IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 20

WCC No. 2003-0899

SUSAN FLIKKEMA

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was involved in an automobile accident during her lunch hour. She ate lunch with her daughters but offered and agreed to pick up lunch for two co-employees, one of whom was her supervisor.

Held: Where the employer learned of the accident the same day it occurred and was aware that claimant was picking up lunch for two employees, it had timely notice of the accident under section 39-71-603, MCA (2001). However, the claimant was not in the course of her employment when injured even though she picked up lunch for two co-employees since her employer did not furnish or pay for her transportation and her picking up the lunch was a favor for co-employees rather than a part of her job duties.

Topics:

Limitations Periods: Notice to Employer. Where the employer learned of the accident the same day it occurred and was aware that the claimant was picking up lunch for two employees, it had timely notice of the accident under section 39-71-603, MCA (1995).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-603, MCA (1995). Where the employer learned of the accident the same day it occurred and was aware that the claimant was picking up lunch for two employees, it had timely notice of the accident under section 39-71-603, MCA (1995).

Employment: Course and Scope: Travel. Where the claimant was on her lunch hour, made arrangements to meet and in fact met her daughters for lunch at a restaurant several miles away from her employer's office, she was not in the course

and scope of employment even though she offered to and did pick up lunch for two co-employees, at least where her doing so was part of an informal arrangement among co-employees under which they picked up lunch for others if going out to eat, and they were not directed or pressured to do so by the employer, and where the employer received no additional benefit from an employee bringing back lunch for co-employees than it received when they brought their lunches.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-407(3), MCA (1995). Where a claimant was on her lunch hour, made arrangements to meet and in fact met her daughters for lunch at a restaurant several miles away from her employer's office, she was not in the course and scope of employment even though she offered to and did pick up lunch for two co-employees, at least where her doing so was part of an informal arrangement among co-employees under which they picked up lunch for others if going out to eat, and they were not directed or pressured to do so by the employer, and where the employer received no additional benefit from an employee bringing back lunch for co-employees than it received when they brought their lunches.

¶1 The trial of this matter was held in Helena, Montana, on February 25, 2004. Petitioner, Susan Flikkema (claimant), was present and was represented by Mr. Daniel B. and Ms. Anna M. Bidegaray. Respondent Montana Contractor Compensation Fund was represented by Mr. Bradley J. Luck.

¶2 Exhibits: Exhibits 1-11 were admitted without objection. Exhibit 12, a copy of a letter/claim form executed by Susan Flikkema relating to health insurance coverage for her accident of August 22, 2001, was admitted over claimant's objection.

¶3 Witnesses: Susan Flikkema, Linda Waliser, and Cody Balke were sworn and testified at trial. In addition, the sworn statements of Susan Flikkema, Cody Balke, Linda Waliser, and Vicki Griffith were submitted for the Court's consideration.

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

> ¶4a Whether Susan Flikkema provided proper notice to her employer of her workers' compensation claim pursuant to section 39-71-603, M.C.A.
>
> ¶4b Whether Susan Flikkema was within the course and scope of her employment at the time of the August 22, 2001 auto accident pursuant to section 39-71-407, MCA.

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 On August 22, 2001, the claimant was involved in a head-on motor vehicle accident in Gallatin County, Montana. The driver of the other car was drunk and was killed. The claimant sustained multiple, serious injuries to her right leg, hip, ankle, and pelvis. (*See* Ex. 5.)

¶7 On the day of the wreck, the claimant was a salaried employee of JTL Group, Incorporated (JTL) and was returning to the JTL office after having lunch in Bozeman with her daughters and picking up lunch to take back to two co-employees at JTL. Further details of the nature and purpose of her travel are set out later on in this decision.

¶8 At the time of the injury, JTL was enrolled under Compensation Plan I of the Workers' Compensation Act, and its insurer at the time of the injury was Montana Contractor Compensation Fund (MCCF).

¶9 A written claim for compensation was timely submitted to the MCCF, however, it denied liability on two grounds. (Ex. 11.) First, it asserted that the claimant failed to timely notify her employer in accordance with section 39-71-603, MCA. Second, it denied that claimant was in the course and scope of her employment at the time of the accident. It maintained those defenses at trial.

¶10 JTL is in the business of road construction. Its busiest time of year is during late spring, summer, and early fall since road construction is dependent upon warm weather.

¶11 The JTL office at which the claimant worked is located between Belgrade and Bozeman, Montana. There are no retail food establishments nearby, hence to eat out at lunchtime JTL employees had to travel to either Belgrade or Bozeman.

