

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 72

WCC No. 9804-7961

WILLIAM FLANSBURG,

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

AAA FENCING & WELDING, INCORPORATED,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: On December 4, 1997, a first report was filed indicating claimant had received an electrical shock at work on October 29, 1997. Claimant testified he told the president of the company about the shock on the day of the incident. The president did not recall the event and testified he would recall such an occurrence, noting he recalls many less serious incidents at work.

Held: The credible evidence indicates claimant did not report an electrical shock within thirty days of the alleged occurrence. In addition to the Court's observation of the witnesses' credibility, factors considered include: that medical reports relatively close to the incident involving claimant's headaches do not mention the alleged incident, there were conflicts between the testimony of claimant and his corroborative witness, the corroborative witness testified he did not recall hearing the report to the president, and other evidence suggests a motive for the late attempt to link claimant's headaches with an incident at work. Petition dismissed.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-603(1), MCA (1995). The credible evidence indicates claimant did not report an electrical shock within thirty days of the alleged occurrence. In addition to the Court's observation of the witnesses' credibility, factors considered include: that medical reports relatively close to the incident involving claimant's headaches do

not mention the alleged incident, there were conflicts between the testimony of claimant and his corroborative witness, the corroborative witness testified he did not recall hearing the report to the president, and other evidence suggests a motive for the late attempt to link claimant's headaches with an incident at work.

Claims: Limitations Period. The credible evidence indicates claimant did not report an electrical shock within thirty days of the alleged occurrence. In addition to the Court's observation of the witnesses' credibility, factors considered include: that medical reports relatively close to the incident involving claimant's headaches do not mention the alleged incident, there were conflicts between the testimony of claimant and his corroborative witness, the corroborative witness testified he did not recall hearing the report to the president, and other evidence suggests a motive for the late attempt to link claimant's headaches with an incident at work.

Limitations Periods: Notice to Employer. The credible evidence indicates claimant did not report an electrical shock within thirty days of the alleged occurrence. In addition to the Court's observation of the witnesses' credibility, factors considered include: that medical reports relatively close to the incident involving claimant's headaches do not mention the alleged incident, there were conflicts between the testimony of claimant and his corroborative witness, the corroborative witness testified he did not recall hearing the report to the president, and other evidence suggests a motive for the late attempt to link claimant's headaches with an incident at work.

¶1 The trial in this matter was held on September 28, 1998, in Missoula, Montana. Petitioner, William Flansburg (claimant), was present and represented by Mr. Andrew F. Scott. Respondent, State Compensation Insurance Fund (State Fund), was represented by Ms. Carrie L. Garber. No transcript has been prepared of this proceeding.

¶2 Exhibits: Exhibits 1 through 4 were admitted without objection.

¶3 Witnesses: Claimant, Lex Herbert and Ron Cochrane were sworn and testified.

¶4 Issue: As set forth in the Pretrial Order, the sole issue to be determined is:

Whether or not the claimant gave notice of his injury to his employer within 30 days of his injury.

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

FINDINGS OF FACT

¶16 Claimant was employed by AAA Fencing & Welding, Incorporated (AAA), on October 29, 1997. On that date he claims that at approximately 2:30 p.m. he suffered an electrical shock and was knocked unconscious while welding beneath a flatbed trailer.

¶17 At the time of the alleged injury, AAA was insured by the State Fund.

¶18 On December 4, 1997, AAA filed a First Report of Occupational Injury or Occupational Disease. The report was filled out by Lex Herbert (Herbert), the president and chief shareholder of AAA. In the report Herbert noted, "Bill [claimant] notified me (Lex Herbert - Owner) today 12-4-97 that he was shocked." (Ex. 2.)

¶19 The State Fund denied liability for the claim and asserts in this proceeding that the claim is barred by claimant's failure to provide his employer with 30-day notice of his alleged injury, as required by section 39-71-603, MCA (1997).

Claimant's Testimony Regarding Notice

¶110 Claimant testified that after he regained consciousness on October 29, 1997, he was dizzy and disoriented. According to claimant, he went to the shop and sat down on a welding bench. He further testified that a coworker, Ron Cochrane (Cochrane), saw him and asked what had happened, and that he replied that he had been shocked and knocked unconscious.

