

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 43

WCC No. 9512-7465

LISA B. LARSEN-ENGLISH

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY

Respondent/Insurer for

JB'S RESTAURANT, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 28 year old waitress, with a history of knee problems, slipped at work, aggravating an existing knee condition. When she slipped, she was following a cook who playfully stole a pan from her, after tossing whipped cream on her. Credible testimony indicated some horseplay occurred and was tolerated by management. Insurer denied liability, contending claimant was not acting in the course and scope of her employment.

Held: Aggravation of claimant's knee injury is compensable. Insurer's contention claimant was acting outside the course and scope of employment is not only unreasonable, but also mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated. Insurer's reliance on out-of-state cases regarding horseplay was not reasonable where it ignored reasonably clear Montana precedents. Penalty and attorneys' fees awarded to claimant.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-611, MCA (1993). Attorneys' fees awarded where insurer's denial of liability was unreasonable. When claimant, a waitress, slipped and aggravated her existing knee condition, she was following a cook who playfully stole a pan from her after tossing whipped cream on her. Insurer's contention claimant was acting outside the course and scope of employment was not only unreasonable, but also

mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated by the employer.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1993). When claimant, a waitress, slipped and aggravated her existing knee condition, she was following a cook who playfully stole a pan from her after tossing whipped cream on her. Insurer's contention claimant was acting outside the course and scope of employment was not only unreasonable, but also mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated by the employer. Insurer's reliance on out-of-state cases regarding horseplay was not reasonable where it ignored reasonably clear Montana precedents.

Attorney Fees: Unreasonable Denial or Delay of Payment. Penalty awarded where insurer's denial of liability was unreasonable. When claimant, a waitress, slipped and aggravated her existing knee condition, she was following a cook who playfully stole a pan from her after tossing whipped cream on her. Insurer's contention claimant was acting outside the course and scope of employment was not only unreasonable, but also mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated by the employer.

Briefs: Citation to Authority: Out of State Cases. Insurer's reliance on out-of-state cases involving horseplay in denying liability for knee injury was not reasonable where it ignored reasonably clear Montana precedent, the injury was precipitated by a work-related incident not initiated by claimant, and the employer, in any event, tolerated some horseplay.

Employment: Course and Scope: Horseplay. When claimant, a waitress, slipped and aggravated her existing knee condition, she was following a cook who playfully stole a pan from her after tossing whipped cream on her. Insurer's contention claimant was acting outside the course and scope of employment was not only unreasonable, but also mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated by the employer. Insurer's reliance on out-of-state cases regarding horseplay was not reasonable where it ignored reasonably clear Montana precedents. Penalty and attorneys' fees awarded to claimant.

Injury and Accident: Generally. When claimant, a waitress, slipped and aggravated her existing knee condition, she was following a cook who playfully stole a pan from

her after tossing whipped cream on her. Insurer's contention claimant was acting outside the course and scope of employment was not only unreasonable, but also mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated by the employer.

Penalties: Insurers. When claimant, a waitress, slipped and aggravated her existing knee condition, she was following a cook who playfully stole a pan from her after tossing whipped cream on her. Insurer's contention claimant was acting outside the course and scope of employment was not only unreasonable, but also mean-spirited, where the clear facts show the incident was precipitated for a work-related reason, that claimant did not initiate the incident, and that some horseplay, in any event, was tolerated by the employer. Insurer's reliance on out-of-state cases regarding horseplay was not reasonable where it ignored reasonably clear Montana precedents.

The trial in this matter was held in Great Falls, Montana on May 1, 1996. Petitioner, Lisa B. Larsen-English (claimant), was present and represented by Mr. Richard J. Martin. Respondent, Lumbermens Mutual Casualty Company (Lumbermens), was represented by Mr. Thomas A. Marra and Mr. Jason G. Dykstra.

Exhibits: Exhibits 1 through 19 and 22 were admitted. Exhibit 21 was admitted over the objection of Mr. Marra. Exhibit 20 was refused.

