

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 44

WCC No. 9609-7617

LARRY B. GOOD

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

ANDERSON STEEL SUPPLY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 52 year old claimant alleged back injury during work as lead welder in handrail shop. Respondent argued claimant did not report the alleged injury within thirty days as required by section 39-71-603, MCA (1995) and also challenged the occurrence of the injury.

Held: Claim denied because claimant failed to report injury within 30 days. Employer had clear practice regarding reporting of injuries which claimant had previously followed. Employees to whom claimant should have reported injury credibly testified they did not receive notice. While claimant's wife testified she told employer's secretary claimant hurt his back at work, the secretary credibly denied receiving that information. Moreover, this is not a case in which a co-employee may be deemed an employer's supervisor or agent under a doctrine of ostensible authority. Ostensible agency is established "when the principal intentionally or by want of ordinary care causes a third person to believe another to be an agent." *Larsen v. Barry Smith Logging, Inc.*, 267 Mont. 444, 447, 884 P.2d 786, 788 (1994). Here, claimant acknowledged that the secretary was not one of the people to whom he could report an injury.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603, MCA (1995). Lead welder's claim for back injury denied where WCC found he did not report the injury within 30 days. Employer had clear practice

regarding reporting of injuries which claimant had previously followed. Employees to whom claimant should have reported injury credibly testified they did not receive notice. While claimant's wife testified she told employer's secretary claimant hurt his back at work, the secretary credibly denied receiving that information. Moreover, this is not a case in which a co-employee may be deemed an employer's supervisor or agent under a doctrine of ostensible authority. Ostensible agency is established "when the principal intentionally or by want of ordinary care causes a third person to believe another to be an agent." *Larsen v. Barry Smith Logging, Inc.*, 267 Mont. 444, 447, 884 P.2d 786, 788 (1994). Here, claimant acknowledged that the secretary was not one of the people to whom he could report an injury.

Claims: Notice to Employer or Insurer: Generally. Lead welder's claim for back injury denied where WCC found he did not report the injury within 30 days. Employer had clear practice regarding reporting of injuries which claimant had previously followed. Employees to whom claimant should have reported injury credibly testified they did not receive notice. While claimant's wife testified she told employer's secretary claimant hurt his back at work, the secretary credibly denied receiving that information. Moreover, this is not a case in which a co-employee may be deemed an employer's supervisor or agent under a doctrine of ostensible authority. Ostensible agency is established "when the principal intentionally or by want of ordinary care causes a third person to believe another to be an agent." *Larsen v. Barry Smith Logging, Inc.*, 267 Mont. 444, 447, 884 P.2d 786, 788 (1994). Here, claimant acknowledged that the secretary was not one of the people to whom he could report an injury.

Claims: Notice to Employer or Insurer: Supervisor. Lead welder's claim for back injury denied where WCC found he did not report the injury within 30 days. Employer had clear practice regarding reporting of injuries which claimant had previously followed. Employees to whom claimant should have reported injury credibly testified they did not receive notice. While claimant's wife testified she told employer's secretary claimant hurt his back at work, the secretary credibly denied receiving that information. Moreover, this is not a case in which a co-employee may be deemed an employer's supervisor or agent under a doctrine of ostensible authority. Ostensible agency is established "when the principal intentionally or by want of ordinary care causes a third person to believe another to be an agent." *Larsen v. Barry Smith Logging, Inc.*, 267 Mont. 444, 447, 884 P.2d 786, 788 (1994). Here, claimant acknowledged that the secretary was not one of the people to whom he could report an injury.

Limitations Periods: Notice to Employer. Lead welder's claim for back injury denied where WCC found he did not report the injury within 30 days. Employer had clear practice regarding reporting of injuries which claimant had previously

followed. Employees to whom claimant should have reported injury credibly testified they did not receive notice. While claimant's wife testified she told employer's secretary claimant hurt his back at work, the secretary credibly denied receiving that information. Moreover, this is not a case in which a co-employee may be deemed an employer's supervisor or agent under a doctrine of ostensible authority. Ostensible agency is established "when the principal intentionally or by want of ordinary care causes a third person to believe another to be an agent." *Larsen v. Barry Smith Logging, Inc.*, 267 Mont. 444, 447, 884 P.2d 786, 788 (1994). Here, claimant acknowledged that the secretary was not one of the people to whom he could report an injury.

The trial in this matter was held in Great Falls, Montana, on April 1, 1997. Petitioner, Larry B. Good (claimant), was present and represented by Mr. Benjamin R. Graybill. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams.

Exhibits: Exhibits 1 through 28 were admitted without objection.

