

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 62

WCC No. 2002-0716

MELODY CHRISTENSEN

Petitioner

vs.

ROSAUER'S SUPERMARKETS, INCORPORATED

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 37-year old delicatessen backup cook claimed she suffered a herniated disk lifting boxes, heavy pans, and trays at work. However, testimony of other witnesses indicated she first complained of back and leg pain after she was assaulted by her former boyfriend. Though claimant's physician opined that her work caused her condition, his opinion was expressly predicated on the history given by claimant: that of pain prior to her assault. In contrast, a team of physicians performing a medical records review on behalf of the insurer, including an occupational specialist, an orthopedic surgeon, and a neurologist, opined that claimant's work did not cause her condition.

Held: The history claimant related concerning the onset of her pain was not credible. Since the medical opinion supporting her claim for benefits was premised on that history, it was not persuasive.

Topics:

Occupational Disease: Proximate Cause. Where the Court found claimant incredible, and the medical opinion supporting her claim for benefits was based on her incredible history of events, she has not proven that her work as a cook caused her herniated disk and resulting disability and medical treatment.

Witnesses: Credibility. Claimant failed to persuade the Court that a herniated disk was job-related where the medical opinion relating the condition to her job was premised on the history given by claimant and the Court found that history to be untrue.

¶1 The trial in this matter was held on April 29, 2003, in Kalispell, Montana. Petitioner, Melody Christensen (claimant), was present and represented by Ms. Laurie Wallace.

Respondent, Rosauer's Supermarkets, Incorporated, was represented by Ms. Linda G. Hewitt.

¶2 Exhibits: Exhibits 1 through 7, 9, 12, and 13 were admitted without objection. Exhibit 8 was admitted over objection. Exhibits 10 and 11 were refused.

¶3 Witnesses and Depositions: Claimant, Susan Warner, Carmen DiMeo, Dawn Frame, Michael Weigle, and Dr. Dana C. Headapohl testified at trial. In addition, the parties submitted depositions of claimant, Susan Schwarz, and Dr. Steven Martini for the Court's consideration.

¶4 Issues Presented: As set forth in the Pretrial Order, the following issues are presented:

- Whether Petitioner suffered an occupational disease arising out of and in the course of her employment with Rosauers [sic] Supermarkets.
- Whether Petitioner's employment with Rosauer's was the cause of her alleged occupational disease.
- Whether Petitioner is entitled to temporary total disability benefits and reasonable medical expenses related to the treatment of the occupational disease.
- Whether Petitioner is entitled to an increase in award for unreasonable delay or refusal to pay proper workers' compensation benefits pursuant to §39-71-2907, MCA.
- Whether Petitioner is entitled to costs and attorney's fees pursuant to §39-71-611 and/or 612, MCA.

(Pretrial Order at 3.)

¶5 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

¶6 Claimant is thirty-seven years old and has a tenth grade education. (Christensen Dep. at 8.) She has worked mostly as a waitress and cashier.

¶7 On December 16, 2001, the claimant went to work as a delicatessen clerk ("deli-clerk") at Rosauer's in Kalispell, Montana. Rosauer's is a grocery store.

¶8 As a deli-clerk, the claimant waited on delicatessen customers, stocked deli items in the display cases, prepared expresso and other coffees for customers, and acted as a cashier. Her regular work shift was from 2:30 p.m. to 9:30 p.m.

¶9 On June 19, 2002, claimant was assigned to work as a backup cook, a job that entailed unloading and cooking chicken. Her shift was changed to commence at 10:00 or 11:00 a.m. (Ex. 3 at 74-87.)

¶10 Claimant's shift overlapped the regular cook's shift. The regular cook worked until 2:30 p.m.; thus, she worked with claimant during a good part of claimant's shift.

