IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 107

WCC No. 9210-6598

ED HAAG

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent

Reversed in *Haag v. Montana Schools Group Ins. Authority,* 274 Mont. 109 (1995)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: School district custodian claimed he injured his shoulder in a work-related accident. Insurer eventually denied liability, but failed to accept or deny the claim within thirty days as required by section 39-71-606(1), MCA (1991).

Held: Claimant was not injured at work; his claim was a fabrication. Pursuant to *Solheim v. Tom Davis Ranch*, 208 Mont. 265 (1984), the insurer's failure to accept or deny within thirty days does not automatically entitled claimant to benefits. Even if the insurer's failure amounted an acceptance of the claim, subsequent denial on the basis of claimant's fraud is appropriate. ***Note: the Supreme Court reversed on both points, holding that the insurer's failure to comply with section 39-71-606(1), MCA (1991), amounted to acceptance of the claim, and that the lower court improperly reached an issue of fraud that was not litigated.***

The trial in this matter was held on March 28, 1994, in Great Falls, Montana. The petitioner, Ed Haag (claimant), was present and represented by Mr. Tom L. Lewis. Respondent, Montana School Group Insurance Authority (MSGIA), was represented by Mr.

Oliver H. Goe. Claimant, Joseph E. Murphy, Sandra Haag, Don Hubert, Jr., Norbert (Norby) Johnson, Jerry Hatch, and Judy Wiltrout testified. Exhibits 1, 4, 5, 7-11, 13-15, 18, 22, 25 and 26 were admitted into evidence without objection. Exhibits 16, 17, 19, 20, 23, 24 and 27 were admitted over the objections of Mr. Goe. Exhibits 6 and 12 were admitted over the objections of Mr. Lewis. Exhibit 3 was not offered. The Court refused Exhibit 21 on the basis of relevancy. The Court reserved its ruling on Exhibit 2 and asked both sides to brief its admissibility. The offer of Exhibit 2 is refused. The parties stipulated that the depositions of claimant, Dr. J. Alton Ross, Dr. Steven P. Akre, and Edward May may be considered by the Court in reaching its decision.

Prior to receiving evidence, the Court ruled that the issue of whether the petitioner is entitled to temporary total disability benefits was not properly before the Court and would be bifurcated. The Court determined that if claimant succeeded on the issues properly before the Court, the Court would request the parties mediate the temporary total disability benefit issue.

Issues presented for decision: Claimant alleges that on March 23, 1992, he injured his shoulder in a work-related accident. MSGIA has denied liability. The principal issues before the Court are (1) whether MSGIA is estopped from denying liability on account of its failure to accept or deny the claimant's claim for compensation within thirty (30) days as required by section 39-71-606, MCA, and, if not, (2) whether petitioner suffered a compensable injury on March 23, 1992.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor of the witnesses, the depositions, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. At the time of trial claimant was sixty-one years of age.

2. Claimant was employed by the Great Falls Public Schools from August 30, 1982 until March 24, 1992. (Tr. at 83-84.) He performed janitorial type duties. Between October of 1983 and March 24, 1992, his job title was "first engineer." (Tr. at 84.) On March 24, 1992, he was demoted to a "swing custodian." (Tr. at 130.)

3. On March 19, 1992, claimant was working as a first engineer at West Elementary School in Great Falls. (Tr. at 83.) At approximately 12:30 p.m., claimant was involved in a serious disciplinary event in the school kitchen and cafeteria. In front of ten and eleven year old children, claimant angrily cursed and berated cafeteria workers. (Tr. at 153; Ex. 6.)

