

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWECC 68

WCC No. 9603-7515

PHIL WALLING

Petitioner

vs.

ARGONAUT INSURANCE

Respondent/Insurer for

U.S. PIPELINE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 58-year old construction worker with a history of back pain claimed to have hurt his back when lifting the hood of a backhoe to check the oil. His wife and two friends testified he told them about the injury shortly after it happened. Two co-workers, both members of claimant's union and with no apparent grudge against claimant, denied that claimant told them of the alleged back injury, contradicting claimant's testimony.

Held: No injury occurred. WCC credited the two co-workers, who testified claimant mentioned a long history of back problems, but no work injury. Neither claimant, nor his witnesses, were credible.

Topics:

Injury and Accident: Accident. 58-year old construction worker with a history of back pain claimed to have hurt his back when lifting the hood of a backhoe to check the oil. WCC credited two co-workers, who testified claimant mentioned a long history of back problems, but no work injury. Neither claimant, nor his witnesses, were credible. Claim denied.

The trial in this matter was held in Great Falls, Montana, on October 7, 1996. Petitioner, Phil Walling (claimant), was present and represented by Mr. Torger S. Oaas. Respondent, Argonaut Insurance (Argonaut), was represented by Mr. Peter J. Stokstad.

Exhibits: Exhibits 1 through 3 and 6 through 10 were admitted at trial without objection by either party. There were no exhibits 4 and 5.

Witnesses and Depositions: Jack Styer, Kyle Carlisle, Leona Walling, Elizabeth Carrico, and claimant testified at trial. In addition the parties submitted depositions of Jerry Lubinsky, Dr. Jack D. Culley, Allen L. Collier, Jack Styer, Kyle Carlisle and Jerry Ramsey for the Court's consideration.

Issues Presented: Claimant alleges that on September 9, 1995, he suffered a compensable injury to his lower back while in the course and scope of his employment. He seeks temporary total disability benefits, attorney fees, costs and a penalty.

* * * * *

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

FINDINGS OF FACT

1. Claimant is 58 years old and resides in Lewistown, Montana.
2. Claimant has worked mostly in construction as a heavy equipment operator. He also has some work experience training race horses. He is a member of the Operating Engineers Union and has customarily obtained employment through the local unit of his union.
3. On or about September 7, 1995, claimant was hired through his local union hall by U.S. Pipeline. At the time of his hire, U.S. Pipeline was constructing a pipeline in northern Montana south of Shelby. The project was scheduled to last until November 1995.
4. Claimant was hired by U.S. Pipeline to work as an oiler. He was assigned to a backhoe and his job was to check the oil in the backhoe, add oil as necessary, and grease the backhoe as needed. At times during his employment he was also required to measure the depth of the ditch being dug by the backhoe and set stakes for the backhoe operator. Claimant did not operate the backhoe.
5. At the time of his hire, claimant was told that he was to work ten hours a day, six days a week.
6. Prior to his employment by U.S. Pipeline, claimant had worked very little in 1995. He worked for Empire Sand and Gravel in Billings for one week during the summer and had earlier worked for two weeks for a trucking company.
7. Claimant has a history of back problems antedating his employment by U.S. Pipeline. On April 28, 1982, he was involved in an automobile accident. For many months following that accident he complained of and was treated for low-back pain. (Ex. 9 at 9, 12, 16, 20.) In

1988 he was seen and treated for back problems. (Ex. 9 at 37-39.) He also admitted to a prior industrial accident involving a back injury. He received a settlement on account of that accident.

8. Claimant asserts, and testified at trial, that on the morning of Saturday, September 9, 1995, he injured his back while lifting the hood of the backhoe to check the oil. He conceded that the hood was not heavy but said that when lifting it he felt his back go out. At trial he characterized his injury as "freakish."

9. According to claimant, on the afternoon of September 9 he told Elizabeth Carrico, who was a fellow oiler assigned to a different backhoe, and Jerry Lubinsky, the operator of the backhoe to which claimant was assigned, that he hurt his back at work that morning. Claimant testified that he first told Carrico about his back injury and that it was very clear to him that she understood that he hurt it at work. He said that he talked to her for about 20 minutes and that she was very sympathetic. He testified that he told Lubinsky about the injury around quitting time.

