IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 34

WCC No. 9903-8171

JOSEPH ROBERT DAVIS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

DAVIS EXCAVATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Owner-operator having elected coverage on himself with State Fund failed to notify the insurer within thirty days of his back injury, as required by section 39-71-603(2), MCA (1997). Insurer denied claim on that basis.

Held: Where insurer had for several years undertaken to provide policy-holders with notice of important statutory changes and coverage requirements, but did not notify claimant a covered "owner" must inform the insurer, not just the employer, within 30 days of injury, the insurer was equitably estopped from asserting the limitations period.

Topics:

Constitutions, Statutes, Regulations and Rules: 39-71-603, MCA (1997). Insurer denied claim on ground that owner-operator, who was himself covered under WC policy, failed to notify insurer of injury within 30 days, as required by 39-71-603(2), MCA (1997). Where insurer had for several years undertaken to provide policy-holders notice of important statutory changes and coverage requirements, but did not provide notice that a covered "owner" must inform insurer, not just employer, within 30 days of injury, insurer was equitably estopped from asserting limitations period.

Claims: Notice to Employers or Insurer. Insurer denied claim on ground that owner-operator, who was himself covered under WC policy, failed to notify insurer of injury within 30 days, as required by 39-71-603(2), MCA (1997). Where insurer had

for several years undertaken to provide policy-holders notice of important statutory changes and coverage requirements, but did not provide notice that a covered "owner" must inform insurer, not just employer, within 30 days of injury, insurer was equitably estopped from asserting limitations period.

Estoppel and Waiver: Equitable Estoppel. Insurer denied claim on ground that owner-operator, who was himself covered under WC policy, failed to notify insurer of injury within 30 days, as required by 39-71-603(2), MCA (1997). Where insurer had for several years undertaken to provide policy-holders notice of important statutory changes and coverage requirements, but did not provide notice that a covered "owner" must inform insurer, not just employer, within 30 days of injury, insurer was equitably estopped from asserting limitations period.

Limitations Periods: Notice to Employer. Insurer denied claim on ground that owner-operator, who was himself covered under WC policy, failed to notify insurer of injury within 30 days, as required by 39-71-603(2), MCA (1997). Where insurer had for several years undertaken to provide policy-holders notice of important statutory changes and coverage requirements, but did not provide notice that a covered "owner" must inform insurer, not just employer, within 30 days of injury, insurer was equitably estopped from asserting limitations period.

¶1 The trial in this matter was held on May 9, 2000, in Helena, Montana. Petitioner, Joseph Robert Davis (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent State Compensation Insurance Fund (State Fund) was represented by Mr. David A. Hawkins and Mr. Greg E. Overturf. No trial transcript has been prepared.

¶2 Exhibits: Exhibits 1 through 28 were admitted without objection.

¶3 Witnesses and Depositions: The Court received and will consider the depositions of claimant, Kay Ann Davis, Jay Phillips, and Mary Heare. Those same individuals were sworn and testified at trial.

¶4 Issues: As rephrased by the Court, the following issues are presented:

1. Whether the Court can grant claimant a waiver from the 30-day limit specified by section 39-71-603(2), MCA (1997), for reporting his injury to the State Fund.

2. Whether the State Fund is estopped from denying liability based upon claimant's failure to report his injury to it within 30 days as required by section 39-71-603(2), MCA (1997).

3. Whether claimant is entitled to a penalty and attorney's fees.

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

FINDINGS OF FACT

¶6 Since 1975 claimant has owned and operated an excavation business known as Davis Excavation. He is a sole proprietor.

¶7 Kay Ann Davis (Kay Ann), claimant's wife, handles the "business end" of the company, including all matters related to workers' compensation insurance.

¶8 Davis Excavation has been insured by State Fund since 1980. (Phillips Dep. at 10.) In 1997, claimant elected coverage for himself under the policy. An"endorsement Agreement Electing Coverage for a Sole Proprietor, Working Partner or LLC Member/manager" was effective May 2, 1997. (Ex. 1 at 2; Phillips Dep. at 11.)

¶9 On June 8, 1998, claimant injured his low back. At the time of claimant's injury, the Montana Workers' Compensation Act required claimant to notify the State Fund of his injury within 30 days of the injury. Section 39-71-603(2), MCA (1997). The text of the statute is set out in ¶ 46 in the Conclusions of Law.