4. Later that afternoon, claimant met with Mr. Duane Dockter (the principal of West Elementary), Joseph Murphy (Assistant Supervisor of Buildings and Grounds), and Kent Graves (Vice-Principal of West Elementary). At that time he was told that he could lose his job as a result of his conduct. (Tr. at 242.) Murphy told him to "stay the hell out of the cafeteria area." (Tr. at 244.) Claimant denies that he was told to stay out of the cafeteria area (Tr. at 285) but the Court does not find claimant's testimony credible. Claimant told Murphy, ". . . I would be history in eleven months, give me eleven months and I'll be history . . . ." (Tr. at 161.)

5. March 23, 1992, was the last day claimant worked.. (Tr. at 126-128.)

6. On March 24, 1992, a disciplinary meeting was held. Present were claimant, Jerry Hatch, (Assistant Superintendent for Personnel Services), Earl Jakes (a union representative), Kent Graves, Joe Murphy (Murphy), and Norby Johnson (Supervisor of Buildings and Grounds). (Ex. 7.) Claimant was suspended without pay until March 26, 1992 at 10:30 a.m., at which time a further discussion regarding claimant's continued employment was scheduled. (*Id.*)

7. At the meeting on March 26, 1992, claimant was informed that he could immediately return to work but that he was demoted to the position of swing custodian. (Ex. 7.) The demotion resulted in a reduction in pay of forty-three (43¢) cents per hour. (Tr. at 130.) At the end of the meeting, claimant said that he had understood his suspension was for three days and "wished to take a pay deduction for one additional day." (Ex. 7.)

8. At 7:54 a.m., March 27, 1992, the claimant was treated for "nervous stomach" and stress at the emergency room of the Great Falls' Deaconess Hospital. (Ex. 11.) The emergency room record reflects the onset of claimant's complaints as "1 week ago" when claimant "was suspended from his job." (*Id.*) Claimant did not mention any injury. The emergency room doctor wrote a note taking claimant off work for three days. (*Id.*)

9. Later on the day of March 27, 1992, claimant delivered the "no work slip" to Murphy's office. (Tr. at 135.) Murphy was out of his office, so claimant phoned Murphy later during the day. He told Murphy that he was not coming to work because he blacked out and had an upset stomach. (Tr. 135.) Claimant did not mention any injury. (Tr. at 136.)

10. On Saturday, March 28, 1992, claimant and his wife went dancing. (Haag Dep. at 47.) In his deposition the claimant also admitted that he might have gone trap shooting that weekend, but at trial he denied doing so. (Haag Dep. at 48; Tr. at 136.)

11. On March 30, 1992, claimant saw Dr. J. A. Ross. (Ex. 12.) At trial the claimant testified that he went to Dr. Ross for treatment of a shoulder injury he suffered while

working on March 23, 1992. (Tr. at 91.) However, Dr. Ross' note reflects the purpose of the appointment as follows:

> Edward **comes in to talk about a problem he had at work** about a week ago. He was helping someone in the kitchen and got into an argument with someone there and profaned rather loudly. He was reported to some officials there and he was suspended from school [and] his job for approximately three days. Before the time was up, he had what sounds like probably an acute anxiety episode, ended up at the Emergency Room at Deaconess Hospital. . . . He does feel somewhat better, **but does not believe he can handle his job a this time.**
>
> **PLAN:** I gave him a note for leave of absence for two weeks and [will] have him back and evaluate him at that time. He does not desire any medication, none was given. He **continues** to have a lot of pain in his left shoulder. He was seen for this and x-rayed some time ago and he does have some degenerative arthritic changes in the shoulder joint. He **was** given medication for this, but it did not help. I think it might be well for him to see a rheumatologist. I made an appointment for him to see Dr. Akre on April 3. . . .[Emphasis added.]

(Ex. 12.) The note reflects the primary purpose of the visit as claimant's anxiety over his suspension. Secondarily, it reflects a preexisting shoulder problem. It is noteworthy that claimant informed Dr. Ross that the medication he had previously taken for his shoulder pain did not help. At trial the claimant testified that medication he had been given for his shoulder in 1991 "helped the problem." (Tr. at 94.) He also testified that by October 11, 1991, his shoulder problem was completely healed. (Tr. at 96.)

