

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 10

WCC No. 9708-7816

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Appellant

vs.

SUBSEQUENT INJURY FUND

Respondent.

DECISION ON APPEAL

Summary: Insurer appealed decision of Department of Labor, arguing for tolling of the notice requirement of section 39-71-906, MCA (1989) to permit shifting of liability for injured worker's benefits to Subsequent Injury Fund (SIF). The injured worker had been certified with the SIF, but the new employer had not supplied information about that employment to the Department as required by section 39-71-906, MCA. The insurer argued that claimant had not told the new employer about his prior injuries and that the notice provision should be tolled, or the SIF estopped from relying on the provision.

Held: Appeal denied. The plain terms of section 39-71-906, MCA, require the employer to advise the Department within 60 days after the first day of employment or "before an injury . . ." that an employee is certified under the SIF. There is no provision for tolling the limitation. There is also no requirement that a worker notify a prospective employer of certification or even obtain certification. There is no requirement that the employer invoke the SIF provisions even if informed of certification. The elements of estoppel are also not satisfied. The party against whom the insurer wishes to apply the elements of estoppel, the SIF, made no representations whatsoever. Even if the estoppel doctrine could be applied to the SIF through the employer and claimant, the insurer failed to prove the reliance and injury elements where it never asked claimant if he was certified and the insurer would not have reduced insurance premiums based on the employee's certification.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

section 39-71-906, MCA (1989). On appeal from the DOL, the WCC agreed that the notice provisions of section 39-71-906, MCA (1989) could not be tolled and that the

Subsequent Injury Fund (SIF) was not estopped from relying on those provisions. Although a worker had been certified with the SIF, he lied to his employer about the existence of prior injuries and neither the employer nor the insurer knew he was certified with the SIF, thus no notice was given to the SIF about his employment. Nevertheless, the plain terms of section 39-71-906, MCA, require the employer to advise the Department within 60 days after the first day of employment or "before an injury. . ." that an employee is certified under the SIF. There is no provision for tolling the limitation. There is also no requirement that a worker notify a prospective employer of certification or even obtain certification. There is no requirement that the employer invoke the SIF provisions even if informed of certification. The elements of estoppel are also not satisfied. The party against whom the insurer wishes to apply the elements of estoppel, the SIF, made no representations whatsoever. Even if the estoppel doctrine could be applied to the SIF through the employer and claimant, the insurer failed to prove the reliance and injury elements where it never asked claimant if he was certified and the insurer would not have reduced insurance premiums based on the employee's certification.

Estoppel and Waiver: Equitable Estoppel. On appeal from the DOL, the WCC agreed that the notice provisions of section 39-71-906, MCA (1989) could not be tolled and that the Subsequent Injury Fund (SIF) was not estopped from relying on those provisions. Although a worker had been certified with the SIF, he lied to his employer about the existence of prior injuries and neither the employer nor the insurer knew he was certified with the SIF, thus no notice was given to the SIF about his employment. Nevertheless, the plain terms of section 39-71-906, MCA, require the employer to advise the Department within 60 days after the first day of employment or "before an injury. . ." that an employee is certified under the SIF. There is no provision for tolling the limitation. The elements of estoppel are not satisfied where the party against whom the insurer wishes to apply the elements of estoppel, the SIF, made no representations whatsoever. Even if the estoppel doctrine could be applied to the SIF through the employer and claimant, the insurer failed to prove the reliance and injury elements where it never asked claimant if he was certified and the insurer would not have reduced insurance premiums based on the employee's certification.

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¶1 This is an appeal by St. Paul Fire and Marine Insurance Company (St. Paul) from a July 18, 1997 decision of the Department of Labor and Industry (DLI). The parties have agreed that a transcript of the proceedings is unnecessary to the appeal. They have briefed the appeal and the matter was deemed submitted for decision on January 20, 1998.

¶2 Issue: St. Paul asserts on appeal that, based on the undisputed facts of this case, the notice requirement of section 39-71-906, MCA, should be tolled.

