IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWC 98

WCC No. 9303-6752

DONNA TURJAN

Petitioner

vs.

ROYAL INSURANCE

Respondent/Insurer for

VALLEY VIEW ESTATES NURSING HOME

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on January 18, 1994, in Missoula, Montana. Petitioner, Donna Turjan (claimant), was present and represented by Mr. Thomas C. Bulman. Respondent, Royal Insurance (Royal), was represented by Mr. P. Mars Scott. Claimant testified on her own behalf. Connie Strong, Nancy Conley and Pat Wallace also testified. Brad Jarvis' post-trial deposition and claimant's deposition were submitted for the Court's consideration. Exhibits 1 through 8 and 10 were admitted into evidence by stipulation of the parties. Exhibit 9 was admitted over Royal's relevancy objection on the condition that it would only be considered if claimant established estoppel up and through the period preceding the date on Exhibit 9, July 31, 1992. Exhibit 11, which consists of portions of a claim file maintained on behalf of Industrial Indemnity Insurance Co. (Industrial Indemnity) with respect to a September 16, 1986 injury, was admitted into evidence by stipulation after the trial. (Tr. at 129-130)

The Court held an *in camera* inspection of another claim file maintained on behalf of Industrial Indemnity. The file included work product and attorney-client privilege documents. The Court determined that the first mention of an April 1987 injury was on July 22, 1992. A sealed copy of the file has been retained by the Court so that it is available in the event of an appeal.

Issues Presented: The issues before this Court are whether claimant complied with the sixty (60) day notice provision of section 39-71-603, MCA and, if so, whether she filed a written claim complying with section 39-71-601, MCA.

Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses appearing at trial, the exhibits and depositions, the Court makes the following:

FINDINGS OF FACT

1. Claimant was employed as a nurses' aide at Valley View Estates Nursing Home (Valley View) from February of 1986 to April of 1987.

2. On September 16, 1986, claimant injured her lower back and right shoulder while lifting a patient into a bath chair. (Tr. at 147.) The injuries occurred in the course and scope of her employment with Valley View.

3. Claimant notified her supervising nurse, Bonnie Hicks, of the injury. On September 22, 1986, she filled out an Accident Investigation Report. (Tr. at 149-150, 161-162.) On January 26, 1987, she filed a written claim for compensation. (Ex. 2.)

4. Previously, on September 1, 1986, claimant had filled out an Accident Investigation Report after a patient hit her. (Ex. No. 2 at 23.) At trial the claimant testified that she knew that she was required to fill out a claim form if she were injured. (Tr. at 161.)

5. Based on the facts recited in the previous two paragraphs, the Court finds that claimant was familiar with the nursing home's procedures for reporting a worker's compensation injury and filing a claim. Claimant knew that she was required to report any industrial accident to her supervisor, fill out a written accident report and file a claim.

6. At the time of claimant's September 16, 1986 injuries, Valley View was insured by Industrial Indemnity Insurance Company, which accepted liability for the claim.[(1)]

7. Following her September 16, 1986 injuries, claimant was treated by Dr. John M. Fuhrman, an orthopedic surgeon. On September 24, 1986, Dr. Fuhrman restricted claimant to "light duty, i.e. no pt. lifting." (Ex. 2 at 8.)

8. Claimant continued to work but was assigned light-duty work. She provided clean towels and linen to rooms at the nursing home. (Ex. 1 at 19.)

9. Although she continued to work, claimant continued to experience low-back pain. Based on Dr. Fuhrman's April 23, 1987 office note (Ex. 6), and claimant's testimony in a deposition taken on July 7, 1992, the pain apparently radiated into her legs. Dr. Fuhrman's note refers to "some radicular signs and symptoms down the posterior lateral distribuion [sic] of the right leg into the ankle." When questioned as to whether the symptoms reported on April 23, 1987, were new ones arising in April 1987, the claimant responded:

Q. There aren't any radicular findings in Dr. Fuhrman's records until after April of 1987. Do you agree with that assessment?

A. Well, the first time I was injured I had a burning sensation, also.

Q. Okay. Now, on April 23rd, 1987 there is a note from Dr. Fuhrman that you had some new symptoms and new pain radiating down in your leg. Would you have told him about new symptoms after the event in April 1987 when you were lifting the other lady?

