

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 70

WCC No. 9801-7905

RICK ZARN

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

GLACIER PARK, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Seasonal employee of Glacier Park injured his ankle slipping off a log where he was standing talking to another employee. Insurer argued he was engaged in recreational activity and not within the course and scope of employment.

Held: The "recreational activity" exception from the definition of employee within section 39-71-118, MCA (1995) does not apply to a ten to fifteen minute conversation between two employees where the conversation included some subjects relating to work for Glacier Park, the injured employee had already started work, and the fall actually occurred as the employee left to commence work. The words "recreational activity" do not in their usual and ordinary sense encompass conversation. Moreover, the legislative history of the exception indicates the exception began as a limitation applicable to ski resorts (employees skiing as recreational activity) and, although the exception was expanded to include all employments, the focus of legislative concern were "recreational activities" such as skiing, golfing, hunting and dude ranching. The course and scope requirement is not so strict as to deny coverage where an employee engages in a minor deviation from his duties. As noted in Larson's treatise, under the modern trend of decisions, even if the activity cannot be said to advance the employer's interests, it may still be in the course and scope of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs and practices of the particular employment, the activity is in fact an inherent part of that employment. At least some

ministrations to the personal comfort and human wants of the employee must be included within the course and scope of employment.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-118, MCA (1995). The "recreational activity" exception from the definition of employee within section 39-71-118, MCA (1995) does not apply to a ten to fifteen minute conversation between two employees where the conversation included some subjects relating to work for Glacier Park, the injured employee had already started work, and the fall actually occurred as the employee left to commence work. The words "recreational activity" do not in their usual and ordinary sense encompass conversation. Moreover, the legislative history of the exception indicates the exception began as a limitation applicable to ski resorts (employees skiing as recreational activity) and, although the exception was expanded to include all employments, the focus of legislative concern were "recreational activities" such as skiing, golfing, hunting and dude ranching.

Employment: Course and Scope: Recreational Activities. The "recreational activity" exception from the definition of employee within section 39-71-118, MCA (1995) does not apply to a ten to fifteen minute conversation between two employees where the conversation included some subjects relating to work for Glacier Park, the injured employee had already started work, and the fall actually occurred as the employee left to commence work. The words "recreational activity" do not in their usual and ordinary sense encompass conversation. Moreover, the legislative history of the exception indicates the exception began as a limitation applicable to ski resorts (employees skiing as recreational activity) and, although the exception was expanded to include all employments, the focus of legislative concern were "recreational activities" such as skiing, golfing, hunting and dude ranching.

Employment: Course and Scope: Recreational Activities. The course and scope requirement is not so strict as to deny coverage where an employee engages in a minor deviation from his duties. As noted in Larson's treatise, under the modern trend of decisions, even if the activity cannot be said to advance the employer's interests, it may still be in the course and scope of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs and practices of the particular employment, the activity is in fact an inherent part of that employment. At least some ministrations to the personal comfort and human wants of the employee must be included within the course and scope of employment.

¶1 The trial in this matter was held on August 31, 1998, in Kalispell, Montana. Petitioner, Rick Zarn (claimant), was present and represented by Mr. Kenneth S. Thomas. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 5 were admitted without objection.

¶3 Witnesses and Depositions: Claimant and Thomas J. Pidgeon were sworn and testified. The parties also agreed that the Court may consider the depositions of the claimant, Thomas J. Pidgeon, Nancee Olson, Richard McGuffy, and Anita Caudill.

¶4 Issues Presented: The following issues, as restated by the Court, are presented for decision:

- Whether claimant suffered a compensable industrial injury arising out of and in the course of his employment.
- Whether claimant is entitled to a penalty pursuant to section 39-71-2907, MCA.
- Whether claimant is entitled to costs and attorneys' fees pursuant to section 39-71-611, MCA.

* * * * *

¶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 Claimant alleges that on September 25, 1997, while employed for Glacier Park, Incorporated (Glacier), he broke his left ankle when he slipped and fell off a log outside the cafeteria at the Lake MacDonald Lodge (Lake Lodge).

