IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 59

WCC No. 2001-0405

STEPHEN BENTZ

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer for

ARTCRAFT PRINTERS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 10/01/02

Summary: Claimant was hired as a sales and customer service representative for a printing company. He was originally paid a salary, expenses, and a commission but thereafter renegotiated his arrangement to a straight com-mission basis with the proviso that he could work out of his home. He was required to travel to Helena and Bozeman on businesses using his own car. After renegotiation, the employer did not pay for any travel but required claimant not only to continue his sales calls but also to come to its business office two to three times a week. Claimant was injured returning to his home office to work after spending the morning at the employer's office. He stopped to pick up his mail, slipped, and fell on ice. The mailbox was on the direct way home.

Held: Claimant's injury is compensable. The commute between home office and the employer's office constituted travel and was subject to the travel provisions of section 39-71-407(3), MCA (1999). The commute satisfied sub-section (b) of 39-71-407(3), MCA. Claimant was "required" to engage in the travel since his employer required him to periodically leave his home office and come into the employer's office. The stop to collect mail was a deviation but it was a minor one and was not disqualifying.

Topics:

> **Employment: Course and Scope: Travel.** A three mile trip between an office maintained at home and the employer's regular place of business constitutes travel

and is subject to the travel provisions of section 39-71-407(3), MCA (1999). *Carrillo v. Liberty Northwest Ins.,* 278 Mont. 1, 8, 922 P.2d 1189, 1194 (1996) distinguished.

Cases Discussed: *Carrillo v. Liberty Northwest Ins.* A three mile trip between an office maintained at home and the employer's regular place of business constitutes travel and is subject to the travel provisions of section 39-71-407(3), MCA (1999). *Carrillo v. Liberty Northwest Ins.,* 278 Mont. 1, 8, 922 P.2d 1189, 1194 (1996) distinguished.

Constitutions, Statutes, Regulations and Rules: 39-71-407(3), MCA (1999). A three mile trip between an office maintained at home and the employer's regular place of business constitutes travel and is subject to the travel provisions of section 39-71-407(3), MCA (1999). *Carrillo v. Liberty Northwest Ins.,* 278 Mont. 1, 8, 922 P.2d 1189, 1194 (1996) distinguished.

Employment: Course and Scope: Travel. Where employer and employee agree that the claimant can perform his work at home but the employer requires the claimant to periodically come into its main place of business, the commute between home office and the employer's office is "required" by the employer within the meaning of section 39-71-407(3)(b), MCA (1999), and is therefore part of claimant's employment and covered by the Workers' Compen-sation Act.

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Employment: Course and Scope: Travel. A stop at a mailbox while commuting between a home office and the employer's main office is a deviation where claimant does not regularly receive mail required for him to work at home. However, where the mailbox is on the direct route home and the stop is brief, the deviation is a minor one and is insufficient to deny workers' compensation coverage for an injury occurring while picking up the mail.

Constitutions, Statutes, Regulations and Rules: 39-71-407(3), MCA (1999). A stop at a mailbox while commuting between a home office and the employer's main office is a deviation where claimant does not regularly receive mail required for him to work at home. However, where the mailbox is on the direct route home and the stop is brief, the deviation is a minor one and is insufficient to deny workers' compensation coverage for an injury occurring while picking up the mail.

¶1 The trial in this matter was held on November 8, 2001, in Bozeman, Montana. Petitioner, Stephen Bentz (claimant), was present and represented by Mr. Chris J. Ragar. Respondent, Liberty Northwest (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 15 and 20 through 37 were admitted. Relevance objections to some of these exhibits are treated in the usual fashion: The Court must review the documents to determine if they are relevant. If they are cited in the decision then they are deemed relevant. If they are not cited, they are either irrelevant or, if relevant, not critical to the decision. Exhibits 16 through 19 were withdrawn and are not considered. There is no Exhibit 27.

