

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 6

WCC No. 2010-2638

RICK McCOLLOM

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered severe injuries from an explosion in his camping trailer, where he stayed while working on a jobsite. Petitioner alleged that he was an on-call employee and that he was camping in part because his employer expected him to arrive at the jobsite quickly if he were recalled after hours. Petitioner's employer denied that Petitioner was on call and alleged that Petitioner was not one of the employees that would have been recalled to the jobsite. Respondent contends that Petitioner's injuries did not occur within the course and scope of his employment.

Held: Petitioner was not an on-call employee and his employer received no benefit from his decision to camp near the jobsite. Petitioner's injury did not occur within the course and scope of his employment and it is therefore not compensable.

Topics:

Employment: Course and Scope: *Courser* Criteria. The Court rejected Petitioner's argument that he was "compelled" to camp near his worksite within the meaning of *Courser* because his employer did not pay him a per diem. While Petitioner may have had better options for living quarters if he received a higher wage, most workers could realistically raise the same argument.

Employment: Course and Scope: *Courser* Criteria. Where Petitioner's employer neither asked him to camp near his worksite nor encouraged

him to do so, Petitioner was not “compelled” to do so within the meaning of *Courser*.

Employment: Course and Scope: *Courser* Criteria. Where the Court did not find Petitioner’s contention that his employer benefitted from Petitioner’s decision to camp near his worksite credible, the Court concluded that Petitioner did not meet this element of *Courser*.

Employment: Course and Scope: Remote Worksite. The Court declined to adopt a “remote worksite” rule, finding Petitioner’s situation to be readily distinguishable from the cases in which other jurisdictions have adopted this rule. The Court noted that Petitioner was not required to reside at the campsite he chose, he did not live on his employer’s premises, and the jobsite was not so remote as to require him to live at the campsite. Nothing in Petitioner’s job duties required him to camp near the jobsite rather than commute from nearby communities as the majority of his co-workers did. The Court held that adopting a “remote worksite” rule was not appropriate in this case; Petitioner did not simply ask the Court to adopt the rule as it is applied in other jurisdictions but rather asked the Court to adopt the rule and expand the doctrine beyond the bounds in effect in other jurisdictions.

¶ 1 The trial in this matter occurred on May 6, 2011, at the Workers’ Compensation Court. Petitioner Rick McCollom was present and was represented by Jonathan McDonald. Greg E. Overturf represented Respondent Montana State Fund (State Fund).

¶ 2 Exhibits: I admitted Exhibits 1 through 5 without objection.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of McCollom, Brian Brown, Joseph Matthew Carroll, Jeramy Cham, Luke Josi, Justin Lavoilette, Jordan Main, Nathan McConkey, Kim Rickard, Dave Wilks, and Daniel Ray Wood can be considered part of the record. McCollom, Carroll, Brown, and Wood testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issue:¹

Was the injury suffered by Petitioner Rick McCollom on June 26, 2009,² compensable under the Montana Workers’ Compensation Act?

¹ Final Pretrial Order at 3, Docket Item No. 41.

FINDINGS OF FACT

¶ 5 Montana Rail Link (MRL) hired LRL Construction (LRL), an Oregon-based business specializing in complicated ground-stabilization work, to repair, enlarge, and reinforce the Mullan Pass Tunnel, a historical railroad tunnel that serves as a major rail conduit over the Continental Divide.³

¶ 6 On June 3, 2009, LRL hired Rick McCollom through the Laborers' Local 1686 Union in Helena. This union is the only laborers' union local in the State of Montana. LRL hired many of its workers from the union. Most of LRL's Montana-based employees lived in the Helena area. None of the Montana-based employees received a per diem.⁴

¶ 7 LRL brought seven primary employees from Oregon to work on the Mullan Tunnel project. The Oregon-based employees formed the management and skilled labor structure for the job. All but one of the Oregon employees received a per diem of \$100 per day to defray the costs of housing and meals while living in Montana.⁵

¶ 8 The LRL crew worked on the Mullan Tunnel project during "windows" in MRL's freight train schedule where the tracks could be cleared for eight hours at a time, six days a week. The windows varied from week to week and occasionally from day to day. At the end of each shift, workers learned when to report for the next shift. If construction debris or earth and rock from a "cave-in" fell on the tracks, workers stayed until the tracks were cleared.⁶

¶ 9 Occasionally, MRL called an LRL manager after hours if debris needed to be cleared. The manager then sent LRL employees to clear the tracks. The managers always sent some of the Oregon-based employees, and on at least one occasion sent some of the Montana-based employees to clear debris. McCollom was never called in after regular hours to clear the tracks.⁷ McCollom also was never called in after regular hours to assist with unloading supply trucks.⁸

² The Final Pretrial Order identifies the date of injury as June 29, 2009. However, at trial the parties stipulated that the correct date of injury was June 26, 2009.

