

DISCLAIMER

The "Greg Kemp" involved in the following workers' compensation matter is in no way associated with the Greg Kemp who is currently residing in Hawaii.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 15

WCC No. 9711-7866

GREG KEMP

Petitioner

vs.

CIGNA PROPERTY & CASUALTY

Respondent/Insurer for

WOLSEY MANAGEMENT, INCORPORATED/

FAMILIAN NORTHWEST

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant and insurer disputed occurrence of industrial accident.

Held: In a bench ruling, WCC found that while claimant admitted lying under oath, and while a number of the details of his testimony appeared fabricated, an injury did occur. Court relied upon emergency room records documenting an acute episode, including physician's finding of exquisite tenderness, testimony of credible witness that some incident occurred, and Court's conclusion claimant lacked motivation to fabricate injury.

Topics

Witnesses: Credibility. In a bench ruling, WCC found that while claimant admitted lying under oath, and while a number of the details of his testimony appeared fabricated, an injury did occur. Court relied upon emergency room records documenting an acute episode, including physician's finding of exquisite

tenderness, testimony of credible witness that some incident occurred, and Court's conclusion claimant lacked motivation to fabricate injury.

¶11 The trial in this matter was held on January 20, 1998, in Missoula, Montana. The petitioner, Greg Kemp (claimant), was present and represented by Mr. Kenneth H. Grenfell. Respondent, Cigna Property & Casualty (Cigna), was represented by Mr. Leo S. Ward.

¶12 Witnesses and Depositions: Claimant, Launita Kemp (claimant's wife), and Raymond Gramza testified at trial.

¶13 Exhibits: Exhibits 1 through 4 were admitted over claimant's objections. Exhibits 5 through 10 were admitted without objection.

¶14 Issues: The claimant seeks a determination that he suffered a compensable industrial accident on May 20, 1997. He also seeks attorney fees and a penalty on account of Cigna's denial of liability for his alleged injury. Cigna urges that the claim is fraudulent and seeks section 39-71-2914, MCA, sanctions with respect to the action.

* * * * *

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

Bench Ruling Adopted

¶16 After hearing, and after considering all of the evidence, the Court issued a bench ruling finding that the claimant suffered an industrial injury on May 20, 1997, for which Cigna is liable. It also entered findings concerning claimant's credibility and his entitlement to benefits. The parties have agreed that the bench ruling, as reflected in the transcript of the ruling, shall constitute the Court's Findings of Fact, Conclusions of Law and Judgment.

¶17 Therefore, the attached transcript of the Court's bench ruling shall constitute its Findings of Fact, Conclusions of Law and Judgment.

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

¶19 Any party to this dispute may have 20 days in which to request an amendment or reconsideration of these Findings of Fact, Conclusions of Law and Judgment.

¶110 SO ORDERED.

DATED in Helena, Montana, this 2nd day of March, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Kenneth H. Grenfell

Mr. Leo S. Ward

Attachment: Bench Ruling Transcript

Submitted on Filing of the Transcript: February 24, 1998

Taken at Missoula County Courthouse

Missoula, Montana

Tuesday, January 20, 1998 - 10:00 a.m.

The Honorable Mike McCarter, presiding.

TRANSCRIPT OF PROCEEDINGS

A P P E A R A N C E S

KENNETH H. GRENFELL, Esq.,

Grenfell Law Firm, 412

West Alder, Missoula, Montana 59802,

appearing on behalf of the Claimant.

LEO S. WARD, Esq., Browning, Kaleczyc, Berry &

Hoven, P.C., 139 North Last Chance Gulch, Helena,

Montana 59624,

appearing on behalf of the Insurer.

Reported by Tamara Stuckey, RPR, Freelance

Court Reporter, State of Montana, residing in

Missoula, Montana.

