

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 55

WCC No. 9308-6872

STEVEN K. YAGER

Petitioner

vs.

**MONTANA SCHOOLS GROUP AUTHORITY
and ALEXSIS RISK MANAGEMENT SERVICE**

Respondent/Insurer for

LIVINGSTON SCHOOL DISTRICT #4 AND #1

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on May 26, 1994 in Helena, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Steven K. Yager, (claimant) was present and represented by Mr. J. David Slovak. Respondents, Montana Schools Group Authority and Alexsis Risk Management Service, were represented by Mr. Leo S. Ward and Bill Adamo was designated representative of both the insurer and employer. Claimant, Beverly Yager, Bill Adamo, Joe Mason and Verne Beffert were sworn and testified. The depositions of claimant, Beverly Yager, Karen Wiles, Joe Mason, William Adamo, Verne Beffert, Mike Warren, Lorraine Eller, Nina Humble, Robert C. Logan, Matthew Bernethy, William F. Frazier, Jr., Michael P. Sand, Lindsay M. Baskett, M.D., and Whitney S. Robinson, M.D., were stipulated into the record by the parties and considered by the Court in reaching its decision.

Exhibits 1 through 7 and 12 through 19 were admitted into evidence without objection. Exhibits 9 and 10 were not admitted as they were redundant to other exhibits. Exhibit 8 (photographs of classroom) was objected to by respondent on foundation grounds. Respondent's objection to Exhibit 8 was overruled and the exhibit was admitted. Exhibit 11 was objected to by the claimant on grounds of relevancy and hearsay. The claimant's objection was overruled and Exhibit 11 was admitted.

At the close of the claimant's case-in-chief, the respondents made a motion for a summary ruling to dismiss the claimant's case. The motion was denied. At the close of trial, the

respondents moved for a bench ruling. The Court advised the parties that it would be in a position to make a bench ruling following review of the deposition testimony and the trial was reconvened for that purpose on June 3, 1994. In its bench ruling, the Court found in favor of the claimant with regard to liability, holding that the claimant suffered a compensable injury within the course and scope of his employment with the Livingston School District. The Court further held that the insurer was not unreasonable in its denial of the claim and denied attorney fees and the penalty. A copy of the transcript of the Court's bench ruling is attached hereto.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

FINDINGS OF FACT

1. The claimant was 39 years old at the time of trial. He is married to Beverly Yager and they have two young children. The claimant graduated from Park High School in 1974 and has been employed in a variety of positions since that time, including employment as a machinist for Burlington Northern and in a variety of manual labor positions.
2. Claimant was hired as a custodian with the Livingston School District in August 1989. His job duties included cleaning, vacuuming, furniture moving, and a host of other duties typically associated with a custodial position.
3. On November 7, 1992, the Livingston School District was self-insured through Montana Schools Group Authority. Alexsis Risk Management Service was retained to adjust the claim.
4. At approximately 12:15 a.m. Saturday, November 7, 1992, while working at the Sleeping Giant Middle School, claimant slipped and fell while pushing a vacuum cleaner out of a classroom. The claimant was pushing the vacuum cleaner with his left hand while holding the electrical cord with his right hand. As he was exiting the room, the vacuum cleaner struck a strip of carpet molding, causing the vacuum cleaner to come to an abrupt stop. The handle of the vacuum cleaner struck claimant in the left hip, causing him to lose his balance and fall backwards. The claimant testified that as he was knocked backwards he pushed a student desk out of the way, landing on the floor on his buttocks. The accident was not witnessed by anyone other than the claimant.
5. The claimant noted pain and discomfort in his low back following his fall but was able to complete his scheduled shift. He left the school at approximately 2:00 a.m.
6. The claimant initially believed that he had pulled or strained a muscle. He expected his condition to improve over the weekend.
7. The claimant's condition did not improve over the weekend and on Monday, November 9, 1992, he called the Park Clinic and was seen by Dr. Lynn Freeman that day. The claimant

also contacted the Livingston School District on November 9, 1992, and reported the accident.

8. The Employer's First Report (Ex. 5) was prepared on November 9, 1992 by Lorraine (Nardella) Eller, an employee of the school district. The report was signed on November 10, 1992 by Bill Adamo, Director of Business Services, on behalf of the employer. The claimant also signed the report on November 10, 1992. The employer indicated on the report that it had no reason to question the accident of November 7, 1992.

