

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 11

WCC No. 9605-7605

TIMOTHY PARTIN

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION ON APPEAL

Summary: After State Fund denied liability for an alleged accident on the ground claimant failed to file a written claim within the one-year period provided under section 39-71-601(1), MCA (1991), appellant petitioned the Department of Labor and Industry for a waiver of the one-year filing requirement. The Employment Relations Division of the Department granted the waiver, but State Fund requested a hearing. The hearing officer denied the claimant's request for a waiver, also holding that an Association of Service Contractors (AOSC) accident report did not satisfy the written claim requirement. The hearing officer reached his conclusions without making credibility resolutions.

Held: The hearing officer's determinations are reversed and the matter remanded to the Department. If claimant's testimony is credited, he has established the requirements of equitable estoppel based on the employer's alleged representations to him concerning use of health insurance and payment of additional expenses by the employer. In addition, the hearing officer erred in his conclusion the AOSC report did not satisfy section 39-71-601(1), MCA (1991). The question of whether claimant in fact provided an AOSC report to the employer is for the Workers' Compensation Court because it does not involve waiver of the one-year limitations period, but whether a claim was timely filed. Claimant is free to petition the Court with regard to the AOSC report.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-601, MCA (1991). WCC reversed conclusion of DOL hearing officer that reversed Department's order waiving one-year filing requirement on basis of equitable estoppel. Hearing officer erred in finding that, even if claimant's testimony

were credited, he had not established elements justifying equitable estoppel of assertion of statute of limitations. If claimant's testimony is credited, he has established the requirements of equitable estoppel based on the employer's alleged representations to him concerning use of health insurance and payment of additional expenses by the employer.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-601, MCA (1991). WCC reversed conclusion of DOL hearing officer that Association of Service Contractors (AOSC) accident report allegedly filed by claimant did not satisfy the written claim requirement of section 39-71-601, MCA (1991). Contention that an official workers' compensation claim form must be filed was rejected in *Weigand v. Anderson-Meyer Drilling co.*, 232 Mont. 390, 393, 758 P.2d 260, 261-262 (1988), where the Supreme Court held the written claim must only contain sufficient information to inform the employer or insurer of the nature and basis of the possible claim and to enable it to investigate the claim and, if necessary, to prepare a defense.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-601, MCA (1991). The question whether claimant in fact provided a written report to the employer satisfying the one-year limitations period of section 39-71-601(1), MCA (1991) is for the Workers' Compensation Court, not the Department of Labor and Industry, because this question does not involve waiver of the one-year limitations period, but concerns whether a claim was timely filed.

Administrative Procedure: Contested Case Hearing: Evidence. DOL hearing officer did not err in refusing to allow claimant to present at a date following the date set for hearing telephonic testimony of a witness not listed by claimant, even though the witness had been listed by the respondent-insurer. If claimant had been permitted to introduce the testimony, it would have been necessary to allow respondent to produce rebuttal testimony, extending and delaying the hearing.

Claims: Filing. WCC reversed conclusion of DOL hearing officer that reversed Department's order waiving one-year filing requirement on basis of equitable estoppel. Hearing officer erred in finding that, even if claimant's testimony were credited, he had not established elements justifying equitable estoppel of assertion of statute of limitations. If claimant's testimony is credited, he has established the requirements of equitable estoppel based on the employer's alleged representations to him concerning use of health insurance and payment of additional expenses by the employer.

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that an official workers' compensation claim form must be filed was rejected in *Weigand v. Anderson-Meyer Drilling co.*, 232 Mont. 390, 393, 758 P.2d 260, 261-262 (1988), where the Supreme Court held the written claim must only contain sufficient information to inform the employer or insurer of the nature and basis of the possible claim and to enable it to investigate the claim and, if necessary, to prepare a defense.

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Limitations Periods: Claim Filing: Waiver of Time: Estoppel. WCC reversed conclusion of DOL hearing officer that reversed Department's order waiving one-year filing requirement on basis of equitable estoppel. Hearing officer erred in finding that, even if claimant's testimony were credited, he had not established elements justifying equitable estoppel of assertion of statute of limitations. If claimant's testimony is credited, he has established the requirements of equitable estoppel based on the employer's alleged representations to him concerning use of health insurance and payment of additional expenses by the employer.

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Limitations Periods: Claim Filing: Generally. WCC reversed conclusion of DOL hearing officer that Association of Service Contractors (AOSC) accident report allegedly filed by claimant did not satisfy the written claim requirement of section 39-71-601, MCA (1991). Contention that an official workers' compensation claim form must be filed was rejected in *Weigand v. Anderson-Meyer Drilling co.*, 232 Mont. 390, 393, 758 P.2d 260, 261-262 (1988), where the Supreme Court held the written claim must only contain sufficient information to inform the employer or insurer of the nature and basis of the possible claim and to enable it to investigate the claim and, if necessary, to prepare a defense.

