IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 50

WCC No. 2000-0001

HEATHER KELLY,

Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent/Insurer for

ST. MARY R.B., INCORPORATED,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Petitioner, a summer employee at St. Mary's Lodge in Glacier National Park, was injured in a car accident while driving to the Kalispell airport with her roommate, who was leaving employment, and another employee. Petitioner had been asked to drive to the airport in accordance with her employer's policy and practice of taking departing employees to the airport or train station. St. Mary's reported the accident to its workers' compensation carrier, Hartford Accident & Indemnity Company, which accepted claims on behalf of petitioner and the other employees in the car. Petitioner, who never herself filed a workers' compensation claim or directed the filing of a claim, seeks ruling she was **not** acting within the course and scope of employment and is not covered by the Workers' Compensation Act.

Held: Although section 39-71-601(1), MCA, requires a claimant to file a workers' compensation claim within 12 months of an injury, the section is a statute of limitations and affirmative defense which must be asserted by the insurer. Here, the insurer has accepted the claim and the only matter before the Court is whether petitioner was injured within the course and scope of employment. Section 39-71-407(3), MCA (1999), governs compensability of injury incurred "while traveling." Petitioner's injury is covered under both subsections of that provision, either of which would be sufficient. Subsection (a) is met where St. Mary's furnished the transportation to the airport and could require employees to drive other employees to the airport or train station, making the travel an integral part or condition of summer employment. Subsection (b) is met where petitioner, though initially

asked by her roommate to drive, was required to complete the task in accordance with St. Mary's policies and procedures. The claim was properly accepted by the insurer and the petition is denied.

Topics:

39-71-601(1). Although section 39-71-601(1), MCA (1999), requires a claimant to file a WC claim within 12 months of injury, the section is a statute of limitations and affirmative defense which must be asserted by the insurer. Where the injury occurred in the course and scope of employment, an injured workers' decision not to file a claim does not take the injury outside the workers' compensation system.

39-71-407(3). Under section 39-71-407(3), MCA (1999), which governs compensability of injuries occurring "while traveling," summer employee of lodge in Glacier Park was injured within course and scope of employment where she was riding in car taking her roommate, a co-employee leaving employment, to the Kalispell airport. Injury covered under both subsections of 407(3): (a) is met where the lodge furnished the transportation and could require employees to drive other employees to departing transport; (b) is met where petitioner, though initially asked by her roommate to drive, was required to complete the task in accordance with employer's policies and procedures. Petition seeking declaration of non-coverage denied where insurer properly accepted claim filed by employer on petitioner's behalf.

Claims: Limitations Period. Although section 39-71-601(1), MCA (1999), requires a claimant to file a WC claim within 12 months of injury, the section is a statute of limitations and affirmative defense which must be asserted by the insurer. Where the injury occurred in the course and scope of employment, an injured workers' decision not to file a claim does not take the injury outside the workers' compensation system.

Employment: Course and Scope: Travel. Under section 39-71-407(3), MCA (1999), which governs compensability of injuries occurring "while traveling," summer employee of lodge in Glacier Park was injured within course and scope of employment where she was riding in car taking her roommate, a co-employee leaving employment, to the Kalispell airport. Injury covered under both subsections of 407(3): (a) is met where the lodge furnished the transportation and could require employees to drive other employees to departing transport; (b) is met where petitioner, though initially asked by her roommate to drive, was required to complete the task in accordance with employer's policies and procedures. Petition seeking declaration of non-coverage denied where insurer properly accepted claim filed by employer on petitioner's behalf.

Limitations Periods: Claim Filing: Generally. Although section 39-71-601(1), MCA (1999), requires a claimant to file a WC claim within 12 months of injury, the section is a statute of limitations and affirmative defense which must be asserted by the insurer. Where the injury occurred in the course and scope of employment, an injured workers' decision not to file a claim does not take the injury outside the workers' compensation system.

