IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 58

WCC No. 2002-0540

DANIEL E. JORDAN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, who had suffered a prior shoulder injury in June 2000, alleges that he suffered a new shoulder injury on May 25, 2001. The insurer asserts by way of affirmative defense that claimant did not give timely notice of the alleged injury to his employer and the parties agree that the notice issue is the sole issue to be determined in this matter.

Held: The claim is barred by claimant's failure to give notice to his employer within thirty days as required by section 39-71-603(1), MCA (1999). Claimant's statement on May 25, 2001, that he had shoulder pain did not provide the employer with adequate notice where he had been complaining of shoulder pain during the weeks prior to May 25th and had suffered a prior shoulder injury.

Topics:

Limitations Periods: Notice to Employer. Notice to an employer that the claimant has shoulder pain is insufficient under section 39-71-603, MCA (1999), where the claimant does not identify any work-related event, has complained on several occasions during recent weeks of shoulder pain, and had suffered a prior shoulder injury.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-603(1), MCA (1999). Notice to an employer that the claimant has shoulder pain is insufficient under section 39-71-603, MCA (1999), where the claimant does not identify any work-related event, has complained on several occasions during recent weeks of shoulder pain, and had suffered a prior shoulder injury.

¶1 The trial in this matter was held on November 13, 2002, in Kalispell, Montana. Petitioner, Daniel E. Jordan (claimant), was present and represented by Mr. Kenneth S. Thomas.

Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Kelly M. Wills.

¶2 Exhibits: Exhibits 1 through 20 were admitted without objection.

¶3 Witnesses and Deposition: The deposition of the claimant was filed with the Court for its consideration. Claimant, Debbie Jordan, Veronica Bovee, and Doug Jellesed were sworn and testified.

¶4 Issues Presented: The issue, as delineated in the Pretrial Order and in discussion with counsel at the commencement of trial, is whether claimant notified his employer within thirty days, as required by section 39-71-603, MCA (1999), of an alleged May 25, 2001 industrial injury. If the Court finds for claimant on this issue, then it is to consider whether Liberty acted unreasonably in denying the claim for lack of notice but will not finally determine whether a penalty should be awarded since there is a further issue as to causation of claimant's current shoulder condition which must then be determined. Hence, the request for penalty can be finally determined only after other issues not presented at present are resolved.

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

FINDINGS OF FACT

¶6 From 1996 until May 30, 2001, the claimant was employed by Stimson Lumber Company (Stimson) at its plywood mill in Libby, Montana.

¶7 On June 23, 2000, the claimant suffered an injury involving his right shoulder while working for Stimson. At the time of the injury he was working as a dryer offbearer and was pushing "wet veneer into a cart when he felt his shoulder pop and 'hot' pain down to his elbow." (Ex. 1.)

¶8 Claimant was thereafter treated, initially at Prompt Care in Libby and thereafter by Dr. John W. Hilleboe, an orthopedic surgeon practicing in Kalispell. On July 27, 2000, Dr. Hilleboe diagnosed a partial tear of the right supraspinatus tendon of the shoulder but prescribed conservative care to see if it would heal without surgery. (Ex. 19 at 20.) He approved claimant for light-duty work. (*Id.* at 21.)

¶9 Claimant's shoulder improved and he returned to his regular work as a dryer offbearer. On December 12, 2000, Dr. Hilleboe approved claimant's return to full duty subject to a twenty-pound overhead lifting restriction. (*Id.* at 27.) On April 2, 2001, Dr. Hilleboe certified that claimant had reached maximum medical improvement (MMI). (*Id.* at 28.)

¶10 During April and May 2001, however, claimant's shoulder began to hurt him more, especially after a full work week. He mentioned to the dryer tender, Doug Jellesed (Jellesed), on several occasions that his shoulder was sore and hurt.

¶11 On Friday, May 25, 2001, claimant experienced a sharp pinching pain in his shoulder while working. He told Jellesed his shoulder was sore but did not tell him anything more and continued working. He worked his next two regular shifts (Saturday and Sunday, May 26 and 27, 2001), then was off work on his regular days off the next two days (Monday and Tuesday, May 28 and 29, 2001.)

