IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 16

WCC No. 9307-6825

ALVA DARRELL BOGLE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

OWNERRENT RENT TO OWN

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on Monday, September 27, 1993, in Helena, Montana. Petitioner, Alva Darrell Bogle, was present and represented by John C. Doubek. Respondent, State Compensation Insurance Fund, was represented by Daniel J. Whyte. The petitioner, David Robinson and Carol Reed testified. Exhibit Nos. 1 through 3 were admitted by stipulation. Exhibit Nos. 4 and 5 were marked for purposes of identification but were not used at trial or formally offered. The depositions of Troy Matthews Collins and David Robinson were submitted for the Court's consideration.

At trial the petitioner renewed his objection to Exhibit No. 2 to the deposition of David Robinson. Mr. Robinson was unable to identify the exhibit based on his own knowledge and the objection is therefore sustained.

Having considered the pretrial order, the testimony presented at trial and through the depositions, the demeanor of the trial witnesses, and the exhibits admitted into evidence, the Court makes the following:

FINDINGS OF FACT

1. The employer in this matter is Ownerrent, a company which has offices in several Montana cities. The petitioner worked at Ownerrent's Helena, Montana office for a short time. He was hired in December 1992, and terminated on January 15, 1993 for reasons unrelated to this proceeding.

2. The petitioner was hired on the same day as Troy Collins. Both the petitioner and Collins were hired by David Robinson, the manager of the Helena Ownerrent office, to deliver and pick up furniture and appliances. They also installed and did minor repair work on appliances.

3. The petitioner filed a workers' compensation claim for a work-related back injury he alleges occurred on January 6 or 7, 1993, while he was loading a washing machine onto a truck.[(1)] He testified that the washer fell on him.

4. On January 6 and 7, 1993, Ownerrent was insured by the State Compensation Insurance Fund.

5. Petitioner did not report his injury to either David Robinson, his manager, or to Mike Edwards, the assistant manager, within the 30 day period prescribed by section 39-71-603, MCA.[(2)] Petitioner testified that he called Mr. Robinson the day after his injury to tell him that his back was hurting. He also testified that he told Robinson on two or three occasions that his back was hurting. In his proposed findings of fact and a post-trial brief, petitioner argues that he also told Robinson of the accident within 30 days of its occurrence, citing trial testimony at transcript page 31, lines 23--25, wherein he testified that he had told Robinson that he "had slipped while loading the washing machine." The quoted testimony, however, is taken out of context without regard to the time or date on which he informed Robinson of the injury. Other testimony of peti-tioner shows that he notified Robinson of the injury no earlier than February 8, 1993, after he had undergone an MRI, TR. 41:5-17; 42: 5-10. Any ambiguity as to when he informed the employer of an industrial accident is dispelled by petitioner's answers to questions put to him by the Court at the conclusion of his testimony:

JUDGE MCCARTER: Mr. Bogle, I do have a couple of questions. As I understand your testimony, and I want to make sure that I am understanding you correctly, when you called Mr. Robinson the day after the injury, you didn't tell him about the accident. You just told him that you were hurting and couldn't come in to work?

THE WITNESS: Right.

JUDGE MCCARTER: If I understand you further, the first time you specifically told him about the accident was after you had the MRI?

THE WITNESS: Right.

Tr. 40:2-15.

6. The accident was witnessed by co-worker Troy Collins.

7. The petitioner testified that he believed that Mr. Collins was his supervisor. According to the petitioner, his belief was based on the following:

a. When interviewing Troy Collins, Dave Robinson had said he was "looking for somebody to fill a place as being a warehouse supervisor." (Tr. 28: 19-20.)

b. Collins had "told me (petitioner) that he was in charge of deliveries and the warehouse...." (Tr. 34: 16-17.)

c. Collins took charge on the job by "[a]lways jumping in the driver's seat and doing paper work and what have you." (Tr. 29:7-8.)

In his deposition Collins admitted telling the petitioner that Robinson had mentioned "he was looking for somebody he could appoint to warehouse manager" but denied ever telling petitioner that he was his supervisor. (Collins Dep. at 13:11-25.) Having observed petitioner and heard his testimony, I find that Collins did not tell petitioner he was his supervisor. I also do not find credible the petitioner's testimony that Collins did more paperwork. The only difference between petitioner's and Collins' work was best described by petitioner's common-law wife, who testified that the only difference mentioned by petitioner to her was that "Collins always hopped in the truck first to drive." (Tr. 50:5-7.)

