

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 20

WCC No. 2006-1689

MATTHEW SOMERVILLE

Petitioner

vs.

MONTANA ASSOCIATION OF COUNTIES WORKERS' COMPENSATION TRUST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner alleges that he injured his back within the course and scope of his employment while operating a loader on June 15, 2005. Petitioner claims he informed his supervisor and a coworker about the incident shortly after it occurred. Petitioner's supervisor and coworker both claim that Petitioner was not operating a loader on that date, and that Petitioner admitted to them that he had injured his back outside of work on the evening of June 14, 2005.

Held: Although the Court was not entirely convinced of the credibility of Petitioner's supervisor and coworkers, Petitioner also was not entirely credible. The Court, therefore, concludes that Petitioner has failed to meet his burden of proof.

Topics:

Credibility. Where the testimony of witnesses for both parties changed between their depositions and their live testimony at trial, the Court finds it difficult to ascribe complete credibility to any witness' account of the alleged industrial accident. The Court ultimately found Respondent's witnesses to be more credible, although not entirely convincing, after taking the witnesses' live testimony, respective demeanors, and the content of their versions of events into account.

Proof: Burden of Proof: Generally. Petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks,

therefore if the evidence is equally balanced, Petitioner will not have met his burden of proof and will not prevail. In this case, where the Court had doubts as to the credibility of witnesses for both sides but found Respondent's witnesses slightly more credible, Petitioner has not met his burden of proof.

¶ 1 The trial in this matter was held on January 19, 2007, in Great Falls, Montana. Petitioner Matthew Somerville was present and represented by Cameron Ferguson. Respondent was represented by Norman H. Grosfield.

¶ 2 Exhibits: Exhibits 1 through 16 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Roger Riley, Mike Bossen, Michelle Lynn, and Lynn Struss were submitted to the Court and can be considered part of the record. Petitioner, Jeannie Somerville, Roger Riley, Mike Bossen, Lynn Struss, and Michelle Lynn were sworn and testified at trial.

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

¶ 4a Whether Petitioner sustained a compensable workers' compensation injury to his back on June 15, 2005, while working for Judith Basin County.¹

FINDINGS OF FACT

¶ 5 Petitioner was employed by the Judith Basin County Road Department (Judith Basin) from September 13, 2004, until June 15, 2005. Petitioner claims he sustained a compensable injury to his back on June 15, 2005, while working for Judith Basin. Respondent denies that claim. As of that date, Judith Basin was insured by the above-named Respondent.²

¶ 6 Petitioner lives in Raynesford, Montana, with his wife and three children.³

¹ Pretrial Order at 2.

² Pretrial Order at 1.

³ Petitioner Dep. 4:7-11.

¶ 7 At the time of the alleged industrial accident, Petitioner was working full time as a laborer and equipment operator for Judith Basin.⁴ Prior to accepting the job with Judith Basin, Petitioner was self-employed as a horse trainer and fencer.⁵

¶ 8 The testimony among the witnesses in this case contains a number of stark contradictions. As will be discussed in greater detail below, the Court has reservations concerning the credibility of both Petitioner's testimony as well as that of his supervisor and coworkers. Therefore, the Court summarizes the relevant portions of the witnesses' deposition and trial testimony immediately below.

¶ 9 Petitioner's supervisor at Judith Basin was Roger Riley. At his deposition, Riley testified as follows: On June 15, 2005, Petitioner and three coworkers – Lynn Struss, Ron Tow, and Mike Bossen – were at a culvert watching Riley attempt to divert a creek so they could work on the road. When the creek could not be diverted, they gave up on that project for the day.⁶ The loader was supposed to be used on the culvert project, but since that project was cancelled due to the water, it was not needed, and no one used or moved the loader on that date.⁷ After the culvert project was cancelled, Riley sent Struss and Tow to another job site. Petitioner and Bossen traveled back to the office with Riley. On the way back to the office, Petitioner told Riley that he had injured his back in town the night before.⁸

¶ 10 At trial, Riley testified as follows: On the morning of June 15, 2005, Petitioner, Struss, Tow, and Bossen drove a service pickup to a gravel pit north of Geysers where Bossen used a loader to fill three dump trucks with gravel. Petitioner, Struss, Tow, and Bossen then drove the dump trucks and the service pickup to the day's job site where Riley was using a backhoe to try to divert water from a culvert. Riley testified that the loader was not moved from the gravel pit that day and that there would have been no reason to do so. After Riley abandoned his effort to divert the water from the culvert, he assigned Struss and Tow to work on a cattle guard. He took Petitioner and Bossen with him in the service pickup to check on another culvert and then return to the office. When Petitioner was getting into the pickup, Riley noticed that Petitioner was moving stiffly and he asked Petitioner if he was injured. Petitioner replied that he did something to his back in town the night before. When they arrived back at the shop, Bossen asked to leave early and Riley

⁴ Trial Test.