¶10 On the evening of June 8, claimant told Kay Ann he was hurt and would probably visit a chiropractor. (J. Davis Dep. at 8; Kay Ann Davis Dep. [hereinafter referred to as K. Davis Dep.] at 5.) Claimant had previously sought chiropractic care for back pain. Initially, claimant "felt it was just a one-day readjustment and back to work type of a deal." (J. Davis Dep. at 14.) However, his pain worsened.

¶11 On June 11, 1998, claimant was treated on an emergency basis at Whitehall Medical Clinic. He described excruciating pain in his left leg. (Ex. 22 at 5.)

¶12 On June 15, 1998, claimant was treated at Orthopedics Associates of Bozeman with an injection and prescription for medication. (Ex. 12 at 6-7.)

¶13 On June 29th, an MRI was taken of claimant's lumbar spine. (Ex. 10 at 4.) On July 9, 1998, Dr. Steven R. Speth, an orthopedic surgeon, reviewed the MRI and diagnosed a lumbar disk herniation at L3-4 lateral and a lateral herniation at L4-5. He recommended surgery at both levels. (Ex. 11 at 5.) Dr. Speth ultimately performed a "Left Lateral L3-4 discectomy" on December 14, 1998. (Ex. 17 at 2.)

¶14 Claimant testified he did not think about workers' compensation insurance immediately following his injury. He initially thought he would be back on his feet within a few days. Then he thought his medical bills would be paid by his health insurance policy.

¶15 Claimant did not personally contact State Fund to report the injury. Communications with the insurer were handled by his wife.

¶16 Kay Ann did not immediately report the injury to the State Fund. During the time immediately following claimant's injury, she was preoccupied with caring for her father, who was hospitalized in Tacoma, Washington. She made several trips to Tacoma.

¶17 Kay Ann also testified that she did not submit the claim to State Fund initially because she believed their premiums might rise. She considered State Fund coverage as applicable to a major injury and, at first, did not think the June 8th injury was "as bad as it was."

¶18 Kay Ann first reported her husband's injury to the State Fund on July 27th, 1998, when she telephoned a "first report" phone number. (K. Davis Dep. at 6-7.) She made the call after the Davis' regular health insurance carrier refused to pay for the MRI because claimant's injury was work related. Kay Ann explained the situation to a State Fund representative. Claimant concedes that the first notice of his injury to the State Fund occurred more than 30 days after his injury.

¶19 Kay Ann received a blank First Report form via e-mail a day or so later. As printed out, the form was too small to complete, so Kay Ann did not complete it immediately. She later had the form enlarged at a Bozeman copy center.

¶20 The First Report form was signed by claimant on August 7, 1998. Kay Ann signed the claim on behalf of the employer. (Ex. 2; K. Davis Dep. at 8.)

¶21 The State Fund received the First Report on August 11, 1998. (Ex. 2.) Kay Ann recalled speaking with Mary Heare (Heare), the State Fund adjuster assigned to the claim, on that date. Heare told her there was a problem with the notice to State Fund, but said she would talk with the State Fund's policy people about whether coverage could be extended.

¶22 In her conversation with Kay Ann, Heare told Kay Ann that information concerning the 30-day reporting requirement would probably be found in the information packet sent employers. In her notes of the conversation, Heare wrote:

> I explained to her [Kay Ann Davis] that I needed to discuss this claim with Joe, as she is the wife and partner of the business I also explained to her that I had some bad news and then referenced 39-71-603(2). She explained that had they known it was so serious they would have notified State Fund sooner. I explained to her that the seriousness of an injury does not determine compensability, it is based on the statutes and the merits of the injury. I indicated to her she will likely find in her employer's packet the information regarding this matter. She indicated she would be checking this as she feels somewhat this should have been explained to her before the incident occurred.

(Ex. 28 at 333.) When Heare spoke with claimant and his wife, she believed employers were provided with an information packet which included a warning of the 30-day notice

requirement under section 39-71-603(2), MCA. She repeated that understanding during her August 12, 1998 interview of claimant:

> My understanding, and I talked to policy services about this yesterday afternoon after I got off the phone with your wife, is that any time a new policy holder is issued a policy with State Fund they are given a package of information. And each update. And my understanding is that information is available in that packet.

(Ex. 5 at 13.)

¶23 Heare and Dennis Small, her immediate supervisor, determined that the claim should be denied for claimant's failure to give the State Fund notice within 30 days. They consulted with Claims Manager Jack Stewart, who concurred.

