

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 50

WCC No. 2005-1241

MELVIN BRIESE

Petitioner

vs.

ACE AMERICAN INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant seeks workers' compensation benefits for a torn meniscus in his knee, alleging he tore the meniscus at work. Based on credibility questions arising as a result of information furnished by the employer, the insurer denied liability.

Held: The Court finds the claimant credible and finds that he was injured as alleged.

¶1 The trial in this matter was held in Helena, Montana, on May 2, 2004. Petitioner was present and represented by Mr. Chris J. Ragar. Respondent was represented by Mr. Thomas J. Harrington.

¶2 Exhibits: Exhibits 1 through 5, 7 through 22kk and 37 through 39 were admitted without objection. Exhibits 23 through 27, 29, and 31 through 35 were admitted over objections. Exhibits 67, 28 and 30 were withdrawn. Exhibit 36 was refused.

¶3 Witnesses and Depositions: Petitioner, Ross Wetzler, Jo Heal, Debra Briese, Shane Briese, Sandra Haag, Kyle Maloney, and Sandra Waldo testified at trial. In addition the parties submitted the depositions of petitioner, Ross Wetzler, Debra Briese, Shane Briese, Kyle Maloney, Sandra Waldo, and Dr. John D. Campbell.

¶4 Issues Presented: As set forth in the Final Pre-trial Order, the issues are as follows:

¶4a Whether Petitioner's August 30, 2004 alleged injury is compensable under Montana's Workers' Compensation Act.

¶4b Whether Petitioner is entitled to an award of costs and attorneys fees.

¶4c Whether Petitioner is entitled to a 20% increase in benefits as a penalty for alleged unreasonable delay and denial of benefits.

(Final Pre-Trial Order at 2.)

¶5 Having considered the Final Pre-trial 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 The petitioner (claimant) alleges that he suffered a knee injury on August 30, 2004, while working for Amerigas, Incorporated (Amerigas), which sells and delivers propane. According to the claimant, he was pulling a hose from his propane truck in preparation to refilling a propane tank at U-Haul in Bozeman. He testified that while twisting and leveraging with his legs to pull out the hose he experienced what felt like a bee sting in his right knee. The incident occurred at about 9:30 a.m. The automated log on the truck shows a delivery time of 9:40 a.m., but according to the claimant that could have been off as much as ten minutes.

¶7 The incident was unwitnessed, so whether or not it occurred as the claimant alleges depends ultimately on the Court's assessment of his credibility. In that regard, the respondent has focused its evidence on whether or not the claimant reported the incident to his supervisor on the morning of August 30th and again on September 24, 2004. The respondent asserts that he did not and that his lack of credibility in that regard compels the conclusion that he is not telling the truth about the incident.

¶8 According to the claimant, he returned to Amerigas immediately after the U-Haul delivery and told Sandy Waldo (Waldo), his supervisor, that he hurt his leg. He testified that she asked if he was alright and whether he needed to see a doctor. He indicated that it was not all that bad.

¶9 Waldo testified that she did not recall the claimant telling her on August 30th about any incident, although she conceded that it is possible he did mention the incident and she forgot the conversation or did not hear him.

¶10 Ross Wetzler (Wetzler), a co-employee, testified that he was present at Amerigas' offices on the morning of August 30th and overheard the claimant telling Waldo about the incident. The respondent, however, presented time records which indicate that Wetzler was not at the office at the time (9:50 a.m. to 10:00 a.m.) the claimant says he reported the

incident. However, as with the truck clock time, the time sheets for Waldo's and another co-employee's work that day may have been inaccurate by up to thirty minutes, thus the evidence of his not being present is inconclusive.

¶11 The claimant seemed okay after the incident. He completed his work shift and on September 2, 2004, went on vacation. While on vacation he built an addition to his garage, doing his own labor.

¶12 On September 11, 2004, the claimant and his wife noticed swelling in his right calf and ankle. On September 14, 2004, when he returned to work, the swelling of his leg below the knee was obvious. However, he did not associate or relate the swelling to any injury of the knee.

¶13 On September 23, 2004, the claimant saw Dr. John A. Vallin in a followup visit for a prior back injury. During that visit, Dr. Vallin examined his leg. In the history he took, Dr. Vallin recorded:

As a result of his back almost going out on him 2-3 weeks ago he describes right ankle sprain. Since then he has had prominent swelling of the whole distal right lower extremity from the knee to the foot for which he is using a knee brace. He states his swelling is worse at the end of the day and better in the morning. He is experiencing some calf pain as well.

(Ex. 22-E.) Dr. Vallin examined the claimant's leg. He noted:

On physical exam he does have swelling of the entire right leg from the knee to the foot. Mild pitting edema in the tibial region and overlying the foot. He has no instability of the ankle. He is tender over the medial malleolus and deltoid ligament. Normal strength reflexes and sensation of the lower extremity. He does have calf tenderness with negative Homan's.

(*Id.*)

¶14 It is clear from Dr. Vallin's note that as of September 23, 2004, the claimant did not relate his leg swelling to his knee but thought it might be due to some sort of ankle sprain two or three weeks previous. There is no mention of any knee injury while working on his garage.