A. I told him all the symptoms I had, even before.

Q. Okay. You wouldn't dispute his records that you had some new symptoms in April of 1987 though, would you?

A. I had all the pain from before and I told him.

Q. Uh-huh. Now, you wouldn't dispute his records though, would you?

A. With the pains I would.

Q. Okay. Now, the event in April 1987, that involved a change in your condition, didn't it? It worsened your condition?

A. Yes.

(Ex. 1 at 25-26, emphasis added.)

10. In April of 1987, the claimant was once again assigned heavier work. (Tr. at 149; Ex. 1 at 19.)

11. According to time records maintained by the nursing home, claimant's last day of work was April 21, 1987. On her last day of work, claimant was helping a nurses' aide lift a patient when she felt a "real sharp pain down the lower back and all the way down my leg." (Tr. at 153.) Since the only issues presented for the Court's determination in this case concern notice (§§ 39-71-601 and 39-71-603, MCA), the Court assumes for the limited purposes of its present decision, but does not decide, that an industrial accident occurred.

12. As already noted in Finding of Fact No. 9, claimant was examined by Dr. Fuhrman on April 23, 1987. Dr. Fuhrman's office note for that date reads in full:

Donna is worse and she has a new constelation [sic] of symptoms in the sinse [sic] that she now has some radicular signs and symptoms down the posterior lateral distribuion [sic] of the right leg into the ankle, which occured [sic] while she was working the other night. She has some atinuation [sic] of the achilles reflex and diminished pin prick, lateral boarder [sic], right foot. Motor strength is full.

IMPRESSION: Radicular signs and symptoms. She has taken off work. She will continue with the Flexural, Motrin, PT and rest at home. Reassessment one wk.

(Ex. No. 6) While the note indicates that new symptoms occurred at work, it does not mention any specific incident or incidents as causing the new symptoms. Claimant's July

1992 testimony also indicates that the symptoms were not new ones, rather she experienced a worsening of her existing symptoms. (See Finding of Fact No. 9.)

13. Claimant testified that on the day of her April 1987 injury, she notified Connie Strong (Strong) of her injury and filled out an accident report for Strong to give to Bonnie Hicks (Hicks). (Tr. at 171-172.) Hicks was not on duty at the time. (Tr. at 174.) The Court does not find claimant's testimony on this point either credible or persuasive. Strong, who no longer works for Valley View, could not recall claimant ever telling her that she had been injured in April 1987. Strong stated that had claimant done so she would have reported it to Hicks, the director of nursing. (Tr. at 44-46.) Strong was a credible witness.

14. Claimant went back to Valley View following her last day of work and delivered to Hicks two "no work" notes written by Dr. Fuhrman, one dated April 23, 1987 and the other June 2, 1987. (Ex. 2 at 8, Tr. at 172 and 175.) However, claimant did not report her April injury to Hicks at those times.

15. In her testimony at trial, claimant initially characterized Strong as her "supervisor." (Tr. at 154.) Later on, however, she testified that Hicks was her supervisor. (Tr. at 161-62, 174.) Hicks performed the only two performance evaluations of claimant, one in July 1986 and the other on February 12, 1987. (Ex. 2 at 20-21.) Strong testified that she was not a supervisor in April 1987. (Tr. at 43-44.) Her testimony was credible. Claimant also took Dr. Fuhrman's notes to Hicks. After considering all of this evidence, I am persuaded that Strong was not in fact a supervisor in April 1987. Claimant knew that Hicks was her supervisor and that her injury should have been reported to Hicks.

16. Ms. Nancy Conley (Conley), a fourteen year employee at Valley View, was personnel director in April of 1987. She was responsible for preparing workers' compensation reports. (Tr. at 49-50.) She first learned of claimant's alleged April 1987 injury in 1993. (Tr. at 52.)

17. Claimant failed to persuade the Court that prior to 1993, Valley View was informed or knew of her April 1987 injury. Valley View learned in late April 1987 that claimant was unable to work, but claimant failed to persuade the Court that Valley View, or its supervisory personnel, were aware that her inability to work was due to a second, April 1987 industrial injury.

