

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 71

WCC No. 9806-7999

PAUL PHILLIPS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

THOMPSON RIVER LUMBER COMPANY

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant worked for a lumber company for several months during 1995 and 1996. During January 1998, he completed and submitted a claim for compensation alleging he had injured his back on his last day of employment, February 16, 1996. He claimed that he told his supervisor about the injury the day it happened, that his supervisor completed paperwork which looked similar to the 1998 claim, and that claimant signed the paperwork. The insurer disputed the occurrence and reporting of the injury. Respondent also alleged claimant did not file a claim within one year.

Held: WCC finds it more probable that claimant did not report a back injury as he claimed. Supervisor and safety inspector who would have received claim credibly testified they had no knowledge of the alleged incident and did not complete or receive a claim relating to the incident. The medical history claimant gave to medical providers indicates he did seek treatment around the time at issue, but failed to mention any particular injury, rather indicating a gradual onset and giving other descriptions inconsistent with the present claim.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-601, MCA (1995). Credible evidence makes it more probable than not that claimant did not file claim for back injury within one year of the alleged accident. Supervisor and safety inspector who would have received claim credibly testified they had no

knowledge of the alleged incident and did not complete or receive a claim relating to the incident. The medical history claimant gave to medical providers indicates he did seek treatment around the time at issue, but failed to mention any particular injury, rather indicating a gradual onset and giving other descriptions inconsistent with the present claim.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-603(1), MCA (1995). Credible evidence makes it more probable than not that claimant did not report back injury within thirty days of the alleged accident. Supervisor and safety inspector who would have received report credibly testified they had no knowledge of the alleged incident and did not complete or receive a claim relating to the incident. The medical history claimant gave to medical providers indicates he did seek treatment around the time at issue, but failed to mention any particular injury, rather indicating a gradual onset and giving other descriptions inconsistent with the present claim.

Claims: Limitations Period. Credible evidence makes it more probable than not that claimant did not report back injury within thirty days of the alleged accident or file a claim within one year. Supervisor and safety inspector who would have received report credibly testified they had no knowledge of the alleged incident and did not complete or receive a claim relating to the incident. The medical history claimant gave to medical providers indicates he did seek treatment around the time at issue, but failed to mention any particular injury, rather indicating a gradual onset and giving other descriptions inconsistent with the present claim.

Limitations Periods: Claim Filing: Generally. Credible evidence makes it more probable than not that claimant did not file claim for back injury within one year of the alleged accident. Supervisor and safety inspector who would have received report credibly testified they had no knowledge of the alleged incident and did not complete or receive a claim relating to the incident. The medical history claimant gave to medical providers indicates he did seek treatment around the time at issue, but failed to mention any particular injury, rather indicating a gradual onset and giving other descriptions inconsistent with the present claim.

Limitations Periods: Notice to Employer. Credible evidence makes it more probable than not that claimant did not report back injury within thirty days of the alleged accident. Supervisor and safety inspector who would have received report credibly testified they had no knowledge of the alleged incident and did not complete or receive a claim relating to the incident. The medical history claimant gave to medical providers indicates he did seek treatment around the time at issue, but failed to mention any particular injury, rather indicating a gradual onset and giving other descriptions inconsistent with the present claim.

Proof: Inferences. The rule of *Harmon v. Deaconess Hospital*, 191 Mont. 285, 289, 623 P.2d 1372, 1374 (1981), which holds that the testimony of a witness that he does not recall whether a certain event or conversation took place does not contradict the positive testimony that such an event or conversation took place, does not require the Court to find in favor of claimant, who recalled reporting an injury, where claimant's supervisor testified he did not recall the report, because other evidence impacts the Court's consideration of the issue, including the supervisor's testimony it was his regular practice to fill out incident reports, no incident report concerning this matter existed, and claimant's version of events was contradicted by other credible evidence.

¶1 The trial in this matter was held on August 31, 1998, in Kalispell, Montana. Petitioner, Paul Phillips (claimant), was present and represented by Mr. David W. Lauridsen. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 10 were admitted without objection.