¶7 At the time of his alleged injury, Glacier was insured by Liberty.

¶8 Claimant submitted a claim for compensation which Liberty denied. Liberty contends that claimant was engaged in a recreational activity when his injury occurred and was not acting in the course and scope of his employment.

¶9 Claimant, who is 39 years of age, was hired by Glacier in 1997, as a seasonal employee and assigned to work at the Lake Lodge. He began work on May 23, 1997. His last day of work for the 1997 season was September 25, 1997, the date of his accident.

¶10 Claimant commuted daily from Columbia Falls to the Lake Lodge. He was not reimbursed for his travel expenses.

¶11 Claimant initially worked as a dorm supervisor. His shift commenced at 8:00 a.m. Richard McGuffy (McGuffy), the general manager of the Lake Lodge, supervised his work as dorm supervisor.

¶12 As the summer progressed, claimant was given additional responsibilities. He was assigned to help the maintenance crew and began reporting to work at 7:00 a.m. He also worked as lobby porter, which involved his cleaning the lobby and bathrooms of the Lake Lodge. From mid-summer onward, claimant reported for work either at 7:00 a.m. or, on the days he worked as lobby porter, at 5:30 a.m.

¶13 Beginning in mid-July claimant signed in for work in Nancee Olson's (Olson) office which was located in the Lake Lodge.⁽¹⁾ The office is located five or six feet from the cafeteria.

¶14 Although employees were supposed to sign in at the beginning of their shift, claimant testified that it was normal procedure for employees to sign in whenever they happened to be near the Lake Lodge. In claimant's case, he typically had to wait for Olson to arrive at work before he could sign in because her office was locked when she was not there and she arrived after his shift began. Olson confirmed that it was not uncommon for employees to begin work and sign in later. (Olson Dep. at 9.)

¶15 On September 25, 1997, claimant arrived at work between 7:30 and 7:45 a.m. He testified that the previous day he had spoken with McGuffy about starting work at 8:00 a.m., rather than his normal 7:00 a.m. start time. McGuffy's testimony did not address claimant's normal schedule or what time he was to begin work on the 25th.

¶16 By September 25th, claimant's duties as lobby porter had ended and his only job responsibilities were as dorm supervisor. His specific duties for that day were to empty the garbage and clean dorm rooms no longer occupied by other Glacier employees.

¶17 Claimant testified that upon arriving at the Lake Lodge he checked the garbage cans inside the Snyder and Boys I dormitories.

¶18 After he finished checking the garbage, claimant walked over to the cafeteria area of the Lake Lodge to tell Justin Burnett that Burnett did not have to start work until the housekeeping staff arrived at 9:00 a.m. (Zarn Dep. at 11-12.) At that point he began talking with Tom Pidgeon (Pidgeon), who worked as a dishwasher in the cafeteria. Pidgeon's last day of work was the previous day, and he was leaving the Lake Lodge on the 25th.

¶19 Claimant recalled talking to Pidgeon for approximately 5 to 10 minutes. Pidgeon recollected the conversation as lasting 15 to 20 minutes. More likely than not the conversation was between the extreme estimates, or approximately 10 to 15 minutes.

¶20 Both claimant and Pidgeon testified that they talked about Pidgeon needing a ride into Kalispell to catch a bus. They also talked about other things, including fishing. (Pidgeon Dep. at 10-11; Trial Test.)

¶21 While talking to Pidgeon claimant was standing on a log located outside the cafeteria. Around 8:30 a.m. claimant stepped off the log, slipped and fractured two bones in his left ankle. Pidgeon recalled that during their conversation claimant told him he was waiting to sign in at the office and that as he stepped off the log claimant said something to the effect of, "I've got to get back to work." (Trial Test.)

¶22 Claimant was taken to the emergency room, where the fractures were surgically repaired.