18. Industrial Indemnity employed Crawford and Company (Crawford) to adjust claimant's September 16, 1986 claim. An April 30, 1987 note to Crawford's claim file number 44934 reads:

Got a call from Nancy at Valley View Estates. Said the claimant is off work now because of this injury. Today is her fifth day off and the doctor said at least another week. This was handled as med only in Missoula, the file was in closing and the medical bills were ready to be paid. We have re-entered the file and can continue to use number 44934.

(Ex. 11 at 10.) In context, this note was clearly referring to the September 1986 injury and claim. Claim file 44934 was opened January 29, 1987, upon Crawfords receipt of a first report of injury respecting claimant's September 16, 1986 industrial accident. (Tr. at 84.)

19. Following the April 30, 1987 phone call, Pat Wallace (Wallace), an adjuster for Crawford, picked up the file and contacted claimant to talk to her about the September 16, 1986 injury. (Tr. at 166.) He interviewed claimant the same day, April 30, 1987. He told her that "the purpose of our interview is to discuss an incident that happened on, I've got a date of 9/16 of '86 at Valley View Nursing Home . . . ." (Ex. 7 at 1.) After obtaining a description of the September 1986 accident and her subsequent work history, the following interchange occurred:

PW[(2)]: Mmmhmm. Okay. And now it's apparently started to cause you more problems recently here?

DT[(3)]: Uh, yea. It was, *it's been coming on off and on ever since I injured it, but boy, when she put me back on afternoon shift, she put me on the worse wing that she could have*. She put me on the west wing. And that's when there's only two girls lifting all those heavy people all night long.

PW: Mmmhmm.

DT: Get em up and then you got [sic] put them on the bed and potty them.

PW: Mmmhmmm.

DT: *And that's, that's when it really started aching*.

PW: Okay.

DT: *I got a sharp pain and then uh I went to sit down for a couple hours* in the dining room trying to ease the pain and no matter what I did, I couldn't get rid of the pain. So I called the doctor the next day.

PW: Mmmhmm.

DT: Oh, this was midnight and I called the doctor the next day and I, uh, I, he, he wasn't in but the nurse was and she ordered me some muscle relaxers to relive[sic] the pain.

PW: Mmmhmm.

DT: So I been taking those. And then I went and saw the doctor the following day and he he sent me through physical therapy after that.

PW: Okay.

DT: (**unclear)** getting relief.

PW: Mmmhmm. When was that?

DT: Oh, I don't remember the date. It was the first four days I went back on the schedule, this, I think it was 18, 19, 20, 21, that's the last two days. *My work I didn't do any lifting since the other girls did it for me.*

(Ex. No. 7 at 3, italics added.)

20. During the interview with Wallace, claimant did not mention any specific incident or incidents as precipitating her increased pain. As can be seen from the quoted portion of the interview, she told Wallace that her back problems had "been coming on off and on ever since I injured it," a statement which is consistent with her July 1992 testimony that prior to April 1987 her symptoms were present and that they merely worsened after her transfer back to a more demanding job. In the interview she described the worsening in terms of "it really started aching" and then a "sharp pain," but did not attribute either to a particular incident or strain.

21. Wallace treated the matter as a continuation and consequence of the September 16, 1986 injury and commenced biweekly benefits based on that injury. Subsequent payments made to claimant were clearly labeled as attributable to the September 16, 1986 injury. (Ex. 11.)

22. The Court is persuaded that on April 30, 1987, and for a long period thereafter, the claimant, Wallace and Valley View attributed all of claimant's symptoms to her September 16, 1986 injury. In the case of Wallace and Valley View that belief was reasonable in light of claimant's failure to describe any specific incident on April 21, 1987, and her description of her pain as waxing and waning ever since her September injury. Moreover, there is no evidence that the claimant's physician had determined her to be maximally healed with respect to the September injury.

23. On April 21, 1987, Valley View was insured by Royal Insurance. Royal did not employ Crawford or Wallace to adjust workers' compensation claims. Claimant presented no evidence that Royal engaged in any conduct from which it could be inferred that Crawford and Wallace were its agents with respect to workers' compensation claims.

24. Crawford and Wallace were never employed by Valley View and Valley View did not engage in any conduct from which it could be inferred that Crawford or Wallace were its agents.