¶12 On May 29, 2001, claimant sought medical care for his shoulder at Prompt Care Clinic in Libby. He was seen by a physician's assistant who recorded that claimant was

complaining of right AC [acromioclaviclar[(1)]] tenderness secondary to a right rotator cuff tear from last year. He does a lot of lumber pulling at the mill and has noticed significant tenderness over the right AC joint.

(*Id*. at 19.) The physician's assistant noted "AC JOINT TENDERNESS" as his impression and prescribed anti-inflammatory medication.

¶13 Claimant's shoulder continued to hurt. He scheduled and kept an appointment with Dr. Hilleboe on June 19, 2001. Dr. Hilleboe's office note for that date states in part:

Reinjured his shoulder. He reached out to pick up something with weight in it and had immediate onset of sharp pain in the shoulder; since then he's noticed swelling over the AC joint. . . .

(*Id*. at 29.) He restricted claimant from "heavy overhead work or crossing his arm across his body." (*Id*.)

¶14 Dr. Hilleboe ordered an MRI (*id*. at 29), which was done on July 18, 2001. (*Id*. at 6.) The MRI indicated an "inflammatory response" of the tendons in the shoulder with swelling but did not indicate any tear of tendons. (Ex. 19 at 6, 30.) Dr. Hilleboe recommended arthroscopic surgery and advised claimant "to change his occupation."

¶15 Meanwhile, on May 30, 2001, claimant had requested a leave of absence from work. His request was based on his grief arising from the death of his son in April. He did not inform his supervisor or Stimson's human resource officer, Veronica Bovee (Bovee), of any injury or incident occurring May 25th.

¶16 Claimant's request for personal leave was granted and he never returned to work thereafter.

¶17 On June 14, 2001, he did call Bovee to ask whether he had medical insurance coverage. Stimson's health insurance coverage is based on work performed two months previous and since claimant had taken substantial time off in April due to his son's death,

Bovee indicated that he might not have insurance for June and suggested he call the insurer.

¶18 During the June 14, 2001 conversation, claimant did not mention any work injury or incident in May but did mention he hurt his shoulder lifting a partially filled gas can from the back of his truck. In fact, claimant had lifted a gas can from his truck and experienced severe shoulder pain, however, it was the same sort of pain he had experienced on May 25, 2001, and in June 2000, not a new and different pain. The gas can contained only a couple of inches of gas and weighed less than five pounds.

¶19 Claimant's leave of absence expired on June 29, 2001, and he was scheduled to return to work on July 9, 2001. However, he did not show up for work on July 9th and Bovee was unable to contact him by telephone as his phone had been disconnected. She wrote him a letter on July 11, 2001, telling him to contact her by July 18, 2001, otherwise Stimson would assume he did not wish to continue employment and he would be terminated.

¶20 Claimant received Bovee's July 11th letter on July 16, 2001. He did not call by July 18th but did call Bovee on July 19th. During the conversation, claimant told Bovee he had a doctor's appointment on the 18th but did not otherwise indicate why he had not called by that day. He did not mention any shoulder injury or incident occurring in May and did not indicate an interest in returning to work. Bovee told him she would send him information on his 401k plan. His employment was terminated on July 19th because he had not shown up for work.

¶21 On August 2, 2001, claimant brought Bovee a "work release" slip from Dr. Hilleboe. The release, dated July 18, 2001, actually stated that claimant was unable to work on account of his right shoulder. (Ex. 12.) Bovee informed claimant that "he no longer worked for Stimson." Claimant did not inform her of any May injury or incident during their conversation.

¶22 On November 26, 2001, Dr. Stanley Makman performed acromioplasty and AC joint resection surgery on claimant's right shoulder. His pre- and post-operative diagnosis was "Right shoulder impingement and AC joint arthritis." (Ex. 19 at 40.)

