IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 9

WCC No. 2003-0787

PETER DOLAN

Petitioner

vs.

AMERICAN PROTECTION INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered a detached retina of his left eye and alleged it was the result of his hitting his head with his hard hat on a brace support on a construction project. The insurer denied the claim as untimely and on the ground that no causal connection existed between the detached retina and the alleged accident.

Held: The testimony of the claimant and a coworker concerning the alleged accident and the mechanism of injury was not credible. Claimant failed to persuade the Court that the accident ever occurred or if an accident did occur that it caused his condition.

Topics:

> **Causation: Medical Condition.** Insurer is only liable for medical conditions in fact caused by an industrial accident.

¶1 The trial in this matter was held on January 30, 2004, in Billings, Montana. Petitioner, Peter "Jono" Dolan (claimant), was present and represented by Mr. Richard H. Renn. Respondent, American Protection Insurance Company (American), was represented by Mr. Joe C. Maynard.

¶2 Exhibits: Exhibits 1 through 16 were admitted without objection. In addition, the hard hat worn by the claimant at the time of his alleged injury was exhibited to the Court but by agreement of counsel was returned to claimant.

¶3 Witnesses and Depositions: The claimant, Jeff Wychoff, and Dr. Christopher Paris testified at trial. Dr. Paris' testimony was taken at his medical offices. Claimant's twelve-

year-old daughter was not permitted to testify since she was not identified as a witness in the Pretrial Order. Counsel for the claimant represented that she would testify that her father had a bloodshot eye following the accident. The failure to list her was not harmless as the claimant testified in his deposition that no one else other than a co-employee - Jeff Wychoff - saw his bloodshot eye. (Dolan Dep. at 11.) The proffer of his daughter as a witness would have deprived the respondent of an opportunity for discovery concerning her testimony and put her testimony in conflict with that of her own father's deposition testimony.

¶4 In addition to trial witnesses, a deposition of claimant was also submitted to the Court for its consideration. The Court also participated by telephone in the deposition of Dr. Brian A. LaGreca, whose testimony has been subscribed and is considered.

¶5 Issues Presented: The issues as set forth in the Pretrial Order are:

> ¶5a Whether Petitioner provided notice of an injury within thirty days.
>
> ¶5b Whether Petitioner's eye condition was caused by an industrial accident.
>
> ¶5c Petitioner's entitlement to a penalty, reasonable attorney fees and costs from Respondent for denial of the claim.

(Pretrial Order at 2.)

¶6 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 FACTS

¶7 Claimant is a fifty-year-old construction worker.

¶8 In late August and the first part of September 2002, the claimant was working for Todd Sargent, Incorporated, as an industrial carpenter on a grain silo construction project near Pompeys Pillar, Montana. Sometime during that time period, the exact date being in dispute, the claimant alleges he banged his head on a brace or support for an overhead 2 x 10 joist. I will refer to the brace hereinafter as a "joist support."

¶9 Claimant alleges that he was wearing a hard hat at the time and struck the joist support with his hat, not his uncovered head. According to the claimant, the accident occurred in the morning and that while he was stunned he continued working.

¶10 In fact, the claimant continued working through October 5, 2002. On that day he experienced large "floaters" and a loss of vision in his left eye. He told his foreman that he was having trouble with his left eye and needed to see a doctor. He left work and went to Dr. F. Curtis Newby, an optometrist. Dr. Newby suspected he was suffering a detached retina

in the left eye and referred him to Dr. Christopher L. Paris, an ophthalmologist practicing in Billings, Montana. (Exs. 2 at 1 and 1 at 5.)

¶11 The claimant saw Dr. Paris the same day - October 5, 2002. (Ex. 1 at 5.) Dr. Paris diagnosed a retinal detachment of the left eye and scheduled the claimant for surgery on Monday, October 7, 2002. (*Id*.)

¶12 The claimant underwent surgery on October 7, 2002, to reattach his retina. (Ex. 1 at 2.) Dr. Paris performed the surgery and has provided follow-up care.

¶13 Claimant submitted a written claim for compensation on October 8, 2002, stating that he was injured between September 6, 2002 and September 14, 2002. (Ex. 12.)

¶14 At the time of the accident, Todd Sargent, Incorporated, was insured by American. American denies liability for his claim.

