

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 38

WCC No. 9511-7448

ROBERT McCLURE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

ELK LAKE CAMP RESORT, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 43-year old resort manager, after being discharged by the lodge owner, filed claim alleging his low back condition was caused by alleged job-related incident with snow mobile. His wife and friends described in detail an alleged incident in which a snow-mobile landed in claimant's lap. Another witness, not part of claimant's friend group, described a much less serious incident. The record indicates claimant did not seek medical attention after the incident, though he said he initially thought his leg was broken, and had a "rough and tumble past" that could have led to a pre-existing low back condition.

Held: Claimant and his witnesses were completely incredible. The Court was not persuaded claimant was hurt at work.

Topics:

Witnesses: Credibility. Although claimant and his friends testified in detail about an alleged accident with a snow mobile, the Court disbelieved their testimony and credited the testimony of another individual that the incident was not serious and did not occur as described by claimant.

The trial in this matter was held on two days, March 19 and April 29, 1996. The first day of trial was in Kalispell, Montana, and the second in Helena, Montana. Petitioner, Robert McClure, was represented by Ms. Laurie Wallace. Respondent, State Compensation Insurance Fund, was represented by Mr. Charles G. Adams.

Exhibits: Exhibits 1 through 3, 9, 11 through 13 were admitted by stipulation. Exhibits 5 through 8 were objected to by Ms. Wallace and were not admitted. Ms. Wallace withdrew the objections to Exhibits 4 and 10 and they were admitted. Exhibit 14 is a demonstrative drawing made during trial.

Witnesses: Petitioner was sworn and testified. Additionally, the Court heard testimony from Helen McClure, James Carey, Michelle Dawson, J.T. Johnson, and Gary Coppin.

Issues presented: Whether petitioner suffered an industrial injury on March 1, 1995, while working at Elk Lake Camp Resort and, if so, whether he gave his employer timely notice of his injury. Petitioner also asks the Court to determine his temporary total disability rate and award him attorney fees and a penalty.

* * * * *

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

FINDINGS OF FACT

1. Claimant is 43 years old and has an eleventh grade education. He goes by the nickname of "Bojay," which the Court will use in this decision. Bojay is married to Helen, who testified on his behalf.
2. Gary Coppin is the owner of Elk Lake Camp Resort ("the resort" or "Elk Lake Camp"), which is located near West Yellowstone. The resort is located in a remote area; during the winter months it can be reached only by snowmobile. It has a main lodge which consists of a restaurant, bar, and rooms for its employees. It also has several cabins which it rents to guests. During the summer the resort caters to fishermen, during the fall to hunters, and during the winter to snowmobilers.
3. In April or May of 1994, Gary Coppin (Gary) hired Bojay and Helen to work at the resort. Their initial duties included cooking, cleaning, and taking reservations.
4. At the time Bojay and Helen were hired, the resort was managed by J.T. Johnson (J.T.) J.T. had managed the resort since 1990 but was considering taking another job. In hiring Bojay and Helen, Gary intended that they learn the business so Bojay could assume management of the resort if J.T. left.
5. In fact, J.T. took another job in the spring of 1994 and Bojay thereafter became manager of the resort. During that summer the resort was additionally staffed with a cook and dishwasher. Gary was also at the resort during most of the summer and did much of the actual managing.

6. During that summer Bojay performed his job duties adequately. However, he exhibited some exaggerated behaviors. He fancied himself as a mountain man and wore a sidearm and large knife until counseled to take them off. He also engaged guests in long-winded accounts of his experiences.

7. Due to seasonal variations, the resort business slowed during the fall and the dishwasher and cook were laid off. In mid-October Gary also left the resort and moved to California, where he spends the winters. He left Bojay and Helen in charge.

8. As the snow fell and accumulated in the late fall and early winter, Elk Lake Camp's business picked up as snowmobilers began making day trips to the resort. The resort became accessible only by snowmobiling from West Yellowstone. Bojay and Helen were marginal if not inept snowmobilers but nonetheless were responsible for snowmobiling to and from West Yellowstone to ferry supplies. Sometime in December they were forced to abandon a snowmobile mid-route. J.T., a proficient snowmobiler, came to the rescue. In need of reemployment, J.T., along with his girlfriend, Janice Wroble, returned to work at the resort. Bojay, however, continued as manager.

9. As the winter wore on, Bojay began drinking excessively. He became abusive towards guests and at times his abusive behavior frightened guests. J.T., who was a credible witness, testified that the entire time he knew Bojay, he (Bojay) complained "constantly" about various aches and pains, including pain in his legs, back, arms and head. J.T. commented that he had never seen anyone with so many complaints or anyone who drank as much as Bojay.