12. The claimant testified that on March 30, 1992, he told Dr. Ross he had injured his shoulder lifting tables at work. (Tr. at 91.) Dr. Ross testified that he keeps detailed notes of each visit and that his notes are the best evidence of what was discussed during the office visit. (Ross Dep. at 29-30.) Dr. Ross' notes do not refer to any shoulder injury occurring at work. During his deposition Dr. Ross discussed the March 30, 1992 visit, stating: "When he came in to see me on the 30th, he came in, as I mentioned to talk about a problem he had at work. The biggest think [sic] he talked about was how badly he was treated." (Ross Dep. at 14) Dr. Ross did not recall discussing any work-related injury. (Ross Dep. at 37) He also testified that his assessment of claimant's shoulder on March 30, 1992 was consistent with his assessment of the shoulder on September 1991. (*Id.*)

13. Claimant's testimony concerning the purpose of the March 30, 1992 visit to Dr. Ross was not credible. I find that claimant did not inform Dr. Ross of any work-related injury to his shoulder and that Dr. Ross' notes accurately reflect what claimant told him on that date.

14. Dr. Ross took claimant off work for two weeks due to claimant's anxiety problems. (Ross Dep. at 11.) The note read: "Advise leave of absence from job. Will re-evaluate in 2 weeks." (Haag Dep. Ex. 2.)

15. On March 31, 1992, claimant took the "no-work slip" from Dr. Ross and gave it to Murphy. (Tr. at 139) He personally handed the slip to Murphy but did not mention his shoulder or any work-related accident. (Tr. at 139-140.) Claimant testified:

> Q So when he came in, you gave it to him?
> A Yes.
> Q Didn't tell him anything about a shoulder?
> A No.
> Q Didn't tell him anything about an accident?
> A No.
> Q Didn't tell him anything about a shoulder disability affecting your ability to do the job?
> A No.
> . . .
>
> Q Didn't tell him why you were off work at all?
> A No.
> Q Just "Here's a slip and I'm out of here"?
> A Yeah.

(Tr. at 139-140.)

16. On September 23, 1991, claimant had seen Dr. Ross on account of pain in his left shoulder. (Ex. 12.) Dr. Ross' office note for that date reads in pertinent part:

> Comes in complaining of a chronic pain in his left shoulder of several weeks duration. He has been putting heat on and massaging it, which has helped some.
> **EXAMINATION:** Feel some crepitus tenderness over the bicipital tendon. X-ray of the left shoulder shows some degenerative changes in the joint. . . .

(*Id.*)

17. On April 3, 1992, claimant saw Dr. Akre. Dr. Akre's office note for that day reads in pertinent part:

> This 59 year old man is referred by Dr. Ross with pain and stiffness in his left shoulder. **This has been a problem for somewhat over a year.** He has difficulty lifting his arm past about 90. Two years ago he states he's had no problem whatsoever in his shoulder. **He has not had any specific injuries. He does custodial work for the schools and finds that certain things he has to do, such as putting away large heavy folding tables, regularly aggravate his symptoms considerably.** There are other activities that he seems to do without too much trouble. . . . **He recently has been off of work for about a week or so because of some problems relating to stress and feels there may be some slight improvement in his shoulder. . . .** [Emphasis added.]

(Ex. 10.)

18. Claimant testified at trial and in his deposition that he told Dr. Akre about a shoulder injury at work. (Tr. at 144 and Haag Dep. at 54-55.) Claimant's testimony was not credible.

19. Dr. Akre's diagnoses was probable adhesive capsulitis of the left shoulder. (Akre Dep. at 9.) X-rays taken at that time were consistent with x-rays taken in September of 1991 by Dr. Ross. (Akre Dep. at 9.)

