

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1998 MTWCC 68**

**WCC No. 9804-7956**

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**HENRY THOMAS JACOBS**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE**

**Respondent/Insurer for**

**YELLOWSTONE ELECTRIC COMPANY**

**Employer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** 47-year old electrician/laborer claimed new injury to his elbow and aggravation of pre-existing shoulder condition. Insurer contended claimant did not report the injuries within 30 days and denied claimant sustained an injury as reported.

**Held:** Claimant's testimony concerning his report of injury to his immediate supervisor, considered in the context of testimony of other witnesses, is credible. The WCC is also convinced claimant suffered a temporary aggravation of pre-existing conditions, but finds claimant did not prove injury on a specific day as required by section 39-71-119(2)(d), MCA (1997) to sustain a claim under the Workers' Compensation Act. While his petition is dismissed and he is denied costs, the insurer has an obligation to adjust his claim under the Occupational Disease Act where elements of an OD have been proven.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-119, MCA (1997).** While claimant proved that electrician work for his employer caused a temporary exacerbation of preexisting shoulder and left limb problems, he did not prove injury on a single day or work shift. His petition for a compensable injury is dismissed, but the WCC notes the insurer is obligated to adjust his claim under the Occupational Disease Act where elements of an OD have been proven.

**Injury and Accident: Accident.** While claimant proved that electrician work for his employer caused a temporary exacerbation of preexisting shoulder and left limb problems,

he did not prove injury on a single day or work shift. His petition for a compensable injury is dismissed, but the WCC notes the insurer is obligated to adjust his claim under the Occupational Disease Act where elements of an OD have been proven.

**Occupational Disease: Disease.** While claimant proved that electrician work for his employer caused a temporary exacerbation of preexisting shoulder and left limb problems, he did not prove injury on a single day or work shift. His petition for a compensable injury is dismissed, but the WCC notes the insurer is obligated to adjust his claim under the Occupational Disease Act where elements of an OD have been proven.

¶11 The trial in this matter was held on August 21, 1998, in Butte, Montana, and recessed at 1:50 p.m. Petitioner, Henry Thomas Jacobs (claimant), was present and represented by Mr. Charles F. Angel and Mr. Christopher R. Angel. Respondent, Liberty Northwest Insurance (Liberty), was represented by Mr. Larry W. Jones. The trial reconvened and was completed on August 28, 1998, in Helena, Montana. Claimant waived his right to be present and was not present at that time.

¶12 Exhibits: Exhibits 1 through 5 and 10 through 16 were admitted without objection. Exhibit 6 was withdrawn. Exhibit 7 was admitted after claimant withdrew his objection. Exhibits 8, 9, 14 and 15 were admitted over claimant's objections. Respondent's demonstrative Exhibits 11 through 13 were deferred but were not thereafter offered.

¶13 Witnesses and Depositions: Henry Thomas Jacobs, Marsha Jacobs, Jeffrey M. Hodges, Dave Weaver, Corey Green and Gary W. Pemble were sworn and testified. In addition, the parties agreed the Court may consider the depositions of the claimant, Gary W. Pemble and Dr. Lowell M. Anderson. Wathen Strong's deposition was attached as an exhibit to Dr. Anderson's deposition and will be cited as the Strong deposition (Strong Dep.).

¶14 Issues Presented: The following issues, as restated by the Court, are raised by the Pre-Trial Order:

1. Whether claimant suffered a compensable industrial injury on or about August 15, 1997.
2. If claimant suffered an industrial injury, whether he gave timely notice of the injury to his employer.

¶15 Having considered the Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the parties' arguments, the Court makes the following:

#### FINDINGS OF FACT

¶16 Claimant is 47 years old. He has worked for approximately 16 years as a laborer and installer of electrical wiring. He is licensed to install residential wiring.

¶17 Claimant, who is left-handed, has experienced left shoulder, elbow and hand problems for many years. His history of problems dates back to at least 1986.

¶18 On May 3, 1994, claimant underwent extensive surgery on his left extremity. The surgery consisted of left shoulder rotator cuff repair, a distal clavicle resection, decompression of the subacromial space, and left carpal tunnel median nerve decompression. His right elbow was also injected with an anti-inflammatory steroid. (Strong Dep. Ex. at 58.) The surgery and injection were done by Dr. Lowell M. Anderson. By November of 1994, claimant had returned to work as a residential electrician. (*Id.* at 61.)

