

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 82

WCC No. 9811-8098

BRADLEY H. McGUIN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

LINCOLN COUNTY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Deputy sheriff who trained in scuba diving for search and rescue claimed that serious ear problems he suffered in ensuing years were caused by incident during a 1986 training in water. Other incidents suggesting ear problems occurred during a work related dive in 1988 and during a recreational swim in 1991. After 1991, his symptoms began to include serious vertigo and hypersensitivity to loud sounds, which had the potential to impact his employment. Physicians considered a "perilymph fistula," a leak in fluid from the inner to middle ear. Three surgeries were conducted, but were not successful. The insurer denied liability for the fistula as caused by the 1986 incident, also asserting claimant failed to report the injury within 60 days as required by section 39-71-603, MCA (1985) or to file a claim for compensation within one year as required by section 39-71-601, MCA (1985). The insurer also argued that if claimant had been injured in 1986, there were material and substantial aggravations in 1988 and 1991 relieving it of liability.

Held: Based primarily on the testimony of two treating physicians that the 1986 incident likely caused claimant's perilymph fistula, the WCC found the 1986 incident caused claimant's medical problem. The Court was not persuaded that the subsequent incidents impacted the claim. Although claimant did not report the 1986 incident within 60 days or file a claim in one year, those failures are excused where claimant was unaware of his condition or that it arose during the incident until much later. Claimant gave notice to his employer within 60 days of the relevant diagnosis and filed a claim within one year following the diagnosis.

Topics:

Constitutions, Statutes, Regulations and Rules: section 39-71-601, MCA (1985).

Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to file a claim within one year of the incident. Because he was unaware of his condition or that it arose during the work incident, he filed a timely claim within one year of the diagnosis of his condition.

Constitutions, Statutes, Regulations and Rules: section 39-71-603, MCA (1985).

Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to give notice to his employer within 60 days of the incident. Section 39-71-603, MCA requires a claimant only to disclose what he knows, it does not require the impossible. Because he was unaware of his condition or that it arose during the work incident, he properly gave notice within 60 days of his diagnosis.

Claims: Filing. Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to file a claim within one year of the incident. Because he was unaware of his condition or that it arose during the work incident, he filed a timely claim within one year of the diagnosis of his condition.

Claims: Notice to Employer or Insurer: Generally. Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to give notice to his employer within 60 days of the incident. Section 39-71-603, MCA requires a claimant only to disclose what he knows, it does not require the impossible. Because he was unaware of his condition or that it arose during the work incident, he properly gave notice within 60 days of his diagnosis.

Limitations Periods: Claim Filing: Generally. Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to file a claim within one year of the incident. Because he was unaware of his condition or that it arose during the work incident, he filed a timely claim within one year of the diagnosis of his condition.

Limitations Periods: Claim Filing: Waiver of Time: Lack of Knowledge. Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to file a claim within one year of the incident. Because he was unaware of his condition or that it arose during the work incident, he filed a timely claim within one year of the diagnosis of his condition.

Limitations Periods: Claim Filing: Waiver of Time: Latent Injury. Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to file a claim within one year of the incident. Because he was unaware of his condition or that it arose during the work incident, he filed a timely claim within one year of the diagnosis of his condition.

Limitations Period: Notice to Employer. Claimant who did not realize until years later that incident occurring during 1986 diving training resulted in serious ear problems was not barred by his failure to give notice to his employer within 60 days of the incident. Section 39-71-603, MCA requires a claimant only to disclose what he knows, it does not require the impossible. Because he was unaware of his condition or that it arose during the work incident, he properly gave notice within 60 days of his diagnosis.

¶1 The trial in this matter was held on Monday, May 24, 1999, in Kalispell, Montana. Petitioner, Bradley H. McGuin (claimant), was present and represented by Ms. Sydney E. McKenna. Respondent, State Compensation Insurance Fund was represented by Mr. Greg E. Overturf.

¶2 Exhibits: Exhibits 1, 3 through 11, and 13 through 20 were admitted without objection. Exhibit 2 was admitted, with the exclusion of pages 249-254 as being irrelevant. Exhibit 12 was admitted over the State Fund's objection.

¶3 Witnesses and Depositions: Claimant, Kitty Presnell, and Richard William Emerson were sworn and testified. Depositions of Dr. Peter G. Von Doersten, Dr. Karl Oehrtman, Sheriff Daryl Anderson, Steven Linton, and David Holzer were submitted for the Court's consideration. Pursuant to leave granted by the Court, a post-trial deposition was also taken of Dr. David A. Youngblood. That deposition was filed with the Court on July 19, 1999, at which time the case was deemed submitted for decision.

