

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 25

WCC No. 9710-7853

PHILLIP R. JENSEN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

LOREN'S HOUSE OF CARPETS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Carpet installer claimed he fell down stairs at work, having grabbed a broken handrail, and was injured. Employer contended claimant was an independent contractor, but insurer had already conceded claimant was an employee. Insurer argued fall did not occur and claim was fraudulent.

Held: Where insurer has conceded claimant was an employee and not an independent contractor, employer cannot dispute that concession in workers' compensation proceeding. After hearing testimony from several witnesses, including that of claimant's brother and sister-in-law that claimant spoke about staging a fall at work "for his retirement," WCC concluded claim was fraudulent.

Topics:

Employment: Employee. Where insurer has conceded claimant was an employee and not an independent contractor, employer cannot dispute that concession in workers' compensation proceeding.

Independent Contractor: Generally. Where insurer has conceded claimant was an employee and not an independent contractor, employer cannot dispute that concession in workers' compensation proceeding.

Injury and Accident: Accident. Carpet installer claimed he fell down stairs at work, having grabbed a broken handrail, and was injured. After hearing testimony from several

witnesses, including that of claimant's brother and sister-in-law that claimant spoke about staging a fall at work "for his retirement," WCC concluded claim was fraudulent.

Fraud. Carpet installer claimed he fell down stairs at work, having grabbed a broken handrail, and was injured. After hearing testimony from several witnesses, including that of claimant's brother and sister-in-law that claimant spoke about staging a fall at work "for his retirement," WCC concluded claim was fraudulent.

¶1 The trial in this matter was held on June 2 and 3, 1998, in Missoula, Montana. Petitioner, Phillip R. Jensen (claimant), was present and represented by Mr. David M. McLean. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. David A. Hawkins. The alleged employer, Loren's House of Carpets (Loren's), which denied that claimant was its employee, was represented by Mr. Keith W. McCurdy. However, Mr. McCurdy was excused from further participation in the trial since the Court ruled on May 28, 1998, that the State Fund's admission that claimant was Loren's employee was conclusive and could not be controverted by Loren's. (Minute Entry (5/28/98).)

¶2 Exhibits: Exhibits 1 through 10, 12 through 16, 17.1 through 17.39, and 19 and 20 were admitted without objection. Exhibits 11, 17.40 through 17.47, 18, and 21 through 28 were refused. Post-trial the parties submitted medical records of Dr. Aaron Sable.

¶3 Witnesses: Petitioner, Dr. Robert Moseley, Michelle Jensen, Todd Johnson, Chris Mostad, Edward Bailey, Russell Bethel, Ryan Roop, Diane Pedersen, and Tony Heath were sworn and testified. Valerie Jenkins and Margie Jensen were affirmed and testified. The parties agreed that the depositions of Jeff Brooks, Ethan Russo, M.D., Michelle Jensen, Phillip R. Jensen, Mark Paul, and the video deposition of Paul Jensen were submitted as part of the record.

¶4 Issues: The parties listed six issues in the Pretrial Order, however, the sole issue remaining for decision is whether the claim in this case was fraudulent.

¶5 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

¶6 The claimant is a carpet installer.

¶7 In 1992 the claimant began working exclusively for Loren's. While Loren's contends that claimant was an independent contractor, the State Fund, which insured Loren's, has conceded claimant was Loren's employee. That concession is conclusive.

¶8 Claimant contends, and testified, that on January 6, 1994, he fell down stairs at Loren's warehouse and injured his back. He testified that the rail for the stairs had been previously

broken and was taped together with "masking tape or something." He said that when he started to fall he put his weight on the rail, the rail gave way, and he fell to the bottom of the stairs, landing on the concrete floor below.

¶9 Claimant had suffered a previous back injury in a 1992 car accident. However, he testified that the pain he experienced following his January 6, 1994 fall was lower in his back than the pain he suffered from the 1992 accident.

¶10 The State Fund disputes the claimant's testimony. Although it initially accepted liability for the claim, it thereafter determined that the claim was fraudulent. At trial it presented evidence, which the Court finds convincing, that the claimant staged the accident.

¶11 Part of that evidence consists of the testimony of claimant's half-brother, Paul Jensen (Paul), and Paul's wife, Margie Jensen (Margie). Margie testified that in late 1993, claimant announced that he was going to stage a fall at work and collect a lot of money from the fall. On December 31, 1993, a week prior to the alleged industrial accident, she penned a note which read:

My brother in law [sic] is planning to break off the hand rail of the stairs and role [sic] down the stairs injuring himself (Note: hand rail is already broke) or fall off the roof where they keep the pad. He is planning on doing this Jan. 3, 1994 or sometime after. He is planning on sueing [sic] Lawrence [sic] Carpet.

(Ex. 20; parenthetical material in original.) While Margie's credibility was vigorously attacked, her testimony was corroborated by other witnesses.