9. However, shortly thereafter the employer began to question the accident. Over the next three months, claimant's activities were observed by school personnel and others, including a private detective hired by Alexsis.

10. The insurer's evidence at trial established that on a couple of occasions the claimant plowed snow from his own driveway and a neighbor's driveway with a small tractor. He also pounded some staples into a fence, built a small cabinet in his shop, and did some trim work (window and door molding) in his home. A surveillance videotape reflected the claimant on one occasion helped his wife move two twin sized mattresses into their home, an activity that took less than five minutes.

11. The Court does not place great weight on the claimant's post-injury activities. The activities did not involve heavy labor and were of short durations. Moreover, many of the activities occurred after a December 18, 1992 MRI. (Ex. 1 at 19) confirmed that claimant suffered a herniated disc at L4-5. On March 17, 1993, claimant underwent back surgery involving L4-5 decompression and fusion of the L4 vertebrae to the sacrum. Thus, claimant's activities were within his capabilities and do not refute the fact that he had a genuine and serious medical condition. Claimant's physicians encouraged him to remain as active as possible before his surgery and permitted light physical activity within a 20-pound lifting restriction. (Robinson Dep. at 15-16; Baskett Dep. at 16.)

12. The insurer also presented evidence in an attempt to show that claimant's job with the school district was in jeopardy, that he did not like his job, and that he therefore had a motive for fabricating his injury. The difficulty with the insurer's assertion is two-fold. First, the claimant had a real back condition, a real herniated disc, and real surgery, matters which cannot be faked. Second, while the Court finds that claimant may have disliked his job, his job was not in any immediate jeopardy. The employer's disciplinary case against the claimant was largely built after the accident of November 7, 1992.

13. School District Superintendent Verne Beffert testified that a litigation file concerning the claimant was started after an incident in October 1991 where the claimant entered the girl's locker room. The file started by Mr. Beffert was called a "Larry Martin style file," which is a type of file maintained by the Livingston School District with regard to employee disputes and/or matters that may be litigated. Mr. Beffert said that he began the file in 1991

because he believed that the locker room incident could lead to litigation. However, on cross-examination Mr. Beffert admitted that the memoranda of witness interviews had been discarded and that he did not even have a record of who the complaining girls were. Mr. Beffert's note instructing his secretary to set up the file also stated, 'Colette, please start a Larry Martin style file for the vault "Steve Yager 1992-93" Thanks. VAB.' (Ex. 7 at 5.) The Court does not find the testimony of Verne Beffert credible. It is unlikely that the names and interviews of key witnesses would have been thrown away if Mr. Beffert started the file in anticipation of litigation over the 1991 incident. Moreover, the "1992-93" designation of the file is inconsistent with starting the file in 1991. The Court concludes that the "Larry Martin style file" was started after the claimant's accident of November 7, 1992, for the purpose of compiling information adverse to claimant.

14. The school district also presented evidence that claimant caused damage to a tile floor at the Sleeping Giant Middle School in August 1992. The incident was characterized by the employer as serious. However, there was no documentation of the problem until Joe Mason's memo to Bill Adamo on December 11, 1992 (Ex. 14 at 51), after the claimant's injury of November 7, 1992 and after Mr. Adamo specifically requested Mr. Mason to prepare a memo concerning the incident.

15. The school district failed to establish that claimant's job was in immediate jeopardy or that he had a motive to fabricate an industrial accident.

16. The insurer and the school district also presented evidence of incidents of claimant's dishonesty in an attempt to persuade the Court that claimant also lied about the accident and injury. While the Court is persuaded that claimant was dishonest on a number of occasions, it concludes that he is telling the truth with regard to the accident of November 7, 1992. I have reached that conclusion based not only upon my personal observation of the claimant's testimony but also on the testimony of claimant's wife, whom I found to be honest and credible; she confirmed that claimant had back pain on November 7, 1992, and that he told her he had been hurt at work. I am also influenced by the factual circumstances following the accident. Claimant's actions following the accident were consistent with the fact of an accident. He reported the accident on Monday, prior to his next scheduled work shift and also sought medical treatment on Monday. The medical evidence shows that after November 7, 1992, a serious disc herniation existed that did not exist prior to that date, at least it was not symptomatic prior to that date. After the accident the claimant and others were able to demonstrate that the vacuum cleaner could catch on the carpet edge. Claimant's condition required surgery. Further discussion of the evidence considered in reaching my final conclusion regarding the happening of the accident is contained in the transcript of the Court's bench ruling, a copy of which is attached to those findings.