Depositions: The parties submitted the depositions of Lisa B. Larsen-English, Donovan (Mickey) Demontiney, Vickie Martinez, Sherry Raiche, Marilyn Thorton, Joe Williams, Judy McCurdie, Doug Wahl, and Artie Wong for the Court's consideration.

Witnesses: The claimant, Dr. Paul Melvin, Joe Williams, and Mickey Demontiney testified at trial.

Issues presented: Claimant seeks compensation and medical benefits for a knee injury she alleges she suffered at work on March 26, 1996. Her claim has been denied by Lumbermens on the grounds (1) that claimant did not suffer an industrial injury and (2) that assuming she did injure herself at work, her injury occurred during horseplay and was therefore outside the course and scope of her employment. In addition to seeking compensation, claimant seeks attorney fees, a penalty and costs.

Bench Ruling: At the close of trial the Court solicited final arguments from counsel. Following those arguments I entered a bench ruling finding that claimant suffered a compensable industrial injury while working in the course and scope of her employment. I further found Lumbermens denial and defense of the claim to be unreasonable, determined that claimant is entitled to attorney fees, a penalty and costs, and directed the parties to address the amount of the attorney fee in post-trial affidavits and briefs. That

matter has now been submitted and the following findings of fact, conclusions of law and judgment will finally dispose of all issues.

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

1. Claimant is 28 years old. She graduated from high school and has attended college for one year. She has two children.

Knee problems: The early years.

2. Claimant has a history of knee problems dating back to her teenage years. She was first treated for problem knees when she was 14 years old. She reported to Dr. Paul M. Melvin on April 15, 1981, that both her knees gave out when climbing or descending stairs and were painful when she ran. Dr. Melvin diagnosed recurrent patellar subluxation. (Ex. 10 at 12.) The doctor described "patellar subluxation" as where the patella (knee cap) is partially but not wholly outside of the joint or its normal location. "Patellar dislocation", on the other hand, is where the patella is entirely outside the knee joint.

3. Dr. Melvin treated claimant conservatively, recommending that claimant wrap her knees, take aspirin and decrease her activities. In a follow-up visit on May 13, 1981, Dr. Melvin reported she was "entirely asymptomatic and no treatment is indicated." (Ex. 10 at 12.)

4. Painful knees caused claimant to return to Dr. Melvin on April 24, 1983. Dr. Melvin noted that her left knee "definitely [had] some crepitous [sic] and slides to the lateral side." He recommended that she wrap her knees and return if she had more trouble. (*Id.*)

5. Claimant's next visit to Dr. Melvin was on May 17, 1985. At that time she reported pain when climbing stairs and that her knee was giving way. Dr. Melvin's note does not indicate which knee was giving way. *Id.*

6. In March of 1986 claimant was seen in the emergency room with a painful left knee. Dr. Melvin saw her shortly thereafter and recommended that she continue to self-treat according to his prior recommendations. (*Id.*)

Knee problems: The Army years.

7. Claimant enlisted in the United States Army in December of 1986. (Ex. 7 at 29.) On May 22, 1990, while serving in the Army, she stepped into a pothole and dislocated the patella of her left knee. (Ex. 7 at 13.)

8. On May 24, 1990, she underwent a left knee arthrotomy with repair of medial retinacula tissue. (Ex. 3 at 13-14.) Following surgery, claimant was in a leg cast for five weeks. After removal of the cast she underwent physical therapy.

9. Claimant continued to have difficulty with her left knee and was unable to pass a required physical fitness test. The Army found her 10% disabled (Ex. 3 at 1) and honorably discharged her in February 1991. (Ex. 7 at 13.)

Knee problems: February 1991 to March 25, 1995

10. After leaving the Army, Claimant returned to Great Falls and began working as a waitress. Over the next three to four years she worked two full-time jobs, waitressing at Elmer's during the day and at JB's at night. Claimant then had a child and quit her job at Elmer's, thereafter working exclusively at JB's.

