

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 27

WCC No. 9712-7889

LAURENCE GAYLE KIEFER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

MARTINS PEAT, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Laborer/supervisor for package/seller of soil products alleged back injury at work. While it was undisputed claimant suffered an earlier back injury, credible evidence from employees and representatives of the employer suggested claimant alleged the new work injury out of anger at the employer, which he thought was unfairly checking the work of his "line." Claimant's statements to a doctor around the time of the alleged second accident also did not support the existence of a second injury. Further, claimant was working a second job at the time of the alleged second injury, which he quit around the time he asserted the work injury.

Held: Claim denied where Court found no traumatic incident occurred as alleged. Claimant was not a credible witness but the insurer's witnesses were. Even if claimant did suffer a second industrial injury, he did not suffer a total loss of wages as the result of that injury where he continued to work a second job, quitting that job for reasons not related to his alleged injury.

Topics:

Injury and Accident: Accident. Laborer/supervisors claim based on alleged second back injury denied where Court did not credit claimant's testimony, but credited witnesses from employer, whose story indicates claimant quit and filed a workers' compensation claim in anger because he believed the employer was unfairly checking the work of his "line."

Wages: Wage Loss. Even if Court had believed and accident occurred as alleged by claimant, claimant did not suffer a total loss of wages as a result of the alleged accident where he continued to work a second job after the alleged accident and quit the second job not on the advice of a physician and for reasons not related to his alleged condition.

¶1 The trial in this matter was held on Monday, January 19, 1998, in Big Fork, Montana. Petitioner, Laurence Gayle Kiefer (claimant), was present and represented by Mr. Darrell S. Worm. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 5 were admitted without objection.

¶3 Witnesses and Depositions: Laurence Gayle Kiefer, Gabrielle Elmer, Sandy Scholl, Tim Berry, Carol Field, Carol Searcy and Kristi Martin were sworn and testified. In addition the parties agreed that the Court may consider the depositions of claimant, Tim Berry, James E. McCreedy, M.D. and Ned A. Wilson, M.D.

¶4 Issues: This is a disputed liability case. Claimant alleges, and Liberty denies, that he suffered a work-related injury on or about July 15, 1997 and was thereafter temporarily totally disabled on account of the injury. The Pretrial Order phrases the issues for decision as follows:

A. Whether the Petitioner is entitled to wage loss benefits pursuant to MCA Section 39-71-701 (1997) [sic].

B. Whether the Petitioner is entitled to costs and attorney fees, pursuant to MCA Section MCA [sic] 39-71-611 or -612 (1997).

C. Whether the Petitioner is entitled to an increase in any award of 20% pursuant to MCA Section 39-71-2907 (1997).

¶5 Partial Bench Ruling: At the conclusion of claimant's case-in-chief, Liberty moved for a directed verdict as to the penalty and attorney fee issues. Claimant's attorney did not object to the motion and the motion was granted.

* * * * *

¶6 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

¶7 Claimant is 27 years old.

¶18 Martin's Peat, Inc. (Martin's) is a Kalispell business which packages and sells peat moss, steer manure, and other soil products.

¶19 In February 1997, claimant began working for Martin's in a laboring position on a "soil bagging line." Peat, manure and other soils (collectively referred to as "soil") are bagged in assembly line fashion. The assembly line employs four workers, one at the head of the line who hangs the bag and fills it, a second worker who then seals the bag, and third and fourth workers who pick up the bags and stack them on pallets. At the end of the day, the pallets are taken by forklift to a separate warehouse building.

¶110 The workers on the soil bagging line rotate among the positions throughout the day.

¶111 The filled bags weigh from as little as 10 pounds up to 50 pounds. The soil bagging line workers were required to lift the bags without assistance.

¶112 During his employment with Martin's, claimant was promoted to supervisor of the soil bagging line. As supervisor, he worked one of the four line positions but supervised the overall operation of the line and the three other employees.

¶113 After becoming the soil bagging line supervisor, claimant's immediate supervisor was Tim Berry (Berry), Martin's soil foreman. Berry provided claimant with daily instructions on the soil products which were to be bagged that day. In turn, Berry was supervised by Carol Field (Field), the plant manager.

¶114 At the end of each shift, claimant completed a production sheet tallying the products bagged during that shift. The tally sheets showed soil bagging line productivity for the shift.

¶115 The scheduled work hours for the soil bagging line crew were 8:00 a.m. until approximately 5:00 p.m., Monday through Friday. While supervising the line, claimant was required to report to work 10 minutes early so he could find out what soils were scheduled for bagging during the shift.

