of the petitioner. Exhibit 16 was admitted for demonstrative purposes.

¶13 Witnesses and Depositions: Debra Copley, John Howard Poush, Michael Camenzind, Mark Spitler, Elmer West, Frieda Ross, Julie Hollar, Shannon Martinsen, Carolyn Wentz, Greg Copley, Louise Miskey, Mary Ellen Bunting, Ruth Jensen (by telephone) and Wayne Bunting were sworn and testified. Claimant was recalled as a rebuttal witness. The parties agreed that the depositions of Gregory L. Copley and Debra Copley may be considered by the Court. No trial transcript was prepared of this proceeding.

¶14 Issues: The following issues are set forth in the Pretrial Order:

1. Whether Petitioner suffered a compensable industrial injury arising out of and in the course and scope of her employment with Employers on December 2, 1996.
2. Whether Petitioner is entitled to an increase in award for unreasonable delay or refusal to accept liability and to pay proper workers' compensation benefits pursuant to §39-71-2907, MCA.
3. Whether Petitioner is entitled to costs and attorneys' fees, pursuant to §39-71-611, MCA.

* * * * *

¶15 Having considered the Pretrial 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

¶16 Wayne and Mary Ellen Bunting own and operate the Choteau Seafood and Steakhouse (Steakhouse) in Choteau, Montana.

¶17 Claimant worked as the head waitress for the Steakhouse from September 1996 until December 14, 1996. Her duties included waiting on customers, bussing tables, doing dishes, and setting up and "breaking down" the salad bar.

¶18 On December 2, 1996, the Steakhouse was uninsured.

¶19 Claimant alleges that on December 2, 1996, she injured her back while lifting a tray from the salad bar. The tray weighed up to approximately 13 pounds and claimant had to extend her hands and arms, lean over, and lift the tray up and out. According to claimant, when lifting the tray she felt a pain in her low back similar to a charley horse.

¶10 Claimant first sought medical care on December 16, 1996, at which time she reported that she was injured at work on December 2, 1996. (Ex. 12 at 1.) She was later diagnosed as suffering from a herniated disk at the L5-S1 level. (*Id.* at 45.)

¶11 Claimant signed a Claim for Compensation on December 19, 1996 and forwarded it to the Department of Labor and Industry. The claim was routed to the Uninsured Employers' Fund (UEF). The UEF denied the claim on February 3, 1997.

¶12 The UEF and the Buntings deny that claimant was injured on the job and have offered evidence suggesting that she may have been injured elsewhere. They have failed to affirmatively establish that claimant was injured elsewhere, however, they do not bear the burden of proof. Rather, claimant must persuade the Court by a preponderance of evidence that she was in fact injured as she claims.

Claimant's Corroborating Evidence

¶13 In addition to her own testimony, the claimant offered corroborating evidence through her husband and her mother, as well as the medical records. Her father-in-law also testified in rebuttal of respondent's suggestion that claimant might have been injured in a snowmobiling incident earlier on December 2, 1996.

¶14 Claimant's husband testified that he was working on December 2 and that he heard his wife call out to him and observed her clutching her back, and that she reported that she hurt her back. However, he contradicted claimant's testimony that he had observed the actual incident.

¶15 Claimant's mother testified that she saw claimant before she went to work on December 2 and again when she came home from work. She described claimant as fine prior to work but said that after work she appeared injured.

The Nature of Respondents' Evidence

¶16 Respondents offered three types of evidence in rebuttal to the claim. First, they presented evidence that claimant did not report the alleged December 2 incident until December 16, after she had sought medical care. Second, they presented evidence that claimant might have been injured elsewhere. Specifically, they presented evidence that (1) claimant engaged in snowmobiling on December 2 prior to work, after which she appeared to be suffering physically; (2) she tended to her husband for several days following his hernia surgery on December 4; and (3) on December 10, she helped in moving to a new house. Third, they presented evidence that the incident described by claimant was insignificant both with regard to the amount the tray weighed and the body mechanics involved in lifting it from the salad bar.

¶17 The evidence with regard to the weight of the tray and the body mechanics used in lifting it is unpersuasive. The forces necessary to cause a back injury, including a herniated disk, is a matter requiring expert evidence. No expert evidence was presented and I am unable to infer that lifting the tray did not or could not cause the injury which claimant suffered.

¶18 However, I found the other evidence, taken together with the Court's courtroom perception of the witnesses, persuasive in determining whether the claimant and her supporting witnesses were credible and believable.

Resolution

¶19 I find that claimant and her witnesses were not credible or believable, and that claimant was not injured at work.

¶20 My finding is based on my observation of the witnesses and my perception as to their veracity. It is also based on the following facts, which I find incompatible with claimant's testimony and an injury on December 2, 1996.

