IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 18

WCC No. 2011-2658

ARY McLEISH

Petitioner

vs.

ROCHDALE INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves this Court for summary judgment. Respondent argues that Petitioner's injury does not arise out of his employment as required by § 39-71-407(1), MCA, because it resulted from an idiopathic fall onto a level surface. Petitioner argues that his injury is compensable because the event resulting in the injury occurred at work.

Held: Respondent's motion is granted. Section 39-71-407(1), MCA, requires that a claimant's injury "arise out of" his employment in order to be compensable. An injury which results from an idiopathic fall onto a level surface does not arise out of one's employment.

Topics:

Proof: Inferences. Respondent moved for summary judgment. Petitioner agreed to a joint statement of uncontroverted facts and further agreed that the only issue before the Court was a legal question. Although Respondent then argued that its motion was a "joint motion," the Court disagreed and held that Petitioner was the non-moving party and therefore entitled to all reasonable inferences in his favor.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Section 39-71-407(1), MCA, requires that an injury both arise out of and in the course of employment. Where Petitioner suffered an "undetermined medical event" which caused him to fall on a

flat surface, his injury occurred in the course of his employment but did not arise out of his employment as his employment was not one of the contributing causes which placed him in harm's way.

Employment: Course and Scope: Generally. Where Petitioner suffered an "undetermined medical event" which caused him to fall on a flat surface, his injury occurred in the course of his employment but did not arise out of his employment under § 39-71-407(1), MCA, as his employment was not one of the contributing causes which placed him in harm's way.

Causation: Injury. Where Petitioner suffered an "undetermined medical event" which caused him to fall on a flat surface, his injury occurred in the course of his employment but did not arise out of his employment under § 39-71-407(1), MCA, as his employment was not one of the contributing causes which placed him in harm's way.

¶ 1 Respondent Rochdale Insurance Company (Rochdale) moves for summary judgment. Rochdale contends that Petitioner Ary McLeish's injury is not compensable because, although McLeish's idiopathic fall and resultant injury occurred at work, the injury did not arise out of his employment as required by § 39-71-407(1), MCA. McLeish contends that his injury is compensable because it occurred at work.

UNCONTROVERTED MATERIAL FACTS[1]

¶ 2 McLeish is employed as a line cook at Nelson Enterprises d/b/a Airport Restaurant and Lounge (Nelson Enterprises).

¶ 3 McLeish's employer is enrolled under Compensation Plan No. 2 of the Workers' Compensation Act, and its insurer is Rochdale.

¶ 4 On or about April 7, 2010, McLeish appeared for work at approximately 11:00 a.m. At approximately 7:15 p.m., McLeish suffered an undetermined medical event and fell to the concrete floor. McLeish believed this to be a seizure, but does not specifically remember the incident.

¶ 5 At the time of the incident, McLeish was the only employee working in the hot kitchen, and was at the end of his shift.

[1] Joint Statement of Uncontroverted Facts.

¶ 6 Directly before this undetermined medical event, McLeish was standing near a mop bucket that contained floor/multi-purpose cleaner or degreaser.

¶ 7 As a result of this undetermined medical event and subsequent fall, McLeish sustained a fractured right clavicle.

¶ 8 McLeish is a long-term alcoholic who has suffered from hallucinations, paranoia, and seizures prior and subsequent to the seizure of April 7, 2010.

¶ 9 McLeish has been experiencing alcohol withdrawal-related seizures since at least 2003. McLeish experienced alcohol-related seizures in: December 2004, resulting in a closed head injury; August 2005; October 3, 2005; February 2006; and May 12, 2010.

¶ 10 On February 8, 2011, McLeish saw Dr. Lennard Wilson, board-certified neurologist, for an independent medical examination. Dr. Wilson concluded that on April 7, 2010, McLeish had a generalized, secondary generalized seizure that caused him to fall and likely resulted in his clavicle fracture.

¶ 11 Dr. Wilson further concluded, on a more-probable-than-not basis, that McLeish's seizures are caused by alcohol withdrawal or are idiopathic in nature.

¶ 12 Dr. Wilson issued his opinion well after the incident of which he had no first-hand knowledge, and was based on an evaluation and interview of McLeish, his review of the medical records, and his review of the videotape of the incident.

¶ 13 No evidence exists to suggest that McLeish's seizure condition is caused by, precipitated by, or otherwise related to his employment with Nelson Enterprises. Dr. Wilson concluded that the etiology of McLeish's seizure condition is not work-related.

