

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 4

WCC No. 9604-7534

JIM DAENZER

Petitioner

vs.

**STATE COMPENSATION INSURANCE
FUND/CURTIS BARTELL**

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Curtis Bartell claimed a back injury while performing logging work for Jim Daenzer, who had contracted with North Idaho Post and Pole for the work. Because Daenzer did not carry workers' compensation insurance, the claim was tendered to State Fund, North Idaho's insurer, pursuant to section 39-71-405, MCA (1993). State Fund accepted the claim, paid some benefits, and settled the indemnity claim. State Fund demanded indemnification from Daenzer, who then filed the present petition, alleging that Bartell was not injured in the course and scope of employment and filed a fraudulent claim.

Held: Claimant was injured as claimed, which entitles State Fund to indemnity. As claimant's employer, Daenzer was required by law to maintain workers' compensation coverage for claimant, §39-71-401, MCA (1993), and in failing to do so is personally liable for benefits, §39-71-515(4), MCA (1993). State Fund was secondarily liable only due to section 39-71-405, MCA (1993), a statutory provision imposing derivative liability on its insured for its subcontractor's failure to meet statutory obligations. The Court rejects Daenzer's arguments that claimant was in fact injured in a bar fight and/or not at work as alleged. Time records kept by claimant support his version of events and render the employer's testimony not credible. The timing of statements in medical records also support's claimant's testimony.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-405, MCA (1993). As the logger claimant's employer, petitioner was required to maintain workers' compensation insurance, §39-71-401, MCA (1993),

and in failing to do so is personally liable for benefits, §39-71-515(4), MCA (1993). As insurer for the logging company with which petitioner had contracted, State Fund was secondarily liable under section 39-71-405, MCA (1993), but is entitled to indemnification from petitioner.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-515(4), MCA (1993). As the logger claimant's employer, petitioner was required to maintain workers' compensation insurance, §39-71-401, MCA (1993), and in failing to do so is personally liable for benefits, §39-71-515(4), MCA (1993). As insurer for the logging company with which petitioner had contracted, State Fund was secondarily liable under section 39-71-405, MCA (1993), but is entitled to indemnification from petitioner.

Employment: Employee. As the logger claimant's employer, petitioner was required to maintain workers' compensation insurance, §39-71-401, MCA (1993), and in failing to do so is personally liable for benefits, §39-71-515(4), MCA (1993). As insurer for the logging company with which petitioner had contracted, State Fund was secondarily liable under section 39-71-405, MCA (1993), but is entitled to indemnification from petitioner.

Independent Contractor: Generally. As the logger claimant's employer, petitioner was required to maintain workers' compensation insurance, §39-71-401, MCA (1993), and in failing to do so is personally liable for benefits, §39-71-515(4), MCA (1993). As insurer for the logging company with which petitioner had contracted, State Fund was secondarily liable under section 39-71-405, MCA (1993), but is entitled to indemnification from petitioner.

Injury and Accident: Accident. In case where uninsured employer seeks to avoid personal liability on claim, WCC rejects employer's arguments that claimant was in fact injured in a bar fight and/or not at work as alleged. Time records kept by claimant support his version of events and render the employer's testimony not credible. The timing of statements in medical records also support's claimant's testimony.

¶1 The trial in this matter commenced on October 23, 1997, in Helena, Montana, and recessed until November 7, 1997, at which time it was completed. Petitioner, Jim Daenzer (Daenzer), was present and represented by Mr. Douglas Anderson during the October 23 proceedings. Respondent, Curtis Bartell (claimant or Bartell), appearing on his own behalf, was also present during the October 23 proceedings. All three individuals (Daenzer, Anderson and Bartell) requested that they be allowed to participate by telephone in the November 7 proceedings and did so. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Laurence A. Hubbard, who was personally present on both dates.

¶12 Witnesses and Depositions: Jim Daenzer, Allan Delahoussaye, Lori Hunt, Gina Huot, Curtis Bartell and Billie Jette were sworn testified at the trial. In addition the parties agreed that the Court may consider the deposition of Chriss A. Mack, M.D.

¶13 Exhibits: Exhibits 1 through 7 and 9 through 22 were admitted without objection. Exhibit 8 was refused.

¶14 At the close of the trial, the Court requested the parties to obtain a typewritten version of the office notes of Patrick R. Montgomery, D.C. Dr. Montgomery's handwritten notes were admitted as Exhibit 10 but are difficult to read. In the alternative, the Court offered the parties the opportunity to depose Dr. Montgomery for the purpose of his reading his notes to a court reporter. Dr. Montgomery thereafter supplied a typewritten version of the notes, and the parties agreed that those notes be submitted to the Court. They have been made part of the Court file.

