

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 59

WCC No. 9803-7937

DAVID RONEMUS

Petitioner

vs.

BUSINESS INSURANCE COMPANY

Respondent/Insurer for

AMERICAN RENOVATION AND CONSTRUCTION COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Construction worker claimed shoulder injury. Insurer denied the claim, arguing claimant did not work the date he claimed injury, had told a supervisor he injured his shoulder lifting weights, did heavy labor for a plumber after the claimed injury, and was considered not truthful by two supervisors. Insurer also argued claimant did not report the injury within 30 days.

Held: Claimant was injured in the course and scope of employment. Claimant was a credible witness and conflicts in evidence were resolved in his favor. The insurer's argument that claimant was not at work on the date he claimed injury is undermined by evidence claimant at first thought the injury was minimal and did not seek medical treatment and, when he did seek treatment, could give only an approximate date of injury. The Court was persuaded the earlier shoulder injury occurred much earlier and that claimant's shoulder was not symptomatic when he began the construction project at issue. In weighing opinion evidence that claimant was untruthful, the court considered the fact the evidence came from the employer's supervisors and not from disinterested members of the community. WCC found claimant did in fact tell his supervisor about the injury within 30 days. Although both claimant and the supervisor did not consider the injury serious, it was nonetheless reported.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-603, MCA (1997). WCC found claimant did in fact tell his supervisor about shoulder injury within 30 days. Although the matter arose in the context of discussing some weekend volunteer work claimant might do, and both claimant and the supervisor did not consider the injury serious, it was nonetheless reported. Notice as to the time and place of the injury was inherent in claimant's statement to the supervisor. Because claimant was working at one construction project, there could be no misunderstanding as to the place of injury. From the context of the conversation, and the lack of claimant's prior complaints of injury or pain, the conversation also provided a plain indication that claimant was indicated that day. There is no requirement in the statute that claimant provide an exact minute or hour of his injury.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-611, MCA (1997). Although Court found claimant credible and was not persuaded by insurer's witnesses on issues of occurrence of accident and reporting, insurer's conduct in resisting claim was not unreasonable where a legitimate credibility issue existed.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2907, MCA (1997). Although Court found claimant credible and was not persuaded by insurer's witnesses on issues of occurrence of accident and reporting, insurer's conduct in resisting claim was not unreasonable where a legitimate credibility issue existed.

Attorney Fees: Unreasonable Denial or Delay of Payment. Although Court found claimant credible and was not persuaded by insurer's witnesses on issues of occurrence of accident and reporting, insurer's conduct in resisting claim was not unreasonable where a legitimate credibility issue existed.

Claims: Notice to the Employer or Insurer. WCC found claimant did in fact tell his supervisor about shoulder injury within 30 days. Although the matter arose in the context of discussing some weekend volunteer work claimant might do, and both claimant and the supervisor did not consider the injury serious, it was nonetheless reported. Notice as to the time and place of the injury was inherent in claimant's statement to the supervisor. Because claimant was working at one construction project, there could be no misunderstanding as to the place of injury. From the context of the conversation, and the lack of claimant's prior complaints of injury or pain, the conversation also provided a plain indication that claimant was indicated that day. There is no requirement in the statute that claimant provide an exact minute or hour of his injury.

Injury and Accident: Generally. Insurer denied claim of shoulder injury from construction worker, arguing he did not work the date of claimed injury, that he told a supervisor he injured his shoulder lifting weights, that he did heavy labor for a plumber after the claimed injury, and that he was considered not truthful by two supervisors. Finding claimant a credible witness, the WCC resolved conflicts in the evidence in his favor and found he was injured during employment. The insurer's argument that claimant was not at work on the claimed injury date was undermined by evidence claimant at first thought the injury was minimal and did not seek medical treatment and, when he did seek treatment, could give only an approximate date of injury. The Court was persuaded the earlier shoulder injury occurred much earlier and that the alleged work for the plumber occurred prior to the injury. In weighing opinion evidence that claimant was untruthful, the court noted the evidence came from the employer's supervisors and not from disinterested members of the community.

