

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 32

WCC No. 2007-1945

RICHARD HANSON

Petitioner

vs.

CEDAR VALLEY CONSTRUCTION, INC.

Respondent/Employer

and

UNINSURED EMPLOYERS' FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to the Montana Supreme Court July 21, 2008

Dismissed Pursuant to Stipulation September 17, 2008

Summary: Petitioner petitioned the Court for a determination that he suffered a compensable industrial injury to his low back on May 14, 2007, during his employment with Cedar Valley Construction, Inc. Petitioner requested that the Court award temporary total disability benefits and determine the proper rate to be paid for such benefits. Additionally, Petitioner requested costs and attorney fees.

Held: The only evidence presented to the Court that Petitioner sustained an injury while working for Cedar Valley is Petitioner's own testimony. The Court does not find Petitioner's version of events to be credible. Therefore, the Court concludes that Petitioner has failed to meet his burden of proof.

Topics:

Witnesses: Credibility. Where the only evidence presented to the Court that a claimant sustained an injury while working for a construction company

is a claimant's own testimony and the Court did not find the claimant to be a credible witness and did not find Petitioner's version of events to be credible, Petitioner failed to sustain his burden of proof.

Credibility. Where the only evidence presented to the Court that a claimant sustained an injury while working for a construction company is a claimant's own testimony and the Court did not find the claimant to be a credible witness and did not find Petitioner's version of events to be credible, Petitioner failed to sustain his burden of proof.

¶ 1 The trial in this matter was held on March 11, 2008, in Kalispell, Montana. Petitioner Richard Hanson was present and represented by Laurie Wallace. Respondent Cedar Valley Construction, Inc., was represented by Darrell S. Worm. Respondent Uninsured Employers' Fund was represented by Arthur M. Gorov.

¶ 2 Exhibits: Exhibits 1 through 7 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Tony Claros, and Steven R. Biggs, D.C., were taken and submitted to the Court. Petitioner, Tony Claros, and Bernadette Rice were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:

¶ 4a Whether Petitioner suffered a compensable industrial injury to his low back arising out of and in the course of his employment on May 14, 2007, while employed by Cedar Valley Construction, Inc., of Kalispell, Flathead County, Montana.

¶ 4b Whether Petitioner is entitled to temporary total disability benefits retroactive to May 15, 2007, less the four day waiting period, and to medical benefits.

¶ 4c A determination of [Petitioner's] proper temporary total disability benefit rate.

¶ 4d Whether Petitioner is entitled to costs and attorney fees pursuant to § 39-71-611, MCA.¹

¹ Pretrial Order at 4.

FINDINGS OF FACT

¶ 5 I find Claros and Rice to be credible witnesses and find their testimony at trial to be credible. As discussed in detail below, I do not find Petitioner to be a credible witness.

¶ 6 Petitioner was hired to work for Cedar Valley Construction, Inc. (Cedar Valley), in May 2007. Tony Claros is president of Cedar Valley and has operated Cedar Valley for approximately 11 years.² At the time of Petitioner's alleged industrial injury, Cedar Valley was not carrying workers' compensation insurance.³

¶ 7 Before being hired, Petitioner made repeated phone calls to Claros, seeking employment. Claros initially informed Petitioner that he was not hiring new employees, but relented after several calls and offered Petitioner 18-24 hours of work per week to start.⁴

¶ 8 At the time Petitioner was hired, Cedar Valley employed two other employees, Bob Martinez and Joe Scott. Martinez – the more experienced of the two employees – earned \$13 per hour while Scott earned \$10 per hour.⁵

¶ 9 Scott's payroll records reflect that he worked an average of 26.25 hours per week between May 5, 2007, and June 29, 2007.⁶ Martinez' payroll records reflect that he worked an average of 28.7 hours per week between May 5, 2007, and June 29, 2007.⁷

¶ 10 At his deposition, Petitioner recalled that when he and Claros discussed his hours and pay on the phone prior to his employment start date, Claros informed him that he would keep him busy, working six or seven days a week and no less than 40 hours per week.⁸ Petitioner further testified that, based on this conversation with Claros and with a fellow employee, Petitioner surmised that he would be working 40-50 hours per week.⁹

² Trial Test.

³ Trial Test.

⁴ Trial Test.

⁵ Trial Test.

⁶ Ex. 3.

⁷ Ex. 4 at 1.