³ Uncontested Facts, Final Pretrial Order.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

¶ 10 McCollom testified at trial. I did not find McCollom to be a credible witness. Specifically, I do not believe McCollom truly believed he was on call for his job at the Mullan Tunnel. Based on the contradictory testimony of the multitude of witnesses in this case, I do not believe McCollom was told he was required to leave his cell phone on after hours to be available to be recalled to the jobsite at a moment's notice, nor do I believe that the job superintendent had planned to call McCollom after hours to unload supply trucks.

¶ 11 McCollom resides in Martinsdale, Montana, where he has lived since 1989.⁹ McCollom testified that when he filled out his initial paperwork for the LRL job, he was asked to provide a method for the company to reach him after hours in case he needed to be recalled to the jobsite.¹⁰ McCollom testified that on the day he started work for LRL, Justin Lavoilette, the job superintendent, made it clear that he could be called back to work at any hour in the event of a cave-in or debris on the tracks after regular work hours.¹¹

¶ 12 McCollom testified that when he first arrived on the jobsite, he spent a few minutes talking to Lavoilette. He told Lavoilette that he had six years' underground experience performing bolting, mining, and nipping duties. Lavoilette then assigned him to Nathan McConkey's bolting crew. McCollom testified that his job duties typically consisted of working on the bolting deck as a bolting helper. He also occasionally ran the "rail king." McCollom testified that he rarely worked outside of the tunnel.¹²

¶ 13 McCollom testified that after discussing his job duties with Lavoilette, he understood that if debris landed on the tracks during a shift, the workers would remove it and then resume their regular job duties. If they could not clear the tracks before the end of their shift, they would stay overtime until the tracks were cleared. If a tunnel collapse occurred outside of the work shift, LRL would call in workers to clear the tracks and stabilize the collapse area. McCollom testified that he assumed that if he were called in after hours that he would need to get to the jobsite "within a reasonable amount of time." McCollom stated that he knew that Lavoilette lived in East Helena and that it would take Lavoilette approximately 45 minutes to an hour to return to the jobsite, so he considered 45 minutes to an hour to be a reasonable amount of time. McCollom further testified that one of the LRL supervisors from Oregon would always be called in to work on clearing the tracks, and the supervisors stayed in Helena or East Helena.

⁹ Trial Test.

¹⁰ McCollom Dep. 28:16-20.

¹¹ Trial Test.

¹² Trial Test.

McCollom admitted that if he were called in to clear the tracks after hours he would have to wait for the LRL supervisor to arrive from Helena or East Helena.¹³

¶ 14 McCollom testified that during the morning safety meetings, Lavoilette or Dave Wilks regularly reminded the crew to keep their cell phones turned on after work in case they needed to be recalled after hours.¹⁴ McCollom testified that at the end of each work shift, the crew members would learn what time to report to work the following day. He stated that the crew would report at that time the next day, “unless they called you in earlier. They never did, but that was the idea for having the phones”¹⁵

¶ 15 For the first two weeks after he was hired, McCollom stayed at the union hall barracks in Helena. McCollom testified that when he began working for LRL, he did not have a cellular telephone. If LRL needed to reach him, they would have to call his Martinsdale land line and his wife would contact a friend in Helena, who would go to the barracks to relay the message to McCollom. During his second week of staying at the barracks, McCollom met Joseph Matthew Carroll. The following week, they moved to a campsite approximately one-half to one mile away from the jobsite. McCollom informed Lavoilette that he could be reached via Carroll’s cell phone if necessary.¹⁶

¶ 16 McCollom worked Monday through Saturday with Sundays off each week.¹⁷ One Saturday, he informed Lavoilette that he would not be available to come in the next day if he were recalled because he planned to go to Martinsdale to retrieve his camping trailer.¹⁸ On Sunday, June 14, 2009, McCollom transported the camper to a campsite he had found near the jobsite.¹⁹

¶ 17 McCollom testified that he drove the camping trailer past the jobsite on his way to the campsite, and although it was not a scheduled workday, he saw crew members working on the tunnel. He had not been called in, so he proceeded to his campsite.²⁰ McCollom testified that he was not called back in because Lavoilette knew he had left town to get his camping trailer. McCollom testified that he knew Lavoilette was agreeable to him leaving town to get his trailer, and approved the travel because he had

¹³ Trial Test.

¹⁴ McCollom Dep. 62:2-9.

¹⁵ McCollom Dep. 47:22 – 48:9.

¹⁶ Trial Test.

¹⁷ McCollom Dep. 32:10-12.

¹⁸ McCollom Dep. 32:13-18.

¹⁹ Trial Test.

²⁰ Trial Test.

