

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2009 MTWCC 36**

**WCC No. 2009-2271**

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**EDWARD SLAVIN**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** Petitioner petitioned the Court for acceptance of his workers' compensation claim and payment of appropriate benefits. Petitioner alleged that an accident and injury occurred in the course and scope of his employment at H & H Express. Petitioner, two coworkers, and the claims adjuster testified to the events surrounding the day of the alleged accident and injury.

**Held:** Petitioner is not entitled to acceptance of his claim. After reviewing the totality of the evidence and observing the witnesses at trial, the Court did not find Petitioner's trial testimony regarding the events surrounding his alleged accident and injury to be credible. The Court found the other witnesses' testimony credible. Petitioner testified that he may or may not have informed a coworker about his injury when they worked together on the morning of the alleged accident. Petitioner also testified that the coworker may or may not have observed him limping while at work. In his recorded statement given to the claims adjuster only six days after the alleged accident, however, Petitioner unequivocally stated that the coworker asked why he was limping and Petitioner informed him more than once that his knee hurt. The coworker testified at trial that he did not observe Petitioner limping and did not ask him about his alleged injury. A different coworker testified that he spoke with Petitioner and observed him on the morning of the alleged accident and did not perceive Petitioner suffering any pain. Finally, in Petitioner's recorded statement, he failed to mention his fishing guide activities that occurred on the same day as the alleged accident and injury. This omission also factored in the Court's determination that Petitioner's version of events was not credible.

## **Topics:**

**Witnesses: Credibility.** Where the only evidence that the Petitioner suffered a compensable injury is the Petitioner's own testimony, which the Court did not find credible, the Petitioner failed to meet his burden of proof.

¶ 1 The trial in this matter was held on August 20, 2009, in Kalispell, Montana. Petitioner Edward Slavin was present and represented by Kevin A. Duff. Respondent Montana State Fund was represented by Kevin Braun.

¶ 2 Exhibits: Exhibits 1 through 14 were admitted without objection.

¶ 3 Witnesses and Depositions: The deposition of Edward Slavin (Slavin) was taken and submitted to the Court. Slavin, Zack Galloway (Galloway), Wayne Bunch (Bunch), and Robbie Mahan (Mahan) were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:<sup>1</sup>

¶ 4a Whether Slavin is entitled to acceptance of his claim and payment of appropriate benefits.

## **FINDINGS OF FACT**

¶ 5 Except as otherwise noted below, I found the testimony of the witnesses at trial to be credible.

¶ 6 Slavin testified that at approximately 12:30 a.m. on June 27, 2008, he suffered an injury to his right knee while working for H & H Express in Kalispell, Montana. Another H & H Express employee, Mahan, was training Slavin to be a substitute delivery driver at the time of his alleged accident. Slavin and Mahan worked together the entire shift. Slavin testified that he and Mahan were loading and unloading freight from a truck when a pallet became caught on a dock plate. Slavin alleges that he twisted his knee and heard a "pop" when he and Mahan pivoted the pallet to remove it from the plate.<sup>2</sup>

¶ 7 Slavin testified that after injuring his knee, he and Mahan continued unloading the delivery truck. After loading the truck, they delivered the freight. Slavin testified at trial that he may or may not have informed Mahan of his knee injury on the day it allegedly occurred.

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> Trial Test.

Slavin further testified that Mahan may or may not have seen him limping during their work shift. Slavin's work shift at H & H Express ended at 5:30 a.m. on June 27, 2008.<sup>3</sup>

¶ 8 At the time Mahan testified at trial, he was no longer an H & H Express employee. Mahan worked for H & H Express for approximately one year before moving to Idaho. Mahan testified that he did not observe Slavin limping or exhibiting any pain behaviors during their entire work shift on June 27, 2008. Mahan also testified that Slavin did not inform him about his knee injury during that shift.

¶ 9 Galloway is employed by H & H Express as a truck driver. On June 27, 2008, Galloway arrived at work at approximately 4:00 a.m. He spoke with Slavin and observed him working. Galloway did not notice Slavin limping or exhibiting any other pain behaviors. Galloway testified that on the morning in question, he recalled having a brief conversation with Slavin and Slavin did not mention his alleged knee injury.<sup>4</sup>

¶ 10 Bunch is a Montana State Fund claims examiner.<sup>5</sup> On July 2, 2008, Slavin gave a recorded statement to Bunch regarding the events surrounding the alleged June 27, 2008, accident.<sup>6</sup> In that statement, Slavin informed Bunch that Mahan was aware of Slavin's injury because Mahan had asked why Slavin was limping.<sup>7</sup> Slavin recalled telling Mahan that he was hurting a couple of times during their shift. Slavin also told Bunch that after his shift at H & H Express concluded, he proceeded home and went to bed. Slavin stated that when he awoke, his knee felt worse so he called his supervisor at H & H Express, Steve Bushman (Bushman), and informed him of his injury. Bushman suggested that Slavin be examined by a doctor.<sup>8</sup>

¶ 11 At the time of Slavin's alleged accident on June 27, 2008, he was also working a second job as a fishing guide for Mo Fish in Lakeside, Montana. Slavin testified at trial that after his shift ended at H & H Express on June 27, 2008, he went home to eat, and then drove to his fishing guide job in Lakeside. Slavin guided fishing clients on Flathead Lake for approximately five hours on the day of his alleged injury. Slavin testified that after guiding clients, he went home and slept for a few hours. When he awoke, his knee pain

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<sup>3</sup> Trial Test.

<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.

<sup>6</sup> Ex. 14 at 1.

<sup>7</sup> Ex. 14 at 2.

<sup>8</sup> Ex. 14 at 3.

was worse so he went to the hospital. Slavin also testified that he called Bushman and informed him of his knee injury.<sup>9</sup>

¶ 12 On August 6, 2008, Kim D. Stimpson, M.D., performed an arthroscopy and partial medial meniscectomy on Slavin's right knee.<sup>10</sup>

¶ 13 After reviewing the totality of the evidence in this case and observing the witnesses at trial, I do not find Slavin's testimony regarding the events of June 27, 2008, to be credible. Slavin testified at trial that he may or may not have informed Mahan about his injury when they worked together in the early morning hours of June 27, 2008. Slavin also testified that Mahan may or may not have observed him limping while at work. However, in his recorded statement given only six days after the alleged accident, Slavin unequivocally stated that Mahan asked why he was limping and Slavin informed him more than once that his knee hurt. Mahan testified at trial that he made no such inquiry of Slavin, nor did he observe him limping. I find Mahan's testimony to be credible. Galloway testified that he spoke with Slavin and observed him on the morning of June 27, 2008, and did not perceive Slavin suffering any pain. Finally, in Slavin's recorded statement to Bunch, Slavin failed to mention his fishing guide activities that occurred on the same day as the alleged accident and injury. This omission also factors in my determination that Slavin's version of events is not credible.

### CONCLUSIONS OF LAW

¶ 14 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.<sup>11</sup>

¶ 15 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>12</sup>

¶ 16 The only evidence that Slavin suffered a compensable injury is Slavin's own testimony which I have found to be incredible. Therefore, I conclude that Slavin has not met his burden of proof in this case.

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<sup>9</sup> Trial Test.

<sup>10</sup> Ex. 10 at 5-6.

<sup>11</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>12</sup> *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).

JUDGMENT

¶ 17 Slavin is not entitled to acceptance of his claim and payment of appropriate benefits.

¶ 18 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 16<sup>th</sup> day of November, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Kevin A. Duff  
Kevin Braun  
Submitted: August 20, 2009