IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 28

WCC No. 2003-0945

ELLIOT CASSIDY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant alleges he injured his neck and arm in an industrial accident while working as a delimber operator for a logging company.

Held: The claimant did not suffer a work-related injury.

Topics:

> **Witnesses: Credibility.** The Court finds the claimant incredible for a multitude of reasons which should be apparent from the text of the decision.

¶1 The trial in this matter was held on March 10, 2004, in Kalispell, Montana. Petitioner Elliot Cassidy (claimant), was present and represented by Ms. Charla K. Tadlock. Respondent was represented by Mr. Daniel B. McGregor.

¶2 Exhibits: Exhibits 1 through 3, 5, 7, 8, 10, and 11 were admitted without objection. Exhibits 4 and 9 were admitted over objection. Exhibit 6 was admitted in part.

¶3 Witnesses and Depositions: Elliot Cassidy, Robin Lindsay, David O. Roberts, Kevin Richmond, Candace Roberts, Sheena Roberts, Timothy Roberts, and Kevin Bartsch testified at trial. The parties also submitted the depositions of Elliot R. Cassidy, Robin Lindsay, Dr. Daniel McGee, David Roberts, and Candace Roberts for the Court's consideration.

¶4 Issue Presented: The Court restates the issue as follows:

> ¶4a Was the claimant injured in a work related injury on July 28, 2003, as he claims?

¶5 Having considered the Preliminary 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 At the time that this action arose the claimant was employed by Dave Roberts Line Logging, LLC, (Roberts Logging).

¶7 The claimant is thirty-five years old. He has an eleventh grade education and has spent much of his life logging or in logging related work. He has also worked as an equipment operator on road construction.

¶8 Roberts Logging is a family operation owned by David O. Roberts (David) and his wife Candace (Candace). The company logs for Plum Creek Timber (Plum Creek) on its lands in Montana. David is in charge of actual logging operations. Candace does bookkeeping and other administrative tasks. Employment decisions are made jointly.

¶9 The claimant was hired by Roberts Logging on July 6, 2003, to operate a delimber. At the time of his hire, the claimant represented to David and Candace that he had six months of experience operating a delimber. His subsequent performance indicated otherwise and he subsequently admitted to Roberts that he had only a few hours experience on a delimber.

¶10 A delimber is a specialized piece of equipment used in logging operations. It has a cab in which the operator sits and a boom which extends many feet out from the cab. It also has two saws which can be operated from the cab. One is a butt saw, which is close to the cab and is used to cut-off the large, bottom end of the tree. The other is a top saw which is at or near the end of the boom and is used to cut-off the top or small end of the tree.

¶11 The delimber cuts off limbs from felled trees and cuts the logs to lengths specified by the timber company. In this case the length of the logs was specified by Plum Creek.

¶12 Roberts Logging conducts its logging operations from logging roads in the logging area. The roads traverse the mountains on which logging operations are conducted. Trees are felled downhill from the road. The delimber is positioned at the top of the road. Trees are dragged from where they are felled using a yarder, which is a crane like piece of equipment. It is positioned on the road within thirty-five or forty feet from the delimber. Felled trees are attached to cables from the yarder using "chokers", which are smaller cables, and then hauled up to the road by the yarder. The felled trees are hauled as far as the road, then the chokers are detached so that delimbing can commence.

¶13 When the felled trees are brought up to the road and released, they are approximately perpendicular to the road. The trunks of the trees are aligned uphill, the tops downhill. David testified, and I find, that the trunks of the trees typically cross or overhang the road by no more than four feet.

¶14 Roberts Logging employs sawyers who fell trees. It also employs an operator for the delimber. David personally operates the yarder. In the summer of 2003, he also had his ten-year-old son assist in releasing chokers on trees once they reached the road.

¶15 Roberts Logging is based in Kalispell. In July 2003, it was logging a site an hour and a half from Kalispell. It required its employees to assemble in Kalispell and then transported them to the logging site. Employees were required to be at the assembly point between 3:45 and 4:00 am.

