IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 57

WCC No. 2002-0586

JOHN MICHAEL HAMPSON

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a registered nurse, provided home nursing care to clients of his employer. He served one client at a time. He was injured while traveling home from work and seeks workers' compensation benefits.

Held: Claimant is not entitled to benefits since he was going home from work. He was not paid for his travel and his going to and from work was not part of his employment, therefore section 39-71-407(3), MCA (1999), precludes him from receiving benefits.

Topics:

Employment: Course and Scope: Coming and Going. A nurse, employed by a company providing home healthcare to clients in their homes, who is injured in a car accident while returning home after completing a work shift at a client's home is not entitled to workers' compensation benefits, at least where the nurse is not paid for the travel, is assigned one client at a time, and does not travel between clients' homes or between the employer's premises and a client's home. § 39-71-407(3), MCA (1999). Where assigned a single client, going to and coming from the client's home is not "part of the employee's job duties" and comes under the long-standing "going and coming rule."

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407(3), MCA (1999). A nurse, employed by a company providing home healthcare to clients in their homes, who is injured in a car accident while returning home after completing a work shift at a client's home is not entitled to workers' compensation benefits, at least where the nurse is not paid for the travel, is assigned one client at a time, and does not travel between clients' homes or between the employer's

premises and a client's home. § 39-71-407(3), MCA (1999). Where assigned a single client, going to and coming from the client's home is not "part of the employee's job duties" and comes under the long-standing "going and coming rule."

Employment: Course and Scope: Travel. The rule providing that a claimant injured while traveling between two premises of the employer, one being a home office where the employee regularly works and which is approved by the employer, *Bentz v. Liberty Northwest,* 2002 MT 221, does not apply to a claimant who stores a few supplies and on occasion consults his textbooks at home. His home is not a "home office" under those circumstances.

Cases Discussed: *Bentz v. Liberty Northwest,* 2002 MT 221. The rule providing that a claimant injured while traveling between two premises of the employer, one being a home office where the employee regularly works and which is approved by the employer, *Bentz v. Liberty Northwest,* 2002 MT 221, does not apply to a claimant who stores a few supplies and on occasion consults his textbooks at home. His home is not a "home office" under those circumstances.

¶1 The trial in this matter was held on October 22, 2002, in Missoula, Montana. Petitioner, John Michael Hampson (claimant), was present and represented by Ms. Sydney E. McKenna. Respondent, Liberty Northwest Insurance Corporation (Liberty) was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 and 11 were admitted without objection. Relevancy objections to exhibits 2 through 10 were overruled and those exhibits were also admitted.

¶3 Witnesses and Depositions: Claimant, Bill Woody and Ron Simpson testified. In addition, the parties submitted the depositions of claimant, Bill Woody, and Gary Schild to the Court for its consideration.

¶4 Issues Presented: The issue presented for decision is whether or not the claimant was injured in the course and scope of his employment while traveling to work. All other issues are reserved.

¶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 Claimant is a registered nurse. At all times relevant to the present proceeding, he resided in Missoula, Montana.

¶7 In April 2000, the claimant was hired by Nightingale Nursing Services (Nightingale). Through its employees, Nightingale furnishes home health services. It has numerous

clients, many of whom need long-term nursing care. It hires nurses such as claimant to provide care to its clients in their homes.

¶8 Nurses hired by Nightingale are offered a choice of clients if there is more than one opening. Whether or not there is more than one opening, a nurse may refuse an assignment to a particular client or a particular shift.

¶9 Nightingale nurses must travel to clients' homes and work at their homes. Nightingale does not require its nurses to use any particular mode of transportation to get to their jobs, only that they arrive at work in timely fashion.

¶10 While Nightingale maintains offices in Missoula and Hamilton, Montana, with few exceptions nurses are not required to go to those offices, rather they travel to and from their homes to the clients' homes.

¶11 When hired, claimant was assigned to a client for whom he worked less than a day. He was then assigned to a client who lived south of Hamilton, Montana. The client required 24-hour care and claimant was assigned to work one of the shifts.