Witnesses: Disclosure Requirements. DOL hearing officer did not err in refusing to allow claimant to present at a date following the date set for hearing the telephonic

testimony of a witness not listed by claimant, even though the witness had been listed by the respondent-insurer. If claimant had been permitted to introduce the testimony, it would have been necessary to allow respondent to produce rebuttal testimony, extending and delaying the hearing.

This is an appeal from a decision of the Department of Labor and Industry (Department) denying the appellant's application for a waiver of the time for filing his workers' compensation claim.

Procedural Background

Timothy Partin (claimant) alleges that he suffered an industrial accident on September 13, 1992, while working for Sun Well Service, Inc. Sun Well was insured by the State Compensation Insurance Fund (State Fund), which has denied liability for the accident on the ground that claimant failed to file a written claim within the one-year period provided under section 39-71-601(1), MCA. (Pre-hearing Order, Uncontested Fact 3.)

On February 4, 1994, claimant petitioned the Department for a waiver of the one-year filing requirement. (Pre-hearing Order, Uncontested Fact 4.) On March 17, 1994, the Employment Relations Division of the Department issued an initial Order Waiving Claim Filing Time. The Order found that claimant had made "a reasonable showing" that he had "BEEN EQUITABLE [sic] ESTOPPED FROM FILING HIS CLAIM."⁽¹⁾ (Ex. 14; capitalization in the original.)

The State Fund did not accept the initial determination and requested a hearing on the matter. (Department File, Notice of Appeal (May 4, 1994)). A hearing was held in Billings, Montana, on October 26, 1994. The hearing officer permitted the parties to submit post-trial briefs and proposed findings of fact and conclusions of law. The last brief was filed on April 18, 1995, at which time the matter was submitted for final decision.

On August 1, 1996, some twenty-two months after the hearing and fifteen months after submission of the case for decision, the hearing officer issued his Findings of Fact, Conclusions of Law, and Order (Findings). In his Findings, the hearing officer reversed the Department's initial order and denied the claimant's request for a waiver of the one-year filing requirement. He found that the employer and the State Fund were not estopped from asserting the one-year statute of limitations. He also held that an AOSC Injury Report, which the claimant testified he had submitted to his employer immediately following his industrial accident, did not satisfy the requirements of section 39-71-601(1), MCA. He did not resolve conflicting testimony or determine the credibility of the witnesses.

On August 30, 1996, the claimant appealed the Department's final determination to this Court. (Court File, Petition for Review.) During the pendency of the appeal, claimant moved for leave to present additional evidence. (Court File, Motion for Leave to Present Additional Evidence (December 20, 1996).) The motion was denied on January 13, 1997. (Court File,

Order Denying Motion to Present Additional Evidence.) Meanwhile, the parties completed their briefing of the issues raised on appeal. The matter is now ready for decision.

Record on Appeal

The record on appeal consists of a transcript of the hearing, the complete file from the Department, including 17 exhibits consisting of respondent's Exhibits 1 through 15 and claimant's Exhibits A and B.⁽²⁾

Factual Background

Sun Well Service, Inc. (Sun Well) operates oil service rigs. (Tr. at 77.) It is based in Williston, North Dakota. Its sole shareholder and president is Marvin Lee Kaiser. (*Id.*)

Claimant was employed by Sun Well from May 19, 1988 to October 15, 1993. He worked at a variety of jobs including floor hand, operator, and tool pusher.

Beginning in mid-1991, claimant experienced left shoulder pain. He did not miss work as a result of this condition, however, he did seek medical treatment. Initially, he was treated by his family physician, Dr. Ashcraft. Dr. Ashcraft injected claimant's shoulder with cortisone but the injection failed to provide claimant with relief. Dr. Ashcraft then referred claimant to Dr. Lotfi Ben-Youssef, an orthopedic surgeon.

1. Facts pertaining to the accident and the claim.

On September 13, 1992, the claimant tripped and fell over a power cord while running towards the "dog house" at an oil rig site near Scobey, Montana. (Tr. at 29.) He fell on his head and right shoulder. Brad Gilbertson (Gilbertson), a co-employee, witnessed the fall.

Shortly after the incident both claimant and Gilbertson went into the pusher shack. Their supervisor, Lynn Sundby (Sundby), was in the shack. Gilbertson told Sundby about the fall, elaborating that he "should have seen that fall, it was funny to watch." (*Id.* at 195.)