8. Troy Collins was not a supervisor for Ownerrent. He held the same position as petitioner, was a co-worker, and had no supervisory responsibilities for Ownerrent or over the petitioner. Petitioner and Collins did identical work. Collins never directed petitioner's work or otherwise supervised him. Dave Robinson scheduled the days petitioner worked. Time sheets for both petitioner and Collins were signed by Dave Robinson or Mike Edwards. Collins and the petitioner often made solo deliveries and worked together only when the deliveries or pickups required two persons. Deliveries were scheduled by Dave Robinson, who also determined whether Collins or petitioner, or both of them, made a particular delivery. The only distinction between Collins' and petitioner's work was that when making deliveries together Collins drove more often than did petitioner because he was quicker to jump in the driver's seat.

9. The petitioner's testimony that he believed Collins to be his supervisor was not credible, and even if he had such a belief it was not a reasonable one.

10. The petitioner's excuse for not reporting the injury to Mr. Robinson or Mr. Edwards within 30 days was that he was "waiting for doctor's word that there was an accident" and "didn't want to file something against somebody that, you know, wasn't their problem." (Tr. 31: 16-22.) Notwithstanding this excuse, the petitioner was conscious of the accident and injury when it happened. According to his own testimony, petitioner experienced immediate pain when the washer fell on him, and the pain kept him from working the next day. Petitioner's testimony shows that he was well aware that he suffered an industrial injury on January 6 or 7 and made a deliberate decision not to immediately advise his employer of the accident.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. The petitioner failed to provide his employer with notice of his alleged injury within the 30 days prescribed by section 39-71-603, MCA, which provides:

Notice of injuries other than death to be submitted within thirty days. 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.

The statute is "mandatory and compliance with its requirements is indispensable to the maintenance of a claim for compensation." *Masters v. Davis Logging*, 228 Mont. 441, 443-4, 743 P.2d 104 (1987) (quoting from *Bender v. Roundup Mining Company*, 138 Mont. 306, 308-9 (1960)).

The petitioner contends that he gave notice to the employer's manager, David Robinson, within the 30 days. I have found, however, that the only notice provided Robinson within the 30 days was that petitioner's back was hurting. Robinson was not told that petitioner's hurting back was related to an injury suffered on the job until more than 30 days after the alleged injury. Notice or actual knowledge that an employee is ill or hurting does not satisfy the notice requirement of section 39-71-603:

It is not enough, however, that the employer, through his representatives, be aware that claimant "feels sick", or has a headache, or fell down, or walks with a limp, or has a pain in his back . . . . There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.

Lee v. State Compensation Insurance Fund, 234 Mont. 197,199-200, 761 P.2d 835 (1988). The employer must have enough information to reasonably alert it that an illness, condition or pain is work-connected. Workers often suffer injuries off the job, and may have pre-existing conditions which periodically flare up. Petitioner worked for Ownerrent for only a short time. Robinson could have reasonably expected that petitioner would have told him that he had been hurt on the job if in fact he had been.

3. Troy Collins' knowledge of the accident cannot be attributed to the employer. Notice to or knowledge of a co-employee does not satisfy section 39-71-603, MCA. *Maki v. Anaconda Copper Mining Co*., 87 Mont. 314, 320-22, 287 P.2d 170 (1930); *Hartl v. Commercial Union Assurance Co.*, 176 Mont. 540, 544, 579 P.2d 1239 (1987). The notice requirement is

satisfied only where someone with supervisory status or authority is notified or has actual knowledge of the injury. *Bender v. Roundup Mining Co.*, 138 Mont. 306,312-3, 356 P.2d 469 (1960).

4. While there may be cases where a co-employee should be deemed an employer's supervisor or agent under a doctrine of ostensible authority, this is not one of them. Ostensible authority must arise, if at all, from statements or actions of the principal which have led the third party to believe that an agency existed. Section 28-10-103, MCA; *Hartt v. Jahn*, 59 Mont. 173, 182, 196 P. 153; *Elkins v. Husky Oil Co.*, 153 Mont. 159, 168, 455 P.2d 329 (1969); *Miller v. Cascade Northern Co.*, 181 Mont 66, 68-9, 592 P.2d 156 (1979).

Ownerrent's supervising agents were David Robinson and Mike Edwards, the manager and assistant manager respectively. The only action or statement attributed to them by petitioner as the basis for his ostensible authority argument was a statement made by Robinson in the job interview of Troy Collins. The statement was that Robinson was looking for someone he could appoint as warehouse manager. Under the circumstances of this case that statement was insufficient to create an ostensible agency. Collins was hired as a driver and delivery man and never designated as a warehouse supervisor. Petitioner was never told by either Robinson or Edwards that Collins was his supervisor or the supervisor of the warehouse. Petitioner's testimony that Collins said he was manager of the warehouse was not credible, and even if Collins made such a statement "[o]stensible authority cannot be proved by the declarations of the alleged agent, whose statements are sought to be charged to the principal," *Northwest Polymeric Inc. v. Farmers State Bank*, 236 Mont. 175, 177-8, 768 P.2d 873 (1989).

Whether ostensible authority existed must be determined from all facts and circumstances surrounding the matter.

