

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 11

WCC No. 2006-1519

DONALD HECKEL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

NEAL LaFEVER

Respondent/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: An apartment manager who received a rent reduction in exchange for collecting rents and doing chores around the building where he resided argued that an infection he suffered in his arm was caused by a cut sustained during an altercation while he was attempting to eject a trespasser from the building, and therefore he is entitled to workers' compensation benefits. The building owner responded that the apartment manager was not an employee because he did not receive wages, that the apartment manager never notified the building owner of the injury, and that the medical evidence does not support the apartment manager's assertion that his arm infection was a result of the altercation.

Held: Although the Court concludes that the building owner knew of the altercation shortly after it occurred, and that the apartment manager was an employee because he received a rent reduction in exchange for his labors, ultimately, nothing in the medical records support a finding that the arm infection was a result of the altercation in the apartment building. Petitioner is therefore not entitled to workers' compensation benefits.

Topics:

Witnesses: Credibility. Where the medical evidence is determinative, the Court need not determine the credibility of conflicting witnesses.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Where Petitioner received a \$200 per month rent reduction in exchange for collecting the rent of other tenants, keeping common areas clean, and other work he performed for his landlord, Petitioner was performing services for a “wage” pursuant to § 39-71-123(1)(e), MCA, which states that wages includes rent if it constitutes a part of the employee’s remuneration and is based on actual value. Therefore, Petitioner was an employee of his landlord.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-603. Where a landlord who employed one of his tenants heard from other tenants that the employee had been injured while ejecting a trespasser, the notice requirement of § 39-71-603, MCA, is satisfied.

Causation: Injury. Where the medical evidence does not support a conclusion that Petitioner’s arm injury occurred as a result of an altercation in which he ejected a trespasser from the apartment building where he was employed, Petitioner cannot meet his burden of proof and the Court need not reach whether the ejection was within the course and scope of Petitioner’s employment.

¶ 1 The trial in this matter was held on June 29, 2006, in Billings, Montana. Petitioner Donald Heckel was present and represented himself. Respondent Uninsured Employers’ Fund was represented by Joseph R. Nevin. Employer Neal LaFever was represented by P. Bruce Harper.

¶ 2 Exhibits: Exhibits 1 through 10, 13 through 15, 17, 23, 30, and 31 were admitted without objection. The Court reserved ruling on the admission of Exhibit 11 at the beginning of trial but left open the possibility that Petitioner could later move for its admission subject to a determination of whether testimony elicited during trial may establish foundation or relevancy and overcome any hearsay objections. Ultimately, Petitioner did

not move for admission of this exhibit and it was not admitted into evidence.¹ Exhibits 12, 16, 18 through 22, and 24 through 29 were objected to and not admitted.

¶ 3 Witnesses: Petitioner, Lee Vanica, Jerry Baggerman, Debbie Shaw, Nathan Blaylock, Bryze Bertram, Michelle Carlson, and Neal LaFever were sworn and testified.

¶ 4 Issues Presented: The contested issues of law from the Pretrial Order are restated as follows:

¶ 4a Was Petitioner an employee of Neal LaFever?

¶ 4b Did any injuries incurred by Petitioner arise in the course and scope of his employment by Neal LaFever?

¶ 4c Is Petitioner entitled to receive compensation and medical benefits as a result of his alleged injuries?

¶ 4d Did Petitioner make any report of his alleged injuries to his alleged employer within thirty days?²

¶ 5 Additionally, Neal LaFever (LaFever) moved for summary judgment in this matter. The Court declined to rule on the motion prior to the start of trial. However, the issues raised in LaFever's motion are addressed in these findings of fact and conclusions of law.

¶ 6 At the conclusion of trial, the Court issued a bench ruling pursuant to ARM 24.5.335. The following findings and conclusions are in accordance with that ruling.

FINDINGS OF FACT

¶ 7 Petitioner resided at an apartment building owned by LaFever.³ Petitioner's rent was \$350 per month. In exchange for performing some tasks for LaFever, including sweeping

¹ Exhibit 11 was a copy of a money order which Petitioner contended was relevant to rebut attempts to impeach his credibility. Although testimony was elicited during trial concerning the nature and origins of this money order, Petitioner did not move for its admission. In any event, since the Court's decision was based on a lack of medical causation, the exhibit would have properly been excluded on relevancy grounds had Petitioner moved for its admission.

² Pretrial Order at 3.