¶4 Issues Presented: The following issues, as restated by the Court, are presented for decision:

1. Did claimant sustain an industrial injury during a dive training school he attended between June 16 and 20, 1986?
2. Did claimant provide his employer with notice of his alleged injury within the time prescribed by section 39-71-603, MCA?
3. Is the claim barred by the statute of limitations, section 39-71-601, MCA (1985)? If so, was the statute of limitations tolled by reasonable excuse due to a latent injury?
4. If claimant suffered an injury between June 16-20, 1986, was his injury materially and substantially aggravated by dives in 1988 and/or 1991?

Bifurcated and reserved for decision in the event that the Court finds that claimant's petition is barred by sections 39-71-601 and/or 39-71-603, MCA, is the following, fifth issue:

5. If the Workers' Compensation Act, specifically sections 39-71-601 and 603, MCA (1985), bars claimant's claim then is he denied due process as guaranteed by the Montana Constitution Article II section 17 and are his constitutional rights violated under Montana Constitution Article II section 16?

¶15 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

¶16 Claimant is 49 years old. He has an associate of arts degree in law enforcement and a bachelor of science degree in sociology.

¶17 Claimant is a credible witness.

¶18 In 1979 claimant was hired as a deputy sheriff for Lincoln County, Montana, and assigned to Eureka, Montana. He worked in that position until June 22, 1997.

¶19 As part of his training while a deputy sheriff, claimant attended law enforcement schools in water search and rescue.

¶110 Claimant's initial training in scuba diving actually occurred prior to his employment in law enforcement. In 1971 he took a YMCA scuba diving course in Spokane, Washington. (McGuin Dep. at 26; Dep. Ex. 2.) During the course he successfully completed a dive to a depth of 100 feet. (*Id.*) He thereafter participated in a number of dives. (*Id.*)

¶111 In 1985 claimant attended a course called *Dive Rescue I*. The course involved classroom instruction and dives in ponds. Claimant was taught techniques for underwater searching and use of rope. (McGuin Dep. at 16.) He completed the schooling and dives without difficulty.

¶112 In June 1986 claimant attended *Dive Rescue II* school. He participated in dives in a lake (up to 10 feet), rappelling off a bridge, and a free float in a river near Bozeman, Montana. (McGuin Dep. at 16-17.) It was during the float that claimant alleges he was injured.

¶113 Claimant testified at trial about the float. Garbed in a wet suit, swim fins, and goggles he walked into the river and laid on his back until he floated. He floated on his back approximately 100 feet when he began feeling a loss of balance. He terminated his float and swam to shore. He did not swim underwater. He does not recall experiencing ear pain. After the float, he was able to drive himself home.

¶14 Claimant's diving instructor was Steven Linton (Linton). Claimant told Linton why he aborted the float.

¶15 Claimant reported that he did not complete the float requirement for *Dive Rescue II* to his supervising lieutenant. (McGuin Dep. at 24.) He did not recall reporting any specific symptoms at that time, only that he was unable to complete the float. (*Id.*)

¶16 Claimant has a history of asthma. He discussed his history with his diving instructor, Linton, who thereafter sent claimant an article entitled *Asthma and Diving*. (McGuin Dep. at 19-20; Dep. Ex. 1.) Linton and the article suggested that claimant's experience while floating may have been due to his asthma.

¶17 Claimant acknowledged that during *Dive Rescue II* he was suffering from sinus congestion. (McGuin Dep. at 20-21.) He had also been trying to lose weight during the year prior to the dive.

¶18 In 1988 claimant participated in a scuba dive at Lake Koocanusa but became disoriented and aborted the dive. He did not recall experiencing excruciating ear pain, only "some pain, plugged ear, whatever. . . " (*Id.* at 38.) He began hyperventilating and experienced an asthma attack. (*Id.* at 37.) The dive was in the course of an investigation and in the course and scope of his employment. (*Id.* at 34-37.) The dive was the last one he ever attempted. (*Id.*) He resigned from the sheriff's dive team. (*Id.* at 39.)

¶19 In 1991 claimant was in Helena and stayed at a motel. During his stay he swam in the motel pool. He attempted to swim underwater to the pool plug but experienced severe ear pain and resurfaced. (*Id.* at 32-33.)

