IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 19

WCC No. 9411-7185

ROBERT B. MUTCHIE

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

Respondent/Insurer for

TVX MINERAL HILL MINE

Employer.

PARTIAL DECISION

Summary: The parties disputed whether claimant, a diamond driller working at a mine, was in the course and scope of employment while putting on overalls in the employer's "dry" room, which houses showers, lockers, and fans for drying clothes, prior to entering the mine portal. While donning his overalls, claimant felt a popping sensation, followed by severe pain in his low back.

Held: Claimant was in the course and scope of employment. While injuries suffered during travel to and from an employer's premises are typically excluded from coverage, injuries occurring on the employer's premises during a reasonable interval before and after working hours may be covered. The course of employment also typically extends to activities connected with changing clothes before and afer work on the employer's premises. See, *Larson's Workmen's Compensation (1994)*.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-407, MCA (1993). A diamond driller working at a mine was in the course and scope of employment while putting on overalls in the employer's "dry" room, which houses showers, lockers, and fans for drying clothes, prior to entering

the mine portal. While donning his overalls, claimant felt a popping sensation, followed by severe pain in his low back. Although injuries suffered during travel to and from an employer's premises are typically excluded from coverage, injuries occurring on the employer's premises during a reasonable interval before and after working hours may be covered. The course of employment also typically extends to activities connected with changing clothes before and afer work on the employer's premises. See, *Larson's Workmen's Compensation (1994) § 15* .

Employment: Course and Scope: Travel. A diamond driller working at a mine was in the course and scope of employment while putting on overalls in the employer's "dry" room, which houses showers, lockers, and fans for drying clothes, prior to entering the mine portal. Although injuries suffered during travel to and from an employer's premises are typically excluded from coverage, injuries occurring on the employer's premises during a reasonable interval before and after working hours may be covered. See, *Larson's Workmen's Compensation (1994) § 15* .

Employment: Course and Scope: Coming and Going. A diamond driller working at a mine was in the course and scope of employment while putting on overalls in the employer's "dry" room, which houses showers, lockers, and fans for drying clothes, prior to entering the mine portal. Although injuries suffered during travel to and from an employer's premises are typically excluded from coverage, injuries occurring on the employer's premises during a reasonable interval before and after working hours may be covered. See, *Larson's Workmen's Compensation (1994) § 15* .

Employment: Course and Scope: Preparation for Work. A diamond driller working at a mine was in the course and scope of employment while putting on overalls in the employer's "dry" room, which houses showers, lockers, and fans for drying clothes, prior to entering the mine portal. While donning his overalls, claimant felt a popping sensation, followed by severe pain in his low back. The course of employment typically extends to activities connected with changing clothes before and afer work on the employer's premises. See, *Larson's Workmen's Compensation (1994) § 15* .

This case was tried in Billings, Montana, on February 6 and 7, 1995. Robert B. Mutchie (claimant) contends that he suffered a compensable back injury on April 28, 1994. The insurer has denied liability under the Workers' Compensation Act but accepted the claim as compensable under the Occupational Disease Act.

The two major issues in this case are (1) whether the claimant has satisfied the definition of an industrial accident and (2) whether the events which gave rise to the claim occurred in the course and scope of claimant's employment. The underlying facts

essential to the resolution of the second issue are essentially undisputed and raise a legal question. Since the parties contemplate the taking of post-trial depositions and filing extensive proposed findings of fact and conclusions of law, the Court directed them to address the course and scope issue before doing any additional work. If the Court determines that the claimant was not engaged in the course and scope of his employment, then the first issue is moot and he is not entitled to benefits under the Workers' Compensation Act. If he was acting in the course and scope of his conduct, then the parties will be free to take post-trial depositions and file their proposed findings and conclusions.

Having considered the evidence and the briefs of the parties, I find that claimant was engaged in the scope and course of his employment at the time of the alleged industrial accident.

Relevant Facts

At the time of his alleged injury, claimant was employed as a diamond driller by TVX Mineral Hill Mine ("the mine"). His pay began at the time he entered the mine portal. Prior to entering the mine portal it was claimant's custom to dress in the "dry" room.

The "dry" room is located on the mine property and is provided by the company for the convenience of its workers. It houses showers, lockers, and fans for drying clothes. While workers purchase their own clothing and may dress for work at home, they routinely use the dry room to change into their work clothes before entering the mine. Upon completion of their shifts, they use the dry room to shower and change to non-work clothing. Additionally, they are required to store certain items furnished to them by the company, including a miner's light and a "self-rescuer," in the dry room. (The "self-rescuer" is a canister that removes carbon monoxide from the air in the event of an underground fire.)

Claimant's alleged industrial injury occurred at 6:10 a.m. on the morning of April 28, 1994. He was putting on his overalls in the dry room. As he put his left arm through one of the suspenders of the overalls, he felt a popping sensation and severe pain in his low back. A few minutes later, he entered the mine and his pay commenced.

