

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 35

WCC No. 9606-7566

RONNI LEWIS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

NORTHERN ROCKY MOUNTAIN EASTER SEAL

SOCIETY/GOODWILL INDUSTRIES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 48-year old in-home care attendant claimed wrist injury while moving a bed. Insurer disputed occurrence of injury and notice to the employer or insurer.

Held: Where claimant was not credible regarding the occurrence of an workplace accident, the Court finds she has not proven any entitlement to benefits. WCC does not reach an issue of notice to the employer/insurer where it concludes no accident occurred.

Topics:

Injury and Accident: Accident. Where claimant was not credible regarding the occurrence of an workplace accident, the Court finds she has not proven any entitlement to benefits. WCC does not reach an issue of notice to the employer/insurer where it concludes no accident occurred.

The trial in this matter was held on February 4 and February 5, 1997, in Billings, Montana. Petitioner, Ronni Lewis (claimant), was present and represented by Mr. Jerrold L. Nye. Liberty Northwest Insurance Corporation (Liberty) was represented by Mr. Larry W. Jones. No transcript of the trial has been prepared.

Exhibits: Exhibits 1 through 6 and 10 through 15 were admitted without objection. Exhibits 7 and 8 were admitted over claimant's objections. Exhibit 9 was not offered into evidence. Exhibits 16 and 17 were made part of the record but not admitted.

Witnesses and Depositions: Claimant, Robin Burns, Renee Lovelace, Tracie Auers Hunt, Sherry Parks, Pat Wagner, Layne Graham, Sharon Graham Fisk, and Will Johnson were sworn and testified. In addition, the parties submitted two depositions of claimant⁽¹⁾ and depositions of Dr. Richard Lewallen, Florence Gray, Tracie Auers (Hunt), Layne Graham, and Sherry Parks.

Issues Presented: The following issues are presented for resolution by the Court:

- (1) Whether claimant notified her employer or whether the employer had actual knowledge of claimant's alleged industrial accident within 30 days of its occurrence, as required by section 39-71-603(1), MCA.
- (2) Whether claimant sustained a compensable injury in the course and scope of her employment as an in-home care attendant with Easter Seal.
- (3) Whether claimant is entitled to a penalty, attorney fees, and costs.

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

FINDINGS OF FACT

1. Claimant is 48 years old and resides in Billings, Montana.
2. Claimant began working for Northern Rocky Mountain Easter Seal Society (Easter Seal) as an in-home care attendant (attendant) in early July 1995. As an attendant, claimant cooked, cleaned, and provided transportation for disabled and elderly clients.
3. A few months prior to going to work for Easter Seal, claimant injured her right wrist. On January 21, 1995, she slipped on ice outside of her home and fell. (Lewis Dep. I at 48.) She was treated for the injury with a lace up splint, which she testified she wore for three to six weeks. She last sought medical care for this injury on January 25, 1995. (Ex. 2.)
4. Claimant testified in her deposition that her right wrist had completely healed by the time she went to work for Easter Seal. (Lewis Dep. I at 51.) She alleges in this proceeding that she suffered a new and different injury to her right wrist while working for Easter Seal. Specifically, she claims that she injured her wrist on September 9, 1995, when she was moving a heavy hospital bed for an Easter Seal client, Layne Graham (Graham). Claimant was providing in-home services to Graham, who was recovering from a rotator cuff injury to her right shoulder and was wearing a sling on her right arm. Claimant testified that Graham asked her to move the bed from one side of the room to the other so that it would be easier for Graham to get in and out of bed. According to claimant, while pushing and pulling on the bed she heard her wrist "pop" and felt sharp, throbbing pain. (Lewis Dep. I at 10-11.)
5. Claimant submitted a written claim for compensation in December 1995.

6. At the time of the alleged injury, Easter Seal was insured by Liberty. Liberty denied her claim. It disputes claimant's assertion that she injured her wrist in a work-related accident. It further alleges that claimant failed to notify her employer of the alleged injury within 30 days as required by section 39-71-603(a), MCA.

7. Initially, there is little question that claimant is presently suffering from a new and different wrist injury than she suffered in January 1995. Dr. Richard Lewallen, who treated claimant in January 1995, and who began treating claimant anew in September 1995, testified without contradiction that claimant's pain on and after September 1995 was in a different area of her wrist than in January 1995, and that it was "probably a different injury." (Lewallen Dep. at 9-10, 24.) X-rays taken on September 12, 1995, disclosed an abnormal distance between the scaphoid and the lunate, which are two bones in the wrist, and Dr. Lewallen later recommended surgical fusion of the bones. (*Id.* at 21, 33.) Thus, the issue which the Court must address is not whether claimant suffers from a wrist condition which is distinct from her January 1995 condition, but whether the condition diagnosed in September 1995 was the result of an industrial accident.