¶1 The trial in this matter was held on July 13, 2000, in Missoula, Montana. Petitioner, Heather Kelly (petitioner), was present and represented by Mr. David W. Lauridsen. Hartford Accident and Indemnity Company (Hartford), the workers' compensation insurance carrier for St. Mary R. B., Incorporated (St. Mary's), was represented by Mr. William O. Bronson. St. Mary's was represented by Mr. Dan L. Spoon. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 4 were admitted without objection.

¶3 Witnesses and Depositions: The parties submitted the depositions of Heather Kelly and Rocky Black for the Court's consideration. Those same individuals, as well as Linda Slavik, also testified at trial.

¶4 Issues: The issue, as restated by the Court, is as follows:

> Whether the Petitioner was acting within the course and scope of her employment with St. Mary's at the time of the automobile accident on September 1, 1999.

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

FINDINGS OF FACT

¶6 Petitioner is currently twenty years old and a college student. She lives in Oregon.

¶7 During the summer of 1999, petitioner was employed by St. Mary's as a seasonal worker at St. Mary's Lodge in Glacier National Park. She worked as a housekeeper, making between five and six dollars an hour. St. Mary's also provided lodging and meals, charging employees $7.95 per day for room and board, which is less than the true value of lodging and meals.

¶8 Petitioner's roommate during the summer of 1999 was Sarah Novak (Novak). Petitioner and Novak became friends during the course of the summer.

¶9 As a benefit to its seasonal employees, St. Mary's provided transportation to the airport or train station for employees returning home by airplane or train at the end of the season. St. Mary's authorized fellow employees to drive departing employees to the airport using their own cars or cars owned and provided by St. Mary's. If the employee's car was used, St. Mary's reimbursed the driver for gasoline.

¶10 The St. Mary's policy regarding transportation at the end of the season is set out in "Department Head Memo", as follows:

> Transportation - we will transport them back to the location where we picked them up. If they were picked up at the train station, we will drop them off at the train station. Same with the airport. But if they were picked up at the train, we will not drop them off at the airport, etc. They can arrange to have a fellow employee take them to the airport or train station. If they use the fellow employee's car, we will pay for gas. They can also arrange to take a company car, but in this case the car must be picked up and dropped off on the same day, no overnight trips. Also the only two people who can go are the driver and the person to be dropped off. The car must be used to drive directly to the train depot or airport and back, no side trips allowed.

(Ex. 4 at 1; underline in original.)

¶11 The policy is reflected in two slightly different versions of a "St. Mary Lodge & Resort Departure Information Sheet," which was evidently prepared for employees. The first states:

> Please notify the office one week prior to your departure what your travel arrangements will be for returning home. We will provide transportation to the East Glacier train station or to the Kalispell airport if we originally picked you up there. If you have arranged for a fellow employee to take you please notify Dustin so we do not schedule a Town Run. We will provide a company vehicle if the employee who is taking you does not have a vehicle, provided they have a valid driver's license and have reviewed and signed the appropriate paper work.

(Ex. 4 at 2.) The second reads:

> Please notify the office one week prior to your departure as to your travel arrangements. We will provide transportation to the East Glacier train station or to the Kalispell airport if we originally picked you up there. We will provide a company vehicle. Please arrange for one fellow employee to drive you.

(Ex. 4 at 3.) There is no evidence regarding which, if either, of these memos was given to petitioner or other employees.

¶12 When a departing employee desired a particular employee to drive her or him to the airport, Rocky Black (Black), the manager of the St. Mary's Lodge, checked to make sure the employee had a valid driver's license and, if driving a company car with a manual transmission, could drive the car. If Black considered the proposed driver satisfactory, he gave verbal permission to the driver to take the departing employee to the train station or airport.

¶13 Black permitted friends and roommates to drive departing employees because they had lived and worked together during the summer, becoming friends. If a friend or roommate was not able to drive, Black designated an on-duty employee to drive. In those cases, the driver received wages while driving. Where a roommate or friend designated by the departing employee drove, no wages were paid to the driver.

¶14 Novak was scheduled to return home to Minnesota by airplane on September 1, 1999. Novak requested that petitioner drive her to the airport. Black approved the request and later went over with both Novak and petitioner the procedures for using a company car to drive to the airport. They agreed to abide by St. Mary's policies regarding driving. Black would not have approved petitioner driving had she not agreed to abide by the policy.