11. Claimant's residual knee problems did not interfere with her employment. She worked continuously from the time of her discharge from the Army until March 26, 1995.

12. The only medical care she received for her knees was in late 1993 and early 1994. She was treated for **right** knee pain by Dr. John A. Belt on November 3, 1993, with follow-up visits in December and January. (Ex. 12 at 10-16.) She was then seen by Dr. Paul M. Melvin on February 15, 1994. (Ex. 10 at 11.)

13. Thereafter, she did not seek medical care until the incident at issue in this case.

The March 26, 1995 incident.

14. On March 26, 1995, claimant was still employed by JB's in Great Falls as a server. A "server" is a waitress or waiter. Claimant's job duties included serving customers and performing side work. "Side work" involves tasks such as cleaning and stocking.

15. At approximately 2:45 p.m., near the end of her work-shift, claimant was doing sidework. Specifically, she was replenishing the whipped cream used to make desserts.

16. Claimant was working in the servers' area of the restaurant. That area is located in front of a cooking/kitchen area. The two areas are separated by a counter on which the cooks set cooked dishes for servers to pick up and take to tables. (Ex. 17.) Generally the cooks stay on the kitchen side of the counter and the waitresses on the server's side.

17. Whipped cream comes in disposable plastic bags. In the serving area the bags were generally kept in a shallow metal pan on a cooling table. On March 26th, claimant was cleaning out the pan and preparing it for more whipped cream.

18. Donovan Demontiney (Mickey), a JB's cook, went into the serving area and attempted to take the pan from claimant. According to claimant, he said that he needed the pan. Claimant also needed it and took it back from him. It is undisputed that a whipped cream

fight of sorts ensued. Claimant said that Mickey initiated the incident by spraying her with whipped cream, getting much of it in her hair. Mickey then took off through the doors that led to the kitchen area, past the dish room, and turned right toward the ice machine. Claimant followed at what she said was a fast walk but not a run, intending to get him back. As she turned right toward the ice machine, she slipped on the wet floor and fell. She experienced immediate pain in her left knee and had to have help getting up.

19. Mickey testified at trial and by deposition. For the most part, his testimony did not contradict claimant's testimony. He conceded he was in the servers' area and that he sprayed claimant with whipped cream but was unable to recall whether he or the claimant initiated the exchange. He also was unsure whether he had gone into the serving area to get a drink or to retrieve a pan. (Dep. of Demontiney at 22-23.) During his testimony he repeatedly told the Court that he did not have a very good memory of the events. He also testified that after claimant fell he was afraid he would be would be reprimanded for "horsing around."

20. Marilyn Thorton is a server at JB's. She was working at the restaurant the night claimant fell. She observed the events immediately prior to the fall.

Lisa brought out a pan to put down in to that table. Mickey came out wanting it. And I believe Lisa leaned over it to keep it there. And Mickey grabbed some whipped cream and threw it on Lisa. Lisa tossed it back. And it went back and forth maybe a time or two. And then it was taken into the kitchen.

(Thorton Dep. at 5-6.)

21. Vicki Martinez, another server, also was working the night claimant fell. She described the events:

See, the easiest way to explain it is we had these metal pans, and we had very few of them, and we put our whipped cream in them. And the cooks would try to steal them for the kitchen, instead of having to clean their own -- clean the other ones out. They would come out and steal ours.

Well, he went to steal it, and Lisa put her hand on it and wouldn't let him have it. So he squirted whipped cream all over her. And when she let go of it, he took off with it. And she went in the back to get it back from him.

After she went through the door, the door closed; and I heard her squeal. And when I went back -- When I went through the door, she was laying on her back and she was soaking wet. She had, I am assuming, slipped and fell.

(Martinez Dep. at 5.)

22. Claimant testified that some degree of horseplay was tolerated at JB's. She said that employees sometimes tossed small bits of food at each other and squirted water, and that employees leaving JB's employment were "whipped creamed" on their last day of work.

