

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 74

WCC No. 9802-7924

CHRISTOPHER DEIGERT

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

RED LODGE MOUNTAIN RESORT

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Ski instructor received serious injuries when hitting a tree while attempting to ski an advanced run at high speed. Evidence indicated instructor was paid only to teach lessons and was allowed but not asked to ski between lessons. Other instructors testified warm-up runs were not customary. This run, in any event, was not a warm-up run but was a challenging run for the employee's own enjoyment.

Held: Skiing is a recreational activity within section 39-71-118, MCA (1995). The real question, however, is whether claimant was acting within the course and scope of employment when skiing. Applying the four-factor test set out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984), the WCC finds claimant was not in the course and scope of employment, distinguishing *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 929 P.2d 222 (1996), where the ski resort employer had encouraged ski instructors to take warm-up runs and the employee had been injured during such a run.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-118, MCA (1995). Skiing is a recreational activity within section 39-71-118, MCA (1995). However, to resolve the question whether a ski instructor skiing while not instructing is covered by the WCA, the Court must determine whether he was acting within the course and scope of employment when skiing. To do so, the Court applies the four-factor test set out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-

17, 692 P.2d 417, 419 (1984), looking to (1) whether the activity was undertaken at the employer's request; (2) whether the employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; (4) whether both employer and employee mutually benefitted 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. Here, the WCC finds claimant was not in the course and scope of employment where he was not teaching a lesson, had not been asked by the employer to perform warm-up runs, the employer received only insubstantial benefit from the claimant's skiing in his "official" resort parka, and claimant was not in fact warming up to teach a lesson, but was skiing a hard run for his own enjoyment. The WCC distinguished *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 929 P.2d 222 (1996), where the ski resort employer had encouraged ski instructors to take warm-up runs and the employee had been injured during such a run.

Employment: Course and Scope: Recreational Activities. Skiing is a recreational activity within section 39-71-118, MCA (1995). However, to resolve the question whether a ski instructor skiing while not instructing is covered by the WCA, the Court must determine whether he was acting within the course and scope of employment when skiing. To do so, the Court applies the four-factor test set out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984), looking to (1) whether the activity was undertaken at the employer's request; (2) whether the employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; (4) whether both employer and employee mutually benefitted 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. Here, the WCC finds claimant was not in the course and scope of employment where he was not teaching a lesson, had not been asked by the employer to perform warm-up runs, the employer received only insubstantial benefit from the claimant's skiing in his "official" resort parka, and claimant was not in fact warming up to teach a lesson, but was skiing a hard run for his own enjoyment. The WCC distinguished *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 929 P.2d 222 (1996), where the ski resort employer had encouraged ski instructors to take warm-up runs and the employee had been injured during such a run.

¶1 The trial in this matter was held on April 27, 1998, in Red Lodge, Montana. Petitioner, Christopher Deigert (claimant), was present and represented by Mr. James G. Edmiston and Mr. Benjamin J. LaBeau. Respondent, Liberty Northwest Insurance Corporation

(Liberty), was represented by Mr. Larry W. Jones. A transcript of the trial has not been prepared.

¶12 Exhibits: Exhibits 1 through 4, 6 through 11 and 19 were admitted without objection. Exhibit 5 was refused. Exhibit 21 was admitted over objection for limited purposes. Exhibits 20 and 23 through 25 were admitted over objection. Exhibits 12 through 18 and 22 were withdrawn.

¶13 Witnesses and Depositions: Claimant, Gary Coyle, Russ Gillette, Vanessa Selby, Mark Selby, Anne McNamera, Connie Merry, Ragnar Hartman, Dan White and Vern Hadley testified at trial. The parties also submitted depositions of the claimant, Gary Coyle, Kathleen Delahanty, Vern Hadley, Scott Mann, Sherrie Nevill and Rigger Poore for the Court's consideration.

¶14 Issues Presented: The issues, as set forth in the Pre-trial order, are as follows:

1. Whether Petitioner was in the course and scope of his employment when injured.
2. Whether Petitioner is entitled to an award of attorney fees and costs pursuant to Sections 39-71-611/612, MCA (1995).
3. Whether Petitioner is entitled to an award of the twenty percent penalty pursuant to §39-71-2907, MCA (1995).

¶15 Partial Bench Ruling: At the conclusion of trial, the Court granted respondent's motion for a directed verdict denying attorney fees and a penalty. The Court found that Liberty did not act unreasonably in denying the claim and taking the matter to trial.

¶16 Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

FINDINGS OF FACT

¶17 On or about December 4, 1996, the claimant was hired by Red Lodge Mountain Resort (RLMR) as an apprentice ski instructor.

¶18 On January 19, 1997, claimant was severely injured when he lost control and hit a tree while skiing Barriers run at RLMR.

