

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 35

WCC No. 2000-0033

TONY BAKER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

R & R DIESEL REPAIR, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant alleged he suffered shoulder injury at work which he reported to his employer (his uncle and other family members). Record disclosed that claimant did have shoulder problem, but claimant's report of injury was contradicted by testimony of employer witnesses and by logs claimant kept. Claimant himself was not a credible witness.

Held: Claimant did not prove either that he was injured at work or that he reported work injury to employer.

Topics:

Injury and Accident: Accident. Where claimant's testimony was contradicted by other witnesses and logs kept in employment, and claimant himself was not a credible witness, he failed to convince the WCC he had suffered an injury at work.

Claims: Notice to Employer or Insurer. Where claimant's testimony was contradicted by other witnesses and logs kept in employment, and claimant himself was not a credible witness, he failed to convince the WCC he had reported a work injury to the employer.

Limitations Periods: Notice to Employer. Where claimant's testimony was contradicted by other witnesses and logs kept in employment, and claimant himself was not a credible witness, he failed to convince the WCC he had reported a work injury to the employer.

¶1 The trial in this matter was held on May 10, 2000, in Helena, Montana. Petitioner, Tony Baker (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent, State Compensation Insurance Fund, was represented by Mr. Charles G. Adams. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 16 were admitted without objection.

¶3 Witnesses and Depositions: The depositions of claimant, Richard Proul, Richard "Bud" Proul, Patricia Proul, and Yvonne Hufford were received for consideration by the Court. Those same individuals, as well as Terry Lewis, were sworn and testified at trial.

¶4 Issues: The issues stated in the Pretrial Order are as follows:

1. Whether the Petitioner suffered an industrial injury on May 17, 1997 arising out of and in the course of his employment with employer.

2. Whether the Petitioner properly reported an injury to his Employer as required by § 39-71-603, MCA.

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

FINDINGS OF FACT

¶6 In 1992 claimant began working as an auto and truck mechanic for R & R Diesel, which does repair work on trucks and automobiles.

¶7 R & R Diesel is a family business in its 22nd year of operation. Richard "Bud" Proul (Bud) is one of the owners and oversees all work. He is claimant's uncle. Pat Proul (Pat) is Bud's wife and works as a secretary for the business. Richard Proul (Richard) and Yvonne Hufford (Yvonne), Bud's and Pat's children, both work at the company. Richard is a foreman and Yvonne works in the office.

¶8 Initially, there is no question that claimant suffered a shoulder injury some time prior to May 28, 1997. Medical records show that he sought treatment for his right shoulder on May 28, 1997, at the Indian Alliance Clinic. (Ex. 8 at 1.) Dr. C. O'Connor recorded, "The patient injured his right shoulder **again** when a drive shaft fell on it about a week ago." (Ex. 8 at 2; emphasis added.) The "again" part of the statement suggests he had previously injured his shoulder but the Court has received no evidence with respect to any earlier injury. The clinic record and Dr. O'Connor's note contain no information indicating where claimant was injured.

¶9 Claimant continued to experience right shoulder pain and was ultimately referred to Dr. Kenneth Carpenter, an orthopedic surgeon, who diagnosed a rotator cuff tear of the right

shoulder. (Ex. 9 at 1.) On March 31, 1998, Dr. Carpenter surgically repaired claimant's right rotator cuff and did a "[d]istal clavicle resection." (Ex. 7 at 6.)

¶10 Claimant alleges in this action that he injured his shoulder at work on May 17, 1997. He claims that a drive shaft fell on him.

¶11 Claimant did not initially pursue a workers' compensation claim. During his deposition, he testified that he submitted claims for his medical care under his regular health insurance policy. According to claimant, he was covered under a policy of his girlfriend Jackie Downey (Jackie).

¶12 Claimant indicated that he submitted medical bills to his healthcare insurer because of statements by Bud, who talked about the "old days where you just toughed it out" and said he didn't "like people that went in and filed claims for workman's comp because he said they was [sic] freeloaders just trying to get money." (Baker Dep. at 12.)

¶13 The healthcare insurer denied benefits after claimant indicated his shoulder condition was the result of a work-related injury.

