IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 72

WCC No. 2002-0777

GEORGE STEPHEN HARGER
Petitioner
vs.
MONTANA CONTRACTOR COMPENSATION FUND
Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED - DISMISSED by Agreement with Prejudice 6/1/04

Summary: Claimant filed a petition seeking benefits with respect to an alleged low-back injury or occupational disease arising in April 2001 as a result of driving a loader on two days. The insurer denied that any injury or disease occurred

Held: The claimant's own testimony establishes a claim for an industrial injury, not an occupational disease, since the harm he claims to have suffered arose during a single work shift. He failed to report the alleged injury to his employer within thirty days as required by section 39-71-603(1), MCA (1999), therefore his claim is barred. Moreover, he failed to persuade the Court that he suffered either an industrial injury or occupational disease since he failed to persuade me that he suffered harm arising from his work. Claimant's testimony to the contrary was not credible.

Topics:

Injury and Accident: Accident. Where claimant asserts that physical harm arose over a single work shift, his claim arises under the Workers' Compensation Act, not the Occupational Disease Act. §§ 39-71-119(2)(d) and 39-72-102(10), MCA (1999).

Constitutions, Statutes, Rules and Regulations: Montana Code Annotated: 39-71-119(2)(d), MCA (1999). Where claimant asserts that physical harm arose over a single work shift, his claim arises under the Workers' Compensation Act, not the Occupational Disease Act. §§ 39-71-119(2)(d) and 39-72-102(10), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-102(10), MCA (1999). Where claimant asserts that physical harm arose over a single work shift, his claim arises under the Workers' Compensation Act, not the Occupational Disease Act. §§ 39-71-119(2)(d) and 39-72-102(10), MCA (1999).

Limitations Periods: Notice to Employer: Failure of an employee to give his employer notice of his alleged industrial accident within 30 days bars any claim for compensation. § 39-71-603(1), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-603(1), MCA (1999). Failure of an employee to give his employer notice of his alleged industrial accident within 30 days bars any claim for compensation. § 39-71-603(1), MCA (1999).

Witness: Credibility. Claimant was found not credible concerning an alleged industrial accident where he specifically denied being injured at the time, he reported a different cause in seeking initial medical treatment, and his testimony explaining his actions was incompatible with the degree of injury he claims he suffered.

¶1 The trial of this matter was held on October 27, 2003, in Helena, Montana. Petitioner, George Stephen Harger (claimant), was represented by Mr. Paul E. Toennis. Respondent, Montana Contractor Compensation Fund (MCCF), was represented by Mr. Bradley J. Luck.

¶2 Exhibits: Exhibits 1 through 6, 10 and 11 were admitted without objection. Exhibits 7 through 9 were withdrawn. Exhibits 22 and 23 of the Harger deposition are hearsay and were deemed by the Court as unhelpful.

¶3 Witnesses and Depositions: Claimant was the only witness at trial. The parties also submitted the depositions of claimant, Dr. Gregory S. McDowell, Dr. Dean Sukin, Doug Rieker, Douglas Schell, and Duane Pisk for the Court's consideration.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

- Is the insurer liable for the Petitioner's alleged occupational disease filed in this matter?
- In the alternative is the Insurer liable for the Petitioner's condition as a workers' compensation injury?
- Did the insurer prove sufficient notice of accident or injury pursuant to § 39-71-603?

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶6 Claimant is sixty-one years of age. He has a two year, Associate of Arts degree in math and physics from a community college.

¶7 Claimant has worked as a heavy equipment and construction vehicle operator all his adult life and has operated a wide range of equipment. He is a union member and has the highest equipment operator designation ("A") given by the union. According to

claimant, he can operate almost any equipment, although he would need brief training for some equipment. (Harger Dep. at 24.)

¶8 At least in recent years, claimant has been dispatched to jobs from the Union Hall of the International Association of Operating Engineers located in Billings.

¶9 On April 5, 2001, claimant was dispatched to Empire Sand & Gravel (Empire) for work. He had previously worked for Empire in 1998 and 2000.

¶10 Claimant was initially assigned work at Empire's cement plant in Billings. His initial job on April 5th was running a Cat 936, which is a small loader. His job entailed scooping and loading material into hoppers used in making cement.