¶12 Margie's written statement was notarized on December 31, 1993, by Daniel B. Bailey (Bailey). Bailey testified that she signed it in his presence on that date. He also testified that although he did not read the content of the statement, the notarized document in fact contained writing and was not blank.

¶13 Valerie Jenkins (Jenkins), who met Margie in November 1993, testified that in December 1993 Margie told Jenkins that claimant was planning to stage a fall on the stairs at Loren's. Later, and prior to January 6, 1994, Margie told Jenkins that she had made a notarized statement about the matter.

¶14 Both Bailey and Jenkins were credible witnesses, and their testimony helps persuade me that Margie is telling the truth about claimant making statements that he intended to stage an accident at Loren's.

¶15 Paul testified that a few weeks prior to January 6, 1994, claimant announced his intention to stage an accident at Loren's. According to Paul, claimant "said that the handrail was going to be his retirement." (P. Jensen Dep. at 8.) Claimant announced his plan to break off the already cracked handrail and fall down the stairs, and his intent to then sue Loren's. (*Id.* at 8-9.)

¶16 At the time of the alleged accident, Loren's had decided to cease using claimant as a carpet installer due to the many complaints it had received about his work. January 6, 1994, was the last day Loren's had assigned work to claimant.

¶17 Claimant testified that he was not aware that Loren's was terminating his services. I did not believe his testimony. Testimony of other witnesses showed that future jobs were prominently posted so that claimant would have been aware that he was no longer being assigned jobs. I find that sometime prior to his alleged industrial accident claimant became aware that Loren's was going to discontinue using him as an installer after January 6, 1994.

¶18 Russ Bethel (Bethel), a carpet installer who also installed carpet for Loren's, testified that prior to the alleged accident he and claimant had discussed the broken rail. Bethel testified that he had grabbed the rail going up the stairs and that it moved unexpectedly. He told claimant about the incident and claimant replied, "Don't do that, that's mine." (Trial Test.) Bethel was a credible witness and his testimony is further indication that claimant was planning to stage an accident involving the handrail.

¶19 Dr. Robert Moseley, who initially treated claimant on January 12, 1994, provided further evidence supporting the State Fund's contention that the claimant staged the accident in order to obtain compensation. During the January 12, 1994 examination, the claimant told Dr. Moseley that he had fallen down stairs on January 6th. He complained of pain and stiffness in his low back and tingling and numbness in his left thigh. Upon examining claimant, Dr. Moseley noted local tenderness and muscle spasm in the low back and that claimant had difficulty moving. He testified that the physical examination and the claimant's subjective complaints were consistent with a low- back strain. Those findings, however, were severely qualified by the doctor's observations. Specifically, Dr. Moseley noted significant overreaction by claimant and found that there was an "emotional component" to his complaints. He testified that claimant "demonstrated a lot of quivering, jerking and withdrawal reactions" during the examination. Claimant reacted to "light touch" on his back. Dr. Moseley characterized his reaction as "unusual" since light touching does not ordinarily cause pain even when there is an underlying back injury. Claimant reported pain when his whole body was rotated, a maneuver which Dr. Moseley indicated rarely causes pain even with severe injury. Dr. Moseley characterized the response as "non-physiologic." Claimant's responses to other tests were non-physiologic and raised serious questions about his veracity.

¶20 Dr. Moseley found significant discrepancies in his examination of claimant. He conceded that there was nothing in his physical examination to contradict the possibility that claimant was faking an injury.

¶21 Dr. Moseley reexamined claimant on February 24, 1994. At that time, the claimant was complaining of areas of numbness inconsistent with any injury. The doctor concluded that

his complaints were largely *functional*, meaning they were psychological rather than physical in origin. He testified that he terminated his care of claimant at that time.

¶22 However, claimant continued to seek care from Dr. Moseley. Dr. Moseley was unable to find any physical basis for his complaints and continued to note a psychological basis for his complaints.

¶23 After considering all of the evidence in this case, I find that the claimant and his wife were not credible witnesses and that claimant staged the January 6, 1994 industrial accident. While claimant has raised serious questions about the credibility of his half-brother and his wife, their testimony was corroborated by other substantial evidence supporting a finding of fraud. I am persuaded by a preponderance of the evidence that the claim is fraudulent.

CONCLUSIONS OF LAW

I. Applicable Law

¶24 Claimant's injury is governed by the 1993 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Persuasion

¶25 The State Fund initially accepted the claim in this case but now alleges that the claim was fraudulent. It bears the burden of proving fraud by a preponderance of the evidence.

III. Resolution

¶26 Either the claimant was injured, as he claims, or his claim is fraudulent. I have found that his claim is fraudulent. No further legal discussion is necessary.

JUDGMENT

¶27 1. The claimant is not entitled to benefits and his petition is **dismissed with prejudice**.

¶28 2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶29 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 2nd day of April, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. David M. McLean

Mr. David A. Hawkins

Mr. Keith M. McCurdy - Courtesy Copy

Date Submitted: September 2, 1998