

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 107

WCC No. 9508-7376

BRIAN OSTWALD,

Petitioner,

vs.

PLUM CREEK MANUFACTURING,

Respondent/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: A sawmill worker with history of work-related back trouble told employer he “was trying to shut kelm [sic] door lifting over tracks and felt a pop in lower back with sharp burning pain and lost feeling in left leg.” Adjusting firm denied claim under Workers’ Compensation Act, on ground the incident did not meet the statutory definition of accident and injury. At trial, citing *Belton v. Carlson Transport*, 202 Mont. 384 (1983), employer argued the claim was not compensable because claimant suffered an earlier occupational disease and had not reached MMI.

Held: Denial of claim under WCC was unreasonable where claimant described an unexpected unusual strain, identifiable by time and place and by part of the body affected, and caused by a single event during a single work shift. The incident was an “unusual strain” in the classical sense. In addition, though insurer invoked procedures of the Occupational Disease Act, DOL appointed physician described incident as injury. *Belton* argument is misplaced; that rule is an exception to the more general rule that the employer and insurer take the worker as they find him and has not been extended to situations where no prior claim has been filed or where no insurer is already liable for the existing condition. Attorneys fees awarded, but not penalty where Pretrial Order contained no request for penalty.

Topics:

Attorneys Fees: Cases Awarded. Attorneys fees awarded where adjusting firm acted unreasonably in denying incident was injury where employee felt pop in lower back accompanied by sharp burning pain and loss of feeling in leg; the incident met the definition of injury and was an “unusual strain” in the classical sense.

Attorneys Fees: Reasonableness of Insurers. Attorneys fees awarded where adjusting firm acted unreasonably in denying incident was injury where employee felt pop in lower back accompanied by sharp burning pain and loss of feeling in leg; the incident met the definition of injury and was an “unusual strain” in the classical sense.

Cases Discussed: *Belton v. Carlson Transport*. *Belton* is an exception to the more general rule that the employer and insurer take the worker as they find him and has not been extended to situations where no prior claim has been filed or where no insurer is already liable for the existing condition.

Injury and Accident: Aggravation: Generally. Denial of claim under WCC was unreasonable where claimant’s report of pop in back, accompanied by burning pain and numbness, described an expected unusual strain, identifiable by time and place and by part of the body affected, and caused by a single event during a single work shift. Although claimant had an existing back condition, respondent is responsible for the aggravation of that condition.

Injury and Accident: Subsequent Injury. *Belton* is an exception to the more general rule that the employer and insurer take the worker as they find him and has not been extended to situations where no prior claim has been filed or where no insurer is already liable for the existing condition.

Injury and Accident: Unexpected Strain or Injury. Denial of claim under WCC was unreasonable where claimant’s report of pop in back, accompanied by burning pain and numbness, described an expected unusual strain, identifiable by time and place and by part of the body affected, and caused by a single event during a single work shift. The incident was an “unusual strain” in the classical sense.

Claimants: Pre-Existing Condition. *Belton* is an exception to the more general rule that the employer and insurer take the worker as they find him and has not been extended to situations where no prior claim has been filed or where no insurer is already liable for the existing condition.

Penalties: Insurers. Although WCC found insurer acted unreasonably, penalty not awarded where Pretrial Order contained no request for penalty.

Unreasonable Conduct by Insurers. Adjusting firm acted unreasonably in denying incident was injury where employee felt pop in lower back accompanied by sharp burning pain and loss of feeling in leg; the incident met the definition of injury and was an “unusual strain” in the classical sense.

The trial in the above-entitled matter came on Tuesday, December 12, 1995, at 8:00 a.m., in Courtroom 1, Flathead County Justice Center, Kalispell, Montana. The Honorable Mike

McCarter, Judge of the Workers' Compensation Court, presided. Petitioner, Brian Ostwald, was present and represented by Mr. Chas. C. Dearden and Mr. David W. Lauridsen. Respondent was represented by Mr. Kelly M. Wills. The court reporter in this matter was Ms. Beth Gilman.

Opening statements were made by counsel. Exhibits 1 through 8 were admitted by stipulation. The parties agreed that the depositions of Randale C. Sechrest, M.D. and Michael Righetti, M.D. can be considered part of the record. Petitioner Brian Ostwald and Mike Covey were sworn and testified.

