IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 30

WCC No. 2005-1325

DENNIS ZAHN

Petitioner

vs.

TOWN PUMP, INC.

Respondent/Insurer

and

EMPLOYERS INSURANCE OF WAUSAU MUTUAL COMPANY

Respondent/Insurer.

Order Vacated and Withdrawn Pursuant to Settlement and Agreement of the Counsel October 11, 2006

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: This matter has been submitted to the Court for decision on a statement of stipulated facts. Petitioner sustained an injury to his low back while working for Town Pump, Inc. (Town Pump) in 1996. At the time of Petitioner's initial injury, Town Pump was self-insured and retained Putman and Associates, Inc. (Putman) to adjust the claim on its behalf. After undergoing surgery in 2003 to treat his injured low back, Petitioner's treating physician released him to return to work on a full-time basis. On December 4, 2003, Petitioner underwent a functional capacity evaluation (FCE) at Putman's request, during which Petitioner sustained an injury to his neck. This injury required surgery and has disabled Petitioner from work. At the time of the neck injury and the FCE, Petitioner was still an employee of Town Pump. However, at the time of the 2003 injury, Town Pump was enrolled under Plan No. 2 of the Montana Workers' Compensation Act and was insured by Respondent Employers Insurance of Wausau Mutual Company. The parties agree that Petitioner's 2003 neck injury is compensable. However, Respondents contend that

Petitioner's indemnity benefits should be paid at the 1996 rate since the FCE and resulting injury was a consequence of the 1996 injury. Petitioner contends he should be compensated at the 2003 rate since the neck injury is a new injury. Petitioner has moved for summary judgment on this issue.

Held: Summary judgment is granted. Petitioner sustained a new compensable injury resulting from an FCE that had been requested by Putman who was acting on behalf of his current employer, Town Pump.

Topics:

> **Employment: Course and Scope: Generally.** Whether an injury arises "out of and in the course of employment" is determined by analyzing four factors, all of which must be considered together and none of which is conclusive: (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 employer controlled or participated in the activity; and (4) whether both employer and employee mutually benefitted from the activity.
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> **Agency: Actual.** A self-insured employer who retains a third-party administrator to adjust a workers' compensation claim enters into an agency relationship with the third-party administrator.
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> **Principal and Agent.** A self-insured employer who retains a third-party administrator to adjust a workers' compensation claim enters into an agency relationship with the third-party administrator.
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> **Principal and Agent.** An agent represents the principal for all purposes within the scope of the agent's actual authority, and all liabilities which would accrue to the agent from the transactions within such limitation accrue to the principal.

STATEMENT OF STIPULATED FACTS

¶ 1 On or about August 7, 1996, Petitioner suffered an industrial injury involving his low back arising out of and in the course of his employment with Town Pump, Inc. (Town Pump).[1]

[1] Statement of Stipulated Facts, Stipulated Fact No. 1.

¶ 2 At the time of this injury, Town Pump was enrolled under Compensation Plan No. 1 of the Montana Workers' Compensation Act and was self-insured. Town Pump retained Putman and Associates, Inc. (Putman) as its third-party administrator of this claim.[2]

¶ 3 Liability was accepted and appropriate compensation and medical benefits have been paid to Petitioner.[3]

¶ 4 Petitioner underwent surgery to treat his injured low back on January 28, 2003.[4]

¶ 5 On September 29, 2003, Petitioner's treating physician released him to return to work on a full-time basis.[5]

¶ 6 On December 4, 2003, Petitioner underwent a functional capacity evaluation (FCE) at the request of Putman to determine Petitioner's functional capacity in light of his injured back. While participating in the FCE, Petitioner sustained an injury to his neck. Liability for the neck injury was accepted by Putman under the August 7, 1996, claim. Petitioner has undergone neck surgery and has been disabled from work. Medical benefits have been paid under the August 7, 1996, claim. Compensation benefits have also been paid under the August 7, 1996, claim and the benefits have been paid at the applicable rate for the 1996 claim.[6]

¶ 7 At the time of the FCE and the neck injury, Petitioner was an employee of Town Pump. At the time of the neck injury, Town Pump was enrolled under Compensation Plan No. 2 of the Montana Workers' Compensation Act and was insured by Respondent Employers Insurance of Wausau Mutual Company (Wausau). On June 24, 2004, Petitioner completed a Claim for Compensation claiming that on December 4, 2003, he suffered an on-the-job injury to his neck while participating in the FCE. The December 4, 2003, industrial injury claim was submitted to Wausau as the insurer for Town Pump at the time of the injury. Liability for the neck injury claim was denied by Wausau on the grounds that the December 4, 2003, neck injury did not arise out of or occur during the course of his employment with Town Pump.[7]

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[2] *Id.* at ¶ 2.

[3] *Id.* at ¶ 3.

[4] *Id.* at ¶ 4.

[5] *Id.* at ¶ 5.

[6] *Id.* at ¶ 6.

[7] *Id.* at ¶ 7.

