

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 5

WCC No. 2006-1769

MILDRED KELLER

Petitioner

vs.

ROCHDALE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for benefits related to an alleged industrial injury arising out of her employment with Four Corners Restaurant and Casino.

Held: Based on the evidence presented at trial and on the Court's determination that Petitioner was not a credible witness, Petitioner's claim for benefits is denied. Petitioner's version of the events on the date of her alleged injury differs dramatically from her coworkers' versions. The Court finds the coworkers that testified about the events in question credible. Furthermore, the medical documentation reflects that Petitioner reported the onset of her low-back pain prior to the alleged injury date.

¶ 1 The trial in this matter was held on May 14, 2007, in Kalispell, Montana. Petitioner Mildred Keller was present and represented by Kevin A. Duff. Respondent Rochdale Insurance Company was represented by Kelly M. Wills.

¶ 2 Exhibits: Exhibits 1 through 5, 7, and 8 were admitted without objection with the exception that Exhibit 3-1 was not admitted because it was not timely filed. Exhibit 6 was withdrawn.

¶ 3 Witnesses and Depositions: The deposition of Petitioner was taken and submitted to the Court. Petitioner, Patrick Keller, Glenn Alexander, Debbie Alexander, Laura Larson, and Tiffany Jaeger-Nystul were sworn and testified at trial.

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

¶ 4a Whether Petitioner is entitled to acceptance of her claim.

¶ 4b Whether Petitioner is entitled to costs associated with her litigated claim.

¶ 4c Whether Petitioner is entitled to attorney fees and a penalty.¹

FINDINGS OF FACT

¶ 5 Petitioner was employed by the Four Corners Restaurant and Casino (Four Corners) in Eureka, Montana. She began working for Four Corners in May 1996, and was working as a cleaning person on the day of her alleged injury.²

¶ 6 Petitioner's employer was enrolled under Compensation Plan II of the Montana Workers' Compensation Act and insured by Respondent.³

¶ 7 On the day of the alleged injury, Petitioner's shift at Four Corners began at 10:00 p.m. on May 17 and ended at 5:00 a.m. on May 18, 2006.⁴

¶ 8 Petitioner testified that at some point during her work shift on Wednesday, May 17 - 18, 2006, she lifted a mop bucket and felt a snap in her lower back. She claims that she called out to Laura Larson (Larson), her supervisor, and that Larson came to her aid.⁵

¶ 9 Petitioner finished her shift on May 18 and continued to work her shifts beginning May 18, 19, and 20, 2006.⁶

¶ 10 Petitioner recalls talking to Glenn Alexander (Alexander), owner of Four Corners, about her injury at the end of her shift on May 18, 2006.⁷ She testified that Alexander may

¹ Pretrial Order at 2.

² Trial Test.; Ex. 1.

³ Pretrial Order at 2.

⁴ Trial Test.

⁵ Trial Test.

⁶ Trial Test.

⁷ Petitioner's Dep. 37:11-14.

have come in on his day off, but that she did not know what days Alexander was scheduled to work.⁸

¶ 11 Larson testified at trial and I find her testimony credible. Larson had known Petitioner for about one year and eight months at the time of trial.⁹

¶ 12 Petitioner and Larson had a conversation a few weeks prior to May 21, 2006, which was Petitioner's last day of employment with Four Corners. During that conversation, Petitioner related to Larson that her back was hurting from an old industrial injury suffered while working for a previous employer. Specifically, Petitioner talked about her sciatica bothering her.¹⁰

¶ 13 Larson testified that she worked with Petitioner on the evening of May 17 and the morning of May 18, 2006, but was absolutely sure that she did not go to Petitioner's aid during that work-shift and does not believe that Petitioner called out in pain.¹¹ Furthermore, Larson testified that Petitioner did not inform her that she hurt her back lifting a mop bucket during the work-shift on the date of the alleged injury.¹²

¶ 14 Petitioner testified that after her shift on the morning of May 18, 2006, she went home and complained to her husband, Patrick Keller, about her low-back injury, and her husband asked whether she had informed Alexander of the injury. Petitioner recalls telling her husband that she spoke to Alexander about injuring her back.¹³ Petitioner testified that her husband drove her back to Four Corners later in the day on May 18, 2006, and she spoke to Alexander a second time and complained about her back injury. She also stated that she requested a form to report her injury but did not receive one.¹⁴ At trial Petitioner admitted that she failed to mention in her deposition the return trip that she made to Four Corners with her husband on May 18, 2006.¹⁵

⁸ Trial Test.