Witnesses and Depositions: Claimant, Donna Good, M.J. Fors, Jennifer McLaughlin, Harvey LaRocque, Jr., Linda Robbins, David Watt and Casey Dean Taylor were sworn and testified. In addition, the parties submitted the depositions of claimant (cited as L. Good Dep.), Donna Good (cited as D. Good Dep.), Dr. James David Hinde, David Watt, Harvey LaRocque, Jr. and Jennifer McLaughlin. No transcript of the trial has been prepared.

Issues Presented: The following issues, as rephrased by the Court, are presented for determination:

1. Whether claimant notified his employer of a work-related injury within 30 days of its occurrence as required by section 39-71-603, MCA (1995).
2. Whether claimant suffered an injury on January 31, 1996, while in the course and scope of his employment with Anderson Steel Supply.
3. Whether claimant is entitled to attorney fees pursuant to section 39-71-612(1), MCA.

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 is 52 years of age and lives in Great Falls, Montana. He completed the eighth grade.
2. Claimant has worked as an iron worker since 1970.

3. Claimant began working as an iron worker for Anderson Steel Supply (Anderson Steel) in July of 1994. At the time of his alleged industrial injury, he was working in the lead position as a welder and finisher in the handrail shop. He supervised two employees, Walt Rusch (Rusch) and Greg Edwards (Edwards).

Alleged Industrial Injury

4. Claimant alleges that he injured his back on January 31, 1996, when he bent down to pick up two pieces of channel iron off the floor. (L. Good Dep. at 10.) He testified during his deposition that he immediately felt his back "pull and rip." (*Id.*)

5. At the time of the alleged injury, Anderson Steel was insured by the State Fund. The State Fund has denied liability on the grounds that (1) claimant failed to notify his employer of his alleged injury within 30 days, as required by section 39-71-603, MCA (1995), and (2) no industrial accident occurred.

Preexisting Conditions

6. At the time of his alleged industrial accident, claimant was suffering from preexisting conditions involving his back and knees. He injured his back in an industrial accident in 1980 while working for Babb Steel in Cheyenne, Wyoming. (L. Good Dep. at 6-7.) Dr. James Hinde began treating claimant for chronic low-back pain in July 1991. (Hinde Dep. at 5.) Dr. Hinde also treated him for knee pain caused by patellofemoral degeneration (chondromalacia). (*Id.* at 6.)

Prior Injuries at Anderson Steel

7. Claimant had two prior industrial accidents while employed at Anderson Steel. The injuries are noteworthy in that they establish the reporting procedure followed by Anderson Steel and followed by claimant with respect to the injuries.

8. On August 26, 1994, claimant sustained burns to his face when he failed to wear protective covering while welding at Anderson Steel. (Ex. 19 at 46-47.) The injury was reported to David Watt, who is the Safety Coordinator for Anderson Steel. Watt is popularly known by Anderson Steel employees as "Safety Dave" and his nickname shall be used hereinafter. In connection with this accident, Safety Dave wrote a "Safety memo to file." The memo contained claimant's thoughts regarding the accident and recommended preventative measures. (*Id.* at 46.) With Safety Dave's help, claimant also filled out an "Employees Report of Alleged Injury," an internal company report used for accidents. (*Id.* at 49.) Casey Taylor (Taylor), claimant's immediate supervisor at Anderson Steel, filled out a "Supervisor's Accident Report." (*Id.* at 52.)

9. Claimant and Safety Dave thereafter filled out the Employer's First Report of Notice of Occupational Injury or Occupational Disease on September 6, 1994. (*Id.* at 46-47.)

10. On December 28, 1995, claimant suffered another industrial injury when a particle of metal got into his eye (*Id.* at 18.) As with the first injury, claimant and Safety Dave filled out a First Report of Occupational Injury or Occupational Disease for workers' compensation purposes. (*Id.*)

Medical Treatment Following Alleged Injury

11. Claimant saw Dr. Hinde on February 7, 1996. Dr. Hinde's office note for that date reflects:

Last Wednesday, i.e., January 31, he was lifting iron weighing approximately 100 pounds from floor to bench level experienced a pulling sensation in his lower back. He continued to work. The next day he noted significant bilateral knee swelling and pain and significant low back pain.

(Ex. 1 at 1.) The note supports claimant's contention that he was injured at work on January 31, 1996.

12. Dr. Hinde ordered an MRI and noted a small herniation of the L5-S1 and mild bulging of the L4-5. (*Id.* at 7.) Following the MRI, he noted: "There is no obvious radicular compression as a result of this small central disc and it is unclear if this MRI finding at all relates to his pain syndrome." (*Id.*)

13. Dr. Hinde diagnosed lumbar and right gluteal strain, resulting in persistent myofascial pain affecting right piriformis and more superficial right gluteal groups. (Ex. 2 at 1.) In regard to causation, Dr. Hinde stated the following:

Based on the history presented to me **by Larry Good** and physical findings suggestive of much more significant piriformis and gluteal involvement on the right than previously noted, I would recommended [sic] that the January 31, 1996 incident be considered to be a new injury. The fact that he worked in varied landscaping, odd construction jobs, and at Anderson Steel for some time prior to his injury indicated tolerance for this type of work and suggested that "something new happened on that date."