⁵ Petitioner Dep. 5:2-9.

⁶ Riley Dep. 16:1-6.

⁷ Riley Dep. 16:14 - 17:1.

⁸ Riley Dep. 16:7-11.

gave him permission to do so. Petitioner asked to leave early and Riley refused because Petitioner did not have enough leave time available. Riley told him to take timbers up to the cattle guard where Struss and Tow were working⁹

¶ 11 Bossen is an equipment operator for Judith Basin.¹⁰ At his deposition, Bossen testified as follows: On June 15, 2005, the work crew did not perform any physical labor, but stood around and watched as Riley attempted to divert water from a creek. Bossen, Petitioner, and Riley later went back to town to get materials for another job. On the way back to the shop, Riley commented that Petitioner looked stiff, and Petitioner replied that he hurt his back in town the previous night.¹¹

¶ 12 At trial, Bossen testified as follows: On the morning of June 15, 2005, Petitioner, Tow, and he were dropped off at the gravel pit. Bossen used a loader to fill three dump trucks with gravel, and he, Tow, and Petitioner each drove a filled dump truck to the job site. Bossen testified that he was the only person who used the loader at the gravel pit that morning. After arriving at the job site, they watched Riley unsuccessfully attempt to divert water from a culvert, and then Riley sent Tow and Struss to work on a cattle guard, while Petitioner and Bossen rode back to the shop with Riley in the service pickup. In response to Riley's comment that Petitioner looked stiff, Petitioner told Riley that he had hurt his back in town the night before.¹²

¶ 13 Struss is a laborer with Judith Basin.¹³ In his deposition, Struss testified as follows: Struss was "around" Petitioner on June 15, 2005. Struss might have hauled gravel, while Petitioner might have been driving a truck.¹⁴

¶ 14 At trial, Struss testified that on the morning of June 15, 2005, he used the service pickup to drop Petitioner, Tow, and Bossen at the gravel pit. Struss then proceeded to the job site with the pickup where he later observed Petitioner, Tow, and Bossen arrive, each driving a full dump truck.¹⁵

⁹ Trial Test.

¹⁰ Bossen Dep. 3:3-8.

¹¹ Bossen Dep. 5:2-18.

¹² Trial Test.

¹³ Struss Dep. 3:4-5.

¹⁴ Struss Dep. 4:21 - 5:3.

¹⁵ Trial Test.

¶ 15 Petitioner's account of that morning differs significantly from that of his coworkers and supervisor. At the time of his deposition, Petitioner testified as follows: On the morning of June 15, 2005, Bossen drove him to the gravel pit and dropped him off.¹⁶ Petitioner loaded a dump truck with gravel for Bossen, and Bossen left the gravel pit.¹⁷ The reason Petitioner went to the gravel pit was to move the loader to the job site.¹⁸ On that day, the work project was to repair a piece of road where a culvert had been washed out.¹⁹ The project was about three miles away from the gravel pit.²⁰ Petitioner testified that when he rode the loader out of the gravel pit, he hit a large hole with one of the tires. Because the bucket was low, it hit the ground when the loader bounced, and Petitioner was severely jolted in the seat.²¹ Petitioner was in the process of moving the loader to the job site at the time of the accident.²² It was shortly after he started moving the loader that the accident occurred.²³ Petitioner stopped the loader and got out. He informed one of his coworkers, probably Bossen, that he needed a break. This coworker then drove the loader while Petitioner drove the dump truck the rest of the way to the job site.²⁴ After he arrived at the job site, Petitioner got out of the dump truck and got into the service pickup where he sat with the heater running.²⁵ Eventually, Riley took Petitioner and Bossen back to the shop in the service pickup. Petitioner informed Riley that he had been injured in the loader and that riding back in the pickup had worsened his back pain and that he needed to go home.²⁶ Riley asked him what had happened and Petitioner told him about getting jolted in the loader.²⁷ After they arrived at the shop, Petitioner asked Riley if he could leave to get his back checked out and Riley refused, stating that Petitioner did not have enough leave time

¹⁶ Petitioner Dep. 15:3-25.

¹⁷ Petitioner Dep. 16:2-4.

¹⁸ Petitioner Dep. 15:5-7.

¹⁹ Petitioner Dep. 17:9-11.

²⁰ Petitioner Dep. 18:11-13.

²¹ Petitioner Dep. 15:6-16.

²² Petitioner Dep. 18:1-10.

²³ Petitioner Dep. 18:14-20.

²⁴ Petitioner Dep. 18:24 - 19:11.

²⁵ Petitioner Dep. 19:16-19.

²⁶ Petitioner Dep. 20:7-13.