¶19 Claimant returned to Dr. Anderson in February of 1997, complaining of left shoulder and elbow pain. In March 1997, Dr. Anderson diagnosed left shoulder impingement and left elbow flexor tendinitis and took claimant off work. (*Id.* at 77.) Dr. Anderson prescribed physical therapy. Following physical therapy, on May 22, 1997, Dr. Anderson found claimant to be at maximum medical improvement and approved his return to work on a trial basis. (*Id.* at 73; Anderson Dep. at 14-15.)

¶110 By the time of his 1997 treatment, claimant had enrolled in a state apprenticeship program to become a journeyman electrician. The apprenticeship program required that he work under journeyman electricians and take educational courses in electrical wiring. While in the program, claimant reported to Gary Pemble (Pemble), who is the Montana coordinator for the apprenticeship program for electricians. Pemble arranged courses and assigned claimant to jobs.

¶111 Upon his May 1997 release to return to work, Pemble arranged for claimant to work as an apprentice for Yellowstone Electric Company (Yellowstone). Over the course of the summer of 1997, claimant worked on an ice rink being built at Four Corners west of Bozeman. Yellowstone was the electrical subcontractor for the ice rink.

¶112 Claimant contends that he suffered a new injury to his elbow and an aggravation of his shoulder condition on or about August 15, 1997, while cutting holes in duct work. He recalled the day as being a Saturday, which according to the 1997 calendar was actually August 16, 1997.

¶113 The holes were needed for fire alarms. Claimant testified that at the time he was injured, he was working under the supervision of Corey Green (Green), who is a journeyman electrician. Claimant testified that he and Green used a hole saw to cut the holes and that the saw quickly became dull. According to claimant, the saw "bound" on several occasions, wrenching his left arm. He thereafter experienced pain in his left hand and elbow and numbness in his left hand.

¶114 Claimant testified that on the following Monday he reported to Green that he had hurt his hand while cutting the holes and asked Green if he could do light-duty work.

¶15 Claimant filed a written claim for compensation on November 6, 1997. (Ex. 5.)

¶16 At the time of claimant's alleged injury, Yellowstone was insured by Liberty. Liberty denied the claim.

¶17 Liberty contends that claimant did not report any alleged accident or injury to Yellowstone within the 30 days prescribed by section 39-71-603, MCA (1997). It further contends that claimant did not suffer a compensable industrial accident.

#### Notice

¶18 Jeffrey M. Hodges (Hodges) was the foreman at the Four Corners work site. He acknowledged that he was aware that workers had encountered some difficulties while cutting holes in the duct work. However, he testified that claimant did not inform him of any injury or arm pain.

¶19 According to Hodges, he instructed claimant upon coming to work for Yellowstone that he was to report any injury to him (Hodges). Claimant denied receiving any such instruction. Green testified that he never received any handbook or instructions that Hodges claimed he routinely gave to new employees. I find claimant's and Green's testimony the more credible, thus I find that claimant was never instructed to report injuries to Hodges or to anyone else in particular. Claimant's immediate supervisor was Green. I find that, lacking other specific instructions, claimant was to report any injury to Green.

¶20 Green denied that claimant reported an injury to him. Claimant, however, testified that when he mentioned his arm pain to Green and asked for lighter duty, Green responded, "Don't be a Wuss." Green could not recall the conversation but said that he would have used a more graphic word than "Wuss." His response adds credibility to claimant's recollection and indicates an attitude of intolerance towards complainers. I find claimant credible and adopt his testimony.

¶21 Based on the foregoing findings, I find that claimant reported arm pain due to drilling within two days of his alleged injury. He made his report to Green and that report was timely.

¶22 In reaching this conclusion, I have taken into account Hodge's testimony concerning time cards, but I did not find his testimony or the time cards persuasive. There was credible evidence indicating that Hodges did not pay as careful attention to time cards as he claimed. He recorded claimant as working in the front lobby on Saturday, August 16<sup>th</sup>. The front lobby is the same area where the duct work holes were drilled and although Hodges used a separate code for duct work drilling, I am unpersuaded that he was sufficiently careful in making out time records that he could not have made an error as to the exact

work claimant was doing in the front lobby. There was credible evidence that he was not even present on some days for which he made out the time records.