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1TUESDAY, JANUARY 20, 1998

2THE COURT: I am going to bench rule on

3 this case, as I indicated. I'm not going to take
4 any additional argument. I think you've argued
5 your cases through your presentations and I gave
6 you an opportunity for opening statements, and I
7 don't think further argument on this matter is
8 going to make a difference. Let's talk first
9 about the facts against Mr. Kemp, which are
10 significant and substantial, as I see them. He's
11 admitted to lying under oath during his
12 depositions. There were a number of matters that
13 I felt, even at trial, he was not telling the
14 truth about. I'm led to wonder, in fact, whether
15 or not he's able to discern the truth at times,
16 and I'm very troubled by his testimony. He has a
17 history of run-ins with his employers. He has
18 short-term tenure with his employers, which
19 indicates sort of a pattern there. There is some
20 evidence in the doctor's record of exaggeration of
21 symptoms, specifically in Dr. Thomson's note of
22 June 23rd concerning the Waddel's symptoms, which
23 he indicates--specifically states is evidence of
24 exaggeration.
25 Ray Gramza was a totally credible

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-3-

1 witness. I'm not persuaded he has any potential

2 gain in this case. There's nothing to indicate
3 that he couldn't go buy his plumbing supplies
4 anywhere else. I don't know why he would come in
5 here and lie. His testimony shows that at least
6 part of Mr. Kemp's version of the events on that
7 day is untrue, specifically the shower being
8 upside down. I don't think there's any question
9 that that shower was upside down, which again
10 leads me to wonder about Mr. Kemp's veracity and
11 perhaps why he was inverting it. The unloading of
12 additional tubs, he told me two stories about--I
13 heard two different versions from Mr. Kemp, and
14 then I heard a third version from Mr. Gramza that
15 I credit more than Mr. Kemp's.
16 In any event, Mr. Gramza also raised a
17 serious question about whether or not Mr. Kemp, in
18 fact, fell. That, in my mind, isn't totally
19 conclusive, because obviously there was a short
20 period of time, which he put it being a half a
21 second, could be a little bit longer, but there
22 was a bit of time when Mr. Kemp was out of his
23 sight when he was grabbing the--trying to grab the
24 tub or the shower to prevent it from falling all
25 the way.

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1 And then, finally, Mr. Kemp didn't return

2 to light duty when he was offered it. His
3 explanation, as I recall it, was that he knew he
4 had problems with the employer, didn't think he'd
5 get a fair break or words to that effect.
6 Factors in his favor, let me outline
7 those. Some sort of incident is verified by Ray
8 Gramza. Again, I indicated who I thought was a
9 credible witness. He verified that, indeed, there
10 was this incident where the shower slid off the
11 truck and was broken. That in itself supports an
12 inference, at least, that there was some sort of
13 trauma there by way of twisting, if not falling.
14 The thing sliding off, if he let's go of it,
15 there's a reaction and that makes sense. And I
16 guess what I derive as far as the mechanics of
17 what happened is that I'm inconclusive on that. I
18 can't conclude that he fell, but on the other
19 hand, I think something happened there.
20 There's no prior history of back pain.
21 There's ER documentation of an acute episode. I
22 indicated at the beginning of this trial that I
23 was troubled by the lack of medical. I think the
24 medical should have troubled both of you, and I'm
25 put in the position of having to take the medical

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1 documents at their face value.
2 At their face value, I can't speculate as
3 to what the doctors might or might not say if they
4 were deposed. The ER physician noted in his
5 history or his examination with respect to his
6 physical examination, he noted, "Exquisite
7 lumbosacral tenderness and tenderness up the
8 paraspinous muscles." He was at least
9 sufficiently convinced at that time of the
10 validity of the complaints and he was sufficiently
11 convinced of that to the extent that he prescribed
12 medication, he took him off work for a whole week
13 and he indicated that he should have a follow-up
14 if his pain continued.
15 Dr. Thomson, again taking him at face
16 value, on the 5th--or the 23rd of May diagnosed a
17 mechanical low back pain. That's the only
18 diagnosis I have in this case. He wrote a
19 prescription for physician therapy. On 6/23, June
20 23rd, he did note again the problem with the
21 Waddel's sign and evidence of exaggeration, but
22 that's all he noted. He didn't go any further
23 than that. He still recommended physical therapy
24 and he only allowed a return to work only on a
25 limited duty basis, which still indicates that

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1 he's crediting with the Claimant--the Claimant's
2 symptoms.