Facts

¶3 In the proceeding below the parties filed an agreed statement of facts. Findings of Fact, Conclusions of Law and Order (July 18, 1997). The uncontested facts are as follows:

1. Steve Nave is a former employee of The Western Sugar Company, an employer enrolled under Compensation Plan No. 2 and insured by Petitioner St. Paul Fire and Marine Insurance Company. Prior to his employment with The Western Sugar Company, Mr. Nave was employed by Pierce Packing Company. Mr. Nave suffered an industrial injury on November 11, 1978, while employed by Pierce Packing Co. Following that injury, Mr. Nave applied to be certified as being vocationally handicapped, for the purposes of the Subsequent Injury Fund. Mr. Nave was certified as being vocationally handicapped on July 8, 1980, certification number 6-81-00003.

2. Mr. Nave, while employed by Pierce Packing Co. suffered a second industrial accident on December 4, 1980, sustaining an injury to his knees and back. He underwent surgery on both his left knee and his back in an effort to treat the injuries he had sustained. The Subsequent Injury Fund became liable for payment of a portion of Mr. Nave's benefit entitlement arising out of the industrial injury. Mr. Nave suffered permanent disability as a result of his knee and back injuries. Ultimately, the claim was settled whereby the Subsequent Injury Fund agreed to pay to Mr.

Nave in a lump sum permanent partial disability benefits totaling \$36,624.00 in addition to a \$2,500.00 partial lump sum advance which was already paid to Mr. Nave. The Subsequent Injury Fund also agreed to pay attorneys fees totaling \$9,156.00 and costs totaling \$225.00. Temporary total disability benefits were also paid by the Subsequent Injury Fund. The claim was settled in August, 1984.

3. Mr. Nave applied for employment with Petitioner's insured, The Western Sugar Company, in August, 1984. As a part of the application process, Mr. Nave was required to complete a form entitled "Physical Condition - Statement of Facts." The form was completed on August 12, 1984, and contained the following question:

Do you now have or have you ever been treated for a back condition or injury?
Explain and state treatment received.

Mr. Nave answered this question "No."

4. Mr. Nave was subsequently hired for the winter campaign at Western Sugar Company. He was also rehired during subsequent years. Once again, as part of the rehiring process, Mr. Nave was required to complete an employment application. As a part of the application process, Mr. Nave was asked the following question:

Do you have any physical limitations which would adversely affect performance of the job for which you are applying?

Mr. Nave was applying for the heavy duty position of coal handler. He answered the question on the employment application "No." The application was completed on December 29, 1988.

5. Mr. Nave sustained an industrial injury involving his low back on or about August 21, 1990 while employed by Petitioner's insured, The Western Sugar Company. Liability for the injury was accepted and disability and medical benefits have been paid by Petitioner.

6. As a result of the industrial injury, Mr. Nave was physically precluded from returning to employment with Petitioner's insured. A full and final compromise settlement of Mr. Nave's injury claim was negotiated between Mr. Nave and Petitioner and submitted to the Department of Labor for review and approval. An order approving the compromise and release settlement was issued by the Department on July 2, 1993.

7. More recently, Mr. Nave has filed a Petition for Hearing before the Workers' Compensation Court which seeks to have the settlement set aside on the grounds of mutual mistake of material fact. The matter was settled by compromise agreement and the settlement was approved by the Department of Labor and Industry by Order dated June 6, 1996.

8. Petitioner has recently learned that prior to going to work for The Western Sugar Co., Mr. Nave had suffered an industrial injury and had become certified with the Subsequent Injury Fund. At the time Mr. Nave sustained his industrial injury on October 21, 1990, the Petitioner had no knowledge that Mr. Nave had suffered a prior industrial injury involving his back or that he suffered physical limitations as a result of his prior industrial injuries. Further, Petitioner had no knowledge that Mr. Nave was certified with the Subsequent Injury Fund.

9. Petitioner did not register Mr. Nave with the Subsequent Injury Fund within sixty days of employment as required by § 39-71-906, MCA.