23. Mickey testified that a lot of "messing around" goes on in the restaurant. He had observed employees throwing food and confirmed that departing employees were squirted with whipped cream on their last day of work. He had not seen water squirted.

24. Marilyn Thorton testified that the employees did engage in some horseplay. She said the management doesn't really "go for the horseplay; but it kind of just happens in fun" (Thorton Dep. at 17.)

25. Doug Wahl was a dishwasher at JB's in March 1995. In his deposition, he testified that the management at JB's tolerated some degree of horseplay:

Q. [By respondent's counsel.] Now, is Joe Williams somebody who tolerates horse play?

A. He tolerates horse play to an extent, but not when it comes to running in the restaurant. We know that floors get pretty slick and mostly back there. I mean, you just don't see people running.

Q. Would you say that Joe Williams is safety minded?

A. Yes, very much so.

Q. Now, when you're talking about this horse play that goes on, can you give me an idea of what kind of horse play you're talking about?

A. Oh, let's see, we, it's more [like] joking.

Q. Somebody would verbally tease somebody?

A. Yeah. The only other time -- well, I'll tell you there's other times when there's a little whipped cream, and that was when somebody would leave.

(Wahl Dep. at 8-9.)

26. Arthur L. Wong is a dishwasher/busboy at JB's. In his deposition, he was asked about horseplay at the restaurant:

Q. [By respondent's counsel.] Did the employees there at JB's, did they goof around or mess around quite a bit?

A. At times they did, yes.

Q. And what was involved in this messing around or goofing around? Would they throw food at each other, for example?

A. Yeah. Well, no, I don't think they would actually throw food at each other per se. They would kind of do things to each other, and then someone would, someone would chase after them or something. But I never throw food on the floor or anything out there in front of our customers, because if it's going to be done, it should be done in back if they were going to do it.

* * * * *

Q. Did the management in the form of [sic] Joe Williams, did he know that people were goofing off?

A. Not at the time. I'm sure he was told after that.

Q. In general, I mean speaking in general, did he know that the employees sometimes goofed off?

A. Yes.

(Wong Dep. at 6-7.)

27. Vicki Martinez testified that she had seen other instances of "whipped creaming" and other horse play. She said that it had ceased since claimant's fall.

Q. Okay. So there is some goofing off and spraying employees with whipped cream from time to time?

A. Yes, from time to time.

Q. Have you ever seen anybody chasing another employee through the store?

A. Yeah, several times.

Q. Tell me some times that you remember.

A. A couple of the girls -- We got these "Wet Floor" signs, and a couple of the girls were chasing each other, like this (indicating), with them, through the front.

Q. Like squeezing like they were going to bite them with it?

A. Yes.

Q. Using the hinge of the Wet Floor sign as a jaw, kind of?

A. Yeah. There is -- We used to have water that we used to spray the lettuce down with. That used to be a big one. You would be standing there doing something, and somebody would spray you in the legs with water, just to make you jump or something.

Q. What is the purpose of all this practical joking?

A. Probably, I would say, to lighten the mood, to make sure that you don't have one person that's just in a totally bad mood. When that happens, it ruins the day for everybody.

Q. Has that changed now, since Lisa's injury, some of that practical joking?

A. Yeah.

Q. In what way?

A. Pretty much, it doesn't go on anymore.

Q. And how did that come to be? Was there an order, or is it just the co-employees have agreed to not do it because of a serious injury?

A. A little bit of both. Joe told us that, you know, it wasn't going to go on anymore; and we all kind of, you know, had seen what happened to Lisa, so we were like, "Well, maybe we just better figure out another way to play."

(Martinez Dep. at 17-19.)

28. At trial, Joe Williams, the general manager of the Great Fall's JB's, testified that he was unaware of horseplay. He had never personally seen anyone squirting whipped cream at another employee, but acknowledged that he was aware it had happened. He testified that the only time the creaming took place, to his awareness, was on an employee's last day and after hours.

