

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 7

WCC No. 2014-3315

JOHN GUYMON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claims he suffered a compensable injury when his employer "body blocked" him while he was operating a jumping jack at work. Respondent counters that Petitioner failed to prove that it is more probable than not that he suffered a compensable injury at work.

Held: The evidence does not support Petitioner's contention that he suffered a compensable injury at work.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119, MCA. Where this Court concluded that the claimant's accounts of a physical assault in the workplace were not credible and that the medical opinion he offered to establish causation was based on misinformation, the claimant failed to meet his burden of proof that an accident caused his left-shoulder condition as required by § 39-71-119, MCA.

Causation: Injury. Where this Court concluded that the medical opinion the claimant offered to establish causation was based on misinformation,

the claimant failed to meet his burden of proof that an accident caused his left-shoulder condition as required by § 39-71-119, MCA.

Proof: Burden of Proof: Causation. Where this Court concluded that the medical opinion the claimant offered to establish causation was based on misinformation, the claimant failed to meet his burden of proof that an accident caused his left-shoulder condition as required by § 39-71-119, MCA.

Proof: Sufficiency. Where this Court concluded that the medical opinion the claimant offered to establish causation was based on misinformation, the claimant failed to meet his burden of proof that an accident caused his left-shoulder condition as required by § 39-71-119, MCA.

Credibility. Where the claimant's accounts of a physical assault in the workplace were inconsistent, both within each telling and from one telling to the next, and where the alleged assailant credibly testified that the assault did not occur, the Court concluded that the claimant's testimony was not credible.

¶ 1 The trial in this matter was held on February 25, 2016, in Kalispell. Petitioner John Guymon, a self-represented litigant, was present. Melissa Quale represented Respondent Montana State Fund (State Fund). Claims examiner Kevin Bartsch was also present on behalf of State Fund.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 2, 5 through 7, 9 through 10, 12 through 20, and 22 through 25 without objection. This Court sustained State Fund's hearsay objections to Exhibits 3 and 4, and did not admit those exhibits. This Court overruled State Fund's relevancy objection to Exhibit 8 and admitted that exhibit. This Court sustained State Fund's relevancy objection to Exhibit 11, and did not admit that exhibit. This Court overruled John's relevancy objection to Exhibit 21, and admitted that exhibit.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of John and Aaron Guymon into evidence. John was sworn and testified at trial. This Court sustained State Fund's relevancy objection and did not allow John to play his guitar. Aaron, Detective Myron Wilson, Nels Johnson, Edward Benton, and Cindy Guymon were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the following issues from the Pretrial Order.

Issue One: Did John suffer a compensable injury in the course of his employment with AGC, Inc. (AGC), on June 13, 2013?

Issue Two: Did John provide timely notice of his injuries pursuant to § 39-71-603(1), MCA?

Issue Three: Is John entitled to costs, attorney fees, and a penalty?

Since this Court rules against John on Issue One, it does not reach Issues Two or Three.

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 Before the incident giving rise to his claim, John had a history of medical problems, including fibromyalgia, ankylosing spondylitis, and sacroiliitis.

¶ 7 John worked as a truck driver and laborer for AGC, a construction company based in Kalispell. Aaron, who is one of John's brothers, owns AGC. Cindy, Aaron's wife, helps him run the company.

¶ 8 In the spring and summer of 2013, AGC was doing the excavation and backfill, as well as some utilities work, for a commercial building in Kalispell.

¶ 9 On the morning of Thursday, June 13, 2013, John and Aaron had several run-ins at the job site, during which Aaron raised his voice to be heard over the construction equipment. John felt that Aaron was in a "bad mood" and yelling at him for no reason.

¶ 10 The situation came to a head in the afternoon. After lunch, Aaron unloaded a jumping jack along an interior wall where he wanted John to begin using it. A "jumping jack" is a fuel-powered, spring-loaded ramming machine used to compact soil. The operator stands behind the machine, engages the throttle, and while holding the handle bar with both hands, walks with it, guiding the machine as its ramming shoe moves up and down over the soil. The machine weighed at least 130 pounds. After John compacted the area near the west wall, he was supposed to compact an area near the north wall.

¶ 11 John made one or two passes in the first area, then proceeded with the jumping jack along the west and north walls, where the soil had already been leveled and compacted, to get to the second area.