Discussion

The law in effect at the time of the injury governs the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital****, 224 Mont. 318, 730 P.2d 380 (1986.)* Thus, the 1993 version of the Workers' Compensation Act is controlling.

Section 39-71-407, MCA (1993), limits workers' compensation benefits to injuries "arising out of and in the course of employment." It provides in pertinent part:

> (1) Every 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** or, in the case of death from the injury, to the employee's beneficiaries, if any.
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> . . .
>
> (3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
>
> (a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and
>
> (ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
>
> (b) the travel is required by the employer as part of the employee's job duties. [Emphasis added.]

Claimant cites ***Herberson v. Great Falls Wood & Coal Co****., 83 Mont. 527, 273 P. 294* (1929), as authority for his contention that he was acting in the course and scope of his employment when he felt the pop in his back. In ***Herberson***, the deceased worker customarily took a street car to a point near the employment premises, got off and walked two blocks to the nearest gate of the employer's yard. ***Herberson,*** *83 Mont.* at 532. The decedent's employer had provided him with a key to the gate and the decedent customarily unlocked the gate in the morning before the other employees arrived and locked it again at night. *Id.* Although unlocking and locking the gate was not one of his duties, the employer was aware that he did it. *Id.* The decedent was struck and killed by a car just as he got off the street car. The Supreme Court held that his beneficiaries were entitled to workers' compensation benefits.

In ***Herberson*** the decedent was not on the employer's premises when killed. In light of the Legislature's addition in 1987 of express statutory criteria regarding travel, 1987 Mont. Laws, ch. 464, § 11, it is no longer clear that ***Herberson*** is good law. However, the Court need not reassess ***Herberson*** since the claimant in this case was on the employer's premises. The case is therefore inapposite.

The insurer, Old Republic Insurance Company, argues that even though the claimant was on the mine's premises at the time of the incident, he was still on his way to

work and in travel status because his pay did not commence until he reached the mine portal. Therefore, it concludes that claimant was subject to the express exclusion contained in section 39-71-407(3), MCA (1993). The Court disagrees.

Injuries occurring on the employer's premises have traditionally been excluded from travel doctrines governing the employee's going to or coming from work. In his treatise on workers' compensation law, Professor Larson specifically distinguishes between injuries occurring on the employer's premises and injuries occurring while the employee is going to or from work. In black letter law, he summarizes the distinction as follows:

> As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunch-time are compensable, but if the injury occurs off the premises, it is not compensable, subject to several exceptions. Underlying some of these exceptions is the principle that course of employment should extend to any injury which occurred at a point where the employee was within range of dangers associated with the employment.

1 Larson's Workmen's Compensation, § 15.00 at 4-3 (1994).

The Court has been unable to find specific Montana precedent concerning changing of clothes on the employer's premises. However, Professor Larson states:

> **§ 21.61 Reasonable interval before and after hours**
>
> The course of employment, for employees having a fixed time and place of work, embraces a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts. The rule is not confined to activities that are necessary; it is sufficient if they can be said to be reasonably incidental to the work. Awards have been made when the employee was injured during a trip to the toilet 15 minutes before starting time, arriving 30 minutes or 45 minutes early, arranging clothes thirty minutes early, placing his lunch on a table before working hours, and drinking coffee in the cafeteria before beginning work.
>
> **§ 21.62 Changing clothes, washing, and bathing**

> The course of employment also extends to all activities connected with changing clothes before and after work, including proceeding to the place where the employee intends to change, and actually changing clothes.
>
> Washing one's hands before going to lunch, or before going home, is a reasonably incidental act, as is taking a shower at the end of the work day on the premises.

***Larson**, supra, §§ 21.61-62 at 5-22 through 5-25.* His conclusion is supported by cases from other jurisdictions. ***E.g., Corpora v. Kansas City Public Service Co.**, 284 P. 818 (1930); **Kauffman v. Co-operative Refinery Association,** 225 P.2d 129, 134 (1950); **Nelson v. City of Oklahoma City**, 573 P.2d 696 (1978); **Bottomley v. Kaiser Aluminum & Chemical Corporation**, 441 A.2d 553, 555 (1982); and see cases cited in footnotes to the Larson text quoted above.*

The insurer argues that the Portal to Portal Act precludes compensation in this case. 29 U.S.C. § 254. The Portal to Portal Act addresses the times at which employees must be compensated. It does not determine the scope of workers' compensation coverage. Consequently, the argument is unpersuasive.

I find that claimant was acting in the course and scope of his employment at the time of the incident on April 28, 1994. The parties shall advise the Court of when they can complete discovery and submit their proposed findings of fact and conclusions of law.

Dated in Helena, Montana, this 8th day of March, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Stephen C. Pohl
Mr. Joe C. Maynard