29. Claimant was a credible witness and I adopt her version of the events and her testimony concerning horseplay. With regard to the onset of the incident, I specifically find that the incident was precipitated by Mickey because he needed the pan for the kitchen and attempted to wrestle it from claimant. I further find that minor horseplay was permitted by JB's management and that on prior occasions employees had sprayed whipped cream on one another, albeit under different circumstances. I did not find William's testimony that he was unaware of horseplay credible and note that he took no disciplinary action with respect to the March 26th incident.

30. Claimant, Mickey, and Joe Williams, all testified that the floor where claimant fell was damp, if not wet.

31. Joe Williams was in his office at the time claimant fell. However, he was immediately told of the accident and went to check on claimant. When he arrived claimant was still on the floor. He asked if she was alright and claimant told him she was messing around chasing Mickey when she fell down and that she was sorry. She said that the V.A. would pay the bill for her knee since she had previous difficulties with her knee while in the service.

Medical Treatment After the 3/26/95 Fall

32. Claimant testified in her deposition that she thought she was first seen at Malmstrom Air Force Base following her fall on March 26, 1995. Review of the medical records, however, indicates she was first seen by Dr. Glenn C. Winstead at Columbus Convenience Care. The nurses assessment from Convenience Care states her left knee "'gave out today @ 1440' fell - twisting L knee." Dr Winstead was unable to assess knee stability at that time, suggested the knee be rechecked if the pain continued, and prescribed Tylox for pain. (Ex. 4 at 1-2.)

33. Claimant went to the Extended Care Clinic at Malmstrom Air force Base the following day and was examined by Michael H. Hewitt, who is a physicians' assistant. Claimant reported increased pain and swelling and gave a history of having slipped at work the previous night. Hewitt drained 15 cc's of bloody fluid from claimant's left knee. However, claimant's pain prevented him from performing a full examination of her knee. X-rays were taken but showed no evidence of injury. The radiologist noted that internal derangement would not show up on plain films and suggested careful follow up and an MRI if the pain persisted. Hewitt referred claimant to Dr. Melvin. (Ex. 12 at 7-9.)

34. Dr. Melvin examined claimant on March 27. Claimant told him she had slipped at work on March 26, 1995. Dr. Melvin noted:

She has about a 2 to 3+ effusion. She is tender medially and one can move her patella laterally with a so called [sic] panic sign very easily. Her x-rays show patellar subluxation. I think because she's had so much difficulty that we should consider doing a lateral release and a transfer of the tibial tubercle. Her Q angle is increased and her knee is in about almost 10 degrees of valgus. I've discussed this in detail with her and I've told her about the surgery, what she can expect and she wants to go ahead with this. I talked to PA Hewitt at the base and he gave the go ahead for this procedure.

(Ex. 6 at 7.)

35. On March 29, 1995, Dr. Melvin performed a lateral release and transfer of the tibial tubercle on claimant's left knee. The operation involved moving the tibial tubercle, which is the point where the patellar tendon attaches to the tibia, medially (towards the inside of the leg), thus changing the angle of pull on the patella and better holding it in place. (Ex. 6 at 9)

36. Dr. Melvin testified at trial. He provided credible and persuasive testimony that claimant's fall on March 26, 1995, caused further injury to her left knee. Specifically, he testified:

a. X-rays taken after the March 26, 1995 incident showed patellar subluxation.

b. When he saw claimant on March 27 and 29, 1995, there was objective evidence of a recent acute injury. That evidence included swelling, fluid on the knee, blood inside the knee joint, and new damage to the cartilage inside the joint.

c. Claimant's injury most likely resulted from a twisting motion of the knee and was entirely consistent with the fall as she described it.

d. In his opinion, claimant's fall on March 26, 1995, caused a dislocation of claimant's left patella.

37. Dr. Melvin's medical opinions were unrebutted.

38. On May 17, 1995, Dr. Melvin released claimant to return to work part-time.

Ex. 10 at 2.)

