IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 70

WCC No. 2004-0997

PERRY A. ROSE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant, who had worked in logging for many years and had a history of low-back injuries, claims that he reinjured his back on July 22, 2003, while working for Treasure State Logging.

Held: The claimant's testimony that he fell from a log and reinjured his back was not credible and I find that the alleged accident did not in fact occur. Accordingly, his claim for compensation is denied.

Topics:

> **Evidence: Credibility.** The claimant's assertion that he suffered a new industrial injury to his low back while working in logging is found not credible where: (1) he had suffered prior injuries to his back; (2) he worked only one day for the employer; (3) at the time of the alleged accident he was either taking narcotic drugs for his back pain or had run out of narcotic drugs because he had taken more than prescribed; (4) his wife attempted to prevent him from going back to work in logging in part because of his preexisting back pain; (5) his symptoms after the accident were the same as before, albeit he claimed that they were more severe; (6) his assertion that another employee had witnessed the accident was disputed by the other employee; (7) his description of the accident was incompatible with the mechanical operation during which he claims he was injured; and (8) he was in dire financial straits.

¶1 The trial in this matter was held in Kalispell, Montana, on August 25, 2004. The petitioner, Mr. Perry A. Rose, was present and represented by Mr. Richard J. Martin. Respondent, Montana State Fund, was represented by Mr. Daniel B. McGregor.

¶2 Exhibits: Exhibits 1 through 19 were admitted without objection.

¶3 Witnesses and Depositions: Perry Rose, Rebecca Rose, Bob Muth, Ann Muth, Jack May, Tony Lietz, and Kevin Bartsch testified at trial. In addition, the parties submitted the depositions of Perry Rose and Rebecca Rose to the Court for its consideration.

¶4 Issues Presented: The issues are stated in the Pretrial Order as follows:

> ¶4a Whether Petitioner suffered a work-related injury on July 22, 2003.
>
> ¶4b Whether Petitioner is entitled to past and future medical benefits for the July 22, 2003 injury.
>
> ¶4c Whether Petitioner is entitled to temporary total disability [TTD] benefits retroactive to the time that the Petitioner was unable to work as a result of the July 22, 2003 injury.

(Pretrial Order at 2.)

¶5 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

¶6 Perry Rose (claimant) is 33 years old. He has worked as a logger for most of his adult life.

¶7 The present case involves an alleged low-back injury occurring on July 22, 2003, while the claimant was working for Treasure State Timber, Incorporated (Treasurer State). At the time of the alleged accident, the Montana State Fund (State Fund) insured Treasure State. It has denied liability for the claim and disputes the claimant's assertion that he suffered an industrial injury on that day.

¶8 Whether or not the claimant suffered an industrial accident ultimately involves my assessment of the claimant's credibility. No one witnessed the alleged accident of July 22, 2003; others working with the claimant at the time do not support his claim. After carefully listening to the claimant's testimony and considering both his demeanor and the other testimony and exhibits in this case, I find that the claimant did **not** suffer an industrial accident or injury on July 22, 2003, while working for Treasure State.

¶9 Treasure State is a small, family logging operation operated by Bob Muth (Bob) with the help of his wife, Ann. It contracts with Plum Creek Lumber to harvest timber in northwestern Montana.

¶10 The claimant worked one day for Treasure State - July 22, 2003. At the time he went to work for Treasure State, he had been off work for several months on account of a prior back injury and was in serious financial straits.

¶11 The claimant had suffered two prior low-back injuries, as shown on the history of his workers' compensation claims.[(1)] (Ex. 13.) The last one was on August 26, 2002, while he was working for Canyon Logging, which was also insured by the State Fund. He was taken off work as a result of that injury.

¶12 The claimant settled his August 26, 2002 claim in April 2003 for approximately $13,000. By July 2003, the settlement moneys were spent.

¶13 The settlement closed medical benefits but the claimant continued to experience episodes of severe back pain and seek medical care after the settlement. He sought emergency room treatment for back pain in both May and June of 2003, receiving shots for his pain. He experienced flareups of back pain collecting firewood and when engaging in other activities.

