IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 92

WCC No. 9310-6908

SCOTT DAVIS

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent Insurer for

THE CITY OF KALISPELL

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on September 12, 1994, in Kalispell, Montana. The petitioner, Scott Davis (claimant or Davis), was present and represented by Ms. Laurie Wallace. Respondent, Montana Municipal Insurance Authority (MMIA), was represented by Mr. Leo S. Ward. Claimant, Lanny Scovel, Jerry Diegal, Leonard Hogan and Dick Brady testified. Additionally, the depositions of Scott Davis, Lawrence Iwersen, M.D. and James Kiley, M.D. were submitted for the Court's consideration. Exhibits 1 through 4, 7 and 9 were admitted into evidence without objection. Exhibit 5 was admitted over objection but for limited purposes. Pages 18-21 of Exhibit 6 and pages 33-37, 43 and 47 of Exhibit 8 were also admitted over objection.

Issues Presented: This case involves Mr. Davis' claim that he suffered an industrial injury to his low-back in late October or early November of 1991. The MMIA timely denied Davis' claim. In this proceeding it asserts that claimant failed to notify his employer of any accident within the thirty days provided by section 39-71-603, MCA. MMIA further contends that Davis did not suffer an industrial injury.

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

1. Claimant lives in Kalispell, Montana. His present age is thirty-nine.

2. Claimant graduated from high school in 1974. He thereafter served in the U.S. Army for two years. After military service he worked at various laboring and heavy equipment operator jobs.

3. In 1983, while working as a heavy equipment operator for Royal Logging, claimant injured his neck and low-back. He reported the injury and filed a claim for compensation.

4. Following his 1983 injury, the claimant experienced low-back pain and pain radiating into his left leg. (Ex. 1 at 113.)

5. On March 28, 1985, claimant underwent low-back surgery. The surgery was performed by Dr. Albert Joern, an orthopedic surgeon, at the Kalispell Regional Hospital. Dr. Joern carried out a bilateral hemilaminectomy and foraminotomy at the L4-5 level, and a complete discectomy at the L4-5 level. He also performed a posterior interbody fusion at L4-5 level and a left-side posterolateral fusion of the L4 to S1 vertebrae. Dr. Joern's operative report is Exhibit 1 at pages 116 through 118. A summary is found at page 113 of Exhibit 1.

6. In August of 1987, claimant settled his 1983 claim for 500 weeks of disability benefits at his maximum rate.

7. Claimant contends that he suffered another injury to his back in late October or early November of 1991, while operating a street sweeper for the City of Kalispell. He testified that while standing on the top of the street sweeper, he slipped on a wet spot and fell to the ground, landing on his buttocks. He claims that he reported the accident to his employer on the same day. According to claimant, he thereafter experienced severe low-back pain, which had not been the case before the injury, and discovered that the 1985 fusion of the low-back had "busted". He testified that he was not previously aware that the fusion had "come apart" or "busted".

8. The MMIA denies that claimant reported any injury within the thirty days provided by section 39-71-603, MCA (1989) and denies that claimant suffered an industrial accident in November 1991. It also contends that even if an industrial accident occurred, claimant's present condition is unrelated to the incident.

9. Claimant testified that after the accident he returned to the city shop at 2:00 or 2:30 p.m. According to claimant, he told two co-employees, Lanny Scovel and Jerry Diegal, that he had just fallen off his sweeper and injured his back, and they told him to report the injury on his time card. Claimant further testified that he noted his injury on the time card and told his immediate supervisor, Leonard Hogan (Hogan), that he had fallen off his sweeper and injured his back. Claimant states that he asked to take the rest of the day off due to his back, but Hogan told him to stay around the shop area and do light work such as cleaning windows until the end off the day. Hogan testified at trial and denied that any conversation

ever occurred; denied that claimant reported the injury; and denied any knowledge of the alleged injury until several months later when claimant filed a claim.