3 Motivation to fabricate in this case:

4 Leo, you've talked about his being in a position
5 where he might be about to lose his job. There is
6 not strong evidence of that. The evidence of that
7 is very weak. There was--there's no prior pattern
8 here of industrial accidents. He had one prior
9 industrial accident, so there's no evidence of
10 fabricating industrial accidents in response to
11 job difficulties. There's no evidence of any
12 impending termination with his employer.

13 One thing I considered is possibly he
14 might have had some thought that breaking the tub
15 might get him fired. But given the way they have
16 these fellows unload these things and given the
17 response of the employer to the tree thing, I
18 can't go any further with that possibility. But I
19 just don't see any strong evidence of that. The
20 tree incident just before had been resolved by
21 basically a written memorandum, which noted that
22 he hadn't been totally truthful, but on the other
23 hand, just stating what he had to do if he had any
24 sorts of accidents. There was no disciplinary
25 action taken. There was no further disciplinary

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1 action contemplated.

2 On the flip side of the motivation issue,
3 he's got some significant obligations, including
4 the obligations he incurred from the prior
5 employment for repayment of certain things. He
6 had a family. And I noticed his job history is,
7 when he loses one job, he goes out--he does go out
8 and get another job, which leads me to the bottom
9 line overall.

10 I'm barely convinced that despite
11 admitting lies and despite my perception that he's
12 been untruthful in many matters before this Court,
13 I still conclude that he did suffer an industrial
14 accident on May 20th.

15 I'm going to lecture you a little bit,
16 because you're going down the wrong path,
17 Mr. Kemp. I read your employment files. I
18 listened to your testimony. And if you continue
19 on the path, the kind of employment relations that
20 you've exhibited in the past few years, and on the
21 path of how you see things as you testified in
22 court, you're--it doesn't bode well for the future
23 for you. You need to turn yourself around and put
24 honesty and truthfulness and integrity up front
25 square between the eyes, and you need to show some

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1 loyalty to your employers and not take things for
2 granted, and you need to take personal
3 responsibility for your own acts. I don't think
4 you're taking personal responsibility and you need
5 to do that, because your lying in this case could
6 very well have resulted in my concluding that
7 there was no industrial accident. And it almost
8 did. It almost did.

9 It's sort of like the kid who cries
10 wolf. You cry wolf too many times and nobody
11 believes you anymore. As a judge, though, I know
12 that people lie about some things, but sometimes
13 they're not lying about other things. And in this
14 case, you've gotten that edge. But you've barely
15 gotten that edge and you need to think about it.

16 You've got a good job right now and you
17 need to think about keeping that job, so you need
18 to be honest with your employer and you need to be
19 loyal with your employer. If you're not, you're
20 going to have a pattern of going from job to job
21 and pretty soon a reputation is going to catch up
22 with you and you're not going to have a job. It's
23 going to be that simple. So get your life in
24 order.

25 Penalty? No penalty. No attorneys

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1 fees. They had a legitimate reason for denying
2 this claim. Sanctions; on the request for trial,
3 one of the things I noted was the allegation in
4 there that was made on November 3rd by you, Ken,
5 that he didn't have a job when, in fact, he did.

6 MR. GRENFELL: Pardon me? Oh, yes, I was
7 mistaken.

8 THE COURT: So how do you explain that?

9 MR. GRENFELL: I just--I hadn't been
10 keeping in contact with him. I didn't know he had
11 gotten a job at that point in time. I should have
12 checked into it before I stated that. He was
13 calling me fairly frequently when he first hired
14 me. He wanted to get this thing resolved so he
15 could get some money. I was under the impression
16 that he was still out of work. I just admit that
17 I was at fault for stating that and I didn't mean
18 to mislead the Court.