I.

¶21 Claimant was scheduled to work and in fact worked December 8, 9, 12 and 13. She worked without complaining to her co-workers, her supervisor or the Buntings.

¶22 Claimant's husband underwent hernia surgery on December 4, 1996. During his home convalescence on December 5, 6 and 7, claimant cared for him. While she testified that she did not lift or carry him, he testified that she assisted in getting him out of bed; he grabbed hold of her and pulled himself up.

¶23 Claimant complained to others about helping her husband. Carolyn Wentz, Mary Ellen Bunting, Wayne Bunting, and Ruth Jensen all testified that Debra had complained to them that she had to lift Greg up and down from the couch and from the bed.

II.

¶24 Claimant's complaints about the hardship of helping her husband are especially significant in light of her lack of complaints about any work-related injury. Despite her claim of continued pain following the alleged December 2 accident, claimant did not tell the Buntings, her immediate supervisor, or her co-workers of the alleged injury until December 16 despite numerous opportunities to do so. While claimant's assertion that she did not speak out because she hoped that her back would get better without medical care, her silence appeared out-of-character with her assertiveness at trial, and was inconsistent with her complaints regarding helping her husband.

¶25 Her failure to report the alleged accident was also inconsistent with her relationship with the Buntings. The Buntings were more than her employers, they were also claimant's friends. They were present at the restaurant/bar on the evening of the alleged accident and on other occasions when claimant worked thereafter. The claimant's complaints about helping her husband and her failure to say one word regarding an accident to the Buntings during this time speaks volumes about her claim.

¶26 Moreover, on December 15 claimant and her husband failed to disclose the alleged accident even when specifically asked about how she hurt her back. On that date, claimant's husband told Wayne Bunting that claimant had hurt her back. However, when asked by Wayne "how" she hurt it, he refused to say. Later that day, Wayne called claimant and asked her how she was and when she would be able to return to work. He also asked how she hurt herself and she did not answer him. It was only on December 16, after claimant had been to the doctor, that she told Wayne Bunting that she had been injured at work.

III.

¶27 Meanwhile, claimant and her family moved from one house to another. On December 9, 1996, claimant and her husband made a very public bet of \$100 that she could pack their entire house that evening for the move on the next day. The bet was overheard by several people and admitted by claimant and her husband. The bet was inconsistent with claimant's assertion that she continued to suffer from charley horse type pain in her lower back.

¶28 On December 10, 1996, a regular day off for the claimant, claimant and her family moved into a new home. They hired two young men to help them with the move. It is undisputed that these helpers were told they were being hired because Greg could not do any heavy lifting due to his surgery. No mention was made of any back problem of claimant.

¶29 Claimant helped with the move. By her own admission, she helped move some boxes, although she characterized them as small and light. She also helped move (slide) a refrigerator at the new house.

¶30 Carolyn Wentz (Wentz), who stopped by the Steakhouse almost every day (Ex. 8 at 5) testified that the claimant told her she was tired and worn out, that her back was bothering her, and that she was upset about having to do all the moving. Wentz recalled claimant saying that she had sprained her back during the move. Wentz was a credible witness.

¶31 I am persuaded that claimant understated her moving activities. One of the movers testified that she helped load a refrigerator onto a truck. While that testimony was undercut by the fact that no refrigerator was moved from the old to the new house, a freezer was in fact moved. There is no evidence of any motive for the mover to lie.

IV.

¶32 The UEF properly denied this claim. Claimant's testimony was not credible and I am not persuaded that she suffered an industrial accident.

CONCLUSIONS OF LAW

¶133 The alleged injury occurred on December 2, 1996; therefore, this claim is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶134 Claimant must prove by a preponderance of the evidence that she suffered an industrial accident and injury. *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).

¶135 No lengthy legal analysis is needed to resolve the issues in this case. Resolution of the case turns on the credibility of the witnesses. I did not find claimant and her corroborating witnesses credible. Claimant bears the burden of proof and she failed to persuade me that she suffered an industrial accident.

¶136 Since claimant has not prevailed, she is not entitled to her costs or attorney fees. § 39-71-611, MCA.

JUDGMENT

¶137 1. The claimant did not suffer an industrial injury and is not entitled to workers' compensation benefits. Her petition is **dismissed with prejudice**.

¶138 Claimant is not entitled to attorney fees or costs.

¶139 3. Pursuant to ARM 24.5.348, this JUDGMENT is certified as final for purposes of appeal.

¶140 4. 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 22nd day of July, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Cameron Ferguson

Mr. Mark E. Cadwallader

Date Submitted: June 9, 1998