IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 91

WCC No. 9309-6901

JANET STRICKLAND

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

JOSEPH W. TACKETT

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on March 2, 1994, in Kalispell, Montana. Petitioner, Janet Strickland (claimant), was present and represented by Mr. Allan M. McGarvey and Mr. Roger M. Sullivan. The respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams. Claimant, Robert Evans, R. Scott Bucher, Wayne Strickland, Marla Handford, Michelle Osborne, Leroy McFadden, and Joseph Tackett testified. Exhibits 1 through 5 were admitted by stipulation. Exhibit 6 was admitted over the objection of the claimant. Exhibits 7 and 8 were admitted over the State Fund's objections. Exhibit 9 was admitted without objection.

The parties agreed to the Court's consideration of the deposition of R. Scott Bucher. A deposition was also taken of Gene Hunter. However, that deposition is not to be, and has not been, considered.

Issue Presented: The claimant was severely injured in an automobile accident that occurred at the intersection where her employer's business was located. The issue presented in this case is whether claimant was acting in the course and scope of her employment at the time of the accident.

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

FINDINGS OF FACT

1. At the time of trial the claimant was 34 years of age.

2. At the times mentioned herein, the employer, Joe Tackett (Tackett) and his wife, Sherry Tackett, operated a small restaurant known as Steaks 'n Stuff Restaurant. The restaurant was located in the Flathead Valley at the intersection of Highway 2 West, Highway 40 and Half Moon Road.

3. Claimant went to work as a waitress for Steaks 'n Stuff in July 1992.

4. In addition to claimant, the Tacketts also employed Marla Handford as a cook and Scott Bucher as a dishwasher. The Tacketts also worked in the restaurant.

5. When the Tacketts were not at the restaurant, Marla Handford was in charge. With at least the tacit approval of the Tacketts, she was claimant's supervisor during those times.

6. On August 21, 1992, claimant went to work between 3:00 p.m. and 4:00 p.m. Marla Handford was already at work.

7. Claimant's regular job duties did not include running errands for her employer, although on one prior occasion claimant had gone to pick up hamburger at Handford's request.

8. At approximately 4:00 p.m. the claimant left work, got into her car and drove off on an errand. She was apparently returning from the errand when at 4:35 p.m. she was involved in an automobile accident at the intersection of Highway 2 West and Highway 40. The accident was a serious one and claimant suffered head injuries.

9. The factual controversy in this case concerns the purpose of the claimant's errand. Claimant testified that Handford asked her to go buy her a tabloid newspaper:

Well, Marla wanted something to read, and she told me to go to that Trumble Creek whatever and get her like an Inquirer or Examiner or Star or something. Now, she may have told me to get something else, but I can't remember. It seems like that Inquirer sticks out in my mind for some reason.

(Tr. I at 54.) Handford denied sending claimant on an errand and testified that claimant made the decision to leave work. She testified that claimant told her that her husband was looking for a dental lab and she wanted to get a newspaper to look through rentals for office space. (Tr. II at 13.) She also testified that she assumed claimant was going out to purchase Midol because she was complaining of cramps. In an earlier statement given to an investigator she recalled claimant telling her she was going out for Midol. (Tr. II at 21, 23.) In the face of claimant's statement that she went to buy Handford a tabloid paper, Handford testified that it was possible that she had asked claimant "to get me something to read because she was going to get something to read." (Tr. II at 14), but she could not recall actually making such a request and reaffirmed that claimant had initiated the errand for her own personal purposes. (Tr. II at 14-15.)

10. There were no other witnesses to the conversation which precipitated claimant's errand. Thus, my determination in this case requires me to weigh the credibility of the claimant and Handford. Having observed both individuals, and having considered the testimony of other witnesses, I find Handford's version of what led up to the errand the more credible. Specifically, I find that claimant left work on a personal errand to purchase a newspaper and possibly an analgesic. In reaching this finding, the following factors were important:

a. Handford was a sincere and credible witness.

b. Handford's testimony that claimant left the restaurant on a personal errand was consistent with statements she made to Joe Tackett and Leroy McFadden immediately following the accident. McFadden recalled that Handford told him that claimant left the restaurant because she needed Midol for cramps. (Tr. II at 63.) McFadden has no relationship to the parties in this case and witnessed the accident. Handford's statement occurred when McFadden stopped in the restaurant shortly after the accident. (Tr. II at 61.) McFadden described Handford as very upset about the accident.

c. Claimant was in a coma for six weeks and continues to have amnesia for the period of time commencing shortly before the accident until approximately eight weeks after the accident. (Tr. I at 74-75.)

d. Claimant admitted that her memory concerning the day of the accident was incomplete and that she remembered only bits and pieces. (Tr. I at 60-61.)

11. Notwithstanding her admittedly incomplete memory of the day of the accident, claimant's memory that Handford asked her to go to the Trumble Creek Hub (a store) to get Handford a tabloid was very specific. While I feel that claimant sincerely believes that is what happened, I find it more likely than not that her memory is predicated on suggestion rather than actual recall. The circumstances indicating that the memory was a product of suggestion rather than actual recall include:

a. On August 24, 1992, while claimant was in a coma, her husband filed a workers' compensation claim on her behalf in which he describes the circumstances of the accident as follows:

While working, *Janet went on a shopping errand for her employer.* While returning to the restaurant Janet was involved in a motor vehicle accident and critically injured. She remains in a coma. This claim form is filled out by her husband.