¶14 In February of 1998 claimant's girl friend, Jackie, went to the office at R & R Diesel and presented a First Report of Occupational Injury or Occupational Disease form. (Ex. 6; Baker Dep. at 14-16; Ex. 1.) Pat was there and testified that this was the first time she heard of an injury to claimant's shoulder. Yvonne testified that Jackie "came in with the claim and said, 'Sign this.'" (Hufford Dep. at 7.) Pat testified that most of the form was already completed, but she inserted information about the employer and signed it as Jackie requested. Pat checked the box on the form stating that the employer had reason to dispute the injury.

¶15 Claimant signed the form, but was not sure who filled it out.⁽⁴⁾ He testified that it was already completed when he signed it. (Baker Dep. at 14-16; Ex. 6.)

¶16 The claim form in question states:

Tony was working on a Mack Log truck when he went to put pull a drive shaft of [sic] and it dropped on his right shoulder.

(Ex. 6.) For the date and time of injury, "**7/15/97**" and "**10:05 a.m.**" were filled in. (*Id.*, emphasis added.)

¶17 On February 27, 1998, Susan Amicucci (Amicucci), who is a claims adjuster for the State Fund, interviewed claimant. (Ex. 12.) Claimant reported:

TB: Well, it was **the third week of July**. And I was working on various big trucks that came in. I was working on R & R Diesel's Kenworth. I was working on a Dick Irving trailer. And a **white Mack log truck**. We put a transmission in the Mack log truck. And, the rear U-Joint that goes from the transmission and the main drive shaft, the longest one that goes from the transmission to the rear end was bad. So my boss, Bud, informed me to pull the drive

shaft to replace the U-Joint. And this is done by removing the lock plate, bending the lock plate flat and taking out the lock bolt. Then you pull the end caps off the U-Joint. Well, I was laying on my back because it was too low from my creeper. So I was laying on my back on the floor and I reached up to pull the caps, I got the caps and the locks off and I rolled over to set the locks and the caps down on the ground like I do every other million times I've done this, and I rolled back over to slip the drive shafts off and just as I rolled over the drive shaft slipped out from the yolk [sic] and fell and struck me in the right shoulder in the center of the right shoulder. And it drove me to the ground. And I crawled out from underneath there grabbing my shoulder and I went in and informed the boss what happened. He was standing there watching and he said that looked like that hurt. Like, you know, I mean he's my uncle so that's what he normally says when I get hurt. You know, that looked like that hurt.

SA: Bud's your uncle?

TB: Yes he is.

SA: O.K.

TB: And uh, then I went into the office and informed them what happened and it never got any better, started getting worse so I went to . .

SA: O.K. Just a sec. Can I interrupt you for a minute Tony? Can you tell me was, did Bud actually see the accident occur then?

TB: He was in the vicinity, he heard the drive shaft hit the ground. He was in the vicinity, yes, he was the closest one of the bunch.

(Ex. 12 at 1-2, emphasis added.)

¶18 Claimant told Amicucci that he recorded the injury in "this little book that they give me that I write down what I do during that day and that course of time." (Ex. 12 at 9.) At deposition he identified a page from his time book which includes the handwritten entry, "Hurt Arm Shop" next to the handwritten date "7/15/97." (Ex. 10; Baker Dep. Ex. 3; Baker Dep. at 21.) At deposition he explained:

Q. When did you write that entry in there where it says, "hurt arm shop"?

A. Well, if I wrote it in here, it was probably the same day.

Q. And this is the shoulder injury you're talking about?

A. It could have been.

Q. It could have been. Okay. Have you had any other shoulder injuries at all?

A. No, I haven't.

Q. So you just had the one injury that resulted in surgery?

A. Yes.

(*Id.* at 22.)

¶19 Yvonne pulled work orders and time cards in the attempt to verify that claimant worked on a "Mack log truck." Work orders kept by R & R Diesel show both the work performed and the employee performing the work on a particular auto or truck. (Ex. 13.) Time cards for individual employees show the time worked by the employee on each work order and identify the work order by its work order number. (See Ex. 11 at 12-14.) Yvonne reviewed claimant's time cards for the entire week of July 15, 1997, and work orders for that time period. She found no reference to any work on a Mack logging truck. Bud forwarded the information to the Department of Labor and Industry, writing:

I have reason to question this claim, for one reason is he never informed me of this injury, & secondly we went back over his time cards & on the date he says he had this accident he never worked on a Mack log truck or worked on a drive shaft. Attached is the four pay periods preceding the injury, & the third reason is after he gets done working here, he goes to his garage he rents & works on other peoples [sic] vehicles.

