

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 50

WCC No. 9601-7471

DARRELL McCLANAHAN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

EUGENE SIMPSON

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 28 year old laborer for excavating contractor filed claim for foot and back injury. Claimant consistently described incident in which contractor's grandson released trailer, could not hold it, and trailer pinned claimant's foot, causing him to twist, fall, and hurt his back. Grandson testified tongue of trailer hit claimant's foot and claimant did not fall. Contractor testified claimant walked off the job and was seen working on a roofing job. Claimant testified he asked for leave to seek additional medical care and employer told him not to come back. Claimant sought TTD benefits, medical benefits, penalty and attorneys fees.

Held: Claimant was credible; the insurer's witnesses were not. In particular, Court finds that grandson minimized events to avoid criticism from grandfather. Benefits awarded, including penalty and attorneys fees. Insurer's conduct was unreasonable for failure to investigate. Insurer took employer's story at face-value, failing to interview witnesses, ignoring consistent medical records, and not facing conflicts within employer's version.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-611, MCA (1995). Attorneys fees awarded where Insurer's conduct was unreasonable for failure to investigate. Insurer took employer's story that claimant did not injure his back at face-value, failing to interview witnesses, ignoring

consistent medical records, and not facing conflicts within employer's version of events.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-2907, MCA (1995). Penalty awarded where Insurer's conduct was unreasonable for failure to investigate. Insurer took employer's story that claimant did not injure his back at face-value, failing to interview witnesses, ignoring consistent medical records, and not facing conflicts within employer's version of events.

Attorney Fees: Cases Awarded. Attorneys fees awarded where Insurer's conduct was unreasonable for failure to investigate. Insurer took employer's story that claimant did not injure his back at face-value, failing to interview witnesses, ignoring consistent medical records, and not facing conflicts within employer's version of events.

Attorney Fees: Unreasonable Denial or Delay of Payment. Attorneys fees awarded where Insurer's conduct was unreasonable for failure to investigate. Insurer took employer's story that claimant did not injure his back at face-value, failing to interview witnesses, ignoring consistent medical records, and not facing conflicts within employer's version of events.

Injury and Accident: Accident. Where claimant consistently described accident in which trailer released by employer's grandson pinned his foot and caused him to twist and fall, hurting his back, his testimony is more credible than that of grandson and employer, who appeared to minimize what happened to avoid responsibility.

Penalties: Insurers. Penalty awarded where Insurer's conduct was unreasonable for failure to investigate. Insurer took employer's story that claimant did not injure his back at face-value, failing to interview witnesses, ignoring consistent medical records, and not facing conflicts within employer's version of events.

Trial in this matter was held on June 21, 1996, in Butte, Montana. Petitioner, Darrell McClanahan (claimant), was present and represented by Mr. Kevin E. Vainio. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams. Exhibits 1 through 13 were admitted without objection. The parties agreed that the depositions of claimant and Dr. Mark W. Borke may be considered as part of the record. The claimant, Chris Hiatt, and Eugene Simpson were sworn and testified. At the close of trial, Judge McCarter issued a bench ruling which is incorporated in these findings.

Issues presented: Claimant contends he injured his foot and back in an industrial accident occurring on June 20, 1995. The State Fund admitted liability for the injured foot but denies that the back injury was caused by the accident. It has refused to pay wage loss and medical benefits. Through his Petition for Hearing the claimant seeks medical and wage-loss benefits, as well as attorney fees, costs, and a penalty.

Having considered the Final 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. He is married and has four children. He has less than a high school education.
2. Claimant began working as a laborer for Eugene Simpson (Simpson) in January of 1995. (McClanahan Dep. at 41-42.) Simpson is in the excavating business. He principally digs water and gas lines and basements.
3. On June 20, 1995, claimant was working for Simpson at a house in Butte, Montana. The project involved lifting the house up off its existing foundation and putting a new basement underneath. The house was jacked up off its existing foundation. Holes were then knocked through the foundation and long timbers were run underneath the house to support its weight while the basement was dug. A jackhammer was used to knock the holes through the foundation.
4. In addition to claimant, Simpson employed his grandson, Chris Hiatt (Hiatt) on the project. At the time of the industrial accident which is at issue in this case, Hiatt was 15 years old.
5. At approximately 10:00 a.m. on Tuesday, June 20, 1995, claimant and Hiatt obtained an air compressor and jackhammer from an equipment rental store. The air compressor was mounted on a trailer. Claimant and Hiatt hitched the trailer to the back of Hiatt's pickup truck. They then drove back to the job site.
6. Upon arriving at the job site, Hiatt parked the pickup and trailer parallel to the curb. Claimant sought out Simpson to ask where they should put the trailer. Simpson was busy operating a backhoe and did not immediately answer. Claimant returned to the trailer, suggested to Hiatt that they wait until they could get direction from Simpson, and then stood between the trailer and the curb.
7. Claimant's description of what happened next is contained in the record in several places. In his Claim for Compensation dated July 3, 1995, he wrote:

I was waiting for directions when Chris unhooked a trailer. The trailer was on a hill. It rolled and hit me.