¶111 Claimant testified that he then went back to work and worked until about 4:30 p.m., at which time he and Cochrane went to the office to clock-out and go deer hunting. Claimant recalled telling Herbert who was in the office at the time, that he had "been shocked and really gotten it." According to claimant, they then talked for 15 minutes.

Herbert's Testimony Regarding Notice

¶112 Herbert testified that on October 29, 1997, he spent the morning out on bids, arriving at the shop/office in the early afternoon. He did not recall claimant telling him of any shock until December 4th. His further testimony makes it likely that his not remembering claimant telling him of the alleged accident on October 29th was not a simple matter of lack of recollection or forgetfulness. Herbert testified that losing consciousness on account of a shock is a significant matter which he would recall. He testified that had he been told of the incident he would have made a note of it and would recall it. He listed other incidents of far lesser significance which involved employees and which he recalled.

¶113 Following his December 4th conversation with the claimant, Herbert interviewed other AAA employees to determine if they knew anything about the incident. None of the employees, including Cochrane, remembered the incident.

Testimony of Cochrane

¶14 Cochrane has been employed as a fencer by AAA since 1996 and has known the claimant since the claimant went to work at the company. He and claimant are friends and "hung out together."

¶15 Cochrane recalled October 29th because it was the day he shot a deer. According to Cochrane, he returned to the shop at approximately 4:00 p.m. from off-site work and was in a hurry to clock out and go hunting. He noted that the days were short and there was not much daylight left. He saw claimant sitting at a welding bench holding his head and recalled claimant telling him he had been shocked and knocked unconscious. Nonetheless, he asked claimant if he wanted to go hunting with him and claimant agreed. They then proceeded into the office, clocked out and took off. Cochrane could not recall whether claimant told Herbert about being shocked.

Claimant's Termination of Employment

¶16 Claimant continued working for AAA until approximately November 15, 1997, when he ceased working. His mother notified AAA that he was sick.

Medical Evidence

¶17 On November 17, 1997, claimant saw Dr. Walker Ashcraft because he was experiencing severe headaches. Dr. Ashcraft's office note for that date records:

Has had a steady frontal headache for the past three days. He has gotten three or four hours sleep at night, but wakes up with a headache and goes to sleep with a headache. . . .

(Ex. 1 at 1.) Claimant did not tell Dr. Ashcraft about the alleged shock. (*Id.* and Trial Test.)

¶18 Still suffering a headache, claimant saw Dr. Ashcraft again on November 20th, at which time Dr. Ashcraft referred claimant to Dr. Lennard S. Wilson, a neurologist. (Ex. 1 at 2.) Again, claimant did not mention the alleged shock. (*Id.* at 4 and Trial Test.)

¶19 Dr. Wilson examined claimant on November 24, 1997. He took a history, which included the following information:

The patient works as a welder and is physically extremely active. He noticed two weeks ago while hunting the slow onset of pain beginning in the top of the head bifrontally and suboccipitally. He was noted by his close friend and land lady that he appeared ill. The pain become [sic] more severe and he felt cold and chilled. . . .

(Ex. 1 at 4.) Claimant did not mention the alleged shock to Dr. Wilson. (*Id.* and Trial Test.)

¶20 On November 25, 1997, claimant's landlord, Daniel Dewert (Dewert), called Dr. Wilson's office and informed Dr. Wilson that claimant had been shocked while welding and may have lost consciousness. (Ex. 1 at 6.) Dr. Wilson further recorded, 'Pt. [claimant] "forgot" to discuss this incident according to Mr. DeWert.' (*Id.*)

Resolution

¶21 After considering all of the testimony in this case, I find that claimant did not report his alleged injury to his employer on October 29, 1997, rather he reported it for the first time on December 4, 1997. Claimant's testimony was not credible. I was also unimpressed and unpersuaded by Cochrane's testimony that he observed claimant in distress on October 29th and that claimant told him he had been shocked and lost consciousness. Indeed, I am unpersuaded that claimant was shocked and lost consciousness.

