IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 28

WCC No. 9406-7073

LIBERTY NORTHWEST INSURANCE CORPORATION

Petitioner

vs.

PATRICK BEVIS

Claimant/Respondent

and

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on November 15, 1994, in Billings, Montana. Petitioner, Liberty Northwest Insurance Company (Liberty), was represented by Mr. Larry W. Jones. Claimant/Respondent Patrick Bevis (claimant) was present and represented by Mr. David W. Lauridsen. Insurer, State Compensation Insurance Fund (State Fund), was represented by Ms. Susan C. Witte. Claimant testified on his own behalf. Wayne Dillon, Frank Green, Kent Mingneau and Terry Ohs were sworn and testified. The depositions of claimant and Dr. Peter Teal were submitted for the Court's consideration. Exhibits 1 through 11 were admitted by stipulation of the parties. Exhibit 12 was admitted without objection.

Issues presented: Claimant suffered a work-related back injury on September 30, 1991. That accident and injury are not disputed. The State Fund, which was the responsible insurer at the time, accepted liability. On January 11, 1993, claimant filed a second claim for an alleged second injury to his back on October 22 or 23, 1992. On the date of this alleged accident, the insurer at risk was Liberty. Liberty has paid claimant both wage loss and medical benefits under a reservation of rights. Through this action, Liberty seeks a determination that it is not liable to claimant and asks the Court to order the State Fund to indemnify it for the benefits it has paid to claimant. The parties have stated the issues as follows:

1. Whether the Claimant reached maximum medical improve-ment after his September 30, 1991, injury and before his alleged October 22, 1992 injury.

2. Whether the Claimant suffered an injury arising out of and in the course and scope of his employment with Pegasus Gold Corpor-ation on October 22, 1992.

3. Whether the Claimant gave proper notice of an October 22, 1992 injury.

4. If the Claimant was injured on October 22, 1992, and if he gave proper notice of that injury, then is the October 22, 1992, injury the proximate cause of his current alleged disability.

5. If the Claimant's September 30, 1991, injury is the proximate cause of his current alleged disability, then must the State Fund indemnify Liberty Northwest for all or some medical and wage loss benefits paid under a reservation of rights?

(Pretrial Order at 2-3.)

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

FINDINGS OF FACT

1. Claimant is thirty years old. At the time of trial, claimant was living in Butte, Montana and attending Montana Tech.

September 30, 1991 Injury

2. On September 30, 1991, claimant was employed as an ore truck driver by N. A. Degerstrom at a mine in Zortman, Montana. On that day he injured his back when a boulder being loaded onto his one hundred ton truck slipped and struck the side of his truck. He was thrown about the cab of his truck. He immediately felt his arms go numb and his back hurt. (Tr. at 32.)

3. At the time of his 1991 injury, Degerstrom was insured by the State Fund. The State Fund accepted liability for claimant's injury and subsequently paid wage loss and medical benefits.

4. Claimant initially obtained chiropractic treatment for his injury and continued working. (Ex. 5 at 1; Tr. at 32-33.) He was assigned some lighter-duty jobs operating other equipment, including a water truck, loader and CAT. (Bevis Dep. at 10.)

5. Despite chiropractic treatment, claimant's condition worsened.

6. On February 25, 1992, claimant sought care from Dr. Peter Teal, a board certified orthopedic surgeon. At that time, claimant was "having pain most of the time in the neck

and upper back mostly on the right side." (Ex. 5 at 2.) He had weakness in his upper extremities and his hands went to sleep while driving. With his neck in certain positions "he almost blacks out and everything begins to get dizzy." (*Id.*)

7. In March of 1992, Dr. Teal took claimant off work and prescribed physical therapy. (Ex. 5 at 3.)

8. Claimant was off work from March 4 to April 5, 1992. (Bevis Dep. at 9.) Dr. Teal released claimant to return to work on April 7, 1992 at claimant's request. (Ex. 1 at 17.) Claimant requested the release because he could not financially afford to be off work any longer. (Tr. at 34.)

9. By April of 1992, Pegasus Gold Corporation (Pegasus) had replaced N. A. Degerstrom as operator of the Zortman mine. Pegasus became claimant's employer.

10. At the time of his 1991 injury claimant was working sixty (60) to seventy (70) hours a week. (Tr. at 35.) Upon taking over operation of the mine, Pegasus reduced overtime hours so that upon claimant's return to work in April 1992, he worked only forty (40) hours per week. (*Id.*) However, instead of driving an ore truck full-time, claimant also drove a water truck and a sanding truck, did some carpenter work and ran a loader and a CAT. (Tr. at 36.) In claimant's words, the work was "considerably" easier than before. (Tr. at 55.)