"The test is found in a determination of the exact extent to which the principal held the agent out or permitted him to hold himself out as authorized, and what a prudent person, acting in good faith, under the circumstances would reasonably believe the authority to be.

Butler Mfg. Co. v. J & L Imp. Co., 167 Mont. 519, 527, 540 P.2d 962 (1975). The belief that another is an agent must be reasonable. *Kraus v. Treasure Belt Mining Co.*, 146 Mont. 432, 435-6, 408 P.2d 151 (1965). The circumstances in this case are inconsistent with the creation of an ostensible agency. Robinson, not Collins, assigned deliveries, determined work schedules, and signed off on time sheets. Collins performed no supervisory functions. Collins' "jumping" into the driver's seat when he made deliveries does not amount to supervision or provide a basis for petitioner to reasonably believe that Collins was his supervisor.

5. Petitioner cites *Bowerman v. Employment Securities Commission*, 207 Mont. 314, 673 P.2d 476 (1983), as authority for tolling the 30 day notice requirement. Bowerman, however,

involved a latent injury and a statutory requirement that a written claim for compensation be filed within one year of the injury, section 39-71-601, MCA. The injury in this case was patent. The experience of pain at the time of a job-related incident, and the continuation of that pain, are sufficient to put a worker on notice of the "nature, seriousness, and probable compensable character" of the injury. *Schmidt v. Procter & Gamble,* 227 Mont. 171, 176, 741 P.2d 382 (1987). Moreover, the Supreme Court has held that the latent injury doctrine is inapplicable to the 30 day notice requirement of section 39-79-603, MCA. *Reil v. Billings Processors*, 229 Mont. 305, 314, 746 P.2d 616 (1987).

6. Lastly, petitioner suggests that the insurer is estopped from interposing a 30 day notice defense because Ownerrent never specifically informed petitioner of his workers' compensation rights. Estoppel arises, however, only where an employer or insurer "has taken some positive action which either prevents the claimant from making a claim or leads him reasonably to believe he need not file such a claim." *Ricks v. Teslow Consolidated*, 162 Mont. 469, 481, 512 P.2d 1304 (1973) (emphasis added). "[I]t is essential to establish an equitable estoppel that the party sought to be estopped have knowledge that he is misleading the claimant and an intention to mislead the claimant to his detriment." Id. at 487. The doctrine of equitable estoppel applies "when an employer or insurer misleads a claimant by foisting onto the claimant a misinterpretation of the Workers' Compensation Act." *Davis v. Jones*, 203 Mont. 464, 466-7, 661 P.2d 859 (1983). There is no evidence in this case that Ownerrent managers intentionally misled petitioner concerning the need for him to notify them of any on-the-job injury. Rather, petitioner's own testimony shows that he made a deliberate choice not to notify his employer of his injury.

Reynolds v. Workmen's Compensation Appeals Board, 527 P.2d 631 (Cal. 1974), cited by petitioner in support of his estoppel argument, is inapposite. That case involved the application of a lawfully adopted rule of the California Division of Industrial Accidents. The rule required employers to notify employees in writing of possible entitlement to workers' compensation benefits whenever they learned of any on-the-job injury or illness. The employer in that case was aware that claimant had suffered a heart attack at work, and the California Supreme Court held that the rule imposed an affirmative duty on the employer to notify the claimant of the possibility that the heart attack was compensable, thereby estopping the employer from asserting the statute of limitations. There is no similar rule in Montana. Under Montana workers' compensation laws the failure of an employer to educate or inform its employees concerning workers' compensation laws, or to affirmatively solicit claims for compensation, does not satisfy estoppel requirements.

"An employer has no affirmative duty to inform the claimant of the right to file a claim. The duty to act is on the employee."

Schmidt v. Proctor & Gamble, 227 Mont. 171, 175, 741 P.2d 382 (1987). Moreover, the employer in this case was never aware that petitioner's back pain arose while he was working.

7. The insurer's denial of petitioner's claim for compensation was reasonable.

8. Petitioner is not entitled to attorney fees or costs.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The petitioner's claim for compensation for a work-related injury he claims occurred on January 6 or 7, 1993, is barred by section 39-71-603, MCA, on account of petitioner's failure to report his injury to his employer within 30 days.

3. Petitioner is not entitled to a penalty.

4. Petitioner is not entitled to attorney fees and costs.

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

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

DATED in Helena, Montana, this 17th day of November, 1993.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. John C. Doubek
Mr. Daniel J. Whyte

1. The claim was denied on account of petitioner's failure to notify his employer of the alleged injury within 30 days. That denial triggered the present controversy. The sole issue presented is whether the claim is barred by the 30 day notice requirement set forth in section 39-71-603, MCA. The Court therefore makes no determination as to whether or not the petitioner in fact suffered an industrial accident.

2. He also did not report it on his first visit to Dr. Brooke Hunter. See Exhibit No. 1.