“alternative motives” for getting McCollom to camp near the jobsite.²¹ McCollom testified that he believes Lavoilette intended to have him start coming in after hours to unload supply trucks.²²

¶ 18 McCollom reported to work on Monday, June 15, 2009. Later that week, he acquired a cellular phone and informed Lavoilette of his new contact information. McCollom purchased the phone so he could stay in touch with his family and so his employer could reach him more easily. McCollom testified that Lavoilette was pleased to learn that McCollom could be reached on his own cell phone. McCollom testified that Lavoilette told him that since he was staying a mile from the jobsite, Lavoilette might call him in to unload trucks or to clean debris after hours. McCollom stated that ultimately, Lavoilette never called him in after hours.²³

¶ 19 McCollom testified that his job was extremely dirty and that he was generally covered in “shotcrete” dust by the end of his shift. McCollom explained that shotcrete is a quick-drying substance used to stabilize rock and that it is a caustic material that causes a chemical burn if it gets wet after it comes into contact with skin. He testified that it was necessary to bathe after his shift to remove any traces of shotcrete from his skin.²⁴

¶ 20 On the day of McCollom’s accident, he worked a normal work shift underground, bolting and grouting holes. He stated he was “filthy” when he came out at the end of his shift.²⁵ After McCollom clocked out, he drove to his camping trailer. McCollom testified that he typically went to his trailer and got cleaned up after each work shift. On this day, McCollom went inside the trailer, turned on the cook stove and pushed the ignition button from the propane. The camper exploded, propelling McCollom outside. McCollom attempted to put out the flames. Carroll arrived at the campsite and called 911. McCollom discovered that he had been badly burned. Carroll drove McCollom to meet the Elliston ambulance. The ambulance transported McCollom to a Helena hospital, and he ultimately was sent to a Seattle burn unit.²⁶

¶ 21 Deputy Gavin R. Roselels of the Powell County Sheriff’s Office reported that he responded to the Mullan Pass area after learning that someone had been burned in a camper explosion. Deputy Roselels reported that he found McCollom in an ambulance

²¹ McCollom Dep. 34:4-13.

²² McCollom Dep. 34:12 – 35:1.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.

²⁶ Trial Test.

and spoke with him briefly. McCollom reported that he had returned to his camper after his work shift and that he struck a match to light his cook stove to make coffee. The camper then exploded. Deputy Roselels investigated the accident site and noted that it appeared that a lantern had been left lit inside the camper, and when McCollom attempted to light the stove, the built-up fumes triggered an explosion.²⁷

¶ 22 Carroll testified at trial. I found him to be a credible witness. Carroll resides in Hungry Horse, Montana. He began working on the Mullan Tunnel project for LRL on June 3, 2009. Carroll did not work underground on the Mullan Tunnel project. He typically ran a forklift, loaded and unloaded trucks, and hauled garbage.²⁸ At his deposition, Carroll testified that he was a “glorified garbage man” and that the LRL supervisors did not think he was competent, even though he had an extensive history of similar work.²⁹

¶ 23 Carroll testified that on his first day on the job, he was asked for his cell phone number and it was explained to him that the supervisors wanted to be able to reach employees in case of bad weather or cave-ins. Carroll testified that on his first week on the job, he stayed at the union hall barracks in Helena along with McCollom. Carroll testified that his home was over 150 miles away, and so commuting from home was not an option. However, he wanted to camp rather than remain in Helena because of the expense of commuting, and because he did not want to put excessive wear and tear on his vehicle. Carroll further testified that it was common knowledge among the LRL employees that he and McCollom were camping near the jobsite.³⁰ Carroll testified that he did not have an understanding that he needed to live close to the jobsite in case he was called in after hours. He just found camping to be a necessity based on his financial situation.³¹

¶ 24 Carroll testified that he was the only person on the jobsite who was certified to operate a forklift. He stated that he was the person who typically unloaded trucks, and since his job duties kept him outside the tunnel, it was convenient for him to do so. He testified that he never came in after hours to unload trucks, and no one had ever suggested to him that he might be called in after hours to unload trucks.³²

²⁷ Ex. 1 at 3.

²⁸ Trial Test.

²⁹ Carroll Dep. 8:3-11.

³⁰ Trial Test.

³¹ Carroll Dep. 26:1-10.

³² Trial Test.

¶ 25 Carroll testified that having a working cell phone was “kind of a necessity” for the job because of changing weather conditions and the rock conditions in the tunnel. Carroll testified that the company called in Luke Josi whenever there was a cave-in.³³ Carroll testified that the cave-ins required additional laborers and that other workers were frequently called in after hours to clear the tracks.³⁴

¶ 26 Carroll testified that he was never called in after hours.³⁵ Carroll further testified that the LRL supervisors generally gave any available overtime hours to the crew members who came from Oregon. Carroll testified that he did not consider himself to be on call. He further testified that while McCollom was knowledgeable, McCollom was not part of the Oregon group and the supervisors were not inclined to give McCollom overtime. Carroll explained that when after-hours cave-ins occurred, boulders had to be removed from the tracks before the shotcrete crew could enter the tunnel. The employees assigned to boulder removal were all from Oregon. Carroll testified that if he had been called in for a cave-in, it would not matter that he could get to the jobsite more quickly than the Oregon workers; he would have to wait for the Oregon workers to clear the tracks.³⁶

¶ 27 Carroll testified that on the day of McCollom’s accident, they had just gotten off work and McCollom had gone to his trailer to wash up. Carroll arrived at the campsite shortly after the explosion. Carroll called 911, put McCollom in his truck, and rushed down the road to meet the ambulance. After the paramedics took charge of McCollom, Carroll went back to the campsite with firefighters to put out the fire.³⁷

¶ 28 Brian Brown testified at trial. I found him to be a credible witness. Brown resides in Helena. Brown was hired to work for LRL on the Mullan Tunnel project through the union. Brown worked for LRL from March 2009 until November 2009 when the project season ended.³⁸ Brown testified that on his first day on the job, he was asked for contact information and an emergency phone number. Brown understood that LRL wanted this information in case of an accident. He testified that he was never told that he might be called to come in to work outside of his normal shift hours.³⁹

³³ Carroll Dep. 15:1-21.

