

IN THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

KEVIN ALLEN,

Petitioner,
vs.

WCC NO. 2002-0642

TRAVELERS INDEMNITY COMPANY OF
CONNECTICUT, aka TRAVELERS
PROPERTY CASUALTY,

Respondent/Insurer.

FILED

DEC 01 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Taken at 2435 Mullan Road
Missoula, Montana
Friday, October 31, 2003

BEFORE THE HONORABLE MIKE MCCARTER

A P P E A R A N C E S

RANDY J. COX and NATASHA PRINZING JONES, Esqs., of
Boone Karlberg, PC, 201 West Main Street, Suite 300,
Missoula, Montana, 59802,
appearing on behalf of Petitioner.

CHARLES G. ADAMS, Esq., of the Keller Law Firm,
50 S. Last Chance Gulch, Third Floor, Helena,
Montana, 59624,
appearing on behalf of Respondent/Insurer.

Reported by Susan Bulman
Registered Diplomate Reporter

EXCERPT OF PROCEEDINGS

FRIDAY, OCTOBER 31, 2003

THE COURT: Well, I'm going to give you a bench ruling, anyway.

MR. COX: Okay. All right. Then I'm good.

THE COURT: My bench ruling is, Charlie, pay it, but no penalty.

MR. COX: Okay.

THE COURT: No penalty because it really turns on whether or not the incident happened as Mr. Allen's described, and I'm convinced it did. Bobbie's testimony, basically, is the underpinnings of their case, plus some sort of insinuation that maybe he hurt himself doing the blocks.

But her testimony was pretty direct about what he was doing and what -- if I believe her, his testimony is totally incompatible about that and so the foundation for Dr. Rotar's opinion basically gets stripped away.

So I can't say that their relying on her is unreasonable. She claims that she was a witness. It creates a question of fact, legitimately brought to the Court.

She obviously has some interest in the case in that she's aligned with the manager of it, who says

1 he didn't know anything about this, which I'm inclined
2 to believe. He wasn't there; he didn't witness
3 anything.

4 I think Julie's testimony is the critical
5 part of it because she basically confirms Mr. Allen's
6 story about her having the top part. Sounds to me
7 like it happened. Possibilities that he did it with
8 the blocks or with the pulling weeds certainly is
9 there, but I don't have anything to indicate that
10 anything happened. Some complaints of soreness. I
11 just finished laying tile in my own house. I was
12 sore.

13 I just don't have anything to pin it on, any
14 incident or anything else that happened. The burden
15 of proof is by a preponderance of the evidence. I
16 think the preponderance is satisfied in this
17 particular case.

18 We've got a fresh report, you know, within a
19 few days to the chiropractor. Certainly he could be
20 making that up, but I don't have anything to indicate,
21 other than suspicion, that he was making it up, so it
22 was verified.

23 The conversation in the park doesn't really
24 help. It was a brief encounter. He'd already been to
25 the chiropractor. Obviously, he had a problem by

1 then, even though he may not have evidenced it. We
2 don't always complain about our symptoms to everybody
3 in every conversation that we have, so I don't find
4 that very significant.

5 Dr. Rotar gives a plausible explanation of a
6 mechanism of injury. He isn't absolutely certain, but
7 absolute certainty isn't required and certainly he's
8 going to send him to Dr. -- one of the other doctors
9 to check out.

10 MR. COX: Chandler, Dr. Chandler.

11 THE COURT: Yeah, Dr. Chandler. That's what
12 I thought, Dr. Chandler, the neurosurgeon, to check
13 out the other alternatives. Obviously, if it's some
14 other alternative and it's not the shoulder
15 impingement, my holding -- I mean, it's -- if he's
16 going to be treated for something that's completely
17 different, then that question becomes, is that
18 related. And maybe it's not, so that's a completely
19 different question.

20 But at this point in time, it certainly
21 appears that he's entitled to further workup, and if
22 there is a surgical recommendation, unless for some
23 reason that's unreasonable, seems to me that he would
24 be entitled to have surgery, too. So anyway, that's
25 where I'm at and that's what I'll find.

1 MR. COX: Thank you.

2 THE COURT: And I can issue findings of fact
3 and conclusions of law that would be along that line,
4 and I think they would probably be fairly brief
5 because the issue is really pretty well joined about,
6 you know, whether or not this incident happened the
7 way he said it did.

8 Once I find it essentially happened the way
9 he said it did, I think Dr. Rotar basically carries
10 the day, because he's the only medical testimony in
11 the case.

12 MR. COX: Okay.

13 MR. ADAMS: So you will be issuing findings?

14 THE COURT: Yeah, unless you don't want me
15 to. If the insurer says okay, you guys say okay, I
16 could just issue a judgment, but otherwise I'll
17 issue --

18 MR. ADAMS: Well, I know in the past I've
19 seen transcripts attached to a judgment and --

20 THE COURT: If that makes you happy, I could
21 do that, too, and just enter a judgment and attach a
22 transcript of what I just said, which is pretty brief.

23 MR. COX: I think what you said is
24 sufficient. You might -- I would only suggest that
25 you take a look at our proposed findings and see if

1 they're okay. But if -- but if not, I'm satisfied
2 with what you just said, and I think we can go forward
3 on that basis.

4 MR. ADAMS: Either way is fine with me.

5 THE COURT: I guess the question is, if
6 somebody wants something more detailed for purposes of
7 appeal, I'll give it to you. Otherwise, if you're
8 happy with what I just said, I'll just enter a
9 judgment.

10 MR. ADAMS: I think this is all fact driven.
11 Correct me if I'm wrong, but I don't think either one
12 of us would be inclined to --

13 MR. COX: No, certainly not.

14 THE COURT: Okay. Why don't you -- if you
15 change your mind, why don't you notify me by the
16 beginning of next week. Otherwise, I'd just issue a
17 judgment and have the court reporter prepare a
18 transcript of my remarks here and that will be the end
19 of it.

20 MR. COX: That's sufficient for us. We're
21 satisfied with that. Thank you, Your Honor.

22 MS. JONES: Thank you, Your Honor.

23 MR. ADAMS: Thank you, Your Honor.

24 THE COURT: Thank you.

25 (Proceedings concluded at 11:45.)

C E R T I F I C A T E

STATE OF MONTANA)
) ss.
COUNTY OF MISSOULA)

I, Susan Bulman, RDR, CSR, Freelance Court Reporter residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause.

That the foregoing pages of this hearing constitute a true and accurate transcription of my stenotype notes of the proceedings.

I further certify that I am not an attorney nor counsel of any of the parties; nor a relative or employee of any attorney or counsel connected with the action nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand on this 7th day of November, 2003.

Susan Bulman

Susan Bulman, RDR, CSR
Freelance Court Reporter
Residing in Missoula, Montana.