10. Claimant also talked to the ditch foreman, Jerry Ramsey, later in the day on September 9. He had learned at lunch time that he was scheduled to work the next day, a Sunday. According to claimant, he then talked to Ramsey and told Ramsey that he needed Sunday off. Ramsey approved his request for time off. Claimant requested Sunday off because he had rented an apartment in Billings while working for Empire Sand and Gravel, and he needed to go to Billings to clean out the apartment and terminate the rental. He testified that he did **not** tell Ramsey of his injury during that conversation because he did not think his injury was serious.

11. To bolster his claim the claimant called three witnesses who testified that he reported his injury to them within a day or two of September 9.

12. Jack Styer, a long time friend of claimant, testified that claimant telephoned him on the evening of September 9, 1995, and told him (Styer) that he (claimant) had been hurt at work while lifting a hood. Styer further testified that claimant accompanied him to Billings on Sunday, September 10, 1995, and that the claimant was stiff and had trouble getting out of the car.

13. Kyle Carlisle, who is Styer's girlfriend and who has known claimant for many years, testified that she accompanied Styer and claimant to Billings on September 10. She further testified the claimant told Styer he hurt his back at work and that claimant had difficulty getting into the car and walked stiffly.

14. Claimant's wife, Leona Walling, was in California visiting her sister on the weekend of September 9-10, 1995, returning to Lewistown on Wednesday, September 13. She testified that claimant called her in California and reported that he had hurt his back lifting a hood and was trying to get an appointment to see a chiropractor.

15. Claimant testified that when he left work on Saturday he intended to call Virginia Olsen, D.C., a Lewistown chiropractor who had treated him previously, to obtain a treatment on Sunday, September 10. He believed he could then return to work on Monday, September 11. According to claimant, Dr. Olsen worked out of her home and he thought she would see him on a Sunday, however, upon returning home he learned that she had moved and was no longer practicing in Lewistown.

16. Claimant testified that on Monday, September 11, he called the office of Jack D. Culley, D.C., another chiropractor practicing in Lewistown, for an appointment but the earliest appointment he could obtain was for Wednesday, September 13.

17. In his direct testimony, the claimant testified that he called the U.S. Pipeline office on Monday, September 11, and told someone in the office that he would not be in to work that day. He further testified that he called the office a second time on Tuesday, September 12, and told someone, probably Allen Collier, the office manager, that he was not returning to work. (Collier Dep. at 10.) He testified that Collier already knew about his report of an accident and that Collier told him that U.S. Pipeline would not pay for chiropractic treatment because he was not hurt on the job but had hurt himself moving furniture.

18. On September 13, claimant went to see Dr. Culley. According to claimant, he told Dr. Culley that he had been hurt on the job. Dr. Culley's office note does not reflect any report by claimant of an on-the-job injury and Dr. Culley testified in his deposition that claimant never told him how he was hurt, only that he was hurt on September 9. (Ex. 1 and Culley Dep. at 7.)

19. In answer to questions from the Court, claimant testified that after seeing Dr. Culley he returned to Billings and stayed there for three weeks, living in the apartment which he had intended to move out of the previous Sunday, September 10. He said that he did not move his belongings out of the apartment on Sunday.

20. Claimant testified that prior to his going to work for U.S. Pipeline he had been training a race horse owned by Styer and that upon his going to work for U.S. Pipeline he had turned that job over to another individual. In answer to questions from the Court, he indicated that during the three weeks he spent in Billings subsequent to his alleged industrial accident, he took care of the horse.

21. Elizabeth Carrico testified at trial. She contradicted claimant's assertion that he had told her he was hurt at work. She testified that she and claimant were standing around conversing on the afternoon of September 9. She said that claimant told her he had a bad back, that his back was always bothering him, and that he had a standing appointment with a chiropractor on weekends. He told her that his back was bothering him and he needed to go to a chiropractor; he never mentioned any work-related incident.

22. Carrico further testified that U.S. Pipeline provided safety indoctrination on the first day of a new employee's work, stressing safety and the necessity of reporting any work-related injuries. Injuries were to be reported to the foreman, or if he was unavailable, to the equipment operator.