10. Gary returned to Elk Lake Camp in January for a short stay. He noted that Bojay had taken up wearing a sidearm and knife again, and appeared to be drinking more. Gary counseled Bojay and suggested he remain upstairs in his room and "out of the way." Gary noted that the resort could be adequately run by J.T., Helen, and Janice. He returned to California, keeping in touch with the resort one or two times a week by telephone.

11. James Carey (Jim) and Michelle Dawson (Michelle) are long-time, close friends of Bojay and Helen. In January 1995 they snowmobiled into Elk Lake Camp and stayed for over a week. During their stay Jim noted that one of the resort's snowmobiles was broken down and thought he could repair it. Bojay contacted Gary, who agreed that Jim and Michelle could return to the resort later on and stay for free in return for Jim fixing the snowmobile.

12. Jim and Michelle returned to the resort at the end of February. Jim proceeded to repair the snowmobile. The alleged events which immediately followed that repair are the focus of the present case.

The "Accident" -- The Testimony

13. On the evening of March 1, 1995, Bojay, Jim, Michelle, and J.T. went snowmobiling. The event was recreational but intended to demonstrate Jim's successful repair of the wounded snowmobile.

14. Each had their own snowmobile. Jim rode the repaired vehicle.

15. Bojay, Michelle and J.T. proceeded up the road a bit while Jim was firing up the mended machine. The three stopped, J.T. a bit uphill from the road, Bojay and Michelle next to a break in a fence adjacent to the road. While testimony of the four friends (Bojay, Helen, Jim and Michelle) put J.T. elsewhere, the Court did not find any of them credible and is persuaded that J.T. was in fact in position to view the events that followed.

16. Bojay and Michelle were sitting on their snowmobiles, waiting for Jim to catch up. Jim got his machine going and came down the road, approaching Bojay and Michelle. It is at this point that the versions of what next transpired diverge.

17. According to Helen, who was the first to testify, she just happened to be standing outside on the porch of the lodge looking across the meadow to where Bojay and Michelle had stopped. She estimated that the two snowmobiles were a quarter of a mile away but testified that she had a clear view and could see their lights. Meanwhile, right in front of the lodge, she observed J.T. and Janice on their snowmobiles, ready to roll. Helen then saw headlights go up and then down and heard a crash. She went inside and the group returned five or ten minutes later. Bojay was limping and complained that he thought he had broken his leg.

18. Helen's observation of Janice was problematic to the Court since none of the other witnesses placed Janice at the snowmobile scene that night. Moreover, the four friends (Bojay, Helen, Jim and Michelle) testified that Janice did little work at the resort and disappeared, literally, for days at a time. According to Jim's initial testimony, he had not seen her for five straight days. Later in his testimony, he said he hadn't seen her for six days, and still later he said seven. Janice did not testify, and the Court cannot verify for itself whether she even exists, but it does know that Bojay and his witnesses went to great pains to portray her as unable to observe the events at the resort.

19. Jim was the next to testify. He testified that Bojay helped him put the track back on the repaired snowmobile and then helped him take the machine out of the upper barn. Bojay and Michelle then left on their own snowmobiles. After a few minutes, Jim followed them. He was unsure whether J.T. left before or after he did.

20. Jim contradicted Helen's sighting of Janice. He testified that Janice was nowhere to be found and was holed up in her cabin, where she'd been, unseen, for five, six or seven days.

21. In any event, Jim testified that when he was approximately 100 feet from Bojay and Michelle, the throttle stuck on his snowmobile. He testified that he attempted to go up the

bank on the right side of the road to go around Bojay and Michelle but fell off the snowmobile and slid about 10 feet in the snow, ending up "laying in the road." In answer to a question from the Court, he stated that he was about 50 feet from Bojay and Michelle when he fell from his sled.

22. Jim went on to describe what happened next. His snowmobile, with the throttle stuck open, continued on its own unattended ride, ran into the back of Michelle's sled, went up in the air with one ski going over Bojay's back, and ultimately landed on Bojay, ending up on his lap. Jim described the events in vivid and animated detail.

23. Jim went on to describe the aftermath of the accident. According to him, he got up and walked to the snowmobiles, which were about 50 feet from where he had come to rest. By the time Jim arrived at the snowmobiles, Bojay was rolling the errant snowmobile off his legs and Michelle was mad. The three of them then stood around smoking cigarettes for 45 minutes, then they returned to the lodge. According to Jim, Bojay was complaining about his leg hurting but he was able to drive his snowmobile to the lodge.