¶11 On September 18, 2002, claimant sought medical care at Family Health Care in Kalispell on account of pain in her buttocks, leg, and left side. (Ex. 1b at 4.) A note in the medical record for this visit indicates "left leg numb x 1 month, getting worse." (*Id.*)⁽¹⁾ An MRI was recommended (Ex. 1b at 5) and completed on September 24, 2002. The MRI disclosed "a very large extruded disc at L5-S1 which is central and left paramedian. It occupies approximately 90% of the spinal canal at this level." (Ex. 1c at 2.) Dr. Richard C. Dewey, a neurosurgeon, saw her on September 24, 2002. He considered her condition emergent and operated on her the next day, September 25, 2002. (Ex. 1c at 6-7.) He performed a laminotomy and micro-diskectomy at the L5-S1 level. (*Id.*)

¶12 Claimant continued working for Rosauer's until September 21, 2002.

¶13 Claimant contends that her herniated disk was caused by her work as a cook at Rosauer's. She points out that she was required to lift boxes of chicken weighing approximately forty pounds, as well as heavy pans and trays. In a First Report of Injury prepared on October 8, 2002, she reported an onset of her symptoms about "2-1½ months ago after I started cooking." (Ex. 7 at 1.)

¶14 Claimant testified that she began experiencing symptoms related to her herniated disk shortly after beginning work as a cook. Specifically, she testified that she began to experience pain in her buttocks within one to two weeks of beginning work as a cook, i.e., the latter part of June 2002. She further testified that she told her co-workers that "my butt hurt" and that "everybody on the job knew" about it. (Trial Test.)

¶15 Several of claimant's coworkers testified at trial. Carmen DiMeo, the regular cook whose shift overlapped claimant's, testified. In addition, Susan Warner, another deli-clerk who began working for Rosauer's in July 2002 and whose shift sometimes overlapped claimant's, and Dawn Frame, another deli-clerk who has worked for Rosauer's for fourteen and a half years and whose shift overlapped claimant's shift, testified. All three coworkers testified that claimant began complaining of back, butt, and leg pain, or numbness only **after** she was assaulted by her ex-boyfriend. The assault occurred on August 8, 2002.

¶16 The August 8th assault on claimant is described in written statements claimant made to a deputy sheriff on August 8th and a further, more detailed, statement she provided to a Victim Witness Program advocate on August 9th. (Ex. 13 and see Deposition of Susan Schwarz.) In the statement to the deputy, claimant wrote that her ex-boyfriend "threw me out in the lawn." In that statement claimant wrote that her boyfriend "slammed me in the

door & when I got in he pick[ed me] up and threw me out in the lawn. I got up tried to go back in the house he shut me in the door again." (*Id.* at 3.) The statement goes on to describe her boyfriend hitting her in the face with a laundry basket and shoving her across the bedroom. (*Id.* at 4.) In the August 9th report, claimant reported a bruise on her leg to the victim advocate and the advocate observed bruises on one leg, one of which was slightly above the knee. (Schwarz Dep. at 18-19 .) Claimant also had bruising on her left arm and on her face. (*Id.* at 17, 20.)

¶17 A description of the assault is also contained in a report of the deputy sheriff who investigated the incident. (Ex. 2 at 4-5.) In his report, written August 8th, the deputy wrote that the claimant reported that her ex-boyfriend shut the door to the house on her arm, then picked her up and "threw out the back door" after she had forced her way into the house. (*Id.* at 4.) He further reported that claimant had a "grass stain on her jeans, right hip area" from being thrown down. (*Id.*)

¶18 Carmen DiMeo testified that the first time claimant complained about her leg or back was the day after the assault. On that day, the claimant told Carmen that she "got bounced around like a football" and showed Carmen bruises on her arms. Carmen testified that thereafter the claimant began complaining that her back hurt and her legs were numb. Carmen also noticed the claimant limping after the assault.

