IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 5

WCC No. 2001-0417

MELLISA THUNE

Petitioner

vs.

MONTANA SCHOOL GROUP INSURANCE AUTHORITY

Respondent/Insurer for

CHESTER SCHOOL DISTRICT NO. 33

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant alleges that she suffered a work-related knee injury on December 16, 2000, but concedes she failed to report the injury within 30 days as required by section 39-71-603, MCA (1999). However, she urges that her employer had actual knowledge within the 30-day notice period.

Held: Claimant has failed to prove that the employer had actual knowledge that her injury was work related or that it was on inquiry notice.

Topics:

Limitations Periods: Notice to Employer. Lacking the employer's actual knowledge that claimant suffered a work-related injury, failure to provide notice of a work-related injury within 30 days bars recovery of benefits. § 39-71-603(1), MCA (1999). Notice is mandatory and indispensable to maintaining a claim for compensation.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603(1), MCA (1999). Lacking the employer's actual knowledge that claimant suffered a work-related injury, failure to provide notice of a work-related injury within 30 days bars recovery of benefits. § 39-71-603(1), MCA (1999). Notice is mandatory and indispensable to maintaining a claim for compensation.

Limitations Periods: Notice to Employer. Knowledge by the employer that the claimant was injured or is suffering from a medical condition does not constitute actual notice that claimant suffered a work-related injury where there is nothing to indicate that the injury or condition is work-related. The employer is not on inquiry notice where the employee has given notice of previous work-related injuries but fails to do so with respect to the injury at issue, where the claimant was apparently uninjured at a company party the day before she reported to work injured, and she had not worked in the meantime, or where a supervisor actually inquires whether the injury is work related and the claimant denies that it is. *Kuzara v. State Compensation Ins. Fund,* 279 Mont. 223, 928 P.2d 136 (1996), distinguished.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603(1), MCA (1999). Knowledge by the employer that the claimant was injured or is suffering from a medical condition does not constitute actual notice that claimant suffered a work-related injury where there is nothing to indicate that the injury or condition is work related. The employer is not on inquiry notice where the employee has given notice of previous work-related injuries but fails to do so with respect to the injury at issue, where the claimant was apparently uninjured at a company party the day before she reported to work injured, and she had not worked in the meantime, or where a supervisor actually inquires whether the injury is work related and the claimant denies that it is. *Kuzara v. State Compensation Ins. Fund,* 279 Mont. 223, 928 P.2d 136 (1996), distinguished.

¶1 The trial in this matter was held on January 10, 2002, in Great Falls, Montana. Petitioner, Mellisa Thune (claimant), was present and represented by Mr. Richard J. Martin. Respondent, Montana School Group Insurance Authority (MSGIA), was represented by Mr. Leo S. Ward.

¶2 Exhibits: Exhibits 1 through 11, 13 through 15, 17, and 19 were admitted without objection. Exhibits 12, 16, 18, and 20 were received and claimant's relevance objections were noted. If any of those exhibits are mentioned in the decision, they were deemed relevant and significant to the decision.

¶3 Witnesses and Depositions: Depositions of claimant, Brian Barrows, Charles Manska, Jr., Rose Hill, and Bill Schlepp were submitted for the Court's consideration. Claimant and Cinda Suta were sworn and testified at trial.

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

- Whether the employer is liable for indemnity and medical benefits for the injuries Petitioner/Claimant received on December 18, 2000?
- Whether Petitioner/Claimant complied with the notice provisions of §39-71-603, MCA.

- Whether Petitioner/Claimant is entitled to an award of attorney fees and costs, as well as 20% penalty for the Respondent/Insurer's refusal to accept liability for this claim?

¶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

¶6 In 1988, claimant "blew out" her left knee in an automobile accident. (Thune Dep. at 2-3.) The knee was rebuilt through surgery. (*Id.* at 3.) Claimant was thereafter on social security disability for twelve years, in part due to her bad knee and in part, according to claimant, due to a congenital condition of one arm. (*Id.* at 4-5.)

¶7 Claimant returned to the work force after she was denied further social security disability benefits. (*Id*. at 7.) She worked for Super 8 Motel in Havre for a year as a housekeeper, then quit. (*Id.* at 7-8.) She next worked for the Havre Day Activity Center during nights, "watching the clients, and cleaning." (*Id.* at 8.) Then on August 1, 2000, she began working for Chester School District No. 33 as activities custodian. (*Id*. at 12, 18.) Once the school year started, she also began working part time assisting kitchen staff for approximately seven-and-a-half hours a week. (Hill Dep. at 2-3.)

¶8 Claimant testified that on Saturday night, December 16, 2000, she was cleaning and taking down the school gym after a basketball game when her knee gave out and she fell while coming down a ladder. She further testified that a short while later she fell on her knee while continuing to work and that thereafter she felt a lot of pain in her knee. This was the same knee she had injured previously. (Thune Dep. at 26.) She testified she finished her job - working for another "half-hour, forty-five minutes" - and went home. (*Id.*)

¶9 At the time of the claimant's alleged injury, MSGIA insured the school district. (Uncontested Fact 2.)

¶10 Claimant did not report her injury to a supervisor within 30 days and she does not contend otherwise. She filed a written claim on March 6, 2001. In that claim she acknowledged that she had not reported the injury to her employer. In the form's box for "Date employer notified," claimant wrote, "Not." (Ex. 1.) Under "Accident reported to," she wrote: "Not. Didn't think that because it was an old injury it would matter." (*Id*.) Claimant acknowledged she did not put an injury date on the First Report form, testifying she "[f]orgot to put it on." (Thune Dep. at 48.)