FINDINGS OF FACT

1. Claimant is 32 years of age. He is married and has two children.
2. Claimant previously worked as a wildlife biologist. However, in April 1994 he went to work for Plum Creek Manufacturing at its Ksanka sawmill. He was initially employed on cleanup. Later he became a stacker operator.
3. Sometime during the late summer of 1994 claimant's low back began hurting. The onset of his back pain was gradual and was not related to any specific incident.
4. Claimant first sought care for his back condition on October 21, 1994, when he saw Dr. Alan P. Collins, his family physician. At the time of Dr. Collins' examination, he recorded the following history:

S: This is a 31 year old man who comes in with a complaint of left lumbar pain for the last 2 months. The pain radiates down the left thigh, causing a tingling numbness on the top and the side of the left thigh. It is helped by Ibuprofen, but at this point he is taking 4 over the counter Ibuprofen tablets, 4 times a day. The patient is working 4 days [a] week at Plum Creek and essentially, the problem is exacerbated by work. At the end of the 4 day stint, he is in pretty bad shape. He goes home, rests us [sic] and at the end of the weekend, he usually feels pretty good and then the cycle starts again. He's working Friday, Saturday, Sunday and Monday of every week at this point. The work he is doing is bent over, pulling boards from left to right, all day long which is probably kind of a set up for back problems. The problem was not of sudden onset, but came on slowly, starting about 2 months ago. He notes that it feels better when he lies on his back with his knees up. He is not doing any exercises in particular.

Patient hasn't had previous disk problems or problems with severe lumbo sacral sprain. He has, however, had problems dating back to high school. In a pole vaulting incident, he developed a kind of a [sic] slipped vertebrae that sounds like spondylolisthesis in the lumbar spine. Later on while horse back riding, he had a

fall, onto his left side, broke some ribs and broke off, what may have been the transverse process on some of his thoracic vertebrae.

Patient has no known medical allergies and otherwise is without medical problems.

(Ex. 6 at 49.) Dr. Collins diagnosed lumbo sacral strain and commented that "this is exacerbated by his work situation." (*Id.*) He further commented that "[t]he upper leg pain, I think, is radiating pain."

5. Dr. Collins prescribed physical therapy and Naprosyn, which is a nonsteroidal anti-inflammatory drug. (*Id.*)

6. Claimant continued to have pain and Dr. Collins referred him to Dr. Michael Righetti, an orthopedic surgeon.

7. Dr. Righetti examined claimant on November 7, 1994. (Ex. 6 at 52.) At that time claimant reported that his low back was "real sore" but did not report significant pain radiating into his legs. (*Id.*) Dr. Righetti reported that "[h]is pain has been primarily back and left buttock, not much leg pain to speak of" and that "[s]traight leg raising causes some low back pain but not much sciatica." (*Id.*) Thus, it appears that the radiating thigh pain reported October 21, 1994, had subsided. Dr. Righetti prescribed further physical therapy, along with anti-inflammatory and muscle relaxant drugs.

8. Claimant submitted the bills for the foregoing medical care to his private medical insurer.

9. Mike Covey, who at that time was the manager of the Ksanka mill, learned of claimant's back pain. He discussed the matter with claimant and claimant's immediate supervisor on October 31, 1994. At that time he was concerned that the back pain might be job related. He explained that if the pain was work related then claimant should file a claim for compensation and should not submit his medical bills to a private insurer. Covey did not explain the difference between an occupational disease and an industrial accident and was unable at that time to determine whether in fact the claimant's low-back pain was job related. Claimant responded that he would pursue a claim if he needed surgery.

10. Covey followed up with a letter on November 7, 1994. That letter, which is found at Exhibit 5, reiterated that "if you have a work related injury or occupational disease, a Claim For Compensation must be completed." (Capitals in original.) He specifically requested claimant to "respond in writing to me as to the nature of your low back pain i.e., is it work related or not?" (*Id.*)

11. Claimant did not file a claim for compensation at that time but continued to work. He was reassigned to operate a fork-lift. Whether the reassignment was coincidental with his back pain or on account of it is not clear to the Court.

12. On November 14, 1994, claimant was wrestling with a heavy kiln door that had come off its hinges. He felt a pop in his back and immediately experienced sharp burning pain. He also experienced a loss of feeling in his left leg. (Ex. 1 at 1 and Ex. 2.)

13. Claimant spent the weekend lying flat on his back but did not obtain relief from his pain. (Ex. 6 at 56.) He contacted Dr. Righetti, who took him off work.

