IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 86

WCC No. 9405-7065

JERRY PINYERD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

PRESTIGE TOYOTA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on August 22, 1994 in Billings, Montana. Petitioner, Jerry Pinyerd (claimant), was present and represented by Mr. Patrick R. Sheehy. Respondent, State Compensation Mutual Insurance Fund (State Fund), was represented by Mr. Daniel J. Whyte. Claimant and Robert "Jake" Jacobson testified. Exhibits 1 through 4 were admitted into evidence without objection.

The parties stipulated to bifurcation of two principal issues in this case. The first issue is whether or not a September 18, 1993 assault on the claimant by Robert Jacobson (Jacobson) arose out of and in the course of the claimant's employment with Prestige Toyota (Prestige). The second is whether the assault caused the medical condition which is the basis for claimant's claim for wage loss and medical benefits. The second issue was deferred until resolution of the first. Since the first issue is resolved adversely to claimant, the second issue is moot.

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

FINDINGS OF FACT

1. Claimant is thirty years old and married. He grew up, attended school and worked in California until 1993.

2. Claimant moved from California to Billings, Montana, in May of 1993. At the time of his move claimant had four years experience as a successful car salesman and had

already lined up a job with Prestige Toyota in Billings. He went to work for Prestige in June of 1993 as a sales representative.

3. Prestige has two teams of salesmen, a "green" team and a "blue" team. The two teams work different hours and compete with one another for the most sales each month. Claimant was assigned to the green team.

4. During claimant's employment at Prestige there were approximately seven salesmen on the green team. One of those salesmen was Robert "Jake" Jacobson.

5. The salesmen on each team competed with one another for the most sales each month. However, car sales also required cooperation among the salesmen. Whenever a salesman was having difficulty in making a sale he was expected to "turn" the prospective customer over to a fellow salesman in the hope that another salesman with a different approach or personality could persuade the customer to buy a new car. If a sale was then consummated, both salesmen split the commission.

6. Prestige established sales quotas for each of its salesmen and paid them on a commission basis. It also paid cash incentives (Spifs) for the top salesman, for demonstration rides, and for obtaining customer purchase commitments.

7. During the first couple of weeks of his employment the claimant was shut out of sales by the other salesmen, who used their experience at Prestige to get to customers first and did not "turn" any customers to the claimant. Claimant talked to the manager of Prestige about the situation. The manager talked to the other team members and they then began to make turns to him.

8. Jake Jacobson was especially hostile towards the claimant. He made it clear that he did not like Californians.

9. Jacobson never made any turns to claimant.

10. On one occasion Jacobson did not show up for work and claimant was sent by his employer to Jacobson's house to pick him up. Upon answering the door Jacobson did not invite claimant into his house and made claimant wait in his car for 20 minutes until he was ready to go to work.

11. After his talk with the manager, claimant began making significant numbers of sales. At the end of July, 1993, Prestige participated in an "Autorama" involving many of the Billings car dealers. It put up $10,000 of incentive money to motivate its salesmen to sell cars. Claimant was very successful, earning $1150 in Spifs and $3,800 in commissions. Jacobson did not do as well and was resentful.

12. On Thursday, September 16, 1993, Jacobson asked claimant if claimant could give him a ride home. Claimant agreed and drove Jacobson home. Jacobson invited claimant in for a beer. While at Jacobson's house, claimant noticed a prescription bottle on a table and commented that Jacobson shouldn't leave drugs laying about.

13. Jacobson testified at hearing that claimant had come over to his house seeking drugs for back pain. The Court did not find Jacobson to be a credible witness and does not believe his testimony on this and many other points.

14. On Friday, September 17, 1993, Jacobson called claimant at 7:30 am and accused him of stealing pills from him. According to Jacobson, the pills were hydrocodone, which is a narcotic analgesic similar to the effect of codeine. Physician's Desk Reference (1994.) Later that day claimant heard from other salesmen that Jacobson was out to get him. At one point during the day Jacobson invited claimant out back to fight. Claimant demurred and was able to stay away from Jacobson the rest of the day.

15. On Saturday, September 18, 1993, Jacobson cornered claimant while he was sitting in a small pickup truck. Claimant managed to close the door of the pickup but the window was open. Jacobson leaned through the window and punched claimant numerous times with his closed fist, hitting him in the back and left leg. Jacobson told claimant to "get off the [car] lot ... get out of town ... you don't belong here."

16. Based on the foregoing findings, and inferences drawn from the testimony in this case, the Court finds that the immediate cause of the assault was Jacobson's belief that claimant had taken some pills from him. Claimant's own testimony establishes that Jacobson accused him of pilfering pills. Although I do not find Jacobson's accusation credible, it is clear that he at least believed that claimant had taken pills from him, and that this belief was the immediate stimulus to the attack. Jacobson's dislike of Californians, combined with his resentment of claimant's recent success in car sales, contributed to Jacobson's general hostility towards claimant.

<u>CONCLUSIONS OF LAW</u>

1. The only issue to be decided at this time is whether the assault arose out of and in the course of claimant's employment.

Section 39-71-407 (1), MCA (1993), provides:

<u>39-71-407. Liability of insurers - limitations.</u> (1) Every insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment or, in the case of his death from the injury, to the employee's beneficiaries, if any.

