

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 14

WCC No. 2002-0510

RICHARD MADDALENA

Petitioner

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant alleges he suffered a back injury on September 24, 1999, while working for Big R, however, he failed to report the alleged accident to his employer within 30 days and failed to file a written claim for compensation within one year.

Held: The claim is barred by sections 39-71-603(1), MCA (1999), and 39-71-601(1), MCA (1999).

Topics:

Limitations Periods: Notice to Employer. Where claimant failed to report his alleged industrial injury within 30 days, or provide the employer with facts which put it on notice that he had suffered a work-related injury, his claim is barred by section 39-71-603(1), MCA (1999), which requires notice to the employer within 30 days of the injury.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-603(1), MCA (1999). Where claimant failed to report his alleged industrial injury within 30 days, or provide the employer with facts which put it on notice that he had suffered a work-related injury, his claim is barred by section 39-71-603(1), MCA (1999), which requires notice to the employer within 30 days of the injury.

Limitations Periods: Claim Filing: Generally. Unless a waiver is granted, a claim for compensation is barred unless filed within one year of the industrial injury. § 39-71-601, MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-601, MCA (1999). Unless a waiver is granted, a claim for compensation is barred unless filed within one year of the industrial injury. § 39-71-601, MCA (1999).

Limitations Periods: Claim Filing: Waiver. Where a claimant is aware he has a back injury and undergoes back surgery, and is not prevented by his employer from filing a written claim, there is no basis for waiving the one-year claim filing requirement. § 39-71-601, MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-601, MCA (1999). Where a claimant is aware he has a back injury and undergoes back surgery, and is not prevented by his employer from filing a written claim, there is no basis for waiving the one-year claim filing requirement. § 39-71-601, MCA (1999).

¶1 The trial in this matter was held on August 12, 2002, in Helena, Montana. Petitioner, Richard Maddalena (claimant), was present and represented by Mr. Geoffrey C. Angel. Respondent, Indemnity Insurance Company of North America (Indemnity), was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1 through 5, 9 and 10 were admitted without objection. Exhibits 6 through 8 and 11 were admitted over relevance objections but will be considered only to the extent that they are in fact relevant.

¶3 Witnesses: Todd Long, Mary Kay Yeley, Kim Strozewsky and claimant testified at trial. No depositions were submitted.

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

1. Whether Richard Maddalena [claimant] suffered an industrial injury on September 24, 1999?
2. Whether Richard Maddalena reported his industrial injury within 30 days?
3. Whether Richard Maddalena failed to file his claim within 12 months of the date of injury?

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

FINDINGS OF FACT

¶6 Claimant was employed by Big R Ranch and Home Supply (Big R) on August 30, 1999, as a "stocker." His job required heavy lifting. For example, he was required to lift railroad ties, which could weigh in excess of 100 pounds, and bales of hay, which could weigh up to 80 pounds.

¶7 Claimant is seeking workers' compensation benefits based on an alleged injury to his back on September 24, 1999. According to claimant, he injured his back when he fell off a row of hay bales which he was picking up for his employer, Big R.

His testimony and medical records also indicate he claims to have suffered a prior back injury at Big R while moving a heavy spool of wire,⁽¹⁾ however, he is not seeking benefits with regard to that alleged injury.

¶8 On September 24, 1999, Big R was insured by Indemnity which has denied liability for the claim.

¶9 Claimant testified that on September 24, 1999, he arrived at work in the morning and that he and a coworker - Brian Duneman (Duneman) were sent to pick up hay and straw and transport it to Big R where it was to be sold. According to claimant, he and Duneman loaded hay into Duneman's truck, then, while cleaning up a row of hay bales, he fell approximately twelve feet (12'), landing on his feet. Claimant said he immediately experienced severe pain and had to be helped by Duneman back to the truck.

¶10 Duneman did not testify at trial.

¶11 Claimant further testified that upon arriving back at Big R he told his supervisor, Todd Long (Long), that he was going to go to a chiropractor. When asked whether he told Long about the alleged accident he testified that he "assumed he did" but had no specific recollection of doing so. Upon redirect, he changed his testimony and testified positively that he did tell Long about the accident.

¶12 At the time of trial, Long was no longer working for Big R. He acknowledged that claimant told him he was going to a chiropractor but denied that claimant told him he was injured on the job. According to Long, the conversation took place before the store opened and that the claimant had done no work before the conversation.