¶20 Between 1986 and 1991 claimant occasionally experienced earaches, especially when driving to higher altitudes and when his siren was sounding. His testimony was as follows:

Q. And can you describe for me the problems that you were having that you're relating to the incident in 1986, that you were having between 1986 and 1991, when you would have seen Dr. Higgs?

A. I can give you an estimate on some of them. It's been a while. I was having ear aches. When I was driving, if I went up and down any steep banks such as climbing mountains, going up mountain roads and changing elevation, I'd develop real severe pain in my left ear. It was enough that it stopped me and I'd have to get out and try to equalize it.

And when I'd click on my siren when I was responding to emergencies, I'd be driving and hit the siren and it seemed like the whole world just tilted. I'd shut off the siren and things would come back. And there was a nausea. I never vomited from it, but [was] queasy. There was some starting of like a bounce, if I moved too fast, I'd kind

of stumble. And then I went and saw Higgs. It finally got so bad that things shifted on me. And I think they refer to it now as rotary nystagmus. I don't know.

Q. Do you recall this happening prior to 1991?

A. Yeah, it happened several times. Exact dates -- I think a lot of it, it was confusing for me because I had had so many ear infections over my lifetime, I just thought it's another cold. But I've never reacted this way. And finally it scared me to the point that I went and saw Higgs.

(McGuin Dep. at 28-29.) His visit to Dr. Higgs, referenced in his testimony, occurred in 1992, after the 1991 incident in the Helena swimming pool. (*Id.* at 29:8-18; Dep. Ex. 3; Tr. Ex. 2 at 144.)

¶21 After the 1991 pool incident the claimant experienced increasing vertigo and hypersensitivity to loud sounds. (McGuin Dep. at 41; Dep. Ex. 6 at 3.) Loud sounds caused distortions in his vision. (*Id.*) He testified as to his post-1991 problems as follows:

Q. Okay. Why don't you tell me about the problems that you had after '91 up to the present. You know, the symptoms you've had and what you've learned about your condition and your understanding of what your condition is.

A. My balance got worse. If I stood up too fast or turned, I felt like I was off balance. The loud noises, going to a party or going to a dance at the fair, security -- I had to stay away from loudspeakers because the sound would cause everything to jump. Pistol qualifications were very unnerving to me because I never had that problem qualifying. I'd go down and qualify and go home.

The last one in '97, I had to go through qualifications four times just to make basic qualification.

(McGuin Dep at 42.)

¶ 22 By 1992 claimant was concerned about the effect of his symptoms on his ability to drive safely and sought medical advice from Dr. Higgs. (*Id.* at 30 and see ¶20.) According to his office notes, Dr. Higgs recommended an ENG⁽¹⁾ and other balance testing at an ENT clinic in Spokane but claimant did not keep the appointment due to his work schedule. (Ex. 2 at 144.)

¶23 Between 1992 and 1997 claimant had numerous treated instances of asthma, bronchitis, and sinusitis. (Ex. 1 at 14-44.)

¶24 On March 3, 1997, claimant was seen by Dr. Timothy F. Obermiller with regard to his chronic asthma. The doctor noted sinus problems and on April 1, 1997, ordered a CT of the sinuses. Following the scan, Dr. Obermiller referred claimant to Dr. Karl M. Oehrtman, an otolaryngologist practicing in Kalispell, Montana. (Ex. 2 at 159.)

¶25 Dr. Oehrtman first examined claimant on April 17, 1997, noting "bilateral frontal disease" of the sinuses. In an addendum to his examination, he further noted, "Patient is noted to have a feeling of being off balance when air is blown into his ear. This makes me wonder about the possibility of a perilymph fistula." (Ex. 2 at 145.)

¶26 A "perilymph fistula" is a leak of fluid from the inner ear into the middle ear through the "oval window" which joins the inner and middle ear. (See Oehrtman Dep. at 10 and following pages and Dep. Exs. 1, 2, and 3; Ex. 2 at 93.) A fistula is "an abnormal passage leading from an abscess or hollow organ to the body surface or from one hollow organ to another and permitting passage of fluids or secretions." (1997 Merriam-Webster Medical Dictionary, www.medscape.com.) "Perilymph" is "the fluid between the membranous and bony labyrinths of the ear." *Id.* Dr. Oehrtman explains the anatomy of the leak in his deposition: his explanation is accompanied by anatomical diagrams. (Oehrtman Dep. at 17; Exs. 1-3.)