³⁴ Carroll Dep. 16:7 – 17:1.

³⁵ Carroll Dep. 17:25 – 18:4.

³⁶ Trial Test.

³⁷ Carroll Dep. 34:14 – 35:9.

³⁸ Trial Test.

³⁹ Trial Test.

¶ 29 Brown testified that on one occasion, one of the Oregon-based supervisors called him on a Sunday and told him that LRL needed a shotcrete crew. He was offered the opportunity to come in for overtime. This was the only time he was called in for work after hours, and he does not know of any other occasion when Montana-based workers were recalled after hours. Brown testified that in the event of a cave-in, the supervisors called the Oregon-based workers first. He believes that if they did recall any Montana-based workers, they would have called him or Daniel Ray Wood, another Montana-based worker, because they knew how to run the shotcrete train and had reputations for being hard workers. Brown testified that most of the incidents he is aware of which required after-hours clean-up were rock slides outside of the tunnel. In those instances, an Oregon-based supervisor went to the jobsite and used a front-end loader to clear the tracks.⁴⁰

¶ 30 Brown testified that job materials were trucked in a few times a week, and any available employee would unload the truck with a forklift. If trucks arrived after hours, the driver would unload the truck. The key to the forklift was left out so that the driver could operate the forklift. Brown does not know of any instances in which an employee was asked to go to the jobsite afterhours to unload a truck.⁴¹

¶ 31 Wood testified at trial. I found him to be a credible witness. Wood resides in Helena. He worked for LRL on the Mullan Tunnel project from March 2009 until November 2009. Wood did not recall the LRL supervisors ever asking him for his cell phone number, although he socialized with the crew and he believes they probably obtained his number through socializing outside of work hours. Wood testified that he believes he, Brown, and one other worker were the only Montana-based employees to work the entire season on the Mullan Tunnel project. Wood testified that he thinks that the three of them were hard workers and got along better with the Oregon crew members.⁴²

¶ 32 Wood testified that he was never told that he needed to be on-call and he was never asked to keep his cell phone on in case he needed to be recalled to the jobsite. Once, a supervisor called Wood on a Sunday and offered him the opportunity to go to the jobsite on overtime. Wood and Brown were the only Montana-based crew members who were called to go in after hours. Wood further testified that sometimes a crew

⁴⁰ Trial Test.

⁴¹ Trial Test.

⁴² Trial Test.

member remained on site to keep an eye on the tunnel outside of work hours, and this job was always assigned to one of the Oregon-based crew members.⁴³

¶ 33 Wood testified that if trucks arrived with job materials during the work shift, LRL employees unloaded the trucks. If trucks arrived after hours, the truck driver used a “grade all” to unload the truck. The key to the “grade all” was either left in the ignition or stashed in a side pocket where the driver could find it. Wood testified that he does not know of any instance where an employee went to the jobsite after hours to unload a truck.⁴⁴

¶ 34 Lavoilette has worked for LRL for over nine years.⁴⁵ At the time of McCollom’s injury, Lavoilette was a superintendent on the Mullan Tunnel project.⁴⁶ During this project, Lavoilette lived in an apartment in East Helena with Wilks.⁴⁷ Lavoilette testified that when LRL takes a project out of state, it takes Oregon-based employees with it.⁴⁸ On out-of-state projects, LRL also contracts with local unions to supply the rest of the labor force.⁴⁹ Lavoilette testified that on the Mullan Tunnel project, LRL used the local union to supply general laborers. He stated that previous tunnel experience, while helpful, was not required, because LRL brought its specialized employees along.⁵⁰

¶ 35 Lavoilette testified that the foremen or supervisors included Wilks, McConkey, and Steve McDaniel.⁵¹ No workers hired through the Helena union were in a leadership position.⁵²

¶ 36 Lavoilette testified that he would not typically pay Montana-based workers a living allowance because they are usually from the local town.⁵³ Lavoilette testified that he had “no clue” as to whether Martinsdale was within commuting distance of the Mullan Tunnel project.⁵⁴ Lavoilette stated that he does not understand why the local

⁴³ Trial Test.

⁴⁴ Trial Test.

⁴⁵ Lavoilette Dep. 6:5-9.

⁴⁶ Lavoilette Dep. 6:20-24.

⁴⁷ Lavoilette Dep. 20:24 – 21:1.

⁴⁸ Lavoilette Dep. 9:8-13.

⁴⁹ Lavoilette Dep. 10:8-12.

⁵⁰ Lavoilette Dep. 10:23 – 11:6.

⁵¹ Lavoilette Dep. 15:8-23.

⁵² Lavoilette Dep. 16:2-5.