¶13 Having observed claimant's and Long's testimony, I find Long the more credible witness. I note claimant's lack of specific recollection of reporting the accident when he testified on direct examination, then his more positive recollection of reporting the incident when asked about it again on redirect examination. I further note that claimant testified that he had hurt his back in a prior incident at Big R when moving a spool of wire and did not report that incident to Big R. I find as a matter of fact that the claimant did not report the alleged September 24th accident to Long on the morning of September 24, 1999. I further find that Big R had not opened when claimant reported his intention to go to a chiropractor. I am unpersuaded that the facts surrounding claimant's statement of his intention to go to a chiropractor put Long on notice that claimant had been injured at work that day or on any other day.

¶14 Claimant quit working at Big R approximately a week after the injury and went to work for Diamond Construction on October 5, 1999. He did not report his alleged accident during that time.

¶15 The first indication Big R had that claimant was asserting he suffered a job-related injury was in mid-December 1999, when Kim Strozewski, the human resources administrator for Big R, was contacted by Dr. Speth's office and asked about workers' compensation coverage. Dr. Speth at that time was treating claimant and had scheduled him for surgery.

¶16 Claimant did not file a written claim for compensation until June 8, 2001, more than a year and a half after his alleged injury. According to claimant, "Penny" at Dr. Speth's office told him he needed to submit a first report but said she would take care of the report. Assuming his testimony to be true, the fact remains that he was responsible for filing the written claim and failed to do so within the twelve months allowed by section 39-71-603, MCA.

¶17 In light of my resolution of the notice and claim filing issues, I do not reach the question of whether claimant in fact suffered an industrial injury on September 24, 1999.

CONCLUSIONS OF LAW

¶18 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).

¶19 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).

¶20 Claimant was required to report his alleged injury to his employer within 30 days of September 24, 1999. Section 39-71-603(1), MCA, provides:

39-71-603. 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.

¶21 On the day of the alleged accident, the claimant told his supervisor only that his back was hurting and that he needed to go to a chiropractor. He did not tell his supervisor that his back hurt because of any incident at work. He did not inform his supervisor of the time and place of the alleged accident.

¶22 The circumstances of the discussion claimant had with his supervisor on September 24th did not put the supervisor on notice of the accident. Unlike the situation in *Kuzara v. State Compensation Ins. Fund*, 279 Mont. 223, 230-31, 928 P.2d 136, 141 (1997), there is no credible evidence that Big R had a policy of discouraging claims, or that claimant informed his supervisor that he suffered an injury, or that the claimant gave his supervisor the name of a co-employee who could give them more information about the injury. Big R had not yet opened when claimant notified his supervisor he was going to a chiropractor. The supervisor testified credibly that claimant had not begun his

work and there was no evidence to show that he was aware claimant had been away from the store picking up hay bales on that day. Since claimant failed to give his employer notice of the alleged accident within 30 days, his claim is barred.

¶23 Claimant also failed to file a written claim within one year, as required by section 39-71-601(1), MCA (1999), which provides:

39-71-601. Statute of limitation on presentment of claim --waiver.

(1) In case of personal injury or death, all claims must be forever barred unless signed by the claimant or the claimant's representative and presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act on the claimant's behalf.

¶24 Subsection (2) of 39-71-601, MCA, allows for a waiver of the one-year filing requirement under some circumstances, providing:

(2) The insurer may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:

(a) lack of knowledge of disability;

(b) latent injury; or

(c) equitable estoppel.

Claimant has not asked for a waiver. Even if he had, none of the grounds is remotely applicable to the facts of this case. He certainly knew of his disability - he required medical treatment and underwent major back surgery on December 14, 1999. (Ex. 2 at 5.) The injury was not latent: again, he sought medical treatment and even underwent major back surgery. Finally, he has failed to show that the employer or insurer prevented him from filing a written claim. Therefore, his claim is barred on account of his failure to file his claim within one year.

JUDGMENT

¶25 The claim in the present case is barred by claimant's failure to notify his employer of his alleged industrial accident within 30 days, as required by section 39-71-603(1), MCA (1999), and his failure to file a written claim for compensation within one year, as required by section 39-71-601(1), MCA (1999). His petition is **dismissed with prejudice**.

¶26 Claimant is not entitled to costs.

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

¶28 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 27th day of February, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Leo S. Ward
Submitted: August 12, 2002

1. Since claimant was not employed by Big R until August 30, 1999, the injury would have had to have occurred within the 3½ week period prior to September 24, 1999. According to a December 10, 1999 note of Dr. Stephen R. Speth, claimant's surgeon:

Richard Maddalena is a 23 year old male who, while working at Ranch and Home Supply Big R, was lifting a heavy role [sic] of fencing when he suddenly had a sharp pain in his lower back.

(Ex. 2 at 7.)