Limitations Periods: Notice to Employer. WCC found claimant did in fact tell his supervisor about shoulder injury within 30 days. Although the matter arose in the context of discussing some weekend volunteer work claimant might do, and both claimant and the supervisor did not consider the injury serious, it was nonetheless reported.

Penalties: Insurers. Although Court found claimant credible and was not persuaded by insurer's witnesses on issues of occurrence of accident and reporting, insurer's conduct in resisting claim was not unreasonable where a legitimate credibility issue existed.

Witnesses: Credibility. Insurer denied claim of shoulder injury from construction worker, arguing he did not work the date of claimed injury, that he told a supervisor he injured his shoulder lifting weights, that he did heavy labor for a plumber after the claimed injury, and that he was considered not truthful by two supervisors. Finding claimant a credible witness, the WCC resolved conflicts in the evidence in his favor and found he was injured during employment. The insurer's argument that claimant was not at work on the claimed injury date was undermined by evidence claimant at first thought the injury was minimal and did not seek medical treatment and, when he did seek treatment, could give only an approximate date of injury. The Court was persuaded the earlier shoulder injury occurred much earlier and that the alleged work for the plumber occurred prior to the injury. In weighing opinion evidence that claimant was untruthful, the WCC noted the evidence came from the employer's supervisors and not from disinterested members of the community.

¶1 The trial in this matter was held on June 8, 1998, in Great Falls, Montana. Petitioner, David Ronemus (claimant), was present and represented by Mr. Norman L. Newhall.

Respondent, Business Insurance Company (Business), was represented by Mr. Jason G. Dykstra. A transcript of the trial has not been prepared.

¶12 Exhibits: Exhibits 1 through 18 and 20 were admitted without objection. Exhibit 19 was refused.

¶13 Witnesses and Depositions: David Ronemus, Darryl Sellers, Robert C. Berger, Robert Chimarusti and John Fennel were sworn and testified. In addition the parties agreed that the Court may consider the deposition of the claimant.

¶14 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

1. Whether Petitioner/Claimant suffered an injury within the course and scope of his employment.
2. Whether Petitioner/Claimant gave timely notice of the injury or whether Employer had actual notice.
3. Whether Petitioner/Claimant is entitled to medical, wage-loss and other benefits.
4. Whether Petitioner/Claimant is entitled to an award of attorney's fees, costs and a 20% penalty.

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

FINDINGS OF FACT

¶16 On August 11, 1997, claimant was hired by American Renovation and Construction Company (American) to work on a construction and remodeling project at Malmstrom Air Force Base in Great Falls, Montana. He was hired to perform work as a carpenter, as a general laborer, and as the "tree man". As tree man, claimant felled and limbed trees.

¶17 Claimant alleges that on or about September 5, 1997, he injured his right shoulder while working for American.

¶18 At the time of his alleged injury, American was insured by Business.

¶19 Claimant submitted a claim for compensation but Business denied the claim. Business continues to resist his claim, urging that claimant was not injured in the course and scope of his employment with American and that he failed to timely report the alleged accident to American.

I. Alleged Accident

¶10 Claimant suffers from a painful right shoulder. Medical information concerning his shoulder pain was presented by way of the medical records of Benefis Convenience Care Center of Great Falls and the records of Dr. J.W. Bloemendaal, an orthopedic surgeon who has treated claimant since November 1997. Dr. Bloemendaal diagnosed an AC (acromioclavicular) joint injury⁽¹⁾ and attributed it to claimant's alleged accident at work. (Ex. 15 at 1.)

¶11 The controversy concerning the occurrence of a work-related accident centers around claimant's credibility and the date listed by him as the date the accident occurred. Business presented evidence showing that claimant did not work on September 5, 1997, the date listed on his incident report. It presented further evidence that he told his immediate supervisor that prior to going to work for American he had suffered a shoulder injury while lifting weights. Finally, it presented evidence which, if believed, undermined claimant's credibility. The latter evidence included opinion evidence of two supervisors that claimant is not truthful and evidence from a plumber indicating that after the alleged injury the claimant performed off-the-books plumbing work involving hard labor.