According to claimant, Sundby directed him to fill out an Association of Service Contractors (AOSC) accident report. The AOSC is a voluntary organization to which Sun Well belongs. It has a safety program which requires that all accidents be reported. Sun Well subscribes to the program and requires its employees to fill out and file an AOSC accident form for each incident. The information is then submitted to the AOSC, which uses it to design safety programs.

Kaiser testified that the filing of an AOSC report triggers the completion and submission of an Employer's First Report of Injury for workers' compensation. He provided the following testimony:

MARTELLO . . . AOSC report, that an employer's report is submitted shortly thereafter?

KAISER: Generally I would expect that to be true. It's either precipitated by that or by the initiation and a medical provider as a result of a medical provider sending it to us.

MARTELLO So in other words, if you get some indication, either through the AOSC report or a medical report that there's been an on the job injury, you fill out, as the employer, you fill out the employer's portion of the employer's report that's submitted to workers' comp.

KAISER: Yeah. This is a Montana report, ...

(*Id.* at 122.)

Claimant testified that he was given the AOSC form to fill out and that he took it home to his motel room that evening, where he completed it. According to claimant, the next morning he had the motel clerk make a copy of the report for his personal records and he then took the original back to work and put it on Sundby's desk. (*Id.* at 37, 40-41.)

Claimant's testimony concerning his completion and submission of the report was uncorroborated. Gilbertson, who was claimant's roommate at the motel, testified that he did not remember the claimant filling out the report at the motel or seeing the claimant give the report to Sundby the following morning. Sundby denied that claimant either gave him the AOSC report or put it on his desk the following morning. He testified that had he received an AOSC report he would have changed the description of the accident. The report reads, "Running To Dog House & Triped [sic] Over Power Cord & Landed Shoulder First On Ground." (*Id.* at 2.) Sundby said he would have changed the report to reflect the fact that claimant was involved in a game of "kick the hard hat" at the time he tripped and fell. (*Id.* at 134.) Sundby, Kaiser, and Carolyn Lynch, an office worker for Sun Well, all testified that the AOSC report was not in Sun Well's files.⁽³⁾ They said that they first learned of it in January 1994 when it and a claim for workers' compensation benefits were forwarded to Sun Well by the State Fund. In any event, Sun Well did not file an Employer's First Report at that time.

On October 15, 1993, claimant resigned his employment with Sun Well. Approximately a month after leaving Sun Well, the claimant contacted Kaiser and asked what the company was going to do about his shoulder problems. Kaiser denied responsibility for the problems. Claimant then completed two formal claims for compensation. One was for his left shoulder problem, which became symptomatic in June of 1991.⁽⁴⁾ The second was for the September 13, 1992 injury to his right shoulder. Both claims were submitted to the State Fund on January 3, 1994. On February 1, 1994, Sun Well submitted an Employer's First Report to the State Fund. (Ex 10.)

2. Facts pertaining to claimant's medical care and his estoppel argument.

Following his September 13, 1992 accident, claimant was first treated by Dr. Ben-Youssef, who practices in Sidney, Montana. Prior to his injury the claimant had intended to go see Dr. Ben-Youssef about his left shoulder but had to postpone his visit when he was sent to work at the rig near Scobey. (Tr. at 33, 37-38, 165-66.) Upon returning from Scobey, he went in to see the doctor with respect to both shoulders.

Dr. Ben-Youssef examined claimant on September 18, 1992. His office notes for the exam state in relevant part:

. . . 26-year old male who has been complaining of 6 months history of **left** shoulder pain increased with lifting activity. The patient states that his right shoulder was slightly aching but last week he fell on his right arm and the right shoulder started hurting also. . . .

. . . .

P.S. The patient does a lot of heavy lifting at work and his problem may be related to avascular necrosis of the lateral end of both clavicles although he is not tender at that level.

(Ex.9, emphasis added.) While Dr. Ben-Youssef noted the claimant's fall, his note does not indicate the fall was work related.

Claimant continued to work for Sun Well but continued to have shoulder pain. Kaiser learned of claimant's shoulder problems and recommended that he see Dr. Richard Evans in Denver, Colorado. Dr. Evans had treated another Sun Well employee. (Tr. at 38.) Claimant also understood that he had treated John Elway, the quarterback of the Denver Broncos football team. (*Id.* at 45.)

