IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 7

WCC No. 2000-0189

MARY SUTTON

Petitioner,

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondent/Insurer for

PEOPLE'S MARKET,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Case Summary: Claimant alleges she was injured in a fall at work. She testified that she immediately informed a coworker of the fall, then reported the injury to her supervisor the next day. Another coworker, who was not working at the time, supported claimant's testimony. However, the coworker on duty and the supervisor denied claimant reported the injury or that the she appeared injured.

Held: No industrial accident occurred. Claimant and her supporting witness were not credible. The supporting witness plainly disliked the employer and was biased. The coworker who was working at the time of the purported accident, as well as the supervisor, were credible.

Topics:

> **Witnesses: Credibility.** Claimant and a coworker who supported claimant's story were not credible. The coworker was plainly biased against the employer and her and claimant's testimony was contradicted by that of a credible unbiased coworker and claimant's supervisor, who was also credible. Claimant's behavior in putting a note regarding the accident in a cash register till was "odd" and further undermined her credibility.
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> **Witnesses: Credibility.** External evidence of credibility should be considered by the fact-finder whenever possible. Mere observation of witnesses in the courtroom may not always lead to the correct conclusion regarding the witnesses' credibility.

¶1 This matter came on for trial in Missoula on January 19, 2001. Petitioner, Mary Sutton (claimant), was present with her attorney, Mr. Dustin L. Gahagan. Respondent, Hartford Accident and Indemnity Company (Hartford), was represented by Mr. William O. Bronson.

¶2 Exhibits: Exhibits 1 through 6 were admitted without objection.

¶3 Witnesses and Depositions: The parties agreed that the depositions of claimant, Lisa Anders, and Terry Bergren may be considered by the Court. Claimant, Terry Windstedt, Linda Ballinger, Lisa Anders, Bernice Bergren, Terry Bergren, and Linda Slavik testified at trial.

¶4 Issues Presented: As set forth in the final pretrial order, the following issues are presented:

a. Is Petitioner entitled to the acceptance of liability for her claim?

b. What is the amount of damages suffered by Petitioner at this time?

c. Is Petitioner entitled to recover her costs and attorney fees incurred in pursuing this action pursuant to Mont. Code Ann. Section 39-71-611?

(Final Pretrial Order at 1-2.)

¶5 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

¶6 On September 9, 1998, the claimant began working for People's Market in Darby, Montana. She was employed as a cashier.

¶7 People's Market is a supermarket owned by Bergren, Incorporated, which is a small family corporation. Terry Bergren is one of the shareholders and is president of the company. His wife, Bernice Bergren, is secretary of the corporation and the primary bookkeeper.

¶8 As a cashier at People's Market, claimant was a checker at a checkout stand. Her duties also included stocking of eggs and milk when those items were low.

¶9 On August 28, 1999, claimant worked the 2:00 pm to 10:00 pm shift. The store closed at 10:00 pm.

¶10 Claimant alleges that between 9:45 and 10:00 pm she went to stock milk and that while moving a crate of milk, which held 4 one-gallon containers, she slipped and fell, injuring her back.

¶11 At the time of her alleged accident, People's Market was insured by Hartford.

¶12 Claimant testified that prior to the end of her shift she reported her accident to Linda Ballinger (Ballinger), another cashier on duty that evening, and Susie Slate (Slate), another coworker. (Slate was not called to testify by either party.) Claimant further testified that just before her shift ended, Terry Windstedt (Windstedt), another cashier who was not working that evening, stopped by the store and that she told Windstedt about her accident.

¶13 Claimant's supervisor was Lisa Anders (Anders) but Anders was not working that evening. Claimant testified that she attempted telephoning Anders before she left work on August 28th but was unable to contact her. She testified that the next day - August 29th - she telephoned Anders and reported the accident and that while working later that day she repeatedly told Anders about the accident. According to claimant, Anders "put her off" about filing a report of the accident, and that at one point she "smiled and went upstairs."

¶14 Claimant had suffered a previous work-related injury at People's Market. The accident was witnessed by Anders. Claimant acknowledged that Anders provided her a form to fill out with respect to the prior injury and there were no difficulties with the claim.