8. Resolution of the question stated in the last sentence of the paragraph above turns on this Court's assessment of the credibility of the witnesses, especially the credibility of claimant. After listening to all of the testimony, reviewing the depositions and exhibits, including a statement given by claimant to Robin Burns (Burns), a claims adjuster for Liberty, on November 21, 1995, and considering the inconsistencies in claimant's trial testimony, deposition testimony, and the November 21st statement, the Court finds that claimant is not a credible witness and does not believe her testimony concerning the alleged accident.

9. Both Graham and her adult daughter, Sherry Fisk (Fisk), were present at Graham's house on the date and time of the alleged accident. Claimant has provided inconsistent stories as to what they saw and knew.

a) Burns interviewed claimant by telephone on November 21, 1995. (Ex. 10.) At that time, claimant stated that her accident was witnessed by both Graham and Fisk. "[S]he [Graham] was in there - they [Graham and Fisk] were both - I think Sherry [Fisk] was in the room there, they were both like standing there. I **know** Sherry [Fisk] was there" (Ex. 10 at 10-11, emphasis added.) Claimant stated that when she injured her wrist she said: "Yow I hurt my wrist - I popped my wrist." (Ex. 10 at 10-11.)

b) In her deposition, claimant placed Fisk and Graham in the living room when she injured her wrist. (Lewis Dep. I at 13.) But she insisted that there was no doubt in her mind that she told Fisk on that day: "I hurt my wrist." (*Id.* at 13.) Claimant also testified that she told Graham of the accident and that Graham should recall the incident. (*Id.* at 14.)

c) In her testimony at trial, claimant had a third version. At trial she testified that Fisk was in her bedroom when the alleged injury occurred, but that Fisk came into Graham's bedroom and said to claimant: "Now what the hell have you done?" (Trial Test.) She testified that she then went into the living room and told Graham that she "popped her wrist" but that Graham was looking in a book and waved claimant away stating: "You will be all right, just finish the dishes and then I'll let you go" (Trial Test.)

10. Fisk adamantly denied that she witnessed any injury. She further testified that claimant never told her that she had hurt her wrist. She stated that she had worked as a nurse's aid for over 20 years and that when someone says, "I'm hurt," her "ears come to attention." (Trial Test.)

11. Graham similarly denied that she witnessed any injury and denied that claimant ever reported any injury to her. She testified that, had claimant mentioned an injury, she would have "jumped on that real quick and called Easter Seal and insisted she go to the doctor."

12. While I found Graham and Fisk to be somewhat eccentric, I found their testimony credible and do not believe any of claimant's three versions of what happened on the day of the alleged injury.

13. Several employees of Easter Seal testified that claimant came into her initial employment interview with a splint on her right wrist. (Ex. 11 at 2-3; Ex. 12 at 2; Ex. 13 at 3.) Moreover, Tracie Auers Hunt (Auers) and Sherry Parks (Parks) testified that claimant wore the splint off and on throughout her employment with Easter Seal. (Auers Dep. at 7-8; Parks Dep. at 13.) But in the November 1995 telephone interview with Burns, claimant denied that she wore a wrist brace to work before her alleged industrial injury.

RB⁽²⁾: Now, um, I have um....[sic] been told by um....[sic] our department in Great Falls that um...the first day that you started working you had a wrist - a brace wrist - a right wrist brace or whatever and that you were told that you couldn't do any heavy lifting.

RL⁽³⁾: What was this now?

RB: Um....[sic] you were, I guess my understanding is that um...the first day and from then on you were pretty much wearing a wrist brace when you first started working for them.

RL: No, I did not - I went in with a wrist brace after the injury.

RB: The wrist brace was after the injury?

RL: Right. I wore it a couple of days cause I had it when I hurt my wrist before.

RB: Okay, so...

RL: Who is telling you this?

RB: Well, it comes from your supervisors, you know, upon hiring you they had understood that there were some restrictions in place before you came on board that you weren't supposed to do any heavy lifting. And so they had you working in, you know, making sure that [you] were working in a job with no heavy lifting. That's, you know that's the only thing my understanding is.

RL: I'm going to have to get an attorney here.

(*Id.* at 14-15.) After further discussion, claimant stated the following:

RL: I went in with my brace on.

RB: And that was after the injury?

RL: After the injury. I told them that I hurt myself and I did - I think that I worked maybe one day and I went back in to fill out my papers with a brace on my hand and went to the doctor and he soft cast it.

RB: Okay, and that was in - that was like September or October you are saying?

RL: Yeah.

RB: Okay, so prior to that you did not wear a wrist brace to work?

RL: No, I didn't.