25. Wallace did not provide any information concerning his interview of claimant or his adjusting of the claim to either Valley View or Royal. (Tr. at 120)

26. Sometime in 1987, claimant hired Kristine Foot (Foot), an attorney, to represent her with respect to her 1986 injury. (Tr. at 162) Initially, Foot represented claimant with respect to her

request to change physicians but her representation later extended to claimant's entitlement to compensation benefits on account of the 1986 injury. (Tr. at 162-4.)

27. During 1987, 1988, 1989, 1990, and 1991, neither claimant nor Foot pursued any claim for benefits on account of the April 1987 injury.

28. Claimant argues that April 12 and 19, 1988 correspondence from Foot to Wallace constituted a written claim on account of the 1987 injury. (Ex. 11 at 1 and 3.) However, that correspondence was nothing more than cover letters enclosing a medical report and medical bill from a chiropractor. While the bills and reports ascribe claimant's condition to "injuries sustained April, 1987," they do not provide any information about any specific incident or incidents, or tell where and how the injuries occurred. (Ex. 11 at 2, 4-8.)

29. It appears that a claim on account of the 1987 injury was seriously raised for the first time during a deposition taken of claimant in the course of litigation over her 1986 injury. In a deposition taken on July 17, 1992, by Industrial Indemnity, the following exchange occurred:

Q. Did you continue to work full time until about April of 1987?

A. Yes.

Q. Okay. In April 1987 was there an event in the workplace that aggravated your condition?

A. They put me back on heavy duty without notice from the doctor and I went to help lift that one lady, I reinjured the upper and lower back.

Q. Do you recall what day that was?

A. No, I don't.

Q. Okay. When you helped lift that lady and reinjured your back, was that what precluded you from continuing to work for Valley View Estates?

A. Yes.

Q. You haven't worked since?

A. No.

Q. Did you prepare an incident report or file a Workers' Comp claim for the April 1986 injury?

A. Yes.

Mr. McNeil: Is there a claim for that?

Ms. Foot: I am not sure I will look. No.

Mr. McNeil: Is there a separate claim for that injury?

Ms. Foot: You know, there should be. I can't tell you for sure.

(Ex. No.1 at 19-20.)

30. At the time Foot was pursuing the 1986 claim on behalf of claimant, her law firm (Milodragovich, Dale and Dye) represented Royal Insurance in at least one workers' compensation claim involving Valley View. (Jarvis Dep. at 16-17.) Claimant did not introduce evidence which would show that the firm's representation extended beyond specific cases or that it was generally authorized by Royal to handle workers' compensation claims on its behalf.

31. On April 2, 1993, claimant filed a Claim for Compensation respecting the 1987 injury. The claim was forwarded to the Montana Department of Labor and Industry by claimant's present attorney, Mr. Thomas C. Bulman. (Ex. 5 at 2.) The claim was not signed by claimant. (Ex. 5 at 1.)

32. The 1993 claim identifies the date of injury as April 17, 1987. However, claimant later learned that she did not work that day, and other evidence in this case shows that the date was April 21, 1987.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital****, 224 Mont. 318, 730 P.2d 380 (1986)*. Thus, the 1985 version of the Workers' Compensation Act governs this case.

2. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 483-484, 512 P.2d 1304 (1973);* ***Dumont v. Aetna Fire Underwriters,*** *183 Mont. 190, 598 P.2d 1099(1979)*. That burden extends to proof of compliance with the notice requirements of the Act.

3. Section 39-71-603, MCA (1985), required claimant to provide notice of her April 1987 injury to her employer or her employer's insurer within sixty (60) days. The statute provides:

No claim to recover benefits under the Workers' Compensation Act, for injuries not resulting in death, may be considered compensable unless, within 60 days after the occurrence of the accident which is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the 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 upon which the injured employee was engaged at the time of the injury is equivalent to notice.