¶24 By letter dated August 13, 1998, Heare notified claimant that State Fund "will be unable to accept liability for your claim as presented." (Ex. 4 at 10.) She cited the 30-day notice provision of section 39-71-603(2), MCA.

¶25 Prior to the State Fund informing Kay Ann of the notice problem, neither claimant nor Kay Ann was aware that a business owner was required to report an injury to the insurer within 30 days. From his days of construction work, claimant understood a claim must be filed with the insurer within a year of the injury. Kay Ann believed that as long as her husband reported his injury to *her*, as the business manager for the firm, he had a year in which to file a claim with the insurer.

¶26 Kay Ann relied upon State Fund to inform her about "what she was supposed to do" under the policy. She recalled receiving various materials from State Fund over the years, but nothing regarding the 30-day deadline for reporting an injury of a business owner to the insurer.

¶27 The State Fund publishes and provides its insureds with a "State Fund's guide to workers' compensation coverage." (Ex. 4.) The document indicates it was last revised in August of 1996. (Ex. 4 at 1.) Under the heading "Early Report of Injury," the document provides:

> All work-related injuries should be reported. Injured employees must notify their employer of any work-related injuries within 30 days of the accident and then submit a First Report of Injury to us within 12 months of the accident. Employers must report all work-related injuries to us or Department of Labor and Industry within six days of notice of an accident.

(*Id*.) The "guide" does not set out the more stringent reporting requirements applicable to individuals covered by a "Sole Proprietor, Partner or LLC Member/Manager Election Endorsement."

¶28 The record also contains annual notices prepared by State Fund and forwarded to its insureds during the years 1997, 1998, and 1999. (Ex. 24-26.) The 1997 notice was published in May 1997. (Ex. 26.) The first paragraph of the 1997 notice contains the following advisory: "The last part of this letter explains new general information important to all customers. Please take the time to carefully read this letter and notice." (*Id*.) The general information sets out information concerning minimum premiums, an elective medical deductible program, and an "immediate claims reporting" process, which encourages businesses to implement a process for immediately reporting injuries to the State Fund. The notice does not mention the 30-day requirement for reporting injuries of business owners.

¶29 The 1998 and 1999 notices contain similar sentences in the opening paragraph. (Ex. 24-25.) Each encourages business owners to implement an immediate claim reporting process. Neither provides information regarding the 30-day notice requirement applicable to business owners.

¶30 The record also contains a copy of the "Employee Notice" provided by State Fund for posting in the workplace.[(1)] (*See* Ex. 5 to Phillips Dep.) Kay Ann recalled receiving and posting such notices over the years. She testified she did not refer to the notice when this matter arose.

¶31 The "Employee Notice" states:

> Employees should report all on-the-job injuries to their supervisor, insurer, or employer as soon as possible. You must report the accident within 30 days. We recommend you report minor injuries to your employer whether or not you receive medical treatment. You must submit a written claim for benefits within 12 months from the date of the accident. You can submit this form to your employer, your insurer, or the Department of Labor and Industry. After you report the injury, your employer has 6 days to notify the insurer.

(Ex. 5 to Phillips Dep.)

¶32 The Employee Notice makes reference to "sole proprietors" as one of the categories of workers ordinarily "exempt" from workers' compensation requirements, but also states that "[c]ertain employments listed above as exempt may be covered if specifically elected." (*Id*.) The Employee Notice is silent regarding the requirement that a covered "sole proprietor" must report an injury to the *insurer* within 30 days.

¶33 Kay Ann testified that she recently telephoned the State Fund to ask what happens if an *employer* fails to contact State Fund within six days following an *employee's* report of an injury and was told, in effect, "we slap your hand . . . ."

¶34 The State Fund sends out legislative updates to its customers. The record contains a "1997 Legislative Update" provided by State Fund to customers. (Ex. 27.) The document

begins by noting, "The 1997 Legislature made important changes to the workers' compensation laws. The following is a summary of the changes which may effect your policy." (*Id*.) The document does not reference section 39-71-603(2), MCA, presumably because that subsection was added by the *1995* Legislature. (*See* 1995 Laws of Montana, ch. 243, § 9.)

¶35 Jay Phillips (Phillips), a policy services supervisor for State Fund, testified that State Fund prepares legislative updates for customers each year. She stated that a summary of legislative changes in 1995 was provided to enrolled employers with payroll reports. Her policy file does not include a copy of such mailings.