¶19 At the time of the accident, RLMR was insured by Liberty. Liberty denied, and continues to deny, liability for the accident on the ground that claimant was engaged in a "recreational activity" within the meaning of section 39-71-118(2), MCA (1995). It also urges that claimant was skiing recklessly and was therefore outside the course and scope of his employment whether or not the recreational activity exception applies.

Ski Instructors' Duties and Pay

¶10 RLMR instructors were given a two-week schedule showing the days on which they were to report to work. (Deigert Dep. at 25-26; Ex 19.) Being listed on the schedule did not assure an instructor that s/he would have a lesson to teach at any given time. (Hadley Dep. at 21.)

¶11 Ski instructors, including claimant, were required to be available to teach ski lessons on their scheduled days. Generally, there were two lessons in the morning, one beginning at 10:00 a.m. for children and one at 10:30 a.m. for adults. There was also an afternoon lesson beginning at 1:00 or 1:30 p.m.

¶12 Ski instructors use the term "bells" to signify the lesson times. The term will be used herein.

¶13 RLMR requested its instructors to sign in when they came to work in the morning; however, the request was not a mandate and there was no penalty for failing to sign in. (Poore Dep. at 19-20; Hadley Dep. at 33.)

¶14 On an instructor's scheduled day of work the instructor was required to report to the lesson area at each bell to find out if she or he had been assigned any lessons. If an instructor was not assigned a lesson at any given bell, the instructor was free to engage in other activities, including skiing, until the next bell. If time permitted, instructors could leave the ski area and, for example, go into Red Lodge. However, leaving the ski area was impractical after the morning bells.

¶15 Claimant and other ski instructors were paid by the hour while giving lessons. In addition, RLMR provided each ski instructor with a season ski pass entitling the instructor to ski at the area at any time, including on days off.

January 19, 1997

¶16 On January 19, 1997, claimant did not sign in for work but reported for the morning bells. He had no lessons and went skiing. He skied down the mountain five or six times prior to his final, ill-fated run.

¶17 Shortly after 12:30 p.m. he skied the Barriers trail. Barriers begins as a single trail, it then splits into three trails which later reunite into a single trail further down the mountain.

¶18 Upon arriving at the junction of the three trails, claimant elected to ski the middle trail. On January 19th the middle trail consisted of two and one-half to three feet moguls (snow hills), presenting a greater skiing challenge. Claimant was aware of the moguls.

¶19 Dan White (White), a ski coach and experienced skier, observed what happened next. According to White, claimant entered the mogul field too fast for his abilities. White immediately sensed trouble and stopped to observe claimant on his run down the mogul

field, expecting claimant to either wipeout or demonstrate extraordinary skill. In his witness statement, he wrote, "a good skier trying to attack the hill like a great skier." (Ex. 5.)

¶20 In White's opinion the claimant was not skiing recklessly and the Court agrees. Claimant simply misjudged his ability to ski the Barriers' moguls. While that misjudgment may constitute carelessness on his part, it does not amount to recklessness.

¶21 Part way down the mogul trail, claimant lost control and hit a tree near the end of the mogul trail.

Course and Scope Issue

¶22 In seeking benefits, the claimant urges that he was in the course and scope of his employment when injured. His course and scope argument is primarily premised on the following contentions:

- He was "hired to ski." (Petitioner's Trial Brief at 4, contention 1.)
- His run down Barriers was a warmup run since he was scheduled to report to the 1:00 p.m. bell. (*Id.* at 5, contention 15.)
- At the time of the accident he was wearing a ski instructor's parka provided by RLMR. (*Id.* at 4, contention 3.)
- While free skiing he was working to improve his skiing techniques which would enhance his ability as an instructor. (*Id.* at 5, contentions 7-11.)

He advances other contentions but the remaining ones are directly related to or subsumed in the four contentions listed above. The Court will address the factual basis for each of the contentions in the findings below.

¶23 Hired to ski: Claimant was not hired to ski other than when teaching ski lessons. He was not paid for skiing when not teaching lessons. He was not required to ski when not teaching lessons. While his pass permitted him to ski when not teaching, he was free to engage in non-skiing activities whenever he was not teaching. The benefit to the employer from claimant's free skiing - "additional 'eyes on the slopes'" which could report accidents, hazardous slope or trail conditions, etc. (Petitioner's Trial Brief at 4, contention 4) - was minimal. RLMR employed ski patrolmen to perform those functions.

¶24 Warmup run: Claimant was not on a warmup run when injured. He had already skied five or six runs. Moreover, warmup runs were not required and, unlike the situation in *Connery v. Liberty Northwest Ins. Corp.*, WCC No. 9602-7507, Findings of Fact, Conclusions of Law and Judgment (July 22, 1996), *aff'd* 280 Mont. 115, 929 P.2d 222 (1996),

RLMR did not recommend a warmup run. Warmup runs were not even customary among RLMR ski instructors.