(Ex. 7 at 1.) In an August 10, 1995 recorded statement taken by field adjuster Steve Miser of the State Fund, claimant reported the accident as follows:

Adj: O.K. Darrell, can you describe for me exactly what happened to you?

Clmt: We came back from renting this trailer at the rental place and me and Chris were standing by the back of the truck waiting for his grand-father. He was doing some work in the back hole [sic] and I told him, uh, I think we need it on the other side of the house so we better unhook it here cause he wanted that hook to go somewhere and I said, well, let's wait a minute, so he stopped and then he went unhooked it and I was standing there looking at the back hole [sic] which is a little ways away while he was working and then I heard [a] "click" and he unhooked the trailer . . . (Interrupted by Adjuster)

Adj. He is?

Clmt: Chris.

Adj: O.K.

Clmt: It was too hard for him to hold, he unhooked it and it come loose and I turned around and he is like trying to grab it and it was coming right for me and as I got like half way turned around a leg of it landed on my foot and so I pinned my foot between, ah, curb and the leg of that thing and then I just twisted around and fell down and that was it.

(Ex. 12 at 1.) In his deposition, taken April 16, 1996, claimant again described the accident:

We went and got the trailer and we came back, and Mr. Simpson was digging with the backhoe. And we parked on the side street by the job we were working and I went over to talk to Mr. Simpson, where he wanted us to park the trailer. And he was driving around fairly close to us, and I was standing between the curb and the trailer and Mr. Simpson really wasn't paying attention to me so I was just standing there waiting.

And Chris unhooked the trailer and the trailer rolled back. It wasn't a very steep hill but it was steep enough for the trailer to roll. He unhooked the trailer, it rolled back, turned slightly to the left, I guess, because I was standing on the left side rear of it, and it turned around, landing -- I was trying to step back over the curb, out of the way. There was a bunch of wood there for blocking this house up. . . . I fell over the blocks of wood. The tongue of the trailer landed on my right foot and I was on the ground.

(Claimant Dep. at 10-11.) The claimant's testimony at trial was consistent with his prior statements and I found his testimony credible.

8. Hiatt is the only other person who witnessed the accident. He confirmed that an accident occurred and that claimant injured his foot. However, he disputed claimant's testimony concerning a fall. According to Hiatt, both he and the claimant were attempting to move the trailer when the tongue swung a short distance and fell on claimant's foot. He

said that claimant did not fall and that he helped lift the trailer tongue off claimant's foot. They then moved the trailer to the curb. Hiatt conceded that he apologized to claimant about the incident because he felt that he might have been partially at fault.

9. Hiatt's testimony confirms that an accident occurred. However, I did not find his version of the accident credible. I note that at the time of the accident he was 15 years old and working for his grandfather, Eugene Simpson. I think he tried to minimize his responsibility for the accident and that he was concerned with his grandfather's possible reaction.

10. Claimant testified that he told Simpson about the accident on the same day it happened. Simpson testified that claimant did not tell him about the accident until the next day. Claimant was the more credible witness.

11. In any event, there is no dispute that Simpson was timely notified of the industrial accident.

12. At the time of the accident, Simpson was insured by the State Fund, which has accepted liability for the accident.

13. Claimant felt immediate pain in his foot after the accident but continued to work the rest of the day. (Claimant's Dep. at 11, 53; Trial Test.)

14. On the next morning claimant's foot was swollen and painful. He testified that his back also hurt. However, he went to work. Claimant testified that he told Simpson his foot and back hurt and he thought he needed to see a doctor. Simpson testified that the conversation focused on claimant's swollen foot and that claimant did not mention any back injury. Both agree that Simpson told claimant to go to the hospital emergency room.

15. Claimant was examined by Dr. W. Borke at the St. James Hospital Emergency Room on June 21, 1995. Dr. Borke's medical report for this visit describes claimant's chief complaint as:

[I]njured foot and back. Patient complains of having an injury to the right foot and low back approximately 1 day prior to arrival. There has been no apparent head trauma. The injury allegedly occurred while at work. The patient had a trailer hitch hit his right foot. The patient fell twisting his back when this occurred. No numbness, tingling, or radiating pain. No history of back problems.

