

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 51

WCC No. 9305-6800

SHARON McCOLLEY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

OMO CONSTRUCTION, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on January 21 and February 2, 1994, in Billings, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Sharon McColley (claimant), was present and represented by Mr. Don Edgar Burris. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Thomas E. Martello. Richard N. Pallach, Jr., Karl Tadday, Mel Kegley, Kimberly Frye, Theresa Oblander, A.C. Ronning, claimant and Jennifer VanLuchene were sworn and testified. The parties agreed that the depositions of claimant and Jacque Sisson should be considered by the Court. Exhibits 1 through 38 were admitted by agreement of the parties.

There are two trial transcripts on file in this matter, one for January 21 and the other for February 2, 1994. The transcripts will be cited Tr. I and Tr. II, respectively.

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

FINDINGS OF FACT

1. On September 28, 1992, claimant worked twelve hours for Omo Construction, Inc. (Omo), as a flagger on a road construction project near the Billings, Montana airport. She claims that during her one day of work she suffered a new industrial injury to her neck and back.

2. While working for Omo claimant was positioned at one end of a road section which was under construction. Her job was to flag north bound traffic. Karl Tadday, another worker, was at the other end of the road segment and flagged the south bound traffic. Traffic was permitted to proceed in one direction at a time, so the two flaggers took turns stopping and holding traffic from their respective directions.

3. Claimant had a sign which she used to slow and stop traffic. The sign was mounted on a pole. The sign and pole were approximately five to six feet tall. She stood during most of the day. (McColley Dep. at 45.)

4. According to claimant, she suffered an aggravation of her back and neck conditions when buffeted about by turbulence created by speeding gravel trucks. Her written claim states:

The company trucks were not required to stop or slow down for flaggers. Instead, they accelerated & went past me at a high speed. I was positioned in the center of the road, at the bottom of an incline. The trucks caused such an air current as they sped by I could hardly hold my sign & my body in an upright position. When there were trucks on both sides of me (entering & leaving the pour) **it was impossible to keep my balance & I was pulled all over the road.** The speed of the trucks along with the dust clouds they created made it extremely dangerous.

(Ex. 22; emphasis added.)

5. At the time of the alleged injury, Omo was insured by the State Fund under Plan III of the Montana Workers' Compensation Act.

6. The claimant did not inform her employer of her alleged injuries but submitted a written claim for compensation directly to the State Fund.

7. The State Fund denied liability for the claim. In this proceeding it challenges claimant's credibility and contends that she did not suffer an industrial injury. In its response, the State Fund also asserted that claimant did not give notice to her employer within the 30 day period specified by section 39-71-603, MCA. However, in the course of trial it was learned that the employer in fact received notice within 30 days, albeit through an inquiry sent by the State Fund to the employer. (Ex. 38; Tr. II at 59-62, 83-84.) Following this discovery the State Fund withdrew its notice defense, leaving the Court to determine whether an industrial accident occurred as claimant alleges.

8. Since December 14, 1983, claimant has worked a total of approximately two and one half months. (Tr. II at 41.)

9. On December 14, 1983, claimant injured her neck in a work-related accident while employed as a laborer for Ramsey Construction and Fabricating Company, Inc. (Exs. 3 and 4; McColley Dep. at 8-10.) She filed a claim for compensation and, except for a one month

period from March 28 to May 2, 1984, she received biweekly workers' compensation disability benefits continuously from the date of her accident until April 1991. She also received a lump sum settlement. All told, between December 14, 1983 and April 29, 1993, claimant received \$131,832.94 in temporary total and permanent partial disability benefits, of which \$61,829.50 was for 500 weeks of permanent partial disability benefits. (Exs. 6, 8 and 11.)

10. Following her 1983 neck injury claimant attended college. (Ex. 5 at 1; Ex. 6 at 12.) However, she did not complete her education.

11. Claimant's 1983 injury resulted in a 3 percent whole person impairment rating. She suffered continuing, permanent symptoms on account of her injury, including headaches:

Q. [By Mr. Martello] Okay. All right. Now, as a result of that 1983 injury you had some -- you had some permanent problems as a result of that injury, did you not?

A. [By claimant] I guess they were, yes.

Q. And they included problems with your neck and problems with headaches; is that correct?

A. Yes.

(Tr. II at 29.) As of September 21, 1988, nearly five years after the 1983 injury, claimant stated that she "currently experiences headaches, tenderness and stiffness between the shoulder blades, and a continuous dull burning ache in her neck radiating down bilaterally into her arms." (Ex. 5 at 2.)

