

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 20

WCC No. 2002-0568

DARIN SHARP

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant alleged that he hurt his leg and back when he stepped in a hole at work. The insurer disputed the fact of the injury and alleged he failed to give notice within 30 days, as required by section 39-71-603(1), MCA (2001).

Held: While the evidence is conflicting, the Court is persuaded that the accident occurred as alleged and that the claimant provided timely notice to his employer.

Topics:

None.

¶1 The trial in this matter was held on September 10, 2002, in Great Falls, Montana. Petitioner, Darin Sharp (claimant), was present and represented by Ms. J. Kim Schulke. Respondent, Montana State Fund (State Fund), was represented by Mr. David A. Hawkins.

¶2 Exhibits: Exhibits 1 through 20 and 25 through 34 were admitted without objection. Exhibits 21 through 24 were admitted for consideration solely with respect to the reasonableness of the insurer.

¶3 Witnesses and Depositions: Claimant, Richard Adamson, Daryl Sharp (claimant's twin brother), Blair "Mick" Little Dog, Steven Scholl, Laura A. Bacon, Eric J. Moe, Phillip Ghekiere, and Brent H. Barns testified at trial. In addition, the parties submitted the depositions of Jerry Bacon, Laura Bacon, Carolyn Ghekiere, Phil Ghekiere, Blair Little Dog, Eric Moe, Darin Sharp, Quay Torok, and Clark Fultz, D.O., to the Court for its consideration.

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

1. Whether Petitioner/Claimant injured his back on December 10, 2001 while working for FX Drilling Co., Inc.

2. Whether Petitioner/Claimant provided notice required by § 39-71-603, M.C.A., to his employer within 30 days of the date he contends he was injured on the job.

3. Whether Petitioner/Claimant is entitled to workers' compensation benefits from and after December 10, 2001 including medical benefits, wage loss benefits and any other benefits under the Workers' Compensation Act.

4. Whether Respondent acted unreasonably in refusing to accept liability for this claim, such that Petitioner/Claimant is entitled to attorney fees and penalty.

(Pretrial Order at 2.)

¶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 worked for FX Drilling Company, Incorporated (FX Drilling) from sometime in 2000 until December 2001.

¶17 FX Drilling is a petroleum drilling company. It drills new wells and also maintains existing pumping wells.

¶18 In December 2001 claimant was one of a crew of three assigned to maintain existing wells.

¶19 Claimant alleges in his petition that on December 10, 2001, he injured his back when he stepped with his right leg into a two and one-half foot deep hole at well site 96-4.

¶20 Claimant's initial written claim for compensation, dated January 27, 2002, stated that he was injured on December 17, 2001. (Ex. 1.) In fact his last day of work was December 14, 2001. Later, he filed an amended claim with an injury date of December 10, 2001. (Ex. 2.)

¶21 Although identifying December 17, 2001, as the date of the injury, the first written claim stated that claimant injured himself on **Monday**, that he worked Tuesday, took Wednesday off, and returned to work on Thursday and Friday. That chronology is fully consistent with his work records for the week of December 10th.

¶22 Claimant testified that after stepping into the hole he experienced pain in his right leg and buttocks but thought he only pulled a muscle when he stepped in the hole. He worked the next day but testified that on Wednesday he did not work because his back and leg hurt too badly. He worked Thursday and Friday but did not return to work thereafter. He said

after that Friday he had difficulty walking and lay on the floor a great deal of the time, finally seeking medical care on December 27, 2001.

¶13 Claimant's immediate supervisor, Eric Moe (Moe), confirmed that claimant worked Monday and Tuesday, December 10th and 11th, but did not work on Wednesday, December 12th. He recalled claimant complaining about his back or leg during that week. (Moe Dep. at 17; Trial Test.) When he stopped by claimant's house to pick him up for work on Wednesday, December 12th, claimant's brother came out of the house and told him that claimant was "hurting" and could not work. (Moe Dep. at 19; Trial Test.)

¶14 Moe's testimony persuades me that claimant's back and leg problems began during the week of December 10, 2001. Claimant was working steadily prior to that week and there is no indication of back and leg pain prior to that week.

¶15 The question is whether those back and leg problems were triggered by a fall at work on December 10th, as claimant alleges, and whether claimant reported an accident to his employer within thirty days of December 10th.

¶16 Blair "Mick" Little Dog allegedly witnessed the claimant's accident, however, his deposition and trial testimony were inconsistent. After observing his testimony at trial, I ultimately deemed his testimony worthless and do not rely upon it in reaching my decision in this case.

¶17 The State Fund presented evidence that claimant may have hurt his back in a fall at "Rock City", a place near Two Medicine which is apparently characterized by its rock formations. The event certainly occurred as claimant admitted to it. He testified he fell about 7 to 8 feet into a ravine when a rock gave way, then he slid another 10 feet. However, he testified he did not hurt himself.