17. The medical evidence also supports the finding of compensability. Dr. Whitney S. Robinson, M.D., the orthopedic surgeon who performed the claimant's March 17, 1993 surgery, testified as follows:

Q. Do you have an opinion based on a reasonable degree of medical certainty as to whether or not that accident would be a competent producing cause of the condition that he presented himself to you with?

A. Yes, I do.

Q. What would that opinion be?

A. I think that it probably is sufficient injury for his preexisting condition to become symptomatic.

(Robinson Dep. at 7.)

Q. If Mr. Yager did not have symptoms or complaints of radiating pain prior to November 6th of 1992, or the fall, and then began experiencing such radiation after the fall, would that be a significant finding with respect to the disc protrusion?

A. Yes.

Q. Why would that be significant?

A. Well, I think that when the symptoms begin, we obviously have no radiographic evidence of what was going on before then. But the onset of the symptoms with radiation of the pain down the leg would presume that the disc protrusion or herniation, the pressure that's on the nerve root in the back, began at that time.

(Robinson Dep. at 8-9.) Doctor L.M. Baskett, who initially treated the claimant for his injury, further confirmed that the accident was the probable cause of the claimant's injury, and that he had no reason to doubt the mechanics of the injury or how it happened. (Baskett Dep. at 13, 15, and 18.)

18. Claimant reached maximum medical improvement on April 14, 1994. (Robinson Dep. Ex. 1 at 6.)

19. The insurer's denial of this claim was not unreasonable. Incidents of claimant's dishonesty reasonably led the school district and the insurer to doubt his veracity. The claimant also gave inconsistent descriptions of the accident, stating initially that he hit a desk when he fell, but later stating that he hit the floor. I was not unreasonable for the school district to seek an assessment of claimant's credibility by the Court.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. Section 39-71-119, MCA, defines injury and accident. An "injury" is caused by an accident and an "accident" is defined as an unexpected traumatic incident or unusual strain, identifiable by time and place of occurrence; identifiable by member or part of the body affected; and caused by a specific event on a single day or a single work shift.

The claimant has the burden of proving that he is entitled to benefits. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 512 P.2d 1304 (1973). The burden is by a preponderance of the probative credible evidence. ***Dumont v. Wicken Bros. Construction Co.***, 183 Mont. 190, 598 P.2d 1099 (1979). The burden extends to proof that "the injury was the proximate cause of his disabling condition." ***Eastman v. Transport Ins.***, 255 Mont. 262, 843 P.2d 300 (1992). The claimant has carried his burden. A preponderance of the credible evidence establishes that claimant's was injured in an accident while working in the course and scope of his employment on November 7, 1992 and that claimant's low-back condition was caused or at least triggered by the accident.

3. The claimant was temporarily totally disabled following his industrial accident and is entitled to temporary total disability benefits up until at least the time he reached maximum medical healing, which occurred on April 14, 1994.⁽¹⁾ He is also entitled to medical benefits.

4. The claimant's requests for a penalty and attorney fees are **denied**. The primary basis for the insurer's denial of the claim was the post-injury activities of the claimant and claimant's dishonesty. While the insurer and the school district gave more significance to the post-injury activities than they should have, the incident's of dishonesty, together with claimant's differing stories as to what he hit when he fell, created a reasonable basis for challenging the claim.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The claimant sustained a compensable injury while in the course and scope of his employment on November 7, 1992. Claimant shall submit his affidavit of costs within 20 days. Respondent shall have 10 days in which to file any objections to claimant's affidavit of costs.

3. Claimant is entitled to temporary total disability benefits from the date of his injury until at least April 14, 1994, and to medical benefits.

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

5. Claimant is not entitled to attorney fees or a penalty.

6. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 20th day of June, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. J. David Slovak

Mr. Leo S. Ward

Attachment: Bench Ruling

1. The Court makes no determination as to whether any other criteria applicable to a termination of temporary total disability benefits have been met.