IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 6

WCC No. 2003-0876

MICHAEL E. MOSCA

Petitioner

vs.

AMERICAN HOME ASSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a driller's helper engaged in heavy labor, woke up on a Saturday morning with extreme back and leg pain which he thought was caused by a bone spur on his foot. He sought medical care on Monday. On Wednesday he was diagnosed with a herniated disk (L5-S1 level). He was unable to return to work and on Friday his wife indicated to his employer that he believed his herniated disk might be work related: she provided the employer with a blank First Report of Injury form but the employer refused to fill it out and did not report any injury to its insurer. Within thirty days of his last day of work, claimant sent a written claim to the Montana Department of Labor and Industry, which passed the claim on to the insurer. The insurer denied the claim and persisted in its denial despite uncontradicted medical opinions that claimant's condition was either a work-related injury or occupational disease.

Held: The uncontroverted medical evidence shows that claimant's herniated disk was work related. In light of the lack of a specific incident related to the condition, the best medical evidence is that it occurred over time and is therefore an occupational disease. He reported as much as he knew about his condition and its cause within thirty days, therefore, his notice was timely under both the Workers' Compensation Act and the Occupational Disease Act. In light of uncontradicted evidence establishing that claimant suffered either an industrial injury or occupational disease and timely reported it, the insurer's denial of his claim was unreasonable and reprehensible.

Topics:

Proof: Conflicting Evidence: Medical. Where the only medical evidence was that claimant suffered an injury or occupational disease, the Court must choose between the two.

Proof: Conflicting Evidence: Medical. Where claimant's job involved hard labor and only upon retrospection did he remember events on a single day that might have caused his herniated disk, and where the evidence and medical opinions indicated his herniated disk arose on account of job activities but diverges as to whether his condition arose as a result of events on a single day or over a longer period of time, the Court finds evidence of a cumulative, multiple trauma over more than one day the more plausible explanation and finds that claimant suffered an occupational disease rather than an injury.

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Limitations Periods: Notice to Employer. Where a claimant wakes up the morning after a heavy laboring job and has back and leg pain, and initially believes that his condition was caused by an unrelated spur on the heel of his foot, but within thirty days tells his employer of his condition and the possibility that it was caused by his job, the notice requirement of section 39-71-603, MCA (2001), is satisfied.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-603, MCA (2001). Where a claimant wakes up the morning after a heavy laboring job and has back and leg pain, and initially believes that his condition was caused by an unrelated spur on the heel of his foot, but within thirty days tells his employer of his condition and the possibility that it was caused by his job, the notice requirement of section 39-71-603, MCA (2001), is satisfied.

Attorney Fees: Unreasonable Denial or Delay of Benefits. Where within thirty days the claimant reported his belief that his herniated disk was job related and the only medical opinions in evidence were that his condition was in fact job related, liability was reasonably clear and it was unreasonable for the insurer to deny the claim and take the case to trial. Attorney's fees are therefore awarded under section 39-71-611, MCA (2001).

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Penalties: Insurers. Where within thirty days the claimant reported his belief that his herniated disk was job related and the only medical opinions in evidence were that his condition was in fact job related, liability was reasonably clear and it was unreasonable for the insurer to deny the claim and take the case to trial. A twenty percent penalty is therefore awarded under section 39-71-2907, MCA (2001).

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¶1 The trial in this matter was held on January 22, 2004, in Butte, Montana. Petitioner, Michael E.Mosca (claimant), was present and represented by Mr. Robert G. McCarthy. Respondent, American Home Assurance Company (American), was represented by Mr. William O. Bronson.

¶2 Exhibits: Exhibits 1 through 33 were admitted without objection.

¶3 Witnesses and Depositions: Michael E. Mosca, Dayleen Mosca, Michael Downey, Sandra Messer, and Kathy Henningsen were sworn and testified. In addition the parties

submitted the depositions of Dr. Gus G. Varnavas, Todd D. Mohr, PA, Delores Giacomino, Michael E. Mosca, and Dayleen Mosca for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

> ¶ 4a Whether Petitioner properly notified his employer concerning his injury in a timely manner.
>
> ¶ 4b Whether Petitioner suffered a workplace injury.
>
> ¶ 4c Whether Petitioner is entitled to the following benefits:
>
> 1) Medical benefits.
>
> 2) Temporary total disability benefits.
>
> ¶ 4d Whether Mr. Mosca is entitled to Occupational Disease benefits and if so in what amount.