¶11 Claimant testified that the seat and transmission of the Cat 936 were defective. According to claimant, the adjustable shock for the seat was broken and the seat dropped twelve to fourteen inches, bottoming out, when going over rough ground. He also testified that when shifting the transmission the loader abruptly stopped, throwing him against the back of the seat.

¶12 Claimant worked ten hours on April 5th. In his deposition he testified that the seat bottomed out "thousands" of times during his shift. (Harger Dep. at 16.) According to claimant, by the end of his shift his "butt was numb, and both legs were hurting and [it was] difficult standing, straighten up, or kind of walking." (*Id.*) At trial he testified that by the end of the day he had pain of a magnitude of eight on a scale of ten, difficulty walking and standing, back and butt numbness, and difficulty standing straight.

¶13 While he worked five hours the next day (April 6th) driving the same loader, claimant testified at trial and in his deposition that there was no doubt in his mind that he was injured on April 5th. (Trial Test. and Harger Dep. at 55:24 to 56:3.) If his testimony is believed, he suffered an injury due to repetitive trauma occurring during a single shift of work. Claimant's own testimony shows that if injured at all his injury occurred on April 5th during a single work shift.

¶14 Claimant did not submit a claim for compensation until July 26, 2001. The claim was denied and claimant now seeks benefits in the alternative under the Workers' Compensation Act or the Occupational Disease Act.

¶15 The insurer denies liability. It alleges that claimant failed to give timely notice of the alleged injury. It further denies that claimant suffered either an industrial injury or an occupational disease. Resolution of the dispute turns in large part on the claimant's credibility.

¶16 Claimant's own statements, taken together with other evidence, demonstrate that he failed to provide his employer with any notice of a claimed injury until July 2001, well outside the thirty day limitation period of section 39-71-39-603, MCA (1999-2001).

¶17 On his April 5th time card, under a section entitled "Comments Safety Deficiencies," the claimant wrote that the loader he had driven "Shifts hard" and "Seat Shocks bad." (Ex. 6 at 1.) However, he checked the "No" box next to the statement "I was injured."

(*Id*.) On April 6th he wrote "See Previous Report" and again checked the "No" box next to the "I was injured" statement. (*Id*.)

¶18 Claimant testified at trial that he did not check the injury box on April 5th or 6th because he did not consider himself injured; he thought he was just temporarily sore. That testimony is incompatible with his other testimony that at the end of his shift on April 5th he had pain of eight on a ten point scale and had difficulty walking and standing. This, if believed, was no ordinary soreness.

¶19 Claimant also proffered another excuse for failing to promptly report his alleged injury. In a recorded statement given to a claims adjuster after filing his claim in July, he said he did not report his alleged injury "[b]ecause I have gone through this workman comp BS and it isn't worth it. It is easier just to try to stay on the job." (Harger Dep. Ex. 1 at 9-10.) In his deposition he again indicated he did not report any injury on April 5th because he disliked the system:

Q. So you knew you had an injury on April 5, but you didn't report it because you didn't like the system.

A. That's exactly correct.

(Harger Dep. at 65:14-16.) While I believe his testimony that he did not report his injury - testimony which is supported by his supervisors and his time card, I do not believe his excuse for not giving notice of his injury.

¶20 In April 2001, claimant's immediate supervisor was Luke Fisk (Fisk), whose title was "Lead Man." Douglas Schell (Schell) was Lead Man when Fisk was absent. Like claimant, both men are union members. Douglas Rieker (Rieker) was the general superintendent for the Billings division of Empire. Claimant did not report any injury to either Fisk, Rieker, or Schell, or to any other putative supervisor, until July 16, 2001. According to claimant, he did not do so because he didn't want to go "through this workman comp BS." (Harger Dep., Ex. 1 at 9-10; Trial Test.)

¶21 However, claimant testified at trial that he "may" have told Fisk on April 5th that he was "beat up" from driving the loader. He further testified that on Monday, April 9th, he talked to Rieker and told him the seat was broken and that it had caused him a lot of physical discomfort and beat him up. On cross-examination he admitted he did not tell them his back was bothering him, only that he was hurting. He also said that shortly after April 5th he started wearing a back brace he had from his 1988 injury and that the brace would have been visible to Rieker (and presumably to Fisk).