(Ex. 16.)

¶20 Claimant then changed his mind about the date of the alleged accident. The Petition for Hearing alleges "that the Employer's First Report indicates, in error, an accident date of July 15, 1997. The correct date of the accident was May 17, 1997." (Petition for Hearing ¶ 3.)

¶21 At deposition, claimant was asked why he first reported the injury as occurring July 15. He testified: "I worked on fifteen, sixteen things a day. The days melt into weeks. I'm usually pretty busy. The only way I can keep track of my time is in my book." (Baker Dep. at 16-17.) His testimony was unconvincing. According to his own time book, he injured himself on July 15, 1997.

¶22 Yvonne checked claimant's time cards for the week before and after May 17, 1997, but again located no paperwork for a white Mack log truck. (Ex. 11 at 1-11.)

¶23 Claimant's time book did not reflect work on a Mack truck. (Ex. 3; Baker Dep. at 17-18; Baker Dep. Ex. 2.) However, at deposition, claimant tried to explain away the lack of an entry by testifying that it was an "after hour job":

A. Well, it was an after-hour job, so it ain't written down.

Q. So it doesn't show up here?

A. No, it don't.

Q. Because it was after hours?

A. Yes. It would be between the 16th to the 17th.

Q. Between the 16th and 17th?

A. Yeah, it was more likely the 17th on account of I was working on an American Gem truck, pulling a drive shaft, and a log truck pulled up, and Richie informed me to pull the rear U-joint.

Q. Okay. And whose log truck was this?

A. Terry Lewis'.

Q. Terry Lewis is who?

A. He's a logger, one of Richie's customers.

Q. Is he a friend of yours, or an acquaintance?

A. No.

Q. How much time did you spend working on Terry Lewis' log truck?

A. Ten, fifteen minutes.

Q. That was it?

A. That was it.

Q. What time was it?

A. It was after 5:00.

Q. 7:00, 5:30, 6:00?

A. Probably between 5:30 and 6:00.

Q. Who else was around at the time?

A. Well, everybody else was gone. It was me and Richie.

Q. Just the two of you?

A. Yes.

Q. They were the only ones around?

A. Yes.

Q. When did you report this injury?

A. It was - Do you mean report it report it on a paper, or tell them what happened?

Q. Tell anybody what happened?

A. That would be the next day, or I might have mentioned it to Richie that night.

Q. Bud wasn't there that night?

A. Bud was there from 3:30 to 5:00 when I was working on the American Gem truck.

Q. But he wasn't there when this happened?

A. No, he wasn't.

Q. And Pat wasn't there in the office?

A. No.

Q. You told an investigator from State Fund, I believe, that Bud saw this happen, correct?

A. Well, that I could be mistaken about. Bud stands over me when I work. He was standing over me on this American Gem truck.

Q. So you might be mistaken about Bud being there?

A. I was doing the same thing to this American Gem truck that I did to the Mack log truck.

Q. But you might be mistaken about Bud being there when this happened?

A. I might be.

Q. How would it be - How might you not be mistaken?

A. It might have happened on the American Gem truck. I worked sixteen different jobs a day.

Q. It might have been the American Gem truck?

A. I was doing the same thing to it. I was pulling the front drive shaft off the rear end.

Q. So you just don't remember?

A. I might be mistaken. I was doing a lot of jobs for R & R Diesel at the time. I was bouncing from job to job to job to job.

Q. Let's just make sure I know what it is that you're going to say when you go to trial. Are you going to say that Bud was there?

A. I might be mistaken. He was there at the American Gem truck.

Q. Is it your testimony that you don't know whether he was there?

A. I know he was there at the American Gem truck, and I know he wasn't here at this log truck, because the log truck was a cash deal after hours.

Q. And you can't say one way or the other whether he was there when you hurt your shoulder?

A. I can't say one way or the other.

Q. And you can't say one way or the other whether Pat was there in the office when you hurt your shoulder?

A. If it was after 5:00, the office staff leaves.

(Baker Dep. at 18-21.)