(Pretrial Order at 2.)

¶5 Bench Ruling: At the conclusion of trial, the Court found as a matter of fact that the claimant suffered either an industrial injury or occupational disease and that American is liable for benefits on account of the injury. The Court further found the insurer's denial of the claim unreasonable, entitling claimant to an award of both attorney fees and a penalty. The present findings of fact, conclusions of law and judgment affirm and amplify the Court's bench ruling.

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

FINDINGS OF FACT

¶7 Claimant is forty-two years old. He was a credible witness.

¶8 For approximately two years prior to November 8, 2002, claimant was employed by Spherion, Incorporated in Butte, Montana. Spherion is a temporary employment agency providing temporary workers to businesses.

¶9 During his two years with Spherion, claimant actually worked for MRI (Montana Resources), Mungas, and O'Keefe Drilling (O'Keefe). He drove truck for MRI and Mungas. He worked as a driller's helper for O'Keefe.

¶10 During the eight months immediately preceding November 8, 2002, claimant worked continuously as a driller's helper for O'Keefe and was paid $8 an hour. He worked full time during that period and sometimes worked overtime. In the fall of 2002, he worked on water wells.

¶11 Claimant's work as a driller's helper involved heavy labor. He helped move 20 foot sections of steel pipe into place and handled wrenches and steel plates. Michael Downey (Downey), the driller with whom claimant worked, and who was called by respondent as a witness, confirmed that claimant's job involved frequent heavy lifting, pushing, and pulling. He noted that the pipe sections weighed up to 350 pounds. Even though a winch was used to move the pipe, the driller and driller's helper often had to "manhandle" the pipe into tight spots. Downey testified that dragging and positioning the pipe involved loads of 100-110 pounds even with the assistance of the winch. He also testified that claimant had to lift steel plates weighing 60 pounds each, and that in a single day involving a 300 foot well plates were lifted and moved up to 300 times. In light of his and claimant's testimony, a job analysis prepared by a vocational consultant hired by the insurer, which indicates that claimant was required to lift only up to 50 pounds occasionally, is entitled to no weight.

¶12 Claimant worked a full shift on Friday, November 8, 2002, on two different wells in Jefferson County, Montana. There was snow and ice on the ground. He recalled the work that day as physically strenuous.

¶13 On Saturday morning, November 9, 2002, claimant had trouble getting out of bed due to low back and right buttocks, and leg pain. The pain continued throughout the weekend.

¶14 Claimant did not initially attribute his back and leg pain to his work. Indeed, he thought it was attributable to a preexisting bone spur or bump on the heel of his right foot. Claimant later recalled slipping on ice on a couple of occasions on November 8, 2002, and catching himself before actually falling. He thought that those slips may have been responsible for his subsequent back condition. However, it is clear that his recollection of the slips was the result of retrospective reflection in trying to find an explanation for his condition after learning his back and leg pain were not attributable to a bone spur on the heel of his foot.

¶15 Claimant's condition did not improve over the weekend. On Monday morning, he called Downey and told him he was going to a doctor and would not be at work that day. He told Downey he had leg and back pain which he thought was caused by a bump on his heel.

¶16 At 10:00 a.m., Monday, November 11, 2002, claimant was seen by Todd Mohr (Mohr), a physician's assistant at Express Care in Butte. Mohr's office note records the following history:

> This is a 40 y.o. gentleman who comes in today complaining of right low back pain for the past few months, no specific trauma. He works hard labor drilling and lifting lots of steel all day long. He does have numbness and tingling down the posterior of his thigh all the way down to his foot. He thinks this was brought on by a bump on the back of his foot that has been there for 5-6 months. It is nontender, it was hurting 5-6 months ago and does not hurt now. . . .

(Ex. 3.) After physically examining the claimant, and despite claimant's belief that his pain was related to a heel problem, Mohr suspected sciatica and ordered an MRI.