¶15 Issues: This proceeding arises out of an industrial accident which Bartell alleges he suffered on June 10, 1995, while working for Daenzer. At the time of the alleged accident, Daenzer was uninsured. Pursuant to section 39-71-405, MCA, the State Fund, which insured the contractor employing Daenzer, accepted liability for Bartell's claim. Daenzer disputes the claim for compensation and State Fund's acceptance of it. He requests the Court to find that the claim was fraudulent. The Pre-trial Order phrases the issues for decision as follows:

1. The first issue presented to the Court is whether the State Fund correctly determined that Respondent Bartell was injured in the course and scope of his employment.
2. The second issue is whether Respondent Bartell filed a fraudulent claim for workers' compensation benefits.
3. The third issue is if Respondent Bartell was injured in the course and scope of his employment what amount of money is the State Fund entitled to recover under MCA §39-71-405.

* * * * *

¶16 Having considered the trial testimony, the demeanor and credibility of the witnesses, the exhibits, the deposition, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶17 Daenzer operates a small logging company. He contracts with larger companies to furnish them logs.

¶18 In May and early June 1995, Daenzer was doing logging work for two larger companies: North Idaho Post and Pole and Beaver Wood Products. (Exs. 2 and 3.) He does not contend that he was an employee of either company. Thus, for purposes of this proceeding, the Court assumes he conducted business as an independent contractor.

¶19 Daenzer employed claimant as a logger from July 1994 until early June 1995. Claimant was initially paid by the ton for the timber he logged, but within a short time Daenzer began paying him by the hour. His initial hourly wage was \$7.50. His wage was thereafter raised to \$8.00 and ultimately to \$8.50 an hour, which was his rate of pay at the time of the alleged industrial injury.

¶110 Claimant kept his own record of his hours and submitted them to Daenzer, who kept no separate time records.

¶111 Claimant has a history of back pain. His recorded medical history, as presented to the Court, begins on March 17, 1995, with chiropractic treatment by Patrick R. Montgomery, D.C. Dr. Montgomery's office note for that date reflects complaints of low back and right leg pain and a history of "[c]hronic recurring low back pain with exacerbation one year ago falling down stairs; persistent grade III right sciatic since." Dr. Montgomery's notes are found at Exhibit 10 and all information concerning his examinations and treatment of claimant are taken from that exhibit unless otherwise noted.

¶112 Dr. Montgomery treated claimant on five occasions in March. Claimant's condition improved.

¶113 Dr. Montgomery next saw the claimant on May 22, 1995. At that time he recorded:

Has been doing well until past 3 days; gradual onset due to activities of daily living; lateral flexion fixation L4-5; right grade II sciatica; bilateral SLR restriction

¶114 Dr. Montgomery examined and treated claimant again on June 5 and 8, 1995. His office note for June 5 reflects upon initial examination there was "no change" in claimant's condition and a positive right SLR (straight leg raising). However, Dr. Montgomery noted improvement in the SLR following chiropractic manipulation that day. On June 8 he noted a "slight increase range of motion."

¶115 Meanwhile, claimant continued working in the woods.

¶116 According to claimant, on June 10, 1995, he was operating a skidder while logging for Daenzer when he felt a "sharp pain like a bee sting" in his lower back. (Ex. 11 and Trial Test.) When he got off the skidder he felt sharp pain in his right hip and leg and had difficulty standing. The episode was acute and worse than what he had previously experienced.

¶117 Claimant filed a written claim for compensation. The claim was dated June 28, 1995, and lists Jim Daenzer as his employer. (Ex. 11.) Because Daenzer was uninsured, the claim

was initially sent to the Uninsured Employers' Fund (UEF). (Ex. 17.) The UEF determined that North Idaho Post and Pole was insured. (Ex. 17.) The claim was forwarded to its insurer, the State Fund.

¶18 The State Fund investigated the claim and accepted liability under section 39-71-405, MCA. Thereafter, the State Fund paid claimant both medical and compensation benefits.

¶19 In March of 1996, claimant and the State Fund entered into a full and final compromise settlement of claimant's remaining entitlement to compensation benefits. Under the settlement, which was approved by the Department of Labor and Industry on April 1, 1996, the State Fund paid claimant \$10,829.00. This was in addition to \$4,497.95 in compensation benefits previously paid to him and \$10,554.15 in medical benefits. The total amount paid by the State Fund on account of the claim was \$25,881.10. Under the settlement agreement, the State Fund remains liable for future hospital and medical expenses incurred by claimant on account of the industrial injury.

¶20 Daenzer disputes the State Fund's decision accepting liability. He contends that claimant last worked for him on June 3, 1995, so could not have been injured while working on June 10. He further contends that any aggravation of claimant's back condition occurred in a bar fight.