19 THE COURT: Well, do you have anything
20 further to say, Leo, about sanctions? You are
21 going to take this loss tough and I don't blame
22 you.

23 MR. WARD: I mean, it's happened before,
24 as you know.

25 THE COURT: Well, it does happen. This

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1 is a tough job sitting up here and trying to
2 unravel cases like this when people aren't telling
3 the truth about everything.

4 MR. WARD: Yeah, well, and it's harder
5 the next time, because in a case of this nature
6 all you can say is look at all of it, and do you
7 ever get that much? Probably not.

8 MR. GRENFELL: I don't think the case
9 is--I don't know what the settlement value of the
10 case would be. We offered to settle it on a
11 disputed liability basis, but...

12 THE COURT: I don't blame them for taking
13 it to trial. I think if their theory is correct,
14 then he doesn't get anything, and I think
15 justifiably not.

16 One thing I'm going to take under
17 consideration is what to do about the fact that he
18 lied in his deposition. And that's probably the
19 best thing going for him, is his willingness to
20 admit that he did so before this Court. That
21 certainly takes a little bit of the taint off it.

22 And that's something that is very serious, as you
23 should know as his attorney, and I want to think
24 about whether I want to do anything additional
25 with that particular item.

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1 Benefits in this case are clearly limited
2 to the medical bills to date, clearly limited to
3 time loss only to the date that he got the offer
4 to return to work on a limited basis.
5 MR. WARD: Is it the date he got the
6 offer or the date he applied for the job?
7 THE COURT: Pardon?
8 MR. WARD: The date he got the offer or
9 the date he got the job?
10 THE COURT: Date he got the offer for the
11 temporary position--light duty position.
12 MR. WARD: Okay.
13 THE COURT: It looks to me he's got a job
14 at this point. I don't know where you're going to
15 try to go with the medicals, but I think he's
16 probably healed up enough.
17 MR. GRENFELL: They've got to be left
18 open.
19 THE COURT: They'll be left open, but--
20 MR. WARD: They'll be challenged.
21 THE COURT: Again, depositions in this
22 case might have been real helpful. But I can't
23 read between the lines of the depositions. My
24 take on this is that he did suffer an injury.
25 There's some evidence of exaggeration, maybe

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1 making a little bit more of it than he should be

2 making, but that's not the issue before me. I

3 can't decide that. I don't know what his future

4 medicals might be, if any. So those will be

5 left. Any other matters?

6 MR. WARD: No, Your Honor.

7 MR. GRENFELL: No.

8 THE COURT: All right. I'm going to

9 think about what to do, whether any further

10 sanctions against you are warranted. I'll think

11 about that. I guess I probably ought to entertain

12 from counsel what, if anything, I should do. Do

13 you want to try to address that now, or do you

14 want an opportunity to address it?

15 MR. WARD: I can address it now, Your

16 Honor. Of course, given your decision, it impacts

17 what I was going to say about that. What I would

18 have said before, had you decided otherwise, is I

19 would have said that I thought it would be

20 appropriate, because we were required to come into

21 court here and prove this case, that we would be

22 paid our attorneys fees and our costs related to

23 that. But because you ruled in the way you have,

24 obviously, it's going to be less than that in

25 terms of the sanctions. What--how much less or

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1 what an appropriate sanction would be under the
2 circumstances, I don't know.

3 One of the reasons I took the deposition
4 of Mr. Kemp was because of that allegation in the
5 Complaint, to try to figure out what exactly was
6 going on with that. Maybe it's appropriate for
7 the amount of cost, attorney fees to travel here
8 to Missoula to take his deposition to find out
9 that, in fact, he was working and that that was
10 not an appropriate allegation in the Complaint.