¶23 McGuffy witnessed the accident and a First Report of Injury was completed on September 25, 1997. McGuffy testified that he did not know if claimant had done any work the morning of September 25, 1997, prior to the time of his accident. (McGuffy Dep. at 9.)

¶24 Liberty argues that because claimant was talking with a coworker at the time of his injury, he was involved in a recreational activity and was not working. That contention is addressed in the Conclusions of Law which follow.

¶25 Liberty also contends that on September 25th the claimant was not supposed to report to work until 9:00 a.m. The contention is unsupported. Both claimant and Olson testified that claimant generally began working between 7:00 and 7:30 a.m. The Court finds claimant's recollection of events to be credible. Liberty produced no witness testimony that claimant was not to report to work until 9:00 a.m. on the morning of September 25, 1997. On the contrary, witness testimony supported the fact that claimant's normal shift began around 7:00 or 7:30 a.m., and claimant testified without contradiction that he received permission to report a bit later, at 8:00 a.m. on that day. Claimant's testimony that he had been told by Anita Caudill, who worked in housekeeping, that housekeeping staff did not have to report to work until 9:00 a.m. on September 25th does not undermine the other testimony because claimant was not part of the housekeep-ing staff, had discussed reporting to work at 8:00 a.m. with his own supervisor, and in fact showed up for work shortly before 8:00 a.m.

¶26 Similarly, I do not find claimant's initial statement that he had eaten breakfast at the Lake Lodge upon arriving on September 25th incompatible with his testimony at trial. He made the statement in his initial interview with Liberty's adjuster, however, in his later deposition he testified he was not sure he ate breakfast and believed he probably had not. McGuffy testified that he did not see claimant eating breakfast the morning of his accident. (McGuffy Dep. at 10-11.) Pidgeon could not recall claimant being at breakfast. (Pidgeon Dep. at 9.)

¶127 The insurer's defense of this claim was not unreasonable. Claimant's initial statement to the insurer concerning his eating breakfast at the Lake Lodge's cafeteria, the 9:00 a.m. start time that day for other workers, and conflicting evidence concerning how long claimant's conversation with Pidgeon lasted and what all they discussed were sufficient to raise an issue as to whether claimant had in fact started or was in the course and scope of work when injured.

CONCLUSIONS OF LAW

I.

¶128 Claimant's injury is governed by the 1997 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶129 Claimant must prove by a preponderance of the evidence that he suffered an industrial accident and injury in the course and scope of his employment. *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).

III.

¶130 In resisting this claim, Liberty argues that at the time of his injury the claimant was engaged in a recreational activity, to wit: conversation with a co-employee which is unrelated to work, and is thus not compensable. The Court finds the argument utterly without merit.

¶131 Section 39-71-118, MCA (1995), defines *employee*. It contains a specific exclusion regarding recreational activities as follows:

1. The term "employee" or "worker" means:

....

(2) The terms defined in subsection (1) do not include a person who is:

(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment. . . .

¶132 The words of a statute must ordinarily be construed in their usual and ordinary sense. *Rocky Mountain Bank v. Stuart*, 280 Mont. 74, 80, 928 P.2d 243, 246 (1996). "Recreational activity" does not in its ordinary and usual sense encompass conversation. The term "recreation" denotes some specific "form of play, amusement or relaxation, " such as "games, sports or hobbies." Webster's New World Dictionary & Thesaurus, Version 1.0

1997. The legislature's intent that it be used in its ordinary sense is borne out by a reading of subsection (2) in its entirety, by legislative history, and by reference to the laws and decisions of other jurisdictions.

¶133 Subsection (2) lists "pass, ticket, permit, device, or other emolument of employment." They are listed in the context of things that do not change the exclusion but their listing indicates that the legislature contemplated recreational activities such as skiing.