10. Claimant did not file a written claim for compensation until April 10, 1992. (Davis Dep. Ex. 1.)

11. The time cards for late October and early November 1991 might well be dispositive of claimant's assertion that he reported the injury on his time card. Those cards, however, have been destroyed. Dick Brady, the Public Works Superintendent for Kalispell, testified that he threw out a drawer full of time cards, representing several years, after the city computerized its payroll information and the cards were no longer needed. Mr. Brady's testimony was credible and no adverse inference is drawn on account of the unavailability of the time cards.

12. Two Kalispell employees testified that they recalled claimant mentioning that he had injured himself. One of the employees, Lanny Scovel, testified that he told claimant to note the injury on his time card. Neither observed him actually filling out the time card. Both witnesses testified that claimant approached them and brought the incident to their attention after he had been terminated from his employment and was already involved in a dispute over his claim. In light of other testimony and circumstances in this case, the Court did not find their testimony convincing or persuasive as to either the filling out of a time card or the occurrence of an accident.

13. Leonard Hogan testified that claimant did not report an injury to him. His testimony was based on his memory and his daily procedures. Whenever an injury occurs, Hogan writes it down on his calendar and requires a memo concerning the accident. Hogan also testified that he would not have told an employee to stay at work after an injury.

14. Claimant's testimony in this case was exaggerated, distorted, incomplete and/or untruthful.

a. His testimony that he first learned that his fusion was "busted" was contradicted by other evidence. Dr. Iwersen's medical note of February 6, 1989, indicates that the PLIF fusion (referring to the posterior interbody fusion of the L4-5) had "definitely failed." The note states specifically that "we talked about the failed fusion of his PLIF." Claimant was thereafter seen by the Spine Care Medical Group in Daly City, California. The May 4, 1989 report from the examining physician, Dr. Gerald Keane, states: "It is my assessment at this point that there is definite evidence of a failed fusion **both** at the interbody and the posterolateral fusions appearing non-solid on the images available to us." Then, sometime prior to March 30, 1990, claimant submitted a medical malpractice complaint against Dr. Joern to the Montana Medical-Legal panel. The complaint alleged that as a result of Dr. Joern's 1985 surgery "Mr. Davis now suffers from a chronically unstable and painful back with an incomplete and failed fusion." The complaint further stated that "Mr. Davis did not

discover that his fusion had failed until November, 1988, after an x-ray had been taken and he was advised thereof." (Ex. 6 at 20.) Claimant has presented no medical evidence that the status of his fusion changed after 1989. Claimant was well aware that his fusion had failed long prior to the alleged 1991 accident.

b. Claimant's written claim for compensation, which was prepared April 9, 1992, identified the date of injury as December of 1991. In his deposition he testified that the accident occurred in October of 1991. At the time of trial he testified that it occurred in late October or early November 1991. In his deposition, claimant testified that he knew he injured himself on a Thursday, because he only had one day of work left. At trial claimant was not certain if it was a Thursday or a Wednesday. Claimant testified that he believed the date was the last Thursday in October, however, his work records show he was on vacation that day.

c. Claimant did not seek medical care following the alleged accident. He saw his family physician, Dr. James Kiley on December 16, 1991 for flu and on February 7, 1992 for depression but the doctor's notes on both dates do not mention any back complaints or any injury at work despite claimant's assertion that he was in great pain following the accident. The Court did not believe claimant's testimony that he told Dr. Kiley about his back or his assertion that Dr. Kiley merely failed to record his complaints.

d. Claimant first reported back pain to Dr. Kiley on March 19, 1992, **after** he had been fired from his job. Claimant was fired from his job on March 17, 1992, because of unexcused absences from work. Those absences were unrelated to any back problem.

e. Claimant testified that he filed the present claim after seeing Dr. Iwersen on April 3, 1992, at which time he says he first became aware he had "busted" his fusion in his accident. The Court finds this testimony unbelievable. Dr. Iwersen's April 3, 1992 note makes no mention of any injury or to claimant's fusion. Rather it states, "The pt was in today, seems to be getting **progressively** worse." (Ex. 1 at 151; emphasis added.) Dr. Iwersen, who testified by deposition, did not indicate any change regarding the fusion, and as set forth in subparagraph a, claimant was well aware of the fusion had failed three years prior to the April 1992 examination.