¶116 On or about May 20, 1997, claimant felt a pop in his back and experienced an onset of severe lower back pain while lifting an empty pallet at work. (Kiefer Trial Test.)

¶117 Berry witnessed the incident. He observed claimant dragging a pallet, then dropping it, then heard claimant say he had hurt his back.

¶118 Claimant finished his shift, and continued working thereafter. However, on June 4, 1997, he went to see Dr. James E. McCreedy, an internist, about his back. Dr. McCreedy's notes reflect that the claimant told him he had hurt his back lifting peat bales. I do not consider the discrepancy between Dr. McCreedy's report of peat bales and claimant's testimony regarding a pallet to be significant since Berry observed the incident and I found Berry's testimony credible.

¶19 Dr. McCreedy showed claimant proper lifting techniques and recommended that claimant rest his back. (Ex. 2 at 6; McCreedy Dep. at 22.) He prescribed Lortab and Flexeril. (*Id.* at 17.)

¶20 Despite Dr. McCreedy's recommendation that he rest his back, claimant returned to work, telling Dr. McCreedy that he had to do so for financial reasons. (*Id.* at 14.)

¶21 Following his visit to Dr. McCreedy, claimant talked to Berry about his doctor bill and the cost of the prescriptions. Claimant asked Berry who was going to pay the bills. Berry replied that he would talk to Kristi Martin (Kristi), a co-owner of the business.

¶22 Berry thereafter informed Kristi. She reprimanded Berry for not telling her sooner about the incident. Kristi decided to pay for the medical expenses from company funds and to not file a workers' compensation report since it appeared to her that the medical care was a one-time thing. Kristi told Berry that a workers' compensation report would be filed if it turned out that further medical care was needed. Martin's paid the medical bills. Claimant continued working.

¶23 Sometime in April of 1997, claimant began working as a preparation "prep" cook at the Bridge Street Gallery restaurant. Mostly he prepared sauces and salads. His hours varied, but he usually worked three to four days per week from 5:30 p.m. or 6:30 p.m. until closing, which was at approximately 10:30 p.m. on weekdays and later on weekends. Claimant estimated that he averaged 20 to 25 hours of work per week at the restaurant.

¶24 Around the time that the claimant started working at Bridge Street Gallery, he began arriving late for work at Martin's. As a result, his bag line sometimes did not begin production until 8:20 a.m. (Berry Trial Test.)

¶25 Berry talked to claimant sometime in June 1997 about his tardiness. Berry told claimant that he thought claimant was over-extending himself working both jobs. Field also talked to claimant, telling him she thought his crew was slacking off or taking coffee breaks that were too long.

¶26 At some point during the early summer of 1997, claimant talked to Field and requested that his crew be allowed to start earlier than 8:00 a.m. and finish earlier in the afternoon. Field agreed to the request but had reservations because of claimant's recent tardiness in arriving at work. She contacted Kristi about the idea. Kristi agreed to it on a trial basis but told Field to take a pallet count every evening and morning to verify that productivity did not decline.

¶27 At Field's request, Berry counted pallets on at least two occasions, the last time on Thursday, July 17, 1997. Berry testified that he conducted the checks because he also was concerned about productivity in light of claimant's recent history of arriving late to work.

¶128 On Friday, July 18, 1997, Field asked her assistant, Carol Searcy (Searcy) to count the pallets. While she was doing her count, one of the bagging line crew came out of the bathroom and observed her counting them. (Searcy Trial Test.) Claimant learned of the pallet count and went to Berry to complain. Berry told claimant that he had counted pallets, too, and that claimant should not take it personally. Berry also told claimant that the pallet counts were satisfactory. Claimant replied that he felt betrayed and he felt Field was picking on him. Berry suggested he go talk with Field. (Berry Trial Test.)

¶129 Claimant went to Field and demanded to know why she was checking up on his work. Field explained that the pallet count was requested by Kristi and that it was to justify the schedule change implemented at claimant's request. Field further told claimant that the pallet counts were fully satisfactory. Claimant replied that he wasn't sure he could work under circumstances where there was no trust.

¶130 Claimant's conversation with Field was heated. At the end of the conversation, Field offered claimant the next week off to rest and cool down. Claimant replied that he would think about it and let her know by the end of the day what he wanted to do. He never got back to Field with an answer of whether he wanted to take the next week off. (Field Trial Test.)