According to claimant, in approximately October 1992 after a safety meeting, he discussed the possibility of treating with Dr. Evans. Claimant testified that Kaiser talked to him "about my shoulders, about getting them fixed, about not putting it on workmans' comp, to put it on my Blue Cross Blue Shield." (*Id.* at 43.) He further testified that Kaiser told him that the "workers' comp multiplier and the rate of workmans' comp in North Dakota, it's killing us." (*Id.* at 45.) He said he told Kaiser he had injured his right shoulder but "didn't give any specific date or any time or place" because he assumed Kaiser "already knew that [details of the accident] due to this injury report [the AOSC report] which I filled out and gave to Mr. Sundby." (*Id.* at 44.)

According to claimant, after Kaiser told him to submit his medical bills to Blue Cross/ Blue Shield (BC/BS), he [claimant] asked, "Well, who's gonna pick up what Blue Cross Blue Shield don't?" (*Id.* at 46.) He said that Kaiser responded, "Don't worry, we'll take care of it." (*Id.*) He understood that the company would pay for travel expenses, motels, meals, and any non reimbursed medical expenses. (*Id.* at 46, 166-67, 169-70.)

The hearing officer questioned claimant about the conversation:

KEIL So they - okay. Did you - did it occur to you perhaps that it was maybe at least somewhat dishonest to file a - to have Blue Cross/Blue Shield billed when it was a work injury?

PARTIN: Yes.

KEIL It wasn't a demand that you do it, was it?

PARTIN: It was a suggestion. It wasn't "You do this or you're down the road, " no.

(*Id.* at 189.)

Kaiser testified that he was aware of claimant's shoulder pain and that he recommended that claimant go see Dr. Evans in Denver. (*Id.* at 87-91.) However, he said he wasn't aware of any connection between claimant's shoulder pain and his work. (*Id.* at 92.) He said he first learned of the claim for a work-related injury after the formal claim for compensation was filed and a copy of the AOSC report was sent to the company by the State Fund.

When questioned regarding his conversation with claimant, Kaiser acknowledged that he wanted claimant to use BC/BS to get his shoulder fixed because "[w]e had it available and I wanted him to get it fixed" (*Id.* at 109.) He was then questioned further about BC/BS and about promises to pay other expenses related to medical care. His testimony was as follows:

HOWE: And you, I think, even stated that - you told Tim that - or you indicated that he had no basis to know if it was workers' comp, but one way or another the expenses would be taken care of. Did you tell that to Tim?

KAISER: I think in words to that effect, yes.

HOWE: And you don't - and so you were indicating at that time that if it were covered by Blue Cross/Blue Shield, that if there were any additional expenses, that the company would pay for those?

KAISER: That isn't the context in what I was thinking of, but I don't deny - I mean, I just don't have memory of whether we agreed to pay that additional expense. I mean, I'm - I believe I would have said it because I've done it for other people and Tim would have been in that category of people favored. The fact that he didn't get paid leaves me to believe then I didn't say it, but - because it didn't occur [the payment of bills]. But I wouldn't suggest that's not a possibility. No, my belief was that between the two, if it was a proper workmans' comp issue, then they would have picked up whatever Blue Cross/Blue Shield didn't, but -.

HOWE: Well, you indicated at that time that you - to Tim that you didn't think it was a proper workers' comp case?

KAISER: I didn't have any basis to believe there was a workmans' comp issue. So I believed it was Blue Cross/Blue Shield and that they should pay -

HOWE: And you told that -

KAISER: - and that, that he still should proceed.

HOWE: You told that to Tim then?

KAISER: Yeah. I had no - I have no basis to know that there was a workmans' comp issue.

HOWE: And Tim didn't respond that - did Tim indicate at that time, "Well, I'll go along with Blue Cross/Blue Shield if you'll pay for my expenses that would go along with a workers' comp case"?

KAISER: I don't recall him responding about anything except agreeing that we needed to get it taken care of. I don't - there was no discussion about whether workmans' comp was going to be avoided or whether we were gonna not file workmans' comp as part of that discussion.

HOWE: Now, Tim and his wife, I believe, or ex-wife, have testified that they were led to believe before he went to Dr. Evans that the company would pay for all expenses and anything a deductible wouldn't pay for for Blue Cross/Blue Shield. And do you have any reason to dispute that they gained that knowledge from you or Mr. Sundby?

KAISER: Well, the only reason I have to dispute it is cause it didn't occur. As I said, I've said several times here, that wouldn't have been unusual for me to have agreed to do that for something at a management level person, to pay those expenses. The fact that they didn't get reimbursed leads me to believe that I hadn't said it, but -

(Id. at 109-11.) Kaiser also denied having any conversation with claimant regarding workers' compensation premium "multipliers." *(Id. at 100.)*

In the fall of 1992, Kaiser promoted claimant to a "pushing position", which is a less physically demanding job than claimant had been doing. *(Id. at 87.)* Kaiser testified that he promoted claimant to the easier job because he had heard reports that claimant was having "difficultly [sic] holding up his end of the bargain one day because he [was] sore and would have days of soreness and days of no soreness" *(Id. at 87-88.)*

Claimant went to Denver and saw Dr. Evans on February 12, 1993. At that time he filled out a Health History Form. (Ex.6) He wrote that he had "pain in shoulders constantly." In response to a question concerning whether his condition was related to his work, he

circled "yes." However, he did not answer the question which asked for the date of any accident.