¶14 As noted in the previous paragraph, the settlement of the Canyon Logging claim closed medical benefits,[(2)] however, the claimant asserted he did not understand that his medical benefits were closed. He brought an ethics complaint against the attorney who had represented him with respect to the claim and also sought to reopen his claim against Canyon Logging. The complaint against the attorney was dismissed; the request to reopen was scheduled for mediation on July 21, 2003.

¶15 Meanwhile, Bob called the claimant about working as a "choker" for Treasure State. The claimant had sought employment with Treasure State in May 2003 but Bob had no openings at that time. By mid-July Bob needed a choker operator and on Wednesday, July 16, 2003, he called the claimant and offered him the job starting Thursday, July 17, 2003. The claimant accepted the offer.

¶16 On July 15, 2003, one day prior to Bob's call, the claimant sought and obtained a seven-day supply of Hydrocodone from his family physician. (Ex. 12 at 3.) Hydrocodone is a classified narcotic drug and was prescribed for the claimant's ongoing back pain.

¶17 Of further significance, on July 10, 2003, five days prior to his obtaining the Hydrocodone, the claimant had obtained a five-day supply of Roxicet. (Ex. 12 at 1.) Roxicet is a combination of acetaminophen and Oxycodone. Oxycodone is a classified narcotic drug.

¶18 On the evening of July 16, 2003, the claimant set his alarm to awaken in time to go to work for Treasure State, however, his wife shut off the alarm after he had fallen asleep. She did so because she did not want him to return to work in logging in view of his prior injuries and physical condition.

¶19 As a result of his wife's action, the claimant did not awaken in time to go to work on July 17th.

¶20 On Friday, July 18, 2003, the claimant telephoned Treasure State and talked to Ann Muth (Ann). He pleaded for work, telling her that he had small children and needed a job. Ann communicated the conversation to Bob.

¶21 On Sunday evening, July 20, 2003, Bob called the claimant and told him he would give him a second chance. He requested the claimant to come to work on Monday, July 21, 2003. However, the claimant asked to start work on Tuesday, July 22nd, explaining that he had a meeting with his attorney about an outfitting business he was pursuing. In fact, the meeting the claimant had scheduled on July 21st was the mediation conference with respect to his 2002 back claim against Canyon Logging.

¶22 The claimant showed up for work on July 22nd as agreed. The claimant testified that he did not take the Hydrocodone prescribed on July 15th on either July 21st or July 22nd. If so, he should have had a two-day supply of the drug remaining when he came home from work on the 22nd. However, his wife testified, and I find, that he had no Hydrocodone remaining when he returned that evening. It is therefore clear that either he was taking narcotic drugs for his back pain even as he went to work on the 22nd or that prior to the 22nd he had taken more narcotics than prescribed.

¶23 The claimant's work on July 22, 2003, consisted of securing "choker" cables around felled trees so the felled trees could be dragged uphill to a road and then de-limbed and loaded onto logging trucks. The choker cables in turn attached to a larger "skyline" cable. The skyline cable was attached to a "yarder," which is a large piece of mobile equipment with a drum which takes up and lets out the cable. In Treasure State's logging operation, the cable was unreeled and fed downhill. The end of the cable was secured downhill from the yarder such that the cable ran above the logged area being worked.

¶24 According to the claimant, he reinjured his lower back on July 22, 2003, while he was helping guide the skyline cable downhill in a new area of downed timber. He testified that while standing on a log and guiding the skyline he fell and landed on the right side of his back. In a statement given after the alleged accident, the claimant said that the cable had slack in it and that he "jerked on it and lost [his] balance . . . ." (Ex. 6 at 2.)

¶25 The yarder operator playing out the cable was Tony Lietz (Tony). Tony testified that if there was slack in the skyline and the claimant had fallen, the drum would have reversed direction and caused a major mess with the cable, something he testified did not occur. His testimony, which I found credible, cannot be reconciled with the claimant's description of the accident.

¶26 The claimant also stated in his statement that another employee-Jake May (Jake) -saw him fall. (Ex. 6 at 2, 4.) Jake testified, credibly, that he did not see any such fall.