12. In late July 1990 Bechtel Construction Company employed claimant as a laborer. Within eight days she suffered another industrial accident, injuring her neck, legs, arms and back. (McColley Dep. at 24; Exs. 12 and 13.) Her claim for compensation was accepted and she was paid temporary total disability benefits from August 7, 1990 to April 6, 1992. (Ex. 19; McColley Dep. Ex. 8.) In March 1992 claimant settled this claim on a full and final compromise settlement basis for \$47,698.17. (Ex. 20.)

13. As a result of the 1990 injury, claimant's impairment rating was increased to 7 percent of the whole person. (Exs. 34 at 2 and 35 at 12.)

14. In March 1991 Dr. James T. Lovitt, an orthopedic surgeon, examined claimant. He noted that claimant was complaining of pain in her back, neck and shoulders. Dr. Lovitt noted that her neck pain was "activity-related." His note also states that claimant told him that "exercises do indeed help but if she does too much they will aggravate it as will poor sleep, housework and use of her arms." (Ex. 33 at 3-4.)

15. Claimant was treated by Dr. Richard A. Nelson, a neurologist, throughout 1991. She returned to Dr. Nelson on February 14, 1992. His office note for that date states: "She

started doing some of her strength programs and developed considerable muscle spasm." (Ex. 35 at 5.) Dr. Nelson next saw claimant again on April 17, 1992. His office note for that date states "Her symptomatology is fairly inactive at this time although it is still very useful for her to have her Thermophore" (*Id.*) A thermophore is "a device or apparatus for retaining heat." Dorland's Medical Dictionary (27 Ed.) Dr. Nelson did not see claimant again until October 7, 1992.

16. Claimant did not notify her supervisor at Omo of her alleged injury. She testified that she believed it to be sufficient to report her injury through the union and testified that she did so. Without the aid of either Omo or a union representative, claimant filled out a typewritten claim and sent it directly to the State Fund. (Ex. 28.)

17. Claimant had several opportunities to report speeding trucks to her Omo supervisor on September 28, 1992. Her supervisor, Richard Pallach, had personal contact with claimant three to four times that day when he repositioned her. Claimant did not complain about speeding trucks during those contacts. She also did not complain about speeding trucks at the end of the work day when Pallach met with her and gave her a "W-2 form, a post-hire application EEO manuals, [and] company policy manuals." (Tr. I at 29; 23-24; 48.) I find the lack of complaints by claimant significant. Based on personal observations of claimant during trial, including her demeanor, I perceive claimant as an assertive individual who would likely have complained loudly to her supervisor had she been buffeted about as she claims.

18. Although no witness who testified at trial observed claimant during her entire work shift, there is substantial, credible evidence that the gravel trucks were not speeding on September 28, 1992, and were traveling at speeds between 20 and 25 miles per hour, and I so find.

a) Mr. Pallach testified that he traveled the construction area constantly throughout the day, going past claimant's position approximately twelve times, or once an hour. (Tr. I at 35.) He has nine years of construction experience and is Omo's traffic control foreman. He estimated that trucks were traveling 25 miles per hour, and the posted speed for the trucks was 35 miles per hour. I find his testimony, including his estimate of the truck speed, credible.

b) Karl Tadday worked as a flagger on September 28, 1992. He was stationed approximately 1,000 feet from the claimant. According to Mr. Tadday, the area the trucks were traveling was graveled and the speed of the trucks "I would say tops was 20 to 25 miles an hour." (Tr. I at 68.) He had no problems with the trucks going by, although he is a much larger individual than the claimant. I found Mr. Tadday and his testimony credible.

c) Mel Kegley, the Montana Department of Transportation's field project manager for the project received no complaints about speeding trucks on September 28, 1992.

d) Both the project superintendent and the safety director of Empire Sand and Gravel, which owned and operated the trucks, testified that the trucks were required to obey speed limits and that they did not receive any complaints about speeding trucks on September 28, 1992.

19. Jennifer VanLuchene, the safety director for Empire Sand & Gravel testified that she has worked as a flagger. She is five feet four inches tall and weights 118. She is of comparable height and weight as claimant. When holding a sign similar to the one claimant held, Ms. VanLuchene testified she felt "slight" buffeting from trucks going by at 35 miles per hour. On redirect she described in more detail the effect of trucks going by at 35 miles per hour:

BY MR. MARTELLO:

Q. We're using this word buffeting, and what does buffeting mean to you? Are you getting blown all over the place or feel the movement of the trucks going by you?