¶3 Witnesses and Depositions: Paul Phillips and Joe Sol were sworn and testified. In addition, the parties agreed that the Court may consider the depositions of the claimant, Mindy Phillips, David Alexander, Joe Sol, Cindy Lieski, Daniel Tyler, P.C., Jill Hart, and Gary Ritter. The parties also agreed that the Court may consider the post-trial deposition of Charles E. Clinkenbeard.

¶4 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

1. Whether claimant suffered a compensable industrial injury arising out of and in the course of his employment.
2. Whether claimant gave proper notice to his employer and whether claimant met the one-year filing requirement.
3. Whether Liberty's denial was unreasonable entitling claimant to an increase in award.
4. Whether claimant is entitled to costs and attorneys' fees pursuant to § 39-71-611, MCA.

¶5 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 went to work for Thompson River Lumber (TRL) in August of 1995. He was hired to perform work as a piler, a job which required him to pull wood from the green chain or the dry chain and to pile it. The work involved heavy, repetitious labor.

¶17 Claimant alleges that on or about February 19, 1996, he injured his back while working on the dry chain at TRL.

¶18 At the time of his alleged injury, TRL was insured by Liberty.

¶19 In January 1998 the claimant completed and submitted a claim for compensation. Liberty denied the claim.

¶110 According to claimant, his coworkers on the chain stopped pulling their share of boards in retaliation for his reporting their theft of lumber. As a result, the amount of lumber he had to pull increased. Claimant testified that he overexerted himself and felt a snap and burning sensation in his back. Claimant alleges he fell to the ground in tears from the pain.

¶111 Claimant contends he immediately reported his injury to his supervisor, Dave Alexander (Alexander), and Alexander had him complete paperwork regarding the injury. At trial the claimant described the form as having a title and as having spaces for his name, social security number, phone number, and type of injury. In his deposition he said the form looked like the claim form he later completed and submitted in January 1998. (Phillips Dep. at 9-12, Dep. Ex. A.) The claim form submitted in January 1998, is the customary First Report of Occupational Injury or Occupational Disease. Claimant said that Alexander filled out the form and that he (claimant) then signed it.

¶112 Claimant did not return to work for TRL after February 19, 1996.

¶113 At the time of claimant's employment, TRL employed Joe Sol (Sol) as its safety inspector. Sol provided new employees with a safety orientation. The orientation included instructing employees to immediately report any on-the-job injury, no matter how minor, to a supervisor. The supervisor was required to then fill out a company incident report and forward it to Sol. Sol maintained a regular log of incident reports and injuries. The log recorded the name of the employee, the date of injury, the type of injury, and the name of the claimant's doctor.

¶114 A search of TRL files failed to turn up any incident report or claim prepared on February 19, 1996, on behalf of claimant.

¶115 Sol never received any incident report or claim with respect to the claimant's alleged injury. His log, a copy of which is found at Exhibit 10, does not record the alleged injury.

¶116 Within a day or two of February 19, 1996, claimant called Sol and told him his back was hurting him. However, Sol testified that the claimant did not tell him of any injury. He

recalled that claimant called and explained that he had not been to work because he'd been to a chiropractor who had then referred him to a physician. A day or two after the initial conversation, claimant called and reported to Sol that he had been told that he had a blood disorder which was causing a spinal problem.

¶17 Alexander, who testified by deposition, recalled that claimant had told him that other employees were overloading him on the green chain but had no recollection of claimant saying that he injured his back. (Alexander Dep. at 7, 16.) However, he testified that when an injury was reported to him it was his standard practice to fill out an incident report and investigate. (*Id.* at 8.) If the injury was then confirmed, a first report (claim) was then filled out. (*Id.* at 7-9.) Alexander did not recall ever filling out an incident report for claimant and testified that if he had filled one out it would be in the files he left behind or Sol would have it. (*Id.* at 10.)

¶18 It is possible that an incident report and claim were filled out on February 19, 1996, but lost. It is also possible that Alexander, who claimant testified was irked by his report of the thefts, deliberately destroyed them. I have considered both possibilities but after careful review of the medical records and after assessing the credibility of the witnesses testifying at trial, I am unpersuaded as to either possibility. I find it more probable that claimant did not report a back injury to Alexander on February 19, 1996, or fill out any paperwork on that date.

