

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 1

WCC No. 9607-7580

ROLF BRUNO GUBLER

Petitioner

vs.

LIBERTY NORTHWEST COMPANIES

Respondent/Insurer for

BELL BUILDERS, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 27 year-old craftsman was injured in motor vehicle accident while driving supervisor's truck to pick up supervisor at beginning of work day. Supervisor, who was the son of the owner's of a family business, had told claimant to take his truck home and pick him up in the morning, which was consistent with use of the truck in the business. Insurer argued accident was not in course and scope of employment and that claimant's shoulder problem resulted from pre-existing condition and was not compensable.

Held: Given its use, the truck was in essence a company truck used in the course of business. At the time of the accident, claimant was performing duties required of him by his supervisor. Requirements of the traditional course and scope test are met, see *Courser v. Darby School Dist. No. 1*, 214 Mont 13, 16-17, 692 P.2d 417, 419 (1984), as are requirements of the statutory "travel" test set forth in section 39-71-407(3), MCA (1995). Claimant was furnished with a company vehicle and was directed in his use of the truck for company purposes. Claimant's injuries, including the shoulder injury, are compensable. While claimant suffered pre-existing shoulder pain, the evidence established that the accident permanently worsened his shoulder problem. Penalty and attorneys fees were denied where the insurer relied on a different factual scenario, based on testimony the Court did not find the most accurate recollection of events.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-407, MCA (1995). Craftsman injured while driving supervisor's truck to pick up supervisor for work was injured in course and scope of employment and met the requirements for compensable travel injury under section 39-71-407, MCA (1995). Given its use, the truck was in essence a company truck used in the course of business which had been furnished to claimant for use at that particular time. At the time of the accident, claimant was performing duties required of him by his supervisor.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1995). Penalty not awarded where insurer relied on version of events described by supervisor when denying liability for motor vehicle accident. While Court found another version of events to have occurred, insurer's reliance on supervisor's recollection was not unreasonable.

Employment: Course and Scope: Coming and Going. Craftsman injured while driving supervisor's truck to pick up supervisor for work was injured in course and scope of employment and met the requirements for compensable travel injury under section 39-71-407, MCA (1995). Given its use, the truck was in essence a company truck used in the course of business which had been furnished to claimant for use at that particular time. At the time of the accident, claimant was performing duties required of him by his supervisor.

Employment: Course and Scope: Travel. Craftsman injured while driving supervisor's truck to pick up supervisor for work was injured in course and scope of employment and met the requirements for compensable travel injury under section 39-71-407, MCA (1995). Given its use, the truck was in essence a company truck used in the course of business which had been furnished to claimant for use at that particular time. At the time of the accident, claimant was performing duties required of him by his supervisor.

Penalties: Insurers. Penalty not awarded where insurer relied on version of events described by supervisor when denying liability for motor vehicle accident. While Court found another version of events to have occurred, insurer's reliance on supervisor's recollection was not unreasonable.

The trial in this matter was held on November 8, 1996, in Billings, Montana. Petitioner, Rolf Bruno Gubler (claimant), was present and represented by Mr. Frank C. Richter. Respondent, Liberty Northwest Companies (Liberty), was represented by Mr. Larry W. Jones. No transcript of the trial has been prepared.

Exhibits: Exhibits 1-9 were admitted without objection. Medical records in Exhibit 7 relating to Taryn Pettit were removed and sealed in a separate envelope by order of this Court.

Witnesses and Depositions: Claimant, Randy Lohnbakken, and Rich Mehrer were sworn and testified. In addition the parties submitted the deposition of claimant for the Court's consideration.

Issues Presented: The claimant contends that on April 30, 1996, he suffered a shoulder and other injuries in a work-related automobile accident. Liberty urges that the accident did not occur in the course and scope of claimant's employment and that claimant's shoulder condition is due to a preexisting injury.