¶15 Petitioner testified at trial that Novak was her roommate and "we were good friends, so I wanted to take her." She knew she would have to be approved by St. Mary's to drive a company car. (Kelly Dep. at 19.)

¶16 On September 1, 1999, petitioner, Novak, and Aaron Capps (Capps), another St. Mary's employee, set out for the airport in a St. Mary's car, with petitioner driving. Capps was not approved by St. Mary's to be in the car and his riding along violated St. Mary's policy. On the way to the airport, Capps took over driving. Petitioner cannot recall anything from September 1st and guessed that she became tired and asked Capps to drive.

¶17 On the way to the airport, while Capps was driving, the car was involved in an accident. Petitioner suffered a head injury and lost consciousness.

¶18 September 1, 1999, was petitioner's day off and she was not paid wages during or for the drive. She testified she did not consider herself working at the time of the accident. She was not required by St. Mary's to drive Novak to the airport, although if she were on duty at the time Novak needed a ride and no one else volunteered, she could have been designated to drive Novak, but in that case she would have been paid wages during the drive. Petitioner was not told that driving other employees to the airport was part of her job.

¶19 Petitioner understood she was allowed to use the company car to drive Novak to the airport because she was an employee. (*Id.* at 22.) She understood the car was used only for St. Mary's business purposes and knew she had to be approved by St. Mary's in order to drive. She knew St. Mary's rules and regulations applied to her use of the car. (*Id.* at 19.)

¶20 Petitioner agreed that but for the accident she would have benefitted from being permitted to drive Novak since they were friends. But for the accident, she would have been able to say goodbye to her friend at the airport.

¶21 At the time of the accident, St. Mary's was insured by Hartford.

¶22 Petitioner did not complete a claim for workers' compensation and no one signed a claim on her behalf.

¶23 However, after Black learned of the accident, he or someone else at St. Mary's contacted Hartford to report the accident. St. Mary has a policy of reporting injuries within twenty-four hours. Black believed petitioner was in the course and scope of employment at the time of the accident.

¶24 Black was shown a copy of the First Report form, on which the box labeled "No" is marked in response to the question, "Was worker injured while in your employ?" Black did not know why the "No" box was marked . (Exhibit 1.)

¶25 Linda Slavik (Slavik) is a claims representative for Hartford and is the adjuster in charge for this case. She testified that the First Report was completed by a telephone call to the insurer. She also did not know why the "No" box was checked. In any event, she made her own independent analysis, determined petitioner was within the course and scope of employment during the accident, and accepted the case as compensable. She also received First Report forms for both Novak and Capps. The claims of Novak and Capps were also accepted. Slavik testified the insurer often accepts claims before actually receiving a claim form signed by the injured worker.

¶26 Slavik received a phone call from petitioner's mother shortly after the accident. Mrs. Kelly wanted her daughter flown home and asked the insurer to cover the cost of a plane ticket. Hartford paid the airfare. However, a benefits check sent to petitioner at her home was returned, uncashed.

CONCLUSIONS OF LAW

¶27 This case presents the unusual situation of an employee asking the Court to determine that she was not in the course and scope of her employment at the time of her car accident and therefore **not** covered by the Workers' Compensation Act (WCA). At trial, her counsel also pointed out that petitioner has never filed a claim and in light of the requirement that she file a written claim within 12 months, § 39-71-601(1), MCA, her injuries should be deemed outside the Act. However, section 39-71-601(1), MCA, is a statute of limitations and an affirmative defense that may be waived by an insurer. In this case the insurer has accepted liability, and in any event it could waive the statute either expressly or by not pleading it. *See* Rule 8(c), Mont.R.Civ.P.[(1)] Since the insurer in this case has accepted liability and, along with the employer, requests that the Court find that petitioner's injuries are covered under the WCA, the sole issue presented is whether petitioner was injured in the course and scope of her employment.

¶28 As a general matter, employees injured in the course and scope of employment are covered under the WCA. Section 39-71-407(1), MCA, provides:

> Each insurer is liable for payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives

> an injury **arising out of and in the course of employment** or, in the case of death from the injury, to the employee's beneficiaries, if any.