11. Following his return to work, claimant continued to experience back and neck symptoms. (Tr. at 36.)

Impairment Rating

12. On July 13, 1992, Dr. Teal concluded that claimant had reached maximum medical improvement (MMI) and rated claimant's impairment at nine (9%) percent of the whole person. (Ex. 4 at 1.) The rating was based on a loss of motion resulting from the injury. (*Id.*)

October of 1992 Injury

13. Claimant alleges that he reinjured his back on October 22 or 23, 1992, when the teeth of an ore loader hit the headache rack on his truck. (Tr. at 37.) The headache rack is a sheet of iron that goes over the truck cab and protects the driver from rocks. It also provides rollover protection. (Tr. at 73.)

14. In October of 1992, Pegasus was insured by Liberty.

15. On January 11, 1993, claimant filed a written claim for compensation. The claim stated that the accident occurred on either October 22 or 23, 1992. (Ex. 7.)

16. Liberty has since paid wage loss and medical benefits under a reservation of rights. In this action it alleges that it should be relieved of liability and should be indemnified by the State Fund because claimant failed to notify his employer of the accident within thirty (30)

days as required by section 39-71-603, MCA, and because any reinjury claimant may have suffered was a temporary, rather than permanent, aggravation of claimant's underlying condition.

Notice Issue

17. The evidence concerning notice to the employer is conflicting. At trial the claimant testified that when the teeth of the loader hit his truck on October 22, 1992, he felt immediate pain, "a lot of pain" in pretty much the same area of his neck and back as before. (Tr. at 37.) He further testified that he immediately reported the accident and his injury to Frank Green (Green), his immediate supervisor. (Tr. at 37-38.) According to claimant, he told Green "that I was hurting, but I would try to make it back [to work], because I had a day or two off that I thought I could heal up enough to come back." (Tr. at 38.) In his deposition, claimant testified that he told everyone on the crew that he had been hurt immediately after it happened. (Bevis Dep. at 25.) He also testified that he filled out an accident report in Green's truck and signed it on the night of the accident. (Bevis Dep. at 29.)

18. Green verified that an incident involving a loader hitting claimant's truck occurred in October, 1992, but put the date of the incident on October 3, 1992. On October 3rd, he completed an incident report entitled "Employee Personal File Entry" and placed it in the claimant's personnel file. (Ex. 11.) The report, which is handwritten, reads in pertinent part:

> Pat called me up into the pit at approximately 8:00 P.M. and asked me to ride with him in his truck because he needed to talk to me. When I got to his truck Pat told me that the loader operator Lyle Jones had hit his headache rack on numerous occasions we proceeded to the ore fill where I examined the headache rack of 1106. There was 2 small places where a loader might have contacted the inner slope of the rack these also looked to be not new. Pat and I continued our conversation and **I asked him twice if he wanted to fill out an accident report & he said no it didn't hurt him but he wanted to let me know.**

(Ex. 11 at 1; emphasis added.) Green's testimony at trial confirmed the substance of his report, including claimant's denial of any injury. (Tr. at 82-83.) He was unaware of any incident occurring on October 22 or 23. This Court finds Green to be a credible witness.

19. Two coworkers, who carpooled to work with claimant, testified that claimant never mentioned any October 1992 injury to them. (Tr. at 87, 91.) Their testimony was credible.

20. After weighing the evidence, I find that the incident described by claimant as occurring on October 22 or 23 in fact occurred on October 3rd. I have taken specific note of the fact that the incident report filed by Green is dated in three separate places and that each date is "10/3/92". (Ex. 11.) I further find that claimant did not report any injury to Green and that he in fact denied that he had been injured. On this point I found Green's testimony more

credible than claimant's. Finally, I find that claimant did not experience any immediate onset of significant pain, as he claimed at trial. In the face of his denial of any injury, it is unlikely that he was in significant pain when he talked to Green. A coworker, Terry Ohs (Ohs), who carpooled to work with claimant, testified that on one occasion that claimant said "he was going to get workers' compensation to pay for his schooling." (Tr. at 91.) Ohs was a credible witness and I find that claimant has exaggerated the October 3rd incident, perhaps in the hope that he would strengthen his claim for workers' compensation benefits so he could get out of the mine and into a different line of work.