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

FINDINGS OF FACT

1. Claimant is 27 years old and resides in Billings, Montana. He is a craftsman in the application of stucco-like finishes to buildings. According to Rich Mehrer, who supervised claimant's work, claimant was the "best" at his trade.
2. Bell Builders, Inc. (Bell) is a building contractor primarily engaged in residential construction in Billings, Montana. It is a family corporation owned by Ray Mehrer and his wife. Mr. Mehrer directs the operations of the company.
3. Bell hired claimant in April 1995.
4. During his employment at Bell, claimant specialized in applying a finishing product called "drivet." Drivet is a stucco-like finish which is troweled onto building surfaces. The application of drivet is a three-stage process. First, styrofoam insulation is applied to the wall. Second, wire mesh is attached to the styrofoam facing. Finally, drivet -- a cement type substance -- is troweled onto the wall.
5. Rich Mehrer (Rich) was claimant's supervisor during the entire period of his employment. He supervised one of the two or more crews employed by Bell. Rich is the son of Ray Mehrer.
6. Over the one-year period of claimant's employment he worked at various job sites in the Billings area. He car pooled to work with Rich and a coworker, Randy Lohnbakken (Randy).
7. For the first couple of months of his employment, claimant, driving his own car, picked up Randy and drove to Rich's home. Claimant, Randy and Rich then drove to the job site in Rich's Chevrolet S-10 pickup (the "pickup"), with claimant doing the actual driving. At that time both Rich's and Randy's driver's licenses were suspended. During much of the rest of the time, either Rich or Randy, usually Rich, picked up claimant. Sometimes claimant took Rich's pickup home at night and picked up the others the next morning.

8. Over the one-year period in which they car pooled, claimant gave Randy approximately \$10 and Rich approximately \$80 to help pay for gas. However, there was never any specific agreement concerning reimbursement for driving to and from work.

9. On April 29, 1996, Rich's crew worked on a house in the Lake Elmo area. The crew consisted of claimant, Randy, and John Brown (John).

10. Randy picked claimant up on the morning of April 29, 1996, and then drove directly to the Lake Elmo job site. Whenever Randy drove claimant to work it was customary for him to drive him home as well. Rich drove separately to the Lake Elmo site in his own pickup.

11. At approximately noon on April 29, Ray Mehrer stopped by the Lake Elmo job site and asked Rich to go to another job site at Briarwood to measure the site and determine what materials were needed for that job. Because the Briarwood job site was muddy, Rich determined that he needed a four-wheel drive vehicle to get to the site. Since his own pickup was a two-wheel drive, he asked Randy to take him to the site in Randy's four-wheel drive GMC truck.

12. Rich knew that he would not be returning to the Lake Elmo project that day. According to his testimony, he asked claimant if he wanted to finish the day at Lake Elmo or if he wanted a ride home at that time. Claimant's recollection was somewhat different. He testified that Rich told him, "Finish the job and just take my truck and pick me up in the morning." I find claimant's recollection to be the more accurate.

13. Claimant and John continued working. At the end of the day claimant drove Rich's pickup home.

14. On the morning of April 30, 1996, driving Rich's pickup and on his way to pick up Rich, claimant was involved in a car accident at an intersection. Another vehicle struck the left front side of Rich's truck.

15. As a result of the accident, claimant sustained injuries to his left side, including his left ankle, shoulder, spine and neck. (Ex. 2-3.) He has since undergone shoulder surgery and has been off work since April 30, 1996.

16. At the time of the accident Bell was insured by Liberty. Claimant submitted a workers' compensation claim to Liberty, which denied the claim. Liberty contends that the claimant's use of the truck was outside the course and scope of his employment and did not satisfy the requirements of section 39-71-407(3), MCA (1995). In addition, it contends that claimant's shoulder condition is a preexisting one and is not attributable to the accident.

17. I find that Rich's pickup truck was in essence a company truck used by Bell in the course of its business and that at the time of the April 30, 1996 accident, the claimant was

performing duties required of him by Bell. My finding in this regard is based on the following:

- a. Rich Mehrer is the son of Bell's shareholders and his work is directed by his parents.
- b. Although Rich owned the pickup which claimant was driving at the time of the accident, Bell had commandeered the pickup for company use. Prior to the accident Bell did not furnish Rich with a company-owned pickup. It required Rich to use his own pickup in the day-to-day operations of the company. The pickup was used to transport materials to and from job sites, pull an equipment trailer, store hand tools used in applying exterior finish, and travel from site to site during the work day. The pickup was essential to Rich's performance of his job duties.
- c. Even before the accident, Rich "lobbied" his parents for a company truck. Following the accident Bell purchased a truck for Rich's use. The new company vehicle is used in the same fashion as was Rich's pickup.
- d. At the time of the accident most of the tools used at the Lake Elmo job site were stored in an equipment trailer at that site. However, a number of hand tools were kept in an equipment box in Rich's pickup. While those tools were owned by Rich, they were available for any of the workers to use and were the only tools available when a worker went to another job site to do touch up work. Both claimant and Randy frequently used the tools stored in the pickup.
- e. Rich was compelled to leave the pickup behind at the Lake Elmo job site because his job duties took him to a place which was inaccessible with the pickup.
- f. Rich needed the pickup for work the next day. Because he had to leave the pickup behind when he went to the Briarwood site, he also needed transportation to and from work the next day.
- g. Rich instructed claimant to take the pickup home at the end of the work day and pick him up the next morning.

18. I further find that the April 30 accident materially and permanently aggravated a preexisting condition of claimant's left shoulder. While claimant experienced shoulder discomfort prior to April 30, the discomfort was primarily associated with his overhead work on ceilings. He was able to "shake off" his discomfort and continue working. He had never sought medical care for his shoulder. In the April 30 accident he hit the left side of his body, including his shoulder, on the inside of the pickup. Two days following the accident Dr. Richard A. Nelson examined claimant. He noted the accident and recorded that claimant had a "considerable amount of pain in left shoulder." (Ex. 2-3 at 17.) In a letter of November 7, 1996, Dr. Nelson wrote:

I first noted Mr. Gubler's shoulder impingement upon physical examination during his initial examination on May 2, 1996.

The shoulder impingement was produced by the bone spur that was present at [the] time of the injury. The clinical symptoms were generated by the bone spurs [sic] impingement on the supraspinatus tendon.

This condition, although pre-existing, was asymptomatic before the auto accident of 4-30-96 and only became symptomatic after the collision.

(Ex. 9; emphasis added.) On July 30, 1996, claimant underwent surgery on his left shoulder.

19. After considering and weighing all of the evidence in this case, including the demeanor of the witnesses, I find that all of the witnesses were credible. However, their recollections, as is often the case, differed in some important respects. I find claimant's and Randy's versions of the events of April 29 more accurate than Rich's recollections and have therefore adopted their testimony in making my findings.

CONCLUSIONS OF LAW

1. Claimant's injury is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).

2. Claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence. *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). That burden extends to proof that the industrial accident was the proximate cause of his disabling condition. *Eastman v. Transport Ins.*, 255 Mont. 262, 843 P.2d 300 (1992).

3. Section 39-71-407(1), MCA, provides in part that "[e]ach insurer is liable for the payment of compensation . . . to an employee of an employer that it insures who receives an injury **arising out of and in the course of employment**" (Emphasis added.)

4. The Montana test for determining whether an employee was injured in the course and scope of employment is set out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984). The factors to 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 benefited from the activity.

Id. As the Court noted in *Courser*, "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." *Id.* at 17, 692 P.2d at 419 (citing *Shannon v. St. Louis Board of*

Education, 577 S.W. 2d 949, 951-2 (Mo. 1979)). While *Courser* was decided more than a decade ago, the criteria have been applied more recently and are still viable. See *Dale v. Trades Street, Inc.*, 258 Mont. 349, 355, 854 P.2d 828, 831-32 (1993).

5. The facts of the present case satisfy the *Courser* elements. Claimant's supervisor, Rich Mehrer, told claimant to take his pickup home at the end of the day and use it to pick him up the next morning. As a supervisor for his parents' company, Rich acted with authority for Bell. These facts satisfy the first three factors. The fourth factor is also satisfied. Although the pickup was registered to Rich personally, Bell required him to use the truck in the day-to-day business of the company. By requiring claimant to take the truck home and pick him up in the morning, Rich assured that claimant finished a full day's work at the Lake Elmo project, that he (Rich) had transportation back to the job site the next morning, and that the pickup would be available for use at work the next day.

6. Although claimant has satisfied the *Courser* criteria, he must also satisfy one of the travel exceptions set forth in section 39-71-407(3), MCA. *Dale v. Trade Street, Inc.*, 258 Mont. 349, 357, 854 P.2d 828, 832-33 (1993). The cited section applies to "going and coming" to work cases. *Carrillo v. Liberty Northwest Ins.*, 53 St. Rep. 829 (September 3, 1996). It provides that "[a]n employee who suffers an injury . . . while traveling is not covered by this chapter unless' certain conditions are met." Subsections (a) and (b) of 39-71-407(3), MCA (1995), delineate the conditions, which are:

- (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.