20. On April 6, 1992, claimant notified the school district that he had suffered a shoulder injury on March 23, 1992 (his last day of work), while lifting a table in the cafeteria at West Elementary School. On April 6th Mr. Murphy filled out a Supervisor's Injury Report but questioned the injury because of claimant's previous disciplinary action. (Ex. 1.)

21. On April 6, 1992, claimant filed a formal claim for compensation with the school district.

22. At that time, the school district was insured by MSGIA. The adjusting firm for MSGIA was Gates McDonald.

23. Gates McDonald received both the Claim For Compensation and an Employer's First Report on April 8, 1992. (Exs. 8 and 9.)

24. Claimant alleges that he injured his shoulder on March 23, 1992, while lifting a table in the West Elementary School cafeteria. There were no witnesses to the alleged accident. (Tr. at 86.)

25. Claimant has given different accounts concerning the time of the alleged accident. In his Claim For Compensation he stated that it occurred at 12:30 p.m. (Ex. 9.) At trial he testified that it occurred shortly after 1:30 p.m. (Tr. at 89.)

26. The School District has a policy requiring its employees to report any injuries as soon as possible. (Tr. at 70.) Claimant was aware of the policy. (Tr. at 137 and Haag Dep. at 25-26.)

27. On June 4, 1992, Mr. Ed May, a claims adjuster for Gates McDonald, interviewed claimant. The claimant denied any prior "shoulder problems." (Tr. at 147 and Haag Dep. at 69-70.) His denial was untrue.

28. On June 9, 1992, MSGIA advised claimant that his claim was denied. (Ex. 18.) The denial was more than thirty (30) days after MSGIA received the claim and was therefore untimely. (May Dep. at 22.)

29. Having observed the testimony and demeanor of the claimant, and considered all of the other evidence in this case, the Court finds that claimant did not suffer any industrial accident or injury on March 23, 1992. Claimant was not a credible witness. His claim in this case was fabricated.

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CONCLUSIONS OF LAW

1. The issue in this case is whether claimant was injured in an industrial accident. That issue does not involve any interpretation or application of workers' compensation statutes. It involves an issue of credibility. Therefore, the Court will not embark on any extended discussion of law.

2. A preponderance of evidence persuades the Court that claimant was not injured at work on March 23, 1992, and that his claim is a fabrication. The evidence against the claimant is not only persuasive, it is "clear and convincing."

3. MSGIA is not estopped from denying this claim. While section 39-71-606, MCA, requires an insurer to accept or deny a claim within thirty (30) days of its receipt, MSGIA's failure to do so does not automatically entitle claimant to benefits. ***Solheim v. Tom Davis Ranch,*** *208 Mont. 265, 677 P.2d 1034 (1984).* In ***Solheim*** the Supreme Court rejected a

claimant's contention that an insurer's failure to deny a claim within the thirty (30) days specified by section 39-71-606, MCA, amounted to an acceptance of the claim.

> We hold that Section 39-71-606, MCA does not automatically entitle a claimant to benefits because of the failure of an insurer to accept or deny a claim within 30 days.

Solheim, *208 Mont. at 280.*

4. Even if MSGIA's failure to deny the claim within thirty (30) days is deemed an acceptance of the claim, MSGIA may contest the claim on the basis of fraud. ***Carmody v. Employers Insurance of Wausau,*** *WCC No. 9302-6686 (May 6, 1994).* A fraud defense shifts the burden of proof to the insurer. ***Carmody.*** In this case that burden was satisfied. This is not a case of evenly balanced evidence. A preponderance of evidence supports the conclusion that claimant did not suffer an industrial injury. In the Court's view, the evidence against claimant is clear and convincing.

5. Claimant is not entitled to attorney fees, a penalty, or any other relief.

JUDGMENT

1. Claimant did not suffer a compensable injury arising out of and in the course of employment on March 23, 1992.

2. The petition is **dismissed** with prejudice.

3. The JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana this 30th day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Tom L. Lewis
Mr. Oliver H. Goe