¶ 12 Seeing this, Aaron approached John and explained that John should have finished the first area before moving on to the second. He also instructed John not to run the jumping jack on areas that had already been compacted as it is time consuming and hard on the machine. Aaron told John to finish the second area, since he was already there; Aaron said that he would then move the jumping jack back to the first area with the excavator.

¶ 13 Aaron observed John make several passes in the second area, and then begin walking diagonally from the north wall back toward the west wall. The jumping jack was running full speed over an area that had previously been compacted.

¶ 14 Aaron got in front of John and held up his hand to signal him to stop. John did not see him. Aaron then yelled to get John's attention. John looked up and throttled the jumping jack down. This occurred approximately 10 feet from the foundation wall. Aaron said, "[G]ive me that [expletive omitted] thing." Aaron spun the machine around, throttled it up, and walked it back over to finish the second area himself. Notwithstanding John's statements to the contrary, Aaron credibly testified that he never made physical contact with John. Aaron and John exchanged words and John walked off the job site.

¶ 15 Following the incident, John had some "issues" with his left arm. However, because of his fibromyalgia and other health conditions, he did not relate them to the incident.

¶ 16 On Monday, June 17, 2013, four days after the incident, Aaron called John and told him to return his work equipment and time card. John met Aaron at Aaron's home workshop. Neither one said a word. John handed Aaron his equipment and time card. Aaron handed John his check, and the two parted.

¶ 17 In mid-to-late June 2013, John went to Benton's house to loan him his welder. Benton grew up with John and Aaron, and has been friends with their entire family. John used both arms to help pull a wagon, containing the welder, a cutting torch, and an oxygen tank up an incline into Benton's garage. The wagon weighed at least several hundred pounds. John did not say anything to Benton about the June 13 incident, nor did he mention that he was in any pain.

¶ 18 On June 25, 2013, John mailed a Separation Statement to the Montana Department of Labor's Unemployment Insurance Division. In it, he stated that the events that led to his discharge from employment were a "Hostile environment." He indicated that he thought he was discharged because he could not do the manual labor that Aaron expected of him.

¶ 19 At the end of June, John and his wife traveled to Ohio to unload a storage shed of John's wife's belongings and bring them to Montana. John did the driving. On the way, John had trouble lifting his left arm, had limited range of motion, and was in pain. While in Ohio, John played his guitar at a barbeque at his in-laws'.

¶ 20 On July 8, 2013, John spoke to a representative from the Unemployment Insurance Division, who quoted John as saying, "[M]y brother pushed [me] off the [jumping jack]. He blew up at me over everything I was doing. I could not do anything right. Aaron is my younger brother. He just jerked the equipment out of my hand and I walked out."

¶ 21 On his way back from Ohio, John stopped in Nashua, Montana. He was supposed to play two shows at his friend's bar, the Wagon Wheel. The first night, July 19, 2013, he played for about three hours, with several 15-minute breaks. But when he woke up on July 20, 2013, his left arm "was in all kinds of pain" and he "wouldn't have been able to play guitar or even pick one up." So, he cancelled the second show and drove home.

¶ 22 On July 26, 2013, John provided another statement to the Unemployment Insurance Division. In response to a question asking him what he said after Aaron pushed him, John stated:

I didn't tell him that I would or would not do anything. He told me I was just wasting his f'ing time as he body blocked me, knocking me backwards and taking the piece of equipment I had in my hands away. He was very angry with me and was being physical so I left the job site and went home about an hour early to prevent the situation from escalating any further.

¶ 23 John first sought medical treatment in relation to his left-arm condition on August 1, 2013, because when he woke up that day, he could not move his left arm, and had pain and burning on the left side of his chest, neck, and head. He was treated by Tyler C. Hoppes, MD, at the Emergency Department of Kalispell Regional Medical Center (KRMC). The medical record from the visit mentions no injury. Rather, with respect to the onset of his left-arm and -shoulder problems, it indicates only that John "developed" pain a couple of months previously, which had remained ongoing for 3 or 4 months and recently worsened without an inciting incident.

¶ 24 John presented to Family Health Care for follow-up on August 8, 2013, and was treated by Linh Barinowski, PA-C. At that visit, John filled out and signed an Injured Worker First Report. In that report, John described the June 13, 2013, incident as follows: "[I] [w]as attacked by [my] [e]mployer," who "[b]ody checked me knocking me a way from [the] Jumping Jack."