Dr. Evans reported in his office notes:

He has had chronic bilateral shoulder pain for several months which is unresponsive to conservative therapy. He **has had no specific injury** other than his heavy labor job.

(Ex. 6, emphasis added.) Dr. Evans prescribed nonsteroidal anti-inflammatory medication and physical therapy. He directed the claimant to contact him again in a month.

The next report by Dr. Evans was the result of a phone call from claimant's physical therapist. Dr. Evans noted in his file on May 4, 1993:

Apparently his physical therapy, nonsteroidals and injections are not holding in long term symptomatically. He is therefore going to call. We are going to probably arrange arthroscopic subacromial decompression, Mumford procedure for him to pursue once he returns from Montana.

(*Id.*)

Claimant saved his receipts for his expenses during his trip to Denver. However, he never submitted the receipts to Sun Well because Sundby advised him in March of 1993 that the expenses would not be covered by the company. (Tr. at 47, 159, 162.) BC/BS paid a portion of the medical bills of Dr. Ben-Youssef and Dr. Evans. Claimant paid the remainder of the medical bills and all of his travel expenses.

Issues Raised on Appeal

In his opening brief the claimant sets out ten Issues.(Claimant's Brief in Support of Petition for Review at 4.) The Court simplifies and restates those issues as follows:

1. Whether the hearing officer abused his discretion when he denied claimant's request on the day of hearing to add two witnesses.
2. Whether the hearing officer correctly applied the law when he determined that the employer and its insurer are not estopped from raising the one-year statute of limitations provided in section 39-71-601(1), MCA, as an affirmative defense.
3. Whether the hearing officer correctly applied the law when he determined that the AOSC injury report does not satisfy the filing requirement set forth in section 39-71-601(1), MCA, and whether the Department had jurisdiction to adjudicate the issue in the first place.⁽⁵⁾
4. Whether the hearing officer erred when he found it unnecessary to determine which witnesses were credible.

5. Whether the hearing officer failed to make essential findings of fact.
6. Whether the hearing officer's findings of fact were clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Scope of Review

Judicial review of a final order of the Department is governed by section 2-4-704(2), MCA, which provides:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (b) findings of fact, upon issues essential to the decision, were not made although requested.

Under the clearly erroneous standard of subparagraph (a)(v), the hearing officer's findings of fact must be overturned on judicial review where they are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 827 P.2d 85, (1992). The Court will not reweigh the evidence; the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. EBI Orion Group*, 252 Mont. 286, 289, 829 P.2d 1 (1992). Conclusions of law must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 803 P.2d 601 (1990).

Discussion

1. Denial of claimant's request to add witnesses.

At the commencement of the hearing below, the claimant's attorney moved for permission to add Mike Miller (Miller) as a witness for claimant. (Tr. at 3.) Miller was not listed by

claimant in his disclosure of witnesses (Department File, June 15, 1994 letter of Marvin Howe) and he was not listed among claimant's witnesses in the Pre-hearing Order (June 24, 1994).

The State Fund, which had listed Miller as a potential witness, ⁽⁶⁾

decided to forego calling Miller as a witness and Miller was neither present at the hearing nor under subpoena, nor was he available to testify on the day of hearing. (*Id.*) Claimant therefore requested permission to present Miller's testimony by telephone at a later time. Counsel for the State Fund vigorously objected on the grounds that Miller had not been listed as a witness by claimant, that Miller's credibility would be at issue and could not be judged by way of telephone testimony, and that the post-trial testimony would deprive the State Fund of an opportunity to present rebuttal testimony through its own witnesses, whom were present at the hearing. (Tr. at 4-9.) The hearing officer denied claimant's motion and Miller did not testify. (Tr. at 9-10.)