A. No, more than the movement, you feel the wind pull on your paddle and it's more of a strain trying to hold the paddle.

Q. Okay. But are you physically being moved, buffeted about?

A. No, no.

(Tr. II at 89.) I found her testimony credible but, as previously found, the trucks going by claimant were only traveling at 20 to 30 miles per hour.

20. On September 29, 1992, claimant sought treatment for neck and back pain at the emergency room of St. Vincent Hospital. While the ER record mentions her job as "flagging" it makes no mention of any injury or buffeting about at work:

Pt. recently went back to work - worked 12 hr. shift "flagging". Pt. has neck & back pain.

....

The patient is a 46 year old female who has a history of chronic back pain secondary to industrial accident. She apparently went to work yesterday, was doing a lot of flagging at a construction site, and now is complaining of severe neck pain.

(Ex. 36 at 1-2.)

21. Similarly, the records of Dr. Richard Nelson, who examined claimant on October 7, 1992, do not mention any accident or buffeting.

The patient was seen at the office today. She has been acting as a flag traffic watch person for a period of what turned out to be a 12 1/2 hour shift and in carrying and holding the flag up continuously through that period of time without breaks had caused her to have a marked increase in the symptoms in her neck and shoulder girdle with muscle spasm

reaching down into the mid thoracic area. We are going to go ahead and give her some muscle relaxants and some therapy for a couple of weeks and if that does not work we will get further studies done.

(Ex. 35 at 5.) Claimant did not see Dr. Nelson again until June 21, 1992, a period of eight and a half months, and Dr. Nelson's billing to the insurance carrier for the June visit ascribed the visit to claimant's 1990 injury. (Ex. 35 at 6 and 24.)

22. Having personally heard claimant testify, and after considering her demeanor, the substance of her testimony, the circumstances surrounding her claim, the demeanor and testimony of other witnesses appearing at trial, and the exhibits, I do not find claimant credible. I do not believe that she was buffeted about as she claims or that the trucks created air currents which affected her. Claimant did not suffer a new industrial accident.

CONCLUSIONS OF LAW

1. The Court has jurisdiction in this matter pursuant to section 39-71-2905, MCA.

2. The claimant seeks a determination that she suffered an industrial accident during a single work shift on September 28, 1992. The law in effect at that time applies. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the definitions in effect on September 28, 1992, are controlling.

A worker is entitled to compensation and medical benefits only if the worker suffers an "injury" within the meaning of the Montana Workers' Compensation Act. See Title 39, Part 7, MCA (1991). "Injury" is defined as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm. [Emphasis added.]

The portions which are particularly relevant to the present case are highlighted.

In a colloquy with the Court at the end of trial, the State Fund conceded that if claimant's description is believable, then the injury definition is satisfied. The State Fund specifically conceded that a series of specific incidents on a single day satisfied the "specific event" requirement (Tr. II at 94). This concession is consistent with the holding in **Welch v. American Mine Services, Inc.**, 253 Mont. 76, 831 P.2d 580 (1992), that blisters caused by new shoes worn over the period of a single work shift satisfied the injury definition.

Thus, the resolution of this case ultimately turns on claimant's credibility as to what occurred on September 28, 1992. Was she buffeted about in a series of incidents involving speeding trucks or did wind currents cause her to strain herself to hold onto her sign? After personally observing the claimant, and considering the substance of her testimony, the circumstances surrounding her claim, the demeanor and testimony of other witnesses appearing at trial, and the exhibits, the Court has reached a firm conviction that claimant is not credible and her description of what occurred is not believable. I am persuaded that the trucks going by claimant on September 28 were traveling at 20 to 25 miles per hour and that no significant wind currents or buffeting occurred.

Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. **Ricks v. Teslow Consolidated**, 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); **Dumont v. Aetna Fire Underwriters**, 183 Mont. 190, 598 P.2d 1099 (1979). She has failed to carry her burden. Specifically, she has failed to establish that she suffered an unexpected traumatic incident or unusual strain which was identifiable by time and place and was caused by a specific event or series of specific events over a single work shift.

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

JUDGMENT

1. The Court has jurisdiction in this matter pursuant to section 39-71-2905, MCA.

2. Claimant failed to establish that she suffered an injury within the meaning of the Montana Workers' Compensation Act and is not entitled to compensation or medical benefits.

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

4. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 2nd day of June, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Don Edgar Burris

Mr. Thomas E. Martello