10. For the purpose of the pending matter, there was no prejudice to the Subsequent Injury Fund by virtue of St. Paul's failure to register Mr. Nave with the Fund within sixty days of employment.

11. The Subsequent Injury Fund did not make any false or misleading statements to The Western Sugar Company with regard to Mr. Nave or his status as a vocationally handicapped worker.

12. The Subsequent Injury Fund did not make any false or misleading statements to The Western Sugar Company with regard to the need to comply with the provisions of § 39-71-906, MCA.

13. Mr. Nave was not, and is not, an agent of the Subsequent Injury Fund.

¶14 The hearing officer made three additional findings at pages 6-7 of the Findings of Fact, Conclusions of Law and Order which are not disputed on appeal. Those findings, as rephrased by the Court, are:

¶15 Even if asked, the Subsequent Injury Fund will not inform an employer whether a new employee is certified as vocationally handicapped.

¶16 St. Paul received premium payments from its insured based on an actuarial analysis of the employer's overall risk and without regard to whether any workers were certified as vocationally handicapped.

¶17 Even if St. Paul had been aware that Mr. Nave was certified as vocationally handicapped, it would not have charged the employer a lower premium.

STANDARD OF REVIEW

¶18 There are no facts in dispute, thus the only issue is whether the hearing officer correctly applied the law to those facts. The appropriate standard of review is to determine whether the hearing officer's conclusions of law are correct. *Steer, Inc., v. Dep't of Revenue of the State of Mont.*, 245 Mont. 470, 803 P.2d 601 (1990); *Zimmerman, et al. v. Uninsured Employers' Fund, et al.*, WCC No. 9611-7648 (Order on Appeal, decided October 23, 1997).

DISCUSSION

¶9 This case involves the Subsequent Injury Fund (SIF), which is established by section 39-71-901(2), MCA. Other statutes pertaining to the SIF provide that a disabled worker may apply to the Department of Labor and Industry (Department) for certification that he or she is vocationally disabled. § 39-71-905, MCA. The employer of a certified worker may then invoke another statutory provision which shifts the liability for subsequent industrial injuries from the employer and its insurer to the SIF. If the SIF provisions are timely invoked, section 39-71-907, MCA, limits the liability of the employer's insurer for a subsequent injury to 104 weeks of benefits and imposes liability for additional weeks upon the SIF. The obvious purpose of the statute is to reduce the employer's risk in employing disabled workers by reducing the employer's insurance premiums.

¶10 This case specifically involves the application of section 39-71-906, MCA. The section sets out the conditions **employers** must satisfy to obtain the "protection and benefits" of SIF provisions. It was enacted in 1973. Other than a name change from "division of workers' compensation" to the "department of labor and industry" in 1989, the sole amendment to this section occurred in 1997 when "vocationally handicapped person" was changed to "person with a disability." The statute in effect on the date of Steve Nave's injury read:

39-71-906. Employer hiring or retaining certified vocationally handicapped person to file information with department -- effect of failure to file. Upon commencement of employment or retention in employment of a certified vocationally handicapped person, the employer shall submit to the department, on forms furnished by the department, all pertinent information requested by the department. The department shall acknowledge receipt of the information. Failure to file the required information with the department within 60 days after the first day of the vocationally handicapped person's employment or retention in employment precludes the employer from the protection and benefits of this part unless the information is filed before an injury for which benefits are payable under this part. [Emphasis added.]

¶11 In this case, the claimant was certified as vocationally disabled in 1980. However, claimant's subsequent employer, Western Sugar, was never notified of the certification and did not provide the Department with the information required by section 39-71-906, MCA, prior to claimant's subsequent August 21, 1990 injury.

¶12 Western Sugar hired claimant in August 1984. In the application for employment, claimant was asked whether he had ever been "treated for a back condition or injury." In fact, he had suffered a job-related back injury in 1980. (Fact 2.) However, he lied in answering "No." He was hired and thereafter went to work for Western Sugar on a seasonal basis. In 1988 he filled out another application for employment by Western Sugar. In

response to an application question asking if he suffered "any physical limitations which would affect performance of the job for which you are applying?", he replied, "No."