In 1987 the Montana Legislature amended section 39-71-407, MCA, to make injury "while traveling" compensable only if certain criteria are satisfied. Subsection (3) of section 39-71-407, MCA (1999),[(2)] 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.]

I consider the course and scope under both subsections, although satisfaction of one is sufficient to render petitioner's injuries compensable.

¶29 Subsection (a) has two prongs. The first is satisfied since the employer furnished the transportation. The second is also satisfied. The employer, as a benefit to its employees and part of their compensation, agreed to furnish departing employees transportation to the airport or train station, making the transportation an integral part of the employment relationship. Even if the subsection is read to mean that the travel be an integral part of the particular employee's job responsibilities, the subsection is satisfied. To fulfill its obligation to transport departing employees to the airport or train station, St. Mary's had to use its employees or hire a third party to provide transportation. Its policy was to use employees; if there were no volunteers for the job, some employee was assigned the task. Thus, taking departing employees to the airport was within the scope of petitioner's and her co-employees' job duties and an integral part of their employment. Petitioner's injuries are therefore covered under the WCA.

¶30 Subsection (3)(b) applies where the employer does not furnish or pay for the transportation or, despite doing so, the travel is not an "integral part or condition of the employment." Under those circumstances, the travel may still be covered if it is "required by the employer as part of the employee's job duties."

¶31 Initially it is difficult for me to imagine when travel would satisfy the language of subsection (3)(b) yet not satisfy the "integral part or condition of the employment" language of subsection (3)(a)(ii), thus it is difficult for me to imagine a situation where the employer provides or pays for transportation which would not satisfy (3)(a) yet satisfy (3)(b). It may be

that the legislature intended (3)(b) to apply only to situations where the employer neither furnishes nor pays for the transportation and, though using differently worded tests concerning the relatedness of the travel to the employment, intended the tests to be equivalent. Whether it so intended, or whether it envisioned situations I cannot readily imagine, I can only speculate. In any event, subsection (3)(b) must be applied as written. Since it is not limited to situations where the employer does not provide or pay for transportation, I must consider whether petitioner's travel was required as a part of her job duties. In making that determination I must construe and apply the language of subsection (3)(b) without consideration of whether the standard it enunciates is identical to the "integral part or condition of the employment" language of subsection (3)(ii).

¶32 In *State Compensation Mut. Ins. Fund v. James,* 257 Mont. 348, 352, 849 P.2d 187, 190 (1993), the Supreme Court construed the "as part of" phrase of subsection (3)(b) "as equivalent to the phrase 'in the course and scope of' employment from the previous common law." *See also, Heath v. Montana Mun. Ins. Authority*, 1998 MT 111, ¶ 13, 959 P.2d 480, 483 (1998). Both *James* and *Heath* indicate that common law cases antedating the passage of section 39-71-407(3), MCA, should be followed in determining whether the travel is "part of the employee's job duties."

¶33 In determining whether an activity falls within the course and scope of employment, four factors are considered, as follows:

> (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.

Connery v. Liberty Northwest Ins. Corp., 280 Mont. 115, 121, 929 P.2d 222, 226; Courser *v. Darby School Dist. No. 1*, 214 Mont. 13, 17, 692 P.2d 417, 419 (1984). "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." *Courser, supra,* 214 Mont. at 17, 692 P.2d at 419.

¶34 Petitioner argues the first two factors are not met because she volunteered to take Novak to the airport and was not specifically asked or compelled, directly or indirectly, to drive Novak to the airport. However, under course and scope precedents, an activity undertaken for the benefit of the employer, is still within the course and scope of employment even though not *specifically* required by the employer and is voluntarily undertaken by the employee "off the clock." That is the lesson of *Courser v. Darby School Dist.*, *supra*. In *Courser* an elementary school teacher was determined to be within the

course and scope of his employment while en route to attend summer college courses necessary to obtain a master's degree. He had been encouraged by his supervisors to attend the program so he would become eligible to apply for an upcoming opening for a school principal. Prior approval of his course work by school administrators was required by his contract with the school district, and such approval was actually given. While completion of the courses also qualified him for a salary increase, he was on summer vacation and not compensated for time spent taking the courses.

