

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 7

WCC No. 9509-7385

JACQUI WALLS

Petitioner

vs.

TRAVELERS INDEMNITY COMPANY

Respondent/Insurer for

BMC WEST/POULSEN'S INCORPORATED

A Montana Corporation

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 42-year old cashier claimed hurting her back while carrying a lawn ornament to a customer's car. The customer and other witnesses contradicted claimant's testimony.

Held: WCC did not credit testimony of claimant, but credited testimony of others indicating she did not injure her back at work.

Topics:

Injury and Accident: Accident. WCC did not credit testimony of 42-year old cashier that she injure her back carrying a lawn ornament to a customer's car. Several witnesses gave testimony contradicting that of claimant.

The trial in this matter was held on January 10, 1996, in Great Falls, Montana. Petitioner, Jacqui Walls (claimant), was present and represented by Mr. Jeff R. Lynch. Respondent, Travelers Indemnity Company, was represented by Mr. Kirk D. Evenson.

Exhibits 1 through 4 and 6 through 8 were admitted without objection. Exhibit 5 was admitted for the limited purpose of showing the disciplinary notices given to claimant by her employer prior to her report of an industrial injury. Claimant, Carol LaRocque, Zane Carter, Chase Walls, Linda Wilson, Vince Miranti, Van Crowe, Dennis Olson, Robert Bradley and Roxanne Dane were sworn and testified. Additionally, the depositions of claimant, Van Crowe, Vincent Miranti and Chase Walls were submitted for the Court's consideration.

Issues presented: The claimant seeks a determination that on June 2, 1994, she suffered a back injury in the course and scope of her employment and that she is, therefore, entitled to benefits under the Workers' Compensation Act. At this time, the parties seek only a determination of liability; the Court is not asked to determine what amount of benefits are due if the claimant's condition is found to be compensable.

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

FINDINGS OF FACT

1. Claimant is 42 years old. She has resided in Great Falls, Montana most of her adult life. She has a 20 year old son, Chase Walls, who testified on her behalf.
2. Claimant began working as a cashier for BMC West/Poulsen's, Inc., on October 4, 1993. With the exception of a short period of time when she answered phones, claimant worked as a cashier. Her job duties included ringing up sales, doing paperwork, dealing with returned items, and cleaning when things were slow.
3. Claimant was primarily stationed at the cashier's stand. She occasionally left the cashier's station to retrieve invoices and, rarely, to assist customers in finding merchandise.
4. At approximately 11:30 a.m., on June 2, 1994, a customer, Linda Wilson, requested claimant's assistance in purchasing a lawn ornament. The lawn ornament was a fish cast in concrete. Claimant estimated that it was 30 inches long, 12 inches high at the mouth, 24 inches high at the tail, and weighed approximately 45 pounds. Wilson testified the fish weighed approximately 20 pounds. The fish was bowed downward in the middle, looking like a lop-sided "U" due to the differing heights of the mouth and tail.
5. Poulsen's employs stock clerks (stockers) and floor sales persons to assist customers in locating merchandise and transporting it to the cashier's stand and ultimately to customers' vehicles. However, no sales person or stocker was available when Wilson requested assistance. Claimant agreed to help her and accompanied her to the display where the statue was located.
6. Claimant testified that she grasped the fish under the head and tail, and lifted it without using her legs. She further testified that she felt a burning, tearing feeling in her lower back as she did so, and that, with shaking legs, she carried it over to the register and set it down on the counter. She then rang up the sale.
7. There was conflicting testimony concerning who took the ornament to Wilson's car. Wilson testified that claimant put it in a cart and accompanied her to the parking lot, where she picked up the ornament and put it in Wilson's car. Dennis Olson, a stocker, testified

that he performed those tasks. Olson is the son of claimant's foster sister and has known claimant all of his life. He testified that claimant is "like an aunt" to him. I have considered his relationship with claimant in evaluating his testimony. However, I do not believe that he was intentionally fabricating this testimony. Wilson specifically recalled claimant's assistance in the store but she may be mistaken as to who assisted her in transporting the ornament from the store to the car. On the other hand, Wilson was a credible witness and I do not believe that she was intentionally untruthful in her testimony. It is possible that Olson learned about the incident from claimant and that his memory of his participation is inaccurate. Resolving this particular conflict in testimony is not central to my decision.