¶15 Claimant called Windstedt as a witness on her behalf. Windstedt testified that she had been to an event in Hamilton, Montana, on the evening of August 28th and stopped by People's Market shortly before closing while on the way home. According to Windstedt, claimant was almost in tears, could not stand up straight, and said that she had fallen and hurt herself.

¶16 Windstedt was a disgruntled employee. She disliked the Bergrens and was outspoken in her dislike for them and her job. In March or April 2000, she found another job and quit working for People's Market without any prior notice to her supervisor or the Bergrens. Her bias against the Bergrens and People's Market was apparent to the Court.

¶17 Ballinger disputed claimant's story. She testified that shortly before closing, the claimant stated she was going to "front eggs," which involves pulling egg cartons forward on the shelves to fill in for cartons of eggs which had been sold. She further testified that the milk had been restocked late that afternoon by Michael Rasmussen, another employee who typically restocked the milk.

¶18 Ballinger testified that claimant did not report any injury to her that evening and that she did not appear to be in pain. Further, she testified that on the next day, August 29th, claimant did not mention any injury and did not appear to be injured or in pain. She denied that claimant ever reported any injury to her.

¶19 While Ballinger has since been promoted to a manager position, at the time of the claimant's alleged injury she was a co-employee and her job was similar to the claimant's job. She was interviewed by Hartford's adjuster shortly after the alleged accident and there is no evidence that her report at that time was inconsistent with her testimony at trial. She is also not friends with Anders outside the workplace.

¶20 Anders similarly disputed claimant's story. Anders worked as a cashier on August 29th during claimant's shift. She testified that claimant said nothing about any injury or accident, that she did not complain about pain, and that she appeared fine. She also saw claimant on August 30th and testified that claimant did not report any injury at that time, although she mentioned "female pain" that day.

¶21 Claimant worked the 7:00 am to 2:00 pm shift on Tuesday, August 31st. Anders was in the store, although not checking groceries, during that time. She testified that claimant did not mention any injury to her that day. However, shortly after the conclusion of claimant's shift, Anders checked the claimant's cash till and found a note from claimant stating that she had been injured August 28th. The note, which is in evidence as Exhibit 6, reads:

> On 8-28-99 while stocking the milk I slipped and fell with a crate of milk.
>
> Since then my lower back caused me so much pain.
>
> Mary

One of Anders' duties was to check the tills of the cashiers at the end of their shifts. I infer that claimant was aware of that fact.

¶22 Claimant first sought medical care for back pain on September 2, 1999, at the Emergency Room of Marcus Daly Memorial Hospital in Hamilton. Apparently, the hospital does not maintain a full record of ER visits, at least the only record the parties were able to obtain regarding the visit was a "Patient After Care Instruction" found at Exhibit 1. That record indicates only that claimant was suffering from back strain.

¶23 Records of subsequent medical treatment neither affirm nor refute claimant's allegation that she suffered a work-related injury on August 28th. Dr. Michael D. Lahey, an orthopedic surgeon who examined claimant on October 25, 1999, diagnosed:

> 1) Generalized myofascial pain
>
> 2) Spondylolysis L5 (ICD-9; 738.4)

(Ex. 1 at 6.) Spondylolysis is "disintegration or dissolution of a vertebra," 1997 Merriam-Webster Medical Dictionary (online at www.medscape.com), and claimant has presented no evidence that the condition has a traumatic origin. Dr. Lahey also noted that Waddell's signs were positive (3 of 5) and that claimant's pain diagram was "a diffuse pattern." (*Id*. at 5-6.)

¶24 Upon finding the note claimant left in the "till" on August 31st, Anders reported the matter to Bernice Bergren, who in turn phoned in a report to Hartford.

¶25 Hartford assigned Linda Slavik (Slavik), one of its claims adjusters, to investigate the claim. Within days of receiving the claim, Slavik telephonically interviewed the claimant, Ballinger, Anders, and Slate. Based on the statements of Ballinger, Anders, and Slate, who denied that claimant reported an accident to them as she asserted, Slavik denied the claim.