¶23 On January 20, 2002, claimant filled out and submitted a written claim for compensation indicating he suffered a work-related right shoulder injury on April 27, 2001. In submitting the written claim, the claimant intended to refer back to the May 25, 2001 onset of renewed sharp shoulder pain, however, he was confused about the date. He knew the date was the last Friday of the month and just before Memorial Day but was looking at an April 2001 calendar when he filled out the claim. April 27th was the last Friday of April.

¶24 Prior to submission of the written claim, the claimant had not informed Stimson of any work-related injury or incident on May 25, 2001. As mentioned earlier, he had told Jellesed on May 25th that his shoulder was hurting, however, he had made similar reports on

previous days and did not indicate that he re-injured his shoulder on May 25th or that it was hurting due to a specific incident or incidents on that day. He did not inform his regular supervisor of any injury. In his conversations with Bovee, he did not inform her of any May 2001 work-related injury or incident.

¶25 It is clear to the Court that claimant was grief stricken during May 2001 and throughout the summer of 2001, and that he is still suffering from the loss of his son. I am persuaded that his failure to tell Jellesed, his supervisor, and Bovee of the onset on May 25, 2001, of renewed sharp pain similar to the pain he suffered in June 2000, was the result of his grief, but despite my deepest sympathy for the claimant, I am stuck with the fact that he did not report a new injury.

¶26 On the other hand, it is not at all clear that the claimant suffered a new injury or aggravation on May 25, 2001, or suffered a new injury aggravation in June 2001 when he lifted a gas can from his truck. His testimony, which I found credible, indicates that his shoulder pain was increasing during the weeks just prior to May 25, 2001. While Dr. Hilleboe found him at MMI in early April 2001, no physician has addressed his situation in light of the history supplied to the Court. Specifically, they have not addressed whether the increase in claimant's shoulder pain in April and May indicated a deterioration of his condition and a return to non-MMI status, or whether the sharp pain he experienced on May 25, 2001 was a natural progression of his original injury. Those matters are not, in any event, before the Court in this proceeding.

CONCLUSIONS OF LAW

¶27 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).

¶28 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).

¶29 Section 39-71-603, MCA (1999), governs the time within which a claimant must report an injury or aggravation to his employer. Section 39-71-603(1), MCA, 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.

Assuming claimant suffered a work-related injury or aggravation of his right shoulder on May 25, 2001, he was required to give notice of his injury or aggravation within thirty days, i.e., by June 24, 2001. While claimant informed Jellesed that he had shoulder pain, that information was insufficient. Informing the employer that one is sick or is in pain does not constitute notice of an industrial accident. In *Dean v. Anaconda Co.,* 135 Mont. 13, 335 P.2d 854 (1959), the Supreme Court affirmed a determination that claimant had not notified his employer where he had merely reported to his supervisor that his "back was sore and hurt him." 135 Mont. at 17, 335 P.2d at 857. As said in *Lee v. Lee,* 234 Mont. 197, 199-200, 761 P.2d 835, 837.

It is not enough, however, that the employer, through his representatives, be aware that claimant "feels sick", or has a headache, or fell down, or walks with a limp, or has a pain in his back, or shoulder, or is in the hospital, or has a blister, or swollen thumb, or has suffered a heart attack. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. [Quoting 3 Larson, Workmans' Compensation Law, § 78.31(a)(2) pp. 15-126 to 15-136 (1988).][(2)]

¶30 I therefore conclude that a claim with respect to the alleged May 25, 2001 injury is barred by claimant's failure to give notice of the alleged injury. However, as I noted in paragraph 26, I make no determination as to whether the claimant in fact suffered an injury on that date.

JUDGMENT

¶31 Claimant's claim for an alleged injury on May 25, 2001, is barred on account of his failure to notify his employer of the alleged injury within thirty days as required by section 39-71-603, MCA (1999). His petition is therefore **dismissed with prejudice** as to that issue and that issue only.

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

¶33 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 19th day of November, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Kenneth S. Thomas
Mr. Kelly M. Wills
Submitted: November 13, 2002

1. The shoulder joint where the acromion meets the clavicle.

2. In *Lee* the Supreme Court expressly adopted the language from Larson, saying, "We adopt the above standard." 135 Mont. at 17, 335 P.2d at 857.