¶19 The history reported by claimant to medical providers indicates that claimant sought treatment on account of back pain he had suffered for some time. The information recorded by the providers not only does not support claimant's assertion that he suffered a back injury on February 19, 1996, it contradicts that claim.

¶20 On September 14, 1995, five months before the alleged accident, claimant sought treatment from Daniel Tyler, D.C. (Tyler) Tyler's records for that date include a Case History Record which appears to be filled out in part by claimant or his wife. (Tyler Dep. Ex. 1.) (Claimant indicated his wife filled out some forms.) Claimant's condition was described as "Informality [sic] of the spine," next to which is noted, "[U]ncertain what levels." His job pulling on the green chain was noted. His major complaints were listed as "both arms go numb, goes out all the time." The onset was listed as "gradual."

¶21 Claimant maintains that he saw Tyler again on February 19, 1996, the same day he claims he injured his back while working on the dry chain. He testified that Tyler manipulated his back, but that Tyler's treatment only made the condition worse. However, records of such a visit were not located.

¶22 On or about February 21, 1996, claimant was examined by Dr. Carl Albertson, who is an orthopedic surgeon. Dr. Albertson recorded that claimant had been experiencing back problems over the past two months and that they were gradually becoming worse. (Lieski

Dep. Ex. 1.) He further recorded that claimant told him that he "continued to work, but his back slowly became worse." (*Id.*) While claimant's attorney suggested that the "2 months" was a typographical error and that Dr. Albertson intended "2 days," there is no evidentiary support for the suggestion. Moreover, Dr. Albertson's note that claimant told him he continued to work for some time and that his back became gradually worse is incompatible with that suggestion. The note further contradicts claimant's testimony that he never went back to work after hurting his back.

¶23 Claimant's next medical treatment was on February 26, 1996, by Dr. Mark S. Heppe, a family practitioner. At that time, claimant was experiencing nausea and vomiting, apparently as a side effect of Indocin which Dr. Albertson had prescribed. (Ex. 8 at 13.) As did Dr. Albertson, Dr. Heppe recorded a history inconsistent with claimant's allegation of a February 19th injury. He recorded:

Paul relates a history of many years duration of pain throughout his cervical-thoracic [sic] and lumbar spine. Has been more intense in the past 2 months. Has been working on the chain at the mill for the past 4 months. **No specific incident of overuse or acute injury.** . . . [Emphasis added.]

(*Id.*)

¶24 Upon Dr. Heppe's referral, claimant next saw Dr. John Smith, a rheumatologist. (Hart Dep. at Ex. 1). Dr. Smith saw claimant on April 19, 1996. His records list claimant's chief complaint as, "[M]y back hurts for six years." (*Id.*) Significantly, Dr. Smith recorded:

26-year-old male denies trauma to back. He has longstanding pain in neck, thoracic, low back regions.

(*Id.*) Dr. Smith further recorded claimant's report of "pain all night long" and hardly sleeping for the previous five years on account of his pain. (*Id.*)

¶25 Charles Clinkenbeard (Clinkenbeard), a co-employee, provided a telephonic deposition in which he testified that claimant told him he had hurt his back and was going to tell Alexander about it. (Clinkenbeard Dep. at 7-9.) He also testified that claimant told him that he had "talked to Dave about it and told Dave about it and filled out some paperwork on it." (*Id.* at 9.) However, Clinkenbeard also testified that whenever he was hurt, Alexander always filled out the forms for reporting the injury and that "Joe [Sol] and Dave [Alexander], in my opinion, are probably the two best guys out there." (*Id.* at 11.)

¶26 I have considered Clinkenbeard's testimony. While I do not lightly disregard his testimony, I have also considered the fact that he and claimant can probably be characterized as friends; they shared driving to work when working for TRL and after claimant stopped working for TRL he kept in touch with Clinkenbeard. More importantly, I have assessed the testimony in the context of what claimant reported to his doctors and

my perception of claimant's and Sol's credibility. I found Sol very credible. I find it unlikely that had claimant been injured on February 19, 1996, and reported it to Alexander that he would have failed to tell Sol about it. I find it extremely unlikely that he told the various physicians about an accident and that they merely failed to record what he told them; in fact, their notes contradict his claim. I find it extremely unlikely that had he been injured on February 19, 1996, he would have omitted that fact when talking to his doctors. Finally, I simply did not find him to be a reliable and credible witness.