¶22 Fisk denied that during 2001 claimant reported any physical problems due to equipment or with his back, or that he ever observed claimant experiencing any physical problems. (Fisk Dep. at 7-9.) Shell similarly denied that claimant ever mentioned any injury or physical problems prior to July 2001. (Schell Dep. at 8, 11.) Schell, who saw claimant several times a day while working in 2001 (id. at 10), was specifically asked if he saw claimant wearing a back brace and he did not (id. at 11). Rieker also denied that claimant ever indicated he was hurt or that he observed claimant with a back brace. While all three testified by deposition, I found claimant's testimony on key points so

incredible that lacking confirmation by Fisk, Schell, and Rieker, I do not believe his present claim that he reported he was hurting or that he wore a back brace. Accordingly, I find that claimant not only did not report an injury but he failed to give his supervisors any indication whatsoever that he was hurt in any way.

¶23 I now turn to the question of whether claimant was injured at all at work.

¶24 Initially, I note that claimant was not candid about his history of prior low-back pain. At trial and in deposition he denied any history of low-back pain. However, his medical records disclose that in 1988 he suffered a low-back injury in addition to a thoracic spine injury. While the thoracic injury was his primary complaint, medical records of Dr. David McLaughlin, the physician treating him for his 1988 injury, document "lumbar spine strain," as well as thoracic strain. (Ex. 2 at 51.) Two years after the 1988 injury, on April 17, 1990, the doctor wrote that "Mr. Harger is still being followed by me for his low-back strain that was acquired during work." (*Id*. at 52.) In April 17, 1990, Dr. McLaughlin wrote to a State Fund claims adjuster, "Mr Harger is still being followed by me for his low back strain that was acquired during work." (McDowell Dep. Ex. 1.)

¶25 Moreover, when claimant initially sought chiropractic treatment on April 24, 2001, for low-back pain he answered a written questionnaire. In his answers he indicated he had "Sciatica or Chronic Back Problems." (Ex. 2 at 18.) He further wrote that he had similar problems for "Life." (*Id*. at 19.) There is no doubt in my mind that his reference to "lifetime" and "chronic problems" was to "lumbar spine problems" because he specifically wrote "lumbar spine" in response to the question asking, "Where is your pain located?" (*Id*.)

¶26 The chiropractic questionnaire also specifically asked claimant whether his condition was the result of a motor vehicle accident, a job injury or a personal injury. He marked personal injury and underlined "personal."[(1)] (Ex. 2 at 19.) The claimant also wrote that his pain started "Sunday - April 22 '01." (Ex. 2 at 19.) The chiropractor's office note recorded the onset of pain as on "Sunday driving from Missoula - Ran Loader All day Monday." (*Id*. at 23; sic.) There is no evidence implicating an on-the-job injury or exacerbation on Monday, April 23rd. Claimant last drove the loader with the bad seat on April 6th. He testified that he did not drive that loader again until three to four weeks later and that the seat had been fixed by then. At trial claimant attempted to explain away the entries in the questionnaire by saying that April 22nd was the date his "real pain" started. This testimony, too, was incredible. It flies in the face of his trial testimony that by the end of the day on April 5th, he had pain of a magnitude of eight on a scale of ten, and difficulty walking and standing. It also contradicts his further trial testimony that on Monday, April 9th, he was "barely capable of walking."

¶27 I must also consider claimant's description of what occurred on April 5th. As noted earlier, he testified that the seat in the loader dropped twelve to fourteen inches and bottomed out; that he drove the loader over rough ground, causing the seat to bottom out "thousands of times"; and that he was also thrown about when shifting the transmission. Both Rieker and Schell testified as to their driving the same loader, Rieker two or three times during the winter of 2001 and Schell on a more regular basis. (Schell Dep. at 6-7; Rieker Dep. at 12.) Both individuals are substantial men: Schell weighs 220 (Shell Dep. at 6.), Rieker weighs 300 (Rieker Dep. at 12). Both men denied that there

was a problem with the transmission. (Schell Dep. at 7; Rieker Dep. at 15.) Both denied that the seat bottomed out. Schell noticed no problem with the seat. (Schell Dep. at 6.) Rieker testified that the seat of the loader had only "6 inches of travel from the utmost position to where they are down all the way." (Rieker Dep. at 13.) Shell described the terrain over which claimant drove the loader as "smooth" and Rieker described it as "flat and level." (Schell Dep. at 8; Rieker Dep. at 17.) Based on my assessment of claimant's credibility, and in light of the testimony of Schell and Rieker, I am persuaded that while there may have been problems with the seat of the loader, claimant has grossly exaggerated the problems and has fabricated or exaggerated the problems with the transmission and terrain.