The facts of this case satisfy both conditions. Subsection (a) is satisfied because Bell furnished claimant with a company truck to drive home on April 29 and to drive to work on April 30, 1996. The travel was "necessitated by and on behalf of the employer as an integral part or condition of the employment" because claimant's supervisor needed to go to another job site but also needed his truck for transportation to and during work the next day. By directing claimant to take the truck home, the supervisor assured his way to work the next day and also arranged for claimant to continue working on the Lake Elmo job. Subsection (b) is satisfied since the employer, through Rich Mehrer, required claimant to take the company truck home and pick up his supervisor the next morning.

7. Claimant satisfied his burden of proving he suffered a compensable injury. Although claimant suffered from a preexisting shoulder condition

[t]he well established rule in Montana is that an employer takes his employee subject to the employee's physical condition at the time of employment. The fact that an employee is suffering from or afflicted with pre-existing disease or disability does not preclude compensation if the disease or disability is aggravated or accelerated by an industrial accident. [Citations omitted.]

Robins v. Anaconda Aluminum Co., 175 Mont. 514, 518, 575 P.2d 67 (1978); accord *Roadarmel v. Acme Concrete Co.*, 237 Mont. 163, 170, 772 P.2d 1259, 1263 (1989) and *Shepard v. Midland Foods, Inc.*, 205 Mont. 146, 151, 666 P.2d 758 (1983). The existence of a preexisting condition does not preclude compensation if the industrial injury materially or substantially contributes to the condition. *Caekaert v. State Compensation Mut. Ins. Fund*, 268 Mont. 105, 885 P.2d. 495 (1994). If the preexisting disease or condition is "**lit up, aggravated or accelerated** by an industrial injury," the worker is entitled to the benefits provided by the Workers' Compensation Act. *Birnie v. U.S. Gypsum Co.*, 134 Mont. 39, 45, 328 P.2d 133 (1958) (emphasis added).

A preponderance of medical evidence, as well as a preponderance of all evidence, see *Plainbull v. Transamerican Ins. Co.*, 264 Mont. 120, 125, 870 P.2d 76, 80 (1994), establishes that claimant's April 30, 1996 industrial accident permanently lit up and worsened his underlying shoulder problem. Prior to the accident he had never sought treatment for his shoulder problem. He was able to shrug off discomfort and continue working. It was Dr. Nelson's medical opinion, which is the only medical opinion offered by either party, that the April 30 accident aggravated claimant's underlying condition. (Ex. 9.)

8. Since claimant has prevailed he is entitled to his costs. § 39-71-611, MCA.

9. Claimant is not entitled to attorney fees or a penalty. A finding of unreasonable conduct on the part of the insurer is required to award either. §§ 39-71-611 and -2907, MCA. Liberty relied upon Rich Mehrer's recollection of the events that took place on April 29 and 30, 1996. Had his recollection been adopted, the Court would have found that claimant was not required to take the truck home and that he did not satisfy the criteria of section 39-71-407(3), MCA (1995). Thus, liability was reasonably debatable and Liberty's denial was not unreasonable.

10. The parties have not requested any determination concerning the amount of benefits which may be due claimant. Should they be unable to agree on the amount due, they shall inform the Court of the impasse and a further hearing will be scheduled.

JUDGMENT

1. Claimant suffered a compensable industrial injury when he was injured in a car accident on April 30, 1996, and is entitled to compensation and medical benefits on account of that accident.

2. Claimant is entitled to workers' compensation benefits for his shoulder condition.
3. The parties have not requested a determination concerning the amount of benefits which may be due claimant. The Court retains jurisdiction to determine such amounts in the event the parties are unable to agree on what is due.
4. The claimant is entitled to costs in an amount to be determined by the Court. Claimant shall submit his memorandum of costs within 10 days of this decision. Liberty shall then have 10 days in which to file its objections, if any. The Court will then assess costs.
5. Claimant is not entitled to attorney fees or a penalty.
6. 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.
7. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 6th day of January, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Frank C. Richter

Mr. Larry W. Jones

Submitted date: November 8, 1996