²⁷ Petitioner Dep. 20:21-23.

available and that Bossen had already asked for the rest of the day off. Riley then assigned him another task.²⁸

¶ 16 At trial, Petitioner testified as follows: On the morning of June 15, 2005, he was using the loader to fill a dump truck and that while he was backing away from the truck, one of the loader's tires hit a hole causing the bucket to hit the ground and jolting him. Petitioner was only operating the loader a few minutes when the incident occurred. Bossen was at the gravel pit waiting in another dump truck at the time. Petitioner informed Bossen that he had hurt his back and needed a break from operating the loader. Bossen took over the loader and Petitioner drove a loaded dump truck to the job site. When Petitioner arrived at the job site, Riley was attempting to divert water away from a culvert with a backhoe. Petitioner backed the dump truck up to the work area and unloaded it. He then went to sit in the service pickup. Shortly before lunch, Petitioner, Riley, and Bossen drove back to the shop in the service pickup. Riley commented that Petitioner looked stiff and Petitioner told him about the incident with the loader. After they got back to the shop, Petitioner told Riley that he wanted to leave to get his back examined and Riley refused, stating that Bossen had already asked for the rest of the day off and that Petitioner did not have enough leave time saved up to take time off. Riley then told Petitioner to take a load of timbers to another job site.²⁹

¶ 17 Every fact witness' testimony changed to some extent between deposition and trial. Interestingly, Riley, Bossen, and Struss all appeared able to recall the events of June 15, 2005, with greater clarity, detail, and consistency between their respective accounts at trial than at their earlier depositions. Petitioner's recollection of what he was doing with the loader at the time of the alleged incident changed from driving the loader to the job site to using the loader to load a dump truck. In Petitioner's account at trial, Bossen did not drop him off at the gravel pit as Petitioner claimed in his deposition, but rather was present at the time the alleged accident occurred. In light of these disparities, the Court finds it difficult to ascribe complete credibility to any of the witnesses' accounts of that day. However, having listened to the witnesses' live testimony and the content of their version of events, and observed their respective demeanors, the Court finds Respondent's witnesses to be more credible, even if the Court is not entirely convinced of the accuracy of their respective recollections regarding June 15, 2005.

¶ 18 After Petitioner delivered the timbers to the other job site, he returned to the office, placed his time sheet and key on Riley's chair, and left. Riley called him that night and

²⁸ Petitioner Dep. 20:23 - 21:5.

²⁹ Trial Test.

asked if Petitioner was quitting and Petitioner stated that he was. Petitioner told Riley that he could not do the job with his back condition.³⁰

¶ 19 When Petitioner arrived home after work on June 15, 2005, his wife saw him moving slowly and he appeared to be in pain. Ms. Somerville testified that Petitioner told her he had been driving the loader and it hit a bump and jarred his back.³¹

¶ 20 On June 16, 2005, Petitioner drove himself to the hospital where he was examined in the emergency room (ER) and then admitted. The ER report states that Petitioner complained of back pain and chronic back pain with an onset on the previous day and that he previously had similar symptoms, diagnosed after a recent office visit as a herniated disk. The ER report does not mention Petitioner injuring or jarring his back at work.³²

¶ 21 Later that day, Petitioner was seen by Paul L. Gorsuch, M.D., who had previously seen Petitioner for back problems. Dr. Gorsuch noted that Petitioner was experiencing back and leg pain “after riding heavy equipment.”³³ Dr. Gorsuch took a history, which stated, “He has been riding heavy equipment over the last week with a lot of jarring, and last night he began to experience severe low back pain and bilateral lateral thigh pain” Again, the history does not mention Petitioner having suffered a single traumatic event as Petitioner described at trial. The history further noted that Petitioner was hospitalized on January 19, 2005, for back and leg pain which resolved with conservative treatment over several months. Petitioner was diagnosed with a protrusion of his two lower lumbar disks.³⁴

¶ 22 A June 16, 2005, MRI of Petitioner’s lumbar spine revealed that Petitioner’s degenerative disk disease at his lower two lumbar disks have progressed since Petitioner’s February 16, 2005, MRI.³⁵ Petitioner was discharged from the hospital on June 18, 2005. The report reflects that Petitioner had been admitted the previous winter at which time he was diagnosed with disk protrusions at the lower two levels of his lumbar spine. His discharge diagnosis included a slight increase in protrusion of his lower two lumbar disks, with higher levels remaining unchanged. The report noted that Petitioner had done well with conservative management until his admission on June 16, 2005, which was apparently

³⁰ *Id.*

³¹ *Id.*

³² Exhibit 9 at 18-20.

³³ Exhibit 9 at 21.