¶21 The only witness called at trial who actually witnessed the alleged bar fight was claimant himself. According to him, while returning home from Missoula his car died and he went inside a nearby bar. A fight outside the bar ensued and claimant went outside to observe. While watching, someone hit him in the eye, resulting in a black eye over the next few days. According to claimant, he left immediately; he did not fall and did not injure his back.

¶22 Claimant mentioned the bar incident to Daenzer, Alan Delahoussaye (Delahoussaye) and Lori Hunt (Hunt), who is Daenzer's sister. According to Daenzer, he saw claimant a couple of days after June 3, and claimant told him he was jumped at High Country Bar and that his back was hurting him. Delahoussaye and Hunt testified that claimant had mentioned being jumped at the bar, however, neither testified that claimant told them that he hurt his *back* in the incident. Hunt testified that she saw claimant at Liquid Louis', a bar in Condon, on June 4, 1995, and that claimant told her he'd been jumped and was "hurting." (Trial Test.) According to Hunt, claimant did not mention where he was hurting, and she observed that claimant's face was discolored (red), particularly around his left eye. During the conversation, claimant also indicated that he was planning to move to Nevada in two weeks because of a better job opportunity. She did not note any obvious back distress, testifying that claimant was sitting at the bar hunched over like other customers.

¶23 Hunt's testimony established that the bar incident occurred on or before June 3, but not long before that date. June 3 is the day that Daenzer asserts that claimant last worked for him.

¶24 There is other evidence supporting claimant's assertion that he was injured on June 10 and not in the bar incident. This evidence, set forth in the following paragraphs, persuades me that claimant is telling the truth about the June 10 incident and in fact suffered an industrial injury on that date.

¶25 Claimant wrote the hours he worked on a calendar. That calendar shows that he worked the following hours during the last week of May:

Tuesday, May 30	8.5
Wednesday, May 31	9.5
Thursday, June 1	9.5
Friday, June 2	<u>9.0</u>
Total hours	36.5

The calendar shows that during the next week he worked the following hours:

Wednesday, June 7	4
Thursday, June 8	4
Friday, June 9	8
Saturday, June 10	<u>4</u>
Total hours	20

(Ex. 7.)

¶26 On June 5, 1995, Daenzer paid claimant \$310.25 in wages. On June 15, 1995, he paid claimant \$170.00. Daenzer testified that the June 5 payment was for hours worked between May 22 and May 29 and the June 15 payment for hours worked from June 1 to June 3. However, the Court notes that the hours reflected on Bartell's calendar amount to \$310.25 (36.5 x \$8.50) for the period ending June 2 and \$170.00 (20 x \$8.50) for the period ending June 10, the exact amounts he was paid.

¶27 Claimant visited his chiropractor on June 5 and 8, 1995, dates after the bar incident. There is no mention of any bar or other incident in Dr. Montgomery's notes. (Ex. 10.) More importantly, the June 5 chiropractic note states that there was "no change" in claimant's condition. The last time claimant had been to the chiropractor was May 22, 1995. Hunt's and Daenzer's testimony make it unlikely that the bar incident occurred prior to May 22. Thus, the June 5 office note of Dr. Montgomery indicates that claimant's back condition was no worse *after* the bar incident than before the incident.

¶28 The June 8 chiropractic note indicates that claimant had a slight increase in range of motion. (Ex. 10.) Thus, he appeared to be improving. In contrast, by the time of his June 12 chiropractic visit, claimant's condition had changed for the worse. The note reflects claimant's report of an aggravation at work. Dr. Montgomery recorded, "Severe exacerbation skidding Saturday; felt pop. . . ." The change in claimant's condition triggered Dr. Montgomery's decision to "[r]efer [claimant] to [a] neurologist." The next day, June 13, 1995, Dr. Montgomery referred claimant to Dr. Chriss A. Mack, a neurosurgeon, because of his concern "about the L5-S1 disc." (Mack Dep. Ex. 1.)

¶29 Dr. Mack diagnosed a herniated disk based on claimant's decreased ankle reflex; positive findings for right straight leg raising, sciatic nerve test, and bowstring; and an MRI. On June 29, 1995, he performed a microdiscectomy at the L4-5 level. (Mack Dep. Ex. 1.)

¶30 Dr. Mack opined that the incident claimant described as occurring on June 10, 1995, aggravated and contributed to his herniated disk condition. (Mack Dep. at 25-26.) He further testified that there was "a pretty large free fragment disk herniation" and that it was unlikely it had been there for long:

That [the large free fragment] implies -- it's pretty hard to imagine that that thing has been there for a long period of time. **That tends to be something not long tolerated by anybody on their best day.**

(*Id.* at 33, emphasis added.)