¶18 The State Fund's witnesses suggested that the incident occurred just before claimant stopped working. Some witnesses testified about conversation that allegedly occurred at the water plant wherein Richard Adamson (Adamson) talked about the incident. Quay Torok testified that claimant was absent from work and that Adamson indicated the incident occurred the prior day. (Torok Dep. 6.) Phil Ghekiere, who was also present during the conversation, testified that the conversation was on December 18th, which would put the date of the incident on December 17th. But Moe's testimony establishes that claimant was already suffering from pain during the week of December 10th and had even lost a day of work on account of his pain. Adamson, who witnessed the incident, confirmed claimant's version of the incident and testified that it occurred in early May 2001, many months before the alleged industrial accident. His testimony was unrebutted and I found it credible.

¶19 Moreover, there are no records of medical treatment for any injuries from the fall at Rock City. The first record of medical treatment is by Dr. Clark Fultz on December 27, 2001.

He testified that claimant reported " that he was working in the oil patch, and after a couple of days he noticed a severe pain in his right hip which was painful when he put weight on his foot." (Fultz Dep. at 4.) That report is consistent with the claimant's story.

¶20 In the end, the alleged rock climbing incident was a red herring. I find that claimant did step in a hole at work on December 10, 2001, injuring himself as he has alleged.

¶21 I therefore turn to the second question, which is whether claimant reported the accident to his employer within thirty days of December 10th.

¶22 Claimant testified that he told Moe on the Tuesday after the accident that his leg hurt and that he was not sure why but thought it was due to his stepping in the hole the day before. (Trial Test.; Darin Sharp Dep. at 18.) According to claimant, Moe asked him if he wanted to fill out an accident report but he replied, "No, I think I just pulled a muscle." (*Id.*)

¶23 Moe testified that although he was aware of claimant's back or leg complaints during the week of December 10, 2001, he was not aware of any on-the-job injury.

¶24 After listening to both claimant and Moe at trial, I find the claimant's testimony regarding his report of the incident more credible. I am therefore persuaded that claimant did report the accident to Moe.

¶25 Finally, I am unpersuaded that the State Fund acted unreasonably in denying this claim. Claimant's supervisors denied that claimant ever notified them of his accident. And, while I ultimately found that the Rock City incident was a red herring, the information provided to the State Fund prior to trial was not so obvious. Ultimately, this case turns on claimant's credibility and was properly submitted to the Court for decision.

CONCLUSIONS OF LAW

¶26 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶27 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶28 Section 39-71-119, MCA (2001), defines the elements which the claimant must prove to establish an injury or accident. Those elements are not seriously in dispute: the sole issue presented under the section is whether the claimant stepped in the hole and hurt his back and leg as he alleges. I have found that he did and no further discussion of the statute is necessary.

¶129 Even though claimant suffered an injury, he was required to give notice of his injury to his employer within thirty days. Section 39-71-603(1), MCA (2001) provides:

39-71-603. Notice of injuries other than death to be submitted within thirty days. (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

I have found that claimant reported his injury to his immediate supervisor - Eric Moe - a day after the injury. Even though Moe may not have communicated the fact to his own superiors, that notice was effective. Moe was the supervisor in charge.

¶130 Since claimant suffered a back and leg injury he is entitled to medical and compensation benefits for those injuries. The Pretrial Order does not ask that I determine specifically what benefits he is entitled to, only that I determine his entitlement in general terms. Moreover, the parties have not presented evidence as to specific benefits.

¶131 The State Fund did not act unreasonably in denying the claim in this case as there were legitimate issues of fact as to whether claimant suffered an industrial accident and whether he timely reported it to his employer. Since an award of attorney fees and a penalty require a finding that the State Fund was unreasonable in denying the claim, §§ 39-71-611 and -2907, MCA (2001), the requests for attorney fees and a penalty are denied.

JUDGMENT

¶132 Claimant suffered a work-related back and leg injury on December 10, 2001, while working in the course and scope of his employment with FX Drilling. He reported the accident within thirty days as required by section 39-71-603(1), MCA (2001). Therefore, the State Fund is liable for compensation and medical benefits for that injury.

¶133 The State Fund did not act unreasonably in denying the claim in this case as there were legitimate issues of fact as to whether claimant suffered an industrial accident and whether he timely reported it to his employer. Since an award of attorney fees and a penalty require a finding that the State Fund was unreasonable in denying the claim, §§ 39-71-611 and -2907, MCA (2001), the requests for attorney fees and a penalty are denied.

¶134 Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶135 Claimant is not entitled to attorney fees or a penalty.

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

¶137 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 11th day of March, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Ms. J. Kim Schulke

Mr. David A. Hawkins

Submitted: September 17, 2002