

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
2003 MTWCC 28
WCC No. 2002-0631

MARK HAARER
Petitioner
vs.
LIBERTY NORTHWEST INSURANCE CORPORATION
Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a ski lift operator at a private ski club, broke his leg while skiing on a paid break. The insurer denied liability under the recreational activity exception. § 39-71-118(2)(a), MCA,

Held: While engaged in a recreational activity, where claimant was required to wear his ski uniform and to answer questions of and lend assistance to club members when skiing, he was "on duty" while skiing. Since on duty, he was in the course and scope of employment while skiing and the recreational exception is inapplicable. His accident is a covered event.

Topics:

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-118(2)(a), MCA. A ski lift operator at an exclusive ski club who is permitted to ski on a break, is paid while skiing, and is required to wear his uniform and answer questions of and render assistance to members while skiing, was in the course and scope of employment while skiing on his break. The recreational activity exception therefore did not apply and an accident occurring while he was skiing was a covered industrial accident.

Employment: Course and Scope: Recreational Activities. A ski lift operator at an exclusive ski club who is permitted to ski on a break, is paid while skiing, and is required to wear his uniform and answer questions of and render assistance to members while skiing, was in the course and scope of employment while skiing on his break. The recreational activity exception therefore did not apply and an accident occurring while he was skiing was a covered industrial accident.

¶1 The trial in this matter was held on February 11, 2003, in Bozeman, Montana. Petitioner, Mark Haarer (claimant), was present and represented by Mr. Stephen C. Pohl. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

¶2 **Exhibits:** Exhibits 1, 2, 4, 5, and 14 were admitted without objection. Exhibits 3, 7 through 12, 15 through 30, 37, and 38, were admitted over relevancy objections and will be considered insofar as they are relevant. Exhibits 6, 13, and 31 through 36 were withdrawn.

¶3 Witnesses and Depositions: Mark Haarer, Noah Marks, Ryan Jones, John Galle, Robin Schmitt, Kurtis Koenig, and Jerry Loomis testified at trial. In addition, the depositions of Mark Haarer, Nathaniel Stevane, and Judy Novotny were submitted for the Court's consideration.

¶4 Issues Presented: Multiple issues are stated in the Pretrial Order but they can be distilled down to the following two:

¶4a Was the claimant injured in the course and scope of his employment and thereby entitled to medical and temporary total disability benefits?

¶4b Was the insurer's denial of liability for the claimant's accident unreasonable, thereby entitling the claimant to a penalty and attorney fees?

¶5 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 FACT

¶6 The Yellowstone Mountain Club (Club) is an exclusive ski and golf resort located near Big Sky, Montana. It has been the subject of various news reports in recent years. The October 2002 issue of *Stratos*, a magazine which targets "elite travelers,"⁽¹⁾ describes the club as one for the very wealthy

[I]t costs \$250,000 to join, with annual dues around \$16,000. Lot prices are near a million.

(Ex. 3 at 3.)

¶7 The resort is gated and not accessible to the general public. Its membership, as one can imagine from the previous description of joining fees and the cost of lots, is exclusive. In the winter, the exclusive nature of the resort is evidenced by the limited number of skiers. As described in *Stratos*:

The Yellowstone Club has 2,800 feet of vertical drop, 2,000 acres of trails, seven lifts, about 400 inches of premium powder each year, and on a typical day, a mere 40 skiers.

(*Id.*)

¶8 Only members, their guests, and, within the limits noted below, employees are permitted to ski at the Club.

¶9 The Club hires ski lift operators to operate the seven lifts at the resort. Each of the ski lifts has huts at both ends with the exception of the beginner's lift, which has an additional hut in the middle, thus, the resort has fifteen regular lift operators on shift each day. In addition, the resort employs relief operators to relieve the regular operators during their breaks. The relief operators rotate among the huts to fill in for the regular operators during their breaks.

¶10 Lift operators work from 7:00 a.m. to 4:15 p.m., although the lifts do not open until 9:00 a.m. Their initial duties are to prepare the lift area by preparing the snow on the ramps to the lift, shoveling snow from the deck areas, and setting out signs. When the lifts are operating, they are responsible for assisting skiers onto the lifts and answering their questions.

¶11 Since there are few skiers at the resort, lift operators are allowed to study and read in the hut when idle.

¶12 Lift operators are required to be courteous and respectful towards members and their guests. They are required to answer their questions and assist them when requested. Typical questions concern skiing conditions and directions. Jerry Loomis, who is the ski lift operations manager, noted that any employee who is not courteous and helpful to members or their guests will be fired.

¶13 Ski lift operators are given two breaks, one in the morning and one in the afternoon, each lasting from forty-five minutes to an hour. The breaks were not strictly timed.

¶14 The breaks are accomplished through the use of relief lift operators who travel among the ski lift huts, often by skiing to them, to relieve the operators.