¶22 I base my determination not only on my perception of the demeanor and truthfulness of the witnesses who testified at trial but also on the following considerations:

- Cochrane's testimony conflicts with claimant's in important parts. Cochrane testified that he did not return to the AAA workplace until 4:00 p.m. and that he saw claimant in distress at that time but they immediately went hunting. Claimant testified that the event occurred at approximately 2:30 p.m. and that he spoke to Cochrane at that time and then went back to work for two hours. Both witnesses were on the same page with respect to the hunt, but it strikes me as odd that claimant would go hunting after a severe shock which caused unconsciousness, especially if he was still suffering the after effects of the shock when Cochrane came back and invited him to go hunting.
- Cochrane's testimony concerning his returning to work late afternoon on October 29th and wanting to leave immediately to hunt is believable although other parts of his testimony were not. Herbert confirmed that Cochrane asked to leave work early so he could go hunting. Both claimant and Cochrane agree that it was late afternoon when they left. Not much daylight was left and Cochrane was in a hurry. In light of Cochrane's hurry to get out into the woods as soon as possible, it is hard to believe that claimant not only reported the injury to Herbert but then spent 10 minutes talking with Herbert.
- When Cochrane was interviewed by Herbert on December 4th, he did not recall anything about claimant's alleged accident even though at trial he testified that between October 29th and December 4th he and claimant had discussed the incident a "ton" of times. On December 5th, after he had talked to claimant during the lunch hour, Cochrane sought Herbert out to tell him that on October 29th he may have seen claimant sitting at a work bench

holding his head. I find it difficult to believe that had Cochrane previously discussed the incident with claimant "tons of times" he would not have recalled it when first asked about it on December 4th.

- Cochrane's December 5th lunchtime conversation with claimant is also troublesome in itself. According to Cochrane, claimant pointed out that the shock was the day Cochrane shot the deer. Yet on cross-examination the claimant indicated that when interviewed by a State Fund claims adjuster after he reported the injury on December 4th he told the claims adjuster that he had not done anything on the day of the shock and that he recalled the hunt only later on.
- When claimant ceased working for AAA in mid-November, he was already in arrears in his rent to his landlord (Dewert). If claimant's testimony is believed, Dewert played a significant role in this claim. According to claimant, he told Dewert about the shock on October 29th after returning from hunting. Claimant testified that Dewert thereafter put two and two together for him, so to speak, by suggesting a link between the shock and claimant's headaches, and that Dewert called Dr. Wilson on November 25th to report the link. The Court finds it odd that Dewert rather than claimant told Dr. Wilson of the link, especially since the claimant had called Dr. Wilson earlier on November 25th to report on his headache and did not mention the alleged shock. According to claimant, Dewert referred him to an attorney who had represented Dewert in a workers' compensation matter.
- The claimant's conversation with Herbert on December 4th is also troublesome. Herbert, whom I found to be credible, testified that when claimant came into AAA on December 4th he said, "Do you remember when I got shocked?" Herbert replied, "No," and claimant then said something to the effect, "That's okay, Cochrane remembers." The conversation suggests, under the circumstances of this case, that claimant did not expect Herbert to remember any prior report of an injury.

¶23 Claimant failed to report his alleged October 29, 1997 industrial injury to his employer within 30 days.

CONCLUSIONS OF LAW

¶24 Claimant bears the burden of proving, by a preponderance of the evidence, that he is entitled to benefits under the Workers' Compensation Act. *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).

¶25 Section 39-71-603(1), MCA (1997), provides as follows:

Notice of injuries other than death to be submitted within thirty days. (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that 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 in which the injured employee was engaged at the time of the injury is equivalent to notice.

Claimant has failed to persuade me that he notified his employer of his alleged industrial accident within 30 days as required by the statute.

JUDGMENT

¶26 1. The claimant failed to notify his employer of his alleged industrial injury within 30 days as required by section 39-71-603, MCA (1997). His petition is **dismissed with prejudice**.

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

¶28 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.

DATED in Helena, Montana, this 15th day of October, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Andrew F. Scott

Mr. Carrie L. Garber

Date Submitted: September 28, 1998