⁸ Petitioner's Dep. 11:3-8.

⁹ Trial Test.

¶ 11 On May 21, 2007, Petitioner filed a First Report of Injury and Occupational Disease with the Employment Relations Division.¹⁰ In this report, Petitioner stated that on May 14, 2007, “I was bending over building some forms and I went to pick the form up and felt a sharp knife like feeling in my lower back. Couldn’t walk for awhile.”¹¹ Petitioner noted that his injury occurred to his “lower right back,” recorded his employment as “Full Time,” and stated that his wages were \$11.00 per hour.¹²

¶ 12 There were no witnesses to Petitioner’s alleged industrial accident.¹³ Martinez and Scott informed Claros of Petitioner’s alleged injury after they learned of the incident from Petitioner.¹⁴ When Claros asked Petitioner what happened, Petitioner informed him that he had pulled a muscle in his back and that there was nothing to worry about because this happened to him often.¹⁵

¶ 13 Petitioner was questioned at his deposition about the number of hours he worked on the day of his alleged accident. Initially, Petitioner responded that he had worked five hours because he started working around 7:30 a.m. and was injured just before lunch.¹⁶ After being shown his first report of injury in which he recorded the time of injury as 9:30 a.m., Petitioner adjusted his recollection and stated that the injury occurred about two hours after he began working.¹⁷

¶ 14 Two days after his alleged injury, Petitioner called Claros and informed him that he was taking muscle relaxants and would be back to work in a few days.¹⁸

¶ 15 The day of Petitioner’s alleged accident was his first and last day of work at Cedar Valley. Claros paid Petitioner \$12 per hour for the two and a half hours he worked.¹⁹

¹⁰ Ex. 1

¹¹ *Id.*

¹² *Id.*

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Trial Test.

¹⁶ Petitioner’s Dep. 14:21 - 15:8.

¹⁷ Petitioner’s Dep. 15:5-13.

¹⁸ Trial Test.

¹⁹ Trial Test.

¶ 16 Petitioner was involved in a previous work-related accident on June 26, 2004, while working as a laborer for Johnson Wilson Constructors, a concrete company in Helena, Montana.²⁰ Anthony J. Popp, D.C., examined Petitioner following this injury and Petitioner reported to Dr. Popp that he experienced right-sided, lower-back pain.²¹

¶ 17 Physical therapist Jay G. Shaver performed a functional capacity evaluation (FCE) of Petitioner on February 28 and March 1, 2006.²² Shaver reported that Petitioner's FCE results were not valid because of his self-limiting behavior and inconsistent evaluation performance.²³ In the report, Shaver described Petitioner as "uncooperative."²⁴

¶ 18 At trial, Petitioner initially denied that he recalled the outcome of the FCE. On cross-examination, however, Petitioner admitted that he remembered that the physical therapist had determined that the results of Petitioner's FCE were invalid.²⁵

¶ 19 Matthew K. Bailey, M.D., released Petitioner to return to work on March 16, 2006.²⁶

¶ 20 In his deposition testimony, Petitioner testified that following his June 2004 industrial injury, he did not work full time until he went to work for Cedar Valley.²⁷ Petitioner testified that he worked a couple of side jobs and used his savings to support himself while he was between jobs.²⁸

¶ 21 On May 15, 2007, Petitioner began treating with Wayne Jacobsmeyer, D.C., for his low back.²⁹ He continued to treat with Dr. Jacobsmeyer until approximately November 5,

²⁰ Ex. 5 at 1; Trial Test.

²¹ Ex. 5 at 6.

²² Ex. 5 at 156.

²³ Ex. 5 at 158.

²⁴ Ex. 5 at 156.

²⁵ Trial Test.

²⁶ Ex. 5 at 120.

²⁷ Petitioner's Dep. 9:13-18.

²⁸ Petitioner's Dep. 9:13-21.

²⁹ Ex. 6 at 6.