¶ 25 John filed a First Report with State Fund on August 16, 2013. The accident description states:

[I] [w]as running a jumping jack when the owner, Aaron Guymon, came charging over [and] body blocked me shoving me backwards [and] grabbing the equipment out of my hands. He slammed me in the left shoulder [and] I slowly reached the point of not being able to raise my arm or move my shoulder.

¶ 26 On September 9, 2013, State Fund denied John's claim.

¶ 27 On September 30, 2013, John returned to the Emergency Department of KRMC, complaining of left-shoulder pain. In the medical record from that visit, Scott D. Burry, MD, noted, "The patient states he was assaulted by his younger brother several months

ago and since then the symptoms have gotten worse. He now states he is not able to raise the left arm over the head. . . . He just came in because things are not getting better.” Dr. Burry ordered an x-ray of John’s left shoulder, which did not show any abnormalities. Dr. Burry suspected John had adhesive capsulitis and referred him to an orthopedist for further treatment.

¶ 28 On October 7, 2013, John saw Benjamin Ward, MD, at Northwest Orthopedics & Sports Medicine. Dr. Ward reported, “On 6/13/13 [John] was working when his brother ‘body slammed’ him into a concrete wall. Since that time he has had pain in the left shoulder.” Dr. Ward also noted, “The left Shoulder Injury has been present for about 3 months. The onset was noted suddenly. The date of injury was 06/13/2013.” Dr. Ward stated that John had adhesive capsulitis of the left shoulder and prescribed physical therapy.

¶ 29 Dr. Ward also ordered an MRI of John’s left shoulder to rule out underlying shoulder pathology, which John underwent on October 21, 2013. The MRI was unremarkable.

¶ 30 On October 24, 2013, John’s former counsel sent a letter to both Dr. Ward and Dr. Burry, asking whether, on a more probable than not basis, the conditions for which they treated John were consistent with his being body blocked on the job site.

¶ 31 On October 25, 2013, Dr. Ward answered “yes,” that “[i]njury to shoulder resulting in delayed adhesive capsulitis” was consistent with the mechanism and injury John described.

¶ 32 On November 3, 2013, Dr. Burry answered “no” to the same question, explaining: “[John’s] symptoms could have been caused by many things. Since he had had the symptoms for so long by the time he came in we really didn’t even discuss the etiology in much detail.”

¶ 33 On November 7, 2013, John saw Joseph G. Sramek, MD, at the Department of Neurological Surgery. Dr. Sramek noted:

Patient states he was injured on June 13, 2013. He states that he was running a “jumping jack” when he was bodychecked in the left shoulder from his boss who also happened to be his little brother. He states that he was fired and that his boss denied doing this. He states that he did not initially have pain but noted symptoms starting July 20. He states he was playing guitar at a bar for about 4 hours on the 19th and woke up on the 20th with severe pain in his left shoulder and down his arm and numbness in his arm eased up somewhat and then referred August 1 with pain in his left shoulder and left arm again.

Dr. Sramek did not feel there was any surgical indication and recommended that John continue with physical therapy.

¶ 34 In 2014, John played several shows, but “[n]ot very well”; he “had to quit early.” He taught himself to play guitar sideways because of his arm, and played quite a few shows in 2015. He does not think he can play nearly as well as he used to. However, in 2015, he noticed that his voice had improved. He attributes this to the incident, explaining, “[b]ecause after what Aaron did to me, he literally broke my spine loose. And now I’m standing up and I can breathe. And I can hit notes that I couldn’t hit before.”

CONCLUSIONS OF LAW

¶ 35 This case is governed by the 2011 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of John’s industrial accident.¹

¶ 36 John bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.²

Issue One: Did John suffer a compensable injury in the course of his employment with AGC on June 13, 2013?

¶ 37 Section 39-71-407(3)(a) provides, in pertinent part: “An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that: (i) a claimed injury has occurred.”

¶ 38 Under § 39-71-119, MCA:

(1) “Injury” or “injured” means:

(a) internal or external physical harm to the body that is established by objective medical findings;

. . . .

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

¹ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201(1)(a), MCA.

² *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

Thus, John must prove that it is more probable than not, that “there was an accident in the course of employment,” that he “suffered an injury,” and that “there is a causal connection between the accident and the injury.”³

¶ 39 The medical evidence in this case demonstrates that John suffers from adhesive capsulitis of the left shoulder. However, John has not met his burden of proving that an “accident” caused his condition within the meaning of § 39-71-119(2), MCA.