¶ 8 Petitioner was earning $9.63 per hour when he injured his back in 1996. Petitioner was earning $13.89 per hour when he injured his neck on December 4, 2003.[8]

¶ 9 A dispute exists between the parties concerning liability for the December 4, 2003, neck injury. It is Petitioner's position that the neck injury constitutes a new, compensable injury, that Wausau is the responsible insurer, and, because the December 4, 2003, neck injury constitutes a new industrial injury, Petitioner's compensation benefits should be paid based on his wages at the time of his neck injury.[9]

¶ 10 In the alternative, Petitioner contends that even if his neck injury is adjudged to arise out of his August 7, 1996, industrial accident, that his disability benefits for his December 4, 2003, neck injury should be based upon the wages he was receiving at the time of that injury.[10]

¶ 11 Both Respondents contend that the December 4, 2003, neck injury did not arise out of or occur in the course of Petitioner's employment with Town Pump, that the neck injury is compensable under the original August 7, 1996, injury, and that compensation benefits should be paid based on Petitioner's wages at the time of the 1996 injury.[11]

STIPULATED ISSUES FOR RESOLUTION

¶ 12 The parties have stipulated to two issues for the Court's resolution:

¶ 12a Whether Petitioner's December 4, 2003, neck injury constitutes a new compensable injury under the Montana Workers' Compensation Act for which Wausau is liable as the insurer on risk at the time of the injury.

¶ 12b If the answer to the issue stated in ¶ 12a is "no," whether the disability benefits due Petitioner as a result of the disability he suffers from the December 4, 2003, neck injury should be based upon the wages he was receiving when the original back injury was sustained on August 7, 1996.

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[8] *Id.* at ¶ 8.

[9] *Id.* at ¶ 9.

[10] *Id.*

[11] *Id.*

DECISION

¶ 13 Summary judgment is appropriate where undisputed facts demonstrate that a party is entitled to judgment as a matter of law.[12] In the present case, the parties have stipulated to the essential facts necessary for summary disposition.

¶ 14 Both parties agree that Petitioner's injury is compensable. The central dispute is whether the 2003 neck injury constitutes a "new" compensable injury, in which case compensation would be based on Petitioner's 2003 wages. In that regard, Respondents' position, rendered to its essence, is that Petitioner's December 4, 2003, neck injury did not arise out of or occur in the course of his employment with Town Pump.[13]

¶ 15 In analyzing whether Petitioner's injury was sustained in the course and scope of his employment, one of the first issues that must be addressed is the relationship between Petitioner's employer, Town Pump, and Putman. The parties have agreed that Town Pump retained Putman to adjust Petitioner's August 7, 1996, claim. As noted above, though, Putman was not the insurer. Rather, at the time of Petitioner's 1996 injury, Town Pump was self-insured and merely hired Putman to adjust the claim.[14] As will be discussed further below, the nature of the relationship between Town Pump and Putman bears scrutiny in determining whether Petitioner's 2003 injury was sustained in the course and scope of his employment.

¶ 16 Section 28-10-101, MCA, states that "[a]n agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." In the present case, Town Pump was self-insured at the time of Petitioner's low-back injury in 1996. Pursuant to § 39-71-2103(1), MCA, therefore, Town Pump was authorized to deal with Petitioner directly with respect to his workers' compensation claim. Town Pump, however, elected to retain Putman to adjust Petitioner's claim on its behalf. In so doing, Town Pump created an agency relationship in which Putman, as the agent, represented the principal, Town Pump, in its dealings with the third person, Petitioner.

¶ 17 Having retained Putman to act on its behalf for purposes of adjusting Petitioner's claim, Putman effectively stood in the shoes of Town Pump to the extent that it was acting

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[12] *Lewis v. Nine Mile Mines, Inc.,* 268 Mont. 336, 340, 886 P.2d 912, 914 (1994).

[13] Statement of Stipulated Facts, Stipulated Fact No. 9.

[14] *Id.* at ¶ 2.

within the scope of the authority granted it. Any rights and liabilities which would accrue within the limits of this authority, therefore, accrue to Town Pump as the principal.[15]

¶ 18 Therefore, for purposes of this Court's analysis in determining whether Petitioner was injured in the course and scope of his employment while undergoing the 2003 FCE, the Court imputes the actions of Putman to Town Pump. It is within that framework that the Court turns its attention to the course and scope issue.

¶ 19 Respondents agree that Petitioner's 2003 neck injury is compensable. However, Respondents contend that Petitioner's "second injury or disabling condition is currently compensable under Montana's workers' compensation laws because it is a **consequence** of the original work injury."[16] In support of this position, Respondents cite *Romero v. Liberty Mut. Fire Ins. Co. & State Comp. Ins. Fund*.[17] Respondents' reliance on *Romero* is misplaced.

¶ 20 In *Romero*, this Court held that a claimant's left arm thoracic outlet syndrome was related to an earlier industrial injury to her right arm. The basis for the Court's conclusion was that the medical evidence indicated that the deterioration of the left arm was a "natural progression" from the earlier injury due to overuse of the left arm. This is not the situation in the present case.

