IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 65

WCC No. 2000-0031

BRIAN BAXTER,

Petitioner,

vs.

UNINSURED EMPLOYERS' FUND,

Respondent/and Third-Party Petitioner,

NORTHERN ROCKIES CONSERVATION COOPERATIVE,

Employer/Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Claimant suffered a work-related injury while working for an uninsured employer. He filled out and signed an accident information sheet when seeking medical care immediately following his injury and understood the medical provider would forward it to his employer. In fact the form was forwarded to the employer, which then returned it to claimant. Claimant, who was initially diagnosed with an ankle sprain, continued to experience difficulty with his ankle. A year and a half after his injury, he was finally diagnosed with a more serious injury, a posterior tibial tendon rupture, which will require surgery. After learning of the seriousness of his injury, he sought advice from an attorney and then filed a claim on an official claim form with the Uninsured Employers' Fund, which denied the claim as untimely. The Department, without notice to the UEF or employer, granted a waiver from the one-year limitation period. However, UEF and the employer requested a contested case hearing, which was thereafter removed to the Workers' Compensation Court following 1999 legislation giving the Court jurisdiction to hear controversies involving waivers.

Held: The accident information sheet contained adequate information under section 39-71-601, MCA, and its submission to the employer satisfied the requirement that it be "presented in writing to the employer, the insurer, or the department, as the case may be." While one interpretation of the presentment requirement is that the claim must be presented to the employer if self-insured under plan one and to the Department if uninsured, the statute does not limit the presentment to plan one employers. Since

uninsured employers are directly liable to a claimant for benefits, § 39-71-515(3), MCA, section 39-71-601, MCA, is reasonably construed as authorizing presentment to employers who are uninsured. The Court is precluded from writing in a restriction limiting employer to self-insured employers only. The claim was therefore sufficient and timely, and claimant is entitled to benefits. Further, the UEF is entitled to indemnification from the employer. Finally necessary to consider the waiver request, the Court notes that the failure of the Workers' Compensation Assistance Bureau to give the employer and UEF notice of claimant's application for a waiver and its action granting the waiver raise grave due process concerns. Notice should and must be given.

Topics:

Administrative Procedure: Notice. Failure of Workers' Compensation Assistance Bureau to give employer and Uninsured Employers' Fund notice of claimant's application for waiver of one-year limitation period and action granting waiver raise grave due process concerns.

Claims: Filing. Accident Information Sheet completed by injured worker when seeking medical care immediately following injury and forwarded to employer contained adequate information under section 39-71-601, MCA (1995) and its submission to employer satisfied statutory requirement that within one year claim be "presented in writing to the employer, the insurer, or the department, as the case may be." Court refuses to read into statute any requirement that employee present claim to *department* rather than employer in cases where employer is not insured.

Claims: Limitations Period. Accident Information Sheet completed by injured worker when seeking medical care immediately following injury and forwarded to employer contained adequate information under section 39-71-601, MCA (1995) and its submission to employer satisfied statutory requirement that within one year claim be "presented in writing to the employer, the insurer, or the department, as the case may be." Court refuses to read into statute any requirement that employee present claim to *department* rather than employer in cases where employer is not insured.

Claims: Notice to Employer or Insurer. Accident Information Sheet completed by injured worker when seeking medical care immediately following injury and forwarded to employer contained adequate information under section 39-71-601, MCA (1995) and its submission to employer satisfied statutory requirement that claim be "presented in writing to the employer, the insurer, or the department, as the case may be." Court refuses to read into statute any requirement that employee present claim to *department* rather than employer in cases where employer is not insured.

Constitutional Law: Due Process: Procedural Due Process. Failure of Workers' Compensation Assistance Bureau to give employer and Uninsured Employers' Fund notice of claimant's application for waiver of one-year limitation period and action granting waiver raise grave due process concerns.

Limitations Periods: Claim Filing: Generally. Accident Information Sheet completed by injured worker when seeking medical care immediately following injury and forwarded to employer contained adequate information under section 39-71-601, MCA (1995) and its submission to employer satisfied statutory requirement that within one year claim be "presented in writing to the employer, the insurer, or the department, as the case may be." Court refuses to read into statute any requirement that employee present claim to *department* rather than employer in cases where employer is not insured.

Statutes and Statutory Interpretation: Inserting or Removing Terms. WCC refuses to read into section 39-71-601, MCA (1995) any requirement that employee of uninsured employer present claim to department rather than employer to satisfy one-year claim filing requirement of statute.