¶12 At the time of the claimant's accident, she worked with three other woman in JTL's office. Her job entailed data entry of payroll, equipment, and scale information. Cody Balke (Balke), who had worked for JTL for only two weeks at that time, worked as the dispatcher and operated the scale which weighed trucks coming and going from JTL's yard. Vicki Griffith (Griffith) was responsible for accounts receivable. Finally, Linda Waliser (Waliser), was the office supervisor and filled in where needed in addition to supervising the other three employees. All employees were cross-trained in operating the scale since the scale was continuously in use. All employees except Balke were salaried. Balke was an hourly employee and regularly worked overtime for which she was compensated.

¶13 JTL also employed estimators in another part of its building, however, they operated separately from the four office employees.

¶14 JTL had a very loose lunch policy. The four office employees were generally allowed one hour for lunch but could take more if needed. However, during the construction season some or all of them worked during all or part of their lunch hour and ate lunch at their

desks, usually socializing and visiting during some of the time they were eating lunch but performing essential functions, such as managing the scale and answering the telephone. An employee wishing to go out for lunch was free to do so as long as at least one and preferably two employees remained in the office. There were no fixed lunch times and the office employees were free to stagger their lunch hours to insure adequate coverage in the office.

¶15 The four office employees were free to bring their own lunches from home, have lunch delivered, or go out to lunch. Often they brought their lunches from home.

¶16 Approximately once a month, Waliser had lunch brought in for all four of the office staff. On those occasions, JTL paid for the lunches and a company car could be used to go get the lunches if they were not delivered.

¶17 When one of the office employees went out to lunch it was customary for her to offer to pick up and bring back lunch for the other employees who remained in the office. As a group, the four office employees tried to have lunch together on a weekly basis, either bringing it in or one of them going to pick it up. The arrangement was an informal one among employees: There was no requirement or directive from JTL or Waliser that any employee pick up lunch for the others.

¶18 On occasion an employee going out to lunch was requested to stop by the bank, pick up plans, pick up office supplies, or do other errands for JTL. When asked to do so, the employee was authorized to use a JTL company car but often used a personal vehicle instead. Employees doing company errands were not reimbursed for their travel, however, Waliser on occasion authorized their purchase of gasoline for their personal cars to make up for the lack of reimbursement.

¶19 With the exception of monthly group lunches provided by JTL, employees were not generally authorized to take JTL company vehicles if just going to lunch even if they were picking up lunch for co-employees. Employees were not reimbursed for travel to and from lunch. Waliser testified that going to lunch was not the sort of circumstance a company vehicle was used for but she also testified that if an employee had specifically asked to use a company vehicle for lunch she would not have refused the request even though she would have considered the use for personal rather than company purposes.

¶20 Waliser was not only the claimant's supervisor, she was her neighbor and a friend of many years. The claimant's own testimony did not indicate or establish that picking up lunch for co-employees was compelled or directed by Waliser or JTL.

¶21 On the day of her accident, the claimant had arranged to meet her daughters for lunch at Arby's in Bozeman at 11:45 a.m. According to the claimant, she asked Balke and Waliser if they needed anything in town and they requested that she pick them up lunch at Taco John's in Bozeman.

¶22 Balke's and Waliser's recollection was somewhat different but not materially so. They testified that Balke had planned to go out and pick up lunch from Taco John's for herself and Waliser. The claimant overheard their planning and told them that if they did not mind waiting a little longer she would pick it up and bring it back. They agreed and gave the claimant their Taco John's orders. Whether I adopt the claimant's version, or that of Balke and Waliser, it is clear that the claimant offered to pick up their lunches since she was going out to lunch anyway.

¶23 The claimant left JTL at 11:30 a.m. on the day of the accident, met her daughters at Arby's in Bozeman, and had lunch with them. The lunch was prolonged by the fact that her daughters went to the wrong Arby's and the claimant had to wait for them to arrive at the right one. The claimant drove her personal vehicle.

¶24 Following lunch, the claimant drove to Taco John's a few blocks away and picked up the food ordered by Balke and Waliser. She then started her drive back to JTL, taking a different route than she would have taken had she returned directly from Arby's. On the way back, she was hit head-on by a drunk driver who veered into her lane of travel.

¶25 Waliser was responsible for the workers' compensation claims of the office staff. She learned of the claimant's accident on the same day it occurred.

CONCLUSIONS OF LAW

¶26 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).

¶27 The 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).

¶28 The initial defense in this case is lack of notice to the employer as required by section 39-71-603, MCA (2001), which provides in relevant part:

> **39-71-603. Notice of injuries other than death to be submitted within thirty days.** (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in

> charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

In this case, the employer had actual knowledge of the claimant's injury and its possible relationship to work. Waliser knew of the accident on the day it occurred. She also knew of the nature of the claimant's journey, and indeed participated in its planning to the extent that it involved the claimant's stopping by Taco John's to pick up lunch for both Waliser and another co-employee. What additional information could the claimant have possibly furnished to her employer? MCCF's contention that the claimant did not comply with the notice provision is utterly without merit.