¶31 Claimant's mother testified that when claimant came home on June 10, 1995, he was walking bent over "like a hundred year old man." (Trial Test.) She drove claimant to Dr. Montgomery on June 12.

¶32 Ultimately, I find it *unlikely* that claimant's herniated disk condition, as it existed on June 12, 1995, and thereafter until it was surgically corrected, arose as a result of the bar assault of June 3. I find it more likely, and am persuaded, that claimant aggravated his back condition while working for Daenzer on June 10, 1995. I therefore find that claimant suffered an industrial injury as he claims, that the State Fund properly accepted liability for his claim, and that the State Fund is entitled to indemnification from Daenzer in the sum of \$25,881.10.

CONCLUSIONS OF LAW

¶133 The matter before the Court concerns benefits. Petitioner requests the Court to determine whether claimant suffered an industrial injury and is entitled to benefits. If the Court answers those questions in the affirmative, the parties request the Court to determine the amount due the State Fund to indemnify it for the benefits it has paid claimant. Since the matter involves a determination of benefits due the claimant, and the party ultimately liable for the benefits, the Court has jurisdiction over the controversy. § 39-71-2905, MCA.

¶134 The claimant's alleged injury occurred on June 10, 1995, therefore the 1993 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶135 Claimant must satisfy the accident and injury definitions set out in section 39-71-119, MCA (1993). The definitions are as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means

- (a) internal or external physical harm to the body;
 - (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
 - (c) death.
- (2) An injury is caused by an accident. An accident is:
- (a) an unexpected traumatic incident or unusual strain;
 - (b) identifiable by time and place of occurrence;
 - (c) identifiable by member or part of the body affected; and
 - (d) caused by a specific event on a single day or during a single work shift.

. . . .

¶136 Aggravations of preexisting conditions are covered under the Act. Section 39-71-407, MCA (1993), provides in relevant part:

39-71-407. Liability of insurers -- limitations. (1) Every insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

(2)(a) An insurer is liable for an injury, as defined in 39-71-119, if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) a claimed injury aggravated a preexisting condition.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

¶37 Claimant bears the burden of proving his case by a preponderance of evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979). He has satisfied his burden. He has persuaded me that he suffered an unusual strain while operating a skidder at work on June 10, 1995, and that the incident caused or aggravated a herniated disk.

¶38 One who is required to pay on obligation properly and primarily owed by another is entitled to indemnification from the other. See *AAR Const., Inc. v. Fergus Elec. Co-op., Inc.*, 215 Mont. 102, 107, 695 P.2d 819, 822-23 (1985); *Miller v. Melaney*, 172 Mont. 74, 79-80, 560 P.2d 902, 905 (1977). As claimant's employer, Daenzer was required by law to maintain workers' compensation coverage for claimant, § 39-71-401, MCA (1993), and in failing to do so is personally liable for benefits, § 39-71-515(4), MCA (1993). The State Fund is secondarily liable only because of a statutory provision imposing derivative liability due to its insured's subcontractor's failure to meet his statutory responsibilities. § 39-71-405, MCA (1993). The State Fund is therefore entitled to recover from Daenzer the amount it has paid on account of the present claim.

¶39 This case illustrates and underscores the need for persons and businesses which employ others to either make absolutely certain that the persons they hire are in fact independent contractors or at all times maintain workers' compensation coverage for those they employ. Although the employment status of claimant was not at issue in this case, the Court heard enough evidence on the point to recognize that Daenzer sought to characterize and treat claimant as an independent contractor; only after claimant's injury did he learn that under legal criteria for determining whether an individual is an independent contractor the claimant was in fact his employee. The Court is well aware that workers' compensation insurance coverage for loggers is expensive. Thus, in that industry, and in similar high premium industries, there is a financial incentive to contract with independent contractors rather than hire employees. But the cost of erroneously believing that someone you have hired is an independent contractor may be far higher than the price of insurance. That cost may include, as here, strict liability for tens of thousands of dollars

in benefits, as well as the possibility of liability for attorney fees and for additional tort damages. §§ 39-71-411, -504, -509, and 515, MCA.

JUDGMENT

¶40 The claimant suffered a compensable accident on June 10, 1995, while employed by Jim Daenzer.

¶41 Jim Daenzer is liable to and shall pay the State Compensation Insurance Fund the sum of \$25,881.10 and all future reasonable medical benefits which may be paid by the State Fund on account of claimant's injury.

¶42 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶43 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 29th day of January, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Douglas Anderson

Mr. Laurence A. Hubbard

Mr. Curtis Bartell - Certified Mail

Submitted: November 7, 1997