¶13 St. Paul, which insured Great Western in 1990, only recently learned of claimant's certification as vocationally disabled. It now seeks to toll the time limitations of section 39-71-906, MCA, and thereby transfer liability for part of the benefits it has paid to the SIF.

¶14 The Court is unable to ascertain the nature of claimant's 1978 injury or the basis for his vocational disability. Those facts are not provided as a part of the agreed facts or in the hearing officer's Findings of Fact, Conclusions of Law and Order, and as earlier noted the Court has not been provided with a transcript of the hearing. The omission, however, does not affect the decision in this case.

¶15 Initially, St. Paul urges that had Western Sugar known about claimant's certification as vocationally disabled it would have notified the Department of such fact and taken advantage of the SIF provisions. It urges that "equity" requires the time limits for notification be tolled and thereby allow it to shift liability to the SIF. I am unpersuaded. St. Paul has conceded that it would not have reduced its premiums on account of the certification. Thus, Western Sugar would have gained no benefit from the certification and had no incentive to notify the Department of the certification.

¶16 The plain terms of section 39-71-906, MCA, require the employer to advise the department within 60 days after the first day of employment **or** "before an injury. . ." that an employee is certified under the SIF. There is no provision for tolling the limitation. *Compare* § 39-71-601, MCA (which sets forth an express provision for waiver of the one year claim filing requirement). There is no requirement that a worker notify a prospective employer of certification or even obtain certification. There is no requirement that the employer invoke the SIF provisions even when informed of certification.

¶17 Courts must construe statutes as they are written and may not insert terms or conditions omitted by the legislature. *Russette v. Chippewa Cree Hous. Auth.*, 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994). The Court cannot write exceptions into the statutes.

¶18 However, irrespective of specific time limitations fixed by statutes, a party may be estopped from asserting the limitation. Equitable estoppel has been recognized in workers' compensation cases. *Eg., Kuzara v. State Compensation Ins. Fund*, 279 Mont. 223, 231, 928 P.2d 136, 141 (1996). The elements which must be satisfied for an estoppel to arise are as follows:

1. There must be conduct amounting to a representation or a concealment of material facts;

2. These facts must be known to the party estopped at the time of the 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 when 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 such 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;
6. He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Kuzara, 279 Mont. at 231, 928 P.2d at 141 (quoting from *Davis v. Jones*, 203 Mont. 464, 466, 661 P.2d 859, 860-61 (1983)).

¶19 The elements are not satisfied in this case. The party against whom St. Paul wishes to apply the elements made no representations whatsoever. The case for equitable estoppel therefore fails ab initio.

¶20 Even if the Court could vicariously apply the estoppel doctrine through the employer and claimant, and hence to the SIF, St. Paul failed to prove the reliance and injury elements (5 and 6). Claimant certainly lied to Great Western about his previous back injury, but Great Western did not ask whether he was certified as vocationally disabled. On appeal there is no evidence before this Court that in asking the question about previous back condition or injury Great Western was interested in claimant's certification or that a truthful answer to the question posed would have resulted in a follow-up question concerning certification. Evidence of element 5 is therefore lacking. As to element 6, the Court has already noted that Great Western was not legally required to invoke the SIF provisions and had no incentive to do so in light of the fact that its insurance premiums would not have been reduced. Hence, the reliance element is lacking. If the reliance element is applied to St. Paul rather than the employer, it is still unsatisfied. St. Paul would not have reduced its premium, and there is no evidence that St. Paul would have refused to insure Western Sugar had claimant not been certified and had St. Paul known of claimant's back injury.

¶21 The decision of the hearing officer is **affirmed**.

DATED in Helena, Montana, this 19th day of February, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Lucy T. France
Mr. Mark E. Cadwallader
Submitted: January 20, 1998