¶3 Witnesses and Depositions: The depositions of claimant, Marie Perkins, and Dwight Hayes were submitted for the Court's consideration. Claimant, Dwight Hayes, Shannah Thompson, and Marie Perkins testified.

¶4 Issues Presented: As set forth in the Final Pre-trial Order, the sole issue presented for decision is: "Whether Petitioner's February 27, 2001 injury is compensible [sic] under Montana's Workers' Compensation Act."

¶5 Having considered the Final Pre-trial 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

¶6 Artcraft Printers (Artcraft) is a commercial printing business with offices and printing facilities in several Montana cities, including Bozeman.

¶7 On December 22, 1999, the Bozeman office of Artcraft hired the claimant as a sales and customer service representative. Artcraft and claimant signed a written agreement on that date. (Ex. 14.) The agreement provided claimant a salary of $415.40 weekly plus a 5% commission on sales. It also provided for sick leave, paid vacation, and medical insurance.

¶8 Under the agreement, claimant was responsible for servicing existing Artcraft customers in Bozeman and Helena, and soliciting new customers in those cities. He called on customers, prepared bids for printing services, and monitored progress on his customers' printing jobs.

¶9 Claimant was required to work eight hours a day, five days a week, on an 8:00 a.m. to 5:00 p.m. schedule. Initially, claimant spent one to two hours daily outside the office calling on Artcraft customers and soliciting new customers. He drove to Helena at least one time a month, spending additional hours outside the office on those days. He was required to use his own car but was reimbursed for his travel. When not traveling, he was required to be in the Bozeman office, making telephone calls, preparing bids, and servicing accounts.

¶10 Claimant's immediate supervisor was Dwight Hayes (Hayes). In the late summer of 2000, Hayes told claimant that he needed to increase his outside-of-office sales calls. He suggested that claimant spend as much as four to five hours a day making outside calls. At about that same time, Hayes told claimant that Artcraft's owner was going to place him on straight commission, eliminating claimant's salary and benefits. Claimant vigorously objected to that arrangement, citing the written agreement of December 22, 1999. Artcraft backed off and continued to compensate claimant in accord with the written agreement.

¶11 Claimant complied with Hayes' request that he increase his outside sales calls. Following the late summer conversation, claimant increased his outside sales contacts to two to four hours a day and eventually to five hours a day on average.

¶12 Claimant also rethought the matter of his compensation. He was interested in establishing his own home business involving web site and graphic design. He already had a home computer system capable of doing graphics, although that system was antiquated. He believed that a new arrangement with Artcraft would allow him to work at home and would also enable him to establish his own business.

¶13 In late October or November of 2000, claimant approached Hayes and proposed that his compensation arrangement be changed to straight commission, as originally proposed in August, but that he be permitted to work from his home. Hayes agreed and the arrangement was put into effect on November 14, 2000. Claimant's compensation after that date was a straight 10% of sales. Claimant testified, and may have believed, that the matter of travel compensation was left open. However, I was persuaded by Mr. Hayes' testimony that no travel compensation or other employee benefits were to be paid under their agreement. In summary, claimant's sole compensation on and after November 14, 2000, was 10% of the printing business generated through his customers.

¶14 Although permitting claimant to work at home, Hayes required claimant to come into Artcraft's Bozeman office two to three times per week. Claimant's presence at the office was essential for several reasons. First, claimant was required to discuss printing quotations with Hayes and obtain his permission for specific bids. Second, some customers sent e-mails and left telephone messages and faxes for claimant at the Bozeman Artcraft office. Third, customer job tickets and work orders had to be maintained at the Bozeman office. Claimant was not permitted to take job tickets or orders out of the office. Finally, claimant was required to check on the status of printing jobs for his customers, which required him to personally check on actual printing at the Bozeman office.

¶15 Otherwise, after November 14, 2000, claimant performed his work at home and on the road. When not on the road visiting or soliciting customers, claimant worked at home, primarily telephoning customers and preparing bid estimates.

¶16 Claimant's home was located approximately three miles from Artcraft's Bozeman office in a residence located on Bald Eagle Road. His landlady lived next door.