¶16 The claimant lives in Cut Bank, Montana.

¶17 The claimant worked for Roberts Logging for three weeks. He was late arriving at the assembly point on the first two Mondays of his employment. On both days, the claimant was only a few minutes late and David waited for him.

¶18 On the third Monday of his employment - July 28, 2003, the claimant was more than a few minutes late and the Roberts Logging crew left Kalispell without him. He did not phone to tell David he would be late.

¶19 After leaving Kalispell, David and his crew met up with a logging truck just a few miles from the site of the actually logging. The truck was operated by Kevin Richmond (Richmond), an independent logging truck operator who contracts to haul logs for Roberts Logging. Richmond was transporting a load of logs for Roberts Logging.

¶20 Upon meeting in the road, Richmond and David stopped, got out of their vehicles, and proceeded to discuss the quality of the logs on Richmond's truck. They examined the logs, noting that some of them did not meet Plum Creek's specifications. While they were inspecting the logs, the claimant arrived in his personal vehicle and alighted.

¶21 Both Richmond and David noticed that the claimant had a black eye. The claimant testified at trial that he had a "slight bruise" under his right eye. Every other person who observed the claimant's face, including Dr. Daniel McGee, a chiropractor who saw claimant the next day, characterized it as a "black eye." Timothy Roberts, who is ten years old and was working for his father on the day in question, remembered the claimant coming to work that day and described him as having a "big ole black eye." Timothy's eyes widened when he described it. His testimony confirmed the testimony of others and my own impression that the claimant had more than a small bruise under his eye, rather he had a "big ole black eye."

¶22 According to the claimant his small bruise was the result of a wrench hitting him in the face while he was working under a car over the weekend.

¶23 David testified that on the morning of July 28th, the claimant told him he had been in a fight. Richmond did not hear the claimant saying he had been in a fight but did hear David talking to the claimant about being in a fight.

¶24 I find the claimant's assertion that he had a small bruise under his eye as a result of a weekend accident while fixing a car not credible. I am persuaded he had a "big ole black eye" consistent with being in a fight and that he told David he had been in a fight.

¶25 Following the meeting on the road, David, the claimant, and the other workers proceeded to the logging site and began their logging operations. Because of fire danger, they worked only from dawn to approximately noon.

¶26 On July 28th, all the workers, including the claimant, were aware of the fact that the fire danger in the area would likely lead to a shut down of all logging operations within a matter of days and that all loggers would be laid off at that time.

¶27 David testified that on July 28th, the claimant was sluggish in his work and he complained of a headache.

¶28 The claimant alleges that on July 28th, he injured his head, neck, back, and arm when he was hit by a section of log he was sawing off. The claimant testified that he was using a chain saw to saw off the butt of a log - the butt being the stump side of the log - because it was rotten. He testified that the log was eight to nine feet off the ground and that he went back twelve to fourteen feet from the butt end of the log and sawed it off at that point. According to the claimant, the sawed off portion fell and hit him on the left side of his head and left arm.

¶29 The claimant's description of the accident raised immediate questions in my mind concerning his veracity or his good sense. In his testimony, and through his gestures, he indicated that he held his chain saw above his head with his arms extended when cutting off the butt end of the tree. His description indicated an incredibly unsafe practice. Considering his years of experience logging, I could not help but question whether he was telling the truth regarding what happened or he was simply reckless. David in his later testimony confirmed my impression that the claimant's described use of his saw was patently unsafe.

¶30 Moreover, David testified credibly that logs extend at most only four feet onto the logging road, where any sawing would have taken place. He also testified it was easier and faster to use a butt saw attached to the delimber than to get down from the cab of the delimber and saw off the butt with a chain saw. Finally, he testified that any sawing off of the butt end of a tree was limited to two foot sections so that the tree was not wasted. I found his testimony credible and persuasive.