¶24 At trial claimant testified he was working under a truck when a drive shaft fell and struck his right shoulder. According to claimant, the incident occurred while he was working on one of two trucks around May 17, either an American Gem truck he serviced on May 16 or 17, or a "white Mack truck" he claimed his cousin, Richard, asked him to work on after hours. He testified that Richard sometimes asked him to perform work for which Richard was paid in cash in off-the-book business. Claimant testified he did the work for Richard as a favor.

¶25 In his direct testimony claimant testified that after the drive shaft fell on him he went into the office and told Pat about the accident. On cross-examination, however, he admitted that if the drive shaft fell when he was working on the "white Mack truck" after hours, he could not have told Pat since she did not work beyond regular business hours.

¶26 During deposition claimant testified that he was hurt "towards the beginning" of the week. (*Id.* at 26.) He said he made it through the rest of the week "[w]ith lots of aspirin." (*Id.*) May 17, 1997, however, was a Saturday.

¶127 Bud testified that for a time the claimant did work at R & R Diesel after regular business hours but that it was his *own* work. He put a stop to it due to the cost of keeping on electricity and insurance concerns.

¶128 Bud also testified that claimant took tools home and often said he was working on "so and so's" car. Claimant acknowledged that he sometimes worked on cars outside of his work for R & R Diesel. He did the work in a garage owned or rented by a roommate. At deposition, he called this work "tinkering" and testified he was not injured doing such work. (*Id.* at 23-24.)

¶129 Bud denied witnessing any industrial accident. He testified that the first time he heard about the matter was when his wife told him about the First Report form brought in by claimant's girlfriend. Bud recalled learning claimant had an injured shoulder after claimant went for an "ultrasound," which Bud stated was around the time of his surgery. The surgery was in March of 1998.

¶130 Bud acknowledged having told stories about the "old days" when he worked while injured. He gave as an example an occasion when he injured his back. He went to the doctor and was told there was nothing that could be done to help him, so he went back to work despite his pain. But he also testified that he always reported his injuries to his employers and never discouraged his own employees from reporting their injuries.

¶131 Pat testified that the company's procedures require employees to report an injury to the office and to complete a form. Claimant was aware of company policy. e testified during deposition that "[t]hey always said that if something happened, tell your supervisor, tell Bud or Richie, and then go in the office and report it, which I did." (*Id.* at 13.)

¶132 Richard testified that he first heard about an injury to claimant's shoulder after Jackie brought in the First Report. He did not witness claimant hurt his shoulder or hear claimant say he hurt his shoulder until he learned that claimant was going to have surgery. (Richard Proul Dep. at 7.)

¶133 Richard denied ever asking claimant to perform work not reflected in the company's paperwork.

¶134 Terry Lewis (Lewis) testified that no work was performed on his Mack logging truck for cash or outside the normal R & R Diesel billing system. He has an account with R & R Diesel and testified he had no reason to have work done off the books since he needs records of the work in order to claim a business expense for tax purposes.

Resolution

¶135 I am **not** persuaded that claimant was injured on May 17, 1997, in the course and scope of employment. Claimant's testimony was not believable, whereas I found the

Prouls' and Lewis' testimony credible. Claimant's statements and testimony are replete with inconsistencies, contradictions, and changes in his story. To name a few:

- He signed a claim form reporting that the injury occurred July 15, 1997, and made a recorded statement to State Fund describing very clearly an injury in "the third week of July" while he worked on a white Mack log truck. He further stated that he immediately reported the injury: "I crawled out from underneath there grabbing my shoulder and I went in and informed the boss what happened." (Ex. 12 at 2.)
- Claimant supported his report of a July 15th injury with a personal time book in which he had written for the week of July 15, 1997 "that I hurt my arm and got hit with the drive shaft." (*Id.* at 10.)
- After the employer's review of time cards and work orders revealed no work on a Mack log truck or a drive shaft on or near July 15th, claimant changed his version of events, stating the injury occurred May 17, 1997.
- Claimant testified that he suffered only one shoulder injury, so he could not have been confused due to two injuries. (Baker Dep. at 22.)
- Time cards and work orders for the two weeks surrounding May 17th do not show a drive shaft pulled on a white Mack truck.
- Claimant's own time book does not record an injury or work on a white Mack log truck on or around May 17th. The failure to record an injury during May is in itself inconsistent with claimant's recording an injury in his diary for July 15th.
- When faced with an absence of May records verifying work on the Mack truck, claimant testified that the work was off-the-books work performed after hours for Lewis, however, Lewis testified credibly that he had no work performed "off the books" on his white Mack log truck.
- With regard to reporting of the injury to Bud immediately following the alleged accident, claimant's story shifted from an unequivocal statement to State Fund that Bud was present and "grabbing my shoulder . . . I went in and informed the boss what happened" to deposition testimony that he was more likely injured while working after hours, when "everybody else was gone" except "me and Richie."
- While claimant testified at deposition that he was hurt "towards the beginning of the week" and worked through the rest of the week "with lots of aspirin," May 17, 1997, was a Saturday.