¶15 Initially, American urges that the claim is barred because the claimant failed to notify his employer of the alleged accident within thirty days as required by section 39-71-603, MCA. I do not reach that issue since I find the testimony of the claimant and his sole witness so lacking in credibility that I am unpersuaded that the accident occurred. Even if some sort of industrial accident occurred, I am unpersuaded that the claimant's detached retina is attributable to the accident.

¶16 Two ophthalmologists testified in this case: Dr. Brian A. LaGreca, who performed an IME at the insurer's request and Dr. Paris, who was the claimant's treating physician and performed his surgery. Both ophthalmologists agreed that the incidence of detached retinas increases with age and that most detached retinas are age related. Dr. LaGreca testified that he did not know what caused the claimant's detached retina but that it was *unlikely* it was caused by the blow to the eye he claims to have suffered at work. Dr. Paris testified that to a bare fifty-one percent to fifty-two percent probability the accident described by the claimant caused the detached retina.

¶17 Having listened to both physicians I find Dr. Paris' medical testimony the more persuasive. Dr. Paris sub-specializes in diseases of the retina. His descriptions of the eye and the detachment process were clear and educational. His testimony showed that his opinions were honestly and independently formulated. He initially opined that the claimant's condition was not related to the on-the-job blow to his hard hat and only changed his opinion after being provided other information regarding the accident, and even then he qualified his opinion by indicating that it was based on a bare, fifty-one percent to fifty-two percent probability. Finally, I find no good basis for preferring Dr. LaGreca's opinions, thus Dr. Paris' opinions are entitled to greater weight:

> "As a general rule . . . . the testimony of a treating physician is entitled to greater evidentiary weight," although it is not conclusive. *Kloepfer v. Lumbermen's Mut. Cas.*

> *Co.*, 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996). At minimum, the treating physician is the tiebreaker where there is evenly balanced, conflicting medical testimony.

Key v. Liberty Northwest Ins., 2001 MTWCC 53, ¶ 30.

¶18 My preference for Dr. Paris' opinions, however, does not resolve whether the accident alleged by the claimant caused his detached retina or whether any accident occurred at all. Dr. Paris' causation opinion was based on the claimant's report to him that his eye had been directly impacted and compressed either by the headband of his hard hat or by the bill of his hard hat. *If neither of those things occurred, then Dr. Paris agrees that claimant's detached retina is probably* ***not*** *related to any work incident in September 2002*.

¶19 Dr. Paris did not pass judgment on claimant's credibility, nor should he have. He simply testified that if the bill of the hard hat or the plastic headband directly impacted the claimant's eye, then on a more-probable-than-not basis the impact caused his detached retina.

¶20 The ultimate decision in this case therefore turns on the claimant's credibility as to whether an accident occurred at all, and if so, exactly what occurred. Based on my observation of the testimony of the claimant and Jeff Wychoff, and the manner in which the claimant asserts the hard hat struck his eye, I find both the claimant and Wychoff's testimony not credible. I am unpersuaded that the hard hat directly impacted the claimant's eye or that the accident even occurred.

¶21 When the claimant saw Dr. Newby and Dr. Paris on October 5, 2002, he did not mention any accident or injury, even though he was asked if he had hit his head. He testified that Dr. Newby asked him if he had been struck on the head lately and he answered, "No." He testified that Dr. Paris asked him if he had been hit on the head and he answered, "No." According to the claimant, he only recalled hitting his head on the joist support after thinking about it over the weekend.

¶22 The claimant attempted to explain away his answers to Drs. Paris' and Newbys' questions by saying, "And I said no. My idea of being struck on the head was somebody physically striking you on the head." (Dolan Dep. at 13.) I found his explanation implausible, especially in light of his trial testimony that when he hit the joist support he saw a flash of light and that shortly after the incident his eye was swollen; his eye was bloodshot; he developed a headache and stiff neck; and he lost his appetite and could not eat lunch. I find it unlikely that had he suffered all of these symptoms immediately following the alleged incident, he would not have recalled and reported the incident when queried by Drs. Newby and Paris on October 5, 2002.