¶19 Dawn Frame testified that claimant first complained about buttock, hip, and leg problems following the August 8th assault. According to Dawn, claimant told her about the assault, saying that her boyfriend had "bounced" her off the steps of the house and onto the lawn "like a football," not once but a couple of times. Claimant complained that her hip and back hurt and showed Dawn a bruise on her forearm. Dawn said that thereafter the claimant walked stiffly and indicated she was in pain.

¶20 Susan Warner testified similarly, confirming that the claimant first complained about her back and leg only after the assault. She testified that claimant told her about the assault and showed her bruises on her arms and on her back at her waist.

¶21 In a statement taken October 30, 2002, by an investigator for the insurer's adjuster, claimant denied she was assaulted by her ex-boyfriend. The following is the colloquy between the investigator and claimant. MW is Mike Weigle, the investigator. MC is Melody Christensen, the claimant:

MW: Somebody at Rosaurer's had mentioned you had been knocked off your porch recently.

MC: I wasn't knocked off my porch. My boyfriend and I had a fight but I wasn't knocked off my porch.

MW: Now Scott is the guy you're dating? What happened on that occasion?

MC: We just got into an argument.

MW: What happened?

MC: I left.

....

MW: Was he [the boyfriend] arrested or anything for assaulting you?

MC: No.

MW: You didn't call the police? Somebody didn't call the police?

MC: No.

MW: So what exactly happened? Did your fall have any trauma from that?

MC: No. We get in arguments but he's never assaulted me.

MW: Somebody at Rosaurer's, and I'm going to go there and square it up. Rumors happen all the time. I'm doing this on your behalf. Somebody at Rosaurer's has said that apparently that you told them he had beat you up and you were pretty bruised.

MC: Well, I get bruises. I mean I can show you a whole bunch on me now but they are not from Mark. [Mark is the ex-boyfriend who claimant reported assaulted her.]

MW: Just kids and . . .

MC: Well, I wrestle around but I don't hurt myself. But I've never been assaulted. The one man who assaulted me, his name was Ron Burow.

MW: So why don't you tell me in detail what happened with Mark and we can get that cleared up right away.

MC: We had an argument over some personal belongings.

MW: Okay, and what happened physically?

MC: We got into an argument. **Nothing physical there.**

MW: Nothing physical?

MC: No. I wanted in the house, he wouldn't let me in the house.

MW: Nothing physical, he didn't push you aside, you didn't fall off the porch?

MC: I didn't fall off the porch. I don't know where that came from but I didn't fall off the porch."

(Ex. 8 at 11-13.)

¶22 It is clear from the foregoing colloquy that claimant specifically denied being assaulted by her ex-boyfriend, denied that anything physical occurred during her argument with him, and denied calling the police. At trial she testified that she did not think the assault was any of the investigator's business. I am not persuaded by her explanation, indeed in assessing her credibility I am persuaded she purposely covered up the assault when talking to the investigator and further find that she has not been truthful in her testimony about the time when she began experiencing buttock pain and leg numbness. Rather, I am persuaded by the testimony of her coworkers, who I found credible, that her first complaints of back and leg pain/numbness occurred immediately following the assault on her by her ex-boyfriend. I further note that claimant's own report when seeking medical care on September 18th was of leg numbness of one-month duration. (Ex. 1b at 4) The report is more consistent with the onset of her symptoms after the assault than it is with her present claim that she began experiencing symptoms in late June.

¶23 This brings me to the medical opinions expressed in this case. Dr. Dewey, who operated on claimant, did not express an opinion as to the cause of her herniated disk. Dr. Steven Martini, who saw claimant for post-surgery followup, did. He opined that it was caused by her work as a cook.

¶24 Dr. Martini based his opinion on the history provided to him by claimant. As stated by claimant in her proposed findings of fact number 20:

. . . His opinion was based on the history that the [claimant's] symptoms came on shortly following the Claimant's change in jobs; that the work exposure was significant; and that the Claimant's testimony as to how the symptoms began and how they progressed was very consistent with the development of a disc herniation. [Citing to Dr. Martini's deposition at 21.]