¶15 One of the incentives for employment at the Club is the opportunity for employees to ski during their breaks. (They are not allowed to ski at the area on their days off.) However, their skiing is subject to both restrictions and requirements, as follows:

¶15a They are required to wear their ski jackets which identify them as employees.

¶15b They are precluded from skiing in some areas and from skiing on fresh untracked powder except at the periphery.

¶15c They are prohibited from smoking.

¶15d They are expected to answer questions of and provide assistance to members and their guests when asked.

¶16 While the Club provided ski guides for members wishing guide service, Club members occasionally request lift operators who are skiing to ski with them. The lift operators are expected to honor the requests and in fact do so.

¶17 Lift operators are paid during their breaks whether or not they are skiing.

¶18 In December of 2001, claimant was hired as a ski lift operator at the Club. At the time of his hire, he was also attending Montana State University.

¶19 Claimant was paid \$9 an hour and began work on January 5, 2002. He was required to clock in when arriving for work and clock out when he finished his shift. He worked four days a week.

¶20 Claimant worked on March 19, 2002. He worked the lower hut of the beginner's ski lift. In early afternoon, no one was using the lift. At 2:00 p.m., claimant was told to shut the lift down, close up his ramp and hut, and take his afternoon break. He had completed most of his shut-down tasks when Noah Marks (Marks), who was the operator at the middle hut of the beginner's slope, snow boarded down and suggested he and claimant ski together on their break. Claimant agreed and accompanied Marks, leaving a couple of shut-down tasks for after his ski break.

¶21 Claimant and Marks took the Lodge Lift up the slopes, transferred to the Mountain Lift and arrived at the top of the mountain. From there they skied the gentle slope of the ridge at the top of the mountain to the First Hour Glass run, which they then skied. They ultimately ended up at the bottom of the Lake Lift, took the Lake Lift back up to the Mountain Lift, transferred to the Mountain Lift, and arrived at the top of the mountain for a second run.

¶22 Both runs would have been accomplished within forty-five minutes to an hour, in other words, within claimant's allowable break time.

¶23 After arriving at the top of the mountain, claimant and Marks intended to traverse the ridge to the Luke-N-Nater run. Claimant preceded Marks down the ridge and intended to stop at the head of the Luke-N-Nater. The wind was blowing and visibility was limited. In skiing terms the light was "flat." Claimant did not see a small drift, hit it, and fell. His bindings apparently did not release immediately and he suffered a spiral fracture of his left leg.

¶24 At the time of the accident, the Mountain Lift was open and operating. Although visibility was limited, the weather was not prohibitive, as evidenced by the claimant's prior, successful run. Moreover, while the visibility was limited on the ridge, the "chutes" which provided skiing from the ridge top had good visibility.

¶25 At the time of his fall, claimant was proceeding at a slow speed. His bindings were set appropriately to his skill level and the terrain he was planning to ski. There is no credible evidence that he was skiing recklessly, or even carelessly.

¶26 As a result of the accident, claimant was hospitalized. His broken leg required surgery with hardware.

¶27 During his convalescence, claimant was unable to return to work at the Club and in fact he did not thereafter return to work at the Club.

¶28 At the time of the claimant's accident, the Club was insured by Liberty. Liberty has denied liability for the accident based on the "recreational activity" exception to coverage. It also argues that the claimant was skiing recklessly and therefore was not in the course and scope of his employment.

Scope and Course

¶29 Based on the foregoing findings, I find as a matter of fact (and law) that the claimant was in the course and scope of his employment when injured. While he was

not required to ski on break, if he chose to ski he was still on duty. While skiing he was required to wear his employee jacket so he could be readily identified by members. He was required to answer member's questions and assist them if requested. And, he was paid for his time while skiing, an indication of the employer's expectation that he would remain on duty and assist members even while skiing for his own pleasure.

Reasonableness

¶30 I find that the insurer's denial of this claim was not unreasonable. While, claimant was engaged in a recreational activity, the significant question was whether he was "performing prescribed duties." The insurer correctly pointed out that claimant was on break and did not have to ski. Indeed, he could have finished closing his lift hut, clocked out, and gone home. There was even conflicting evidence as to whether he had completed the work of closing his hut.

¶31 Moreover, the facts of this case differ from the two prior cases this Court has decided. In *Connery*, cited below, skiing was a part of the claimant's job. Claimant was a ski instructor and her employer recommended a warm-up run as a prelude to teaching students. In *Deigert*, the claimant was also a ski instructor but was not asked to take warm-up runs. This case presents an entirely different situation. Skiing on break was not a required part of the claimant's job. It was a wholly optional activity. However, as I have determined, when skiing the claimant was required to provide assistance to Club members and guests, therefore, he was performing duties prescribed by the employer.