39. Claimant returned to Dr. Melvin on August 23, 1995 complaining of pain and swelling in her left knee. X-rays taken at that time showed the patella, the patellar tendon and the hardware used in the surgery were all in place. Dr. Melvin took claimant off work for two weeks and advised claimant of his doubt as to her ability to continue working as a waitress. (Ex.10 at 2.) In a follow-up visit September 7, 1996, claimant was doing better, however, her knee remained swollen and painful. He released claimant to return to work part-time and gave her a brace to help support the knee joint. (*Id.* at 1.)

Ultimate findings

40. Based on the foregoing findings of fact, I make the following ultimate findings of fact:

a. As a result of her fall on March 26, 1995, claimant suffered an acute, further injury to her left knee. That further injury was the cause of her knee surgery on March 29, 1995.

b. The incident of March 26, 1995 was work-related. It was precipitated by Mickey's need for a pan and his attempt to take the one being used for whipped cream.

c. Mickey Demontiney was the instigator of the events of March 26, 1995. He initiated the whipped cream fight in furtherance of his attempt to secure the pan or in retaliation for claimant frustrating his attempt to secure the pan, squirting claimant first.

d. Claimant reacted reflexively to Mickey's actions.

e. In securing the pan and reacting to Mickey's actions, claimant was acting in the course and scope of her employment. Claimant's subsequent fall occurred in the course and scope of her employment.

Insurer's actions.

41. The insurer's denial of this claim was unreasonable. Its contention that claimant's injury was unrelated to her employment and does not meet the injury and accident

definitions flies in the face of both the facts and the law. The contention is not only unreasonable but is mean-spirited. Insurer's contention that claimant was not acting in the course and scope of her employment ignores the clear facts that the incident was precipitated for a work-related reason and that claimant did not instigate the incident. The insurer's focus on out-of-state cases involving horseplay rather than on Montana precedents ignored the reality that Montana precedents are controlling.

Attorney fees and costs:

42. Claimant's attorney filed a request for attorney fees in the amount of \$8,991.50, along with documentation of his hours spent working on the case. Additionally, he sought a surcharge of \$1,091.89. Respondent filed a response stating that it does not contest the amount sought in attorney fees except for the surcharge. Claimant then withdrew the surcharge request. Since there is no objection to the base amount, the Court finds that claimant is entitled to attorney fees in the amount of \$8,991.50.

43. Claimant has presented an itemized list of costs which totals \$1,945.82. Not available at the time the list was presented was Dr. Melvin's bill for trial testimony. Claimant subsequently obtained such bill, which is in the amount of \$400.00. Respondent did not object to any of the costs itemized or to claimant's stated intent to forward Dr. Melvin's bill at a later time. Therefore, the Court finds that claimant is entitled to costs in the amount of \$2,345.82.

Incorporation of findings from bench ruling.

44. The specific findings made by the Court in its bench ruling are incorporated by reference.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1993 version of the Workers' Compensation Act governs this case.

2. The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *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).

3. Section 39-71-119, MCA (1993), defines injury as follows:

(1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(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.

The criteria of subsection (1)(a) are clearly met since uncontradicted evidence in this case shows that claimant's fall resulted in physical harm to her knee. Specifically, it caused a dislocation of the patella and internal bleeding within the knee joint.

The fact that claimant suffered from an preexisting knee condition (periodic subluxation of the patella) does not change this conclusion; injuries which aggravate a preexisting condition are compensable under the Workers' Compensation Act. Section 39-71-407(2), MCA expressly provides:

(2) (a) An insurer is liable for an injury as defined in 39-71-119 if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) **a claimed injury aggravated a preexisting condition.**

Lumbermen's argues, however, that the requirement of section 39-71-119(2)(a) that the injury arise from "an unexpected traumatic incident or unusual strain" is not satisfied in this case because her knee "could have collapsed on her at any time regardless of whether she was at work or not." Its contention on this point is set out in paragraph 4 of Lumbermens contentions in the Pretrial Order. Verbatim, it reads:

4. Petitioner's knee problem was not related to her employment, and does not meet the definition of an injury as the "accident" was not an unexpected traumatic incident or unusual strain. Given Petitioner's knee history, it could have collapsed on her at any time regardless of whether she was at work or not, and the fact that it occurred while she was at work is irrelevant.