A. The Prior Injury

¶12 Claimant testified that he had in fact injured his shoulder some 20 years ago while weight lifting but that his shoulder had healed and had been asymptomatic for many years.

¶13 There is no credible evidence that prior to the incident related by claimant that he was suffering from any ongoing shoulder pain or difficulties. Darryl Sellers (Sellers), claimant's supervisor, recalled claimant telling him that he had injured his shoulder two years previous. Sellers also related that claimant talked about getting back into weight lifting.

¶14 There is no medical documentation or other evidence indicating that when claimant went to work for American his shoulder was painful or otherwise symptomatic. The prior injury is a red herring.

B. The 1997 Injury

¶15 Business presented evidence that the claimant did not work on September 5, 1997. That evidence is persuasive, however, it does not establish that claimant was *not* injured at work.

¶16 Business' theory at trial was that if claimant injured his shoulder he did so on a weekend and not at work. It presented evidence that trees downed at the construction site were removed from Malmstrom by Seller's, on his own time and for his own personal profit. According to Sellers, some of the American workers volunteered to help him. Ultimately, the profits from removing the trees were used for a Christmas party at work, although Seller's denied promising the workers that the profits would be used in that manner.

¶17 Claimant admitted at trial that he helped transport the tree remains from Malmstrom on a weekend.

¶18 The removal of the trees from Malmstrom Air Force base was required by American's construction contract with the Air Force. Transporting them off base was a part of the contract. However, the Court need not determine whether in helping with weekend tree removal the claimant was performing work within the course and scope of his employment since I have determined and find that the claimant was not injured on a weekend. Rather, he was injured on a workday for which he was paid by the employer.

¶19 The following facts are important to my determination that claimant's injury occurred during a workday rather than when "volunteering" to help transport the trees off the Air Force base:

a. Claimant's identification of his date of injury was "approximate," as shown by medical records for his initial medical care. He first sought care at the Benefis Convenience Care Center in Great Falls on November 3, 1997. The intake nurse for Benefis recorded: "R [right] shoulder injured - **approx 9-5-97** while at work." (Ex. 14-1; emphasis added.) Dr. James Harkness, who examined claimant, recorded:

This 42-year-old presents to the clinic today with right shoulder pain. This has been going on now for a couple of months. He injured it **on approximately September 5 he thinks.**

(*Id.* at 2; emphasis added.)

b. Claimant testified that he did not remember the exact date of his accident. He thought it was on a Friday because he knew he "had off a few days after the injury." (Ronemus Dep. at 18.) At trial he testified that his days off were Saturday and Sunday.

c. His supervisor's testimony supports claimant's recollection of an injury on a regular work day. Darryl Sellers testified that claimant reported shoulder soreness to him on a Friday evening after work and that he and claimant discussed whether, in light of the soreness, claimant should help in loading and trucking wood from Malmstrom on Saturday. When filling out an incident report in November, Sellers dated the Saturday as September 13th, which fixes the Friday as September 12th, not September 5th. American's employee time records reflect that claimant worked on September 12th. (Ex. 5 at 3.)

¶20 In concluding that claimant suffered a work-related injury on a regular work day, I have taken into consideration the evidence offered by Business to attack claimant's veracity. As to the opinion evidence of veracity, I found it wholly unconvincing and note that the evidence was given by supervisors of American (Berger and Chimarusti), not by members

of general community. I was also unpersuaded by John Fennel's testimony dating plumbing assistance provided by claimant in December. I find it more likely that Fennel was mistaken and that claimant's assistance was just prior to claimant seeking medical care in November, as claimant testified. Ultimately, I find claimant to be a credible witness and resolve conflicting testimony in his favor.