¶12 Claimant thereafter commuted from his home in Missoula to the client's home south of Hamilton. He was not paid or reimbursed for his travel, although there was a brief discussion between him and Bill Woody (Woody), the President of Nightingale, about the deductibility of his mileage on his income tax returns. While Woody's and claimant's recollection of the conversation differed, I am persuaded that the discussion took place and that Woody did indicate it was "possible" that a tax deduction for mileage could be taken and suggested claimant keep track of his mileage. However, I am also persuaded that the conversation fell short of constituting tax advice or guaranteeing the deduction.

¶13 Claimant's supervisor was Ron Simpson (Simpson), the Director of Nursing for Nightingale. Unlike claimant, he was paid for his travel. However, his job entailed going from client-to-client, house-to-house to see the clients and employees and review the clients' medical charts.

¶14 Claimant kept blank "flow sheets" and pens used at work at his home. Flow sheets are used to chart information about the client and are part of the client's medical chart. While claimant testified that he was asked by Simpson to keep these supplies at home, Simpson denied doing so and I found Simpson's testimony to be the more accurate. On the other hand, it was clear from the testimony that nurses were expected to have the supplies available to them and were free to keep them at home, but the supplies could also be kept at clients' homes. Claimant stored them in a desk at his home for his own convenience.

¶15 Claimant also had nursing texts at home which he occasionally consulted when he had questions pertaining to the nursing care of his client. However, he was not required to keep the texts at home and could call his supervisor if he had questions about care. His

consulting texts at home and keeping supplies at home did not convert his home into a home office.

¶16 Claimant also received his paychecks, work schedules, notices, and other information at home. He was not required to go to the Nightingale office, although on occasion he did so to deliver patient charts and supplies.

¶17 On November 7, 2000, claimant worked 12 hours for his client. He was traveling home from Hamilton to Missoula following his shift when he was involved in an automobile accident. He suffered serious injuries.

¶18 At the time of his accident, claimant was not carrying any supplies, charts, or other items destined for Nightingale's offices. He was simply going home.

¶19 Claimant gave timely notice of his accident to his employer and filed a claim for compensation.

¶20 At the time of the accident, Nightingale was insured by Liberty. Although Liberty's premiums for Nightingale's nurses, including the claimant, were based on a classification that indicated the nurses were traveling employees (Ex. 6), Liberty denied liability for the claim on the ground that claimant was not in the course and scope of his employment because he was traveling home from work and did not satisfy the travel criteria of section 39-71-407, MCA (1999).

¶21 Following his recovery from his injuries, claimant returned to work for the same client. Later on, as a result of an altercation involving a co-employee, claimant was transferred to work for a different client.

¶22 Conflicts in testimony are resolved in accordance with the foregoing findings of fact.

CONCLUSIONS OF LAW

¶23 This case is governed by the 1999 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).

¶24 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).

¶25 To be compensable, an injury must generally arise "out of and in the course of employment . . . . " § 39-71-407(1), MCA (1999). However, specific criteria must be met for injuries suffered while traveling. Section 39-71-407(3), MCA, 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. [Emphasis added.]

The parties agree, and the facts as found above confirm, that the claimant was not reimbursed for his travel to and from work, hence subsection (a) is not satisfied. The dispute is over whether he meets subsection (b).

¶26 Section (b) is a two-pronged requirement. First, the travel must be required by the employer. Second, the travel must be part of the claimant's job duties. The travel in this case was required in the sense that the employer required claimant to show up for work. But such requirement has never been considered sufficient to bring travel to and from work under the umbrella of workers' compensation coverage. *See, e.g., Buhl v. Warm Springs State Hosp.* 236 Mont. 363, 769 P.2d 1258 (1989) (pre-1987 law); *State Compensation Mut. Ins. Fund v. James [James],* 257 Mont. 348, 849 P.2d 187 (1993) (applying subsection (3) of section 39-71-407, which was added in 1987). The reason that mere travel to and from work has never been considered sufficient to afford coverage for that travel is apparent from the second prong of subsection (b): simply stated, ordinarily work does not begin until the worker arrives at the workplace and work ends when he departs the workplace, thus travel to and from work is not "part of the employee's job duties." Seen in this way, subsection (b) is merely a codification of the pre-1987 rule governing going to and from work. Indeed, in *James* the Supreme Court held that quoted language is equivalent to the "course and scope" of employment requirement of "previous common law." 257 Mont. at 352, 849 P.2d at 190.