¶136 In reaching my decision I have considered the fact that on May 28, 1997, Dr. O'Connor recorded that claimant injured his right shoulder when a "drive shaft hit R shoulder." (Ex. 8, at 1.) In addition, the January 28, 1997, record of Dr. Kenneth Carpenter reflects that "Tony

injured his right shoulder May 17, 1997." (Ex. 9 at 1.) However, neither record states where the injury occurred or that it was work related. Given the nature of the evidence discussed above, I find it more probable that the drive shaft event, if it occurred at all, did not occur at R & R Diesel but rather when claimant was doing work on the side.

¶137 I am also not persuaded that claimant reported a shoulder injury to his employer prior to February 1998. Claimant's shifting statements regarding reporting to Bud are noted above. His statements regarding reporting to "the office" are similarly contradictory. I found credible the testimony of the Proul family that they first heard about an injured shoulder when claimant's girlfriend presented the First Report in February 1998.

¶138 Through questioning at depositions and trial, counsel for claimant has suggested that Bud discouraged claimant from filing a workers' compensation claim by talking about the "old days" and criticizing people who file claims. I find no credible evidence that Bud discouraged the filing of workers' compensation claims. Claimant admitted he was aware that he was supposed to report his injury. Moreover, the suggestion that he was discouraged from reporting his injury flies in the face of his own testimony, though not credible, that he in fact made a timely report.

CONCLUSIONS OF LAW

¶139 Since claimant alleges he was injured on May 17, 1997, the 1995 version of the Workers' Compensation Act applies in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).⁽²⁾

¶140 Claimant bears the burden of persuading the Court that he is entitled to benefits. See *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).

¶141 Claimant was required to report his alleged injury to his employer within 30 days. Section 39-71-603(1), MCA (1995), provides:

A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

¶142 Claimant has failed to carry the burden of persuading the Court that he reported a shoulder injury to his employer within 30 days of the alleged injury. Moreover, he has failed to persuade me that he suffered an injury at work.

¶143 In Petitioner's Proposed Findings of Fact, Conclusions of Law, and Judgment, claimant cites *Harmon v. Deaconess Hosp.* 191 Mont. 275, 623 P.2d 1372 (1981), for the proposition that testimony by a claimant that he remembers reporting an injury overcomes the employer's testimony that he cannot remember a report. Claimant suggests that he has presented credible testimony showing he reported his injury and that his employer has merely presented evidence of a lack of memory. The evidence does not support his contention. Claimant's testimony that he was injured and timely reported his injury was not credible and was internally inconsistent and contradictory. Moreover, the record contains credible testimony of each member of the Proul family working at R & R Diesel denying knowledge of an injury to claimant's shoulder until February of 1998.

JUDGMENT

¶144 1. Claimant did not suffer an injury at work on or about May 17, 1997, and is **not** entitled to workers' compensation benefits requested in the Petition for Hearing. His claim is also **barred** on account of his failure to report an injury within 30 days, as required by section 39-71-603, MCA (1995). The petition is **dismissed with prejudice**.

¶145 2. Pursuant to ARM 24.5.348, this JUDGMENT is certified as final for purposes of appeal.

¶146 3. 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 15th day of June, 2000.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman H. Grosfield

Mr. Charles G. Adams

Submitted: May 10, 2000

1. As with much of claimant's testimony, I found this testimony difficult to believe.
2. Although some provisions of the 1997 Act took effect prior to May 17, 1997, none is applicable in this matter.