¶23 It was only after the claimant learned that he had a detached retina and required surgery that he mentioned the alleged accident. I find it significant that on the morning of

his surgery he dropped by the office of an attorney who had previously represented him and discussed filing a workers' compensation claim with the attorney's secretary. (Trial Test. and Ex. 7 at 3.) This was **before** he had reported any accident to either Dr. Paris or even to his employer. He also wrote a note to himself on October 7, 2002, stating as follows:

> DR. CHRIS PARIS @ 1:00 P.M
>
> WOULD RUNNING INTO X BRACE W/HARD HAT CONTRIBUTE TO DETACHED RETINA?
>
> ANS: "YES IT COULD CAUSE OR CONTRIBUTE TO THE DETACHMENT."

(Ex. 7 at 6; caps in original.) The 1:00 P.M. reference was to the time he was scheduled for surgery. The "ANS", i.e., "answer", indicated certainly was not one provided by Dr. Paris, who was unable to initially comment on causation (ex. 1 at 10) and did not find any causal connection until after he met with the claimant and the claimant's attorney in March 2003. (Paris Test.) It appears more likely that the note of September 7, 2002, indicates that claimant was already orchestrating his claim.

The next day, October 8, 2002, claimant wrote the following note to himself:

> QUESTIONS FOR LEGAL SEC.
>
> 1) HOW TO BEST EXPEDITE/**EXPLOIT** CLAIMS. (TWO AT SAME TIME.)[(1)]
>
> . . .

(Ex. 7 at 13; caps in original, emphasis added.) The claimant testified that he misspoke when he used the word "exploit." I am not convinced by his explanation.

¶24 The only witness supporting the claimant's story that he hit his head at work was Wychoff, a coworker. Wychoff testified that while he did not witness the claimant running into the joist support he observed the claimant immediately thereafter. He claimed to have seen the claimant dropping the beams he was carrying, stumbling, and then sitting for awhile. He further testified that following the incident the claimant's eye was bloodshot and that at lunch claimant told him about running into the beam support and gave him (Wychoff) his (claimant's) sandwich because the (claimant) had lost his appetite as a consequence of the incident. Wychoff further testified that a foreman was present when the claimant told him about the accident. Finally, he corroborated claimant's ultimate choice of September 10, 2002, as the date of the accident.

¶25 I found Wychoff's testimony totally incredible based not only on my observation of his demeanor but on the inconsistencies between his and the claimant's stories. The claimant testified at trial and in deposition that there were no witnesses to his accident and that he did not report any accident to a supervisor on the day it occurred. In a letter dated December 12, 2002, to the Department of Labor and Industry (Department) the claimant

did not identify Wychoff as a witness to the accident, rather he said that "During lunch I told Jeff Wychoff about the incident." (Ex. 10 at 11.) Wychoff drove the claimant to Billings to meet with Dr. Paris on March 3, 2003, a meeting intended to persuade Dr. Paris that the claimant's detached retina was the result of an industrial accident. After the alleged accident, the claimant helped Wychoff remodel a bathroom in his home. He also telephoned and talked to Wychoff shortly before the mediation which preceded the filing of this case. It is inconceivable that if Wychoff's testimony were true he would not have revealed it to claimant and that in turn the claimant would not have revealed it in pursuing his claim.

¶26 As I have already indicated, Dr. Paris was initially unable to causally relate the claimant's retinal detachment to the alleged accident described by the claimant. Claimant first described an accident to him on October 7, 2002. Dr. Paris testified that when claimant told him on October 7th that he had walked into a joist support the claimant but that claimant was very vague in his description of what occurred. Based on that initial description, Dr. Paris testified was very skeptical as to how the alleged accident could have caused the detached retina.

¶27 On December 7, 2002, Dr. Paris replied to the insurer's inquiry regarding causation, as follows:

> December 7, 2002
>
> Kathy Andersen
> Adjustor in Charge
> Crawford & CO
> 711 Central Ave Ste 111
> Billings, Mt. 59102
>
> > RE: Jono Dolan
> > Employer: Todd & Sargent
> > File # 221-27911
>
> Dear Ms. Andersen:
>
> Mr. Jono Dolan presented on 10-5-02 with a 1 week history of diffuse visual Acuity OS. On evaluation a Rhegmatogenous retinal detachment associated with vitritis and uveitis were present. Mr. Dolan subsequently underwent uncomplicated retinal detachment repair on 10-7-02. He related at that time a history of trauma sometime between September 7 and September 14 at which time he stated that he suffered a severe contusion to his left brow.
>
> Retinal break may result from contusion injuries in or abut the eye however usually this is a result of direct force. Blunt trauma compresses the eye which causes the

vitreous body to exert traction in the area of the eye referred to as the vitreous base which results in retinal breaks. In young individuals a majority of retinal detachments occur following such injury within a two year period. Only 12% of detachments are found immediately. As to whether or not Dr. Dolan's injury was severe enough to induce retinal detachment, I do not feel that I can adequately comment as I did not see Mr. Dolan following his injury.