¶ 14 McLeish and Rochdale disagree as to whether McLeish suffered a compensable injury. McLeish believes that it is enough that he fell at work, and that the fall resulted in his injury. Rochdale believes that McLeish suffered a seizure; that the seizure was the cause of his resultant fall and broken clavicle; and that, because the seizure was not caused or precipitated by his work activities, McLeish cannot establish the requisite causation. Therefore, the sole issue before the Court is whether Rochdale must accept liability for McLeish's injury based exclusively on the fact that McLeish's seizure and resultant fall occurred at work.

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ANALYSIS AND DECISION

¶ 15 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[2]

¶ 16 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[3] The material facts necessary for disposition of this case are undisputed. This case is appropriate for summary disposition.

¶ 17 As set forth in their Joint Statement of Uncontroverted Facts, the parties agree that the sole issue before the Court is whether Rochdale must accept liability for McLeish's injury based exclusively on the fact that McLeish's idiopathic seizure and resultant injury occurred at work.[4]

¶ 18 At the outset, the procedural posture of this motion must be clarified. McLeish argues that he is the non-moving party and, accordingly, entitled to all reasonable inferences. Rochdale argues that this motion is essentially a joint motion for summary judgment because the parties submitted a Joint Statement of Uncontroverted Facts and agreed that the only issue before this Court is a legal question.[5] Rochdale argues, therefore, that the Court need not give any reasonable inferences to either party.[6]

¶ 19 This is not a joint motion for summary judgment. Rochdale moved for summary judgment. McLeish opposes Rochdale's motion. McLeish did not waive his status as the non-moving party by stipulating to the Joint Statement of Uncontroverted Facts. As the non-moving party, McLeish is entitled to all reasonable inferences in his favor.

¶ 20 Section 39-71-407(1), MCA, provides in pertinent part: "For workers' compensation injuries, each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer . . . that it insures who receives an injury arising out of and in the course of employment . . . ."

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

[3] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[4] Joint Statement of Uncontroverted Facts, ¶ 14.

[5] Respondent's Reply Brief in Support of Summary Judgment (Respondent's Reply Brief) at 1.

[6] *Id*. at 2.

¶ 21 The requirements that an injury arise out of employment and occur in the course of employment are separate and discrete requirements. The Montana Supreme Court noted in *Pinyerd v. State Comp. Ins. Fund*: "The language 'in the course of employment,' generally refers to the time, place, and circumstances of an injury in relation to employment."[7] The requirement that an injury "arise out of" employment is related to the concept of causation.[8] Referencing *Landeen v. Toole County Refining Co.*,[9] the *Pinyerd* Court noted that the words "out of" point to the cause of the accident and are descriptive of the relationship between the injury and employment.[10] In general, if the claimant's employment is one of the contributing causes which placed him in the path of harm and without which the injury would not have followed, the claimant is entitled to compensation.[11]

¶ 22 In this case, the injury for which McLeish seeks compensation is the fractured right clavicle which resulted from his undetermined medical event and subsequent fall. Rochdale does not dispute that McLeish's injury occurred in the course of his employment. The determinative issue is whether McLeish's injury arose out of his employment. In that regard, the Court must examine the relationship between McLeish's injury and his employment.[12]

¶ 23 It is undisputed that McLeish's fractured clavicle resulted from the "undetermined medical event" which caused him to fall.[13] The Court first examines, then, whether the "undetermined medical event" is work-related. In that regard, the uncontroverted facts which support a finding that the "undetermined medical event" is not work-related are as follows:

> (a) McLeish suffered seizures prior and subsequent to the seizure of April 7, 2010.
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> (b) McLeish has been experiencing alcohol withdrawal-related seizures since at least 2003. McLeish experienced alcohol-related seizures in: December 2004, resulting in a closed head injury; August 2005; October 3, 2005; February 2006; and May 12, 2010.

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[7] *Pinyerd v. State Comp. Ins. Fund*, 271 Mont. 115, 119, 894 P.2d 932, 934 (1995).

[8] *Pinyerd*, 271 Mont. at 120, 894 P.2d at 934.

[9] *Landeen v. Toole County Refining Co.*, 85 Mont. 41, 277 P. 615 (1929).

[10] *Pinyerd*, 271 Mont. at 120, 894 P.2d at 935..

[11] *Parker v. Glacier Park, Inc.*, 249 Mont. 225, 228-29, 815 P.2d 583, 585 (1991).