¶ 21 In the present case, Petitioner was requested by his current employer, Town Pump, to submit to a functional capacity evaluation. This request was made more than two months after Petitioner had been released by his treating physician to return to work on a full-time basis. It was while participating in this FCE that Petitioner sustained a new, distinct injury to an entirely different part of his anatomy. This was no more a "natural progression" of his back injury than if he had tripped in the waiting room and fractured his leg. Therefore, this Court's analysis in *Romero*, while correct as applied to the facts of that case, is inapposite to the present case.

¶ 22 Respondents also posit several "what if" scenarios in support of their position. These hypotheticals, while intriguing, do not fit the facts before this Court which are, simply put, that Petitioner sustained an injury while fulfilling a request of his current employer. What the result may be in any of the alternative scenarios posed by Respondents is best left for a time when those are the actual facts before the Court.

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[15] § 28-10-601, MCA.

[16] Respondents/Insurers' Response Brief to Petitioner's Motion for Summary Judgment at 5 (emphasis in original).

[17] 2001 MTWCC 5.

¶ 23 In determining whether Petitioner's 2003 injury was sustained in the course and scope of his employment, the Court finds the most useful guidance from this Court's previous analysis in *Bain v. Liberty Mut. Fire Ins. Co*.[18] In *Bain*, the Court noted that the overall test of whether an injury is work-related is determined by applying the four-factor test set forth in *Courser v. Darby School Dist. No. 1*.[19] These four factors are:

> (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.[20]

¶ 24 Quoting from *Courser*, this Court further noted that 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 the attendant circumstances. The totality of all the attendant circumstances would compel a finding that Petitioner's injury occurred in the course and scope of his employment irrespective of the agency analysis discussed above.[21]

¶ 25 The Court finds the similarities between the present case and the facts in *Bain* to be compelling. In *Bain*, the Petitioner claimed that she suffered from various medical conditions as a result of undergoing Hepatitis B vaccinations at the Flathead County Health Department. The Petitioner in *Bain* obtained these vaccinations at the request and urging of her employer. Applying the four-part *Courser* test, this Court found that the Petitioner was within the course and scope of her employment when she underwent the vaccinations.

¶ 26 Similarly, in the present case, the Court finds the four factors to clearly preponderate in favor of a finding that Petitioner was acting in the course and scope of his employment when he underwent the FCE. First, Petitioner underwent the FCE at the request of Town Pump.[22] Second, although it is not entirely clear whether the FCE was required, this Court noted in *Bain* that the employer need not ***require*** the activity but need only encourage it.[23] It is clear from the stipulated facts that Town Pump encouraged Petitioner's attendance at

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[18] 2004 MTWCC 45.

[19] 214 Mont. 13, 692 P.2d 417 (1984).

[20] *Bain* at ¶ 131.

[21] *Id.*

[22] Statement of Stipulated Facts, Stipulated Fact No. 6.

[23] *Bain* at ¶ 132.

the FCE in light of the fact that Town Pump was the party that requested Petitioner to undergo the FCE in the first place. Third, although it is not entirely clear from the statement of stipulated facts to what degree Town Pump participated in the FCE, this Court noted in *Bain* that this factor was satisfied when the employer made the arrangements and paid for the vaccinations. As a self-insured employer, it is evident that Town Pump would have paid for the FCE in the present case. Although it is probably safe to infer that Town Pump also made the arrangements for the FCE, the presence or absence of this fact alone is not determinative in any event. Finally, as Petitioner's current employer at the time of the FCE, Town Pump obviously benefitted from the FCE since the request was made specifically "to determine Petitioner's functional capacity in light of his injured back."[24]

¶ 27 Sections 39-71-701(3) and 703(6), MCA, provide that the weekly benefits to which an injured worker is entitled for temporary total and permanent partial disability is based upon the wages the worker was receiving "at the time of injury." From the statement of stipulated facts, it is abundantly clear, and this Court so holds, that Petitioner's December 4, 2003, neck injury is a distinctly identifiable injury to a completely different part of his anatomy from the injury which formed the basis of his 1996 workers' compensation claim. This was neither an aggravation of a preexisting injury nor was it a natural progression of the low-back injury. The only application of these statutes that applies their plain language as written to the facts of this case is to hold that Petitioner's compensation should be based on the wages he was earning "at the time of" his December 4, 2003, injury.

¶ 28 Having decided in Petitioner's favor on the first stipulated issue for resolution, the Court does not address the alternative issue that was presented.

JUDGMENT

¶ 29 For the foregoing reasons, Petitioner's motion for summary judgment is **GRANTED**.

¶ 30 Petitioner's disability benefits should be based on the wages he was earning at the time of his December 4, 2003, injury.

¶ 31 JUDGMENT is entered in favor of Petitioner.

¶ 32 This JUDGMENT is certified as final for appeal.

[24] Statement of Stipulated Facts, Stipulated Fact No. 6.

¶ 33 Any party to this dispute may have twenty days in which to request reconsideration from this Order Granting Petitioner's Motion for Summary Judgment.

DATED in Helena, Montana, this 5th day of September, 2006.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: John T. Johnston
Kelly M. Wills
Submitted: September 23, 2005