21. Wayne Dillon (Dillon) is safety director at the Zortman mine. (Tr. at 60.) On October 27, 1992, he took claimant to Dr. Dobni at the Malta Clinic because "[h]e was having trouble **again** with his arms and that." (Tr. at 68; emphasis added.) Dillon denied that claimant mentioned anything about a new injury. (*Id.*)

22. Dr. Dobni's notes also do not mention any new injury. They indicate a back injury in January 1992, which is obviously an error in date. Claimant's complaints were of "pain between top of T-spine and mid back and loss of sensation and strength in both arms **equally that returns after period of rest**." (Ex. 12.) Dr. Dobni's impression was "**Chronic pain syndrome -- appears well established.**" (*Id.*) He recommended "1 more review at Dr. Teal. Then pain clinic." (*Id.*)

23. Dr. Dobni took claimant off work on October 27, 1992. (Ex. 9.) He has remained off work ever since.

24. Dillon was a credible witness. Dr. Dobni's notes indicate a long standing rather than a new injury. I find that claimant did not mention any new injury to either Dillon or Dr. Dobni. I further find that the first notice to Pegasus of a new injury was in January, 1993 when claimant filed his written claim. (Claimant testified that he had filled out an earlier claim form and submitted it to the State Fund (Tr. at 50-51) but this testimony was uncorroborated and I did not find it credible.)

25. Claimant testified that Green and Dillon discouraged him from filing workers' compensation claims. (Tr. at 55.) He further stated that Pegasus had a bonus program for the fewest lost-time accidents. (*Id.*) I did not find his testimony on this point to be credible. It was contradicted by both Green and Dillon. Both denied discouraging claims. (Tr. at 66.) Dillon testified that employees were regularly instructed to immediately report their injuries (Tr. at 61) and his testimony was confirmed by one of claimant's coworkers, Kent Mingneau (Tr. at 87). Moreover, in October 1992, the Zortman mine was not under any bonus program for lost-time accidents. (Tr. at 66.)

Post-October 1992 Medical History

26. Claimant telephoned Dr. Teal on October 31, 1992 asking for a letter to get him off of work. (Ex. l at Ex. B.) Dr. Teal testified at his deposition that claimant did not tell him that he

had another injury during that telephone call. (*Id.* at 19.) He further stated that he definitely would have recorded such a report in his office notes. (*Id.*)

27. Claimant was seen by Dr. Teal on November 17, 1992. (Ex. 1 at Ex. B.) Dr. Teal's office note for that day reads in pertinent part:

> This patient is now 28 years old. He's been under my care for injuries received as a result of truck driving accidents. He returned to truck driving on a part time basis in April of this year. He was in financial trouble at the time and felt he had to do something. He went back to work working two days a week. He had a lot of pain when he worked and was not able to increase his working days.
>
> About 4 weeks ago, he was re-injured when a loader was loading his truck and the end of the loader came down hitting his truck, jarring his back. He continued to work for the next 2 weeks in spite of increasing pain in his back and now he's been off of work for 2 weeks.
>
> At the present time, his pain is a little lower than the previous episode. It seems to begin at the base of the neck and go down to the mid back and he is aware of three different spots that hurt. There's some pain radiating around to the rib cage but no pain radiating into the arms and legs although he does have some aching in both upper and lower extremities. . . . .

(*Id.*) The office note contains the first mention of any new injury. However, it also verifies that claimant had continued to experience pain after his return to work in April of 1992. Dr. Teal diagnosed claimant's condition as "Recurrent sprain, cervical thoracic spine." (Ex. 1 at Ex. B.)

28. On May 24, 1993, Dr. Teal expanded his diagnosis to include bilateral thoracic outlet syndrome. (Ex. 5 at 17.) He referred claimant to a thoracic outlet syndrome specialist.

29. In August of 1993, the claimant underwent first rib resection surgery for thoracic outlet syndrome. (See Ex. 5 at 21.) However, the surgery failed to provide him with any relief from his symptoms. (Ex. 1 at 23-27.)

<u>Relatedness of Condition to 1991 Injury</u>

30. Dr. Teal was the only medical witness in this case. It is his unequivocal opinion that claimant's current condition is attributable to his 1991 injury and that the 1992 incident amounted to only a temporary aggravation of his underlying condition.