(Ex. 2 at 1.) An x-ray of the right foot revealed no broken bones. (Ex. 1 at 3.) Dr. Borke examined claimant's back and found "moderate L5-S1 tenderness, mild spasm." (*Id.*) Claimant was diagnosed as having a contusion to the right foot and lumbar strain. (*Id.*)

16. Dr. Borke testified by deposition that claimant's back injury was consistent with the accident claimant described. He further testified that claimant could have strained his

back even without falling due to a twisting motion when the trailer tongue fell on his foot. (Borke Dep. at 10-11.)

17. Dr. Borke advised claimant not to work for five days and to follow-up if the pain in his back or foot persisted. (Ex. 1 at 1.) He suggested that claimant follow-up with Dr. J.P. Murphy, an orthopedic surgeon.

18. Claimant did not work on Thursday through Sunday, June 22-25, 1995.

19. At trial the State Fund attempted to persuade the Court that during the four days between June 22 and 25, claimant was roofing for another contractor, thus suggesting that claimant's injuries were trivial. Simpson testified that on Saturday he saw claimant at a roofing job at a nearby house. According to Simpson, claimant was hammering on the roof, although Simpson could not say what he was hammering. Simpson stopped and asked how claimant was and claimant responded that he was "okay." Claimant agreed that he was at the site of the roofing job but said that he was on the ground, not on the roof, and was trying to collect money the roofing contractor owed him for prior work. He agreed that Simpson had stopped and asked him how he felt and that he had replied "okay."

20. Simpson attempted to bolster his own testimony by throwing in a comment that two of his other employees had seen claimant doing roofing work that weekend. The Court sustained a hearsay objection to the comment but has taken notice that no other persons were called by the State Fund to corroborate Simpson's story. The State Fund did not attempt to interview the roofing contractor in question or Simpson's other employees. I also take note that Simpson had earlier told Steve Miser, an investigator for the State Fund, that he saw claimant roofing on Thursday, Friday, and Saturday (Ex. 11 at 2), whereas Simpson testified at trial that he only saw him once on that Saturday. I find claimant's testimony the more credible.

21. Claimant returned to work for Simpson on Monday, June 26, 1995. He worked that day and the next disconnecting water pipes underneath the house. (Claimant Dep. at 54.) Claimant testified that his back continued to hurt and that after working for two days he asked Simpson if he could go see Dr. Murphy about his continuing pain. Claimant testified that Simpson told him that if he needed to go to the doctor then he (Simpson) did not need claimant because he was accident prone. Claimant left the job site and did not return to work for Simpson.

22. Dr. Murphy's office notes confirm a contact with claimant on June 30, 1995, noting that claimant had hurt his back and right foot on June 20, 1995, when a trailer landed on his foot and he fell and twisted his back. (Ex. 3 at 1.) According to claimant, Dr. Murphy did not see him that day because of concern over payment for the visit. Claimant related that the doctor's receptionist told him that Mrs. Simpson had called the doctor's office and said

that Simpson was not responsible for any doctor bills since he did not need to see a doctor and was not "hurt that bad." (Claimant Dep. at 7-8.)

23. Simpson testified that claimant left work on approximately June 28, 1995, without any explanation. I found his testimony implausible and not believable. Claimant had been performing satisfactory work up to that time. He had no other job lined up, and Dr. Murphy's notes confirm his testimony that his back was hurting and he was attempting to get medical care. I find claimant's testimony as set forth in Finding 21 the more credible.

24. Claimant was examined by Dr. Murphy on July 14, 1995. Dr. Murphy's office note for that day reads as follows:

Darrell presents today with chief complaint of low back and foot pain. He was injured at work when a trailer fell on his foot. He twisted his back. He also complains of [sic] shoveling and lifting causes severe low back pain with radicular pain into the lt buttocks and left lower extremity. Also occasional numbness and tingling in the lt foot.

Exam reveals straight leg raising limited on lt at about 60 degrees, negative on the rt. He has good motor power of the anterior tibs, triceps, surae mechanism, toe plantar flexors, extensor hallucis longus and peroneals bilaterally. There is no sensory deficit in the lower extremity.

X-rays showed marked spasm of the lumbar spine. I think we should keep him off work, start him on a program of PT twice a week for 3-4 weeks, muscle relaxant, re-evaluate him in one month.

(Ex. 3 at 1.)

25. Claimant then began physical therapy. On July 18, 1995, he told the physical therapist, Keith Thompson, that he had "injured low back when twisted low back at work after being struck by trailer." (Ex. 9 at 1-2.)

26. Claimant was scheduled for five physical therapy sessions between July 18 and August 8, 1995. He attended two, missing the other three. Claimant testified at trial he was unable to attend some physical therapy sessions because he had no money for gas. Nonetheless, Thompson's notes indicate that claimant's symptoms improved during this time. (Ex. 9 at 10-14.)