(*Id.* at 16.) Claimant's story concerning the splint changed at trial. For the first time, she testified that she wore a splint on her right wrist after she injured herself on June 28 or 29, 1995, when she slammed it in the hood of a car while working at her ex-husband's body shop. (She had previously stated to Burns that she had **only one** injury to her wrist prior to the alleged industrial accident.) (Ex. 10 at 12-13.) She further testified that as a result of the June accident, she had a blood blister on the inside of her thumb, extending to the palm of her hand, did not receive medical treatment for the injury, and wore a splint when she rode her bike in order to keep the pressure off of the blood blister. Claimant testified that she wore the splint two or three times during her employment with Easter Seal and that she had spoken with co-employees about her splint.

14. I am persuaded that claimant deliberately lied about not wearing a splint during her interview with Burns and that she in fact was wearing a splint off and on during her employment with Easter Seal. Her story that she wore the splint for a blood blister is implausible, but her testimony concerning the hood falling on her may provide an explanation as to how she suffered a second injury to her wrist. I need not determine, however, whether this event or some other event caused her current wrist condition. I only need to determine whether the claimed industrial accident occurred.

15. Claimant testified that she told Pat Wagner (Wagner), a scheduler at Easter Seal, that she had injured her wrist at Graham's. Wagner denied that claimant ever told her about a work-related injury (ex. 11 at 3) and so testified at trial. I found Wagner credible.

16. Claimant testified that Sherry Parks (Parks), her supervisor at Easter Seal, was in the office when she told Wagner about the work-related injury and that Parks participated in the conversation. Parks did not recall claimant reporting a work-related injury. (Parks Dep. at 34.) Parks testified that if claimant had come to her and told her she had injured herself at work, Parks would have had claimant fill out an accident report. (*Id.* at 34.) I found Parks' testimony credible.

17. In the telephone interview with Burns, claimant stated that after her alleged injury, employees of Easter Seal had called twice regarding her employment status. (Ex. 10 at 3.) During her deposition, claimant stated that Wagner called her once (Lewis Dep. I at 32-33), that Parks called her once (*id.* at 34), and that Eric, a scheduler, had called her at least three or four times during the last two weeks of September (*id.* at 35). Claimant stated that these were the only conversations that she had with Easter Seal employees. (*Id.* At 38.) At trial, claimant testified that Wagner called two or three times, that Parks called her two or three times, and that Eric "was annoying" in that he sometimes called once or twice a day for a month. (Trial Test.) The inconsistencies and exaggeration of facts merely add to the Court's perception of claimant as not credible.

18. In her statement to Burns and in her first deposition, the claimant stated that she went into the Easter Seal office and to the doctor on a Monday, four or five days following the alleged industrial accident. (Ex. 10 at 11; Lewis Dep. I at 15.) She told Burns that she went to the doctor because she "was in so much pain" that she "couldn't stand it." (Ex. 10 at 11.) However, at trial, claimant testified that she had a **telephone** conversation with Wagner on the Monday following the alleged accident during which she explained that she would no longer work for Graham because she had injured her wrist. Claimant testified that she did not actually go into the Easter Seal office until the second Monday following the accident (a week and a half after her injury), the same day that she went to see Dr. Lewallen. This latter testimony is corroborated by the doctor's note stating that claimant was injured "a week and a half ago" (ex. 2 at 2), but is inconsistent with her original story that she was in so much pain over the weekend following the injury that she had to go to the doctor on Monday.

19. Claimant testified that as a result of the alleged industrial injury she has been severely limited in using her right arm. Dr. Lewallen reported in an office note dated October 25, 1995:

Ronni returns. She has noted a little improvement in her splint. However, when she tries to lift anything of any significant weight she has difficulty with this. She did pick up a two liter bottle of pop and dropped this.

(Ex. 2 at 6.) In her depositions claimant testified that her wrist "hurts continually" and that she doesn't "hardly . . . do anything." (Lewis Dep. II at 10; Lewis Dep. I at 42.) She further testified that she does housework "every once in a while" and drives a car "sometimes." (Lewis Dep. I at 42.) When asked if she would be able to make a sandwich and pour a glass of milk with her splint on, she replied: "No. What I would probably do is take something out of the freezer, throw it in the microwave, and microwave it." (*Id.* at 43.) She stated that when she goes grocery shopping, she has to have someone else carry the groceries in for her. (*Id.* at 46.) She said that, basically, "within reason" she tries to avoid using her wrist. (*Id.* at 47.)

20. At trial, claimant reiterated that she is limited in performing physical labor, that her daughter does the vacuuming and washes the clothes, and that she cannot lift a skillet to cook and usually microwaves her dinner. She testified that she has limited wrist motion, for example, she cannot stir a can of paint but is able to paint with up and down movements. Claimant testified that she mostly uses her left hand now because of the right wrist injury.