> a. On October 29, 1993, he wrote in a letter to Susan Jansen the following pertinent portions:
>
> > Subsequent examinations and diagnostic studies have shown that this patient does not have a cervical disc and it appeared that the symptoms of

pain in the shoulder, upper back, neck and in the right arm were at least partially due to a thoracic outlet syndrome. This type of syndrome can be brought on by trauma and it was my opinion that **the accident of September 30, 1991, was responsible for the thoracic outlet symptoms as well as for the symptoms that I've interpreted as representing a sprain of the cervical and thoracic spine.**

Recently, this patient has developed some new symptoms suggesting that he has a costovertebral symptom which also may be secondary to his thoracic sprain. Chronic inflammation in the thoracic spine resulting from a sprain can produce swelling and deformity in the costovertebral joint and secondarily affect the intercostal nerve producing a costovertebral syndrome. . . **All of his visits, all of his treatment has been related to that initial accident. . . . It seems unreasonable to me to assume that all of his subsequent symptoms were a result of that October 1992 injury. . . . This patient's symptoms have not really changed during the course of his treatment and <u>I don't think his condition was changed by that October 1992 injury.</u>**

(Ex. 1 at 32; emphasis added.)

b. On March 14, 1994, he wrote in a letter to Sandy Scholl, a Liberty claims adjuster, "It is my opinion that Mr. Bevis has reached maximum medical improvement, but it is also my opinion that **there is no measurable permanent impairment as a result of his most recent injury.**" (Ex. 1 at 14 and Ex. 2; emphasis added.)

c. In his deposition he reaffirmed the opinions he provided in the October 29, 1993 letter. (Ex. 1 at 8-9.) He was asked, "Is it your opinion that the 1992 -- the second incident did not have a permanent affect on his condition?" He replied, "Yes."

d. Dr. Teal also testified that in February of 1992 he felt that claimant should not go back to truck driving. (Ex. 1 at 12.) He stated, "And by that, I mean that if he did go back to that kind of work, that it would reaggravate his symptoms in my opinion, and he'd experience more pain and be unable to continue with it. And I think in fact that's what happened." (*Id.* at 26.) Dr. Teal was asked by Liberty's attorney if he felt that claimant should not have gone back to work after his September 1991 injury and he replied, "That's right." (*Id.* at 27.)

<u>CONCLUSIONS OF LAW</u>

1. 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 1991 version of the Workers Compensation Act governs this case.

2. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 483-484, 512 P.2d 1304 (1973);* ***Dumont v. Wicken Bros. Construction,*** *183 Mont. 190, 598 P.2d 1099 (1979).*

3. Section 39-71-603, MCA (1991) provides:

> No claim to recover benefits under the Workers' Compensation Act, for injuries not resulting in death, may be considered compensable unless, within 30 days after the occurrence of the accident which is claimed to have caused the injury, notice of the time and place where the accident occurred **and the nature of the injury** is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident **and injury** on the part of the employer or the employer's managing agent or superintendent in charge of the work upon which the injured employee was engaged at the time of the injury is equivalent to notice. [Emphasis added.]

The notice requirement is "'mandatory and compliance with [the requirements of the statute] are indispensable to [maintaining] a claim for compensation . . . . '" ***Buckentin v. State Fund****, 265 Mont. 518, 523, 878 P.2d 262 (1994) (quoting from* ***Reil v. Billings Processors, Inc.,*** *229 Mont. 305, 308, 746 P.2d 617, 619 (1960), brackets in original).*

As the words of the statute plainly require, section 39-71-603, MCA, requires notice not only of a particular incident but of the "nature of the injury." While claimant told his supervisors of the October 1992 incident, he did not inform them that he had been injured. In fact, he specifically denied that he had been hurt. It was not until three months later that he notified his employer that he had been injured in the incident.

Citing ***Killebrew v. Larson's Cattle Co.,*** *254 Mont. 513, 839 P.2d 1260 (1992),* claimant argues that any failure to specifically report an injury is excused. In ***Killebrew*** the Supreme Court held, "An employee who has a reasonable belief at the time of an accident that he has suffered no injury which will require treatment or is otherwise compensable, is not barred from recovery under § 603 because he learns otherwise beyond the 30-day period." *254 Mont.* at 521. The Court found that claimant had complied with the notice requirement since he had provided his employer with as much information as he had about the nature of his injury.

This case is different. Claimant testified that he immediately knew he was hurt. His testimony precludes him from now asserting that the contrary was true. Moreover, by the time he saw Dr. Dobni on October 27th, which was within the thirty (30) day period, claimant should have certainly been aware of his injury.

Claimant had ample opportunity to tell his supervisors that he was injured. He could have done so when he talked to Green on October 3, 1992. He could have told Dillon on October

27, 1992, when he was taken to the Malta Clinic. The most likely reason for his failing to do so is that he had continued to have upper back and arm pain and numbness on account of his September 30, 1991 injury and did not believe at the time that the October 1992 incident was all that significant.