¶27 A fistula of the oval window of the ear was thereafter diagnosed during exploratory surgery of claimant's left ear on June 26, 1997. (Uncontested Fact 2.) The first attempt at repair, which was done during the exploratory surgery, failed, or at least did not materially improve claimant's symptoms. Claimant has undergone two more failed surgeries by another otolaryngologist, Dr. Peter G. Von Doersten. (Ex. 2 at 93-97.)

¶28 Claimant has been offered "very radical surgery" to address his continuing vertigo but the surgery has serious risks. (Ex. 2 at 95.) He has declined the surgery in light of the risks.

¶29 Following his first surgery, on August 11, 1997, claimant notified his employer regarding the fistula and his belief it was related to his diving. (Uncontested Fact 3.) On his doctor's advice (ex. 2 at 95), he retired on December 31, 1997. (Uncontested Fact 5.)

¶30 In this proceeding, claimant contends that his June 20, 1986 river float caused the fistula. At the time of his float the Lincoln County Sheriff's Department was insured by the State Fund.

¶31 The State Fund has denied liability for the fistula on several grounds. It denies that the fistula was caused by the 1986 river float. It further alleges that his claim is barred by his failure to report the injury within the 60 days provided in section 39-71-603, MCA (1985), and to file a claim for compensation within the one year provided by section 39-71-601, MCA (1985). Finally, it contends that if the fistula was caused by the 1986 dive then it was materially and substantially aggravated by later dives in 1988 and 1991, thus relieving the State Fund of liability under the subsequent injury rule.

¶32 The parties have presented deposition testimony of three physicians with regard to the causation issue. Claimant's treating physicians, Dr. Oehrtman and Dr. Von Doersten, provided testimony which supports his claim that the fistula was caused by the 1986 river

float. Dr. David Youngblood examined the medical records and history on behalf of the State Fund and testified that the fistula was not caused by the 1986 river float.

¶133 Dr. Oehrtman is an otolaryngologist, meaning he specializes in the diagnosis and treatment of diseases and injuries of the ears, nose, and throat. (Oehrtman Dep. at 6.) His practice includes diagnosis and treatment of fistulas, including fistulas arising from diving. (*Id.* at 7-8.) He testified that while perilymph fistulas in the oval window of the ear *may* arise as a result of pressures exerted during diving, diving is not the exclusive cause. (*Id.* at 17-18.) He testified that the condition may also be associated with sky diving, which involve changes of pressure affecting the ear, or trauma, such as a blow to the head. (*Id.* at 35-37.) Sometimes no specific event can be associated with the condition and he agreed that there are "a multitude of other things" other than diving that can cause a fistula. (*Id.* at 41.)

¶134 Dr. Oehrtman testified initially that "it is possible that through diving Mr. McGuin could have developed a perilymph fistula" and that it could have possibly occurred "even in a fairly shallow diving situation." (*Id.* at 38, 40.) When asked if he had a medical "opinion to a reasonable degree of medical certainty," he replied:

A. That's hard to say. He consulted with my partner in 1992, and in that note I don't see really an onset of the symptoms outlined, so at some time preceding '92.

(*Id.* at 39.) When further queried whether, based on claimant's history of the fistula was caused by the 1986 dive, he testified:

A. His history to me initially [regarding dizziness] was 1991. As I read the deposition, I see dizziness mentioned, if I haven't missed it, for the first time in 1986. I think it's plausible to say without any doubt that this is when it occurred. I can't say that, but it's definitely a plausible explanation for his symptoms.

(*Id.* at 42.)

¶135 Ultimately, however, Dr. Oehrtman concluded on a "more probable than not" basis that the 1986 river float caused the fistula. Asked if he thought it was more likely than not that the river float caused the fistula, he replied:

A. Since I can't think of any other event that would be more suspect than that, I think that's probably the best answer to when it occurred. There's no other history that I can flush out in taking a history from him that would try and place this at another time.

(*Id.* at 46.) When asked what would have caused the fistula during the river float, he explained:

A. The pressure difference from the dive, the possibility of doing Valsalva maneuver vigorously trying to get his ears to clear would be another time that it actually tore. Those would be the main things I would think of.

(*Id.*)

¶136 Following his first, failed surgery, claimant was treated by Dr. Von Doersten, who practices in Missoula. Dr. Von Doersten is an otolaryngologist with specialized training in skull base surgery and neurotology. (Von Doersten Dep. at 6-7.) He specializes in ear and skull base surgery (*id.*), and performed the second and third surgeries on claimant's ear. (Ex. 2 at 92-107.)