2007.³⁰ Petitioner's pain failed to improve to his satisfaction under Dr. Jacobsmeyer's care³¹ and he switched treatment to Steven R. Biggs, D.C., M.D., on November 6, 2007.³²

¶ 22 Prior to treating with Dr. Biggs for his low-back symptoms, Petitioner filled out an intake form which included a medical history.³³ Petitioner did not mention an injury to his low back in an industrial accident in 2004.³⁴ At his deposition, Dr. Biggs testified that he was unaware of Petitioner's 2004 low-back injury.³⁵

¶ 23 Dr. Biggs testified at his deposition that he based his diagnosis of Petitioner's lumbar disk degeneration and lumbar segmental dysfunction on his physical examination of Petitioner, Petitioner's history, and an MRI.³⁶

¶ 24 Dr. Biggs testified that he relies on a patient's subjective complaints in his diagnosis. Dr. Biggs further testified that the credibility of the patient is relevant in making his diagnosis.³⁷

¶ 25 Petitioner informed Dr. Biggs that he was injured on the job and developed low-back pain radiating into the right side of his leg with numbness in the lower leg.³⁸

¶ 26 In an August 1, 2007, letter, Dr. Jacobsmeyer opined that Petitioner suffered a new injury on May 14, 2007. Dr. Jacobsmeyer opined that, unlike the 2004 injury, Petitioner experienced pain, numbness, and tingling down his right leg after May 14, 2007.³⁹

¶ 27 Petitioner testified at trial that after he was released to return to work from his 2004 injury in March of 2006, he applied for employment with Super One, Smith's, Albertsons,

³⁰ Ex. 6 at 70.

³¹ Petitioner's Dep. 29:6-17.

³² Ex. 6 at 75.

³³ Biggs' Dep. 7:6 - 8:19.

³⁴ Biggs' Dep. 6:22 - 7:20

³⁵ Biggs' Dep. 6:22 - 7:5.

³⁶ Biggs' Dep. 5:25 - 6:18.

³⁷ Biggs' Dep. 14:23 - 15:3.

³⁸ Biggs' Dep. 18:4-18.

³⁹ Ex. 6 at 43.

and Ace Hardware, but was unable to secure employment.⁴⁰ Petitioner further testified that he called some construction companies out of the phone book to inquire about employment. In response to questioning from the Court, however, Petitioner was unable to provide specific names of the construction companies he purportedly called.⁴¹

¶ 28 Based on observing Petitioner's demeanor and noting numerous inconsistencies in Petitioner's testimony, I do not find Petitioner to be a credible witness. Petitioner's testimony concerning conversations he had with Claros differs significantly from Claros' testimony. For example, Petitioner testified that in a phone conversation, Claros told him he would be working six or seven days a week and no less than 40 hours. Claros recalled that he offered Petitioner 18-24 hours of work per week. Claros' recollection is bolstered by the payroll records of both Scott and Martinez, Claros' two other employees. Neither Scott nor Martinez were working 40 hours per week around the time that Petitioner's alleged injury occurred. Scott's and Martinez' hours between May 5, 2007, and June 29, 2007, averaged 26.25 and 28.7 hours per week, respectively. Nevertheless, Petitioner checked "Full Time" on his first report of injury and testified at trial that he understood he would be working 40-50 hours per week based upon his conversations with Claros and another employee. In short, much of Petitioner's testimony is not supported by the evidence, and, in fact, is contradicted by the evidence.

CONCLUSIONS OF LAW

¶ 29 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's alleged industrial accident.⁴²

¶ 30 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁴³

¶ 31 In order to sustain his burden of proof, Petitioner must first establish that it is more probable than not that he "suffered a compensable industrial injury to his low back arising out of and in the course of his employment on May 14, 2007, while employed by Cedar Valley Construction, Inc., of Kalispell, Flathead County, Montana."⁴⁴ The only evidence

⁴⁰ Trial Test.

⁴¹ Trial Test.

⁴² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁴³ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

⁴⁴ Pretrial Order at 4.

presented to me that Petitioner sustained an injury while working for Cedar Valley is Petitioner's own testimony. I did not find Petitioner to be a credible witness and do not find Petitioner's version of events to be credible. Therefore, I must conclude that Petitioner has failed to meet his burden of proof.

¶ 32 Since Petitioner has not prevailed in his claim, he is not entitled to his costs or attorney fees.

JUDGMENT

¶ 33 Respondent Uninsured Employers' Fund is not liable for Petitioner's injury and corresponding benefits.

¶ 34 Petitioner is not entitled to his costs.

¶ 35 Petitioner is not entitled to his attorney fees.

¶ 36 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.

DATED in Helena, Montana, this 25th day of June, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace/David W. Lauridsen
Darrell S. Worm
Arthur M. Gorov
Submitted: March 11, 2008