24. Michelle testified that she and Bojay left the lodge ahead of the others and had stopped and were looking at a hole in the fence when the accident occurred. She said the two of them were talking and the next thing she knew she had been thrown from her machine and Bojay had a snowmobile lying on top of him. She testified that after extricating himself from under the snowmobile Bojay complained of a sharp pain in his leg.

25. According to Michelle, she did not stick around the accident scene but instead drove her snowmobile back to the lodge. She then walked back to the accident scene and helped Jim and Bojay turn the two remaining snowmobiles around. She then rode back to the lodge with Bojay.

26. Michelle put the time of the accident at around 4:00 or 5:00 p.m. and said it was "fairly" dark. She did not recall J.T. being present.

27. According to Bojay, he and Michelle left ahead of the others and had stopped on the road near the break in the fence. He testified that he was sitting on his snowmobile when he felt something crash into the back of it and the next thing he knew another snowmobile was sitting across his lap, running full throttle. He reached up and hit the kill switch on the snowmobile. Michelle and Jim then helped lift the machine off him. He did not see the snowmobile or its headlights before the crash.

28. Bojay testified that after the accident his right leg was numb from the thigh down the right side of the leg to his ankle. He thought he had broken his leg.

29. Bojay went along with Jim's version of the aftermath of the accident, testifying that the three snowmobilers smoked some cigarettes before all three headed back to the lodge on their own snowmobiles.

30. Bojay testified that upon returning to the lodge, the snowmobilers and Helen ate rack of lamb and scampi and then watched HBO. The meal must have been remarkable for its memory was still etched in Bojay's mind a year later.

31. J.T. confirmed that Bojay and Michelle were stopped on the road next to the hole in the fence and put himself approximately 150-175 feet away. J.T. was also stopped but was uphill, which gave him a good view of the events that followed. His observations of what occurred differs sharply from the testimony of the other three snowmobilers.

32. According to J.T., Jim followed him up the hill and then rode his snowmobile back down to the road. Jim saw Bojay and Michelle stopped in the road and attempted but was unable to stop his snowmobile and ran into the back of Bojay's snowmobile. Jim flew over the windshield of his own machine, and landed between Bojay and Michelle. Neither Bojay nor Michelle was dislodged from their own snowmobiles. J.T. described the accident as occurring at a very low speed and said that Jim took the header because he was riding in a semi-standing position.

33. J.T. rode down the hill to determine if Jim had been hurt. Ascertaining that he was okay, the three snowmobilers then rode out to a wildlife refuge near Elk Lake, drank a couple of beers, and then returned to the lodge.

34. While Jim and Michelle testified that the group had not been drinking, J.T. disagreed, testifying that the entire group had been drinking that day and that they continued drinking upon returning to the lodge.

35. J.T. testified that Bojay never gave any indication that he had been hurt in the incident.

Notice to the Employer -- The Testimony

36. Helen testified that Bojay called Gary around 7:00 or 8:00 p.m. on the evening of the accident or possibly the next night. According to Helen, Bojay told Gary that the repaired snowmobile was running fine but that there had been an accident and he had injured his leg. She said that Jim and Michelle, as well as herself, were present during the phone call. Helen further testified that Gary telephoned the lodge several times over the next few weeks and inquired about Bojay's leg.

37. Jim testified that it was late on the morning after the accident when Bojay called Gary. The call was placed from the bar in the lodge and he was sitting at the end of the bar when it was made. (The phone was a cellular one.) He recalled Bojay telling Gary that the sleds were running okay, there had been an accident, and he had hurt his leg.

38. Michelle recalled that Bojay attempted to call Gary on the night of the accident, was unable to get through, and then reached him the next morning no later than 11:00 a.m. She too said that Bojay told Gary about the accident and his leg injury.

39. Bojay told the same story but further reported that Gary had told him to "kick back" since there was little going on at the resort at that time of year.

40. Gary testified that Bojay called him within one or two days of the accident and told him that Jim had run into him while they were snowmobiling. However, he testified that Bojay did not make it sound like a very significant accident. He testified that he did not recall anyone telling him that Bojay was hurt in the accident. However, Gary could not say with "absolute certainty" that he was not told.

41. Gary was aware that Bojay had problems with his leg but said that Bojay had complained of various aches and pains from the time he started work at the resort. He testified that Bojay had told him about previously racing motorcycles and that his stories made it sound like he had a rough and tumble life.

Later Happenings at the Lodge

42. Despite his feeling that he had broken his leg, Bojay never sought medical care while at the lodge. He had opportunities to do so since J.T. snowmobiled to West Yellowstone once or twice a week.

43. Bojay testified that he put himself on "light duty" following the accident and no longer performed the heavier, more strenuous work. However, J.T. testified that Bojay had never done any strenuous work before the accident and that he saw no change in Bojay's activities.