¶25 Ski parka: While he was wearing a ski instructor's parka at the time of his accident, RLMR did not require or encourage him to do so. He was required to wear the parka only when teaching lessons. He was free to wear his own parka when not teaching, and the evidence presented at trial fails to show that his wearing the RLMR parka, rather than changing into his own parka, was anything more than a matter of convenience to him.

¶26 Claimant urges that RLMR nonetheless received substantial benefits from his wearing his instructor's parka while free skiing. Specifically, he urges that in wearing the RLMR parka he was a goodwill ambassador who could provide information and assistance to skiers asking for help and was a "living billboard" for ski lessons at the resort.

Notwithstanding this contention, goodwill ambassador and living billboard were not among claimant's duties and, as already noted, he was not required to wear the RLMR parka in any event. Moreover, other ski instructors testified that they were infrequently asked questions by skiers when wearing their instructor parkas. RLMR may have received some benefit from claimant wearing his instructor parka, but the benefit was not sought and was indirect and insubstantial.

¶27 Improving skills: Claimant contends that he was working on his skiing techniques in anticipation of taking a Level I PSIA certification examination. Level I certification would have enabled him to teach higher level classes and increased his hourly wage. However, PSIA certification, of any level, was not required by RLMR as a condition of his employment. There was no evidence that RLMR specifically requested him to obtain certification, or that there was a shortage of more advanced instructors, or that improvement of claimant's skills were in any way essential to his job. Claimant was qualified to teach the classes he was hired to teach. He failed to establish that his skills for teaching beginning skiers were unsatisfactory or deficient.

¶28 RLMR offered technical clinics to its instructors, however, attendance at the clinics was not required.

¶29 In any event, claimant's run down the Barriers' moguls was not associated with any practice of skills associated with the skiing techniques he was teaching or learning. Those techniques did not require mogul skiing and did not require a high rate of speed. Claimant's run down the Barriers' moguls was at high speed and was plainly a recreational run.

¶30 The insurer's denial of this claim was reasonable.

CONCLUSIONS OF LAW

I.

¶131 The claim in this matter is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶132 The issue in this case arises under the "recreational activity" exception to workers' compensation coverage. The exclusion was adopted in 1993 at the urging of ski resorts, *Zarn v. Liberty Mutual Fire Insurance Company*, 1998 MTWCC 70 (October 9, 1998) at 6, and is codified in subsection (2) of section 39-71-118, MCA (1993/1995). Subsection(1) of section 39-71-118, MCA, defines employee for purposes of the Workers' Compensation Act. Subsection (2) then excludes persons who meet the employee definition of subsection (1) but who are engaged in recreational activities. Section 39-71-118, MCA (1995), provides in relevant part:

39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1)

The term "employee" or "worker" means:

. . . .

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

(a) *participating in 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 italics added.]

In *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. 115, 119, 929 P.2d 222, 225 (1996), the Supreme Court summarized the purpose of the recreational exclusion:

The purpose of § 39-71-118(2)(a), MCA, as revealed by its legislative history, is clear. Many employers, such as Winter Sports, Inc., offer seasonal passes to their employees as a form of compensation. Those seasonal passes are used by the employees for work-related and personal recreational activities. Section 39-71-118(2)(a), MCA, shields employers from workers' compensation liability when an employee is injured while he or she is off-duty and engaged in purely personal recreational activity.

¶133 Skiing is a recreational activity, however, that fact alone is insufficient under subsection (2). The subsection requires that the employee not only be engaged in a recreational activity but also that the employee "at the time is relieved of and is not performing prescribed duties." In *Connery v. Liberty Northwest Ins. Corp.*, WCC No. 9602-7507, Findings of Fact, Conclusions of Law and Judgment (June 22, 1996), I determined that the quoted language means that the recreational activity exclusion is inapplicable if

the activity is in the course and scope of employment. I then applied the course and scope factors set out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984). On appeal, the Supreme Court affirmed, holding that "application of a traditional course and scope of employment analysis is, and will be, necessary to determine exactly what an employee's 'prescribed duties' are in a particular case." *Connery v. Liberty Northwest Ins. Corp.*, 280 Mont. at 120, 929 P.2d at 225 (1996).

Under *Courser*, the course and scope factors are:

(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 benefitted 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.

