

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1993 MTWCC 9**

**WCC No. 9305-6790**

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**GREGORY S. BUCKENTIN**

**STATE COMPENSATION INSURANCE FUND**

**Respondent.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

The trial in this matter was held on Wednesday, September 8, 1993, in Great Falls. Petitioner, Gregory S. Buckentin was present and represented by Mr. Torger S. Oaas. Respondent, State Compensation Insurance Fund by Mr. Thomas E. Martello. The petitioner was the only witness at hearing. The parties stipulated that the Court could consider the deposition testimony of both petitioner and Don Bost. The only exhibit offered and admitted was Exhibit No. 1. Having considered the pretrial order, the testimony presented at trial and through the deposition, the demeanor of Mr. Buckentin and the exhibit, the Court makes the following:

**FINDINGS OF FACT**

1. The petitioner is a construction worker. He worked for Bost Construction (Bost), which is the employer in this matter, for almost 11 years, the last six or seven as a construction foreman.
2. The petitioner filed a claim for compensation stating that he suffered a work-related back injury on December 1, 1992, while working for Bost.
3. On December 1, 1992, Bost was insured by the State Compensation Insurance Fund (State Fund).
4. The State Fund denied liability for the claim on the grounds that petitioner had failed to report the alleged injury to his employer within the 30 day time limit prescribed by section 39-71-603, MCA.
5. According to petitioner, the injury occurred on December 1, 1992, at a construction site at Armington Junction, which is near Belt, Montana. Petitioner was unloading sheetrock when he felt something pull in his lower back. He was immediately aware that he had hurt his back.

6. On December 2, 1992, he told another employee, Dwight Ayers, about the injury but did not report it at that time to his own supervisor, Don Bost.

7. Petitioner continued to work through December 17, 1992. He was then off work from December 18, 1992 through January 4, 1993, due to a shut down of company operations for the holiday period.

8. Petitioner's condition worsened after December 1, 1992. During the week preceding the holiday layoff, he became unable to carry his wallet in his rear pants' pocket because of his pain. During the two week holiday layoff he "laid around home, hoping it would heal up." During the week of December 18, he began experiencing pain radiating into one of his legs. He testified that the radiating pain "was something different than the other times when I pulled my lower back out."

9. Petitioner returned to work on January 5, 1993. On that day he again unloaded sheetrock, which only exacerbated his pain. That same day he called Dr. Thompson to obtain an appointment to see the doctor on January 11, 1993.

10. Petitioner was examined by Dr. Thompson on January 11, 1993.

11. Petitioner told his employer, Don Bost, about his injury on January 11, 1993, which was 41 days after the injury. This was the first notice to the employer.

12. Petitioner openly and honestly conceded that he failed to report his injury to his employer within 30 days. He testified that he did not do so because he had a history of low back pain which had been typically remedied by chiropractic treatment, and he believed that his back condition would improve during the holiday layoff.

13. On December 1, 1992, petitioner was aware of company policy requiring him to promptly report any work-related injury to his employer. He testified that company policy required injuries to be reported as soon as possible. The daily reports he filled out for his employer, including the one for December 1, 1992, had a place to report "problems, delays and accidents." He was aware that injuries to workers were to be reported in the space provided. Petitioner turned the reports in daily when working locally, otherwise weekly.

14. The petitioner had at least three previously reported work-related injuries while working for Bost, including a back injury. All three were reported to the employer within a day or two.

15. The petitioner had a good working relationship with his employer. He talked face-to-face to Don Bost on several occasions between December 1, 1992 and January 11, 1993, but failed to report his injury to Mr. Bost during those conversations.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over the present controversy. *Section 39-71-2905, MCA.*

2. The claimant 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, 743 P.2d 104 (1987) (citing *Bender v. Roundup Mining Company*, 138 Mont. 306, 309, (1960)); accord *Reil v. State Compensation Insurance Fund*, 229 Mont. 305, 706 P.2d 617 (1987).

The petitioner relies on *Bodily v. John Jump Trucking, Inc.*, 250 Mont. 274, 819 P.2d 1262 (1991), to argue that the 30 day notification period did not start until he became unable to work or became aware of the gravity of the injury. The cited case does not support his argument. In *Bodily* the worker suffered repeated trauma in the form of bouncing and jostling while driving a logging truck. Over a six month period the daily bouncing aggravated a pre-existing back condition and caused increasing pain with each work shift until the worker became unable to work. He then he notified his employer of his condition. Unlike *Bodily*, the evidence in this case does not show repeated trauma which only cumulatively causes disability. The claim here arises out of a single incident. Petitioner admitted that he was aware he was injured. He had acute symptoms commencing on December 1, 1992. By the week of December 18, 1992, he was aware that his injury was different from and more serious than the back strains he had previously suffered. Thus, this is not a case in which the nature of the injury "does not lend itself to precise notification," *Id.* at 282.

Petitioner cites *Bowerman v. Employment Security Commission*, 207 Mont. 314, 673 P.2d 476 (1983), as authority for ignoring the 30 day notice requirement. The statute at issue in that case was the one year filing requirement for the written claim for compensation. Section 39-71-601, MCA. The Supreme Court has held that the latent injury doctrine announced in *Bowerman* is inapplicable to the 30 day employer notice requirement. *Reil v. Billings Processors*, 229 Mont. 305, 314, 746 P.2d 616 (1987). Moreover, the injury in this case was patent.

The evidence presented in this case fails to establish any legal excuse for petitioner's failure to comply with the 30 day notice requirement. "[S]imple ignorance of

compensability, absent any evidence of estoppel by the employer or medical disinformation [is insufficient] to toll the notice requirement". **Reil**, 229 Mont. at 314. The claimant was not deterred from timely filing of his claim by any policy or actions of his employer. He was well aware that his employer encouraged prompt reporting of injuries. He had numerous opportunities to notify his employer of the injury within the 30 day period. He could have reported the injury on his daily report. He also could have mentioned it in conversations he had with Mr. Bost between December 1, 1992, and December 31, 1992.

Accordingly the petitioner's claim that he suffered a work-related injury on December 1, 1992 is barred by section 39-71-603, MCA.

3. Petitioner is not entitled to an award of attorney fees or costs.

#### JUDGMENT

1. JUDGMENT is hereby entered in favor of the respondent and the petition is dismissed with prejudice.

2. The claimant failed to provide his employer with notice of his alleged injury within the 30 days prescribed by Section 39-71-603, MCA

3. Petitioner is not entitled to an award of attorney fees or costs.

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

5. Pursuant to ARM 24.5.344 any request for rehearing or for amendment of the Court's decision shall be filed within 20 days.

DATED in Helena, Montana, this 19th day of October, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Torger S. Oaas

Mr. Thomas E. Martello