Claimant argues on appeal that the hearing officer abused his discretion in denying claimant the opportunity to present Miller's testimony. The "[t]est of abuse of discretion is whether [the] trial court acted arbitrarily without employment of conscientious judgment or exceeded bounds of reason resulting in substantial injustice." *Davis v. Davis*, 921 P.2d 275, 276 (Mont. 1996). The hearing officer clearly did **not** abuse his discretion. Miller was a co-employee of claimant and claimant provided no good excuse for his failure to list him as a witness or subpoena him for trial. Had the hearing officer permitted his post-trial testimony, he would have had to permit the State Fund to then offer rebuttal testimony.⁽⁷⁾

2. Estoppel.

Section 39-71-601(1), MCA (1991), provides that a written claim for compensation must be filed within one year of the industrial accident. Pursuant to subsection (2) of section 39-71-601, MCA, petitioner requested a waiver from the one-year requirement. Subsection (2) provides:

The department 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.

At hearing claimant attempted to show that a waiver should be granted on equitable estoppel grounds. He argued that Kaiser's direction that he use BC/BS to pay for his medical treatment and Kaiser's promise to pay for travel expenses and non reimbursed medical expenses gave rise to an estoppel.

There was conflicting testimony concerning claimant's conversations with Kaiser and Kaiser's awareness of the industrial accident. The hearing officer expressly declined to resolve credibility issues: "It has not been determined in the findings whether the claimant or Sun Well are found to be more credible; however, it is felt that the resolution to this case does not hinge on credibility and thus the discrepancies need not be sorted out." (Findings at 12.)

Thus, for purposes of his decision, the hearing officer determined that claimant failed to prove estoppel whether or not his testimony was true. In his fourth conclusion of law, the hearing officer said in relevant part:

The claimant admitted in his testimony: 1) that he knew from the moment of the accident that his right shoulder injury was job-related (tr. at 35, 161); 2) that he had filed proper claims for compensation in the past, and then proceeded to file claims for his shoulders after the final confrontation with Mr. Kaiser (*id.* at 26-27); 3) that he was not *told* by Mr. Kaiser to file his medical bills with Blue Cross/Blue Shield - that it was merely a suggestion (*id.* at 189⁽⁸⁾); 4) that he was aware it was not honest or proper to file a claim with an insurer which should not have liability (*id.* at 190); and, most importantly, 5) that he did not submit to Sun Well any receipts for travel-related expenses *because they had already refused to pay* (*id.* at 47); and 6) that *he himself paid all excess medical costs* not covered by Blue Cross/Blue Shield while Sun Well paid nothing (*id.* at 48). It was evident well within one year from the date of the accident that Sun Well was not inclined to pay anything. From at least the moment that the travel receipts were refused in March of 1993, the claimant was put on notice that he was not receiving what had allegedly been promised and, using the "reasonable man" concept, should have known to file a claim. ***Bowerman v. Employment Security Commission***, 207 Mont. 314, 673 P.2d 476 (1983).

(Findings at 12, italics in original, citations to transcript added by the Court.)

The doctrine of equitable estoppel applies in workers' compensation cases. See *Ricks v. Teslow Consolidated*, 162 Mont. 469, 481-82, 512 P.2d 1304, 1311 (1973). However, equitable estoppel is disfavored and the party invoking the doctrine -- here the claimant -- must prove all of the elements of the doctrine by clear and convincing evidence. *Bruner v. Yellowstone County*, 900 P.2d 901, 905 (Mont. 1995) *Id.* The elements which must be proved are:

'(1) there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts; (2) these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him; (3) the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him; (4) the conduct must be done with the intention, or

at least with the expectation, that it will be acted upon by the other party, or under the circumstances that it is both natural and probable that it will be so acted upon; (5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it, and (6) he must in fact act upon it in such a manner as to change his position for the worse.'

Dagel v. City of Great Falls, 250 Mont. 224, 234-35, 819 P.2d 186, 192-93 (1991) (adopting and quoting *Sweet v. Colborn School Supply*, 196 Mont. 367, 372-73, 639 P.2d 521, 524 (1982)).

Since the hearing officer found that claimant's own testimony failed to establish the elements necessary for estoppel, his testimony is deemed to be entirely true for purposes of review on appeal. Contrary to the hearing officer's conclusion, that testimony established all six estoppel elements, at least with respect to the period of September 13, 1992 (the day of the accident) to March 1993 (when Sundby told him Sun Well would not reimburse him for his out-of-pocket expenses).

(1) Kaiser told claimant that Sun Well would pick up his out-of-pocket expenses if he sought payment for his medical care from BC/BS rather than through workers' compensation. The promise amounted to a representation and satisfied the first element.

(2) Kaiser, as president of Sun Well, had the authority to make the promise. Since the promise related to future action, and represented his intention, the knowledge element is satisfied.

(3) At the time he sought medical care in Denver, the claimant had no reason to believe that Kaiser and Sun Well would not honor Kaiser's promise. He was therefore unaware that the promise was false or that it would be breached.