¶35 Quoting *Bump v. Central School District*, 40 A.D. 243, 338 N.Y. Supp.2d 998, 1000 (1973) , the Montana Supreme Court held that voluntary attendance at an activity does not remove the employee from the course and scope of employment "if such attendance was incidental to the ordinary employment and was undertaken at the employer's request." *Id*., 214 Mont. at 17-18, 692 P.2d at 419. The key to bringing the activity within the course and scope of employment was "**some action on the part of the employer to connect the trip to employment, some sponsorship, some approval, some employer action . . . .**" *Courser*, 214 Mont. at 18, 692 P.2d at 420, quoting *Johnson Stewart Mining Co. v. Industrial Co.*, 133 Ariz. 424, 652 P.2d 163,167 (1982) (emphasis added). The Court found it unnecessary for *Courser* to be "on duty" or "on the clock" at the time of injury.

¶36 In the present case, although St. Mary's did not specifically request or order petitioner to drive Novak to the airport, its policy encouraged and implicitly requested its employees, including petitioner, to drive departing friends and roommates to the airport or train station. Lacking volunteers, St. Mary's could designate and order any one of its employees to do so, thus the possibility of compulsion was also present. In driving Novak to the airport, petitioner was discharging the employer's obligation to Novak to return her to the airport when departing. Those facts are sufficient under *Courser* "to connect the trip to employment" and satisfy the first two of the four "course and scope" criteria. *Courser,* 214 Mont. at 18, 692 P.2d at 420.

¶37 The third factor is whether the employer "controlled or participated in the activity." *Courser* explained that *actual* control is not necessary for compensability. "The right to control is sufficient." *Courser*, 214 Mont. at 19, 692 P.2d at 420. "That right may exist if the employee is acting for the benefit of the employer." *Id*. In the present case, St. Mary's exercised the right of control over petitioner's travel. Its rules required that petitioner be approved to drive Novak to the airport, and in fact she was approved. Petitioner's actual travel was governed by rules prohibiting any deviation in travel or carrying of passengers, even fellow employees. I credit Black's testimony that he reviewed with petitioner the company rules and regulations regarding use of a company car for the trip. While petitioner did not recall discussing these matters with Black, she testified she did not remember anything from the day of the accident. Moreover, she acknowledged knowing that St. Mary's rules and regulations applied to the drive. These facts represent sufficient employer control or participation in the activity. The third factor is satisfied.

¶38 The final factor considers whether the employer and employee mutually benefitted from the activity. I have found that they did. In driving Novak to the airport, petitioner was discharging St. Mary's obligation to Novak to return her to the airport, thus benefitting St. Mary's. In driving Novak to the airport, petitioner had the opportunity to spend a few more hours with her friend and see her off, thus benefitting petitioner.

¶39 An argument might be made that under subsection (3)(b), travel may be within the course and scope of employment yet not be "required by the employer." The "required" component, however, is met in this case since the travel was required of some employee and once the petitioner volunteered her travel was subject to the employer's direction and control. I find that subsection (3)(b) is satisfied.

¶40 Since petitioner's travel meets the criteria of section 39-71-407(3), MCA (1999), her injuries are covered under the WCA. Accordingly, Hartford properly accepted liability for her injuries.

JUDGMENT

¶41 1. Petitioner was acting within the course and scope of her employment at the time of her September 1, 1999 automobile accident.

¶42 2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶43 3. Any party to this dispute may have 20 days in which to request a rehearing form these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 22nd day of August, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. William O. Bronson
Mr. Dan L. Spoon
Date Submitted: July 17, 2000

1. Rule 8(c) provides:

> (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other

> matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

While the Workers' Compensation Court has its own rules of procedure, its rules require a respondent to set out its contentions in its response, ARM 24.5.302(1)(a), hence the Court will not consider a statute of limitations defense if not listed in the contentions.

2. The law in effect at the time of claimant's injury applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). At the time of her injury, the 1999 version of the WCA applied.