¶17 Claimant had a computer and a fax machine at his home. He used both in his work for Artcraft. He used the computer to prepare bids and for e-mail correspondence with customers. He maintained an internet connection for his e-mail, however, he had that connection for personal purposes even before he began working at home. He kept Artcraft fax cover sheets and thank you notes at home for corresponding with customers.

¶18 Claimant used the Franklin Estimating Guide and an Expedex book in his estimating. He maintained copies of both books at home and kept personal notes in them to help in preparing bids. However, both books were available at Artcraft's Bozeman office, as were a computer, e-mail service, telephone, and fax machine. Everything claimant used at home when doing Artcraft work was available to him at the Bozeman Artcraft office. Only the personal notes he kept in his estimating books were unique, and he could have kept those books at the Bozeman office had he chosen to work there.

¶19 Claimant's working at home mutually benefitted claimant and Artcraft. Claimant was more productive when working at home; he had more flexibility while working; he could work on developing his home business in his free time; and he was happier. Artcraft, which had a high employee turnover rate and was concerned with employee retention, retained a happier and more productive employee. While claimant's sales had been a concern during the summer of 2000, after November 14, 2000, his sales were considered satisfactory.

¶20 Claimant's home business never materialized and it did not interfere with his work for Artcraft.

¶21 Claimant received mail at his home address which was related to his Artcraft job but not essential to his Artcraft duties. For example, he received professional magazines, but he had received those at home prior to his establishing a home office. He received phone bills which included charges for calls he made to Artcraft customers, however, the phone bill was for his personal phone and had previously been sent to his home. He received personal credit card statements for credit cards he used to charge travel expenses. He received advertisements and junk mail related to printing and graphic design, but he had received those types of materials at home before he began working at home. He may have received a check for travel expenses incurred prior to November 14th. (Ex. 31.) He may have received a commission check or two at home, but those checks were routinely distributed at the Bozeman office.

¶22 At 8:00 a.m, on February 27, 2001, claimant drove from his home to Artcraft's Bozeman office. While there he checked his office e-mail and fax messages, checked on printing jobs which were in progress for his customers, and made some phone calls to clients. He left the Artcraft office at approximately 11:00 a.m., to drive to his home office and continue

working from there. He had additional calls and work to do for Artcraft and intended to do them from the home office.

¶23 On the way home, claimant stopped to pick up his mail. His mailbox was approximately two blocks from his home and he shared it with his landlady. The mailbox was on the way home and he had to pass it to get home.

¶24 Claimant stopped his car and got out to retrieve his mail from the mailbox. He slipped and fell on the ice and broke his hip.

¶25 At the time of the claimant's injury, Artcraft was insured by Liberty. Claimant gave timely and proper notice of his injury to both Artcraft and Liberty. However, Liberty has denied liability for his injury on the ground that the injury occurred during travel which was not required by his employer.

CONCLUSIONS OF LAW

¶26 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶27 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).

¶28 The facts in this case are virtually undisputed, although the parties may wish to colorize some of the facts differently. Distilled to their essence, the key facts are as follows:

> ¶28a With his employer's permission, the claimant worked at home but was required to spend some of his time on the road soliciting and servicing customers and to spend a few hours every week in the employer's office.
>
> ¶28b Claimant was not required to work at home but his employer approved his doing so. It did so because it believed that the arrangement benefitted both claimant and itself. In fact, it did.
>
> ¶28c The materials and machines claimant used at home were provided to him at work. Thus, he could have accomplished his work just as well at his employer's office as at home.
>
> ¶28d Claimant was commuting between his employer's office and his home office when injured.

¶28e Claimant's collection of his home mail was not essential to his job. The mail he received at home was not related to the fact that he worked at home and would have come to him at his home mail address whether or not he worked at home.

¶28f On the other hand, claimant's mail box was on the direct route he used to commute between his employer's office and home office and his stopping to collect his mail was a minor deviation in his travel between offices.