⁵³ Lavoilette Dep. 34:20-25.

⁵⁴ Lavoilette Dep. 33:15-25.

union would have sent someone not from the area to the job, and that workers knew the location and job duties at the outset. Lavoilette testified that each worker had to decide for him or herself if the job was worthwhile.⁵⁵

¶ 37 Lavoilette testified that LRL “went through” approximately 50 laborers who were hired out of the Helena union hall. He stated that many people did not like the work or could not accommodate the schedule changes.⁵⁶

¶ 38 Lavoilette testified that McCollom worked as a “nipper” on the Mullan Tunnel project. He described the job as a helper position: “[I]t’s basically a go-get-it boy.”⁵⁷ Lavoilette testified that McCollom was not assigned the nipper job because of his previous experience, but because it was a job position that Lavoilette needed to fill.⁵⁸

¶ 39 Lavoilette testified that on occasion, debris fell onto the tracks. Sometimes this occurred during a shift, and sometimes it happened after hours.⁵⁹ If debris fell on the tracks after hours, an on-site MRL employee called Lavoilette. He then drove to the jobsite to inspect the situation, but the MRL employee usually cleared the tracks.⁶⁰

¶ 40 On July 20, 2009, a major cave-in at Mullan Tunnel blocked rail traffic for 25 days. LRL flew in crews from across the country who worked 12-hour shifts in conjunction with the Montana-based employees to clear the tracks.⁶¹ Lavoilette testified that, prior to this cave-in, he could not recall an instance where he had other workers go to the jobsite after hours to deal with track debris.⁶² Lavoilette testified that approximately once a month, he would get a call after hours about track debris and he would go to the jobsite, often with Wilks, and on rare occasions with additional LRL employees.⁶³

¶ 41 Lavoilette stated that he sometimes had Josi stay overnight at the jobsite to clean equipment or to unload deliveries of shotcrete. Lavoilette stated that Josi was faster and more careful at unloading than most of the drivers and so it was worthwhile to leave

⁵⁵ Lavoilette Dep. 35:1-16.

⁵⁶ Lavoilette Dep. 14:3-9.

⁵⁷ Lavoilette Dep. 12:14-20.

⁵⁸ Lavoilette Dep. 46:3-8.

⁵⁹ Lavoilette Dep. 25:14-25.

⁶⁰ Lavoilette Dep. 26:6-23.

⁶¹ Uncontested Fact No. 18, Final Pretrial Order.

⁶² Lavoilette Dep. 26:24 - 27:3.

⁶³ Lavoilette Dep. 41:4-16.

him on site when a load was expected.⁶⁴ Lavoilette further testified that he always instructed the supplier that his crew would only unload trucks during regular shift hours, and that if a delivery showed up after hours, the driver could either use LRL's forklift or wait until the next shift arrived.⁶⁵ Lavoilette stated that he "absolutely" did not have any discussions with McCollom or any other Montana-based worker about unloading trucks after hours.⁶⁶

¶ 42 Lavoilette testified that there was no benefit to LRL from McCollom and Carroll camping near the jobsite instead of staying in Helena or East Helena with the rest of the crew.⁶⁷ Lavoilette testified that he does not recall having a conversation with McCollom about McCollom returning to Martinsdale to retrieve his camping trailer, and Lavoilette was unaware that McCollom was camping near the jobsite until he learned about McCollom's accident.⁶⁸

¶ 43 Wilks has worked for LRL for approximately seven years.⁶⁹ He was a foreman on the Mullan Tunnel project.⁷⁰ Wilks stayed in East Helena when he worked on this project.⁷¹ Wilks testified that LRL did not have a policy regarding where workers needed to live.⁷²

¶ 44 Wilks testified that on approximately 10 occasions, MRL called the LRL emergency contact numbers after hours to report that debris needed to be removed from the tracks. Wilks believed the emergency contacts were Lavoilette, Dan Lavoilette, McConkey, and himself. If MRL called, the emergency contact personnel reported to the jobsite and cleared the tracks.⁷³ Wilks testified that, if necessary, they called in five or six crew members to deal with the clean-up.⁷⁴

⁶⁴ Lavoilette Dep. 29:2-9.

⁶⁵ Lavoilette Dep. 29:19 – 30:1.

⁶⁶ Lavoilette Dep. 30:2-7.

⁶⁷ Lavoilette Dep. 49:7-10.

⁶⁸ Lavoilette Dep. 46:19 – 47:4.

⁶⁹ Wilks Dep. 6:22-25.

⁷⁰ Wilks Dep. 8:14-16.

⁷¹ Wilks Dep. 9:8-14.

⁷² Wilks Dep. 11:16-22.

⁷³ Wilks Dep. 16:21 – 17:18.

⁷⁴ Wilks Dep. 18:6-16.