⁹ Trial Test.

¹⁰ Trial Test.

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Trial Test.

¹⁵ Trial Test.

¶ 15 Alexander testified at trial and I find his testimony credible. Alexander's typical work week was Friday through Tuesday. He testified that he generally did not work on Wednesdays and Thursdays during the period of time that Petitioner's alleged injury occurred and he was not at Four Corners on the morning of May 18, 2006, the date Petitioner claims she spoke to him about her injury.¹⁶

¶ 16 Alexander was aware that Petitioner had suffered from back pain for years.¹⁷

¶ 17 On May 22, 2006, Alexander asked Petitioner how she was doing. Petitioner responded that her back hurt. Alexander inquired about whether her back hurt due to a work-related incident and Petitioner responded that it was just her sciatica bothering her.¹⁸

¶ 18 On May 22, 2006, Petitioner was examined by Serban Ionescu, M.D., for severe back and left leg pain. Dr. Ionescu's notes reflect that Petitioner's symptoms began a "couple of weeks" ago and were progressively worsening. Dr. Ionescu further noted that Petitioner had a history of chronic low-back pain after a work-related injury but had not been evaluated in the office in a couple of years.¹⁹

¶ 19 Petitioner filed a First Report of Injury on July 8, 2006.²⁰

¶ 20 Petitioner has filed eleven separate workers' compensation claims with the Montana Department of Labor and Industry since 1986, including a claim for a December 1986 low-back injury.²¹ It was because of her experience with workers' compensation claims that she understood that a form must be filed with the Department of Labor and Industry.²²

¶ 21 In a September 12, 2006, letter addressed "TO WHOM IT MAY CONCERN," Dr. Ionescu responded to an inquiry from Terry Bohnsack, Respondent's adjuster, regarding Dr. Ionescu's notes of May 22, 2006, which noted that Petitioner's symptoms had been present for a couple of weeks. Dr. Ionescu's letter reads, in pertinent part:

¹⁶ Trial Test.

¹⁷ Trial Test.

¹⁸ Trial Test.

¹⁹ Ex. 3-53.

²⁰ Ex. 1.

²¹ Petitioner's Dep. Ex. 3.

²² Trial Test.

We have found ourselves in a similar situation many times, being unable to precisely document a certain date of injury, as the patients do not suffer a clear-cut injury but rather work into an injury in a gradual manner; therefore, many times a precise date of loss is impossible to appoint. This is the situation with [Petitioner], who has had chronic back pains but had noticed no flareups for a couple of years before our visit on 05/22/06. At that time she came in with low back pains and radiculopathy related symptoms, and she was unable to point to a specific date of injury but rather to a gradual onset, most likely related to the type of work she was doing at that time. . .²³

¶ 22 Based on my observation of Petitioner's demeanor, the substance of her testimony at trial, and the other evidence presented, I do not find Petitioner to be a credible witness. Conversely, I have found both Larson and Alexander to be credible, and neither of them remembered the alleged events of May 17 - 18, 2006 in the same way that Petitioner recalls them. Specifically, Larson does not recall hearing Petitioner cry out in pain or attending to her after hearing her cry out in pain. Nor does Larson recall Petitioner informing her of an injury on the day in question. I further find Alexander's testimony credible that he was not present on the day Petitioner testified that she spoke to him. Furthermore, Dr. Ionescu's medical note from the May 22, 2006, examination sets forth Petitioner's history. This history, which was taken four days after Petitioner's alleged injury, reflects that Petitioner informed Dr. Ionescu that her pain began a few weeks prior to the examination date. Notably missing from the same medical note is any mention of a specific incident with the mop bucket that allegedly took place approximately four days prior to the examination and which Petitioner now describes in detail.

CONCLUSIONS OF LAW

¶ 23 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.²⁴

¶ 24 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.²⁵

¶ 25 Petitioner has failed to satisfy her burden of proof. As set forth in detail in paragraph 22 above, I do not find Petitioner's version of events to be credible and I am not

²³ Ex. 3-9.

²⁴ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

²⁵ *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).

persuaded that the incident upon which she bases her claim for benefits occurred. Therefore, Petitioner is not entitled to the benefits she seeks in this case.

JUDGMENT

¶ 26 Petitioner is not entitled to acceptance of her claim in this case.

¶ 27 Petitioner is not entitled to costs, attorney fees, or a penalty.

¶ 28 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.

¶ 29 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 in Helena, Montana, this 17th day of January, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kevin A. Duff
Kelly M. Wills
Submitted: May 14, 2007