(Pretrial Order at 3.)

The argument flies in the face of the facts and the law. The event that occurred here was a slip and fall causing a twisting of the knee, which in turn dislocated the patella. To say that the fall was expected defies logic. The argument is equivalent to saying that all slip and falls are expected because people slip and fall all the time. Under that tortured logic almost

every work-related injury would be expected. Plainly, the slip and fall in this case was unexpected. Thus, the requirements of section 39-71-119(2)(a), MCA (1993) are met.

Moreover, in *Jones v. Bair's Cafes*, 152 Mont. 13, 19, 445 P.2d 923, 926 (1968), and *Robins v. Ogle*, 157 Mont. 328, 333, 485 P.2d 692, 694-95 (1971), the Supreme Court interpreted "unusual strain" as physical harm resulting from a traumatic incident. In *Jones* it said:

[T]he measure would seem to be the result of a tangible happening of a traumatic nature which results in physical harm, be it a rupture, a strain or a sprain.

Id. In *Robins* the Court considered a case in which the claimant suffered a herniated disk while lifting a mop-pail. Addressing the insurer's argument that the injury did not meet the unexpected cause or unusual strain requirement, the Court said:

While it may be arguable in the instant case whether the strain was unusual from the standpoint of cause, it is clear that the effect here was unusual -- herniation of an intervertebral disc resulting from picking up the bucket in the wrong manner and turning to pick up the mop. An unusual result from a work-related strain qualifies as "an unusual strain"

157 Mont. at 333, 485 P.2d at 695. Characterizing the result in this case -- the dislocation of the patella and resulting surgery -- as "usual" rather than "unusual" is equivalent to saying that the dislocation and surgery were inevitable irrespective of claimant's physical activities. There is no evidence of such inevitability in this case.

4. Lumbermens' further argument, contained in Respondent's Proposed Findings of Fact, Conclusions of Law and Judgment, that the claimant failed to show that her condition and surgery were proximately caused by the March 26, 1995 incident, simply ignores the facts in this case. Again, the fact that claimant suffered from a preexisting condition involving subluxation of her patella does not preclude compensation. The employer and its insurer take the worker as they find her. *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 103, 894 P.2d 327, 330 (1995). An aggravation of a preexisting condition is compensable. (See previous discussion.) Claimant had bad knees but she was able to work not just full time, but nearly 80 hours a week for several years without acute distress. The fall March 26, 1995, caused an acute problem. Her patella did not just sublux, it dislocated, causing bleeding within her joint. The surgery addressed her acute problem. This is not a case where a condition "coincidentally" occurs during work hours. The condition here was proximately caused by a specific, work-related incident.

5. Relying on several Oregon case, Lumbermens further argues that claimant's fall is not compensable because it occurred during horseplay. The Court need not address the Oregon precedents. Montana law applies in this case and is reasonably clear.

In *Richardson v. J. Neils Lumber Co.*, 136 Mont. 601, 341 P.2d 900 (1959), the Supreme Court considered an injury arising because claimant foolishly rode a conveyor belt. In that case the claimant worked at a lumber mill collecting, staking and tying bundles of processed lumber. On the day of his injury, there was a lull in his work. During the lull the claimant went a short distance from his usual work station. He then hopped onto a conveyor belt and rode it twenty feet back to his work station. During the ride he caught his foot under the belt and his foot was crushed. The Court found the injury to be compensable even though the claimant should not have been riding the belt.