¶36 Neither party offered into evidence a "1995 Legislative Update." Kay Ann recalled receiving legislative updates from time to time from State Fund, but did not recall any reference to the 30-day reporting requirement at issue. Based on her testimony, and lacking the actual 1995 notice, I find that the 1995 notice did not refer to the 30-day reporting requirement for business owners.

¶37 Heare testified that her investigation of the claim included a request for information from the customer service branch of State Fund regarding information provided to policyholders. She stated at deposition:

> I learned that they send periodic mailers to policyholders and that they do legislative updates with policyholders and just the general information that's given to a policyholder when they become a policyholder and then the newsletter that they send occasionally to a policyholder.

(Heare Dep. at 10.) Heare found no evidence of notice to the insured regarding the requirement at issue:

> Again, the only information I have or had at the time that I did my investigation is the general information that is sent to all policyholders which states that they are to contact the insurer or their employer within 30 days.

(*Id*. at 12.)

¶38 Phillips has worked as a policy services supervisor for approximately ten years. (Phillips Dep. at 5.) Phillips knew of nothing from the underwriting department that informed policyholders that a sole proprietor must notify the insurer within 30 days of an injury. (*Id*. at 24.) Phillips testified: "There could be from another department, but I can't specifically, I can't specifically think of anything from underwriting." (*Id*.)

¶39 There is no evidence showing that the State Fund ever notified Davis Excavating of the 30-day reporting requirement for business owners.

¶40 Based on the fact that the State Fund issued legislative updates, I infer and find that it was aware of amendments made by the 1995 legislature to the Montana Workers' Compensation Act, including the amendment requiring business owners to report work-related injuries to the insurer within 30 days.

¶41 I find that in publishing and distributing notices and legislative updates to its insureds, the State Fund intended or expected its insureds to rely on the information contained in those documents.

¶42 Finally, I find that the State Fund has not acted unreasonably in denying the claim in this case. As discussed hereafter, section 39-71-603(2), MCA, on its face provides the State Fund with a defense. Whether the State Fund is estopped from asserting the defense raises complex issues of law and is at least reasonably debatable.

CONCLUSIONS OF LAW

¶43 Claimant's entitlement to benefits is governed by the 1997 version of the Workers' Compensation Act since that version was in effect at the time of his injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶44 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).

¶45 There is no dispute in this case regarding the occurrence of claimant's injury. In addition, the parties agree that claimant did not report his injury to State Fund within 30 days.

¶46 The State Fund denied the claim based on section 39-71-603(2), MCA (1997), which provides:

> If a sole proprietor, partner, manager of a manager-managed limited liability company, member of member-managed limited liability company, or corporate officer covered under this chapter is injured in an accident, the sole proprietor, partner, manager, member, or corporate officer or an appointed designee shall, within 30 days, notify the insurer of the time and location of the accident and the nature of the injury.

The statute is plain and clear on its face and must be applied as written. *In re A.W.,* 1999 MT 42, ¶ 9, 293 Mont. 358, 975 P.2d 1250 (1999). Unless compliance with the requirement is legally excused, the claim in this case is barred.

¶47 The evidence presented at trial shows that neither claimant nor his wife, who acted as business manager, were aware of the requirement at the time of claimant's injury. However, Montana follows the common law maxim that "ignorance of the law is no excuse." *Donovan*

v. Graff, 248 Mont. 21, 25, 808 P.2d 491, 494 (1991); *Rieckhoff v. Woodhull*, 106 Mont. 22, 30, 75 P.2d 56, 58 (1937).

¶48 Claimant argues, nonetheless, that the State Fund is equitably estopped from asserting the bar. The estoppel argument is based on the fact that the State Fund undertook to provide information about policy requirements and legislative changes but did not warn claimant of the 30-day deadline.

¶49 Montana has long recognized the doctrine of equitable estoppel in workers' compensation cases. The doctrine requires six elements:

> (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts;
>
> (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party;
>
> (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon;
>
> (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon;
>
> (5) the conduct must be relied upon by the other party and lead that party to act; and
>
> (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

Selley v. Liberty Northwest Ins. Corp, 2000 MT 76, ¶ 10; *Dagel v. City of Great Falls*, 250 Mont. 224, 234-35, 819 P.2d 186, 192-193 (1991). In *Selley*, however, the second requirement -- that the party to be estopped must have knowledge of the fact at issue - was loosened. In that case, the insurer paid the medical bills of the claimant's treating physician for many years, then stopped payments when it learned that the physician did not have hospital privileges and therefore did not qualify as a treating physician. The Supreme Court held that even though the insurer did not have earlier, actual knowledge that the physician lacked hospital privileges, it was in a better position to discover that fact than claimant and therefore should be estopped from invoking the statutory requirement of hospital privileges.