¶ 40 While John maintains that Aaron physically assaulted him, his accounts are inconsistent, both within each telling and from one telling to the next, and therefore not credible. They run the gamut from not mentioning an assault at all, to Aaron pushing him off the jumping jack and jerking the equipment out of his hands, to Aaron body blocking him and knocking him backwards, to Aaron slamming him in the left shoulder, to — what he testified to at trial — Aaron hitting him from the back sending him sideways into a cement wall.

¶ 41 At trial, John blamed not mentioning the assault at various points on not wanting to upset Cindy; on not knowing he was injured at first and simply wanting to move on; on not “really know[ing] what that was all about at that point” and having to “put it all together as to what had happened”; on his wife filling out his Unemployment Separation Statement; and on Dr. Hoppes failing to accurately record his statement.

¶ 42 John also testified, “I never said Aaron jerked the equipment out of my hand,” and blamed that error on a language barrier with the Unemployment Insurance Division representative. Yet he went on to report Aaron “taking the piece of equipment I had in my hands away” to the Unemployment Insurance Division and Aaron “grabbing the equipment out of my hands” to State Fund. At trial, he testified that, after getting knocked into the wall, he throttled the jumping jack down. As to what happened next, John stated both that Aaron took the equipment out of his hands, and that John left the equipment freestanding to get in Aaron’s face. The regularity with which John has made contradictory and inconsistent statements like these demonstrates that his testimony is not credible.

¶ 43 Aaron, on the other hand, credibly testified that he never made physical contact with John, and that the altercation was strictly verbal. Furthermore, Aaron’s multiple accounts of the incident have remained constant over time.

¶ 44 John has also failed to prove causation. In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court held that claimants are required to prove causation through medical expertise or opinion.⁴

³ *Ford*, ¶ 43.

⁴ *Ford*, ¶ 49.

¶ 45 John offered Dr. Ward's statement that, on a more probable than not basis, John's adhesive capsulitis was consistent with his being body blocked at work. However, a doctor's opinion is entitled to no weight when it is based on misinformation.⁵ This Court gives Dr. Ward's opinion no weight for two reasons. First, as this Court has concluded that Aaron did not body block John, this Court finds that the description John gave Dr. Ward of the June 13, 2013, incident was false.⁶ Second, based on John's trial testimony, this Court finds that John either gave Dr. Ward inaccurate information concerning the onset of his symptoms or that Dr. Ward misunderstood him.⁷ At trial, John testified that Dr. Ward's October 7, 2013, medical record incorrectly states that John had had pain in the left shoulder **since** his brother body slammed him into a concrete wall at work on June 13, 2013. Regarding the statement that "[t]he left Shoulder Injury has been present for about 3 months" in the same record, John testified as follows:

A. No, the left shoulder injury has not been present for three months. It did not show up until August.

Q. So again, in this medical note the doctor --

A. I started having problems with it on the 19th of July . . . when I was playing music.

Q. Okay. But the doctor has reported this incorrectly?

A. Yes, apparently.

¶ 46 Moreover, the parties jointly offered a second statement about causation that does not link John's condition to the June 13, 2013, incident. Although his September 30, 2013, medical record provides, "The patient states he was assaulted by his younger brother several months ago and since then the symptoms have gotten worse," Dr. Burry opined that, on a more probable than not basis, "[John's] symptoms could have been caused by many things." Indeed, between the June 13, 2013, incident and the first time he sought medical treatment, John pulled a heavy wagon up a friend's driveway, drove from Montana to Ohio and back, unloaded the contents of a storage shed into an enclosed trailer, and played his guitar several times, including at an approximately three-hour gig.

⁵ See *Warburton v. Liberty Northwest Ins. Corp.*, 2016 MTWCC 1, ¶ 68; *Christensen v. Rosauer's Supermarkets, Inc.*, 2003 MTWCC 62, ¶ 26.

⁶ See *Warburton*, ¶ 68 (giving no weight to the opinions of two doctors "in light of the inaccurate medical histories and understanding of the industrial accident upon which they were based").

⁷ See *id.*; *Christensen*, ¶ 26 (finding doctor's opinion concerning causation unpersuasive "in light of [doctor's] express reliance on a history [this Court] found to be untrue").

JUDGMENT

¶ 47 Petitioner did not suffer a compensable injury in the course of his employment with AGC on June 13, 2013.

¶ 48 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

¶ 49 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

DATED this 28th day of June, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: John Guymon
Melissa Quale

Submitted: February 25, 2016