8. The claimant testified both at trial and in her deposition that she must have either appeared in pain or made some kind of noise indicative of pain because Wilson asked her if she was okay. (J. Walls Dep. at 34.) The claimant testified that she told Wilson she must have pulled a muscle.

9. Wilson testified that she remembered claimant accompanying her to the lawn ornament display, picking up the fish ornament and carrying it to the cashier's stand. She testified that she asked claimant if she needed assistance and that claimant responded she did not. She further testified that she was standing within five feet of claimant when claimant picked up the ornament and that claimant did not say anything or display any pain behavior. Finally, she denied claimant telling her that she had pulled a muscle and said that claimant did not appear hurt.

10. Claimant also testified that prior to her leaving work on June 2nd, she told several other Poulsen's employees, including Olson, that she had pulled a muscle lifting the ornament. (J. Walls Dep. at 18.)

11. Olson recalled claimant telling him of the alleged incident **but not until the next day, June 3, 1994.**

12. In her deposition claimant testified that she called her doctor, Dr. Dietrich, probably around 3:00 p.m. on the day of the injury. (J. Walls Dep. at 24-25.) According to claimant, she spoke to the doctor's receptionist and told her that she had hurt her back. (*Id.*) She characterized herself as being "really upset" at the time. (*Id.* at 24.) Finally, she said that "they didn't get me in to see him until June 10th." (*Id.* at 25.)

13. Dr. Dietrich had previously treated claimant and we have his office notes dating back to April 28, 1994. The first note of any back injury was on June 8, 1994. The note for that date refers to a telephone conversation with claimant wherein she indicated that she had "pulled her back lifting a lawn statue." (Ex. 3 at 1.) The note further reflects Dr. Dietrich calling in a prescription for Toradol for claimant. He then notes, "**If she is not better in a few days, we should set up an app[oin]tmen[t] for her.**" (*Id.*) Dr. Dietrich's notes also

reflect other telephone contacts with claimant. Dr. Dietrich thereafter examined claimant on June 10, 1994. (Ex. 3 at 2.)

14. At approximately 4:30 p.m. on June 2, 1994, Van Crowe, sales manager of Poulsen's, requested claimant to come to his office to discuss her employment. Claimant had previously been issued warnings for substandard work. (Ex. 5 at 2, 4.) Crowe testified that during the June 2, 1994 meeting he discussed claimant's job performance with her and offered her two options -- either resign with two weeks pay or be placed on probation for 30 days. Claimant told Crowe she would like to think about the options overnight. Crowe testified that at the end of their meeting claimant told him, "Oh by the way, I hurt my back this morning carrying a heavy object for a customer." (Crowe Dep. at 27.) According to Crowe, while those may not have been her exact words, the quoted sentence reflects the substance and tenor of her statement to him.

15. Claimant testified that at the meeting with Crowe she was fidgeting in her seat and that he asked her what was wrong. According to claimant, she told him that she thought she had pulled a muscle. Claimant testified that she told him about her injury prior to the discussion about her employment options.

16. While claimant testified that she told a number of other Poulsen employees of her injury prior to leaving, none of those other people testified. Thus, no witness corroborated her testimony concerning the statements she claimed she made prior to meeting with Crowe on the day of the alleged incident, while two witnesses refuted her testimony.

17. Claimant testified that after work on June 2, 1994, she told several other people about her alleged injury. She identified Zane Carter, a boy friend with whom she had been living, Emma Olson, her foster sister, Chase Walls, and Carol LaRocque, a friend, as people she told on that evening or later on. All of these individuals with the exception of Olson testified at trial and corroborated her testimony.

