

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 40

WCC No. 9311-6943

CRYSTAL TEMPEL

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE OF PITTSBURGH

Respondent/Insurer for

R.G.I.S. INVENTORY SPECIALISTS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in the above-entitled matter was held on Wednesday, February 16, 1994, in Helena, Montana. The Honorable Mike McCarter, Judge of the Workers' Compensation Court, presided. Petitioner, Crystal Tempel (claimant) was present and represented by her attorney, Mr. Thomas A. Budewitz. Respondent, National Union Fire Insurance of Pittsburgh, was represented by Mr. Oliver H. Goe.

A Pretrial Order was agreed to between the parties and adopted by this Court. As reflected herein, there were no uncontested facts. The parties proposed and this Court adopted the following issues for determination:

1. Whether Petitioner suffered a compensable industrial injury arising out of and in the course of her employment on January 28, 1993, while working for R.G.I.S. Inventory Specialists.
2. If Petitioner suffered an accident on January 28, 1993, arising out of and in the course of her employment with R.G.I.S. Inventory Specialists, were her subsequent medical expenses related to such accident.
3. Whether Petitioner is entitled to costs.

At the commencement of trial and consistent with the rules of the Court, the parties agreed and stipulated that the depositions of Crystal Tempel, Tom Tempel, Barb Tewmeyer, Patricia Hanon, and Dr. Finney were to be admitted into evidence and considered part of the

record. Exhibit Nos. 1 through 5 consisting of the medical reports and records of Dr. Wienert and Dr. Finney, St. Peter's Hospital and Dr. Gorsuch, as well as a summary of medical expenses were admitted into evidence without objection. Exhibit Nos. 6 through 10, including the diary of Crystal Tempel, the daily log of Patricia Hanon, the Employer's First Report, Report to Walt Kelly from Patricia Hanon, and an April 16, 1993 letter from ALEXSIS to Crystal Tempel were objected to by the claimant on the grounds of hearsay and relevance. Such objections were overruled and the exhibits were admitted into evidence. Crystal Tempel, Tom Tempel, Lorie Wallace and Patricia Hanon were all sworn and testified.

At the close of trial, and having had the opportunity to personally hear from all the witnesses and to review all relevant evidence including depositions, this Court entered a bench ruling for respondent finding that it did not believe Tempel's claim of a work-related accident occurring on January 28, 1993. The Court requested respondent to prepare proposed findings of fact consistent with the bench ruling. Having received and considered the proposed findings, this Court now enters the following Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. Claimant began working for R.G.I.S. Inventory Specialists, in October, 1992. R.G.I.S. is also known as "Marketing Force," and will be called by that name in the findings that follow.
2. Through its employees, Marketing Force sets up and stocks manufacturers' displays in retail stores throughout Montana and other states. Claimant's job was to set up and stock manufacturers' displays at various retailers in the Helena area.
3. At the time of claimant's initial employment by Marketing Force, she had a history of back problems. She had undergone a laminectomy in June of 1992.
4. Claimant alleges that on January 28, 1993, she suffered a further back injury while stocking a Muppet Babies display at the Helena K-Mart store. She testified that while working at K-Mart she reached overhead for a box and fell backwards; she immediately felt pain in her back and down into her leg. There were no witnesses.
5. On January 28, 1993, Marketing Force was insured by National Union Fire Insurance of Pittsburgh, which has responded to and defended against claimant's petition.
6. Resolution of this case requires the Court to judge the credibility of the witnesses who testified at trial. Having observed the witnesses and their demeanor, and considered the depositions submitted by the parties, I find that claimant and her witnesses were not credible.
7. At the time of her alleged injury, claimant's supervisor was Patricia Hanon (Hanon), who maintained regular telephone contact with her. Hanon testified at trial and I found her to be credible.

8. Claimant did not report any injury to K-Mart personnel or Hanon on January 28, 1993. She went to work the next day setting up a display at the Helena Wal-Mart store.

9. On February 4 or 5, 1993, claimant left a message on Hanon's answering machine stating that she was quitting as of that day.

10. On February 8, 1993, claimant and Hanon talked by telephone. They disagree as to what claimant said. According to claimant, she told Hanon that she hurt herself at work while lifting boxes. Hanon testified that claimant told her that she'd reinjured her back while on a family outing and said nothing about a work-related injury. I find Hanon more believable and adopt her version of the conversation.

11. Claimant did not notify Hanon of any work-related accident until February 20, 1993, when she left a message on Hanon's answering machine stating that she needed a workers' compensation claim form because she hurt her back on the job.

12. I find that no work-related accident occurred on January 28, 1993. In reaching this conclusion, I have considered not only the demeanor of the witnesses but also their stories. Claimant's story was particularly troublesome. She quit work before she saw a doctor. She testified that following the injury she was in a state of denial, didn't think the injury was serious, and didn't consider a workers' compensation claim. She didn't talk about going to a doctor until mid-February. However, according to Lorie Wallace, a friend who testified on claimant's behalf, on the evening of January 28, 1993, claimant said she had hurt her back at work and was thinking about quitting work. Meanwhile, on February 1, 1993, claimant was able to attend a three hour concert in Great Falls. Claimant also says she started a diary on February 4, 1993, to record matters connected to the injury, while at the same time claiming that she didn't believe she had a serious injury or that it was job related. Then, there are inconsistencies in her diary and not all entries were made contemporaneously; it was clear to the Court that the diary was prepared with this litigation in mind. After considering all things, the Court reached a firm conclusion that claimant was not telling the truth and that both the diary and the alleged conversation with Lorie Wallace were manufactured with this litigation in mind.

13. The further rationale stated by the Court at the end of trial is adopted by reference.

CONCLUSIONS OF LAW

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

2. Claimant must prove by a preponderance of credible evidence that she suffered an injury in the course and scope of her employment. ***Eastman v. Transport Ins. Co.*** 255 Mont. 262, 266, 843 P.2d 300 (1992). She has not sustained her burden.

3. Claimant is not entitled to either attorney fees or costs.

JUDGMENT

1. The Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. Claimant did not suffer an injury in the course and scope of her employment. Therefore, her petition is dismissed with prejudice.
3. Claimant is not entitled to an award of attorney fees or costs.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Pursuant to ARM 24.5.344, any request for rehearing or for amendment of the Court's decision shall be filed within 20 days.

DATED in Helena, Montana, this 22nd day of April, 1994.

(SEAL)

/s/ MikeMcCarter

JUDGE

c: Mr. Thomas A. Budewitz

Mr. Oliver H. Goe