¶137 Dr. Von Doersten confirmed the existence of a perilymph fistula. (*Id.*) With regard to the cause and onset of the fistula, he put claimant's activities in the 1986 *Dive Rescue II* at the "top" of his list of possible causes. (See Von Doersten Dep. at 40.) He testified that "[i]t seemed likely that [the 1986 school] was an activity which could lead to a purulent fistula" (*id.* at 24) and that it was logical to view the 1988 and 1991 dives as aggravating the condition (*id.* at 34). Ultimately, he opined that it was "most likely that things began in '86." (*Id.* at 44.)

¶138 Dr. Youngblood testified in two depositions, the first taken by claimant's counsel on May 20, 1999 (Youngblood Dep. I), and the second taken by the State Fund's counsel on June 14, 1999 (Youngblood Dep. II). Dr. Youngblood specializes in dive and hyperbaric medicine. (Youngblood Dep. I at 7-8.) He is board certified in both occupational medicine and hyperbaric medicine. (*Id.* I at 12.) He has extensive experience in diving accidents, 50 percent of which are related to ear and inner ear injuries or difficulties. (Youngblood Dep. II at 25.) He has diagnosed perilymph fistulas in diving accidents but does not treat them. (*Id.* II at 53-54.) He has never performed surgery on a fistula. (*Id.* II at 54.)

¶139 Dr. Youngblood testified that it is most likely that claimant's fistula was caused by his 1991 swimming pool dive. (*Id.* II at 52.) Alternatively, he said that the fistula might have initially occurred in the 1988 Lake Koocanusa dive, but if so it had healed and was reopened in the 1991 pool dive. (*Id.*) At minimum, he felt that the 1991 incident represented a significant aggravation of a preexisting condition. (*Id.*)

¶140 Dr. Youngblood conceded it was possible that the fistula first occurred during the 1986 dive school. (*Id.* II at 39, 50.)

¶141 Having carefully considered the deposition testimony of the three physicians, I am persuaded that the evidence preponderates in favor of a finding that the 1986 river float caused claimant's perilymph fistula. Both treating physicians support that finding, testifying that the 1986 river float more likely than not caused it. I found their testimony more persuasive because they diagnose and treat perilymph fistulas as a part of their regular medical practices, and do so without regard to whether they arose in diving

accidents. In contrast, Dr. Youngblood's familiarity with perilymph fistulas is limited to diving accidents and he does not treat them. The treating physicians had broader expertise regarding causation and had more specialized knowledge of the conditions based on their regular treatment of the condition.

¶42 The medical evidence does not persuade me that the 1988 Lake Koocanusa dive materially and permanently aggravated claimant's condition. Dr. Youngblood did not believe claimant suffered from a preexisting fistula at the time of the 1988 dive, so his testimony did not address aggravation based on that incident. Dr. Von Doersten testified that the incident aggravated a preexisting fistula but did not address the materiality or permanency of any aggravation. Dr. Oehrtman did not address the question at all.

¶43 As discussed in the conclusions of law that follow, it is unnecessary for me to consider whether the 1991 swimming pool dive materially aggravated claimant's condition.

CONCLUSIONS OF LAW

¶44 Claimant's alleged injury occurred in 1986, therefore the 1985 version of the Workers' Compensation Act governs his entitlement to benefits. See *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶45 Claimant bears the burden of persuading the Court, by a preponderance of the evidence, that he suffered a compensable injury. See *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979).

¶46 Section 39-71-119, MCA (1985), provides the definition of work-related injury applicable to this case. It provides:

39-71-119. Injury or injured defined. "Injury" or "injured" means:

(1) a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm and such physical condition as a result therefrom and excluding disease not traceable to injury, except as provided in subsection (2) of this section;

(2) Cardiovascular or pulmonary or respiratory diseases contracted by a paid firefighter employed by a municipality, village, or fire district as a regular member of a lawfully established fire department, which diseases are caused by overexertion in times of stress or danger in the course of his employment by proximate exposure or by cumulative exposure over a period of 4 years or more to heat, smoke, chemical fumes, or other toxic gases. Nothing herein shall be construed to exclude any other working person who suffers a cardiovascular, pulmonary, or respiratory disease while in the course and scope of his employment.

(3) Death resulting from injury.