¶31 David also testified that throughout the day of July 28th, he was working on the yarder and that the yarder was located only thirty-five feet from the delimber. In order to perform his job he had to keep a close watch on where the trees were dropped. He testified that he never saw any accident, indeed he said that the claimant was reluctant to even come out of the cab of his delimber that day.

¶32 The claimant testified that he climbed up on the yarder after his alleged accident and told David he had been hit by a log. David denied that any such conversation occurred.

¶33 Because of the risk of fire, David shut down work at noon. The claimant left immediately in his own vehicle.

¶34 According to the claimant, after arriving back home in Cut Bank on the afternoon of July 28th, he attempted to call David to "notify" him of his injury and tell him he would not be at work the next day. His testimony was incredible in light of his other testimony that he told David of his accident on the job site. Why would he have to call David that evening to *re-notify* him of the accident?

¶35 The claimant testified that he called the Roberts' residence three times during the afternoon of July 28th and there was no answer but that on the fourth try he talked to the David 's daughter, Sheena, and told her to tell her dad he would not be at work the next day. The Roberts have an answering machine and caller identification, and are meticulous in recording business calls; they found no messages on the answering machine and no caller-ID record of any such calls. Sheena testified and denied talking to the claimant. I find that the claimant did not make the calls he claims he made.

¶36 The claimant did not show up for work on July 29th, but instead went to a chiropractor, Dr. Daniel McGee, in Cut Bank. According to Dr. McGee, the claimant was complaining of "constant headache, bilateral leg numbness, pain in . . . left arm with numbness in the fingers." (McGee Dep. at 5.) Dr. McGee's office note indicated that the claimant's condition was related to a logging accident of July 28, 2003.

¶37 On its face the doctor's office note bolsters the claimant's claim in this case. Additional information, however, undermines the value of the report.

¶38 While filling out a "Confidential Patient Information" form, which is attached to Dr. McGee's deposition as Exhibit 3, the claimant told Dr. McGee that his condition had commenced **a month or two earlier and had gradually worsened**. (*Id*. Emphasis added.) Dr. McGee testified:

> Q. Did he describe an accident at that time?
>
> A. Initially he didn't. When he first came in, he said that, he said it was something that he had had for about a month or two, and then it just gradually got worse. We got to talking and he was hesitant, and I asked him why. And he said that he was injured at work, and he didn't want his employer to know because he didn't want to get fired. And at that point I had him fill out a slightly different history form that's a little more thorough, and I provided copies to workers' comp . . . .

(*Id*.) No matter how you cut it, the claimant lied to Dr. McGee. In assessing whether his initial story or his subsequent claim of an industrial accident is true, I have to ask, why

would he conceal an industrial accident if he told David of his accident on July 28th, as he said in his trial testimony?[1] Moreover, the claimant knew that he was going to be laid off anyway because of the fire danger. His claim that he was afraid to report an injury because of fear of termination does not ring true and I do not believe it.

¶39 There is another significant problem with the claimant's story as told to Dr. McGee. Both Dr. McGee's notes and his personal recollection reflect that the claimant sustained a crushing blow to his right neck and shoulder area. That was the area of the body where the claimant reported his symptoms. (McGee Dep. at 17; McGee Dep. Ex. 2 at 5.) In direct examination Dr. McGee opined that the left-sided injury described by the claimant in his workers' compensation claim was consistent with the injury he reported to him. (McGee Dep. at 13.) Under cross-examination, however, Dr. McGee acknowledged that his treatment was for a crushing injury to the right side of the body, which was inconsistent with the left-sided injury reported in the workers' compensation claim. Dr. McGee rationalized that either he or the claimant might have made a mistake, however, he confirmed that the claimant's pain and radicular symptoms were on the right, not on the left side. (*Id.*) Dr. McGee went on to explain that it was possible to get hit on the left side and develop symptoms on the right - usually the result of a lateral whiplash in a car accident. (*Id.*) He then opined that this mechanism might explain the apparent inconsistency, but that it was his experience that crushing blows (like the one sustained by the claimant) usually result in symptoms on the same side of the body that sustained the blow. (*Id.*) After considering his testimony, I find it implausible that the claimant's right-sided symptoms on July 29th were due to a left-sided injury on July 28th.