(*Id.*; emphasis added.)

Notice to Employer

14. Claimant filed a First Report of Occupational Injury or Occupational Disease March 11, 1996, or 40 days after the alleged injury. (Ex. 14.) However, the employer denies notice of the injury prior to that time.

15. The evidence concerning whether claimant notified anyone at work of his alleged accident is conflicting. However, the evidence presented in this case shows that Anderson Steel required that all injuries be reported to Safety Dave, Harvey LaRocque, Jr. (LaRocque),

who was Steel's general manager, or an immediate supervisor. Claimant's experience in reporting his two prior injuries demonstrates that he was aware of the reporting process. He also testified in his deposition that Safety Dave was the person he was supposed to tell about the accident. (L. Good Dep. at 13.) In his deposition he further testified that "[i]t's company policy to tell somebody above you, and that means Casey's [Taylor] boss, Casey, or the safety man, or, you know, like that." (*Id.* at 14.) Nonetheless, claimant failed to report his alleged injury to Safety Dave, LaRocque, or his immediate supervisor (Casey Taylor) within 30 days of January 31, 1996.

a. Claimant testified that he did not notify Watt of his injury on the day of the accident because Watt was "definitely not there" on that day of the accident. (*Id.* at 13.) He asserted that he walked by Watt's office but that he was not in. (*Id.*) Watt testified that he was working on the date of the alleged accident and would have been available to claimant. Watt was the more credible witness and I find claimant in fact did not seek Watt out on the day of the alleged accident.

b. Claimant testified that on February 5, 1996, he telephoned Anderson Steel and told LaRocque of the industrial accident. LaRocque confirmed that he had talked to claimant on February 5th but testified that claimant did not tell him that claimant had injured his back at work, rather claimant told him only that he was having problems with his knees and was going to see his old workers' compensation doctor and a chiropractor. Claimant confirmed that he told LaRocque that his "knees were swollen" in this telephone conversation. (Trial Test.) LaRocque testified that when claimant told him that his knees were bothering him he assumed that the problem was related to his preexisting problems with his knees. LaRocque was the more credible witness and I find that his version of the conversation is accurate.

c. Claimant testified that he "mentioned" the accident to his immediate supervisor, Casey Taylor (Taylor), when Taylor came to visit him at his home:

I told him where it [the industrial accident] happened, how it happened, when it happened, and I pulled up those two pieces of channel and pulled my back, and it was at my work station. And he said he didn't hear about that.

(L. Good Dep. at 20-21.) Taylor testified credibly that claimant did not tell him about the alleged accident at Anderson Steel until after he had filed the claim with the State Fund, and I find that claimant did not in fact timely report his alleged accident to Taylor.

d. Claimant did not assert that he timely reported his alleged injury to Safety Dave and I find that he in fact did not do so.

16. Claimant also asserted that his wife telephoned Anderson Steel the day after his alleged injury and reported his injury to the receptionist answering the phone. Donna Good

(Mrs. Good), claimant's wife, testified that she made the call from her workplace. She testified that she told the receptionist answering the phone that claimant would not be going into work that day because he had hurt his back at work the day before. (D. Good Dep. at 8.) Mrs. Good also called Dr. Hinde on that day to schedule an appointment for claimant. (*Id.* at 5-6.)

17. Mrs. Good's supervisor, M.J. Fors (Fors), was present when she made the phone calls. (*Id.* at 13-14.) She testified that she heard Mrs. Good say that claimant had injured himself on the job the day before and that he would not be into work on that day. However, on cross-examination, Fors indicated that at least some of her information may have come from speaking personally with Mrs. Good and she further acknowledged that some of what she heard may have been during Mrs. Good's conversation with Dr. Hinde's office.

18. Claimant testified that he followed up with a call to Anderson Steel on Friday, February 2, 1996, and spoke with Jennifer McLaughlin (McLaughlin), the secretary/receptionist for Anderson Steel. He said that he left a message asking that LaRocque call him back. However, he did not tell the receptionist that he had injured himself at work.

19. Jennifer McLaughlin testified that while she had no independent recollection of the calls, she made a contemporaneous record of the calls, writing on claimant's vacation and sick leave record, "Gone 2/1 & 2/2 - Pipes frozen." (Ex. 8.) Her note regarding frozen pipes was corroborated by claimant, who acknowledged in his trial testimony that he may have mentioned frozen pipes to her during his conversation. McLaughlin further testified that had she been told of a work-related injury, she would have transferred the call to Safety Dave or LaRocque. McLaughlin further testified that she has never received a call from an Anderson Steel employee reporting a work-related injury to her. I found her testimony wholly credible and do not believe that Mrs. Good or claimant reported the injury to her.