¶17 After seeing Mohr, claimant spoke with Sandra Messer (Messer), a personnel supervisor for Spherion. He told her he was going to have an MRI due to a suspected back condition. According to Messer he told her not to worry because he did not hurt himself at work, rather he had been helping someone over the weekend and hurt himself. I found her testimony incredible. Claimant denies telling her he hurt himself off the job. More significantly, Kathy Henningsen (Henningsen), who owns Spherion and is Messer's supervisor, testified that based on her conversations with Messer she understood that claimant woke up in pain on Saturday morning. Henningsen also testified that Messer told her that claimant had related his belief that his pain was caused by a bone spur. I have not the slightest doubt that claimant indicated he woke up in pain on Saturday morning and reported that fact to Messer, and that he reported, as he believed at that time, that he believed it was caused by a bone spur and not his work. I do not believe he told Messer he hurt himself on Saturday. Moreover, there is no evidence of any activity or injury on Saturday.

¶18 On Tuesday, November 12, 2002, claimant underwent an MRI. The MRI disclosed a large disk herniation at L5-S1 impinging on the right S1 nerve root. (Ex. 4.)

¶19 After learning that he had a herniated disk, claimant began to suspect that his condition might be work related. On Friday, November 15, 2002, claimant's wife went to Spherion's offices and talked to Henningsen. She presented Henningsen with a First Report of Injury and indicated that claimant desired to file a claim although he was not sure how he had been hurt. Henningsen refused to complete or file the form. She was unsure if claimant had suffered a work-related injury. She testified she was confused and did not know what to do and whether to file a claim. She wanted to talk to claimant further and tried to contact him but was not able to get a hold of him. She did not fill out the first report and did not contact Spherion's insurer. However, she acknowledged in her testimony that she knew as of November 15, 2002, that the claimant was probably going to pursue a workers' compensation claim.

¶20 On November 8, 2002, American insured Spherion.

¶21 On November 21, 2002, claimant filled out and signed a First Report of Injury and sent it to the Montana Department of Labor an Industry (Department). (Ex. 1.) In that report, in response to a question asking for a description of his accident, he wrote:

> Went to work Friday 11-8-02. Saturday 11-9-02 could not stand was not sure what was wrong. Went to dc [sic] 11-11-02.

(*Id*.) In response to a question regarding the cause of his injury, he wrote "not sure." (*Id*.) The report was received by the Department on November 25, 2002.

¶22 At the time the claimant's wife talked to Henningsen on November 15, 2002, and at the time the claimant sent in his first report on November 25, 2002, no physician had related his herniated disk to his work. However, claimant surmised that possibility and pursued it as diligently as he could have. He did not at that time recall any specific incident precipitating an onset of pain. Indeed, even though subsequent thought about the matter brought forth a memory of two slips on his last day of work, those slips were not associated with specific pain or injury. Thus, the information imparted by claimant's wife to Henningsen on November 15th, was all the information claimant had. Had claimant been clairvoyant, perhaps he could have told Henningsen that his doctors would ultimately find a causal relationship between his herniated disk and his job. However, the workers' compensation provisions requiring notice to the employer do not require clairvoyance.

¶23 Ultimately the claimant did recall that on November 8th, he had slipped on ice and caught himself a couple of times. In retrospect, he thought the slips might have caused his herniated disk but he testified in his deposition that he had also slipped at work on previous occasions.

¶24 The claim filed by claimant ultimately found its way to American's Montana adjuster. Henningsen's testimony showed that the adjuster had the claim at least as early as mid-December 2002.

¶25 American denied the claim and has persisted in its denial.

¶26 On December 2, 2002, claimant saw Dr. Gus G. Varnavas, a neurosurgeon. (Ex. 8.) Dr. Varnavas reported that claimant's back and leg pain "has been progressive and unremitting. He has been unable to work." (Ex. 8 at 1.) The doctor recommended surgery.

¶27 On December 4, 2002, claimant underwent a discectomy. (Ex. 5.) The surgery found a "large free fragment" from a "massive disc herniation" at the L5-S1 level. (*Id*. at 1.)