II. Notice

¶21 Claimant testified that on the day of his injury, he told his supervisor, Darryl Sellers, that he injured his shoulder. He testified that he told Sellers about the injury during work hours. He did not tell him specifically how he injured it.

¶22 As already found, Sellers testified that he learned of claimant's shoulder problems on a regular work day and prior to claimant voluntarily helping transport tree remains off the base. Indeed, he testified he told the claimant he didn't want him to help with the volunteer work if his shoulder hurt, but said that the claimant was adamant about wanting to volunteer.

¶23 I am persuaded that Sellers did tell claimant that if his shoulder pain was work-related he should formally report it in writing. However, at the time of the report, claimant felt, as he testified, that the injury was trivial and that he expected it to resolve within a matter of days. At the time of the report, the injury was not a "big deal" and I am persuaded that neither claimant nor Sellers gave it the attention that it, in retrospect, deserved. On the other hand, I am persuaded that claimant did in fact notify Sellers during working hours that he injured his shoulder. While claimant may not of specifically stated that he injured it on the job, that fact was inherent in the timing of his report and the lack of any prior indication that he had current shoulder problems.

¶24 Following the incident claimant continued to work until his pain motivated him to seek medical care. Following initial medical care on November 3, 1997, claimant filled out a formal accident report. The report is dated November 4, 1997, and states that the accident occurred on Friday, September 5, 1997. (Ex. 7.)

¶25 Thereafter, on December 4, 1997, claimant filed a written claim for compensation. (Ex. 3.) The Court notes that the accident description in the claim states that claimant injured himself while "loading firewood onto [a] pickup truck," thereby suggesting that he was injured while voluntarily helping transport the trees off the Malmstrom Air Force Base. (*Id.*) However, the claim form was also the First Report and the body of the form was not filled out by claimant.

III. Temporary Total Disability

¶26 Dr. Bloemendaal took claimant off work on November 25, 1997, but then approved his return to light-duty work. (Exs. 15-3 and 15-4.) Claimant was in fact off work for three days, November 26 through November 29, 1997, returning to work on December 1, 1997.

¶27 On December 1, 1997, claimant was told by one of American's supervisors (Berger) that he could not go back to work unless he had a full release. Claimant contacted Dr. Bloemendaal's office and requested that he fax a full release to the employer. The doctor complied with the request (Ex. 18.) Meanwhile, claimant's shoulder pain commenced anew and he told his employer that he couldn't do heavy-duty work.

¶28 American found light work for claimant on December 1 through 4, 1997. On December 4, 1997, American laid claimant off for lack of light-duty work, stating that it would not reemploy him until he was released to full-duty work. (Ex. 11.)

¶29 On December 5, 1997, claimant returned to Dr. Bloemendaal, who took him off work once more and prescribed physical therapy. (Ex. 15-1.)

¶30 Claimant was not thereafter released to return to work until February 5, 1998, and then only to light duty. (Ex. 15-6⁽²⁾.) Claimant thereafter returned to light-duty tree trimming, working with a friend.

IV. Penalty and Attorney fees

¶31 While I have found that claimant suffered an industrial injury and timely reported it to his employer, I also find that Business did not act unreasonably in denying the claim. The evidence in the case is conflicting. While I have resolved credibility issues in claimant's favor, the evidence presented at trial would have permitted me to find him not credible and hold against him. The insurer had ample justification for disputing the claim.

CONCLUSIONS OF LAW

I.

¶32 The alleged injury in this case occurred in September 1997; therefore, this claim is governed by the 1997 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶33 Claimant must prove by a preponderance of the evidence that he suffered an industrial injury. *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).

III.

¶134 Under the 1997 Workers' Compensation Act, a compensable industrial injury requires both an "accident" and an "injury." Section 39-71-119, MCA (1995), provides in relevant part:

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

(a) internal or external physical harm to the body that is established by objective medical findings;

. . . .

(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.

. . . .