(4) The conversation between Kaiser and claimant, as told by claimant, shows an expectation by Kaiser that claimant would act upon his promise of reimbursement.

(5) Claimant in fact sought medical care, had his care billed to BC/BS, and incurred out-of-pocket expenses. Thus, he relied and acted upon the promise.

(6) Claimant incurred out-of-pocket expenses for his medical care. Under the Montana Workers' Compensation Act, claimant was entitled to full benefits for reasonable medical care. Thus, his out-of-pocket expenses resulted in a change of his position for the worse.

When Sundby told claimant that Sun Well would not pay his out-of-pocket expenses, the claimant could no longer reasonably rely on Kaiser's promises, and claimant's own testimony indicates that he in fact did not do so. He did not submit the bills for his expenses to Sun Well. He did not seek out Kaiser to convince him to carry through with his promises. Claimant's conduct demonstrates that he was aware that his bargain with Kaiser had been repudiated. At the same time, the incentive for his not pursuing workers'

compensation had also been vitiated. Thereafter, on and after March 1993, reliance (element 5) was lacking.

Claimant argues, however, that the estoppel which operated during the first six months following the accident extends the claim filing period by the same six months. I agree. The Supreme Court has held in other cases that the claim filing period is "tolled" during the period the estoppel is operative: "[W]e have held . . . under the statute of limitations in the Workers' Compensation Act that where misstatements by an employer or insurer prevent a claimant from filing a Workers' Compensation claim in a timely fashion, or mislead the claimant into believing that no claim can or need be filed, the doctrine of equitable estoppel applies to toll the limitation period and allow filing of the claim." *Mellem v. Kalispell Laundry & Dry Cleaners*, 237 Mont. 439, 442, 774 P.2d 390, 391-92 (1989).

While in this case the estoppel ceased to operate before the expiration of the filing requirement, claimant was deterred from filing a claim during the first six months of the period and therefore did not have the full benefit of the limitations period. The nature of the doctrine of equitable estoppel has been aptly described as follows:

[The doctrine of] equitable estoppel has long been recognized in Montana and is used to prevent injustice and to promote justice, honesty and fair dealing. It is founded in equity and good conscience and its object is to prevent a party from taking unconscionable advantage of his or her own wrong while asserting a strict legal right.

In re Marriage of K.E.V., 267 Mont. 323, 331, 883 P.2d 1246, 1251 (1994). The injustice of giving no effect to the estoppel because it ended before the claim filing period had run would be more evident had the estoppel ceased to operate a day or a few days before the end of the filing period. While the injustice here is not as severe, the employer should not be allowed to take advantage of the filing delay it induced by its promises. I therefore conclude that should claimant's testimony be adopted as true, then the limitations period should be extended by six months. Such extension would make the formal claim submitted by claimant in January 1994 timely.

My ruling, however, does not end the matter since the hearing officer failed to resolve credibility questions. He did not determine that claimant was truthful or that the Sun Well witnesses were not credible. Should the testimony of the Sun Well witnesses be adopted as true, claimant's estoppel arguments fail since he cannot establish that Kaiser was aware of any industrial accident. If Kaiser's testimony is believed, he did not promise to reimburse claimant for out-of-pocket expenses and innocently told claimant to do what he was entitled to do anyway -- utilize his BC/BS medical coverage for treatment of a non-job related condition. Therefore, this case must be remanded for a determination concerning credibility.

3. The AOSC report.

Claimant further argues that the AOSC report, which he testified he completed and submitted to his employer, satisfies the filing requirement. The hearing officer rejected the argument, concluding:

It is undisputed that the claimant did not file an *official* workers' compensation claim (form DWC-MIS PF954) until 15½ months after the accident. The fact is he had filed such claims in the past and did so again after his termination. This indicates that he was aware of the difference between filing of proper claims and the AOSC injury report form. Also, the AOSC form is obviously inadequate for claim purposes as it contains nothing which even remotely characterizes it as a document to be used for the purpose of claiming workers' compensation benefits, and by virtue of the fact the claimant is not identified by name and *did not even sign the document* as specifically required under § 601 (see *Ex. 5*).

(Finding at 11.)

The hearing officer initially erred by applying the wrong version of the Workers' Compensation Act (WCA). The law in effect at the time of claimant's injury governs his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Claimant was injured in 1992, thus the 1991 version of the WCA applied. Section 39-71-601(1), MCA (1991), did **not** require that the claimant sign the claim. The section 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 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 for him in his behalf.

The signature requirement was added by the 1993 legislature. As amended, section 39-71-601(1), MCA (1993), 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. [Underlining added.]