¶27 Moreover, claimant has offered no medical evidence supporting his contention that he was injured on February 19, 1996. None of the physicians attending claimant were aware of the claim. Dr. Albertson felt that claimant may be suffering from spondylitis which is a descriptive term for inflammation of the vertebrae. Dorland's Illustrated Medical Dictionary (27th ed. 1985). The diagnosis says nothing about the cause of the condition. Dr. Heppe wrote, "I agree that he certainly has a fairly classic history and presentation for inflammatory spondylitis" (Ex. 8 at 14.) Dr. Smith, on the other hand, diagnosed fibromyalgia. (Hart Dep. Ex. 1.)

¶28 Finally, in making my findings of fact in this case I have considered the rule of *Harmon v. Deaconess Hospital*, 191 Mont. 285, 289, 623 P.2d 1372, 1374 (1981), which holds that the testimony of a witness that he does not recall whether a certain event or conversation took place does not contradict positive testimony that such event or conversation did take place. Alexander did not recall claimant telling him of the alleged injury, whereas claimant testified positively that he did. If that was the only testimony involved in resolving the matter, then *Harmon* would apply. However, there was other testimony affecting the Court's consideration of claimant's assertion. First, Alexander testified it was his regular practice to fill out an incident report whenever an injury was reported to him and then forward the report to Sol, who logged it. No incident report was ever located or logged. Second, claimant within a day or two, talked to Sol but didn't inform him of any injury. Third, claimant did not inform any of his medical providers of any injury, indeed his statements to his medical providers were incompatible with his claim. *Harmon* is inapposite.

¶29 I am unpersuaded that claimant suffered an industrial injury on February 19, 1996, or that he reported such injury to his employer within 30 days of February 19, 1996, or that he filed a written claim of any sort prior to January 1998.

CONCLUSIONS OF LAW

I. Applicable Law

¶30 Claimant seeks benefits with respect to the alleged injury occurring on February 19, 1996. His claims are governed by the 1995 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶131 Claimant must prove by a preponderance of the evidence that he is entitled to compensation. *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).

III. Notice to Employer

¶132 Section 39-71-603, MCA (1995), required claimant to provide his employer with notice of his alleged accident within 30 days. He failed to do so and his claim is barred.

IV. Written Claim

¶133 Section 39-71-601, MCA (1995), required claimant to file a written claim within one year of his alleged accident. He did not file a written claim until almost two years later. His claim is therefore barred.

V. Industrial Injury and Accident

¶134 The 1995 WCA, section 39-71-119, MCA, defines a compensable industrial injury in relevant part as:

Injury and accident defined. (1) "Injury" or "injured" means:

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

....

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

Claimant failed to present any medical evidence establishing a connection between his back condition and any incident on February 19, 1996. Medical evidence might be unnecessary in some cases, as where a worker suffers an open wound obvious to all. But this is not such a case. The diagnoses of claimant's treating physicians do not provide any self-evident link between a single event on a single day and his condition. Thus, claimant has failed to prove an essential element of an industrial injury.

VI. Costs and Attorney Fees

¶35 Claimant has not prevailed in this action and is not entitled to either attorney fees or costs. § 39-71-611, MCA (1995).

JUDGMENT

¶36 The claim in this matter is barred by the claimant's failure to notify his employer within 30 days of his alleged injury, § 39-71-603(1), MCA (1995), and his further failure to file a written claim within one year, § 39-71-601, MCA (1995). Additionally, claimant has failed to establish that he suffered an industrial injury. His petition is dismissed **with prejudice**.

¶37 Petitioner is not entitled to attorney fees or costs.

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

¶39 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 9th day of October, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. David W. Lauridsen

Mr. Larry W. Jones

Date Submitted: October 2, 1998