¶50 *Selley* of course involved a factual matter. Similarly, some cases involving estoppel to assert the time limitation for filing a written claim have involved factual matters. *E.g., Lindblom v. Employers' Liability Assur. Corp.,* 88 Mont. 488, 295 P. 1007 (1930) (insurer

estopped from asserting time limitation for claim filing where claimant led to believe his employer's agent was taking care of the claim); *McCoy v. Mike Horse Mining & Milling Co.*, 126 Mont. 435, 437, 252 P.2d 1036, 1037 (1953) (insurer estopped from asserting time limitation where company doctors told claimant there was nothing wrong with him "that occurred as a result of the accident"). However, other cases have involved representations concerning the law.

¶51 In *Levo v. General-Shea-Morrison*, 128 Mont. 570, 280 P.2d 1086 (1955), the employee suffered a heart attack at work. During his recovery, he received information from the company's personnel manager and attorney that heart attacks were not covered by workers' compensation. The Supreme Court held that the insurer was equitably estopped "from contending that a claim was not filed in time." *Id.*, 128 Mont. at 571, 280 P.2d at 1087. The Court explained:

> [T]he advice here given by the assistant project manager and personnel director and the advice given by a lawyer who the claimant thought to be a company lawyer did not permit the claimant in good conscience to file a claim. Ignorance based on completely erroneous advice from persons who are directly connected with the affairs of the employer can be even more profound and dangerous in its consequences than ignorance based on no advice at all. Such advice effectively prevents a conscientious employee from filing a claim for an award or at least until different advice of equal or higher standing is received. According to the record the conclusion is inescapable that claimant was actually dissuaded from filing a claim by the agents of defendant.

Id., 128 Mont. at 576, 280 P.2d at 1089-90. Regarding the insurer's contention that the estoppel doctrine was inapplicable because the representation concerned a matter of law which the claimant was responsible for ascertaining, *id.* at 576, 280 P.2d at 1090, the Court responded:

> [E]ven if we were to ascribe to the contention that it is solely a question of law, it would be a very narrow construction of the statutes regarding Workmen's Compensation if this court were to say that a claimant should find it his duty to examine all the technicalities concerning the Workmen's Compensation Act and come to a right conclusion while the employer and the insurance carrier, whose responsibilities are far greater, should be excused because of their misinterpretation of the Act itself, which misinterpretation the employer in turn foisted off upon the claimant.

Id., 128 Mont. at 576-577, 280 P.2d at 1090. Recognizing that its decision may be an extension of existing law of estoppel, the Court observed, "Certainly if there is any circumstance wherein the doctrine of equitable estoppel should be extended, it is in matters concerning an injured workman, where the law itself says that the Workmen's

Compensation Act shall be construed liberally." *Id.*, 128 Mont. at 577, 280 P.2d at 1090. While the liberal construction rule has been repealed, the recent case of Selley indicates to this Court that in workers' compensation matters the superior knowledge of an insurer or employer is a factor the Court will consider in fashioning and applying the doctrine of estoppel.

¶52 *Yurkovich v. Industrial Accident Board*, 132 Mont. 77, 314 P.2d 866 (1957), involved estoppel based upon conduct of the Industrial Accident Board. The claimant, a mine-worker, was injured in the presence of his foreman. He completed a portion of the form used by the employer to report the injury to the Board. Within the limitations period, the claimant wrote to the Industrial Accident Board

> . . . for information, giving the Board his name; that he was injured on January 19, 1955, at the Brophy mine; that he believed the mine had made a report to the Board; that the fall of rock on his back had hurt his neck and back, and asked if he could have X-rays taken. Plaintiff also asked the Board "would you please inform me as [to] what I am to do about it I thank you kindly."