¶28g Claimant was injured on his way to his home office from his employer's office. The purpose of his trip home was to do additional work for his employer.

¶29 The question raised in this case is whether claimant was injured in the course and scope of employment. Travel to and from work has historically been considered outside the course and scope of employment. *State Compensation Mut. Ins. Fund. V. James,* 257 Mont. 348, 350, 849 P.2d 187, 188 (1993). In 1987 the Montana Legislature adopted specific criteria for determining when an injury is compensable while traveling. 1987 Mont. Laws, ch. 464, § 11, codified at § 39-71-407(3), MCA (1987). The travel provision is as follows:

(3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and

(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(b) the travel is required by the employer as part of the employee's job duties.

¶30 The 1987 statute on travel supercedes any prior case law. However, *James* appears to hold that the statute is simply a codification of prior case law governing travel: "In 1987, our legislature took official notice of the 'going and coming' rule as well as the exceptions which had evolved to it over the years." 257 Mont. at 350, 849 P.2d at 188.

¶31 The first question the Court must address is whether the travel statute applies at all. In *Carrillo v. Liberty,* WCC No. 9410-7155, Findings of Fact and Conclusions of Law and Judgment (8-14-95), I held that an employee who walked a block and a half from her place of employment during work hours to buy a present for a going-away party for a co-employee was traveling. My holding was based on what I believed was the proper definition of traveling:

The word "traveling" is not specifically defined in the Workers' Compensation Act but in its ordinary and usual sense it means going from one place to another. Larson's treatise on workers' compensation similarly refers to "traveling employees"

> as "employees whose work entails travel *away from the employer's premises*." 1A Larson Workmen's Compensation Sec. 25.00 at 5-275 (italics added). Claimant was going from her place of employment to a different place. Claimant's "campus" argument is unpersuasive since her intended destination was the Holter Museum rather than the Fuller building [another of the employer's building].

Id. at 3-4.

On appeal the Montana Supreme Court held that my definition of travel was too expansive. It said:

> Reliance on this statute [§ 39-71-407(3)] was also erroneous because it first required the Workers' Compensation Court to conclude that Carrillo was "traveling" at the time of her injury. In order to arrive at that conclusion, the court relied on its common understanding of the term and a misapplication of Larson's reference to "traveling employees" at 1A Larson's Workmen's Compensation Law, Sec. 25.00 at 5-275. However, according to Black's Law Dictionary 1500 (6th ed. 1990), to travel is "[t]o go from one place to another at a distance; to journey." **It does not seem to include trips of one and one-half blocks.** [Emphasis added.]

Carrillo v. Liberty Northwest Ins., 278 Mont. 1, 8, 922 P.2d 1189, 1194 (1996).

¶32 As lawyers will inevitably argue to me, if one and one-half blocks does not constitute travel, then what about two blocks, or three blocks, or six blocks, or a mile? What about the three miles that claimant traveled in this case? What if the distance is six, ten, twenty, fifty, or a hundred miles? Where is the divining line in terms of distance?

¶33 *Carrillo* provides no guidance as to what distance constitutes travel. It only holds that one and one-half blocks is not far enough to constitute travel. Three miles is a far longer distance and typically involves use of a car to travel that far. I think that three miles is a sufficient distance to constitute travel, and that the travel provisions of section 39-71-407(3), MCA (1999), apply.

¶34 At trial counsel for both parties agreed that the criteria of subsection (a) of 39-71-407(3), MCA, was not satisfied. That agreement flows from the fact that claimant used his own car and was not compensated for any of his travel, even for travel in connection with his outside sales. Thus, the travel failed to satisfy subsection (a)(i).

¶35 The harder question is whether the travel met the criteria of subsection (b), which provides that the travel is a covered part of the employment if it "is required by the employer as part of the employee's job duties." Liberty argues that the travel was not required because claimant was not required to work at home - he could have performed his work, other than outside sales calls, at Artcraft's Bozeman office. Claimant argues that the

travel was required because he was required to come to the Bozeman office two to three times a week for a few hours.