¶28 Claimant's surgery did not provide full pain relief and he continued to be treated for pain. (Ex. 12-1). As of November 14, 2003, Dr. Michael Sousa, an orthopedic surgeon, performed an occupational disease evaluation of claimant at the request of the Department, and opined that claimant was still temporarily unable to perform any type of work. (Ex. 26 at 6.)

¶29 Dr. Varnavas testified by deposition. Based on claimant's description of his slips and his heavy lifting he attributed claimant's herniated disk to his work on November 8, 2002. (Varnavas Dep. at 15-18, 27, 35-37.) He testified that just claimant's heavy lifting could have caused the herniated disk and commented that lifting and twisting is often the major culprit in such cases. (*Id*. at 18, 37.)

¶30 Dr. Sousa was asked by the Department to evaluate claimant for an occupational disease. Dr. Sousa examined claimant on November 14, 2003, and opined that claimant's herniated disk was an occupational disease. (Ex. 26 at 5.)

¶31 American has offered no contrary medical opinions. Thus, the only medical opinions tendered in this case relate claimant's herniated disk to his work.

¶32 I find that the claimant's herniated disk was more likely than not the result of on-the-job lifting and twisting over a period of more than one day. While claimant later recalled two slipping incidents on November 8, 2002, neither was associated with immediate pain and were only recalled later. Dr. Sousa, an independent medical examiner, expressly found that claimant's condition met all criteria for an occupational disease. Dr. Varnavas' testimony also supports that conclusion. As noted above, he testified that twisting and lifting is a major culprit in herniated disks. Claimant's testimony, and that of Michael Downey show that claimant's job involved heavy lifting and twisting on a day-by-day basis. No specific incident stands out, therefore it is reasonable to infer and find that the herniated disk resulted from the claimant's work over more than a single day.

¶33 I next address whether American's denial of liability was reasonable. As I found at trial, its denial is not reasonable.

¶34 After reviewing the briefs, depositions, and exhibits the day before trial, I questioned the basis for denying the claim and therefore conducted a telephone conference with counsel regarding the basis for taking the case for trial. During that conference I noted that the only medical opinions I had been provided were that claimant's condition was work related. I further noted that the notice defense was inconsistent with the insurer's position that claimant did not suffer a work-related injury, pointing out that if it was an occupational disease then the thirty day notice requirement of section 39-71-603, MCA, did not apply. After the conference, the insurer decided to go to trial.

¶35 During cross-examination of claimant, I interrupted the trial and conducted a further conference with counsel in which I indicated that the notice defense under the Workers' Compensation Act (WCA) was untenable since claimant provided notice within thirty days of his awareness that the condition might be work related. I summarized my concerns on the record.

¶36 Nonetheless, the trial continued with the insurer still denying liability even though its own evidence (Henningsen's testimony) showed she was apprized on November 15, 2002, - a mere seven days after claimant's alleged injury and six days after he became symptomatic - of the claimant's belief that his condition was job related and another witness (Michael Downey) confirmed claimant's occupation involved repetitive heavy lifting, pushing, and pulling.

¶37 I find that liability in this case was reasonably clear and should have been accepted:

¶37a Claimant was involved in an occupation requiring heavy labor. He woke up with debilitating back and leg pain the morning after a day of work involving heavy labor and was thereafter determined to have a herniated disk. The two physicians evaluating his claim opined that his herniated disk was work related; one opined it was an injury by providing testimony supporting a finding that it was an occupational disease, the other, who was an independent medical examiner designated by the Department, opined that his condition was an occupational disease. **The insurer presented no medical opinion that the claimant's condition was <u>not</u> work related.**

¶37b The notice defense was without any merit whatsoever. The insurer's own witness (Kathy Henningsen) testified that on November 15, 2002 - well within the thirty days set out in section 39-71-603, MCA - she was aware of the claimant's intent to pursue a workers' compensation claim. On that date she was provided with as much information as claimant had regarding his condition and the cause of his condition. No notice defense was proffered under the Occupational Disease Act (ODA) and none was available in any event since the ODA does not contain a thirty day notice requirement.