¶123 I have also taken into consideration the testimony of Pemble regarding his discussions with claimant concerning his reassignment to Great Falls. Pemble's testimony established that claimant was unhappy with his reassignment to Great Falls in September 1997 and refused to extend his work in Great Falls beyond the initial four-week period he was supposed to work. However, claimant testified that he was having arm pain at the time and had scheduled a doctor's appointment for the week he was sent to Great Falls. He had to cancel the appointment on account of the assignment. He also testified that he rescheduled the appointment for the week following the scheduled end of the Great Falls assignment. His testimony was supported by that of Dave Weaver, the superintendent of the Great Falls job, who confirmed that claimant had told him that he had to cancel a doctor's appointment as a result of the assignment. It is further supported by the fact that upon returning to Bozeman in mid-October, claimant went to see Dr. Anderson about his arm. Again, I find claimant's version of the events credible and persuasive.

#### Injury

¶124 Dr. Anderson and Dr. John A. Vallin provided uncontradicted medical evidence that claimant's work for Yellowstone aggravated his preexisting arm and shoulder conditions and caused a new left elbow ulnar nerve neuropathy. (Strong Dep. Ex. at 90-91; Anderson Dep. at 24, 26-27.) The aggravation of preexisting conditions was temporary. (Strong Dep. Ex. at 92.)

¶125 However, neither Dr. Anderson nor Dr. Vallin related claimant's aggravation of preexisting conditions or his new ulnar nerve condition to a single event or to a series of events on a single day. Dr. Vallin merely observed that claimant's continued work "in the capacity of an electrician, which requires repetitive heavy manual labor, would result in aggravation of a pre-existing condition as it relates to his ongoing shoulder and elbow symptoms." (*Id.* at 91.) Dr. Anderson declined to pin claimant's conditions on his drilling holes in the duct work. Rather, he attributed his conditions to a "combination" of the drilling and other work-related repetitive activities. (Anderson Dep. at 22 and see *id.* at 27.)

### CONCLUSIONS OF LAW

#### I. Applicable Law

¶126 Claimant seeks benefits with respect to the alleged injury occurring on August 15, 1997. His claims are governed by the 1997 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

#### II. Notice

¶127 Claimant was required to notify his employer of his alleged injury within 30 days of that injury. § 39-71-603, MCA (1997). He satisfied the notice requirement by reporting his injury to his immediate supervisor within two days of the alleged injury.

### III. Burden of Proof

¶128 Claimant must prove by a preponderance of the evidence that he suffered an industrial injury. *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).

### IV. Industrial Injury and Accident

¶129 Under the 1997 WCA, a compensable industrial injury requires both an "injury" and an "accident." Section 39-71-119, MCA, provides in relevant part:

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

(a) internal or external physical harm to the body that is established by objective medical findings;

...

(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.

Claimant has satisfied the criteria of section 39-71-119(1), MCA; however, he has failed to prove, as required by section 39-71-119(2), MCA, that his condition was caused by a specific event on a single day or during a single work shift. The medical evidence presented by claimant demonstrates that repetitive activity caused a temporary aggravation of his preexisting left extremity conditions and caused a new left ulnar nerve neuropathy. The opening physicians did not attribute the conditions to any single incident or to anything occurring on a single day. Hence, claimant's medical proof, while providing an uncontroverted and compelling basis for an occupational disease claim, does not satisfy his burden of proving he suffered an injury within the meaning of the WCA.

### V.

¶130 Since claimant has not prevailed in this action, he is not entitled to costs.

### JUDGMENT

¶131 1. Claimant did not suffer an industrial accident within the meaning of section 39-71-119, MCA, and is not entitled to workers' compensation benefits. His petition is **dismissed with prejudice**.

¶132 2. Petitioner is not entitled to attorney fees or costs.

¶133 3. Liberty has an obligation to adjust this claim under the Occupational Disease Act.

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

¶135 5. 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 25th day of September, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Christopher R. Angel

Mr. Charles F. Angel

Mr. Larry W. Jones

Submitted: August 28, 1998