Uninsured Employers Fund: Indemnification. UEF entitled to indemnification from uninsured employer.

¶1 The trial in this matter was held on August 29, 2000, in Kalispell, Montana. Petitioner, Brian Baxter, (claimant), was present and represented by Mr. S. Charles Sprinkle. Respondent/Third-Party Petitioner, Uninsured Employers' Fund (UEF), was represented by Mr. Daniel B. McGregor. With the Court's permission, counsel for Employer/Respondent, Northern Rockies Conservation Cooperative (NRCC), was excused from attending, however, NRCC remains a party to this proceeding and will be bound by the decision of the Court.

¶2 This matter is submitted for decision on Exhibits 1 through 21, the agreement of counsel at trial as to essential, undisputed facts, copies of the depositions of David L. Neumann, D.P.M., Jay Maloney, M.D., and Brian P. Baxter, and brief testimony of the claimant.

¶3 Issues Presented: The parties set forth the following issues in their Pre-Trial Order.

1. Whether a claim was filed within the statutory period of one year per MCA 39-71-601;

2. Whether the Workers' Compensation Assistance Bureau's November 30, 1999 Order Waiving Claim Filing Time was constitutionally invalid.

3. Whether Brian's time requirement should be waived due to lack of knowledge of disability or latent injury.

4. Whether the June 8, 1997, accident is the cause of Brian's present medical condition.

5. If the condition was caused by the 6/8/97 accident, did Brian exacerbate the problem by his subsequent actions.

6. Is the Uninsured Employer's Fund entitled to reimbursement from Northern Rockies Conservation Cooperative for any and all benefits paid with respect to Mr. Baxter's Claim.

(Pre-Trial Order at 2.)

¶4 Having considered the pre-trial order, the testimony presented at trial, the depositions, and exhibits, the Court makes the following:

FINDINGS OF FACT

¶5 On June 8, 1997, while employed by NRCC, claimant twisted his right ankle. He was working in the course and scope of his employment when injured.

¶6 At the time of the injury, NRCC was not covered by Montana workers' compensation insurance.

¶7 On the day after his injury, claimant sought medical care from Dr. Jay Maloney at Prompt Care Center of St. John's Lutheran Hospital in Libby, Montana. He was diagnosed as suffering an "ankle sprain" (Ex. 19 at 1), took a few days off to rest it, and then returned to work. (Baxter Dep. at 22.)

¶8 At the time of his care, claimant filled out and signed an accident information sheet (Ex. 19 at 2-3), which he understood would be forwarded to his employer. The signature date is 9/6/97, but that is a transposition of the date, which was actually 6/9/97. (Baxter Dep. at 23.) The document states the name and address of his employer, the date of the accident, and the fact that the injury was due to employment. It also provides the place and a description of the accident. It states that the accident was reported to the NRCC.

¶9 St. John's forwarded the accident information sheet to NRCC by mail. The envelope in which it was sent is postmarked June 30, 1997. (Ex. 2.)

¶10 The accident information sheet was received by NRCC in early July. NRCC put it into a new envelope and mailed it to claimant. (Baxter Dep. at 24, 26; Ex. 1.)

¶11 Claimant discussed his injury with John Weaver (Weaver), his supervisor at NRCC, upon returning to work approximately eight to fourteen days following his injury. (*Id.* at 27.) Weaver told claimant that NRCC did not have workers' compensation insurance and that it was not required to provide coverage. (*Id.*)

¶12 Claimant continued working during the summer of 1997. While believing he had only sprained his ankle (*id.* at 41), he continued to experience ankle pain. Dr. Randall Sechrest saw him in February 1998, prescribed an orthotic and referred him to physical therapy. (Ex. 21.) Over the next several months, claimant had a number of physical therapy sessions. (*Id*.) However, his pain continued.

¶13 Finally, in December 1998, claimant was seen by Dr. David L. Neumann, a podiatrist, who diagnosed a posterior tibial tendon rupture which had not been previously diagnosed. In a November 4, 1999 letter, Dr. Neumann described claimant's history and his diagnosis:

> Mr. Brian Baxter initially consulted with me regarding his ankle problem on December 3, 1998. He was a forty five year old male who sometime in June of 1997 appeared to have suffered a sprained ankle. He was treated by Dr. Sechrest last April and had several x-rays of his right foot at that time. Radiographs revealed no obvious fractures or dislocations of his ankle. He had sought other medical advice. They all felt that Brian had just sprained his ankle and this would be just an acute injury and would gradually heal over time.
>
> The problem persisted and Brian came in to see me. He reports the history for the next year and a half. Is having great difficulty in performing at normal proficiency, those work related tasks that he was doing prior to his injury before June of 1997. This included less efficiency and slower work performance which involves duties requiring hiking in the mountains over long periods of time on various terrain, five to ten mile hikes a day for his survey work.
>
> My assessment of Brian's foot problem was a posterior tibial tendon rupture which had not been previously diagnosed. This left him with a deformity of his foot called a Pes Vagal Planus foot deformity which is limiting him in his duties at his work.
>
> In my opinion based upon the patient's history he had a lack of knowledge of his disability until my examination on 12-3-1998. This is reflected in his history and the previous medical providers diagnosed a sprained ankle when this was probably a ruptured posterior tibial tendon to begin with.
>
> Brian Baxter is now left with a Pes Vagal Planus deformity secondary to this posterior tibial tendon rupture. This will not correct itself unless a surgical procedure is applied, this being a flat foot type procedure. This injury was basically concealed from Brian's knowledge due to the lack of diagnosis until he came to this office. The patient assumed that he had a bad sprain and it was just not healing up.

(Ex. 19 at 8-9.)

¶14 When questioned about Dr. Maloney's diagnosis of sprain, Dr. Neumann testified that it is not unusual for an orthopedist to miss a posterior tibial tendon rupture. (*Id.* at 19.)

Moreover, Dr. Neumann did not disagree with the conservative treatment which had been prescribed by Dr. Maloney (*id.* at 27) and indicated that he would have also started with a similar treatment. However, since claimant's condition has worsened, Dr. Neumann now recommends surgery to correct claimant's foot condition. (*Id*. 34.)

¶15 After Dr. Neumann's diagnosis, claimant consulted an attorney and was advised to file a workers' compensation claim. In the summer of 1999, he filled out a first report. (Baxter Dep. Ex. 12.) That report was received by the Department of Labor on July 16, 1999, and forwarded to the UEF for adjusting. (*Id.*)

¶16 On August 26, 1999, the UEF denied the claim based on claimant's failure to file within one year of the injury. (Ex. 11.)

¶17 Thereafter, the claimant applied to the Department for a waiver of the one-year statute of limitation. On November 30, 1999, the Workers' Compensation Assistance Bureau issued a waiver. The waiver was issued without prior notice to either NRCC or the UEF.

¶18 When the UEF learned of the waiver, it requested a contested case hearing. Before a hearing could be held, the 1999 Legislature amended the waiver procedure, adding a new subsection (3) to section 39-71-601, MCA. The subsection provides:

> (3) Any dispute regarding the statute of limitations for filing time is considered a dispute that, after mediation pursuant to department rules, is subject to jurisdiction of the workers' compensation court.

The Legislature made the section retroactive "unless a party elects to remain in the contested case process at the department." 1999 Montana Laws, ch. 442, § 31(1). The parties in this case were notified of their right to remain in the contested case process before the department but did not elect to do so. Thus, jurisdiction to hear the waiver issue was transferred to the Court.

¶19 Claimant's current condition, a posterior tibial tendon rupture, is the result of his injury on June 8, 1997. Claimant understood initially that he had suffered only an ankle sprain. He did not appreciate the seriousness of his injury or the need for surgery until December 1998.

CONCLUSIONS OF LAW

¶20 The claimant's injury occurred on June 8, 1997, therefore the 1995 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶21 The 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, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.,* 183 Mont. 190, 598 P.2d 1099 (1979).

¶22 Section 39-71-601, MCA (1995), requires that any claim for compensation must be made in writing within one year of the injury but also provides that the one-year limitation may be waived under certain circumstances. The section provides:

> **39-71-601. Statute of limitation on presentment of claim -- waiver.** (1) In case of personal injury or death, all claims must be forever barred unless signed by the claimant or the claimant's representative and presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act on the claimant's behalf.
>
> (2) The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:
>
> (a) lack of knowledge of disability;
>
> (b) latent injury; or
>
> (c) equitable estoppel.

As noted in paragraph 18, the 1999 Legislature added a subsection (3), giving the Court jurisdiction over waiver disputes.

¶23 Claimant can avoid the harsh effect of the limitations period only if the accident information sheet filled in and signed by the claimant on June 9, 1997; mailed by the medical provider to the employer; and then returned by the employer to the claimant without comment, satisfied the claim filing requirement, or I grant a waiver.