In any event, having failed to report an injury within thirty (30) days, the claim against Liberty is barred.

4. The previous conclusion of law does not end the inquiry in this case. In addition to its desire to terminate payments to claimant, Liberty is seeking indemnification from the State Fund for payments it has already made. It is entitled to indemnification only if the payments it made were properly the responsibility of the State Fund. *See* ***EBI/Orion v. State Compensation Insurance Fund****, 240 Mont. 99, 782 P.2d 1276 (1989)* and ***Raisler v. Burlington Northern Railroad Co.,*** *219 Mont. 254, 258, 717 P.2d 535 (1985)*("Indemnity . . . shifts the entire loss . . . to the one who should bear the loss.").

Thus, to sustain its claim for indemnification, Liberty must initially show that claimant's current condition was caused by his 1991 industrial accident. *See* ***Walker v. United Parcel Service,*** *262 Mont. 450, 454, 865 P.2d 1113 (1993).* Liberty has established to the satisfaction of the Court that claimant's current condition was caused by his 1991 injury. Dr. Teal so testified and his testimony is unrefuted.

In addition, Liberty must show that the State Fund remained at risk. Where the first insurer seeks indemnification from a subsequent insurer, it must prove two elements. "First it must show that . . . [claimant] had attained a condition of maximum healing. Second, it must establish that he sustained an injury after he reached maximum healing." ***EBI/Orion,*** *249 Mont.* at 453. Since this case involves a claim for indemnification by a subsequent insurer against the first insurer, proof that either one of the elements is lacking entitles Liberty to indemnification from the first.

Liberty argues that claimant had not reached maximum healing prior to October 1992 and that in any event the October 1992 incident only temporarily aggravated claimant's underlying condition. The maximum healing issue is problematic. "`Maximum healing' means the status reached when a worker is as far restored medically as the permanent character of the work-related injury will permit." Section 39-71-116(12), MCA (1991). Dr. Teal initially found claimant to be maximally healed in July of 1992. However, he later determined that claimant was a candidate for surgery aimed at relieving the symptoms of thoracic outlet syndrome. Had that surgery succeeded it could be argued that the July 1992 opinion was premature and that at that time the claimant had not reached maximum healing since further medical treatment could be expected to improve his condition. The expectation for further improvement in this case did not arise until much later, and then it was ultimately unfulfilled.

The Court need not, however, resolve the maximum healing issue since it concludes that the October 3, 1992 incident did not permanently aggravate claimant's underlying condition. In this case, "[t]he fact that a claimant has reached maximum medical healing does not relieve an [the first] insurer from future liability for medical and compensatory benefits where there is **no new, intervening cause**." ***Lapp v. W.R. Grace,*** *254 Mont. 237, 240, 836 P.2d 602 (1992)* (emphasis added). Thus, a new injury does not relieve the first insurer from liability unless it results in a *permanent aggravation* of the condition for which the first insurer is otherwise responsible. *See* ***EBI/Orion,*** *249 Mont. at 449 and* ***Walker****, 262 Mont. at 456.* Dr. Teal's testimony that the incident caused only a temporary aggravation was uncontradicted. Dr. Teal testified that the symptoms of his condition before and after October 1992 were virtually the same. Where the treating physician's opinions are uncontradicted by other medical testimony, his or her opinions "are entitled to special weight and should not be disregarded absent specific legitimate reasons for doing so." ***Weber v. Public Employees' Retirement Board,*** *52 St. Rpt. 162, 165 (March 9, 1995).* I find Dr. Teal's opinion that claimant suffered no permanent harm from the October 1992 incident persuasive.

Liberty has met its burden and is entitled to indemnification for disability and medical benefits it has paid to or on behalf of claimant including the expenses of his 1993 surgery. However, indemnification for disability benefits is limited to the rates applicable to claimant's 1991 injury. ***Aetna Casualty & Surety Co. v. State Fund re: Marla Smith,*** *WCC No. 9308-6873 (decided September 16,* 1994).

JUDGMENT

1. Claimant is not entitled to further benefits from Liberty.

2. Liberty is entitled to indemnification from the State Fund for disability and medical benefits it has paid the claimant. It is only entitled to recover the disability benefits at the rates applicable to claimant's 1991 injury.

3. If Liberty and the State Fund cannot agree on the amount due Liberty, they may request the Court to make that determination.

4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

Dated in Helena, Montana, this 17th day of April, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. David W. Lauridsen
Ms. Susan C. Witte