

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 65

WCC No. 9704-7743

DENNIS VEZINA

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CONCRETE AND EXCAVATION, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant with history of knee and back work injuries, who worked only two days for employer, filed claim for compensation almost one year after the alleged injury. The employer and insurer disputed the occurrence of the alleged injury, which claimant said happened when he stepped in a pothole and his "leg kinda snapped."

Held: The Court was not persuaded an injury occurred. The injury was not witnessed and claimant himself was not a credible witness. His testimony was inconsistent and vague. In addition, the following mitigated against the occurrence of an injury: record of medical care indicate that claimant did not report a work injury, but a continuation of earlier problems; on a doctor's form asking for description of how accident occurred, claimant wrote "Wyo," evidently a reference to an earlier injury in Wyoming; claimant had in fact tried to have his medical bills covered under a claim related to the earlier Wyoming injury.

Topics:

Injury and Accident:Accident. Claimant with history of knee and back work injuries, who worked only two days for employer, filed claim for compensation almost one year after the alleged injury. The Court was not persuaded an injury occurred. The injury was not witnessed and claimant himself was not a credible witness. His testimony was inconsistent and vague. In addition, the following mitigated against the occurrence of an injury: record of medical care indicate that claimant did not report a work injury, but a continuation of earlier problems; on a

doctor's form asking for description of how accident occurred, claimant wrote "Wyo," evidently a reference to an earlier injury in Wyoming; claimant had in fact tried to have his medical bills covered under a claim related to the earlier Wyoming injury.

The trial in this matter was held on October 28, 1997, in Billings, Montana. Petitioner, Dennis Vezina (claimant), was present and represented by Mr. Brad L. Arndorfer. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams.

Exhibits: Exhibits 1 through 19 were admitted into evidence without objection.

Witnesses: The claimant, Dr. Robert S. Schultz, Robert Dolly and Rick Rigney testified at trial. In addition, the parties submitted the depositions of claimant, Dr. Robert S. Schultz, Rick Rigney and Robert Dolly to the Court for its consideration.

Issues: This case involves a disputed industrial accident which the claimant alleges occurred at the end of March or early April 1993 while he was employed by Concrete and Excavation, Inc. As phrased by the parties, the following issues are presented:

1. Whether the Petitioner suffered an injury on or around April 7, 199[3].
2. Whether the State Fund is liable for medical benefits related to surgery and other treatment to Petitioner's knee.
3. Whether the Petitioner is entitled to an award of attorney's fees and costs pursuant to § 39-71-611, MCA.
4. Whether the Petitioner is barred by Judicial Estoppel from obtaining the claimed relief.

(Pretrial Order at 3.)

* * * * *

Having considered the trial testimony, the demeanor and credibility of the witnesses, the exhibits, the depositions and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. The claimant is 39 years of age and resides in Billings, Montana.
2. On July 8, 1976, claimant suffered a significant injury to his right knee while working for a drilling company in Wyoming. (Ex. 11.) In February 1977 he underwent a meniscectomy⁽¹⁾ of the medial meniscus of his right knee. (*Id.*)
3. According to claimant, he thereafter returned to work in the oil fields and worked steadily until 1979, when he injured his back. (Claimant's Dep. at 24-26.) From 1979 to 1984, he

worked intermittently in the oil fields. (*Id.* at 26.) Between 1984 and 1993, claimant worked at a number of jobs. He was unemployed during some of that time and his testimony concerning his job history was vague, suggesting that his jobs during that time were intermittent and punctuated by unemployment. (*Id.* at 26-31.)

4. On March 31, 1993, claimant went to work as a laborer for Concrete and Excavation, Inc. (Concrete), in Billings, Montana. Although claimant testified that he worked for Concrete over three days, the employer's records show that he worked only two days -- March 31 and April 1. (Dolly Dep. Ex. 3.)

5. Claimant alleges and testified that on his last day of work for Concrete he stepped into a pothole and his right "leg kinda snapped." At the time of the alleged injury he was working on a curb and gutter project. He was working with several other workers, including his supervisor, Rick Rigney (Rigney), and Kelly Sanderson (Sanderson). He testified that he sat down for awhile, then continued working.

6. At the time of the alleged industrial accident, Concrete was insured by the State Fund. Claimant did not submit a written claim to the State Fund until almost a year later. The claim, which is Exhibit 12, was received by the State Fund on March 30, 1994. The claim listed the date of injury as "on or about April 7, 1993." Claimant listed two witnesses to the accident, Keith Carpenter (Carpenter) and Kelly Sanderson.

7. Bob Dolly (Dolly), who is the principal shareholder in Concrete, disputed the claim and contended that claimant did not injure himself on the job. The State Fund investigated the claim, taking statements from the claimant and Rigney, and contacting Dolly and the Billings Clinic, where claimant had subsequently undergone knee surgery. (Exs. 5, 7 & 8.) Rigney did not witness any accident and said neither claimant nor anyone else reported any accident to him while claimant was employed. (Ex. 5.)

8. The State Fund denied the claim and this litigation ultimately ensued.

9. The key issue in this case is claimant's credibility. His claim that an accident occurred rests solely on his own testimony. The lack of a witness to an accident is in itself neither unusual nor ordinarily noteworthy. However, the evidence presented at trial persuaded me that the claimant is not credible and the accident did not occur. My determination is based both on my observations of claimant's demeanor at trial and on the additional evidence recited in the findings that follow.