44. Sometime after the snowmobile accident, Bojay was decked by Harry List. He and Harry had some words about some gasoline provided to Harry by the resort. According to Bojay, Harry hit him with a pipe. According to J.T., who was present at the time, Bojay was intoxicated and belligerent towards Harry, who punched Bojay with his fist, knocking him across several bar stools into the wall.

45. J.T. testified that Bojay was a heavy drinker, drinking up to one and one-half bottles of whiskey a day. He characterized the period when Jim and Michelle were at the resort as "one big party." J.T. told Gary about the heavy drinking and Gary asked him to keep track of the empty bottles.

46. During the winter of Bojay's management, resort revenues decreased from the \$20,000 for each of the prior two winters to \$15,000 despite an increase of 1,000 resort customers.

47. J.T. counseled Gary to terminate Bojay. He cited Bojay's drinking and behavior, including an instance when Bojay refused to allow guests in the bar even though it was several hours before closing. Gary also began to hear negative reports about Bojay from people in West Yellowstone.

48. Gary returned to Elk Lake Camp at the beginning of April and terminated Bojay's and Helen's employment. Bojay thereafter described himself as on "R and R", just "kicking back collecting unemployment."

Still Later

49. In July 1995, Bojay telephoned Gary and told him he was having trouble with his leg. He told Gary that his problem stemmed from the snowmobile accident. Bojay acknowledged that Gary responded by telling him he should see a doctor and told him that, "That's what insurance is for."

50. Bojay did not immediately see a doctor. First, he sought out an attorney, and only thereafter saw a doctor.

51. Claimant saw Dr. D.J. Pitman on August 1, 1995. The office note for the visit describes the claimant as having suffered an injury "while standing and was hit in **back** with a moving or falling snowmobile." (Emphasis added.) Dr. Pitman's office notes describe right-sided weakness and numbness and foot drop due to L5-S1 disk compression. (Ex. 2 at 2.) X-rays revealed L5-S1 disk space narrowing. (Ex. 2 at 1.) That finding was confirmed by an MRI done on September 15, 1995. (Ex. 2 at 4.)

52. Dr. Pitman's medical records are the only medical evidence presented in the case and are very brief. At page 3 of Exhibit 2 there is a note on Dr. Pitman's prescription pad. That note does not appear to have been written by Dr. Pitman as there is a different signature at the bottom, under which it states, "Seen and discussed with Dr. Pitman." In any event, the note indicates that "[p]atient's symptoms of numbness and weakness are consistent with his injury and x-rays."

53. The State Fund denied liability for Bojay's subsequent workers' compensation claim. It argues that Bojay failed to give his employer timely notice and that he did not suffer an industrial accident.

Resolution

54. I find that Bojay and his witnesses -- Helen, Jim and Michelle -- were not credible and that both J.T. and Gary were. I base this finding not only upon the witnesses demeanor at trial and my impressions of them, but also upon the following specific observations I made during the trial:

- a. Bojay and Helen, Jim and Michelle are close friends. They have visited back and forth and kept in constant touch. Within the week prior to trial, they were all together and talked among themselves about the case.
- b. Despite denials of heavy drinking, I was persuaded that throughout the winter Bojay drank heavily and that the four friends all drank heavily during the two weeks

Jim and Michelle were at the lodge. The testimony of Bojay, Helen, Michelle and Jim concerning their "minimal" drinking was, in my view, carefully crafted by them to ward off expected testimony by J.T. and Gary that they were heavy drinkers. In cross-examination Michelle undermined her "one or two cocktails in the evening" testimony when she admitted that they all were "really drunk" on one or two occasions while she and Jim were at the lodge. While the drinking habits of the four friends is not an issue in this case, the Court had the impression that they had carefully tailored their testimony in an attempt to influence the outcome of this case and that their testimony was deliberately inaccurate.

c. Similarly, their testimony about J.T. and Janice appeared exaggerated and specifically aimed at undermining their credibility before they could even testify. If their testimony is to be believed, Janice spent nearly all of her time holed up in her cabin and did little if any work. I doubt that was the case and believe that their testimony was exaggerated.

d. Helen's observation of Janice revving her snowmobile on the evening of the accident was problematic to the Court since none of the other witnesses placed Janice on the snowmobile scene that night. Moreover, the four friends (Bojay, Helen, Jim and Michelle) testified that Janice did little work at the resort and disappeared, literally, for days at a time. According to Jim's initial testimony, he did not see her for five straight days. Later in his testimony, he said he had not seen her for six days, and still later he said seven. I was negatively impressed by the efforts of Bojay, Helen, Jim and Michelle to portray Janice as unable to observe events at the resort. I believe their reports concerning Janice were exaggerated.