¶131 At approximately 3:00 p.m. on the same day (July 18, 1997), Berry saw claimant driving away from Martin's. At that time, Berry was returning from a bulk delivery in Whitefish, Montana. Berry flashed his headlights at claimant, who pulled over to talk. Claimant told Berry that Field had given him the rest of the day off and next week, too, but he had to call Field to let her know if he wanted it.

¶132 At approximately 4:00 p.m. on July 18, Kristi received a call from claimant. Claimant expressed anger over the pallet count. Kristi said she told claimant that the pallet count was her idea and that, as his employer, she had a right to double or triple check his work. At this, claimant hung up on Kristi. Kristi deemed his response a resignation of his employment.

¶133 The foregoing is a prelude to the claim which is made in this case. According to claimant, he suffered a second work-related low-back injury on July 15, 1997, which was three days prior to the blow-out with Field and Kristi. Claimant testified that on July 15, 1997, he was lifting a water-logged pallet and he injured his back in the same place only more intensely than during the May 20, 1997 incident. He testified that his pain was located in his mid to lower back, into the buttocks, with numbing into the back of his legs.

¶134 Claimant stated that he reported the injury to Berry. Claimant also stated he told Field on both Thursday, July 17, and Friday, July 18, that he had to leave work early because he was in intense pain and unable to continue working. (Kiefer Trial Test.)

¶135 Berry, Field and Kristi had no knowledge of a second injury to claimant's back. Berry recalled that at some time prior to July 15, 1997, he had walked through the production building and saw claimant holding his back and that claimant had told him his back was sore. Berry told him to go talk with Field if he needed to see a doctor or if he needed the rest of the day off. At that time, claimant did not tell Berry that he injured his back at work; it was much later that claimant told Berry, without specifics, that he hurt his back lifting a pallet and that his back was sore.

¶136 Claimant never returned to work at Martin's.

¶137 Claimant returned to Dr. McCreedy on July 23, 1997. Dr. McCreedy's office note of that date states that "[u]nfortunately, his back pain has not improved." (Ex. 2 at 6.) Dr. McCreedy explained this note during his deposition testimony as "and by that I think the implication is that the back pain was ongoing since the 4th of June, when I first saw him." (Dr. McCreedy Dep. at 8.) Dr. McCreedy's office note did not record any new incident or reinjury on July 15, and Dr. McCreedy testified in deposition that as a general practice he would have recorded a new incident if it had been reported to him. (*Id.* at 7-8; Ex. 2 at 6.) However, Dr. McCreedy did record, "He [claimant] has contacted an attorney and apparently is working on a case for Worker's [sic] Compensation." (Ex. 2 at 6.)

¶138 Dr. McCreedy was not aware of any new back injury or aggravation and did not offer any medical opinion supporting claimant's allegation that he suffered a new injury or aggravation on July 15, 1997. He did recommend that claimant do no heavy lifting, but that recommendation was based on claimant's subjective complaints rather than any objective evidence of a back condition. (McCreedy Dep. at 10-11). McCreedy referred claimant to Dr. Ned Wilson, an orthopedic surgeon who specializes in back problems. (Ex. 2 at 10; Dr. McCreedy Dep. at 12.)

¶139 Dr. Wilson saw claimant initially on August 22, 1997. By that time claimant was reporting not only the initial back problem in May 1997 but a July 15, 1997 incident. (Ex. 2 at 5.) Dr. Wilson's office note for that date reads in relevant part:

Mr. Kiefer is a 27 yr. old pt [patient] referred to me by Dr. McCreedy for evaluation of back pain. He has a hx [history] of developing back pain several mos. [months] ago when he was working as a supervisor at Martin's Peat. This involved quite a bit of lifting. Then on July 15th he developed severe acute low back pain with some radiation to both buttocks. He has not had any pain radiating into his legs or associated with any numbness or weakness in his legs. He describes his pain going both mid and low back, exacerbated by activities and bending, generally relieved by lying down.

(*Id.*) Dr. Wilson's assessment of claimant's back complaints at that time was, "Thoracic and lumbar back pain, probably of discogenic etiology without radiculopathy." (*Id.*)

¶40 Dr. Wilson thereafter ordered MRI imaging and ultimately a bone scan. He examined claimant again on September 17 and October 17, 1997. (Ex. 2 at 2 and 5; Wilson Dep., *passim*.)

¶41 Ultimately, Dr. Wilson was unable to provide any explanation for claimant's thoracic level pain. (*Id.* at 20, 23.) With respect to claimant's lower back complaints, he attributed them to degenerative disk space narrowing to the aging process and exacerbated by activity. (*Id.* at 9, 15-16, 20.) His "presumptive" diagnosis was "one of mechanical back pain secondary to degenerative disk problems." (*Id.* at 20.)