[12] *Pinyerd*, 271 Mont. at 120, 894 P.2d at 935.

[13] Joint Statement of Uncontroverted Facts, ¶ 7.

> (c) Dr. Wilson examined McLeish on February 8, 2011. Based on his evaluation and interview of McLeish, his review of McLeish's medical records, and his review of the videotape of the incident, Dr. Wilson concluded that on April 7, 2010, McLeish had a generalized, secondary generalized seizure that caused him to fall and likely resulted in his clavicle fracture. Dr. Wilson concluded, on a more probable than not basis, that McLeish's seizures are caused by alcohol withdrawal or are idiopathic in nature. Dr. Wilson concluded that the etiology of McLeish's seizure condition is not work-related.
>
> (d) No evidence exists to suggest that McLeish's seizure condition is caused by, precipitated by, or otherwise related to his employment with Nelson Enterprises.

¶ 24 Notwithstanding his medical history, Dr. Wilson's medical opinion, and his stipulation that no evidence exists to suggest that McLeish's seizure condition is caused by, precipitated by, or otherwise related to his employment with Nelson Enterprises, McLeish argues that "it is unclear what precipitated this [undetermined medical] event as [McLeish] was both working in a hot kitchen and near a mop bucket containing chemicals, more specifically a multi-purpose cleaner or degreaser."[14] McLeish argues that the Court should consider "the theory that the hot kitchen or the chemicals in the mop bucket may have precipitated this 'undetermined medical event.'"[15] McLeish appears to argue that this theory constitutes a reasonable inference which should be drawn in his favor as the non-moving party, and which precludes summary judgment. McLeish contends: "[A] question of fact exists as to whether the hot kitchen or the chemicals [McLeish] was working around contributed, in any way, to [McLeish's] seizure."[16]

¶ 25 The problem with McLeish's argument is that, by definition, a reasonable inference has to be reasonable; to wit, there must be at least some reason for the inference. McLeish offers no reason for what he himself characterizes as a "theory" that the hot kitchen or cleaning chemicals in the mop bucket may have precipitated the undetermined medical event that resulted in his fall. Although it is undisputed that the kitchen was hot and that McLeish was standing near a mop bucket that contained cleaning chemicals, McLeish offers nothing but speculation and unsupported theory to connect these circumstances to his fall.

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[14] Response to Respondent's Motion for Summary Judgment (Petitioner's Response Brief) at 1.

[15] *Id.* at 3.

[16] *Id.* at 4.

¶ 26 "Once the moving party has met its burden, the party opposing summary judgment must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, raising a genuine issue of material fact."[17] As it pertains to the "undetermined medical event" that led to McLeish's fall, Rochdale has met its burden of establishing through uncontroverted facts that the event was not work-related. McLeish's unsupported speculation that it may have been related to the hot kitchen or chemicals in the mop bucket is insufficient to raise a genuine issue of material fact.

¶ 27 McLeish next argues that even if his seizure was not work-related, "it does not matter."[18] McLeish asks: "How would this be different than someone that simply falls over at work and breaks their clavicle?"[19] Although this is a question of first impression in Montana, this very distinction is discussed at length in *Larson's*. *Larson's* describes an idiopathic fall onto a level floor as a "personal-risk case," in which the fall and resulting injury is personal to the claimant's condition and divorced from the employment. *Larson's* reasons: "The idiopathic-fall cases begin as personal-risk cases. There is therefore ample reason to assign the resulting loss to the employee personally."[20] *Larson's* notes that the idiopathic-fall case may still be compensable in situations where the claimant falls from a height or strikes an object, even if that object may be commonly found outside the workplace. *Larson's* notes: "[It] is a well-settled rule of law that idiopathic falls onto such familiar household objects as tables and bookcases are compensable."[21]

¶ 28 *Larson's* contrasts the "personal-risk" case with the "neutral-risk" or "positional-risk" case. This is a case such as the alternative hypothetical McLeish poses, in which the claimant simply falls over at work and breaks his clavicle. *Larson's* explains: "[A]ll that is needed to tip the scales in the direction of employment connection, under the positional-risk theory, is the fact that the employment brought the employee to the place at the time he or she was injured – an extremely lightweight causal factor, but enough to tip scales that are otherwise perfectly evenly balanced."[22]

¶ 29 McLeish's argument that an idiopathic fall onto a level floor should be treated the same as a "neutral-risk" fall, conflates the "in the course of employment" requirement with the "arising out of employment" requirement. McLeish's argument would effectively

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[17] *Peterson v. Eichhorn*, 2008 MT 250, ¶ 13, 344 Mont. 540, 189 P.3d 615.