¶28 Ultimately, I am **un**persuaded that claimant suffered a repetitive injury to his low back either on April 5, 2001 or over the course of two days, April 5 and April 6. He did not report an injury to his employer, going so far as to check the "No" box next to the statement "I was injured" on his time card. Further, his reports to the chiropractor on April 24, 2001, are incompatible with his claim of an injury or occupational disease. Indeed, the history he gave the chiropractor indicates he had a chronic low-back problem which was exacerbated by a long drive to Missoula on Sunday, April 22, 2001. Finally, his testimony concerning the seat bottoming out, the transmission throwing him around, and the rough terrain were not credible.

CONCLUSIONS OF LAW

¶29 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶30 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶31 An industrial injury is defined in section 39-71-119(2), MCA (1999), as a work-related accident which 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**.

The "specific event" language of subsection (1)(d) encompasses repetitive trauma occurring over a single day or work shift. *Welch v. American Mine Services, Inc.,* 253 Mont. 76, 82, 831 P.2d 580, 584 (1992) (foot infection due to abscess which was caused by new boots rubbing claimant's feet during a single work shift is an injury under the criteria identical to those in the present case).

¶32 An occupational disease is harm that is due to trauma or exposure occurring over more than one day or a single work shift. Section 39-72-102 (10), MCA (1999), provides in relevant part:

(10) "Occupational disease" means harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift. . . .

¶33 In this case, the claimant's own testimony establishes a claim for an industrial injury rather than an occupational disease. His description of events and the harm he alleges was caused by them shows that the alleged harm arose as a result of repetitive trauma over a single work shift. Claimant was unequivocal in asserting that the harm occurred on April 5, 2001. His description of his alleged physical condition - pain of eight on a scale of ten, difficulty walking, and difficulty standing - support his assertion. Therefore, his claim arises if at all under the Workers' Compensation Act, not under the Occupational Disease Act.

¶34 Accordingly, the notice provision prescribed by the Workers' Compensation Act, applies in this case. That provision is found at section 39-71-603(1), MCA (1999). It provides:

(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.

As a matter of fact, I have found that the claimant did not provide his employer with notice of his alleged industrial accident within thirty days. Claimant also failed to prove that his employer was actually aware of any accident. Therefore, his present claim for compensation is barred by section 39-71-603(1), MCA (1999).

¶35 Although section 39-71-603(1), MCA, bars the claim in this case, I have considered in the alternative whether claimant in fact suffered an industrial injury or occupational disease. As a matter of fact, I have found that the claimant did not suffer harm on account of his work on April 5 or April 5 through 6, 2001. I simply did not find credible the claimant's testimony concerning the onset and cause of his back pain. Therefore, irrespective of statutory bar under section 39-71-603(1), MCA (1999), he is not entitled to compensation because he has failed to prove he suffered either an industry or an occupational disease.

JUDGMENT

¶36 The claimant's claim for benefits is barred on account of his failure to timely notify his employer of his alleged industrial injury. § 39-71-603(1), MCA (1999). Moreover, claimant did not suffer either an industrial injury or an occupational disease as he

alleges. The insurer is not liable for benefits and the Petition is **dismissed with prejudice**.

¶37 This JUDGMENT is certified as final for purposes of appeal.

¶38 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 26th day of December, 2003.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Paul E. Toennis
Mr. Bradley J. Luck
Submitted: October 27, 2003

1. Almost a year after the April 24, 2001 chiropractic visit, the chiropractor wrote a "To Whom It May Concern" letter indicating that claimant reported that his operation of the loader with a defective seat had aggravated his back and that "on Sunday April 22, 2001 his symptoms started to reoccur." (Ex. 2 at 30.) However, this letter was written at the behest of claimant. There is nothing in the chiropractor's April 24th notes indicating any discussion of the loader or defective seat. I give the letter no weight.