¶26 Terry Bergren terminated claimant's employment on September 2nd or 3rd, 1999. That termination, coming so soon following her claim, at least raises questions as to the motive of the employer in terminating her and the possibility that termination was retaliatory and that the employer has orchestrated a false denial of her claim.

¶27 In direct examination, claimant's attorney asked claimant for an "opinion" regarding Terry Bergren's reasons for terminating her. I sustained an objection to the question on the ground that the question was asked for improper opinion testimony, however, I offered claimant's counsel the opportunity to elicit testimony as to the facts and circumstances of the termination, after which he could renew the opinion question if he wished. Claimant's counsel terminated the inquiry.

¶28 During his testimony, Terry Bergren was asked about the reason for claimant's termination. He denied firing claimant on account of the alleged injury or her workers' compensation claim. He testified that she was terminated on account of dishonesty regarding the status of her charges for groceries purchased at the store. His explanation was perfunctory and not wholly satisfactory.

¶29 In any event, I have not based my decision in this matter upon the Bergrens' testimony, rather I have based it upon my assessment of the credibility of claimant, her co-employees, and Anders. Even if I were to find that the termination was retaliatory, my assessment of those witnesses' credibility would be unchanged, as would my final decision in this case.

Resolution

¶30 This case comes down to a matter of credibility. The conflicting testimony cannot be reconciled as honest miscommunication. If claimant and Windstedt are not telling the truth about the claimant repeatedly reporting her alleged injury immediately after its alleged occurrence and claimant appearing obviously injured, then it is less likely claimant is telling the truth about the accident itself.

¶31 Based upon my own assessment of the witnesses at trial and my observation of their demeanor, as well as the content of their testimony, I find that neither claimant nor Windstedt were credible and that both Ballinger and Anders were. I further find that claimant's claim that she was injured on August 28th is not credible.

¶32 As is my practice whenever assessing witness credibility, I have paid close attention to other evidence which might confirm or refute my personal perception of credibility. Mere observation of witnesses in the courtroom may not always lead to the correct conclusion regarding the truthfulness of witnesses.

¶33 The following factors tend to support my personal observation and assessment of the witnesses' testimony:

- Windstedt, who testified in favor of claimant, was clearly biased against the Bergrens and People's Market. During her employment with People's Market, she complained bitterly about the owners and her job. She testified that she was "harassed" by Anders, yet her own testimony as to the incidents she believed constituted harassment fell far short of showing harassmen.
- I find it implausible that after traveling to Hamilton for a social event on August 28th Windstedt stopped by People's Market just before closing and just in time to hear about an accident which would have occurred only minutes before.
- A previous industrial accident involving the claimant was duly reported. Claimant failed to present any evidence of a pattern by People's Market of discouraging workers' compensation claims and any explanation of why Anders would have ignored her claim in this case.
- Ballinger had no apparent bias against claimant and no apparent motive to lie. She was a mere co-employee at the time she first responded to claimant's statements about claimant's reports of her injury.
- Claimant's "note in the till" strikes me as odd. If she was worried that Anders would not report her injury, then why put it in the till that Anders would inventory? And why not report the accident directly to the Bergrens, who were by that time back in the store?
- Claimant's alleged restocking of milk occurred fifteen minutes before the store closed. The milk had been restocked a few hours earlier. While it is possible that restocking was necessary at that time, it does not seem plausible so near the closing time.

¶34 I find that claimant did not slip and fall while restocking milk and that she was not injured on the evening of August 28, 1999, while working for People's Market.

CONCLUSIONS OF LAW

¶35 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). That burden includes proof that an industrial accident in fact occurred.

¶36 Claimant has failed in carrying her burden. I am unpersuaded that she slipped and fell at work on August 28, 1999, as she claims. Since her claim is predicated on her assertion that she slipped and fell at work on that date, her claim for compensation fails.

JUDGMENT

¶37 1. The claimant did not suffer an industrial accident or injury on August 28, 1999, and is not entitled to workers' compensation benefits on account of the alleged accident. The insurer properly denied her claim and her petition is **dismissed with prejudice**.

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

¶39 3. 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 8th day of February, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Dustin L. Gahagan
Mr. William O. Bronson
Date Submitted: February 7, 2001