20. As stated in the foregoing findings, I found the employer's witnesses fully credible. In doing so I have taken into consideration the possibility that the employees are still employed by Anderson Steel and that Anderson Steel may have been considering terminating claimant's employment. Claimant presented evidence of a February 5, 1996 file memo note in which LaRocque wrote:

Has not fulfilled the requirement of a lead person in spite of many attempts by Casey [Taylor] to get him on line. A written warning is in the works, however, on 2-1-96 he did not show for work, nor did he call in.

(Ex. 4 at 1.) LaRocque denied that he was contemplating firing claimant as of the date that he wrote the preceding memo. Taylor testified that he had been monitoring claimant for a couple of weeks prior to claimant's leaving because claimant was having trouble keeping up with his lead man responsibilities. Claimant testified that prior to his accident, he had never received a warning from anyone at Anderson Steel regarding termination or

demotion. Although the situation raises suspicions concerning the employer, I found the testimony of LaRocque and Taylor credible and persuasive and their concern over claimant's rate of work genuine. Claimant contacted LaRocque on Friday, February 9, 1996, and told him that he would be in physical therapy for two weeks. LaRocque told claimant to get back to him when he was finished with physical therapy. Claimant had no contact with Anderson Steel until three weeks later, and based on the expectation that claimant was to report back in two weeks, LaRocque replaced claimant. His haste to do so may well reflect his dissatisfaction with claimant's work, but there was persuasive evidence that claimant was in fact slow in his work. I am not persuaded that there is a conspiracy among Anderson Steel employees to give false testimony in an attempt to frustrate his claim.

CONCLUSIONS OF LAW

1. Claimant's injury is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).
2. An injured worker is required to give notice to his employer within 30 days of his industrial accident. Section 39-71-603, MCA (1995), provides:

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.

The notice requirement is "'mandatory and compliance with [the requirements of the statute] are indispensable to [maintaining] a claim for compensation" *Buckentin v. State Fund*, 265 Mont. 518, 523, 878 P.2d 262 (1994) (quoting from *Reil v. Billings Processors, Inc.*, 229 Mont. 305, 308, 746 P.2d 617, 619 (1987) (brackets in original)).

3. Notice to or knowledge of a non-supervisory co-employee does not satisfy section 39-71-603, MCA. *Maki v. Anaconda Copper Mining Co.*, 87 Mont. 314, 320-22, 287 P. 170, 172-74 (1930); *Hartl v. Big Sky of Montana, Inc.*, 176 Mont. 540, 544, 579 P.2d 1239, 1241 (1978). The notice requirement is satisfied only where someone with supervisory status or authority is notified or has actual knowledge of the injury. *Bender v. Roundup Mining Co.*, 138 Mont. 306, 312-13, 356 P.2d 469, 472 (1960).

4. Mrs. Good's alleged report to McLaughlin was not sufficient because McLaughlin is not a supervisor at Anderson Steel. Claimant himself confirmed that he was supposed to report

his injury to Safety Dave, the general manager or his immediate supervisor, and I have found as a matter of fact that he failed to do so within 30 days.

5. This is not a case in which a co-employee may be deemed an employer's supervisor or agent under a doctrine of ostensible authority. Ostensible agency is established "'when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent.'" *Larson v. Barry Smith Logging, Inc.*, 267 Mont. 444, 447, 884 P.2d 786, 788 (1994) (citing section 28-10-103, MCA). The belief that another is an agent must be reasonable. *Id.* (citations omitted). The employer in this case did not act in a manner which could have led claimant to reasonably believe that McLaughlin was his supervisor. To the contrary, Anderson Steel had a clear line of supervisory control. Moreover, even if McLaughlin was in that line of control, I have found as a matter of fact that the alleged accident was not reported to McLaughlin.

6. The claim in this case is barred under section 39-71-603, MCA, since claimant did not provide timely notice to his supervisor or any supervisory personnel of his employer.

7. In view of the failure to give timely notice of the injury, I find it unnecessary to consider whether the alleged accident in fact occurred.

8. Since claimant has not prevailed in this action, he is not entitled to attorney fees and costs.

JUDGMENT

1. Claimant is not entitled to compensation or medical benefits on account of his alleged injury of January 31, 1996, because he failed to give his employer notice of his injury and accident within thirty days as provided in section 39-71-603, MCA (1995).

2. Claimant is not entitled to attorney fees and costs.

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

4. 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 16th day of July, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Benjamin R. Graybill

Mr. Charles G. Adams

Date Submitted: April 9, 1997