¶135 Claimant has satisfied his burden of proof that he suffered an injury. The medical evidence in this case, while scant, confirms that claimant suffered an injury to his right shoulder and that the injury is related to an incident at work. The claimant's testimony establishes that his condition arose at the time of a specific incident occurring at work on a day he was paid for his work.

IV.

¶136 Section 39-71-603 (1), MCA (1997), required the claimant to provide his employer with notice of his industrial injury within 30 days. The section provides:

Notice of injuries other than death to be submitted within thirty days. (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

¶137 The Court is persuaded by a preponderance of evidence that on the same day of the injury, the claimant notified his immediate supervisor that he was injured. That is all

section 39-71-603(1), MCA, requires. Notice as to the time and place of the injury was inherent from the claimant's statement to his supervisor. Claimant was working at Malmstrom Air Force Base on his employer's project, hence there could not be any misunderstanding as to the place of the injury. The nature and context of the conversation, and the lack of prior complaints concerning a recent injury or pain, also provided a plain indication that claimant was injured that day. There is no requirement in the statute that the claimant provide an exact minute or hour of his injury.

V.

¶138 Claimant's entitlement to temporary total disability benefits is governed by sections 39-71-701, 736 and -116(34), MCA (1997), which provide for payment of temporary total disability where a worker experiences a total loss of wages on account of a work-related injury. The benefits are payable until claimant reaches maximum medical improvement, returns to work, or is released to a full return to work.

¶139 Claimant experienced a total loss of wages on November 26 through 28, 1997, and again from December 5, 1997 through February 2, 1998. Although Dr. Bloemendaal's note does not indicate that claimant had reached MMI on February 2, 1998, claimant testified that he has worked since that date. He failed to provide evidence of any continuing total loss of wages after February 2, 1998, and has therefore born his burden of persuasion only to that date.

VI.

¶140 Since claimant has prevailed, he is entitled to his costs in an amount to be determined pursuant to ARM 24.5.3342.

VII.

¶141 Claimant is not entitled to attorney fees or a penalty. An award of attorney fees and a penalty requires a finding that the insurer has unreasonably delayed or refused to pay benefits. § 39-71-611, -2907, MCA (1997). The insurer's denial of the claim herein was not unreasonable. This case presented legitimate factual issues. Indeed, but for the Court's resolution of credibility issues in claimant's favor the judgment in this case would have been for the insurer.

VIII.

¶142 Since Business is liable for claimant's industrial injury, it shall pay the medical expenses set forth in Exhibit 17-1, amounting to \$637.78. It is also liable for future medical benefits as prescribed in section 39-71-704, MCA (1997).

JUDGMENT

¶43 1. In September 1997, the claimant suffered an industrial injury while in the course and scope of his employment with American Renovation and Construction Company. His employer's insurer, Business Insurance Company, is liable for his injury.

¶44 2. Business Insurance Company shall pay the medical bills related to claimant's industrial injury, which as of the date of trial amount to \$637.78.

¶45 3. Business Insurance Company shall pay claimant temporary total disability benefits for November 26 through 28, 1997, and December 4, 1997 through February 1998, less the six day statutory waiting period, § 39-71-736, MCA (1997). If the parties are unable to agree as to the amount due, then they shall advise the Court and a further hearing will be held to make the determination. The Court retains continuing jurisdiction for that sole purpose.

¶46 4. The claimant is entitled to his costs but not to attorney fees or a penalty. Costs shall be determined in accordance with Court Rule 24.5.342.

¶47 5. Pursuant to Court Rule 24.5.348, this JUDGMENT is certified as final for purposes of appeal.

¶48 6. Any party to this dispute has 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 28th day of July, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman L. Newhall

Mr. Jason G. Dykstra

Date Submitted: June 8, 1998

1. The acromioclavicular joint is the joint where the clavicle meets the acromion. The bones and joint are part of the complex of bones and joints which make up the shoulder. See Frank H. Netter, M.D., *Atlas of Human Anatomy* (1989) at plates 395-405.

2. The release is dated "2/5/97" but the 97 is a misprint. It should have read 98.