¶134 Indeed, the recreational activity exception, as originally introduced in the 1993 legislature, was limited to ski resorts. The bill was amended in committee so that it applied not just to employees "of a ski area operator" but also to other employees "injured while participating in a recreational activity." Minutes of House Committee on Labor and Employment Relations, February 4, 1993 and February 9, 1993. Even so, most of the discussion before both the House Committee and the Senate Labor and Employment Relations Committee (Minutes of March 4, 1993) concerned ski resort employees. The only other recreational activities mentioned in the hearings were golfing, hunting, and dude ranching. (House Committee Minutes of February 4, 1993 at 3 and 4; Senate Committee Minutes of March 4, 1993 at 6.)

¶135 As discussed in this Court's decision in *Connery v. Liberty Northwest Insurance Corporation*, WCC No. 9602-7507, Findings of Fact, Conclusions of Law and Judgment (July 22, 1996), *aff'd on appeal*, 280 Mont. 115, 929 P.2d 222 (1996), the Montana recreational activity exception is nearly identical to a Colorado workers' compensation statute. The reported Colorado cases involve skiing and golf. *Id.* *Connery* involved a ski resort employee.

¶136 The recreational activity exclusion does not apply to conversation between an employee and another person.

IV.

¶137 While, at the time of his accident, claimant had already begun work and was on the employer's grounds, those facts are not conclusive as to coverage for his injury since his injury was covered only if he was working in the course and scope of his employment. The course and scope requirement, however, is not so strict as to deny coverage where the employee is engaged in a minor deviation from his duties. In his treatise on workers' compensation, Larson states the general test for determining whether an injury is work-related, as follows:

§ 20. GENERAL TEST OF WORK CONNECTION AS TO ACTIVITY

20.00 A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. **Under the modern trend of decisions,**

even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.

1A Larson's Workers' Compensation Law § 20, CD ROM Record 9645 (emphasis added). In further discussion apropos to the present case, Larson says:

It has been well established for many years that work-connected activity goes beyond the direct services performed for the employer and includes at least some ministrations to the personal comfort and human wants of the employee. It would be inhuman to snatch away compensation protection from a worker at each momentary rest from the exertions of the job. On the other hand, one can hardly justify an award to a worker who has been sleeping all day instead of working.

Id. At § 20.10, Record 9648.

¶138 Following the guidance provided by Larson, it is plain that some non-work related conversation is within the course and scope of employment given the nature of a typical employment and the characteristics of human nature. In this case, the conversation did not go beyond the pale of what can be humanly expected. Part of the discussion related to employment is that claimant and Pidgeon discussed whether Pidgeon, who had been working and staying at the Lake Lodge, needed a ride into town. Given the fact that the Lake Lodge was closing and it was claimant's last day, a 10 or 15 minute conversation with a departing co-employee was neither surprising nor extraordinary under the circumstances. Finally, when the accident occurred, claimant was just starting on his way to the office to sign in and had thus returned, even in a strict sense, to his specific employment duties. I conclude that claimant was acting in the course and scope of his employment when injured.

V.

¶139 An award of attorney fees and a penalty both require proof that Liberty unreasonably denied liability for this claim. §§ 39-71-611 and -2907, MCA (1997). While I find that the insurer's recreational activity argument is beyond the pale of legitimate legal argument, there were sufficient facts to raise a triable issue of fact as to whether claimant was acting in the course and scope of his employment when injured. The insurer's defense of the claim was therefore reasonable and claimant is not entitled to either attorney fees or a penalty.

VI.

¶140 Since claimant has prevailed he is entitled to his costs.

JUDGMENT

¶41 Petitioner suffered a compensable industrial accident when he slipped and fell off the log on September 25, 1997, and is entitled to compensation and medical benefits on account of the accident. The parties have not asked the Court to determine the amount of benefits due.

¶42 Petitioner is entitled to costs in accordance with ARM 24.5.343.

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

¶44 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 9th day of October, 1998

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Kenneth S. Thomas

Mr. Larry W. Jones

Date Submitted: August 31, 1998

1. Olson was the hotel accountant at the Lake Lodge. In her testimony, Olson confirmed that claimant normally began work around 7:00 or 7:30 a.m. and that he was typically at work before she arrived. (Olson Dep. at 8.)