The statute is "mandatory and compliance with its requirements is indispensable to the maintenance of a claim for compensation." ***Masters v. Davis Logging,*** *228 Mont. 441, 443-4, 743 P.2d 104 (1987) (quoting from* ***Bender v. Roundup Mining Company****, 138 Mont. 306, 308-9 (1960)).*

Claimant did not give notice to her supervisor or employer within the sixty (60) days provided by section 39-71-603, MCA (1985). While claimant testified that she reported her 1987 injury to Strong, the Court did not find her testimony credible. Moreover, her initial testimony that Strong was her supervisor was belied by other evidence. ***Compare Bogle v. Ownerrent Rent to Own****, 51 St. Rep. 0380, 381 (1994).* Thus, even if claimant had reported the accident to Strong, the report would not have satisfied the reporting requirement. The notice requirement is satisfied only where someone with supervisory status or authority is notified or has actual knowledge of the injury. ***Bender v. Roundup Mining Co.,*** *138 Mont. 306, 312-3, 356 P.2d 469 (1960).*

4. Claimant argues that Wallace must be deemed an agent for Valley View and that claimant's April 30, 1987 interview by Wallace constituted notice to Valley View. There are two types of agency: actual and ostensible. The two types are defined by section 28-10-103, MCA, which provides:

28-10-103. Actual versus ostensible agency. An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. Any agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him.

In this case Crawford and Wallace were not agents-in-fact with respect to the 1987 injury. While Conley called Crawford, Crawford's note of the call indicates that Conley believed that claimant was off work on account of her 1986 injury. "An agent has such authority as the principal actually or ostensibly confers upon him." § 28-10-401, MCA. Even if Industrial Indemnity and its adjusters are deemed agents of Valley View because it insured Valley View, the agency was limited to injuries occurring during the policy period. Industrial Indemnity did not insure Valley View for injuries occurring in April 1987 and Conley's call did not authorize Crawford and Wallace to investigate or adjust injuries occurring outside of the policy period.

Claimant has also failed to prove that Crawford and Wallace were ostensible agents with respect to the 1987 injury. No evidence was presented which would support a finding that Valley View or Royal did anything which would have led claimant to believe that Crawford and Wallace were authorized to handle any new claim. When he contacted claimant on April 30, 1987, Wallace specifically told claimant that he was investigating the 1986 claim. On the other hand, claimant was well aware of the reporting requirements for any new injury and failed to follow them.

5. Claimant contends, however, that "[a]n adjuster acting for an insurance company may be considered to be the agent of the insured so as to estop the insured from setting up a statute of limitations defense." She cites ***Mandola v. Mariotti****, 557 S.W. 2d 350 (Tex. Civ. App. 1977);* ***Nesbitt v. Erie Coach Company****, 204 A.2d 473 (Penn. 1964); and* ***Hayes v. Gessner****, 52 N.E. 2d 968 (Mass. 1944)* as authority for her contention. In ***Mandola*** the Texas Court of Appeals held that "[a] party may be estopped from asserting a statute of limitations when he has, by misrepresentation of a material fact, induced a plaintiff to postpone filing of a suit until his claim is barred by the statute." ***Mandola****, 557 S.W. 2d at 351*. The plaintiff in that case failed to commence her action within the time provided by law because a claims adjuster had contacted her shortly after the accident and advised the claimant that she did not need an attorney because the insurance company would take care of all damages. ***Id.*** In ***Nesbitt*** the Court held that an insured is estopped from raising a statute of limitations defense where its insurer or the insurer's adjuster has committed fraud or concealed important information. ***Nesbitt,*** *204 A.2d at 476*. The claimant in ***Nesbitt*** was similarly lulled into inaction when the claims adjuster expressly discouraged her from hiring an attorney or otherwise pursing her claim. ***Id.*** The facts and holding in ***Hayes*** are similar to those of the previous two.

The three cited cases are readily distinguishable. In each case it appears that the insurer provided coverage for the claim at issue. In this case, Industrial Indemnity did not. Moreover, each case involved fraud or concealment of critical information. An employer or insurer is estopped from asserting a notice defense only where one or the other "has taken some **positive** action which either prevents the claimant from making a claim or leads him reasonably to believe he need not file such a claim." ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 481, 512 P.2d 1304 (1973) (emphasis added).* "[T]he party sought to be estopped [must] have knowledge that he is misleading the claimant and an intention to mislead the claimant to his detriment." ***Id.*** *at 487*. The doctrine of equitable estoppel applies "when an employer or insurer misleads a claimant by foisting onto the claimant a misinterpretation of the Workers' Compensation Act." ***Davis v. Jones****, 203 Mont. 464, 466-7, 661 P.2d 859 (1983)*.