Should you have further questions please do not hesitate in contacting my office. Enclosed is also information regarding retinal detachments and trauma.

With Best Regards:

Christopher L. Paris, M.D.
Retinal Specialist

CLP/kg

Enclosures

(Ex. 1 at 10.)

¶28 Two significant facts appear from Dr. Paris' December 7, 2002 letter and his trial testimony. First, based on the claimant's initial description of his accident, Dr. Paris understood that the claimant had suffered a "contusion to his left brow," not a direct blow to the eye itself. Second, again based on the claimant's initial description of the accident, Dr. Paris could not causally relate the detached retina to the alleged accident.

¶29 The first time the claimant indicated that he had suffered a direct blow to his eye was on March 3, 2003, when he and his attorney met with Dr. Paris. At that time, the claimant told Dr. Paris that when he ran into the joist support the impact caused his hard hat to pivot downward, forcing the rigid headband of the hat directly into his eye. Wychoff, a co-employee who had driven the claimant to the appointment with Dr. Paris, was then produced to corroborate the claimant's assertion that the impact caused his eye to become bloodshot, a fact which lends support to a conclusion that the hard hat directly impacted his eye.

¶30 By the time of his deposition on November 7, 2003, the claimant had yet another version of what occurred. He testified on that date that the **bill** of the hard hat hit him in the left eye. He testified as follows:

Q. Any direct blow to the eye?

A. Just the hard hat bill as it came down.
You see, it knocked the hard hat off. I mean, it tipped it down
in the front, and then, you know, my head, of course, flew back and - -

Q. So, it - - you hit your forehead; it knocks the hat down. The hat flips off, and the brim of the hard hat is what got you in the eye?

A. When it flipped out, yeah.
But they've got a bill, a small, short bill. I think the bill is what got my eye.

(Dolan Dep. at page 12, lines 9 - 21.)

The first time Dr. Dolan was ever apprised that it was the bill of the hard hat, rather than the plastic headband that impacted claimant's eye was a few days before the trial when the claimant and his attorney again met with the doctor.

¶31 At trial the claimant demonstrated how the brim or bill of the hard hat could have struck his eye. His demonstration was unconvincing. Perhaps a computer simulation could demonstrate it was possible but as demonstrated it appeared implausible that the bill would have struck claimant's eye.

¶32 In the end, I am simply left with a firm belief that the claimant's testimony concerning the accident is untrustworthy and not entitled to belief. He has failed to carry his burden of proof.

¶33 The insurer's denial of this claim was not unreasonable even if I had determined that the claimant was entitled to compensation. The facts of the case presented substantial issues concerning the timeliness of the claimant's notice to his employer and whether the claimant's alleged injury was related to an industrial accident.

CONCLUSIONS OF LAW

¶34 This case is governed by the 2001 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).

¶35 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).

¶36 The claimant is entitled to compensation only if he proves that he suffered an industrial injury or the condition for which he seeks compensation. §§ 39-71-119 and -407, MCA (2001). The claimant has failed to persuade me that any accident occurred or, even if it did, that such accident caused his detached retina. Therefore, he is not entitled to benefits.

¶37 Since an award of attorney fees and a penalty require the claimant to not only prevail but to prove that the insurer's denial of liability was unreasonable, §§ 39-71-611 and -2907,

MCA, and the claimant did neither, he is not entitled to either attorney fees or a penalty, or to costs.

JUDGMENT

¶38 The claimant's detached retina was not caused by an industrial accident. His claim for benefits is therefore denied and his petition is **dismissed with prejudice**.

¶39 The claimant is not entitled to costs, attorney fees, a penalty, or any other relief.

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

¶41 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 19th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard H. Renn
Mr. Joe C. Maynard
Submitted: January 30, 2004

1. The reference to a second claim was apparently to a claim involving carpal tunnel.