¶42 As of the time of his deposition, Dr. Wilson opined that claimant had reached maximum medical improvement. (*Id.* at 21.) He also testified that any restrictions based on claimant's back condition would be due to claimant's subjective complaints rather than any objective medical findings, and therefore dependent upon claimant's truthfulness concerning his pain complaints. (*Id.* at 10.)

¶43 Based solely on the claimant's report of the onset of back pain at work, Dr. Wilson related claimant's back complaints to his work at Martin's. (Ex. 2 at 1; Wilson Dep. at 18-19.) However, he did not distinguish between the May incident and the incident alleged to have occurred on July 15.

¶44 Neither Dr. McCreedy nor Dr. Wilson was aware of claimant's second job at Bridge Street Gallery. Neither doctor took him off work from that job. Nonetheless, claimant ceased working at Bridge Street on July 26.

¶45 Resolution of this case turns on the credibility of the witnesses. I found the Martin's witnesses credible. In contrast I did not find claimant credible. I was especially disturbed by claimant's initial denial in his deposition about deer hunting during the fall of 1997. (Kiefer Dep. at 30.) His hunting was a significant fact relating to his level of physical activity and he flatly denied hunting. (*Id.*) Then when confronted with the fact that he shot a deer in the Helena area, he admitted that he had. (*Id.* at 30-32.) At trial he attempted to explain away his initial denial, testifying that he was confused by the question and thought that the question was about his hunting with a specific individual -- Tim Berry. His explanation is contradicted by the stream of questioning in the deposition and simply added to my overall sense that claimant was not telling the truth about key elements of his case.

¶46 I find that there was no industrial incident on July 15, 1997; that claimant fabricated the incident out of his anger against Martin's; and that he decided to find a way to draw workers' compensation benefits because he did not want to return to his job. I do believe that he had some ongoing back pain as a result of the May 1997 work-related incident, as evidenced by his complaint to Berry some time prior to July 15, but I am unpersuaded that his back pain was as severe as he portrayed it subsequent to July 18, 1997.

¶47 I am also unpersuaded that back pain caused him to quit his job at Bridge Street Gallery and find it more likely he quit because he believed it was necessary to do so to draw workers' compensation benefits. Searcy was at the Bridge Street Gallery on the evening of July 18, 1997. Claimant was working that evening. She asked claimant what was going on and he told her he was going to file a workers' compensation claim. Searcy told him he could not do that while working for Bridge Street Gallery. Claimant replied that he was going to quit his job at Bridge Street Gallery.

¶48 Finally, even if I were to find that there was a traumatic incident on July 15, 1997, there is no medical evidence that claimant suffered a new injury or a material aggravation of his preexisting condition.

CONCLUSIONS OF LAW

¶49 The injury that is the subject of this litigation allegedly occurred on July 15, 1997; therefore, his claim is governed by the 1997 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶50 Claimant must prove by a preponderance of the evidence that he suffered an industrial injury. *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).

¶51 Under the 1997 WCA, a compensable industrial injury requires both an "accident" and an "injury." Section 39-71-119, MCA (1997), provides in relevant part:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

....

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

....

¶52 Claimant has failed to satisfy his burden of proof. I have found as fact that there was no traumatic incident on July 15, 1997. Claimant's testimony concerning an incident was not credible. Moreover, even if there were a traumatic incident on July 15, there is no medical evidence that he suffered physical harm as a result of the incident. He was suffering preexisting back pain and neither Dr. McCreedy nor Dr. Wilson opined that he suffered a new injury or a material aggravation to a preexisting back condition.

¶53 Even if claimant suffered an industrial injury on July 15, 1997, he is not entitled to temporary total disability benefits because he did not suffer a "total loss of wages" on account of the injury. § 39-71-701, MCA (1997). He was working two jobs at the time of the alleged injury. He was not taken off work from the second job by either of his physicians and did not quit that job on account of his injury.

¶54 Since claimant has not prevailed, he is not entitled to his costs or attorney fees. § 39-71-611, MCA.

JUDGMENT

¶55 1. Petitioner did not suffer an industrial injury on July 15, 1997, and is not entitled to workers' compensation benefits.

¶56 2. Petitioner is not entitled to costs or attorney fees.

¶57 3. The petition is dismissed with prejudice.

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

¶59 5. 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 23rd day of March, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Darrell S. Worm

Mr. Larry Jones

Date Submitted: January 19, 1998