e. As previously found, Jim gave a vivid, detailed description of the accident, almost as if he saw it in slow motion. Meanwhile, he was being thrown from a snowmobile, sliding about ten feet and ending up prone in the snow. I found his story wholly unbelievable.

f. The testimony by Bojay and Jim that they sat around smoking for 45 minutes before returning to the lodge was implausible. J.T.'s testimony that they proceeded with their snowmobiling was more believable.

g. While I do not ordinarily give much weight to pain behavior in the courtroom, in this case there were two instances of pain behavior that struck me as particularly calculated to get my attention. During her testimony, Helen said that Bojay cannot walk, sleep, sit, or do anything for more than ten to fifteen minutes. At that point Bojay had been sitting without apparent discomfort for approximately 45 minutes. I would not find that in itself remarkable since the concentration required in the courtroom could have an analgesic effect. But immediately after that testimony, Bojay began squirming and grimacing. Later, shortly before Bojay finished testifying

he was asked to confirm on cross-examination that he could not sit for longer than 15 or 20 minutes. He responded that he could not do so without fidgeting. At this point, Bojay had been on the stand for approximately one hour and had shown little sign of discomfort. But when he got up from his chair a couple of minutes later he grimaced and groaned, and moved as if in great pain. I could not help but have the impression that he was putting on a show.

h. I found it odd that Bojay, after being specifically told by Gary to see a doctor, went to a lawyer first.

i. In view of Gary's response to Bojay's July telephone call I find it implausible that Bojay had previously told him that he had hurt himself. Gary plainly thought that he should get medical care and that insurance would cover it. No explanation was offered as to why Gary would have said anything different in March than in July.

j. Bojay testified that the blow delivered by Harry broke his collar bone. Yet he has never even seen a doctor about that injury. And, Bojay never sought medical care for his assertedly broken leg for five full months.

55. After listening to Bojay testify, and observing his demeanor, I was persuaded that J.T.'s and Gary's testimony concerning Bojay's drinking, bizarre behavior, prior rough and tumble life, and continual bodily complaints is true.

56. I did not find Bojay or his corroborating witnesses believable and am not persuaded that a snowmobile landed on him, as he claims, or that he was injured on March 1, 1995. I am also not persuaded that he told Gary about an injury until July 1995.

57. While it appears that Bojay has a real low-back condition with radiating symptoms, I am not persuaded that his condition arose on March 1, 1995, or as the result of any accident. There is evidence of prior leg and back complaints. His failure to obtain medical care for several months is inconsistent with the acute injury he claims. In light of his failure to obtain medical care even after he left the resort, his testimony that he felt like he broke his leg did not make sense and was not believable. His claim that he broke his collar bone also suggests that he is prone to exaggeration.

58. The only medical information supporting Bojay's claim is that his back condition is consistent with the history he provided. Even that history -- of him standing and being hit by a snowmobile -- was inconsistent with his trial testimony, and is yet another discrepancy in the case he has presented. There is no medical testimony establishing that the nature of claimant's condition is such that it could only have occurred as the result of a single traumatic incident, or that the onset of the condition must have occurred in March 1995.

59. The Court entered a bench ruling at the end of trial. The explanations provided at that time for the Court's decision are reaffirmed and incorporated by reference.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the petitioner's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1993 version of the Workers' Compensation Act governs this case.
2. The petitioner has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *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).
3. This case is one of credibility. The petitioner and his three witnesses, Helen McClure, James Carey, and Michelle Dawson, all testified that petitioner was injured in a snowmobile accident on March 1, 1995, and that the injury was reported to the employer within a day or two. Their testimony, however, was neither reconcilable nor credible. While there was certainly a low speed collision of snowmobiles, petitioner was not ejected from his seat and was not struck by the errant snowmobile. I am unpersuaded that he suffered any injury. I am similarly unpersuaded that he notified his employer of any injury within the 30-day period required by section 39-71-603, MCA (1993).
4. The respondent's denial of this claim was reasonable.
5. Petitioner is not entitled to attorney fees, a penalty or costs.

JUDGMENT

1. Petitioner did not suffer a compensable industrial injury and is not entitled to compensation or medical benefits.
2. Petitioner is not entitled to attorney fees, a penalty or costs.
3. Accordingly, his petition is **dismissed with prejudice**.
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.
5. This JUDGMENT is certified as final.

Dated in Helena, Montana, this 29th day of May, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace
Mr. Charles G. Adams
Submitted: April 29, 1996