¶40 Dr. McGee admitted that the claimant had one and maybe two black eyes when he came in for treatment. Even though the claimant did not volunteer any information about the cause of his black eye(s), he concluded that the claimant had received his black eye(s) in a fight. (*Id.*) His observations are incompatible with the claimant's assertion that he only had a small bruise under his eye as a result of being hit by a wrench. Dr. McGee further conceded that it was possible that a fight could have caused the claimant's injuries. (*Id.*)

¶41 Since the claimant did not show up for work on the morning of July 29th, David and Candace decided to terminate the claimant's employment. On that same morning, Candace placed a newspaper ad for a replacement delimber operator. The ad was placed before logging operations were shut down later that day on account of fire danger.

¶42 At approximately 9:20 p.m. on the evening of July 29th, the claimant phoned the Roberts and informed them that he would be at work the next day. David, however, told him that Plum Creek had shut them down and no one was allowed in the woods. The claimant said he would come over the next morning to get his gear so he could try to get work on a fire crew.

¶43 On July 30, 2003, the claimant went to the Kalispell Regional Medical Center complaining of neck and upper and lower back pain. (Ex. 2.) The history provided by the claimant at that time was that he was "struck on L [left] forearm and chest by falling tree and knocked to ground." (*Id.*) That history is inconsistent with his trial testimony. He denied being struck in the chest or being knocked to the ground; he also denied giving the history reflected in the medical record. The physical examination of the claimant was unremarkable, reflecting essentially subjective complaints. (*Id.*) X-rays showed degenerative joint disease of the cervical spine. (*Id.* at 3, 4, and 7.)

¶44 The claimant's July 30, 2003 visit to the Kalispell Regional Medical Center was the last recorded medical visit for his alleged industrial injury.

¶45 On the morning of July 30th, prior to going to the Kalispell Regional Medical Center, the claimant and his girlfriend went to the Roberts residence to pick up claimant's gear. David told the claimant that his employment was terminated on account of his failure to show up for work or call in on July 29th, thus he would not have a job after the fire danger had passed.

¶46 The claimant and his girlfriend left but returned five minutes later. The claimant's girlfriend, speaking for claimant, demanded his paycheck and accused David of violating Montana law by not paying the claimant immediately. She also threatened David with a lawsuit for wrongful termination of employment and for not making immediate wage payment upon firing the claimant. In addition, she informed David that the claimant would be filing a workers' compensation claim.

¶47 The claimant's girlfriend, Robin Lindsay, testified and denied making the threats, however, I am absolutely convinced she did so.

¶48 My previous findings undoubtedly indicate my ultimate factual resolution in this case. I find that the claimant was not injured at work on July 28, 2003. Indeed, I am left with a firm conviction that this is a false claim.

CONCLUSIONS OF LAW

¶49 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).

¶50 The 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). In order to prove his entitlement to benefits, the claimant must prove he was injured in an industrial accident. He has failed in his burden of proof, indeed, as I have found in my findings of fact, I am convinced this is a false claim.

JUDGMENT

¶51 The claimant was not injured in a work-related accident on July 28, 2003, as he claims. His petition is **dismissed with prejudice**.

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

¶53 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 18th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Charla K. Tadlock
Mr. Daniel B. McGregor
Submitted: March 10, 2004

1. In light of the claimant's representation, Dr. McGee submitted his bills for treatment to the Montana State Fund, rather than requiring immediate cash payment from him. (McGee Dep. at 14, 24, and 25.) Claimant therefore gained an immediate benefit by changing his story.