11 Maybe that would be reasonable. I don't know.

12 THE COURT: Yeah, as far as the sanctions
13 on that and the allegation, I'm not going to
14 impose sanctions against Mr. Grenfell personally.
15 Although he should have checked. You should have
16 made sure.

17 MR. GRENFELL: Pardon me?

18 THE COURT: You should have checked with
19 your client and made sure before you--

20 MR. GRENFELL: Yes. I think Mr. Ward
21 would have taken Mr. Kemp's deposition no matter
22 what that stated. He's never not taken a
23 deposition of a Claimant, in my experience, before
24 the trial. But I don't know. I can't speculate.

25 THE COURT: I'll take any sanctions which

1 may be imposed will be imposed against the
2 Claimant individually, against Mr. Kemp
3 individually.
4 I'm going to think about that a little
5 bit and see what my authority is under the
6 circumstances, and also what my duties are under
7 this kind of a circumstances. I think judges have
8 duties as well as authorities, and one of the
9 duties of a judge is to preserve the integrity of
10 the judicial process. And when somebody lies in a
11 proceeding under oath before the Court, that
12 underlies the judicial process. I may have a duty
13 as well as authority to deal with that. But I
14 haven't dealt with this before, so I want to step
15 back from that and see what my duty is and what my
16 authority is, and I think at that point, if I
17 think I do have a duty and authority to do
18 something, I will notify the two of you and tell
19 you where I think my duty and authority is and
20 give you an opportunity to respond before I make a
21 final determination. I may even have to hold a
22 hearing.
23 Okay, we'll be in recess.
24 MR. GRENFELL: Thank you.
25 THE CLAIMANT: Thank you, Your Honor.

1 THE COURT: Let me ask counsel one other
2 thing before you leave. My bench ruling that I
3 just made was pretty complete. If you want, I can
4 give you written findings, which are basically
5 going to be repetitive, although it will probably
6 be a little bit more articulate; or, if you want,
7 we can allow the bench ruling to stand and I can
8 enter bench ruling in accordance with the record.
9 I don't have conclusions of law, obviously, in
10 this, but--

11 MR. WARD: I don't care, Your Honor.

12 It's not an issue for me.

13 MR. GRENFELL: It makes no difference to
14 me. I think I understood the ruling.

15 THE COURT: All right. What I'll do--

16 MR. GRENFELL: You awarded no costs or
17 attorneys fees to the Claimant or the Defendant,
18 and you found in favor of the Claimant in terms of
19 the injury, the medical bills and his period of
20 disability.

21 THE COURT: Up to the point of the offer
22 of light employment.

23 MR. GRENFELL: Okay.

24 THE COURT: What I'll do is I'll have
25 Tammy prepare a transcript of what I've said in

1 the bench ruling and I will attach that to an

2 entry of judgment. Is that satisfactory?

3 MR. WARD: That's fine, Your Honor.

4 MR. GRENFELL: That's fine.

5 (Proceedings concluded at 3:15 p.m.)

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1 CERTIFICATE

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3

4 STATE OF MONTANA)

) ss.

5 COUNTY OF MISSOULA)

6 I, Tamara Stuckey, RPR, Freelance Court Reporter and Notary Public for the State of
7 Montana, residing in Missoula, Montana, do hereby certify:

8 That I was duly authorized to and did

9 report the proceedings in the above-entitled cause;

10 That the foregoing pages of this

11 transcript constitute a true and accurate transcription of my stenotype notes.

12 I further certify that I am not an

13 attorney, nor counsel of any of the parties, nor a relative or employee of any attorney or
counsel

14 connected with the action, nor financially interested in the action.

15 IN WITNESS WHEREOF, I have hereunto set

16 my hand and seal on this 20th day of February, 1998.

17

18 Tamara Stuckey, RPR

19 Freelance Court Reporter Notary Public, State of Montana

20 Residing in Missoula, Montana. My Commission expires: 10/25/98.

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