¶ 45 Wilks testified that on a few occasions, they offered a few of the Montana-based employees the opportunity to come in after hours, but it was always optional.⁷⁵ Wilks testified that when he needed extra workers to report to the jobsite after hours, he looked up contact numbers in his cell phone. He did not have all the workers' numbers programmed into his phone, but only ones he believed he would find "helpful." Wilks testified that he does not believe he had McCollom's cell phone number programmed into his phone.⁷⁶ Wilks testified that the only Montana-based workers whose numbers were programmed into his phone were the four that worked on the shotcrete crew, including Brown and Wood.⁷⁷

¶ 46 Wilks testified that he did not know if McCollom had previous work experience as a "nipper" and that it is a simple job which any worker could master in a few hours.⁷⁸

¶ 47 Wilks testified that "everybody" knew that McCollom and Carroll were camped near the jobsite.⁷⁹ Wilks testified that supply trucks sometimes came in after hours, and the driver usually phoned ahead so that LRL was expecting them. Wilks testified that usually, they made the driver wait to be unloaded until the next work shift. He further testified that he does not know of McCollom ever going in after hours to unload a truck, but if he did it, it was on his own initiative and it was not his job to do so.⁸⁰

¶ 48 Josi currently works for LRL.⁸¹ He began working for the company in April 2009, and the Mullan Tunnel project was his first work assignment.⁸² Josi was hired to run equipment. He spent two seasons on the Mullan Tunnel project.⁸³ In 2009, Josi lived in East Helena, sharing a place with Jeramy Cham and McDaniel.⁸⁴

¶ 49 Josi testified that he was never told that he needed to be reachable by cell phone after hours.⁸⁵ He also stated that the LRL supervisors would have called the Oregon-

⁷⁵ Wilks Dep. 18:21 – 19:24.

⁷⁶ Wilks Dep. 29:20 – 30:13.

⁷⁷ Wilks Dep. 30:14-22.

⁷⁸ Wilks Dep. 29:2-7.

⁷⁹ Wilks Dep. 22:1-5.

⁸⁰ Wilks Dep. 38:20 – 40:2.

⁸¹ Josi Dep. 5:22-24.

⁸² Josi Dep. 6:2-8.

⁸³ Josi Dep. 6:9-19.

⁸⁴ Josi Dep. 7:18-25.

⁸⁵ Josi Dep. 9:22-25.

based crew members before they called the Montana-based crew members if they needed workers after hours.⁸⁶

¶ 50 Josi testified that if the LRL crew had concerns that rock was not stable at the end of a shift, he stayed on site. Since Josi was the loader operator, he was responsible for removing debris.⁸⁷ Josi estimated that he stayed overnight four or five times. He did not recall ever having to call in additional workers. He stated that, with the assistance of the on-site MRL employee, he was always able to clear the tracks.⁸⁸

¶ 51 Josi testified that he would have called Lavoilette if more debris fell on the tracks than he could remove when he stayed on the jobsite. He believes Lavoilette and Wilks would have come to the jobsite to assess the situation. Josi testified that Lavoilette and Wilks would likely have called in only Oregon-based employees to remove debris after hours.⁸⁹

¶ 52 Josi further testified that he often unloaded the supply trucks when they arrived.⁹⁰ If a truck came in after hours, the driver either waited for the next shift to arrive or unloaded the truck.⁹¹ Josi testified that he was not aware of any discussions about Montana-based workers coming in to unload the trucks after hours.⁹²

¶ 53 McConkey testified via deposition. McConkey worked for LRL from August 2006 until January 2011. McConkey worked on the Mullan Tunnel project from March 2009 until August 2010, with a break for a few months during the winter.⁹³ McConkey lived in Helena during the time he worked on the project.⁹⁴ McConkey agreed that he would be considered a “supervisor” on the jobsite.⁹⁵ McCollom was on McConkey’s drilling crew.⁹⁶ McConkey testified that he knew that McCollom was camping near the jobsite.⁹⁷

⁸⁶ Josi Dep. 10:1-5.

⁸⁷ Josi Dep. 11:9-21.

⁸⁸ Josi Dep. 12:1-13.

⁸⁹ Josi Dep. 15:19 – 16:13.

⁹⁰ Josi Dep. 12:19-21.

⁹¹ Josi Dep. 12:25 – 13:7.

⁹² Josi Dep. 13:8-13.

⁹³ McConkey Dep. 6:1-16.

⁹⁴ McConkey Dep. 14:22-23.

⁹⁵ McConkey Dep. 6:25 – 7:2.

⁹⁶ McConkey Dep. 7:5-10.

⁹⁷ McConkey Dep. 8:3-5.

¶ 54 McConkey testified that there was never any discussion about workers keeping their cell phones turned on after work hours in case they needed to be contacted.⁹⁸

¶ 55 McConkey testified that, prior to the large cave-in in July 2009, he does not recall any time when a cave-in or track debris required workers to go to the jobsite outside of their scheduled work hours.⁹⁹ McConkey stated that the only people who would return to the jobsite would be the superintendents.¹⁰⁰

¶ 56 Jordan Main testified by deposition on February 23, 2011. At the time of his deposition, he had worked for LRL for almost three years.¹⁰¹ Main worked for two “terms” on the Mullan Tunnel project.¹⁰² When he worked on the project, he and McConkey rented a house together and typically carpooled to the jobsite.¹⁰³ Main lived in East Helena during the first season he spent on the Mullan Tunnel project.¹⁰⁴ He testified that all of the Oregon-based LRL employees lived either in Helena or East Helena while they worked on the project.¹⁰⁵