¶15 Dr. Vallin sent the claimant for a Doppler ultrasound. The ultrasound showed a Baker's cyst which caused the swelling. (Ex. 22-D.) Dr. Vallin felt that the cyst was the result of damage to the meniscus of the knee and in talking with the claimant ascertained "that last month when he [claimant] twisted his knee he may have sustained some

intraarticular damage, meniscal damage, etc. to his knee.” (*Id.*) Dr. John D. Campbell, an orthopedic surgeon, subsequently diagnosed a meniscus tear. (Ex. 22-C.)

¶16 The time frame Dr. Vallin mentions concerning the claimant twisting his knee dovetails with the claimant’s contention concerning an August 30, 2004 incident involving his knee.

¶17 After learning that his leg swelling was due to a knee injury, the claimant talked to Waldo. According to the claimant he asked Waldo if she remembered his telling her about the work incident involving his knee. The claimant testified that Waldo told him it was too late to pursue a workers’ compensation claim.

¶18 Waldo denies the conversation, however, telephone conversations the claimant and his wife had with a friend, Jo Heal (Heal), who is an adjuster for the Montana State Fund, support the claimant’s testimony. The claimant and his wife contacted Heal on September 25, 2004, and told her of the claimant’s conversation with Waldo, and asked if indeed it was too late to pursue a workers’ compensation claim. Heal advised them that it was not too late and recommended that the claimant contact Waldo once again and tell her he wanted to file a workers’ compensation claim. The claimant followed her advice and a claim was in fact filed on September 30, 2004. (Ex. 1.)

¶19 Dr. Campbell opined in writing that the claimant’s meniscus tear was the result of the August 30, 2004 incident, as described to him by the claimant. He explained that the several days delay between the actual injury and the leg swelling were typical of the injury:

Many people do not get swelling from an acute meniscal injury and it does not occur until several days later. Acute swelling is usually from bleeding. Often meniscal tears are in the avascular zone of the meniscus and you do not get swelling until you have actual joint irritation that causes joint fluid to be made to lubricate the joint more and this can take several days. This is very classic and it should not be of any incident with another physician reviewing this file.

(Ex. 22-B.)

¶20 Dr. Campbell testified by deposition. Asked to assume that the claimant’s version of the incident on August 30th, the onset of swelling approximately twelve days later, and no intervening traumatic incident involving the knee, Dr. Campbell testified on a more-probable-than-not basis that the August 30th incident caused the claimant’s meniscus tear. (Campbell Dep. at 26-27.)

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¶21 Having reviewed all of the evidence and listened to and observed the witnesses at trial, I find that the claimant in fact tore his meniscus while pulling on a propane hose on August 30, 2004. I found the claimant's testimony the more credible. While I recognize that not all of the times and documents regarding his initial report of the incident to Waldo jive, I also recognize that the times and human recollection are not completely reliable. The delayed onset of the swelling was consistent with an August 30th injury. Moreover, the claimant's continued work, both at his job and on his garage, along with the lack of symptoms for several days, then the onset of symptoms in the leg rather than the knee, made it difficult for him to associate his leg swelling and pain to the August 30th incident until being told by Dr. Vallin that his swelling originated in the knee. Dr. Vallin's note of August 24th, made shortly after telling the claimant of the Baker's cyst, is fully consistent with the claimant's claim that he injured his knee on August 30th. The telephone calls by the claimant and his wife to Heal also suggest that he met resistance from Waldo when he attempted to tell her he was injured.

¶22 The denial of liability by the insurer was not unreasonable. It relied on Waldo's denial that the claimant reported the injury prior to September 25, 2004, and on time records casting into doubt a co-employee's claim that he witnessed claimant reporting his injury to Waldo on August 30th. The insurer reasonably questioned the claimant's credibility.

CONCLUSIONS OF LAW

¶23 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).

¶24 The claimant bears the burden of proving by a preponderance of the evidence that his meniscal tear was caused by a work-related injury to his knee on August 30, 2004. *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). He has borne his burden, persuading the Court that he in fact suffered a meniscal tear to his right knee while pulling on a propane hose while delivering propane to U-Haul for his employer. Accordingly, he is entitled to workers' compensation benefits for his injury.

¶25 The claimant has also requested attorney fees and a penalty. Both require proof that the insurer acted unreasonably in denying his claim. §§ 39-71-611 and -2907, MCA (2003). Here, even though I have held in the claimant's favor, there was a reasonable basis for denying the claim. He is therefore not entitled to attorney fees or a penalty.

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JUDGMENT

¶26 On August 30, 2004, the claimant suffered a work-related injury to the meniscus of his right knee. Accordingly, he is entitled to workers' compensation benefits as provided in the Workers' Compensation Act and Ace American Insurance Company shall pay the benefits to which he is entitled. The Court makes no determination as to the specific benefits to which the claimant is entitled in the expectation that the parties will be able to agree on the benefits. The Court reserves jurisdiction to determine specific benefits in the event they are unable to agree.

¶27 The claimant is entitled to his costs and shall file his memorandum of costs pursuant to the Court's rules. He is not entitled to attorney fees or a penalty.

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

¶29 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 16th day of August, 2005.

(SEAL)

MIKE McCARTER
JUDGE

c: Mr. Chris J. Ragar
Mr. Thomas J. Harrington
Submitted: May 2, 2005