27. Claimant returned to Dr. Murphy on August 15, 1995, complaining of continuing pain in the low back with radicular pain in the left extremity. Dr. Murphy ordered an MRI. (Ex. 3 at 2.) The MRI revealed a "small central disc protrusion (herniation) at L5-S1." (Ex. 4 at 1.)

28. On August 22, Dr. Murphy recommended continuing conservative care including muscle relaxants and physical therapy. (Ex. 3 at 3.)

29. Claimant underwent a second course of physical therapy between August 24 and September 6, 1995. He was scheduled for six appointments and attended three. Based on therapist Thompson's notes, he improved slightly over this time period. (Ex. 9 at 3-9.)

30. Claimant returned to Dr. Murphy on September 8, 1995. Dr. Murphy's note for this visit is very brief and reads "[i]n today stating doing much better; has missed last 2 PT appts. Going to RTW full duty /c no limits." (Ex. 3 at 3.)

31. Claimant testified at trial that he asked Dr. Murphy to release him to work because he needed to earn money and his father-in-law had offered him work in exchange for rent. Claimant and his family live in a house owned by claimant's father-in-law.

32. Since September 8, 1995, claimant has only done odd jobs; he has not returned to full-time employment. However, he does not contend he has been temporarily totally disabled beyond September 11, 1995, the day he went to work for his father-in-law.

33. Claimant testified that prior to June 20, 1995, he had never had back problems.

34. The State Fund presented no other explanation of claimant's onset of back pain.

35. I find that on June 20, 1995, claimant suffered a back injury, along with his foot injury, as a result of his industrial accident. Claimant has consistently reported back pain, beginning with his report of back pain to the emergency room physician on the day after the injury. His attempt to see Dr. Murphy on June 30, 1995, is consistent with his testimony that his back continued to hurt after his return to work on Monday, June 26, and that he told his employer that he needed to see a doctor. He had no prior history of back pain. The emergency room physician confirmed that his back strain was consistent with either a fall or twisting injury. No other explanation has been offered for why he had an onset of back pain immediately after the industrial accident.

36. The State Fund's denial of liability for claimant's back pain was unreasonable. The fact that claimant's back pain commenced immediately following the accident is unrefuted. The State Fund could point to no alternative explanations or any prior history of back pain. It had an independent duty to investigate this claim, instead it took the employer's word at face value and failed to investigate. It did not interview the roofer for whom Simpson said that claimant was working. It did not interview Simpson's wife, whom claimant was told had called Dr. Murphy's office, to find whether she called and why. Her knowledge that claimant was attempting to see Dr. Murphy would have contradicted her husband's claim that claimant simply walked off the job without a word of explanation, for if he did, how would she know about Dr. Murphy? It failed to contact Dr. Murphy's receptionist about the matter. Simpson claimed that two of his other employees saw claimant working, but there was no follow-up with them either. And, there is the matter of the medical records, which plainly support this claim.

CONCLUSIONS OF LAW

1. The statutes in effect on the date of injury apply in determining the benefits due. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Claimant's injury occurred on June 20, 1995, therefore the 1995 version of the Worker's Compensation Act applies in this case.
2. The claimant has the burden of proving that his back injury is compensable under the Workers Compensation Act. *Gerlach v. Champion International*, 254 Mont. 137, 140, 836 P.2d 35, 37 (1992).
3. The claimant has satisfied his burden. He suffered a back injury, as well as a foot injury, as a result of the June 20, 1995, industrial accident. He is therefore entitled to medical benefits for treatment of his back.
4. He is also entitled to temporary total disability benefits for the period of June 20 to September 11, 1995, the date on which he was released to return to work without restrictions, less six days as provided in section 39-71-736(1), MCA (1995), and less the two days he worked on June 26 and 27, 1995. On September 11, 1995, he reached maximum medical healing and is not entitled to benefits thereafter.
5. The claimant is entitled to a 20% increase in benefits since the insurer unreasonably refused to pay benefits. § 39-71-2907, MCA (1995). He is also entitled to attorney fees and costs in an amount to be determined by the Court. § 39-71-611, MCA (1995).

JUDGMENT

1. The State Fund shall pay claimant's medical expenses for treatment of his low-back condition.
2. The State Fund shall pay claimant temporary total disability benefits for the period June 20, 1995 through September 11, 1995, less the six day waiting period specified by section 39-71-736(1), MCA (1995), and less the two days of work he performed on June 26 and 27, 1995.
3. The State Fund shall pay claimant a 20% penalty on all benefits.
4. Claimant is entitled to attorney fees and costs pursuant to section 39-71-611, MCA and in accordance with ARM 24.5.343.
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.
6. This JUDGMENT is certified as final for purposes of appeal.

Dated in Helena, Montana, this 5th day of July, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Kevin E. Vainio
Mr. Charles G. Adams
Submitted: June 21, 1996