Dr. Martini acknowledged the possibility that the August 8th assault caused her disk herniation and also offered that a third possibility - that neither work nor the assault caused it. (Martini Dep. at 20-21.) He also acknowledged that claimant did not tell him about the assault and that he was relying on the history related to him by claimant's counsel during the deposition in formulating his opinion concerning causation. (*Id.* at 17-18, 24-25.)

¶25 Dr. Headapohl, who testified at trial, did not examine claimant, however, she, along with Dr. Randall Sechrest, an orthopedic surgeon, and Dr. Nathan Russo, a neurologist, conducted a medical records review. Based on that review, the three of them concluded that claimant's work did not cause her disk herniation. (Headapohl Trial Test. and Ex. 12.) Dr. Headapohl testified that there was nothing about the claimant's job or in her medical history supporting a causal connection between the job and the disk herniation. She testified that with the large size herniation, such as claimant suffered, one would expect symptoms to emerge shortly after the herniation. She noted that had the herniation occurred at work one would normally expect some specific event or indication, like a "pop

in the back," followed by other symptoms. As I have found, nothing of that sort occurred in this case.

Resolution

¶26 Claimant has the burden of persuading me by a preponderance of the evidence that her condition was caused by her work. See *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). She has failed to satisfy that burden. While there was no affirmative medical opinion that the assault caused her herniated disk, Dr. Martini's testimony establishes that it is one of the possible causes of her condition. Indeed, he outlines yet a third possibility - that is, the possibility that there was some cause other than either work or the assault. It is not the insurer's burden to affirmatively establish a cause other than the work as the more likely of the three possibilities: it is the claimant's burden to affirmatively establish that her work was likely the cause of her condition. She simply failed to satisfy me that was the case. Dr. Martini's opinion concerning causation was predicated on the history claimant provided concerning the onset of symptoms in late June. I found that history to be untrue. In contrast, Dr. Headapohl testified affirmatively based on the information contained in the claimant's medical records, the nature of claimant's job, and the lack of any indication of a herniated disk in association with her work. I find her opinions persuasive, especially in light of Dr. Martini's express reliance on a history I have found to be untrue. Finally, I note that the treating physician rule does not come into play in this case, firstly because Dr. Martini did not become a treating physician until after claimant's surgery and is thus in no better position than any other physician who conducts a post-surgery records and history review, and second because the rule is only a tie breaker where the opinions of two physicians are evenly balanced. In this case there is no tie: Dr. Martini's opinion was only as good as the history provided him and Dr. Headapohl's testimony was affirmatively persuasive that work was not the cause.

Reasonableness of the Insurer

¶27 Even if I were to hold that claimant is entitled to benefits, the adjusters for Rosauer's did not act unreasonably in denying this claim. A legitimate causation issue existed.

CONCLUSIONS OF LAW

¶28 This case is governed by the 2001 version of the Montana Occupational Disease Act since that was the law in effect at the time the claimant's alleged work-related condition arose. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶29 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she 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). To do so, she must prove that her condition was caused by her work. § 39-72-102(10), MCA (2001) (defining occupational disease as "harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift."); § 39-72-408, MCA (2001) (requiring that the disease be proximately caused by the employment). As set out in paragraph 27, claimant failed to satisfy her burden.

¶30 Since the adjusters did not act unreasonably, and claimant did not prevail in any event, the claimant is not entitled to attorney fees.

JUDGMENT

¶31 The claimant did not suffer an occupational disease and is not entitled to benefits. Her petition is **dismissed with prejudice**.

¶32 This Judgment is certified as final for purposes of appeal.

¶33 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 28th day of October, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Laurie Wallace

Mr. Todd A. Hammer

Ms. Linda G. Hewitt

Submitted: May 14, 2003

1. The quotation is claimant's reading of the handwritten note. (See Petitioner's Proposed Findings of Fact and Conclusions of Law ¶ 17.) I concur in that reading.