18. Vince Miranti, a former salesman at Poulsen's, testified that around June 8, 9 or 10, 1994, he was at work at Poulsen's and noticed that claimant appeared to be in pain as she walked up an aisle in the store. He asked her what had happened and she told him she had hurt her back while moving. She did not say anything about hurting her back while at work or while lifting the fish ornament.

19. Claimant ceased working on June 13, 1994. Although she attempted a return to work in September 1994, her attempt was unsuccessful.

20. Claimant testified that although she made her decision to move from Carter's residence at the end of May 1994, in fact she did not start moving out until **after** June 2, 1994. She dated the start of her move as June 5, 1994, when she moved some of her effects to LaRocque's residence. The move took several days. Claimant's son testified that he and

a friend moved furniture and boxes at the end of June, and LaRocque and Carter confirmed that items were being moved after June 2, 1994.

21. Crowe testified that prior to June 2, 1994, he was aware that claimant was in the process of moving from Carter's residence. He could not recall a specific conversation whereby he learned about the move. However, he was reasonably certain claimant or Carter told him about the move. He thought it most likely that he learned of the move when he questioned claimant about Carter's use of her discount purchase privilege at Poulsen's. (Crowe Dep. at 30-33.)

22. After considering all of the testimony, especially the testimony recited in these findings of fact, and considering the demeanor of the witnesses, I find the testimony of Wilson, Crowe, Miranti and Dennis Olson credible and do not believe that claimant hurt her back at work. According to claimant, her alleged injury was witnessed by Wilson. Wilson, however, testified credibly that she saw no sign of any injury and that claimant did not report any injury to her. Claimant asserted that she told numerous people of her injury prior to her 4:30 p.m. meeting with Crowe but did not call a single witness who could verify her assertion. Olson, who has a close relationship with claimant, recalled claimant telling him of the incident the *next* day. Claimant's assertion that she called Dr. Dietrich's office at 3:00 p.m. on the day of her alleged injury did not ring true in light of the doctor's notes indicating that she did not call him until June 8th and that at that time he contemplated seeing her only if the medication he prescribed by telephone did not alleviate her symptoms. I find Crowe's testimony concerning his 4:30 p.m. meeting with claimant and his awareness that claimant was moving to be credible and convincing. Miranti's testimony that claimant told him that she hurt her back while "moving" was also credible and convincing. While "moving" could refer to "moving the ornament," I find such explanation of her statement to be implausible, especially in light of claimant's assertion that she hurt her back when "lifting" the ornament. Finally, the testimony of claimant's witnesses did not persuade me that claimant injured herself at work. Claimant told those witnesses of the alleged accident **after** she had been placed on probation and **after** she had already staked out a claim for a work-related injury. While their testimony about the move occurring after June 2nd was credible, claimant moved her furniture and effects over several days and I am persuaded that she in fact commenced moving things out of Carter's residence at the end of May when she admittedly made her decision to move.

23. Since I find that claimant did not injure her back at work on June 2, 1994, it is unnecessary to recite and evaluate the medical evidence.

CONCLUSIONS OF LAW

1. A workers' compensation insurer is liable only for injuries "arising out of and in the course of employment." § 39-71-407(1), MCA.

2. The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 484, 512 P.2d 1304, 1313 (1973). She must therefore establish that her condition arose from an injury which she suffered in the course of her employment.

3. Claimant failed to carry her burden. As I have found, she did not injure her back at work as she claims.

4. Since claimant did not suffer a work-related injury, she is not entitled to compensation or medical benefits or to attorneys fees and costs.

JUDGMENT

1. Claimant did not suffer a work-related injury on June 2, 1994, and is not entitled to compensation or medical benefits.

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

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 17th day of January, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Jeff R. Lynch

Mr. Kirk D. Evenson

Submitted: January 10, 1996