¶27 As in *James*, the claimant in this case was simply traveling to and from work. His work did not begin until he showed up at his client's house and it ended when his shift ended and he left the client's house. This case is distinguishable from *James* only in the fact that in *James* the claimant's regular place of work was the employer's business premises (James worked at a hotel), whereas in this case the claimant's regular place of work was at the home of one of his employer's clients. That distinction, however, is immaterial. It makes no difference where the claimant's place of work is so long as the actual job duties begin only upon arrival at the workplace and end upon departure from the workplace.

¶28 Claimant urges that the usual going and coming rule does not apply because he could be reassigned to a different client. The authority of the employer to reassign the claimant to a different workplace, however, does not change the rule. Claimant at any given time had only one place of work. Claimant's situation is distinguishable from Nightingale's director of nursing, whose duties required travel as a part of his job since he was required to travel from client to client during the workday. Claimant's situation is similarly distinguishable from that in *Parker v. Glacier Park, Inc.*, 249 Mont. 225, 815 P.2d 583 (1991), where claimant, a hotel employee, was injured while traveling between hotels. The travel between hotels was required as a part of his job.

¶29 Similarly, the present case is distinguishable from the recent home office case considered in *Bentz v. Liberty Northwest,* 2002 MT 221. In that case the employer agreed to claimant working at home but required him to periodically travel to the employer's premises and also to call on customers in the field. In this case, the claimant's evidence fails to establish that he worked from his home. He was not required to work at home and he was not required to maintain supplies for work at his home. While he did so, it was for his own convenience, not a requirement by his employer. His sole workplace was the client's home.

¶30 Claimant has cited the Court to Larson, *Larson's Workers' Compensation Law,* and numerous cases from other jurisdictions as authority for his claim that his travel to and from his client's home is compensable. Initially, his argument is answered by pointing out that Montana workers' compensation benefits are governed by Montana statutes, which often are unique. Moreover, the cited sections of Larson deal with situations where travel is part of the job. The cases cited by claimant involved regular travel from workplace to workplace, not travel to and from one fixed workplace. *Olsteen Kimberly Quality Care v. Petty* [*Petty*], 944 S.W. 2d 524 (Ark. 1997; *Olsteen Kimberly Quality Care v. Parr,* 965 S.W.. 2D 155 (Ky. 1998); and *Toolin v. Aquidneck Island Medical Resource,* 668 A.2d 639 (R.I. 1995), which are cited by claimant as indistinguishable from the present case, involved nurses assistants who served multiple clients on a daily basis. The claimants in those cases were required to travel from client to client as a regular part of their jobs. In *Hinojosa v. Workmen's Comp. App. Bd.,* 501 P.2d 1176 (Cal. 1972), the claimant, a farm laborer, was regularly shuttled among eight ranches owned by the employer and was required to provide his own transportation between ranches. The California Supreme Court expressly noted

Hinojosa did not know from day to day on which of his employer's fields he would be working or the duration of the work on that field; he needed a motor vehicle not only to get to the fields but for the variable inter-ranch transit necessary to perform the day's work. Thus the working conditions imposed by the employer required that Hinojosa provide himself with some form of automotive transportation.

501 P.2d at 1177. In *Gautreaux v. Life Ins. Co. of Georgia,* 256 So.2d 832 (La. Ct. App. 1972), the claimant was an insurance salesman who was required to call on numerous customers to sell insurance and collect premiums, thus his daily travel was part and parcel of his employment.

¶31 Claimant further argues that at the time of his accident he was traveling between two different portions of his employer's premises, viz. his home and the client's home. The argument, however, requires a determination that he maintained a home office. As a factual matter, I have found that he did not.

¶32 The classification of employees for insurance premium purposes does not change or enlarge the coverage of the Workers' Compensation Act. Therefore, Liberty's classification of Nightgale nurses does not change the result I reach in this case.

¶33 I therefore conclude that claimant has not met the requirements of section 39-71-407(3), MCA, which would bring his travel and his injuries under the Workers' Compensation Act. He therefore is not entitled to benefits and his petition must be dismissed with prejudice.

JUDGMENT

¶34 Claimant's injuries of November 7, 2000, did not occur in the course and scope of his employment. He is not entitled to workers' compensation benefits for those injuries. His petition is **dismissed with prejudice**.

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

¶36 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 day of 18th November, 2002.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Sydney E. McKenna
Mr. Larry W. Jones
Submitted: November 6, 2002