³ Response of Neal LaFever at 3; Amended Response of Neal LaFever to Petition for Hearing at 2-3.

the common area floors and stairs, taking care of the laundry room, changing light bulbs, and collecting rent, he received a \$200 deduction on his monthly rent.⁴

¶ 8 Petitioner testified that in August 2004, he witnessed Jerry Baggerman (Baggerman) carrying a backpack and sleeping bag, walking down the stairs of the apartment building where Petitioner lived. Petitioner informed Baggerman that he was not supposed to be in the building. Baggerman and Petitioner began to fight, and Petitioner was hit by the sleeping bag and backpack which Baggerman held. Petitioner testified that during this altercation, spots which he has on his arms due to sun exposure broke open. Petitioner believes Baggerman's backpack and sleeping bag were dirty and that Petitioner got an infection in his arm from contact with Baggerman's possessions. Petitioner stated that no police report was filed concerning the incident.⁵

¶ 9 Petitioner testified that about three days after the fight, one of the building's tenants thought he looked unwell, and urged him to seek medical treatment. The tenant apparently called LaFever and asked him to take Petitioner to the hospital. LaFever drove Petitioner to the emergency room.⁶

¶ 10 Petitioner testified that on the way to the hospital, LaFever asked him if he had burned his arm. Petitioner told LaFever that he did not burn his arm, but he could not account for the injury. Petitioner testified that at the time, he did not think the injury could have come from the fight, and he thought it was possibly a reaction to some medication he was taking. Petitioner further testified that it was not until a doctor informed him that he had nearly lost his arm due to infection that Petitioner thought his arm injury might have been caused by the fight.⁷

¶ 11 Nathan Blaylock (Blaylock) worked for LaFever for a time. He testified that on the day after the fight, LaFever told him that Petitioner had been attacked by Baggerman and that Petitioner had been hospitalized. Blaylock visited Petitioner in the hospital and observed Petitioner's arm.⁸

⁴ Trial Test.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

¶ 12 Deborah Shaw (Shaw) works at the Monte Carlo Bar, which LaFever also owns.⁹ Shaw testified that she heard about the fight the following day, or perhaps the day after that, and that she believes it occurred in August 2004. Shaw further testified that she did see that Petitioner's arm was red, but she believes he had a problem with his arm prior to the fight, and that she observed redness on his arm at least a month prior to the fight.¹⁰

¶ 13 Baggerman testified that he got into an altercation with Petitioner at the apartment building. Baggerman was visiting a friend and Petitioner told him he was not allowed on the property. Baggerman stated that he was intoxicated at the time. He was holding his backpack and sleeping bag when he shoved Petitioner. Petitioner fell, and Baggerman thinks Petitioner may have gotten a cut from the sleeping bag. Baggerman testified that someone else was with Petitioner at the time of the incident. Baggerman further testified that this incident happened during the winter, but later stated he thought it might have been in June. Baggerman stated that he did not do anything which would have caused a burn, and that he did not notice any cuts or bleeding. However, he further testified that after the altercation, he had blood, both Petitioner's and his own, all over him.¹¹

¶ 14 Bryce Bertram (Bertram) was a tenant of the building Petitioner managed. On the night of the fight, Bertram heard yelling in the hallway and exited his apartment. In the hallway, he saw Baggerman overpowering Petitioner, and Bertram ejected Baggerman from the building. Bertram testified that Petitioner had a couple of scrapes, including a scrape on his arm in the location which later got infected. Bertram did not remember precisely when the incident occurred but was sure it was in the summer of 2004.¹²

¶ 15 LaFever testified that he heard that Petitioner had cellulitis on his arm, and he went to Petitioner's apartment to check on him. When LaFever saw the condition of Petitioner's arm, he took him to the emergency room. LaFever asserted that the fight between Petitioner and Baggerman occurred about a month after Petitioner was released from the hospital, and that Blaylock took Petitioner to the hospital after the fight. At trial, LaFever admitted he knew the fight had occurred, because one of the building's tenants called him about it.¹³

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¶ 16 On August 2, 2005, Bernadette Rice (Rice), Claims Adjuster for the Uninsured Employers' Fund (UEF), sent a letter to LaFever informing him that Petitioner had filed a First Report of Injury. According to the letter, the injury date was October 1, 2003.¹⁴ On August 11, 2005, UEF Field Auditor Michelle Carlson (Carlson) filed a narrative report after Petitioner visited her office. According to Carlson, Petitioner told her that he did not know if the incident with Baggerman occurred a year or two years ago, and that the UEF should refer to the date of the medical bills to determine the date of injury.¹⁵ In a follow-up letter on August 31, 2005, Rice clarified that Petitioner's alleged date of injury was August 21, 2004. Rice further informed Petitioner that his claim was being denied by the UEF because the medical information provided did not support a finding that his medical condition was caused by a work-related injury.¹⁶

¶ 17 The medical records in this case indicate that Petitioner was treated in the emergency department of St. Vincent Healthcare on August 24, 2004. The report states:

This 70-year-old male comes in per wishes of his landlord for evaluation of shortness of breath and arm infection. The patient states that he noticed his arm was problematic for the past few days, feels it is secondary to a new heart medication¹⁷

Upon examination, Petitioner was found to have a second- to third-degree burn on his right arm near his elbow.¹⁸ He was then admitted to the hospital.¹⁹ In the history taken at the time of admission, the admitting physician noted that Petitioner "is not sure what happened" to his arm, and that he did not remember injuring it or noting any problems until recently. The report denotes Petitioner seemed to have an "extensive cellulitis and burn on his right arm" ²⁰ The admitting physician further notes that this burn could possibly have been caused by a toxin.²¹

¹⁴ Ex. 10.