The hearing officer also erred in suggesting that an *official* workers' compensation claim form must be filed. That contention was expressly rejected in *Weigand v. Anderson-Meyer Drilling Co.*, 232 Mont 390, 393, 758 P.2d 260, 261-62 (1988). In both *Weigand* and *Scott v.*

Utility Line Contractors, 226 Mont. 154, 157, 734 P.2d 206, 208 (1987), the Supreme Court held that a claim need not be submitted on any particular form. It need only contain information which is sufficient to inform the employer or insurer of the nature and basis of the possible claim, *Weigand* at 157, 734 P.2d at 262, and to enable it to investigate the claim and, if necessary, prepare a defense, *id.* and *Scott* at 157, 734 P.2d at 208.

In this case, the AOSC report was in writing. It listed the date and time of the accident. It described the accident: "Running to Dog House & Triped [sic] Over Power Cord & Landed Shoulder First On Ground." (Ex. 5, capitalization in the original.) It identified the right shoulder as the part of the body injured. While it did not provide the injured worker's name, it listed the employee's age, the length of time he had worked in his position, and the exact date of his hire, information which made identification of the worker easy. Thus, the AOSC report provided sufficient information for the employer to readily identify the worker and investigate the claim. Moreover, Kaiser testified that AOSC reports typically triggered the preparation of a workers' compensation claim. I therefore conclude that if the claimant filled out and submitted the AOSC form on September 14, 1992, as he testified, then he satisfied the filing requirement of section 39-71-601(1), MCA, and his claim is timely.

However, as with the estoppel issue, the hearing officer failed to make any determination concerning conflicting testimony. Claimant testified that he filled out and submitted the form. However, the insurer attacked claimant's credibility and mustered evidence that the report was not submitted to it until well over a year after the accident.

Ordinarily, the remedy for the hearing officer's failure to resolve conflicting testimony would be to remand this issue to the hearing officer for a credibility determination and additional findings of fact. However, if the AOSC report was adequate and timely, as contended by claimant, then his claim was timely. The Department's jurisdiction regarding claim filing extends only to waivers of the one-year filing requirement. It was without jurisdiction to determine whether the AOSC report was either adequate or timely submitted: That function belongs to the Court. I raise the issue *sua sponte* since subject matter may be raised at any time and may even be raised by a court *sua sponte*. *Marriage of Miller*, 259 Mont. 424, 426, 856 P.2d 1378, 1380 (1993). Thus, the credibility issue must be resolved by way of a petition to this Court and a *de novo* trial.

4. Credibility of witnesses.

Claimant's assignment of error concerning the hearing officer's failure to determine which witnesses are credible is well taken and has already been addressed.

5. Essential findings.

This matter has been addressed in connection with other issues..

6. Substantial evidence.

Since further findings must be made by the hearing officer, further review is premature.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by the DLI hearing officer on August 1, 1996 are **reversed**. The matter is **remanded** to the Department for further findings of fact in accordance with this decision. Petitioner is also free to petition the Court with regard to the AOSC report.

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

Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

DATED in Helena, Montana, this 14th day of March, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Marvin L. Howe

Mr. Thomas E. Martello

Ms. Christine L. Noland

Submitted Date: January 14, 1997

1. The statement that *claimant* had been equitably estopped from filing his claim is technically incorrect. The order should have said that the employer and insurer were equitably estopped from asserting the one-year statute of limitations.

2. The Department file contains four additional documents in the exhibit section of the file but those documents are not marked as hearing exhibits. The documents are a June 9, 1994 unsigned letter to Marvin Kaiser from Delane Erickson; a January 26, 1994 letter of Marvin Kaiser; a one page document entitled ATTACHMENT TO INJURY CLAIM dated "Sept. 13, 1992" [sic]; and a June 15, 1994 letter of Marvin Kaiser to Delane Erickson. They were not offered into evidence at hearing and there is no indication that they were considered by the hearing officer.

3. In addition to filing an AOSC report for every accident, Sun Well was required to submit a monthly accident report called a Contractor Safety Status Report (CSSR). The CSSR compiled all of the information from the AOSC reports for the previous month. The CSSR for September 1992 does not include any reference to an accident on September 13, 1992. (*Id.* at 147.)

4. The left shoulder claim is not at issue in this case.

5. The jurisdictional issue is raised sua sponte by the Court.

6. Claimant did not provide notice that he might call any witness listed by the opposing party.

7. "Rebuttal testimony" is used here in the broad sense of testimony which contradicts or undermines the testimony of another witness, and not in the sense of a witness called after completion of the defendant's part of the case.

8. This testimony was elicited by the hearing officer. Previously the claimant had testified that he was told to submit his claim to BC/BS (tr. at 43, 51) by Kaiser.