(Ex. 1, italics added.) The statement that "Janet went on a shopping errand for her employer" had no factual basis and was either surmise or advocacy on the husband's part. While he testified that on the evening of the accident Joe Tackett told him that "Marla had sent Janet to the store" and was "very upset because she felt it was her fault for sending

Janet to the store" (Tr. II at 100), I did not find this testimony credible. It flies in the face of what Handford told McFadden and Tackett immediately after the accident; it is not supported by Tackett's testimony; and I find it unlikely that Handford, who has consistently denied sending claimant to the store, ever made such a statement.

b. On September 2, 1992, Mr. Strickland commissioned Robert B. Evans, an investigator and paralegal for the law firm of McGarvey, Heberling, Sullivan & McGarvey, to investigate the circumstances of the accident.

c. On September 2, 1992, Evans examined claimant's wrecked car. He testified that he discovered a National Enquirer and National Examiner, both dated August 25, 1992 in the car. (Ex. 7; Tr. I at 77-78, 91, 95.) Claimant was still in a coma.

d. On the next day, September 3, 1992, Evans went to the Trumble Inn to determine if it sold tabloids. Claimant was still in a coma.

e. Thus, the elements for claimant's "memory" plainly existed prior to her awakening.

12. In finding Handford's testimony credible, I have considered all of the testimony presented at trial and by deposition. I have also considered the arguments the parties have made concerning the significance and credibility of testimony concerning the use of Midol, newspaper subscriptions, the reading of tabloids, cramps, menstrual periods, the purchase of maxipads, the sale or non-sale of tabloids at the Trumble Creek Hub, and the discovery of the tabloids in the car following the accident.

CONCLUSIONS OF LAW

1. The law in effect on the date of the claimant's accident governs this case. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986).* Since the accident occurred on August 21, 1992, the 1991 version of the Workers' Compensation Act applies.

2. The statute applicable to the present controversy is section 39-71-407, MCA (1991). Subsection (3) of the statute provides:

(3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(a)(i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and

(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(b) the travel is required by the employer as part of the employee's job duties.

The travel criteria set forth in subsection (3) was adopted by the 1987 legislature. 1987 Montana Laws, ch. 464, § 11. Pre-1987 precedents which conflict with the new law are therefore inapposite, as are liability theories from other jurisdictions.

3. The words "travel" and "traveling" are not specifically defined in the Workers' Compensation Act but in their ordinary and usual sense they mean going from one place to another. Larson's treatise on workers' compensation similarly refers to "traveling employees" as "employees whose work entails travel *away from the employer's premises*." 1A Larson Workmen's Compensation § 25.00 at 5-275 (italics added).

Claimant left the premises of her employment and drove away in her car. She was returning in her car when the accident occurred. She was "traveling" at the time of the accident and must therefore satisfy "the specific provisions of subparagraph (a) or (b)" of section 39-71-407(c), MCA, ***State Compensation Ins. Fund v. James,*** *257 Mont. 348, 352, 849 P.2d 187 (1992).*

4. Claimant was not furnished with transportation or reimbursed for costs of her travel. Subparagraph (a) of section 39-71-407(3), MCA, is not satisfied.

5. Thus, claimant must show that her errand was "required by the employer as part of . . . [her] job duties." § 39-71-407(3)(b), MCA. The Supreme Court has construed "part of" as 'equivalent to the phrase "in the course and scope of" employment from the previous common law.' ***James,*** *257 Mont. at 352.* There must be some causal connection between the injury and employment, ***Parker v. Glacier Park, Inc.****, 249 Mont. 225, 228, 815 P.2d 583 (1991),* and evidence that claimant "was attending to employment-related matters," ***Dale v. Trade Street, Inc.****, 258 Mont. 349, 355, 854 P.2d 828 (1993).*

In determining whether travel is "part of the employee's job duties," the pre-1987, four-part test adopted by ***Courser v. Darby School Dist. #1****, 214 Mont. 13, 16-17, 692 P.2d 417 (1984),* applies. ***Dale****, 258 Mont. at 355.* That test is:

(1) whether the activity was undertaken at the employer's request, (2) whether the employer directly or indirectly compelled the employee's attendance at the activity, (3) whether the employer controlled or participated in the activity, and (4) whether both employer and employee mutually benefitted from the employee's attendance at the activity.

Id. Ultimately, "there must be some identifiable benefit to the employer." ***Id.*** **(**citing ***Steffes v. 93 Leasing Co., 177 Mont. 83, 87-88, 580 P.2d 450, 453 (1978))*.**

The facts of the present case do not satisfy the ***Courser*** elements. While I have found that Handford was claimant's supervisor, I have also found that Handford did **not** (1) request claimant to undertake any errand, (2) direct or compel her to do so, or (3) control or participate in the errand. Neither Handford nor the Tacketts benefitted from the errand.

Thus, the errand was not undertaken as part of claimant's employment. While tragic, claimant's automobile accident is not compensable.

6. The claimant is not entitled to costs.

JUDGMENT

1. Claimant did not suffer an injury arising out of and in the course of her employment and is not entitled to compensation or medical benefits.

2. Claimant is not entitled to costs.

3. This JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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.

DATED in Helena, Montana, this 6th day of October, 1994.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Allan M. McGarvey
Mr. Charles G. Adams