¹⁵ Ex.15 at 1.

¹⁶ Ex. 17.

¹⁷ Ex. 4 at 1.

¹⁸ *Id.*

¹⁹ Ex. 4 at 2.

²⁰ Ex. 5 at 1.

²¹ Ex. 5 at 2.

¶ 18 Many discrepancies exist between the various accounts of the altercation between Petitioner and Baggerman. The testifying witnesses were unable to agree on when the fight occurred, and whether any injuries were evident on Petitioner in the aftermath of the altercation. Baggerman testified both that he saw no cuts or bleeding, and that he was covered with Petitioner's blood after the fight. Bertram asserted that he saw a cut on Petitioner's arm in the location where the infection later occurred, but Petitioner, LaFever, and Shaw all testified that Petitioner had some sort of problem with his arm prior to the fight, so the Court cannot rule out the possibility that Petitioner's arm was injured prior to the altercation.

¶ 19 The date of injury also cannot be reliably determined. Petitioner could not recall when the fight occurred and relied on the medical records which indicated that he visited the emergency room on August 24, 2004. According to a report from the UEF, Petitioner believed he went to the emergency room about three days after the fight. Therefore, based on the date of the medical bills, the fight would have occurred on August 21, 2004. LaFever asserted that he transported Petitioner to the hospital for his arm problem about a month before the fight occurred, and that Blaylock took Petitioner to the hospital after the fight. Blaylock, on the other hand, asserted that when he learned about the fight the morning after it occurred, Petitioner was already hospitalized.

¶ 20 Factually, this Court would be hard-pressed to determine whose version of events is most accurate. However, the medical evidence before the Court is determinative. The medical records all describe Petitioner as having suffered a burn or severe cellulitis. Petitioner admits that he did not inform his medical providers that he received a cut in that location during the fight with Baggerman because he did not remember it. In fact, Petitioner apparently believed the damage to his arm was caused by a reaction to a prescription medication. With no medical evidence supporting his contentions, Petitioner cannot prevail on his claim for benefits.

CONCLUSIONS OF LAW

¶ 21 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 Petitioner's injury.²²

¶ 22 At issue is whether Petitioner was an employee of LaFever. Petitioner was performing services for LaFever in exchange for a wage. Section 39-71-123(1)(e), MCA, states that wages includes board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value. Petitioner received a rent reduction of \$200 per month in exchange for the work he performed for LaFever. This

²² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

reduction constitutes rent under § 39-71-123(1)(e), MCA. The Court therefore concludes Petitioner was LaFever's employee.

¶ 23 Also at issue is whether Petitioner reported his alleged injury within 30 days as required by § 39-71-603, MCA. Petitioner testified that when LaFever asked him how he injured his arm, Petitioner did not know the injury stemmed from the fight. However, LaFever admitted at trial that he knew about Petitioner's fight with Baggerman because one of his other tenants reported it to him shortly after it occurred. The notice requirement of § 39-71-603, MCA, is satisfied if an employer learns of the injury or has actual knowledge of the injury within the prescribed 30-day period.²³ Since LaFever, the employer, had actual knowledge of Petitioner's injury within the 30-day period, the notice requirement of § 39-71-603, MCA, is met.

¶ 24 Ultimately, however, Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.²⁴ While a claimant is not required to prove with certainty and to the elimination of all other possibilities that an injury is work related, the claimant nonetheless bears the burden of proving it is more likely than not that the injury is work related.²⁵ Petitioner has failed to meet this burden. The medical evidence does not support a conclusion that Petitioner's injuries arose within the course and scope of his employment. None of the medical reports indicate that the infection in Petitioner's arm could have been the result of Petitioner's fight with Baggerman. Because of this lack of evidence, the Court need not consider the additional issue of whether the act of ejecting a trespasser was within the course and scope of Petitioner's employment. With the medical records unable to support his assertions, Petitioner cannot meet his burden of proof. Petitioner's claim for benefits is denied.

JUDGMENT

¶ 25 Petitioner's petition for workers' compensation benefits is **DENIED**.

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

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

²³ *Alsbury v. State Comp. Ins. Fund*, 2001 MTWCC 8, ¶ 23 (citations omitted).

²⁴ *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).

²⁵ *Oswald v. Horizon CMS Healthcare Corp.*, 2003 MTWCC 19, ¶ 3.

DATED in Helena, Montana, this 7th day of March, 2007.

(SEAL)

\s\ James Jeremiah Shea
JUDGE

c: Donald Heckel
Joseph R. Nevin
Arthur M. Gorov
P. Bruce Harper
Submitted: June 29, 2006