This case does not satisfy the elements of estoppel. Valley View did not mislead claimant about the need to promptly report any injury. Claimant was well aware of the reporting requirements and failed to follow them. Wallace made no representations and gave no assurances with regard to the 1987 injury. He expressly informed claimant that he was investigating her 1986 claim. The information claimant provided to him regarding increased pain in April was reasonably interpreted by him as attributable to the 1986 injury. During the conversation with Wallace, claimant did not attribute her increased pain to any specific incident or incidents. She described her condition after the 1986 injury as "coming on off and on." Finally, there was no medical determination of maximum healing following the first injury.[(4)] The absence of a maximum healing determination was significant in light of the

claimant's continued symptoms and the continuing legal responsibility of the first insurer where the worker is reinjured prior to reaching maximum healing. ***Richter v. Simmons Drilling, Inc.,*** *241 Mont. 518, 788 P.2d 308 (1990) (to receive compensation for a second work-related injury, the claimant must establish that he or she reached a medically stable condition before the occurrence of the second injury).* As in ***Wassberg v. Anaconda Copper Company****, 215 Mont. 309, 697 P.2d 909 (1985),* a misunderstanding by claimant is insufficient to create an estoppel where the claimant cannot attribute her misunderstanding to any assertion by the employer or any of its agents. ***Wassberg****, 215 Mont. at 321*.

6. The 1987 claim is also barred on account of claimant's failure to file a written claim within the one-year period specified by section 39-71-601(1), MCA (1985), which provides in relevant part:

(1) In case of personal injury or death, all claims shall be forever barred unless presented in writing to the employer, the insurer, or the division, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf.

Compliance with the notice requirement of section 39-71-603, MCA (1985), does not relieve a claimant from the written claim requirement of section 39-71-601(1), MCA. ***Devlin v. Galusha, Higgins & Galusha,*** *202 Mont. 134, 138, 655 P.2d 979 (1982).*

In this case, a written claim, using a standard claim form, was not filed until April 2, 1993. Even then it was unsigned. Claimant argues, however, that correspondence and medical reports received by Crawford in March 1988 should suffice as written notice under the statute.

The statute does not specify the particular form or content of the written notice. Technical omissions and errors in such things as names, dates and numbers will not defeat a written claim which is otherwise adequate. ***Stokes v. Delaney & Sons, Inc.,*** *143 Mont. 516, 521, 391 P.2d 698 (1964).* The statute does not require that the claim be filed on a particular form. ***Weigand v. Anderson-Meyer Drilling Co.,*** *232 Mont. 390, 758 P.2d 260 (1988) (filing of Form 54 is not the exclusive method of complying with the written claim requirement).* In both ***Weigand*** and ***Scott v. Utility Line Contractors,*** *226 Mont. 154, 734 P.2d. 154 (1987)*, the Supreme Court held that the written claim requirement was satisfied where, within the one year prescribed by the statute, the employer received actual notice that claimant had suffered a work-related accident; the claimant assisted the employer in filling out an Employer's First Report, which was then submitted to the insurer; and a medical report was submitted to the insurer.

In this case none of those things were done. Claimant's contention that Foot's 1988 letters to Wallace, along with the doctor's bills and a report, satisfy the written claim requirement,

stretches the holdings in ***Scott*** and ***Weigand*** beyond the breaking point. Foot's April 12 and 19, 1988 letters (Ex. 11 at 1 and 3) say nothing about any 1987 injury. The April 19 letter asks only that Wallace "handle this bill at your earliest convenience." (Ex. 11 at 1.) The April 12 letter identifies enclosed medical records and states that "[a] review of these documents shows that Donna Turjan has ongoing problems with her back with radiation into the legs as a result of her industrial injury." (Ex. 11 at 3.) At the time of these letters claimant was receiving biweekly benefits. (Ex. 11 at 58.) Each payment identified the "date of loss" as "9/16/86." (*Id*.) The payments had been initiated after Wallace's interview of claimant wherein he had told her that the "purpose of our interview is to discuss an incident that happened on, I've got a date of 9/16 of '86 at Valley View Nursing Home . . . ." (Ex. 7 at 1.)