¶ 57 Main testified that prior to the large cave-in in July 2009, he recalled one instance in which workers were called back to the jobsite after hours to clean up a cave-in or track debris.¹⁰⁶ Main testified that the local laborers hired out of the Helena union hall would not have been called in to clear the tracks after hours.¹⁰⁷

¶ 58 Main testified that while he believed most employees left their cell phones on after hours, he does not recall supervisors ever instructing employees to keep their cell phones turned on in case they needed to be recalled.¹⁰⁸

¶ 59 Main testified that he knew that McCollom was camping near the jobsite. He further testified that he never had a reason to call McCollom on his cell phone and he was not sure he ever had McCollom’s number.¹⁰⁹

⁹⁸ McConkey Dep. 9:9-18.

⁹⁹ McConkey Dep. 10:15-24.

¹⁰⁰ McConkey Dep. 11:1-4.

¹⁰¹ Main Dep. 6:3-5.

¹⁰² Main Dep. 6:9-12.

¹⁰³ Main Dep. 9:8-14.

¹⁰⁴ Main Dep. 20:1-5.

¹⁰⁵ Main Dep. 20:18 – 21:2.

¹⁰⁶ Main Dep. 11:25 – 12:7.

¹⁰⁷ Main Dep. 13:12-18.

¹⁰⁸ Main Dep. 25:1-8.

¶ 60 Main testified that when supply trucks arrived, any available worker would unload the truck. If no one was available, the driver could unload the truck. If a truck came in after hours, the driver could either unload the truck or wait for the next shift to arrive.¹¹⁰

¶ 61 Cham has been an LRL employee since April 2009, and he worked on the Mullan Tunnel project from April until October 2009.¹¹¹ When Cham worked on this project, he shared an apartment in East Helena with Josi and McDaniel.¹¹² Cham testified that he was never asked to leave his cell phone on outside of work hours and he was never told that he was expected to be on call.¹¹³ Cham testified that on occasion, Josi stayed on the jobsite overnight to check the tunnel if the crew had worked on “bad ground” that day.¹¹⁴ Prior to the large cave-in in July 2009, Cham recalled between 6 and 10 small “sloughings.” Those all occurred during work shifts and the crew stayed overtime to clean up the debris. However, he did not recall anyone ever getting called back in to clear debris.¹¹⁵ Cham testified that he recalled one instance on a Sunday where he, Main, Wilks, McDaniel, and “maybe a few of the Montana boys, I think maybe [Brown] and [Wood]” took the shotcrete train into the tunnel.¹¹⁶

¶ 62 State Fund denied McCollom’s workers’ compensation claim on June 28, 2010, on the grounds that McCollom’s injury occurred outside the course and scope of his employment.¹¹⁷

CONCLUSIONS OF LAW

¶ 63 This case is governed by the 2007 version of the Workers’ Compensation Act since that was the law in effect at the time of McCollom’s industrial accident.¹¹⁸

¶ 64 McCollom bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.¹¹⁹ McCollom has not met his burden of proof.

¹⁰⁹ Main Dep. 14:2-11.

¹¹⁰ Main Dep. 17:21 – 18:14.

¹¹¹ Cham Dep. 6:5-17.

¹¹² Cham Dep. 8:4-15.

¹¹³ Cham Dep. 11:2-12.

¹¹⁴ Cham Dep. 11:13-25.

¹¹⁵ Cham Dep. 12:10-24.

¹¹⁶ Cham Dep. 13:11-22.

¹¹⁷ Ex. 2 at 7.

¹¹⁸ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

Was the injury suffered by Petitioner Rick McCollom on June 26, 2009, compensable under the Montana Workers' Compensation Act?

¶ 65 McCollom argues that his injuries are compensable under the *Courser* criteria, *infra*, and that alternatively, if this Court determines that his injuries are not within the course and scope of his employment as set forth by the *Courser* criteria, this Court should adopt a “remote worksite” rule which would make employers liable for injuries which occur to workers who are staying somewhere other than their residences in order to travel to and from their place of employment for each shift.

¶ 66 In *Courser v. Darby School Dist. No. 1*, the Montana Supreme Court set forth the following criteria:

Controlling factors repeatedly relied upon to determine a work-related injury include: (1) whether the activity was undertaken at the employer's request; (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity. The presence or absence of each factor, may or may not be determinative and the significance of each factor must be considered in the totality of all attendant circumstances.¹²⁰

¶ 67 In the present case, McCollom does not allege that he decided to camp near the jobsite at LRL's request. Clearly, McCollom has not fulfilled the first *Courser* factor.