The Montana Supreme Court has only applied the course of employment requirement in one situation involving an assault by one employee on another. That case is ***Penny v. Anaconda Company,*** *194 Mont. 409, 632 P.2d 1114 (1981).*

Citing Larson's Workmen's Compensation Law, § 11.16, the Court in ***Penny*** noted that there are two lines of authority concerning assaults. It then adopted the line of authority which is exemplified by the rule set forth in ***Willis v. Taylor & Fenn Co.,*** *79 A.2d 821, 822 (Conn. 1951),* quoting it as follows:

"The fact that employees sometimes quarrel and fight while at work does not make injury which may result one which arises out of their employment. There must be some reasonable connection between the injury suffered and the employment or the conditions under which it is pursued."

194 Mont at 413.

In ***Willis*** the Connecticut Supreme Court also said that the "basic principle" to be followed in assault cases is:

"If one employé [sic] assaults another employé [sic] solely to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant, and cannot be said to arise either directly out of the employment or as an incident of it. But when the employé [sic] is assaulted while he is defending his employer, or his employer's property, or his employer's interests, or when the assault was incidental to some duty of his employment, the injuries he suffers in consequence of the assault will, as a rule, arise out of the employment."

*79 A.2d at 822 (quoting from **Jacquemin v. Turner & Seymour Mfg. Co.,** 92 Conn. 382, 384, 103 A. 115, 116).*

In ***Penny*** the animosity leading to a fight between the claimant and a coworker had its genesis in a difference of opinion regarding union policies. However, the difference arose four years prior to the fight and the hearing examiner who decided the case concluded that the fight "had no connection with the disagreement over union policies and that Penny started the fight solely to gratify his personal feeling of hatred and anger toward his coworker." *194 Mont. at 413.* The hearing examiner concluded that the fight did not occur in the course and scope of Mr. Penny's employment, and the Supreme Court affirmed.

In this case, the initial cause of Jacobson's animosity towards claimant was Jacobson's dislike of Californians. His attitude towards claimant cannot be explained simply based on friction arising out of the competitive nature of the employment: No evidence was presented suggesting that Jacobson was hostile to non-Californian salesmen, or that he refused to "turn" customers to non-Californian salesmen. Moreover, the immediate impetus for the assault was Jacobson's belief that claimant had taken some pills. That motivation was wholly unconnected to employment. Thus, as in ***Penny,*** the assault was carried out to "gratify his [Jacobson's] personal feeling of hatred and anger toward his coworker." The claimant was not defending his employer, his employer's property, or his employer's interests. The assault was not incidental to some duty of claimant's employment.

The fact that Jacobson intended to run claimant off the job, if not out of town, does not change the legal analysis of the situation. That analysis focuses on the motive for the attack and on whether the claimant was assaulted because of his job performance. It does not depend on the assailant's ultimate goal in carrying out his attack.

Claimant argues, however, that there is a "reasonable connection between the injury suffered and the employment" since there was "an increased risk of assault because of

the nature and setting of the work." Petitioner's Proposed Findings of Fact and Conclusions of Law at 8. He attributes the increased risk to the competitive conditions of claimant's employment.

The "increased risk" doctrine is separate and distinct from the "friction and strain" doctrine invoked in ***Penny***. The mention in ***Penny*** of "two lines of authority" was in the context of assaults arising out of "friction and strain" connected with employment. ***Penny's*** citation to Larson was to a section which specifically concerns the "friction and strain" doctrine. (That section includes a discussion of ***Willis*** as exemplifying one of two lines of authority concerning assaults arising from on-the-job friction and strain.) Larson at § 11.16(b).

In addition to the friction and strain doctrine, Larson also addresses cases where the nature of the employment puts the employee at greater risk of assault:

[E]very jurisdiction now accepts, at the minimum, the principle that a harm is compensable if its risk is increased by the employment, the clearest ground of compensability in the assault category is a showing that the probability of assault was augmented either because of the particular character of claimant's job or because of the special liability to assault associated with the environment in which he must work.

Id. § 11.11(a) at 3-178. Included in Larson's discussion of jobs which have an increased risk of assault are jobs with dangerous duties, such as policeman, watchman and bartender (discussed in § 11.11(a)); jobs in a dangerous environment, such as jobs in a high crime locality (discussed in § 11.11(b)); and assaults which occur on the highways (discussed in § 11.11(c)). Friction resulting from a competitive employment environment is not among the increased risk factors discussed in Larson.

Larson also identifies as compensable assaults which grow out of an argument over performance at work, the possession of tools, delivery of a paycheck, quitting work, firing of an employee, mediating between quarreling employees, and labor disputes. ***Id. at §§ 11.12(a) - (c).*** This case does not fall under any of those categories.

Thus, this case is governed by the rule adopted in ***Penny.*** As in ***Penny,*** the assault upon claimant did not occur in the course of his employment and he is not entitled to benefits on account of the assault.

2. Since the assault did not occur in the course of employment, claimant is not entitled to benefits with respect to any injuries he may have suffered as a result of the assault.

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

<u>JUDGMENT</u>

1. The assault on claimant did not occur in the course and scope of his employment. He is therefore not entitled to benefits with respect to any injuries he suffered in the assault.

2. Claimant is not entitled to attorney fees and costs.

3. Claimant is not entitled to a penalty.

4. Since the Court's ruling in this matter is dispositive of all other issues raised by the parties,

this judgment is 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, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 20th day of September, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Patrick R. Sheehy
Mr. Daniel J. Whyte