¶24 In *Partin v. State Compensation Insurance Fund*, WCC No. 9605-7605, decided March 14, 1997, I discussed what is required to satisfy the written claim requirement under section 39-71-601, MCA. Claimant Partin tripped and fell over a power cord, hitting his head and right shoulder. He filled out an Association of Service Contractors (AOSC) accident report and testified he submitted the report to his employer well within the one-year requirement. I found that if the claimant's testimony was true, the AOSC accident report satisfied the claim filing requirement. I rejected a contention that a claim must be filed on a particular form or contain all of the information set out in the Department's first report form:

> The hearing officer also erred in suggesting that an *official* workers' compensation claim form must be filed. That contention was expressly rejected in *Weigand v. Anderson-Meyer Drilling Co.,* 232 Mont. 390, 393, 758 P.2d 260, 261-62 (1988). In both *Weigand* and *Scott v. Utility Line Contractors,* 226 Mont. 154, 157, 734 P.2d 206, 208 (1987), the Supreme Court held that a claim need not be submitted on any particular form. It need only contain information which is sufficient to inform the employer or insurer of the nature and basis of the possible claim, *Weigand at* 157,

734 P.2d at 262, and to enable it to investigate the claim and, if necessary, prepare a defense, *id*. and *Scott* at 157, 734 P.2d at 208.

Partin at 17.

¶25 In this case, the accident information sheet was in writing and signed by the claimant. It listed the date and time of the accident. Claimant described the accident as occurring while "hiking up slope and twisted ankle in small depression in ground." (Ex. 19 at 2, capitalization in the original.) He identified the ankle as the part of the body injured. The accident information sheet provided the injured worker's name and specifically noted the injury was due to employment. It provided ample information for the employer to readily identify the worker and investigate the claim. I conclude the accident information sheet satisfies the written claim requirement of section 39-71-601(1), MCA.

¶26 Supreme Court decisions applying section 39-71-601, MCA, support my conclusion. Relying on *Scott v. Utility Line Contractors,* 226 Mont. 154, 157, 734 P.2d 206, 208 (1987), the Supreme Court in *Weigand v. Anderson-Meyer Drilling Co.,* 232 Mont. 390, 394, 758 P.2d 260, 262 (1988), stated that the purpose of section 39-71-601, MCA, is to provide the **employer** with notice of the industrial accident so the employer can investigate the claim and if necessary prepare a defense. In *Scott* the Court found that a written employer's first report prepared with the claimant's assistance within one year of the accident and setting out the claimant's name, social security number, address, date of birth, wages, accident information, the identity of witnesses, and treatment information, satisfied section 39-71-601, MCA (1981). In *Weigand*, the employer prepared the employers' first report, also with claimant's assistance, within a year of the accident. However, the insurer argued that a claim form specifically published for claimants to fill out (Form 54) is the exclusive method by which a claim may be submitted. The Court rejected the argument and again held that the employers' first report satisfied section 39-71-601, MCA (1981).

¶27 The UEF contends that even if the claim is satisfactory, other requirements of the section are not met. First, it contends that it was not submitted *by the claimant*. Second, it contends that claimant was required to file the claim with the Department and that his sending a claim to the employer was insufficient. Neither argument is persuasive.

¶28 Section 39-71-601, MCA, does not specify **how** the claim must be sent or given to the employer, insurer, or Department. It requires only that the claim must be signed by the claimant (it was) or his representative and **presented** to the employer, insurer, or Department. The fact that St. John's Hospital put the claim in the mail for claimant was sufficient to present the claim to the employer.

¶29 The UEF's second contention raises a more difficult issue. The language of the section requires that the claim be presented "to the employer, the insurer, or the department, **as the case may be**." The UEF relies on the bolded language, arguing that where an employer

is uninsured the claim must be presented to the Department. That is certainly one possible interpretation of the section since employers may be self-insured under Plan 1, section 39-71-2101 et. seq., MCA, and the reference to employer might be interpreted as referring to cases in which the employer is a Plan 1 self-insured. However, the section refers to "employer" without qualification, i.e., without designation of the employer as a Plan 1 self-insured. Where the employer is neither insurer nor self-insured, it is nonetheless liable for workers' compensation benefits. Section 39-71-515, MCA, provides in relevant part:

> **39-71-515. Independent cause of action.** (1) An injured employee or the employee's beneficiaries have an independent cause of action against an uninsured employer for failure to be enrolled in a compensation plan as required by this chapter.
>
> (2) In such an action, prima facie liability of the uninsured employer exists if the claimant proves, by a preponderance of the evidence, that:
>
> (a) the employer was required by law to be enrolled under compensation plan No. 1, 2, or 3 with respect to the claimant; and
>
> (b) the employer was not so enrolled on the date of the injury or death.
>
> (3) It is not a defense to such an action that the employee had knowledge of or consented to the employer's failure to carry insurance or that the employee was negligent in permitting such failure to exist.
>
> (4) **The amount of recoverable damages in such an action is the amount of compensation that the employee would have received had the employer been properly enrolled under compensation plan No. 1, 2, or 3.**
>
> (5) A plaintiff who prevails in an action brought under this section is entitled to recover reasonable costs and attorney fees incurred in the action, in addition to his damages. [Emphasis added.]

Thus, the statute may reasonably be read as encompassing the filing of a claim with the uninsured employer, as well as with a self-insured employer. In light of the failure of the section to delimit the filing requirement to self-insured employers, and the prohibition against courts inserting additional requirements into a statute, section 1-2-101, MCA ("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."), I construe the "as the case may be" language as permitting the filing of a claim with the uninsured employer. Thus, the submission of the accident information sheet to NRCC satisfied the filing requirement of section 39-71-601(1), MCA (1995), and was timely thereunder.

¶30 Since I have found that claimant suffered a job-related injury on June 8, 1997, and filed a timely claim, I need not consider whether the one-year limitations period should be waived. However, as argued by the UEF, I note that the failure of the Workers' Compensation Assistance Bureau to give the UEF and employer notice of the application and notify them it was granting the waiver raises grave due process concerns. Notice to adverse parties is an essential part of due process. While the Bureau's waiver is not final and is subject to a hearing should one be requested, without notice a party cannot effectively and timely exercise its right to contest the waiver application or seek a hearing. Notice should have and must be given to the employer, the insurer, or the UEF, as the case may be.

¶31 Finally, I consider claimant's request for attorney fees. I addressed a similar request in *Uninsured Employers' Fund v. Helstowski/Auto Financing USA,* 2000 MTWCC 29, paragraph 33:

> The remedies this Court can order are limited to those provided by statute. While there is statutory provision for an award of attorney fees against an insurer which has unreasonably withheld benefits, §§ 39-71-611, -612, MCA (1997), there is no corresponding statute for an award of attorney fees against an employer, at least in a proceeding in the Workers' Compensation Court. Section 39-71-515 (5), MCA (1997), does make provision for an award of costs and attorney's fees against an uninsured employee [sic] but that section is limited to an independent cause of action brought by the employee in district court. Such actions are within the exclusive jurisdiction of the district court. Thus, this Court lacks jurisdiction to order Borup to pay claimant's attorney's fees in this case. Claimant will have to seek his fees in district court.

The motion to amend the Pre-Trial Order to request attorney fees is denied as it is both late and futile.

¶32 Pursuant to section 39-71-504 (1)(b), MCA (1995), the UEF is entitled to be indemnified for all reasonable benefits it pays claimant. The section provides:

> **39-71-504. Funding of fund -- option for agreement between department and injured employee.** The fund is funded in the following manner:
>
> (1)(a) The department may require that the uninsured employer pay to the fund a penalty of either up to double the premium amount the employer would have paid on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 or $200, whichever is greater. In determining the premium amount for the calculation of the penalty under this subsection, the department shall make an assessment based on how much premium would have

been paid on the employer's past 3-year payroll for periods within the 3 years when the employer was uninsured.

(b) **The fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.** [Emphasis added.]

¶33 Since claimant has prevailed, he is entitled to his costs.

JUDGMENT

¶34 1. Claimant filed a timely claim for compensation. His claim is **not** barred by section 39-71-601, MCA (1995).

¶35 2. On June 8, 1997, claimant suffered an industrial injury. Since his employer was uninsured, the UEF is liable to claimant for compensation and medical benefits to the same extent as an insurer. Section 39-71-503(1)(a), MCA (1995).

¶36 3. Northern Rockies Conservation Cooperative shall indemnify and reimburse the UEF for all reasonable benefits UEF pays to the claimant on account of his June 8, 1997 injury.

¶37 4. Petitioner is entitled to costs pursuant to section in accordance with ARM 24.5.343.

¶38 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶39 6. Any party to this dispute may have 20 days in which to request a rehearing from these findings of fact, conclusions of law and judgment.

DATED in Helena, Montana, this 20th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. S. Charles Sprinkle
Mr. Daniel B. McGregor
Date Submitted: August 29, 2000