14. Thereafter claimant continued to experience both back and leg pain. In a letter dated December 12, 1994, to Putman and Associates, which adjusted the claim for Plum Creek, Dr. Righetti noted that claimant was still off work and that claimant had experienced some decrease in numbness but still had "a lot of left thigh and leg pain," along with continued back pain. (Ex. 6 at 58.) Dr. Righetti ordered an MRI at that point.

15. The MRI was performed on December 15, 1994, and disclosed

Mild anterior listhesis 3 on 4 with probable bilateral spondylolysis defects and moderate facet spurring left side predominant with mild disc bulging without major canal or neuroforaminal compromise evident.

Mild 2-3 disc degenerative change without canal or neuroforaminal compromise.
Lumbar MRI otherwise normal.

(Ex. 6 at 59, originally in caps.)

16. Claimant has continued to experience pain in his back, buttocks and left leg, with some intermittent pain in his right leg. (*Id.* at 60-65.) His pain is constant, whereas prior to the November 14, 1994 incident, he had been able to obtain some relief by lying down and taking anti-inflammatories. Surgery is now under consideration.

17. Claimant returned to work in early January 1995 as a security guard, which is a lighter-duty position. He has continued to work in that position.

18. Both Dr. Righetti, who is claimant's treating physician, and Dr. Sechrest, an orthopedic surgeon who conducted an occupational disease examination at the request of the Department of Labor, agreed that the November 14, 1994 incident symptomatically worsened claimant's preexisting back condition and increased his disability.

19. Claimant immediately reported the November 14, 1994 incident to his employer. In his handwritten report he described the incident as follows:

Back has been giving me trouble at work for about 3 months have seen a couple doctors without filling [sic] a comp claim. Monday morning after doing a full shift was trying to shut kelm [sic] door lifting over tracks and felt a pop in lower back with sharp burning pain and lost feeling in left leg. [Punctuation and capitalization missing in original.]

(Ex. 2.) Plum Creek then filled out an employer's first report of notice of occupational injury or occupational disease. (Ex. 1 at 1.) That report repeated claimant's description of his back trouble of three months duration and the specific incident of November 14, 1994.

20. On December 12, 1994, Putman & Associates notified claimant that his claim was being denied under the Workers' Compensation Act but would be considered under the Occupational Disease Act. In rejecting a workers' compensation claim, Putman's claims adjuster wrote:

In making a determination on whether you are entitled to benefits for your present medical condition, it is necessary to address the relationship of your condition to the definitions of "injury" and "accident" in accordance with the Montana Workers' Compensation Act. Please be advised that an "accident" and "injury" are defined as:

"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."

Given the facts of your claim as reported to your employer on your Claim for Compensation and reviewing the information you provided during your recorded statement, your condition does not meet the definitions of "injury" and "accident". This correspondence will therefore serve as formal notification that your claim for workers' compensation injury benefits is denied.

(Ex. 1 at 3.)

21. Putman's reasons for denying the claim under the Workers' Compensation Act were patently unreasonable. The incident described in the claimant's report of the accident and the Employer's First Report plainly satisfied the accident definition quoted in Putman's letter. There was an unexpected unusual strain; it was identifiable by time and place; it was identifiable by the part of the body affected; and it was caused by a single event occurring during a single work shift. Indeed, it was an unusual strain in the classical sense. Moreover, section 39-71-407, MCA (1993), expressly provides coverage for an injury which aggravates a preexisting condition.

22. Plum Creek thereafter invoked the procedures of the Occupational Disease Act by requesting the Department of Labor to set up an examination by a physician on the Occupational Disease Panel. (Ex. 1 at 5.) Dr. Sechrest was appointed and conducted an examination. He reported that claimant was suffering from an occupational disease. (Ex. 6 at 64-65.) However, in his report Dr. Sechrest referred to the incident of November 14, 1994,

as an "injury" and noted that as a result of the injury claimant's "pain appreciated both in the low back and L [left] lateral thigh" (*Id.* at 64.)

23. Neither Plum Creek nor claimant, who was unrepresented, requested a second examination and on March 14, 1995, the Department issued an Order of Determination finding that claimant suffers from an occupational disease. (Ex. 1 at 25.) No hearing was requested and the Order thereafter became final. See order denying motion for summary judgment (December 5, 1995).