23. Lubinsky testified by deposition. He testified that on Saturday, September 9, Jerry Ramsey, the foreman, informed his crew that they would have to work on Sunday. After learning he was scheduled to work Sunday, claimant told Lubinsky that "he had some business to take care of because he'd been down in Billings or had an apartment down there and he had to have Sunday off." (Lubinsky Dep. at 7, 23-24.) Claimant also told Lubinsky that "he had a standing appointment with a chiropractor that he had to go and he wanted to get his back worked on before his back got sore on him and went out." (*Id.* at 12, 23-24.) Lubinsky testified that claimant did not tell him he injured his back when lifting the hood of the backhoe. He said that if the claimant had told him he had been injured on the job, he (Lubinsky) would have told Ramsey about it. (*Id.* at 13-14.)

24. Lubinsky was present when claimant asked Ramsey for Sunday off. (*Id.* at 11.) The conversation occurred between 3:00 and 4:00 p.m. (*Id.* at 12-13.) Ramsey turned to Lubinsky and asked him if he needed claimant to work with him on Sunday. Lubinsky answered in the negative. (*Id.*) Lubinsky did not recall claimant mentioning anything about his back. (*Id.* at 13-14.)

25. Lubinsky confirmed Carrico's testimony concerning U.S. Pipeline's emphasis on promptly reporting injuries. (*Id.* at 26.)

26. Lubinsky testified that when claimant left work on Saturday afternoon he took all his clothing with him, including spare, heavy clothing ordinarily left at the job site. (*Id.* at 15, 29.)

27. Allen Collier, the project office manager for U.S. Pipeline, testified by deposition. He testified that claimant called him twice, once on or about September 12 and again on September 20. (Collier Dep. at 9, 11, 45-46.) In the first call claimant told Collier that the job was hard, he was sore, and he was not coming back to work. (*Id.* at 10, 46.) During the second call claimant reported that he had been hurt on the job and said he had reported his injury to Lubinsky. (*Id.* at 11.) Collier had heard that claimant had been moving furniture or moving from one house to another, so he asked claimant if he might have hurt his back moving. (*Id.* at 13-14.) Claimant replied, "No." (*Id.*)

28. The alleged accident in this case was unwitnessed, but many accidents are unwitnessed; the lack of a corroborating witness in and of itself is insufficient to deny the claim in this matter. On the other hand, where there are facts and circumstances drawing a claimant's credibility into question, the Court must determine whether the claimant's report of an accident and injury is credible. After considering and weighing all of the

evidence in this case, including the demeanor of the witnesses, I have concluded that the claimant is not credible or truthful and that an accident did not in fact occur. My ultimate finding in this regard is based upon the following:

a. This is not a case in which a claimant has a sudden onset of back pain with no prior history of such pain.

b. According to two co-workers, on the day of the alleged accident, claimant told them that he had a bad back and had a standing weekend appointment with a chiropractor. He told neither of the co-workers about any accident. Both of the co-workers -- Carrico and Lubinsky -- were members of the same union as claimant. Neither was working for U.S. Pipeline at the time of their testimony. There was no evidence indicating that they talked to each other. There was no evidence that either had a grudge against claimant. In sum, there is no apparent reason for them to misrepresent or distort the substance of their conversations with claimant. If anything, one would expect their allegiance to be to their fellow employee and fellow union member.

c. I observed and listened to Carrico and found her to be a wholly credible witness. I believe her testimony concerning her conversation with claimant.

d. On the other hand, I did not find claimant to be a credible witness. His testimony that he did not tell his foreman about an injury on Saturday because he did not believe it to be serious did not ring true in light of his assertion that he specifically told both Lubinsky and Carrico about an accident. His return to Billings after his alleged injury and living there for an additional three weeks so he could take care of Styer's horse was troubling in light of his claim of near immobility the Sunday before and his intent to vacate the Billings apartment on that Sunday. Another trainer for the horse had been hired and no plausible explanation was offered as to why that trainer could not have continued to care for the horse. Carrico testified, and claimant agreed, that the job of oiler was not physically demanding, involving only an hour or two of actual work on some days. I was presented with no evidence which would persuade me that claimant was capable of taking care of a horse but incapable of performing the duties of an oiler.

e. I have also taken into consideration that claimant has had two prior back injuries. (With respect to the first injury, see Ex. 9 at 12, 21.) He received a settlement with regard to the second injury, which occurred on the job. His work history during the year prior to his alleged injury of September 9, 1995, was spotty at best, totally three weeks, and he was spending at least some of his time training horses. While I have no doubt that his back was bothering him in early September, I also note that he has

had experience in making claims and that his spotty employment provided him a motive to pass his back problems off on an allegedly new injury.