¶36 Both arguments have merit but the claimant's argument is the more persuasive. The claimant's use of a home office was the product of negotiation between him and his employer. While the employer did not have to agree to allow claimant to work at home, it did agree. And, it is clear that the home office was claimant's primary office where he did most of his office work. It was the employer that insisted - "required" - claimant travel from his home office to Artcraft's Bozeman office two to three times a week. This is not a situation, such as that considered in *Santa Rosa Junior College v. Workers' Compensation Appeals Board,* 708 P.2d 673 (CA. 1985), where claimant merely took work home for his own convenience after regular work hours and the employer merely acquiesced to the practice. Had claimant negotiated with Artcraft to perform his regular work at its Butte office and been required to commute two or three times a week to the Bozeman office, it could hardly be argued that his travel was not required by his employer. It should make no difference that he negotiated to work from his home. I therefore find that the work travel was required and that claimant's injury is compensable unless his stop at the mailbox was a disqualifying deviation from the travel.

¶37 When traveling, the injury must still occur in the course and scope of employment. "The employee must remain in the course and scope of employ-ment while traveling in order for the injury to be compensable." *Dale v. Trade Street, Inc.,* 258 Mont. 349, 352, 854 P.2d 828, 830 (1993). Thus, substantial deviations from the usual course and scope of employment are not covered. *Id*.

¶38 Determination of whether the deviation is substantial is governed by a four-part test laid out in *Ogren v. Bitterroot Motors, Inc.,* 222 Mont. 515 521-22, 723 P.2d 944, 948 (1986), and summarized in *Dale* as follows:

> *Ogren* declares the factors to be considered in determining whether a deviation from the scope of employment is substantial enough to take an employee out of the employment context: (1) the amount of time taken up by the deviation; (2) whether the deviation increases the risk of injury; (3) the extent of the deviation in terms of geography; and (4) the degree to which the deviation caused the injury.

Factors (1) and (3) favor the claimant. The time required to stop and get mail was trivial and there was no geographical deviation. As to factor (3), the deviation might be said to have increased the risk of injury had claimant not stopped to pick up the mail he would not have slipped and fallen. However, the nature of the risk - ice - is inherent in the travel and in getting in and out of the car. Claimant would have been exposed to a similar risk getting into or out of his car at the Artcraft office and his home office. On the other hand, had he not picked up the mail, the possibility of slipping and falling would have been on two rather than three occasions. This factor weakly cuts against the claimant.

¶39 The fourth factor presents the most difficulty. In *Dale* the Court held that "[t]he deviation was the cause of the accident." 258 Mont. at 356, 854 P.2d at 832. The claimant in *Dale* was a long haul truck driver who had stopped in Miles City, met his brother, then accompanied his brother in his brother's truck for a personal visit. During the course of the afternoon, claimant's brother had a few too many drinks. On the way back to the truck stop where claimant had left his truck, approximately one mile from the truck stop, claimant and his brother, who was driving, were involved in an automobile accident. It was in that context that the Court found that the deviation was the cause of the accident. It can be argued that the same is true here since the accident would not have occurred if the claimant had not stopped at the mailbox and thereby deviated from his travel. But that sort of argument can be made in *every* case where there was a deviation. The deviation in *Dale* was significant because it involved travel that was separate and wholly independent of claimant's job. The deviation in this case was more akin to the stopping for a break or meals which the *Dale* Court, in later discussion, characterized as part of employment travel and benefitting both employee and employer.

¶40 Examining all four factors, I conclude that the deviation in this case was minor and that the claimant's injury is therefore covered under the Workers' Compensation Act.

JUDGMENT

¶41 The claimant's February 27, 2001 injury was work related, occurred in the course and scope of his employment, and is compensable.

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

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

¶44 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 19th day of November, 2001.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar
Mr. Larry W. Jones
Submitted: November 8, 2001