¶47 Industrial injuries encompass "unusual strains." The term "unusual strain" was first interpreted by the Montana Supreme Court in *Jones v. Bair's Café*, 152 Mont. 13, 445 P.2d 923 (1968). The Court held that "unusual strain" encompasses not only unexpected *causes* of injury, but also unexpected *injuries* resulting from ordinary workplace activities. In *Jones* the Court allowed recovery when a dishwasher, during an unusually heavy work period, picked up a heavy tray of dishes and suffered a back injury. Similarly, in *Robins v. Ogle*, 157 Mont. 328, 485 P.2d 692 (1971), the Court allowed recovery by a claimant who, "while working as a cook on the graveyard shift, was engaged in lifting a mop pail full of water when she felt a pull and a burning sensation." *Id.* at 329, 485 P.2d at 693. The Court explained: "The strain suffered by claimant here, although not 'unusual' from the standpoint of the general manner in which the mopping was done, was 'unusual' in that on this particular occasion she 'picked [the bucket] up wrong' and 'twisted [her] back' when she moved the bucket and removed the mop." *Id.* at 332, 485 P.2d at 694.

¶48 The "unusual strain" cases nonetheless require some tangible occurrence in the workplace which causes an unusual result, i.e. the injury. There must be a cause and effect relationship between the work activity and the injury. In the present case the claimant has persuaded the Court that his perilymph fistula was caused by his river float during the 1986 *Dive Rescue II*. Whether considered an injury in the traditional sense or the result of an "unusual strain," it is compensable.

¶49 While the statutes in effect in 1986 required claimant to give his employer notice of his injury within 60 days thereof, § 39-71-603, MCA (1985),⁽²⁾ and to file a written claim for compensation within 1 year, § 39-71-601, MCA (1985),⁽³⁾ he was unable to comply with either requirement because he was unaware of his condition or that it arose during the 1986 *Dive Rescue II*. His treating physicians did not even suspect the presence of a perilymph fistula until April 1997, and did not diagnose the condition until June 26, 1997. Claimant gave notice to his employer within 60 days of that diagnosis and filed his claim within one year following the diagnosis. The question the Court must consider is whether those facts tolled the statutory notice and filing requirements.

¶50 In *Bodily v. John Jump Trucking, Inc.*, 250 Mont. 274, 819 P.2d 1262 (1991), the claimant, a truck driver, suffered from progressive pain and loss of strength in his arms while working. His condition caused him to stop working in 1986. Approximately a year later, his treating physicians determined that he suffered from cervical stenosis which was accelerated by cumulative microtrauma due to this truck driving.⁽⁴⁾ Claimant then gave notice to his employer that his condition was work related, filed a claim, and sought benefits. The insurer argued that his notice was too late under section 39-71-603, MCA (1985). The Supreme Court rejected the defense. It noted that claimant was unaware that his physical condition was related to his employment until 1987, therefore he could not

have given his employer notice that he had suffered a work-related injury. It held that claimant's reports to his employer of his symptoms and that his work made them worse was sufficient notice. The Court held:

We conclude that claimant satisfied the notice requirement. Since claimant's disability was the result of cumulative traumas which occurred over a period of time, the date of injury, for purposes of complying with the notice requirement, is the date on which claimant was first unable to continue with his employment due to his physical condition. That date was July 8, 1986. Applying a liberal construction to Sec. 39-71-603, MCA (1985), we conclude that **by providing his employer with all the information available to him on that date** regarding the nature of his injuries, the fact that his condition was aggravated by his employment, and the nature of job duties which appeared to aggravate his condition, claimant complied with the Workers' Compensation Act's notice requirements. [Emphasis added.]

250 Mont. at 283, 819 P.2d at 1267-68.

¶51 A year later, the Supreme Court again addressed the notice issue. In *Killebrew v. Larson Cattle Co.*, 254 Mont. 513, 839 P.2d 1260 (1992), the Court considered whether claimant's disclosure of an accident without indicating he had been injured was sufficient notice under the section. The Court held that it was since claimant was unaware that he in fact had been injured in the accident:

Claimant was not in a position to provide more information than he described because it was not until after 30 days that his injury from each of the above accidents worsened to the point where he sought medical treatment and was informed of the specific causes for his physical complaints. To interpret the requirements of Sec. 603 any more strictly than we have would defeat the public policy objective for the Workers' Compensation Act as set forth in Sec. 39-71-105(1), MCA (1987). That section provides that:

It is an objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease.

That objective cannot be accomplished if we construe Sec. 603 so narrowly that it erects insurmountable barriers to collection of disability benefits, when they are unrelated to any legitimate public policy.