¶29 The real question in this case is whether the claimant was in the course and scope of her employment. Neither party disputes that she was traveling at the time of her accident. *Compare with Carrillo v. Liberty Northwest Ins.,* 278 Mont. 1, 922 P.2d 1189 (1996). Therefore, section 39-71-407(3), MCA (1995) applies. That section provides:

> (3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
>
> (a)(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and
>
> (ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
>
> (b) the travel is required by the employer as part of the employee's job duties.

¶30 The section has alternative provisions for determining whether the claimant's travel was in the course and scope of her employment. Subsection (a) has a two part test. The first part requires the employer to furnish the claimant with transportation or reimburse her for the costs of her transportation. If this test is not met, then the second part never comes into play.

¶31 The facts of this case fail to establish that JTL either furnished the claimant with or reimbursed her for transportation on the day of her accident. The claimant was not on a banking errand, or going to pick up plans or office supplies, or any similar errand for JTL. She was not authorized to use a company car to go to lunch. Therefore, subsection (3)(a)(i) is not met.

¶32 At trial the claimant argued that there was some sort of waiver of subsection (3)(a)(i). I am unable to understand the argument or what difference it might make. The subsection on its face is an unequivocal requirement. Moreover, even where transportation is provided, the second test of (3)(a)(ii) must be met, and that test is similar to if not identical

to the alternative test under subsection (b). *See Kelly v. Hartford Accident & Indemnity Co.*, 2000 MTWCC 50, ¶ 31.

¶33 Resolution of this case therefore depends on whether the claimant's travel on the day of the accident was "required by the employer as a part of the employee's job duties." § 39-71-407(3)(b), MCA (2001). I previously analyzed this requirement in *Kelly* as requiring application of the traditional course and scope of employment test laid out in *Courser v. Darby School Dis. No. 1,* 214 Mont. 13, 692 P.2d 417 (1984).

¶34 As an initial matter the word "required" as used in section 39-71-407(3)(b), MCA, means the same thing as "part of the employee's job duties," for if the task being performed by the employee is "part of the employee's job duties," then the task is "required." Thus, the word "required" is redundant and the focus is on whether the task is "part of" the employee's job duties. *See State Compensation Mut. Ins. Fund v. James,* 257 Mont 348, 352 849 P.2d 187, 190 (1993); *Heath v. Montana Mun. Ins. Authority,* 1998 MT 111, ¶¶ 13-14, 288 Mont. 468, ¶¶ 13-14, 959 P.2d 482-83, ¶¶ 13-14.

¶35 The applicable test for determining whether the travel is part of the employee's duties, and therefore within the course and scope of her employment, is a fourfold one. The four factors which must be considered 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.

Courser, 214 Mont. at 17, 692 P.2d at 419. "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." 214 Mont. at 18, 692 P.2d at 419.

¶36 Even considering the fact that one of the lunches the claimant was fetching was for her supervisor, the supervisor and employer did not request, direct, or compel her to fetch the lunches. The claimant volunteered to get them. While it was customary for the office employees to pick up lunches for others when they went out for their own lunch, the custom was an informal arrangement among co-employees, and was not compelled, even indirectly, by the employer or the claimant's supervisor. Factors 1 and 2 are not met.

¶37 Similarly, the employer did not control the trip. The claimant made her own determination and arrangements to go out to lunch and then offered to pick up lunch for others. The only possible aspect of control was the designation of Taco John's as the place to pick up lunch, but, again, that designation was part of an informal lunch arrangement of

co-employees, not something required, directed, or controlled by the employer or a supervisor. Participation was as co-employees, not as supervisor/employer and subordinate/employee. The third factor is not met.

¶38 As to the benefit of the claimant picking up lunch, her doing so enabled her two coworkers to stay at work and continue working, thus benefitting the employer. However, the employer gained the same benefit when, as on most days, the employees brought their lunches from home. And if the employees staggered their lunches and each took off a full hour or more for lunch, the work was still done since three of the employees were salaried and the fourth was permitted overtime. The benefit to the employer was too remote to bring the claimant's lunch hour trip within the course and scope of employment.

¶39 Thus, analyzing the four factors, I find in this case that the claimant was not in the course and scope of her employment at the time of the accident.

JUDGMENT

¶40 The claimant's August 22, 2001 accident did not occur in the course and scope of her employment as she was on a personal errand on her lunch hour. Therefore, she is not entitled to workers' compensation benefits and her petition must be **dismissed with prejudice**.

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

¶42 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 2nd day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Daniel B. Bidegaray
Ms. Anna M. Bidegaray
Mr. Bradley J. Luck
Submitted: February 25, 2004