³⁴ *Id.*

³⁵ Exhibit 9 at 25.

precipitated by “long periods of driving heavy equipment with a lot of jarring over two days.”³⁶

¶ 23 At an August 19, 2005, appointment with Rosemary Youderian, RNCS, Petitioner informed her that after he was discharged on June 18, 2005, Dr. Gorsuch gave him a 20-pound lifting restriction for three weeks, and that at the end of those three weeks, Petitioner still was unable to lift or work and he then quit his job with Judith Basin County.³⁷ In actuality, Petitioner had quit his job the day before his admission and the history he gave to Nurse Youderian was inaccurate. Petitioner’s differing accounts of his back injury and his employment, as recorded in his medical records, is a significant factor in this Court’s reservations concerning Petitioner’s credibility.

¶ 24 At a preoperative physical on November 2, 2005, Petitioner’s history was described as: “Severe low back pain with radiation to right leg. Began January 2005 after he slipped and fell while cutting ice in a livestock tank.”³⁸ The history does not mention a back injury from getting jolted on a piece of heavy equipment on June 15, 2005. An ER report from January 17, 2005, describes Petitioner’s earlier incident as a fall on ice at home while clearing a creek for his cows to drink.³⁹ He was admitted to the hospital at that time, and a subsequent MRI revealed the protrusion of his two lower lumbar disks.⁴⁰ Petitioner was off work for about a month following that accident.⁴¹

¶ 25 Petitioner was admitted to the hospital on November 16, 2005, for a two-level anterior lumbar discectomy and fusion. Dr. Gorsuch noted that he had been seeing Petitioner for back and bilateral leg pain since January 2005, and that Petitioner has had a pattern of flare-ups, hospitalizations, and resumption of activities following exacerbations of his back and leg pain. Dr. Gorsuch explained that Petitioner’s trend has been worsening and that although he underwent extensive conservative management, he continued to have

³⁶ Exhibit 9 at 27.

³⁷ Exhibit 6 at 5.

³⁸ Exhibit 6 at 6.

³⁹ Exhibit 9 at 1.

⁴⁰ Exhibit 9 at 7.

⁴¹ Trial Test.

significant flare-ups.⁴² Petitioner's surgery was postponed for unrelated reasons and he eventually underwent the diskectomy and fusion on November 22, 2005.⁴³

¶ 26 Petitioner did not file a First Report of Occupational Injury or Occupational Disease until July 14, 2005, when he went to the Judith Basin offices and asked for a form. On that date, secretary/bookkeeper Michelle Lynn and Riley were present. Petitioner asked for a form to report a workers' compensation claim, which Lynn provided to him. Petitioner took the form home, filled it out, and mailed it back.⁴⁴ Petitioner, Lynn, and Riley differ as to the exact conversation which occurred in the office that day. They also disagree as to which parts of the form were filled out by whom, including whether Petitioner filled in a date of injury or whether that information was added by someone else.⁴⁵ Although some controversy exists as to whether Petitioner reported his injury within 30 days as required by § 39-71-603, MCA, ultimately there is no dispute that it was July 14, 2005, when Petitioner spoke to Lynn and Riley and obtained a form. Petitioner claimed that his injury occurred on June 15, 2005, which is within 30 days of July 14, 2005. Therefore, if Petitioner is to be believed, his injury occurred within 30 days of his report. If the Court does not find Petitioner to have suffered an industrial accident on June 15, 2005, it does not matter if Petitioner might have suffered an injury on a previous day, because his claim then would be time-barred.

CONCLUSIONS OF LAW

¶ 27 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 industrial accident.⁴⁶

¶ 28 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁴⁷ The Court concludes that Petitioner has not met this burden.

⁴² Exhibit 9 at 53.

⁴³ Exhibit 9 at 56.

⁴⁴ Trial Test.

⁴⁵ Trial Test.; see also depositions of Riley, Lynn, and Petitioner.

⁴⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁴⁷ *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).

¶ 29 Where it is equally as likely that conflicting witnesses are telling the truth and the evidence is evenly balanced, liability must be determined based on the burden of persuasion.⁴⁸ In the case at hand, the Court has credibility concerns with all witnesses, but found Respondent's witnesses slightly more credible than Petitioner. Even if it was a toss-up, however, Petitioner would not prevail because of the burden he must meet. In any event, since Petitioner did not meet his burden of proof, the Court concludes he did not sustain a compensable workers' compensation injury on June 15, 2005.

JUDGMENT

¶ 30 Petitioner did not sustain a compensable workers' compensation injury to his back on June 15, 2005, while working for Judith Basin County Road Department.

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

¶ 32 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 11th day of June, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Cameron Ferguson
Norman H. Grosfield
Submitted: January 19, 2007

⁴⁸ *Garcia v. UEF*, 1998 MTWCC 53, ¶ 43 (*aff'd* 1999 MT 35N).