¶ 68 As to the second factor, McCollom argues that LRL indirectly compelled him to camp near the jobsite because it did not pay him a per diem. McCollom argues that his rate of pay did not make it financially feasible for him to rent alternative housing while simultaneously paying his family's living expenses in Martinsdale. McCollom was hired out of the Helena union hall and elected to accept this job position, knowing that it was unrealistic for him to commute back and forth to his residence in Martinsdale. McCollom's argument, essentially, is that if LRL paid him a better wage he would have had better options for his living quarters. This would, in fact, be true for most workers who could realistically argue that their wages “compel” them to live where they work. The sort of “compulsion” contemplated by the *Courser* factor, however, appears to be of a more specific sort: For example, in *Michalak v. Liberty Northwest Ins. Corp.*, I concluded that an employer had indirectly compelled the claimant's attendance at a

¹¹⁹ *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).

¹²⁰ *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16-17, 692 P.2d 417, 419. (Citation omitted.)

company picnic because the claimant's supervisor specifically asked him to attend the event and perform certain duties at it.¹²¹ Earlier, in *Bain v. Liberty Mutual Fire Ins. Co.*, this Court found the second *Courser* factor to be met when the claimant received a vaccination which her employer encouraged but did not require. This Court stated that under *Courser*, encouragement was sufficient "compulsion" to meet the requirement.¹²² In the present case, it appears that LRL neither requested McCollom's presence at the campsite, nor encouraged him to stay there. I therefore conclude McCollom has not met the second *Courser* factor.

¶ 69 As to the third factor, McCollom argues that this factor is met because LRL benefitted from having competent workers nearby in the case of a tunnel collapse. However, McCollom himself acknowledged that, even if he were the first worker on site after a tunnel collapse, he would not be able to begin work until at least one supervisor arrived from Helena or East Helena. Therefore, there was no benefit to LRL in having McCollom live closer to the tunnel than the Oregon-based employees. While McCollom further contended that LRL benefitted from having him nearby because he would be able to unload supply trucks which arrived outside of the workday, there is no evidence that LRL wanted or needed McCollom to perform this service. I therefore conclude that McCollom has not met the third *Courser* factor.

¶ 70 As to the fourth factor, McCollom argues that he and LRL mutually benefitted from having him stay at the campsite because he saved money and LRL benefitted by having him as an employee where he would not otherwise have been able to afford to work for the company without a per diem. While McCollom contends that he was a particularly valuable employee and that LRL benefitted from his extensive underground experience, the LRL managers testified that McCollom's job duties required minimal training and that he was no more or less valued than the other Montana-based workers who worked on the Mullan Tunnel project. While evidence was presented which indicated a high turnover rate among the Montana-based workers, neither party presented any evidence of a worker shortage, nor did either party present evidence that LRL had difficulty filling McCollom's position after his injury. I therefore conclude that McCollom has not met the fourth *Courser* factor.

¶ 71 Although the presence or absence of each *Courser* factor is not determinative, in this case, McCollom has met none of them. I therefore conclude that under the *Courser* test, he was not injured within the course and scope of his employment.

¹²¹ 2007 MTWCC 14, ¶ 43 (*aff'd* 2008 MT 3, ¶ 15).

¹²² 2004 MTWCC 45, ¶¶ 132-33 (*aff'd* 2005 MT 299N).

¶ 72 Alternatively, McCollom urges the Court to adopt a “remote worksite” rule which is in effect in some jurisdictions. McCollom argues:

For many years, “it is held uniformly that a logger who is required to live in a bunkhouse, or a janitor or superintendent who is required to live in an apartment building . . . should be considered within the protection of the compensation act when injured or killed by the burning of his place of residence. Here, there is a close causal connection between the requirement of residence and the risk itself, which was the burning of that residence.” Larsons at 24-11.¹²³

¶ 73 McCollom’s situation is readily distinguishable from such cases: he was not required to reside at the campsite. McCollom acknowledges as much in his trial brief, but argues that “the ‘required to live’ element of the rule has been relaxed in recent years.”¹²⁴ McCollom then argues that cases from California and Oregon found injuries compensable when “the nature of the employee’s work necessitates [that] the employee live on the premises.”¹²⁵ Again, McCollom’s situation is readily distinguishable: he did not live on his employer’s premises, nor did the nature of his work require him to do so. McCollom chose to live at a nearby campsite while most of the other LRL employees commuted from local communities. Nothing in the nature of his work required him to live more closely to the jobsite than his co-workers did.

¶ 74 Although McCollom urges the Court “to adopt the ‘remote worksite’ line of cases,”¹²⁶ what McCollom actually asks the Court to do is to expand the doctrine beyond the bounds of other jurisdictions where a “remote worksite” rule is in effect. Unlike the cases upon which McCollom relies, McCollom was not residing on the employer’s premises, he was not required to live at the campsite, and his jobsite was not so remote as to necessitate him staying at the campsite. While I can envision situations in which a “remote worksite” rule may be applicable in Montana, the present case is not such a situation. I therefore conclude McCollom is not entitled to compensation for his injury under this doctrine.

JUDGMENT

¶ 75 The injury suffered by Petitioner Rick McCollom on June 26, 2009, was not compensable under the Montana Workers’ Compensation Act.

¹²³ Petitioner’s Trial Memorandum, Docket Item No. 38, at 7.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 9.

¶ 76 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 2nd day of March, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jonathan McDonald
Greg E. Overturf
Submitted: May 6, 2011