f. Styer was the most incredible witness of all. His testimony at trial was wholly inconsistent with his deposition testimony, which had been given a mere two weeks prior to trial. In his deposition Styer testified that he first learned of claimant's injury when he stopped by claimant's house on a Monday or Tuesday, on the way to his (Styer's) ranch. (Styer Dep. at 5.) He testified that he was surprised to see claimant home because he knew he had been working. (*Id.* at 5, 8.) He testified that he "didn't stay around there very long." (*Id.* at 6.) He testified that claimant said "he couldn't even sit in the pickup." (*Id.* at 7.) He testified that when he stopped by claimant's house "it wasn't on a weekend." (*Id.*) Styer was asked during his deposition what he did the weekend prior to the above events. He responded that he was probably in Billings at the horse races. When further questioned if claimant had gone with him that weekend, he replied, "No. He wasn't home, as far as I know." (*Id.* at 11.) He did not mention any call from claimant on Saturday night, September 9, 1995.

This testimony, of course, is at complete odds with testimony at trial. At trial he testified that claimant called him Saturday night and then went with him to Billings on Sunday. When asked on cross-examination why he had not mentioned claimant going with him to Billings, he replied that he did not think it important at the time. When asked by the Court whether he had talked to anyone about this case after the deposition, he testified that he had talked with his girlfriend, Kyle Carlisle, and claimant's wife, and that his memory was triggered by these conversations. As I stated in the first sentence of the previous paragraph, I found his testimony wholly incredible. His "new" memories following conversations with claimant's other two witnesses suggests to me that the witnesses collaborated in preparing their trial testimony.

g. Carlisle also was not credible. While her trial testimony was not as blatantly inconsistent with her deposition as was Styer's, nonetheless she did not make the same disclosures in her deposition as at trial. In her deposition she testified that she and Styer just happened to visit claimant at his house but she could not remember the exact date. (Carlisle Dep. at 4.) She further stated that she thought that it was some time in August of 1995 and that it was at that time claimant said that he had hurt his back working on the pipeline. (*Id.* at 5.) She did testify that claimant went to Billings with her and Styer near the time of claimant's alleged injury, but did not say that it was on the day she and Styer had stopped by claimant's house. (*Id.* at 6.) In contrast, at trial she specifically testified that she learned of claimant's injury when she and Styer stopped by claimant's house to pick him up for the trip to Billings.

h. All of claimant's witnesses had a personal connection to him. Styer has known claimant since high school and considers him a good friend. Carlisle is Styer's girlfriend and has

been friends with claimant and his wife for seven or eight years. Leona Walling has a personal stake in the outcome of this trial. On the other hand, the witnesses who were adverse to claimant have no personal connection to this trial and the Court was not provided with any evidence of their bias against claimant

i. I do not believe claimant's testimony that he reported the accident to Dr. Culley. It is the type of thing that would be routinely recorded by a chiropractor if for no other reason than for payment purposes. Dr. Culley's office note does not mention any industrial accident. Moreover, Dr. Culley testified that claimant did not report an accident.

29. U.S. Pipeline's insurer, Argonaut, denied liability for the claim. Argonaut's denial was reasonable.

CONCLUSIONS OF LAW

1. The claimant has the burden of proving that he sustained an injury and that the injury occurred in the course and scope of his employment. *Gerlach v. Champion International*, 254 Mont. 137, 836 P.2d 35 (1992). He must also prove by a preponderance of the evidence that a causal connection exists between the injury and his current condition. *Brown v. Ament*, 231 Mont. 158, 752 P.2d 171 (1988).

2. Claimant has failed to carry his burden. I am not persuaded that claimant injured his lower back on September 9, 1995, while working as an oiler for U.S. Pipeline. I do not believe his testimony that he felt his back go out while lifting a hood on a backhoe.

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

4. Claimant is not entitled to costs.

JUDGMENT

1. Claimant did not suffer an industrial injury on September 9, 1995, and is not entitled to workers' compensation benefits.

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

3. This JUDGMENT 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 28th day of October, 1996.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Torger S. Oaas
Mr. Peter J. Stokstad