In finding the incident compensable the Court held that the horseplay doctrine did not apply to the incident since horseplay requires two or more participants. But it then went on to reject the insurer's assertion that the injury nonetheless did not occur in the course and scope of employment. It found that if the act causing the injury "could be reasonably contemplated" in the employment, then it arose out of the employment. *Id.* at 610, 341 P.2d at 905. It further held that the fact that the mode of transport used by claimant was dangerous did not remove claimant from the protection of the Workers' Compensation Act. In so holding, it quoted with approval an opinion of Justice Cardozo:

The fact that the mode of transportation utilized by the claimant to return to his work station was dangerous, as hindsight proves, did not as such remove him from the protection of the Workmen's Compensation Act. The test is whether the act could be reasonably contemplated. In *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522, Justice Cardozo said: 'Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. * * * The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment.'

Id.

In the present case, disputes between employees over use of kitchen equipment were reasonably foreseeable. See *Pinyerd v. State Compensation Ins. Fund*, 271 Mont. 115, 121, 894 P.2d 932, 935 (1995). Horseplay involving throwing of food, squirting of water, and squirting of whipped cream had previously occurred with at least the partial knowledge of the employer and without reprimand. The incident in this case did not result in a reprimand. Under these circumstances, horseplay with whipped cream could be reasonably expected.

Moreover, what occurred in this case might better be characterized as an assault rather than true horseplay. It arose out of a dispute over a pan. While the splaying of whipped cream by Mickey was in itself harmless, it was not invited, rather it was in furtherance of his attempt to wrest control of the pan from claimant or in retaliation

for his inability to do so. Thus, the situation is akin to that which occurred in *Pinyerd*, where the claimant was assaulted by a fellow employee in part because of resentment arising out of company encouraged competition among its car salesmen. In its decision on appeal the Supreme Court held that the test of whether the claimant's injury arose out of this employment was "not simply what precipitated Jacobson's assault, but whether there was a reasonable connection between Pinyerd's injury and the conditions under which he pursued his employment." 271 Mont. at 121, 894 P.2d at 935. Here, the incident was not of the magnitude of the assault in *Pinyerd*, which was carried out with fists, and this case is further distinguishable because the claimant did not remain passive in the face of the aggressor's actions. Nonetheless, there was an aggressor, the aggression arose out of the employment, and the tension leading to the aggression, as well as the particular means used by the aggressor, were reasonably connected to the employment. Finally, it is reasonable to expect that an assaulted employee, whether assaulted with fists or whipped cream, may actively resist or reply in kind.

While neither *Richardson* nor *Pinyerd* are precisely on point, they provide reasonably clear guidance for assessing whether the incident in this case was compensable. The facts of the present case fall within their guidelines for compensability.

6. As found in Finding of Fact 41, Lumbermens' denial of liability was unreasonable. The facts and law were not reasonably debatable. Lumbermens' argument that the claimant's injury did not satisfy the injury and accident definitions, and that her condition and surgery were not proximately caused by the March 26, 1995 incident went far beyond the pale of reasonable advocacy. Claimant is therefore entitled to both attorney fees and a penalty. §§ 39-71-611 and -2907, MCA (1993). The amount of attorney fees is set forth in Finding of Fact 44. The amount of the penalty is 20% of all compensation and medical benefits presently due and which in the future may become due claimant. § 39-71-2907, MCA (1993).

7. Since claimant has prevailed in this matter, she is entitled to costs. § 39-71-611, MCA (1993).

JUDGMENT

1. On March 26, 1996, claimant suffered a compensable industrial injury of her knee. The respondent, Lumbermens Mutual Casualty Co., is liable for the injury and shall pay claimant appropriate compensation and medical benefits.

2. The Court retains jurisdiction of this matter to determine the amount of benefits due in the event the parties cannot agree on the amount.

3. Lumbermens shall pay claimant attorney fees in the amount of \$8,991.58.

4. Lumbermens shall pay claimant costs in the amount of \$2,345.82.
5. Lumbermens shall pay claimant a penalty in the amount of 20% of all benefits presently due and 20% of all benefits which may become due in the future.
6. 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.
7. This JUDGMENT is certified as final.

Dated in Helena, Montana, this 14th day of June, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Richard J. Martin
Mr. Thomas A. Marra
Submitted June 11, 1996