Id., 132 Mont. at 81, 314 P.2d at 869. A secretary to the Board responded, informing claimant he was entitled to medical treatment, enclosing forms for submitting medical reports and medical bills, but giving "no information in regard to the form required in relation to compensation . . . ." *Id.*

¶53 The worker in *Yurkovich* did not present a claim for compensation within 12 months of his injury. The Supreme Court applied the doctrine of estoppel, explaining as follows:

> While it may not be the duty of the Board to go out and solicit claims, as intimated by counsel for such Board, yet we deem it the duty of the Board to fully advise an industrial injured workman, when he comes to the Board as here and asks for information, as to what he should do. The Board as trustee of the funds which are provided for the benefit of such workmen as beneficiaries, and when dealing with the beneficiary, is under a legal and moral duty to deal fairly with him and to disclose to him all matters affecting his interests, either beneficially or otherwise.

Id., 132 Mont. at 81-82, 314 P.2d at 869. This case is noteworthy in three respects. First it involved information concerning the law, i.e., the requirements for filing a claim. Second, the Court found that the Board owed claimants a higher duty on account of its administrative responsibility for workers' compensation. Third, the Court applied the doctrine of estoppel based on an omission rather than commission.

¶54 *Davis v. Jones*, 203 Mont. 464, 661 P.2d 859 (1983), involved a ranch hand who lost consciousness while chopping ice, then died at home of a heart attack. When the worker's wife went to the employer for her husband's last pay check, she asked about possible insurance coverage. The employer stated he had no responsibility because her husband

had died at home. As in the cases discussed above, the representation involved a matter of law (the statutes as interpreted by the employer) and, as in the other cases, the Supreme Court found that the employer and insurer were estopped from asserting the time limitation for filing a claim since they had mislead the claimant's beneficiary.

¶55 On the other hand, decisions of the Supreme Court hold that the employer and insurer are not required to solicit claims or take affirmative action to inform claimants concerning the requirements for filing a claim. E.g., *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Wassberg v. Anaconda Copper Company*, 215 Mont. 309, 667 P.2d 909 (1985). In *Wassberg* the Court attempted to clarify the rules emerging from earlier decisions. It disagreed with language in prior decisions suggesting that silence on the part of an employer or insurer, i.e., failure to inform about a claim-filing deadline, could give rise to estoppel. The Court drew an "important distinction between a claimant's mistake and an employer-induced mistake." *Id*., 215 Mont. at 319, 697 P.2d at 916 [emphasis in original]. According to the Court, cases such as *Levo* and *Davis* involved an erroneous assertion of law on the part of the employer or insurer which lulled the claimant into not filing a claim. *Id*. The Court viewed other cases, such as *Ricks*, as establishing that an employer or insurer has no duty to solicit a claim, stating "[t]he duty to act first is not on the employer, it is on the employee." *Id.*, 215 Mont. at 320, 697 P.2d at 916.

¶56 Application of estoppel principles require a balancing of interests. In *Wassberg* the Court set out the respective interests and considerations:

> On the one hand, there are the rights of employers to be protected from old claims that are difficult, or impossible to investigate. Also at stake is the rule that employers should not be saddled with the duty to actively solicit claims -- this involves more a question of policy than an interpretation of law, and we do not feel the courts are the appropriate place to make this determination. Finally, we must recognize that a finding of estoppel brings with it an "attendant implication of bad faith." [Citation omitted.]
>
> On the other hand, claimants are at a comparative disadvantage to employers or insurers in legal sophistication. This situation gives the employer many opportunities to mislead. To protect the rights of often innocent employees, we must set down a rule that insures them good faith in relations with employees and claimants.

Id., 215 Mont. at 320-21, 697 P.2d at 916.

¶57 The *Wassberg* Court ruled that "mere understandings" of a claimant, without evidence of an assertion on the part of the employer or insurer, should not give rise to estoppel. In *Wassberg*, the claimant's understanding that he would be protected by filing an accident *report*, as opposed to a claim for compensation, was insufficient to create estoppel.

¶58 The cases discussed above teach several lessons which must be applied in the present case. First, despite the cardinal rule that "ignorance of the law is no excuse," an insurer which misleads a claimant as to matters of law concerning requirements for filing a claim is estopped from imposing a defense based on the law it misrepresented. Second, where an insurer furnishes the claimant with information which is incomplete it is estopped from relying on a law which fairly should have been a part of the complete information.