254 Mont. at 521, 839 P.2d at 1265-66. I note that this decision was under the 1989 version of the Workers' Compensation Act, after the liberal construction rule was repealed. ⁽⁵⁾

¶152 Together these two cases establish one clear principle, which is: section 39-71-603, MCA, requires a claimant only to disclose what he knows, it does not require the impossible.

¶153 There are two prongs to the notice requirement. The first is notice of the accident. The second is notice of the injury. *Bodily* holds that notice of the accident is not required where the worker is unaware that his medical condition is in any way related to his employment. *Killebrew* holds that *even though the notice requirement "is not tolled where the employee is unaware of the severity or compensable nature of his injury,"* Killebrew, 254 Mont. at 519, 839 P.2d at 1264 (citing *Reil v. Billings Processors, Inc.* 229 Mont. 305, 7846 P.2d. 617 (1987); *Roessel v. Rivendell of Billings*, 244 Mont. 175, 797 P.2d 174 (1990)); the statute is, in effect, tolled, where the worker is in fact unaware of **any** injury.⁽⁶⁾ Read together, the two decisions hold that the statute is satisfied where the worker reports as much as he or she knows.

¶154 *Bodily* and *Killebrew* involved different prongs of the notice requirement. This case involves both. Here, claimant timely reported the fact that he was unable to complete his float to his supervising lieutenant but did not report any specific incident suggesting that he was involved in an accident or that he suffered an injury or unusual strain. However, he had no reason to believe that an accident occurred or that he was injured. He did not report his specific symptoms, however, he had no reason to do so since he apparently ascribed them to his asthma, not to any injury occurring during the river float. At the time he reported to his lieutenant he had no reason to believe that his inability to complete his river float was anything other than coincidental to a non work-related condition. Under *Bodily* and *Killebrew*, read together, his 1986 report to his lieutenant satisfied section 39-71-603, MCA (1985).

¶155 The law concerning claim filing is even clearer. Despite the one-year filing requirement, § 39-71-601, MCA (1985), the Supreme Court has held that the period is tolled "until the claimant, as a reasonable man, should recognize the nature, seriousness and probable, compensable character of his latent injury." *Bowerman v. Employment Security Commission*, 207 Mont. 314, 319, 673 P.2d 476, 479 (1983). "Latent" means hidden or invisible. The injury in this case was clearly latent. Claimant's condition was not even suspected until April 1997, in large part because of his underlying allergies, asthma, and sinus infections. *Bowerman* applies. The one-year filing requirement did not start running until 1997 and was satisfied by the filing of the claim in November of 1997.

¶156 Finally, the Court must address the State Fund's contention that it is relieved of liability because the claimant's condition was materially aggravated by claimant's 1988 and 1991 dives. The State Fund's contention is an affirmative defense and it bears the burden of proof with respect to its allegation. *Briney v. Pacific Employers Ins. Co.*, 283 Mont. 346, 351, 942 P.2d 81, 84 (1997).

¶158 The 1991 dive does not provide a basis for an affirmative defense. Section 39-71-407(5), MCA (1999), currently provides that a non work-related, subsequent injury relieve the insurer from liability for benefits attributable to the subsequent injury, providing:

(5) If a claimant who has reached maximum healing suffers a subsequent nonwork-related injury to the same part of the body, the workers' compensation insurer is not liable for any compensation or medical benefits caused by the subsequent nonwork-related injury

However, the provision was enacted in 1989, approximately three years after claimant's injury. Under *Buckman*, the section is inapplicable.

¶159 The law in effect at the time of claimant's 1986 injury is set out in two Montana Supreme court cases, *Rightnour v. Kare-Mor, Inc.*, 225 Mont. 187, 732 P.2d 829 (1987) and in *Guild v. Bigfork Convalescent Center*, 229 Mont. 466, 747 P.2d 217 (1987). In *Rightnour* the Court held the insurer is responsible for a non work-related subsequent injury "if it is the direct and natural result of a compensable primary injury, and not the result of an independent intervening cause attributable to the claimant's own intentional conduct." *Rightnour*, 225 Mont. at 189, 732 P.2d at 831. In *Rightnour* the Supreme Court determined that the insurer was liable with respect to back surgery required following a subsequent, non work-related injury where the original, compensable injury weakened the claimant's back, thus contributing to the need of subsequent injury and back surgery. In that case the claimant had suffered a work-related back injury and had undergone two back surgeries. She reached maximum medical improvement (MMI), then, while at home, tripped over her dog's chain, fell, and reinjured her back. She thereafter underwent a third back surgery. The Court found the insurer liable for the third surgery because the industrial injury had weakened her back and set her up for the second injury. In *Guild* the Supreme Court held that even though the claimant had reached MMI following her work-related injury, the insurer for the work-related injury was liable for benefits flowing from a subsequent, non work-related injury which the Court characterized as "a triggering event relating back to Mrs. Guild's [claimant's] 1983 [industrial] injury." *Guild*, 229 Mont. at 470, 747 P.2d at 219.

