

IN THE WORKERS COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 70

WCC No. 2002-0642

KEVIN ALLEN

Petitioner

vs.

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

a/k/a TRAVELERS PROPERTY CASUALTY

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant alleges he suffers from a shoulder impingement syndrome as a result of a work-related lifting incident. Based on a coworkers testimony disputing the claimants version of the lifting incident and claimants outside lifting activities, the insurer denied liability.

Held: Based on the Courts assessment of the witnesses credibility, the timing of medical treatment, the claimants consistent reports of a work-related injury, and the treating physicians finding that the claimants condition is consistent with the mechanism of injury reported by claimant, the Court finds that the claimant was injured as he alleges.

Topics:

Witnesses: Credibility. Despite contradictory testimony of a coworker, the Court finds claimants report of an industrial accident credible where his description is generally supported by another coworker. His shoulder condition arose shortly after the alleged incident. On the date of the first medical treatment a week later, and consistently thereafter, the claimant consistently attributed his shoulder pain to the incident.

¶11 The trial in this matter was held on October 31, 2003, in Missoula, Montana. Petitioner, Kevin Allen, was present and represented by Mr. Randy J. Cox and Ms. Natasha Prinzing Jones. Respondent, Travelers Indemnity Company of Connecticut (Travelers), was represented by Mr. Charles G. Adams.

¶12 Exhibits: Exhibits 1 through 6 were admitted without objection. Exhibits 7 and 9 were admitted over objections. Exhibit 8 was withdrawn.

¶13 Witnesses and Depositions: Kevin Allen, Karen Stephan, Roberta Douglas, Tim Supola, and Julie Hurd testified. In addition the parties submitted the depositions of Kevin Allen and Dr. Mark Rotar for the Courts consideration.

¶14 Issues Presented: The issues as set forth in the Pretrial Order are:

4a. Whether Petitioner suffered an industrial injury arising out of and in the course and scope of his employment on July 30, 2001, while employed by Homes America.

4b. Whether Respondent is liable for benefits under the Workers Compensation Act?

4c. Whether Respondents conduct has been unreasonable so as to warrant the award of attorney fees and costs and assessment of a penalty.

(Pretrial Order at 2.)

¶15 Bench Ruling: At the conclusion of trial the Court found as a matter of fact that the claimant suffered an industrial injury as alleged and that Travelers is liable for benefits on account of the injury. However, based on the conflicting stories of witnesses, I also held that the insurer acted reasonably in denying benefits. I therefore denied attorney fees and a penalty.

¶16 The present findings of fact, conclusions of law and judgment affirm and, to a limited extent, amplify my bench ruling.

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

FINDINGS OF FACT

¶18 Claimant was employed by Homes America in Missoula, Montana, from April 9, 2001 to August 1, 2003.

¶19 On July 30, 2001, claimant worked from 5:00 p.m. to 7:00 p.m. While at work on that date, claimant and Julie Hurd (Julie), who was a coworker, moved a dresser in one of the model homes at Homes America. The task was within the scope and course of their employment.

¶10 According to claimant, he grabbed the bottom of the dresser with his left hand and twisted his shoulder when Julie let go of the dresser. He felt a pull in his shoulder.

¶11 Claimant initially thought he had merely pulled a muscle in his shoulder. However, his shoulder became more painful and on August 6, 2001, he sought care from Dr. Don R. Butler, a chiropractor.

¶12 Subsequently, claimant was diagnosed by Dr. Mark Rotar, an orthopedic surgeon, as suffering from impingement syndrome of his left shoulder. Dr. Rotar has to date treated claimant conservatively, prescribing physical therapy and at least one injection of steroid and novacain medication. Claimants shoulder pain has not resolved and in his deposition, Dr. Rotar testified that he now recommends shoulder surgery.

¶13 Based on claimants report concerning the July 30th incident, and the mechanism of the injury described by claimant, Dr. Rotar causally related claimants impingement syndrome to the July 30th incident.

¶14 On July 30, 2001, Homes America was insured by Travelers.

¶15 Claimant submitted a claim for compensation with respect to his shoulder. Travelers denied the claim.

¶16 At trial Travelers presented testimony by Roberta Douglas (Roberta), who was present at the time of the alleged injury. She contradicted claimants description of how he and Julie were moving the dresser, thus raising doubts as to whether the incident described by claimant occurred. However, Julie also testified. While she was unaware at the time that claimant suffered an injury, her testimony contradicted that of Roberta and generally supported claimants description of what occurred.

¶17 I found claimants and Julies testimony the more credible.

¶18 Travelers also presented testimony concerning claimants non-work activities, specifically his work in building a retaining wall at home. The evidence was presented to raise the possibility that claimant might have injured his shoulder lifting the blocks used in building the wall. However, there was no evidence that claimant in fact was injured while building the wall.

¶19 Moreover, claimants first report of shoulder problems was on August 6, 2001, one week after the July 30th incident. In answering a questionnaire at Dr. Butlers office, he reported he suffered a shoulder strain on July 30th at work.

¶20 I find as a matter of fact that claimant suffered a shoulder strain, subsequently diagnosed as shoulder impingement syndrome, at work on July 30, 2001, as he claims.

¶21 However, in view of the testimony by Roberta, I further find that Travelers did not act unreasonably in denying the claim. If her testimony were believed, the incident described by claimant did not occur. The case is therefore one requiring an assessment of credibility of the witnesses present at the time of the alleged industrial accident. The evidence at trial did not provide a basis for concluding that Travelers was unreasonable in crediting Robertas version of events.

CONCLUSIONS OF LAW

¶22 This case is governed by the 2001 version of the Montana Workers Compensation Act since that was the law in effect at the time of the claimants industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶23 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). He has satisfied that burden since he has persuaded me that he suffers from shoulder impingement syndrome caused by a July 30, 2001 incident at work.

¶24 Travelers did not act unreasonably in denying the claim made in this case. Since an award of attorney fees and imposition of a penalty requires a finding of unreasonableness on the part of the insurer, ¶¶ 39-71-611, -2907, MCA (2001), claimant is entitled to neither.

JUDGMENT

¶25 On July 30, 2001, the claimant suffered an industrial injury to his left shoulder in a work-related incident. Travelers is liable for his injury and shoulder impingement syndrome and shall pay appropriate compensation and medical benefits. The parties should be able to determine the amounts due. The Court reserves continuing jurisdiction to determine the amounts in the event they are unable to do so.

¶26 Claimant is not entitled to a penalty or attorney fees.

¶27 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶28 This JUDGMENT is certified as final for purposes of appeal.

¶29 Any party to this dispute may have twenty 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 December 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Natasha Prinzing Jones

Mr. Randy J. Cox

Mr. Charles G. Adams

Submitted: October 31, 2003

Attachment: Copy of Bench Ruling