24. On August 29, 1995, claimant filed the present petition. Plum Creek moved for summary judgment on the ground that the Department's determination finding that claimant suffers from an occupational disease bars the present claim on res judicata grounds. The Court denied the motion, pointing out that a claimant can be suffering from an underlying occupational disease and also have suffered an industrial injury which aggravated his low-back condition. order denying motion for summary judgment (December 5, 1995).

25. At trial Plum Creek, citing *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983), argued that the present claim for benefits should be denied because claimant was suffering from an occupational disease and had not reached maximum healing with respect to that disease.

26. Both Dr. Sechrest and Dr. Righetti were deposed. Their depositions establish that claimant suffers from spondylolysis pre-dating his employment but that the condition was aggravated by his work. The doctors also agreed that claimant was suffering from an occupational disease since his work was aggravating his condition. Finally, Dr. Righetti testified that as of the November 7, 1994 examination, claimant was not at maximum healing with respect to the occupational disease. However, as already stated in Finding 18, both doctors agreed that the November 14, 1994 incident worsened claimant's condition.

CONCLUSIONS OF LAW

1. For the reasons set forth in the Court's order denying motion for summary judgment, the present claim is not barred by the Department of Labor and Industry's determination that claimant is suffering from an occupational disease.

2. Under the Workers' Compensation Act, injury and accident are defined as follows:

39-71-119. Injury and accident defined. (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 incident of November 14, 1994, meets all of the criteria.

3. It has long been the law that an injury which aggravates a preexisting condition is covered under the Workers' Compensation Act. The law is clear that an insurer is liable for an injury as defined in section 39-71-119, MCA, if the claimant establishes it is more probable than not the injury aggravated a preexisting condition. Section 39-71-407(2), MCA (1993), provides:

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

(i) a claimed injury has occurred; or

(ii) **a claimed injury aggravated a preexisting condition.** [Emphasis added.]

The employer takes the employee as it finds him. *Houts v. Kare-Mor*, 257 Mont. 65, 68, 847 P.2d 701, 703 (1992). The employee is entitled to compensation if the condition was aggravated or accelerated by an industrial injury. *Hash v. Montana Silversmith*, 248 Mont. 155, 158, 810 P.2d 1174, 1175 (1991).

4. Claimant's reliance on *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983), is misplaced. *Belton* concerns liability as between two different insurers for two different accidents. The decision held that the first insurer remains liable for a claimant's condition despite a subsequent aggravation of the condition *if* claimant had not reached maximum healing prior to the subsequent aggravation. This rule is an exception to the more general rule that the employer and the employer's insurer take the workers as they find them. But the exception has not been extended to situations where no prior claim has been filed or where no insurer is already liable for a condition.

5. Plum Creek's defense of this claim has been unreasonable. Its initial denial, which asserted that no accident had occurred, was utterly without merit. Its subsequent invoking of the Occupational Disease Act was patently calculated to force claimant under the Occupational Disease Act, which has less generous benefits than the Workers' Compensation Act, and thereby secure Plum Creek potential savings in the payment of future benefits. Its reading of *Belton* ignored the express limitation of the decision to cases in which there is a prior claim and a prior insurer which has been determined liable for the

claim. Its attempt to force this claim under the Occupational Disease Act ignored case precedent holding that where a claim is possible under both the Occupational Disease and the Workers' Compensation Acts, the claimant, not the insurer, has the right to elect as between the two acts. *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 477, 665 P.2d 783, 786 (1983). Its theories ignored the unequivocal opinions of both Dr. Sechrest and Dr. Righetti, opinions which demonstrate that claimant indeed suffers from an occupational disease but that his disease was aggravated by an injury on November 14, 1994.

6. Since Plum Creek's denial of this claim was unreasonable, claimant is entitled to attorney fees and costs. § 39-71-611, MCA (1993).

7. Since the Pretrial Order contains no request for a penalty, the Court will not consider awarding a penalty.

8. Since there is no specific request for benefits, the Court makes no determination concerning what benefits if any are due the claimant.

JUDGMENT

1. The claimant suffered an industrial injury on November 14, 1994. That injury is compensable under the Workers' Compensation Act.

2. The claimant is entitled to reasonable attorney fees in an amount to be determined by the Court.

3. Claimant is entitled to his costs in an amount to be determined by the Court.

4. This JUDGMENT is certified as final for purposes of appeal.

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 19th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Chas. C. Dearden

Mr. David W. Lauridsen

Mr. Kelly M. Wills

Submitted: December 12, 1995