10. Claimant listed Carpenter as a witness to the accident and testified during direct examination that he thought Carpenter was his supervisor. In an April 28, 1994 interview, he stated that Carpenter gave him a ride to work, but during his deposition and at trial he changed his mind and testified that he believed it was Rigney who gave him the ride. While Carpenter had worked for Concrete in 1992, the payroll records for the company show that he did not work for Concrete at any time during 1993. Claimant offered no refutation of the

payroll records nor any explanation regarding his listing of Carpenter as a witness. While admitting that he knew Carpenter, on redirect examination he said he had Carpenter mixed up with Rigney. I did not find his explanation convincing.

11. Claimant testified at trial that on the way home the day of his industrial accident he told Rigney about the accident. Rigney disputed the testimony, testifying that he did not learn of the accident until Dolly told him later on that claimant had come to him and asserted he had been hurt on the job. Rigney was a credible witness.

12. On April 9, 1993, claimant sought medical care from Dr. Robert Schultz with respect to his knee. According to claimant, he told Dr. Schultz about the accident he alleges happened while working for Concrete. Dr. Schultz's records, however, do not reflect such fact, indicating rather that claimant told him that he had been having continual problems with his knee. Dr. Schultz recorded:

This is a 35 year old gentleman who has a history of being involved in an oil field injury in 1979. He apparently was in California at the time. He had a boom come down and strike his right knee. He was treated by a physician in Ventura, California, I believe with an open medial meniscectomy. Since that time he has had intermittent episodes of the knee giving out on him and swelling. These occur several times a week. They occur with any type of significant activity and are happening at work. He has almost a constant ache in the knee, recurrent effusions and a lot of pain along the medial joint area. He has not had any treatment recently for his knee. He also has a history of bilateral club-feet as a youngster and is status post multiple surgeries on both of them done at Primary Children's Hospital by Dr. Sherman Coleman. He is currently working as a concrete worker. He has significant difficulty doing that because of his right knee. He has been unable to participate in any sports since his original injury. He is otherwise reasonably healthy.

(Ex. 4.)

Dr. Schultz conceded it was possible that claimant could have told him of an accident and he failed to note it, but also testified that it was more probable that he would have noted any accident had he been told of one. Claimant on his part attempted to explain away the note, minimizing any knee difficulties prior to going to work for Concrete and testifying that he told Dr. Schultz that prior to his accident he only experienced minor swelling in his knee every 6 or 9 months.

13. Claimant also testified that while he is entitled to free medical care at an Indian health center, he went to Dr. Schultz because he knew he had suffered a workers' compensation injury and that his medical care would be covered.

14. While claimant's version of his visit with Dr. Schultz could be plausible, it flies in the face of a form he personally filled out at Dr. Schultz's office on April 9, 1993. The form is for

industrial accidents. There is a section on it which asks that the patient state in his or her "own words how the accident occurred and the part of the body injured." (Ex. 2 at 9.) Claimant wrote in "Wyo." Plainly, if he believed, as he testified at trial, that he went to Dr. Schultz because he knew he had suffered an industrial accident at Concrete, he would have responded that he had been injured while working at Concrete.

15. Dr. Schultz performed surgery on claimant's knee on April 15, 1993. Claimant testified in his deposition that he understood "from the git-go" that the medical bills for his surgery would be submitted to Montana workers' compensation. (Claimant Dep. at 66.) In fact, following his surgery the claimant submitted a request to the State of Wyoming asking that his 1974 Wyoming claim be reopened so that the Wyoming workers' compensation carrier would pay for the surgery. He secured an attorney to assist him in prosecuting his claim. At trial he testified that he had forgotten about the Wyoming proceeding but he then went on to testify that he recalled contacting a Wyoming attorney two weeks after his surgery and talking by telephone to his attorney on a half dozen occasions.

16. Dr. Schultz's medical testimony at his deposition and at trial, and his medical records of claimant, were consistent with a finding that claimant had a longstanding history of knee instability and pain as reported in Dr. Schultz's initial office note. Dr. Schultz found no evidence of any acute recent injury and testified that his underlying knee problem was due to the 1974 injury and the sequela from that injury. His testimony and medical records indicated that claimant's knee showed signs of long term degeneration, including a preexisting anterior cruciate tear and degenerative changes in the knee.

17. I find that claimant did not suffer any new injury or aggravation while working for Concrete and that, as reported by Dr. Schultz's initial medical note, he had for some time had problems with instability of his knee that got worse with time.

CONCLUSIONS OF LAW

1. The claimant bears the burden of proving by a preponderance of all the evidence that his knee condition was caused or materially aggravated by an accident occurring at work while employed by Concrete and Excavation, Inc. *Gerlach v. Champion Int'l*, 254 Mont. 137, 140, 836 P.2d 35, 37 (1992). He has failed to carry his burden. Indeed the evidence preponderates against his claim.

2. In light of its factual determination that no industrial accident occurred, the Court need not address the State Fund's contention that claimant is judicially estopped from pursuing his Montana claim.

3. Since claimant has not prevailed in this action, he is entitled to neither costs nor attorney fees.

JUDGMENT

1. The claimant did not suffer an industrial injury while working for Concrete and Excavation, Inc., and is not entitled to Montana Workers' Compensation benefits. His petition is **dismissed with prejudice**.

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

3. This JUDGMENT is certified as final for purposes of appeal.

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 21st day of November, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Brad L. Arndorfer

Mr. Charles G. Adams

Submitted: October 28, 1997

1. A meniscectomy is the "surgical excision [removal] of a meniscus of the knee" Medical Dictionary, Merriam-Webster, Incorporated. (1997 Ed.) [Online through www.medscape.com].