At minimum, a written claim must describe the industrial accident with sufficient particularity to inform the insurer of the nature and basis for the claim. ***See Scott,*** *226 Mont. at 157.* In both ***Scott*** and ***Weigand*** an Employer's First Report was prepared by the employee and employer. An example of such a report is found in this case at page 1 of Exhibit 2. As can be seen from that example, the report requires the following information to be provided: (1) the date and time of the injury; (2) "what specific object or substance caused the injury"; (3) a description of how the accident occurred and what the employee was doing when it occurred; (4) the nature of the injury; (5) the part of the body affected; and (6) the names of witnesses to the accident. None of this information was provided by the Foot letters.

Nor were the accompanying medical bills and reports adequate to inform the insurer of the nature and basis for the claim. The bills record "April 1987" in response to a "Date Of: Illness (First Symptom) or Injury (Accident) or Pregnancy (Lmp)." (Ex. 2 at 6, Ex. 11 at 2, 4.) Dr. Matz' report contains the following information concerning an injury: "The following is the results of an interim exam performed March 22, 1988, on Donna Turjan's present condition as a result of injuries sustained April, 1987, and care thereafter." (Ex. 11 at 6.) No further information is provided. There is no description of where the accident occurred, how it occurred, when it occurred, or even whether it occurred at work. Dr. Matz did not treat claimant for her 1986 injury and did not provide any specific information which would indicate that claimant's condition on and after April 1987 was attributable to a new injury or aggravation.

7. The alleged written claim of April 1988 was deficient for a second reason. It was not given to "the employer, **the** insurer, or the division, as the case may be." § 39-71-601(1), MCA (1985) (emphasis added). The reference to "**the** insurer" means the insurer providing insurance coverage with respect to the claim. The word "the" is singular and specific, the opposite of "any." "The" insurer with respect to the 1987 injury was Royal. As concluded earlier in these conclusions of law, Crawford and Wallace were not representatives or agents of either Royal or Valley View, and neither Royal or Valley View are estopped from

raising notice or statute of limitations defenses. Thus, even if the notice had been adequate, it was ineffective because it was not provided to the employer or insurer.

8. The payment of compensation benefits commencing in April 1987 does not estop Royal from raising the statute of limitations defense. The benefits were specifically paid with regard to the 1986 injury and could not have misled claimant into believing she did not have to file a claim with respect to any new injury. ***Sharkey v. Atlantic Richfield Co.,*** *238 Mont. 159, 167, 777 P.2d 870 (1989).*

9. Claimant makes one additional estoppel argument which is not addressed in the discussion of the sixty (60) day notice defense. She argues that Royal is estopped from raising the statute of limitations because Foot's law firm represented Royal in other matters. The argument fails for two reasons. First, claimant did not present persuasive evidence indicating that, prior to 1993, Foot recognized the existence of a claim on account of a 1987 injury. When asked in 1992 whether there was a workers' compensation claim for the April 1987 injury, Foot replied: "You know, there should be. I can't tell you for sure." (Ex. 1 at 20.) The Court is not privy to what claimant told Foot about a 1987 accident prior to her July 17, 1992 deposition. Lacking further information it is impossible for the Court to determine what Foot knew when. Second, claimant has presented no evidence that Foot's law firm had general authority to receive and process claims on Royal's behalf. The only proof she offered was that the firm was hired to resolve specific matters for Royal. Hiring an attorney on a case-by-case basis does not constitute the appointment of the attorney as the insurer's agent in all matters.

10. While section 39-71-601(2), MCA (1985), permits the Department of Labor and Industry to waive the one-year filing requirement for an additional two-year period, there is no evidence in this case that it has done so. Moreover, the written claim in this case was filed six years after the injury, well after the maximum three-year period permitted under the section.

JUDGMENT

1. The claimant's claim for compensation arising out of an alleged industrial accident occurring in April 1987 is barred by claimant's failure to provide her employer with timely notice of the injury, as required by section 39-71-603, MCA (1985), and by her failure to file a written claim within the time provided by section 39-71-601(1), MCA (1985).

2. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

3. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 3rd day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Thomas C. Bulman
Mr. P. Mars Scott

1. In December of 1992 the claimant and Industrial Indemnity entered into a full and final compromise settlement of the September 16, 1986 injury. The settlement was approved by the Department of Labor and Industry on March 24, 1993. (Ex. 4.)

2. Pat Wallace.

3. Donna Turjan.

4. Even at the trial of this matter the claimant did not present evidence that she reached maximum healing prior to the April 1987 incident.