f. Claimant also testified that he informed Dr. Iwersen about his accident during the April 3, 1992 examination. Dr. Iwersen's medical note, however, does not mention any accident. (Ex. 1 at 151.)

g. Claimant testified that he did not file a claim right away because he was not sure his condition was serious. That testimony is found to be incredible in light of claimant's testimony that after the accident he was in great pain and requested lighter duty work.

h. Claimant's testimony that after the alleged accident he was in great pain and that he requested and received lighter duty work was not supported by his supervisor or any other employee.

i. Claimant testified during his deposition that after his alleged injury in 1991 he began "self-medicating" with alcohol. (Davis Dep. at 74.) As of that time, he denied that he was an alcoholic or that he had ever been diagnosed as having a problem with alcohol. (*Id.*) In addition he gave the following testimony:

Q: Okay. So your testimony here today is the reason that you were using alcohol, and let's be blunt about it, more than you should have, was because you were in physical pain related to this injury.

A: Yes.

Q: Prior to that time were you using alcohol? Prior to October, the end of October of 1991, were you using alcohol? Did you have a problem with alcohol use?

A: No.

Q: Okay. It was only after that time that your problem with alcohol use arose; is that correct?

A. That's correct.

(Davis Dep. at 75-76.) At trial claimant admitted he had been diagnosed as an alcoholic in 1988. In 1988 he also received in-patient treatment for alcoholism.

j. During his deposition claimant testified that Dr. Iwersen had never told him of any problems regarding his fusion until after March, 1992:

Q: Okay. Now, at some point you ended up going to -- you had been going to see Dr. Joern and you started going to Dr. Iwersen. What were the circumstances of that? Why did you change physicians?

A: Dr. Joern was no longer taking patients.

Q: Okay. And that's when you went to Dr. Iwersen?

A: I was referred to Dr. Iwersen from Dr. Joern's office.

Q: Okay. And were you feeling pain at the time you went to see Dr. Iwersen for the first time? Was the pain increasing at that point? Was it getting worse?

A: I had to continue to see physicians for updates on the security of the fusion.

Q: What were they telling you?

A: That it was -- that it was healing just fine, getting good bone mass.

Q: Okay. Did Dr. Iwersen tell you that it was healing just fine?

A: Yes.

Q: Okay. Did he ever tell you that it was not healing fine?

A: Not until after -- March of '92.

Q: Okay. So Iwerson [sic] never mentioned to you that there might be a problem with the fusion until March of 1992? Is that accurate?

A: Would you please repeat that?

Q: Iwerson [sic] never told you there was a problem with the fusion until March of 1992 is I believe what you just testified to. Is that correct?

A: That's correct.

Q: Okay. So you weren't aware that there might have been a problem with the fusion prior to that date; is that correct?

A: That's correct.

Q: Prior to that date the physicians were telling you that it was a good fusion, a solid fusion?

A: Yes.

(Davis Dep. at 45-47.) As previously noted, this testimony flies in the face of the medical records, as well as Dr. Iwersen's deposition testimony. Moreover, when confronted with Dr. Iwersen's records from 1989, claimant then testified that Dr. Iwersen told him in 1989 that he "thinks" that the fusion had failed but had no way of determining whether it had or not.

k. Claimant had plans in April 1992 to move to Orlando, Florida. He testified at trial that he did not do so because Dr. Iwersen told him that sudden movements could cause paralysis. Dr. Iwersen's records indicate that he approved the move to Orlando (Ex. 1 at 151), and there is not a scintilla of medical evidence supporting claimant's testimony on this point.

15. Claimant was not a credible witness; Hogan was. Having weighed all of the testimony in this case, and considering all of the circumstances, I find that claimant did not report any injury to Hogan or on his time card. I further find that the first report of any injury occurred in April 1992, when claimant submitted a written claim for compensation.