¶27 Jake testified that the claimant indicated toward the end of the workday that his legs were tired and that he was out of shape. The claimant told him that it would take time for

him to get in shape again. Jake testified that the claimant never indicated he had fallen and hurt himself. I found Jake's testimony credible. The claimant admitted in his own testimony that he was out of shape and "not feeling very good that day." The claimant also admitted that he never told Bob, who was at the job site, about any accident.

¶28 Upon returning home from work on July 22, 2003, the claimant did not mention any injury or accident to his wife. Indeed, he told her only that he was tired and was going to enjoy the new job. He then went to a local lake with his family. While at the lake he told his wife that he was tired and they went home, where he slept for awhile. He awoke later that evening and told his wife that his back hurt and that he had fallen down at work.

¶29 The claimant then went to the Emergency Room (ER) of the Kalispell Regional Medical Center. The ER record reflects that he arrived at the ER at approximately midnight. (Ex. 8 at 2.)

¶30 The claimant testified that he had a deep, raspberry-colored bruise on his back when he arrived at the ER. Such a bruise would lend credibility to his claim that he fell at work. I have carefully reviewed the ER record of July 22, 2003. The ER record reflects, "[Claimant] **[r]eports** bruising and discoloration over the lower back." (Ex. 8 at 2 (emphasis added).) However, the physician who physically examined the claimant recorded that there was "**[n]o evidence of significant external trauma.**" (*Id*. (emphasis added).) That observation is incompatible with the claimant's assertion of a significant, visible bruise. I find that in fact there was no such significant bruise.

¶31 On August 5, 2003, the claimant saw Edward P. Stein, M.D., who had treated the claimant previously. Dr. Stein noted that the claimant's symptoms were the same as before but that the claimant simply complained that his symptoms were worse. (Ex. 17.) I quote from Dr. Stein's August 25, 2003 letter referring the claimant back to Dr. Mark McGlothlin, who had previously treated the claimant for his back problems:[(3)]

> I am referring Mr. Rose back to you in follow up of his back condition. As you are aware, he suffered a work comp injury in August 2002. I believe you last saw him September 2002 for his functional capacity evaluation. Patient was recently seen in KRMC ER on 7/22/03 when he reportedly fell on his back and landed on a log with exacerbation of his chronic low back pain. Per patient and his wife, prior to his reinjury he was having chronic low back pain in the lumbar area bilaterally with right lower extremity gluteal pain and a tingling like numbness and achiness both in the front and back of his right thigh and inner posterior calf, that now have all been aggravated since this injury. **They tell me today there are no new symptoms; it is just that they are all worse.**

(Ex. 17 at 1 (emphasis added).)

¶32 In their trial testimony, both the claimant and his wife confirmed that the claimant had no new symptoms after the alleged July 22nd accident.

¶33 I am convinced that the claimant was not reinjured in an accident on July 22, 2003. I am unpersuaded he fell on his back as he alleges. Rather, I am persuaded that due to his preexisting low-back condition and his deconditioning, his work on July 22nd simply caused a flareup of his pain similar to flareups he experienced with other activities, including his wood gathering.

CONCLUSIONS OF LAW

¶34 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶35 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶36 The claimant has failed to carry his burden of proof. I am unpersuaded that he fell from a log and reinjured himself as he claims. I am convinced that the incident he describes did not in fact occur.

JUDGMENT

¶37 The claimant did not suffer an industrial accident on July 22, 2003, as he claims. Therefore, he is **not** entitled to workers' compensation benefits with respect to the alleged accident. His petition is **dismissed with prejudice**.

¶38 This JUDGMENT is certified as final for purposes of appeal.

¶39 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 13th day of October, 2004.

(SEAL)

MIKE McCARTER
JUDGE

c: Mr. Richard J. Martin
Mr. Daniel B. McGregor
Submitted: August 25, 2004

1. The claimant had also previously suffered a torn rotator cuff.

2. Kevin Bartsch, the State Fund's adjuster who adjusted the Canyon Logging claim, testified that he had serious concerns about the claim based on the claimant resisting a return to light-duty work, his multiple visits to the emergency room even after he had a treating orthopedic physician, and questions concerning the claimant's possible overuse of narcotics for his pain. Because of disputes over the claimant's utilization of medical care, future medical benefits were taken into consideration in the final settlement amount and future medicals were closed.

3. The claimant never returned to Dr. McGlothlin.