¶38 The requirement that an insurer act reasonably in adjusting a claim does not end on the courthouse steps. I find it extraordinary that even after being apprized of the Court's concerns with its defenses in this case that the insurer persisted in those defenses.

<u>CONCLUSIONS OF LAW</u>

¶39 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Since his occupational disease claim also arose while the 2001 version of the ODA was in effect, that version of the ODA also applies.

¶40 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶41 The claimant has provided unrebutted medical evidence that he suffers from either an occupational injury or occupational disease. To constitute a compensable injury under the WCA, claimant must prove that he suffered:

- (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.

§ 39-71-119(2), MCA (2001). The ODA covers work-related conditions arising as a result of trauma or exposure over more than a single day. Section 39-72-102(10), MCA (2001), provides in relevant part:

> (10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. . . .

The medical opinions in this case are that he suffered one or the other.

¶42 As set forth in my findings of fact, I am persuaded that the claimant's condition arose as a result of his heavy lifting and twisting over a period of more than one day. No single event on a single day stands out as the causative factor although in retrospect the claimant believes that a couple of slips on ice on November 8th triggered his condition. I therefore find and conclude that the claimant's herniated disk is a compensable occupational disease. As such, he is entitled to medical benefits and to temporary total disability benefits from November 11, 2002 to the present time.

¶43 Finally, I consider the claimant's request for attorney fees and a penalty. Both must be awarded if the insurer's denial of benefits is unreasonable. Section 39-71-611, MCA (2001), provides in relevant part:

> **39-71-611. Costs and attorney fees payable on denial of claim or termination of benefits later found compensable -- barring of attorney fees under common fund and other doctrines.** (1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
>
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
>
> (b) the claim is later adjudged compensable by the workers' compensation court; and
>
> (c) in the case of attorney fees, the workers' compensation court determines that **the insurer's actions in denying liability or terminating benefits were unreasonable**. [Emphasis added.]

Section 39-71-2907, MCA (2001), provides:

> **39-71-2907. Increase in award for unreasonable delay or refusal to pay.** (1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, **the insurer unreasonably delays or refuses to make the payments**. [Emphasis added.]

¶44 In this case, I have found that the insurer's denial of benefits was unreasonable since liability was reasonably clear. The evidence clearly established that the claimant was engaged in heavy lifting: the insurer's own witness, Michael Downey, established the heavy nature of the job. Uncontradicted medical opinions established that the claimant's herniated disk was job related; the only question posed by those opinions was whether it arose on a single day as a result of a single incident, thus making it compensable under the WCA, or whether it arose over a longer period of time, making it compensable under the ODA. The notice defense was insubstantial: the employer admitted notice of a potential claim well within the thirty days required under the WCA, § 39-71-603, MCA (2001). The suggestion that claimant might have suffered an injury over the weekend of November 9-10, 2002, was unsubstantiated and contradicted by the employer (Henningsen).

¶45 I am at a loss to understand its continued denial of the claim. American's obligation to act reasonably did not end upon the filing of the petition. It did not end upon the swearing of the first witness. Its obligation to act reasonably was a continuous one and required that it consider new information whenever received. American ignored uncontradicted medical opinions; it ignored the evidence of its own witnesses; and it disregarded the concerns of this Court. Its denial of liability was unreasonable; its taking the matter through trial was irresponsible and reprehensible.

JUDGMENT

¶46 Claimant suffers from an occupational disease for which American Home Assurance Company is liable. American shall forthwith pay all of claimant's medical expenses related to his herniated disk and shall pay him temporary total disability benefits retroactively to November 11, 2002, and continuing until such time as he reaches maximum medical improvement. The Court retains jurisdiction to determine claimant's compensation rates and the amount of benefits due him in the event the parties are unable to agree on the amounts.

¶47 American shall pay claimant a twenty percent penalty on all benefits.

¶48 American shall pay claimant's attorney fees in an amount prescribed by statute and determined under the rules of this Court.

¶49 American shall pay claimant's costs as determined pursuant to this Court's rules.

¶50 This JUDGMENT is certified as final for purposes of appeal.

¶51 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 13th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Robert G. McCarthy
Mr. William O. Bronson
Submitted: January 22, 2004