16. I further find that claimant did not suffer an industrial accident. I did not find his testimony concerning the occurrence of an accident credible.

17. While he experienced a temporary remission of his symptoms following his surgery in 1985, claimant's back pain and leg pain was present long before his alleged 1991 accident. He saw Dr. Iwersen on November of 1988 and was complaining of pain in both his back and

legs. (Iwersen Dep. at 8.) Claimant's continued complaints caused Dr. Iwersen to refer claimant to a spine clinic in California, where claimant was seen on May 4, 1989. (Ex. 1 at 37, 101-104.) In March of 1990 Dr. Iwersen prescribed physical therapy. (Ex. 1, Iwersen at 151.) In a March 26, 1990 letter Dr. Iwersen wrote:

Concerning Mr. Donald Scott Davis; as we had discussed, I think that it would be in his best interest to continue a very limited physical therapy program on a very limited basis and seek continued back therapy through a facility which has the same equipment as his physical therapist. I think that in this way, we could limit not only the therapy that he receives but also the number of visits he makes to the physician.

At this time he has elected not to have surgery. I think at this time that is a prudent choice and I agree with him. I think that he will require long term physical therapy.

. . . I think that at most he will require 4-6 weeks of physical therapy throughout each year, supervised by his therapist, Knut Skybak. I think that I can see him on a yearly basis to help monitor this and to help monitor his progression, should any surgical intervention become necessary.

(Ex. 1, Iwersen at 7.) I find it more likely than not that claimant's back symptoms in March and April 1992, and thereafter, are a continuation and natural progression of his preexisting condition.

CONCLUSIONS OF LAW

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

2. This case is governed by the statutes in effect on the date of claimant's alleged injury. ***Buckman v. Montana Deaconess Hospital****, 224 Mont. 318, 321, 730 P.2d 380 (1986).* Claimant contends he was injured in October of 1991, thus the 1991 version of the Workers' Compensation Act applies.

3. Claimant is required to give notice of an injury within thirty days after the occurrence of an accident. Section 39-71-603, MCA (1991) 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 section is mandatory and "no claim shall be considered compensable unless the employer or employer's insurer is notified within [the] 30 days." ***Buckentin v. State Fund,*** *51 St.Rep. 0656 (1994)(quoting* ***Reil v. Billings Processors, Inc.****, 229 Mont. 305, 308, 746 P.2d 617, 619).*

Claimant contends that he informed his co-workers, as well as his supervisor, Leonard Hogan, of his accident the day it occurred. Notice to co-workers is not sufficient to satisfy the notice requirement, ***Bogle v. State Fund****, 51 St.Rep. 380 (1984),* and the Court has found as a matter of fact that claimant did not report any injury either to Hogan or on his time card. The first notice of his alleged injury was in April 1992, several months after the alleged injury.

4. A worker is entitled to compensation and medical benefits only if the worker suffers an "injury" within the meaning of the Montana Workers' Compensation Act. See Title 39, Part 7, MCA (1991). "Injury" is defined is defined as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

(3) "Injury" or "injured" does not mean a physical or mental condition arising from:

(a) emotional or mental stress; or

(b) a nonphysical stimulus or activity.

(4) "Injury" or "injured" does not include a disease that is not caused by an accident.

(5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical harm in relation to other factors contributing to the physical harm.

Claimant has not persuaded the Court that any accident occurred in 1991 or that he injured or aggravated his back condition in 1991. A preponderance of credible evidence persuades the Court that the claimant's current back problems are the result of his preexisting condition caused by his 1983 injury.

5. Claimant is not entitled to a penalty, costs or attorney fees.

JUDGMENT

1. Claimant is not entitled to compensation because he failed to give proper notice to his employer and in any event did not suffer an industrial injury in October, November or December of 1991.

2. Claimant is not entitled to a penalty, attorney fees or costs.

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

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

DATED in Helena, Montana, this 7th day of October, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Leo S. Ward