CONCLUSIONS OF LAW

¶32 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).

¶33 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).

¶34 Subsection (1) of 39-71-118, MCA (2001), defines who is an employee for purposes of workers' compensation coverage. Section (2) provides a number of exceptions to that definition. As applicable to the present case, subsection (2)(a) excepts persons engaged in purely recreational activities, providing:

(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;

Liberty urges that the "recreational activity" exception quoted above exempts it from liability for claimant's injury. The Court disagrees.

¶35 The recreational activity exception was the subject of previous decisions of this Court. The seminal case is *Connery v. Liberty Northwest Ins. Corp.*, WCC No. 9602-7507, Findings of Fact Conclusions of Law and Judgment (July 22, 1996). In *Connery*, I held:

Section 39-71-118(2)(a), MCA, plainly requires a two-part analysis, first focusing on whether activity leading to the accident was a recreational one. If it was, then a second criteria must be met, that being to wit: at the time of the activity the injured individual must have been relieved of and not performing duties of [her] employment.

(*Connery* at 8.) Applying that analysis I found that a ski instructor who was on a warm-up run immediately preceding a lesson was in the course and scope of her employment since warm-up runs were recommended by her employer. I concluded that her claim was not barred by the recreational activity exception.

¶36 On appeal the Supreme Court affirmed both the analysis and result. With regard to determining whether a claimant engaged in a recreational activity is or is not performing the duties of employment, the Court said:

The definition of an employee's "prescribed duties" is fact-intensive, and will vary considerably from case to case. Therefore, the 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. 115, 120, 929 P.2d 222, 225 (1996).

¶37 Applying the same analysis to the present case, I find and conclude that the claimant was engaged in a recreational activity while skiing but that he was nonetheless performing duties of his employment. In finding that he was performing employment duties, I apply the course and scope tests laid out in *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984), and repeated in *Connery* in the decision on appeal at 280 Mont. at 121, 929 P.2d at 226. They are as follows:

Controlling factors repeatedly relied upon to determine a work-related injury include: (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.

While the claimant was not required to ski on his break (Factors 1 and 2), his skiing was governed by his employer to the extent that he was required to identify himself as an employee while skiing and assist members asking question or requesting other assistance. (Factor 3.) The employer plainly benefitted from the assistance its employees provided to members while skiing. (Factor 4.) Indeed, the employer even paid its employees on break, compensation which reflected the need for the employees to be available as needed to help members.

¶38 Liberty also attempts to characterize the claimant's skiing at the time of his accident as "reckless," thereby taking it out of the course and scope of employment. *Compare Deigert v. Liberty Northwest Ins. Corp.*, 1998 MTWCC 74. However, the facts fail to show any recklessness, or even carelessness, on the part of the claimant. While visibility was limited, it was not prohibitive. The lift to the top of the mountain was open. Claimant had his bindings set in accordance with his skill and the terrain he expected to ski. The claimant was skiing slowly, indeed his slow speed may have contributed to his injury.

¶39 I therefore conclude that while the claimant was engaged in recreational skiing he was still on duty and subject to his employer's control. He was in the course and scope of employment, therefore he was "performing prescribed duties." Thus, the recreational exception does not apply and he is entitled to compensation.

¶40 In addition to benefits, the claimant requests attorney fees and a penalty. Both require proof that the insurer's denial of liability was unreasonable. §§ 39-71-611 and -2907, MCA (2001). I have found as a matter of fact that the insurer's denial was not unreasonable. There were reasonable questions about the proper application of the recreational activity rule to the facts of this case.

JUDGMENT

¶41 Liberty is liable for the claimant's March 19, 2002 skiing accident, for medical benefits for treatment of his injuries, and for temporary total disability benefits during the period of claimant's temporary total disability. The parties have not requested the Court to calculate the amount of benefits due the claimant and should be able to make those calculations themselves. However, the Court retains continuing jurisdiction to determine the actual benefits in the event the parties cannot agree.

¶42 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶43 Claimant is not entitled to attorney fees or a penalty.

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

¶45 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 11th day of April, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Stephen C. Pohl
Mr. Larry W. Jones
Submitted: February 11, 2003

1. The magazine's WEB page site describes the magazine's audience in the following terms:

STRATOS MAGAZINE targets and reaches an affluent niche market, specifically those who utilize private jet aircraft to satisfy their travel requirements. Published exclusively for these elite travelers,

STRATOS is an in-flight book that reaches America's top CEOs, senior corporate executives, institutional investors, corporate directors, investors and wealthiest individuals. Their lifestyle and financial achievements make them quickly identifiable as the upper 1% of the overall U.S. population.

STRATOS is designed, edited and produced to appeal to these upscale, well educated individuals whose need to travel swiftly and privately is vital. Private aviation allows them to utilize their time most effectively. <http://www.stratosmag.com>