¶34 *Connery*, like this case, involved a ski instructor. Unlike this case, however, the employer recommended that its ski instructors take warmup runs before teaching lessons and Ms. Connery's accident occurred during a warmup run. The first factor was therefore satisfied. Based on evidence that warmup runs allowed claimant to limber her muscles and joints and familiarize herself with skiing conditions, I found that both claimant and the employer benefitted from the warmup, thus the fourth factor was satisfied. In finding a benefit to the employer I noted, "The fact that the employer recommended a warm-up run indicated its belief that such runs directly or indirectly contributed to ski lessons." Finally, I found that by "requiring instructors to sign in and attend lineup, and assigning lessons at odd times, . . . the employer also indirectly contributed to claimant's warm-up run" because "[t]here 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." Based on this analysis, I found that factor two was "met, although weakly." The third factor -- control or participation of the employer -- was lacking. Finally, I concluded that "on balance [Connery's] warm up run was within the course and scope of [her] employment and part of her duties." *Connery*, WCC No. 9602-7507, Findings of Fact, Conclusions of Law and Judgment (June 22, 1996) at 10. On appeal, the Supreme Court affirmed my analysis. *Connery*, 280 Mont. at 121-22, 929 P.2d at 226.

¶35 Each case must be analyzed on its own particular facts. The facts as found in this case differ significantly from the facts in *Connery*. RLMR did not recommend warmup runs to its instructors. Unlike the situation in *Connery*, the Court cannot infer a benefit to RLMR from warmup runs. Moreover, the testimony of RLMR ski instructors cast significant doubt on the value of warmup runs. Warmup runs were not customary among the ski instructors. As one instructor testified, her warmup was a cup of coffee. Additionally, as found by the Court,

claimant's excursion into the moguls came after multiple runs and was for his personal pleasure. Based on these findings, claimant has satisfied none of the *Courser* factors.

¶136 Similarly, claimant's parka and training arguments do not arise to a course and scope level under the *Courser* factors.

- RLMR did not require claimant to wear his instructor's parka when not giving lessons, did not require him to obtain PSIA certification, and did not require him to become a more proficient skier. Factor one is therefore unsatisfied.
- RLMR did not directly compel claimant's wearing of his instructor's parka when not teaching, nor did it directly compel him to practice and improve his skiing techniques. While it might be argued that RLMR indirectly compelled both activities because the schedule of lessons left little time to leave the ski area, see *Connery*, WCC No. 9602-7507, Findings of Fact, Conclusions of Law and Judgment at 10, the compulsion was of the weakest sort. Claimant could have easily switched to his own jacket when not showing up for bells and not teaching. He was free to ski or not ski, to practice techniques or not practice them. The techniques he was teaching were not mogul techniques. If the second factor is implicated under these facts, it is a weak association.
- RLMR did not control claimant wearing an instructor's parka when he was not teaching.
- RLMR did offer ad hoc clinics to its instructors but attendance was not required. The clinics provide weak satisfaction of the third factor, however, any techniques he learned did not involve mogul skiing. The mogul run was for claimant. Thus, the third factor is unsatisfied.
- RLMR received minimal benefit from claimant's wearing his instructor's jacket when free skiing. RLMR hired ski patrolmen to patrol for accidents and report ski conditions. Questions to instructors wearing RLMR parkas when free skiing were infrequent and claimant presented no evidence that the availability of ski instructors to answer guests' questions had any impact on RLMR business. Similarly, while claimant might be characterized as a "walking billboard" for ski lessons, he presented no evidence indicating that it created any additional ski school business than what was generated by ski school information available at the base of the mountain. Claimant has failed to satisfy factor four.
- As to the benefit from practicing his skiing techniques, claimant has not provided any evidence that his mogul run contributed to any technique he was working on. Moreover, with respect to the teaching claimant was hired to do, RLMR was satisfied with his skills and did not require any additional skills or that claimant improve his existing skills. No evidence was presented to indicate that claimant's skills were

deficient for the job he performed. Finally, while learning new skills and improving existing skills, which may have led to PSIA certification, a better position instructing more advanced skiers, and an associated increase in pay, claimant presented no evidence that there was any shortage of PSIA certified teachers for the more advanced classes. Thus, any benefit to RLMR was speculative and fails to satisfy factor four.

¶37 On balance, the *Courser* factors are not satisfied. Claimant was not acting in the course and scope of his employment when injured on January 19, 1997.

IV.

¶38 The claimant is not entitled to attorney fees, costs or a penalty since he has not prevailed in this action. Moreover, an award of attorney fees or a penalty require proof that the insurer has acted unreasonably. Even had claimant prevailed, the insurer had a reasonable basis in fact and law to dispute the claim.

JUDGMENT

¶39 1. Claimant was not in the course and scope of his employment when injured on January 19, 1997, and is not entitled to workers' compensation benefits with respect to that injury. His petition is **dismissed with prejudice**.

¶40 2. Claimant is not entitled to attorney fees or costs.

¶41 3. Claimant is not entitled to a penalty.

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

¶43 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.

DATED in Helena, Montana, this 16th day of October, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. James G. Edmiston
Mr. Benjamin J. LaBeau
Mr. Larry W. Jones
Submitted: April 27, 1998