[18] Petitioner's Response Brief at 4.

[19] *Id*.

[20] Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law,* vol. 1, § 9.01[4][b] at 9-8 (Matthew Bender 2006)

[21] *Larson's*, § 9.01[2] at 9-5.

[22] *Larson's*, § 9.01[4][b] at 9-8 – 9-9.

render the "arising out of employment" requirement merely redundant to the "in the course of employment" requirement. The statute frames these two requirements in the conjunctive: both must be satisfied. In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.[23] It is not the prerogative of this Court to ignore the "arising out of employment" requirement so long as the "in the course of employment" requirement is satisfied.

¶ 30 Finally, McLeish argues that compensation for an injury suffered from a fall on the employer's premises against a level concrete floor is compensable because an unusually hard surface itself creates a hazard that arises out of employment, even if the fall is caused by an idiopathic condition of the employee.[24]

¶ 31 Rochdale argues that the majority of jurisdictions require something beyond the hardness of the floor for an injury to be compensable. *Larson's* notes that a distinct majority of jurisdictions have denied compensation while a significant minority have awarded compensation for idiopathic level-floor falls.[25]

¶ 32 The compensability of an idiopathic level-floor fall has not been addressed previously in Montana. However, the Legislature has codified the requirement that in addition to occurring in the course of employment, an injury must also arise out of the employment in order to be compensable. As it pertains to the requirement that an injury arise out of the employment, the Montana Supreme Court has set forth the general rule that if a claimant's employment is one of the contributing causes which placed him in the path of harm and without which injury would not have followed, the claimant is entitled to compensation.[26] As Rochdale concedes, whether an injury is related to and arises out of employment is a very low bar. There is, however, a bar, low as it may be. If an injury resulting from an idiopathic fall onto a level surface is compensable, I am hard-pressed to conceive of a situation in which any injury could be deemed not to have arisen out of the employment. Any level surface hard enough to cause injury could arguably be construed as "unusually hard." Conversely, if the surface was not hard enough to cause injury, there would be no claim. Adopting the minority rule would effectively render meaningless the "arising out of employment" requirement of § 39-71-407(1), MCA.

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[23] § 1-2-101, MCA.

[24] *See Employers Mut. Liability Ins. Co. v. Indus. Acc. Comm'n*, 41 Cal. 2d 676, 263 P.2d 4 (Cal. Supreme Ct., 1953); *Hernando County Sch. Bd. v. Dokoupil*, 667 So.2d 275, 276 (Fla. Dist. Ct. App. 1995); Followed by *Duval County Sch. Bd. v. Golly*, 867 So.2d 491 (Fla. Dist. Ct. App. 2004).

[25] Larson's, § 9.01[4][a] at 9-8.

[26] *Parker v. Glacier Park, Inc.*, 249 Mont. 225, 228-29, 815 P.2d 583, 585 (1991).

¶ 33 The Montana Supreme Court has held: "[W]hether an injury arises out of and occurs in the course of employment is controlled by the particular facts and circumstances of each case."[27] The undisputed facts and circumstances of this case are that McLeish suffered an event that caused him to fall to the floor and fracture his clavicle. Dr. Wilson concluded that this event was a seizure caused either by alcohol withdrawal or was idiopathic in nature. Dr. Wilson concluded that the etiology of McLeish's seizure condition is not work-related and McLeish concedes that no evidence exists to suggest that his seizure condition is caused by, precipitated by, or otherwise related to his employment with Nelson Enterprises. I conclude, therefore, that McLeish's injury did not arise out of his employment and is not compensable.

¶ 34 Rochdale also argues that McLeish's chronic alcohol abuse was the major contributing cause of his injury and that he is therefore ineligible for benefits pursuant to § 39-71-407(4), MCA. Because I have found that McLeish's injury does not arise out of his employment and is not compensable, I need not address this issue.

ORDER

¶ 35 Respondent's motion for summary judgment is **GRANTED**.

¶ 36 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 18th day of July, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard R. Buley/Eric D. Mills
Joe C. Maynard/Tyler T. Norwood
Submitted April 8, 2011

[27] *Penny v. Anaconda Co.*, 194 Mont. 409,413, 632 P.2d 1114, 1116-17 (1981).