¶160 Applying *Rightnour* and *Guild*, and imposing the burden of persuasion upon the insurer, the evidence concerning the 1991 dive is insufficient to break the connection to the 1986 injury. If the 1991 dive aggravated the preexisting perilymph fistula, it did so because the fistula was preexisting.

¶161 The 1988 dive in Lake Koocanusa is a different matter. The Supreme Court has held that a subsequent work-related injury which materially aggravates a preexisting work-related injury shifts responsibility for the resulting condition from the first insurer to the subsequent insurer, at least where the claimant reaches MMI prior to the subsequent injury. *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983). Whether the rule benefits the State Fund is unknown since the Court is not advised as to whom insured the

Lincoln County Sheriff's Department in 1988. If it was the State Fund, the rule is of no avail. If it was not the State Fund, then the insurance company which insured the Sheriff's Department at the time is liable.

¶162 In any event, the evidence is insufficient to establish that the Lake Koocanusa dive satisfies the *Belton* rule. First, there is insufficient evidence to establish that the claimant reached MMI prior to the 1988 dive. While Dr. Youngblood testified that fistulas may heal themselves, he was of the opinion that the 1986 dive did not cause the fistula in the first place, and provided no MMI opinion with respect to the 1986 injury. Second, the evidence is insufficient to establish that the 1988 dive materially and permanently aggravated claimant's conditions. The only physician expressing any opinion on the point was Dr. Von Doersten, however, his testimony was limited. While he testified that the 1988 and 1991 dives likely exacerbated claimant's condition (Von Doersten Dep. at 34-35), he was not asked to explain what he meant by exacerbation

¶163 In light of the resolution in this case, it is unnecessary to consider claimant's constitutional challenge.

JUDGMENT

¶164 1. Claimant suffered an industrial injury in 1986, specifically a perilymph (sometimes referred to a "purulent") fistula of his ear. The State Fund is liable for both medical and compensation benefits with respect to that injury.

¶165 2. The Court has not been asked to determine the amounts due medical providers or to claimant, and expresses no opinion in that regard.

¶166 3. The Pretrial Order does not list costs or attorney fees as issues and the Court therefore does not award either.

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

¶168 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 16th day of December, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. Sydney E. McKenna

Mr. Greg E. Overturf

Submitted: July 19, 1999

1. ENG is the abbreviation for electronystagmography which is "the use of electrooculography to study nystagmus." Nystagmus is the "rapid involuntary oscillation of the eyeballs occurring normally with dizziness during and after bodily rotation or abnormally after injuries (as to the cerebellum or the vestibule of the ear)." (On-line Merriam-Webster Medical Dictionary, <http://www.medscape.com/mw/medical.htm>.)

2. Section 39-71-603, MCA (1985), provides:

Notice of injuries other than death to be submitted within sixty days. No claim to recover benefits under the Workers' Compensation Act, for injuries not resulting in death, may be considered compensable unless, within 60 days after the occurrence of the accident which 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 insured 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 upon which the injured employee was engaged at the time of the injury is equivalent to notice.

3. Section 39-71-601, MCA (1985), provides:

Statute of limitation on presentment of claim -- waiver. (1) In case of personal injury or death, all claims shall be forever barred unless presented in writing to the employer, the insurer, or the division, 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 for him in his behalf.

(2) The division may, upon a reasonable showing by the claimant of lack of knowledge of disability, waive the time requirement up to an additional 24 months.

4. As of the 1987 amendments to the Workers' Compensation Act, microtrauma is no longer recognized as an injury. § 39-71-119, MCA (1987).

5. The liberal construction rule was repealed in 1987. 1987 Montana Laws, ch. 464, §§ 1(4) and 68.

6. The term "tolling" is perhaps legally inaccurate, but the effect is the same, and this judge cannot readily think of a better term.