¶59 In this case, the State Fund made no specific mention in its communications with Davis Excavating of the requirement that a business owner notify the State Fund of an injury within 30 days. However, in light of the other information it furnished its customers, its omission was misleading. In notifying Davis Excavating and claimant that the injury must be reported to the employer within 30 days, and saying nothing of reporting to the insurer within 30 days, the Davises were misled into believing that reporting to the employer within 30 days was sufficient. Moreover, the legislative updates distributed by the State Fund in 1995 and 1997 affirmatively informed its insureds of significant changes in workers' compensation law. Omitting mention of the new, 1995 requirement that business owners notify the insurer, not just the employer, within 30 days of an injury, was misleading since insureds, including the Davises, could reasonably assume that the notice covered all significant changes effecting them.

¶60 The facts of this case show more than the mere silence discussed in *Ricks* and *Wassberg*. The State Fund made affirmative representations which its insureds could reasonably believe were complete; they were not and were therefore misleading and false. At least five of the six elements for estoppel are present: (1) there was a combination of representations and silence amounting to a concealment of the 30-day notice requirement of section 39-71-603(2), MCA (1997); (2) the State Fund was aware of the 30- day notice requirement; (3) the claimant was unaware of the 30-day notice requirement; (4) the State Fund intended that its insureds, including claimant, rely upon its notices and legislative updates; and (6) the claimant is in fact worse off as a result of his ignorance that his claim would be barred unless he gave notice to the State Fund within 30 days.

¶61 The only element which remains to be addressed is factor 5, which is the reliance factor. The State Fund correctly points out that both the "Guide to workers' compensation coverage" and the "Employee Notice" state that employers must notify the insurer or Department of Labor and Industry of an employee's injury within 6 days of the injury. Had claimant and his wife heeded this notice, then the 30-day notice issue would never have arisen.

¶62 There are two problems with the argument. First, it concerns the employer giving notice, not the claimant, and it applies to all cases, not just cases involving injured business owners. Claimant was in fact both employer and employee, but as a claimant he

was only told he had to notify the employer (himself) within 30 days. Second, the notice did not specify any consequences *to claimant* should the matter not be reported within the 6 days. It is not reasonable to assume that the failure of an employer to report an injury to the insurer within 6 days bars the claimant's claim for benefits. Indeed, that proposition is on its face untrue in all cases involving non-owner employees. Third, there is no provision of law barring a claim for compensation based on the employer's failure to report the injury to the insurer within 6 days. I therefore conclude that the 6 day-notice provision in the two documents did not fairly warn claimant that his claim might be barred if he did not notify the State Fund of his injury within 6 days. Therefore, the notice does not undermine my finding that claimant relied on the State Fund's failure to notify him of the 30-day notice requirement. I find the fifth factor, reliance, is present and that all elements for estoppel are satisfied.

¶63 The Supreme Court has stated that "[e]quitable estoppel must be established by clear and convincing evidence." *Selley, supra* at ¶ 10; *Beery v. Grace Drilling*, 260 Mont. 157, 163, 859 P.2d 429, 433. Although application of equitable estoppel to the precise facts of this case is novel, the evidence proving the facts underlying my decision is clear and convincing.

¶64 At trial the claimant also argued that denial of his claim would deny him due process. The issue is not stated in the Pretrial Order, and is therefore not properly before the Court. Moreover, it is unnecessary to reach this argument.

¶65 Claimant has requested a penalty and attorney's fees on the allegation of unreasonable insurer conduct. § 39-71-611, -2907, MCA (1997). I find the application of the doctrine of equitable estoppel sufficiently novel in this case to prevent a finding of unreasonable conduct on the part of State Fund.

JUDGMENT

¶66 1. State Fund is estopped from asserting the 30-day notice requirement of section 39-71-603(2), MCA (1997), under the circumstances of this case, rendering claimant's notice to the insurer timely. Claimant is therefore entitled to compensation and medical benefits with respect to his June 8, 1998 injury, which benefits shall be paid by the State Fund. The parties have not asked the Court to determine the amount of benefits due.

¶67 2. Claimant is entitled to costs in an amount to be determined by the Court, in accordance with ARM 24.5.343.

¶68 3. 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.

¶69 4. This Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 9th day of June, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Mr. David A. Hawkins
Submitted: May 9, 2000

1. Section 39-71-401(6), MCA (1997) provides:

> Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of workers' compensation insurance. . . . The sign must be provided by the department, distributed through insurers or directly by the department, and posted by employers in accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a $50 fine for each citation.