21. Liberty hired a private detective to conduct surveillance of claimant. (Exs. 7 and 8.) The detective videotaped claimant on May 29, 1996, and November 5-7, 1996. The video tapes were admitted into evidence and have been viewed by the Court. While claimant's activities, as recorded in the videos, do not disprove that she suffers from a painful wrist condition, they are nonetheless incompatible with her testimony and statements. The May 29th video shows claimant outdoors picking up various items with her right hand only, including a plastic lawn chair, a plastic children's wading pool, and what appears to be a wood post. In addition, she picks up various items of patio furniture, a pole, and a small child using both hands. The November 5-7 surveillance tape shows claimant building and painting a fence at her home. She carries boards and hammers and pries nails out of boards using her right hand only. She performs all activities with her right hand only, which includes at least an hour of painting. In direct contradiction to her prior testimony, claimant stirs a can of paint using her right hand. The videos do not show claimant guarding her right wrist. I conclude that claimant has exaggerated her pain and her limitations, further undermining her credibility.

22. Claimant's introduction of evidence concerning a phone conversation she had on September 24th or 26th with Wagner further undermines her credibility.

a) Claimant testified that at the time of Wagner's call she was playing cards at her home with several friends, including Christita Brown, Florence Gray, Eynette Peterson, Emma Smith, Jackie Sanchez, "Tow Truck Rich," and Jamaul D'Janno, who is currently claimant's husband. (Lewis Dep. I at 30-31.) Claimant further testified that she put Wagner on the speaker phone and that Wagner said she was calling on Parks' behalf to see if claimant had filled out "the paper for the accident" and if claimant had "brought it in yet." (*Id.* at 26.) Claimant testified that she told Wagner that the only paper that she had was "the one for not being able to go back to work."

Finally, she testified that Wagner told her that Parks said claimant only had a couple of days left to fill out the papers for her injury. (*Id.*)

b) Claimant presented the Court with identical affidavits signed by Peterson, Sanchez, Brown, D'Janno, and Gray. (Exhibits 3a-3e.) Gray testified that claimant brought the affidavit over for her to sign. (Gray Dep. at 18.) Apparently, claimant, or someone on her behalf, prepared the affidavit for the witnesses to sign.

c) Gray testified that D'Janno was not at the card party on the day of the alleged phone call. (*Id.* at 19.) She testified that it was "just women." (*Id.*) When questioned by Liberty's counsel, "Now, you seem awfully sure about that [D'Janno's absence]," Gray replied, "Yes, I am." (*Id.*) In addition, Gray testified that there were only three or four card players on that particular date. (*Id.* at 17.)

23. In her interview with Burns, claimant stated that she had never filed a workers' compensation claim before. (Ex. 10 at 12.) However, in her deposition, she testified that she had filled out a claim for workers' compensation benefits in another case in 1991 or 1992 but that the "first claim was never filed properly" and did not result in benefits being paid. (Lewis Dep. I at 17-18.)

24. In her telephone interview with Burns, claimant stated that she was not taking any pain pills or anti-inflammatories. She stated:

Ah, I don't take anything like that. Um, I have a very low tolerance to anything and when I did go into him like three or four days later it was like - don't move it at all and I um.....[sic] I don't do, you know, um.... [sic] I'm allergic [to] almost everything, okay. There's so few things that I can take and if I do it knocks me out so I don't - I don't do anything like that. It's all, you know, it [sic] all there even in his reports that I don't, I don't do anything.

(Ex. 10 at 17.) However, in her deposition of June 26, 1996, claimant testified that she was on painkillers from the date of her first visit to Dr. Lewallen in September 1995 until February of 1996. (Lewis Dep. I at 39-40.) Dr. Lewallen's office notes do not indicate that he prescribed any pain medication and he testified that he did not give her any pain medication. (Ex.2; Lewallen Dep. at 11.)

25. In summary, I find claimant wholly incredible and am not persuaded that an accident occurred as she claims.

26. Because I have found that claimant did not suffer a compensable injury, it is unnecessary to address the notice issue.

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 she 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); *Dupont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). Claimant has not carried her burden of proof since she has failed to persuade the Court that she suffered an industrial accident as she has alleged.

3. Claimant is not entitled to attorney fees, costs or a penalty.

JUDGMENT

1. Claimant is not entitled to workers' compensation benefits.

2. Claimant is not entitled to an award of attorney fees, costs, or a penalty.

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

4. 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 4th day of June, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Jerrold L. Nye

Mr. Larry W. Jones

Date Submitted: February 5, 1997

1. Cited as: "Lewis Dep. I" and "Lewis Dep. II."

2. Abbreviation for Robin Burns.

3. Abbreviation for claimant, Ronni Lewis.