¶11 MSGIA denied the claim because of claimant's failure to timely report her injury to her employer.

¶12 While acknowledging she failed to timely report her injury to her employer, claimant contends that prior to the expiration of 30 days her supervisors learned that she had injured her knee at work. However, her supervisors deny any knowledge of a work-related injury.

> ¶12a Charles Manska (Manska), the supervisor of claimant's janitorial work, testified at deposition that he talked to claimant on the afternoon of December 18, 2000, and that she was in a knee brace. According to Manska , he asked claimant what had happened and whether she had been hurt at work and claimant replied, "No," the incident did not occur at work, but was "an old injury that she had re-aggravated." (Manska Dep. at 16.) Manska testified he did not know claimant was claiming a work injury until approximately the middle of March 2001. (*Id*. at 29.)
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> ¶12b Rose Hill (Hill), claimant's kitchen supervisor, testified at deposition that she observed claimant at a school bowling party on Sunday, December 17, 2000, and that claimant did not have a leg brace and did not appear to be limping or injured. (Hill Dep. at 5-6.) Hill recalled that when claimant came into the school on December 18th there was joking about claimant slipping and falling at a bowling party the day before. Claimant did not tell her she had hurt herself at work when at the school on December 18th or when she came back to the school later on with a doctor's note to tell Hill she had to have surgery. (Hill Dep. at 5, 7, 13.)
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> ¶12c Brian Barrows (Barrows), the school superintendent, also was at the bowling party on Sunday, December 17, 2000, and testified in his deposition that he did not see claimant limping or any other evidence of an injury. (Barrows Dep. at 31.) On Monday, December 18th, he was in the kitchen area at 11:15 a.m. to get cookies and coffee and saw claimant come into the school with a brace on her leg. (*Id*. at 31-32.) According to Barrows, he had the following conversation with her:
>
> > I said, "wow, what happened to you?" She said, "it's an old injury, and I hurt it over the weekend."
>
> (*Id*. at 32.) Barrows said that claimant told him she could do the kitchen work, however, he wanted to make sure and asked her to get a signed release from her doctor stating that she could work. (*Id*.) Barrows testified that claimant never told him about any work-related injury and that he learned of it either through a later letter or the claim (id. at 62-63), both of which were sent after the 30-day notice period (exs. 1 and 11 at 65.)

¶13 Claimant asserts that her supervisors' denials of any knowledge of a work-related injury are not credible. I am unpersuaded. It was claimant and her witness, Cinda Suta (Suta), whom I found difficult to believe on critical points. Indeed, I am doubtful that claimant in fact re-injured her knee at work as she claims, but I need not address that matter.

¶14 Claimant was scheduled to work in the kitchen during the lunch hour on Monday December 18, 2000. Suta testified that on the morning of December 18th she received a call from Hill, claimant's supervisor with respect to her lunchroom job. According to Suta, Hill asked her if she could work claimant's lunch hour shift because claimant had been hurt. Suta initially indicated that she thought Hill said claimant was hurt at work but then was not sure. In any event, I found Suta's testimony wholly incredible.

¶15 Moreover, how Hill or any of her supervisors could have learned that claimant was injured at work by the time of Suta's purported conversation is beyond my comprehension. Claimant was alone at the time of the alleged accident and did not identify anyone she told about a work-related accident prior to the time of the alleged call to Suta.

¶16 Claimant attended a bowling party with fellow employees on Sunday, the day after the alleged injury. She testified that she told others that her knee was hurting her but that she did not tell them she had hurt her knee at work. (Thune Dep. at 28-30.)

¶17 Claimant went to her physician, Dr. Gladys Young, on Monday morning, December 18th, and claims to have told the doctor that she injured her knee coming down a ladder, Dr. Young's office note of that date tells a different story:

> S: Melissa [sic] comes in because **3 days ago while running she tripped and fell forward on her knee** and is having discomfort. She has had many problems with this knee with 2 orthopedic surgeries, the first as a young person and then last year she had what sounded like a[n] anterior cruciate repair with tendon transplant. She had been doing pretty well until this injury.

(Ex. 3 at 1, emphasis added.)

¶18 On December 18th claimant reported to work for her lunch hour kitchen duties. When she arrived, the school superintendent, Barrows, was standing in the area near the time clock. Claimant admits she did not tell Barrows that she injured her knee at work but denies telling him that it was an old injury which she re-injured on Sunday. Claimant suggests that Barrows presence near the time clock indicates his advance knowledge of her injury. However, claimant arrived at work 15 minutes early, which in itself makes the suggestion unlikely. Moreover, Barrows indicated he was in the area because he had gone to the kitchen for a cookie (Barrows Dep. at 33), which is a more likely scenario.

¶19 Claimant testified during deposition that she did tell Craig Waldron (Waldron), who substituted for her in the kitchen, that she had hurt her knee at work. (Thune Dep. at 33.) She "told him that I had fallen down the ladder, and he asked me if I had filed a workmen's comp. And I said, 'not yet.'" (*Id*. at 33.) Waldron was not a supervisor. (*Id*.) Although he did not testify, I am unpersuaded that claimant ever told him she injured her knee at work and find her testimony not credible. Why would she tell him and not other co-employees or supervisors? Her testimony at trial - that she did not tell Waldron she hurt herself at work,

rather Waldron just asked her if she had filed a claim - was inconsistent with her deposition testimony. Moreover, there is no evidence that Waldron ever communicated with the claimant's supervisors about the matter.

¶20 Prior to December 16, 2000, claimant had suffered a work-related injury to her eye. She reported that injury promptly to her supervisor (Manska). When asked why she did not file an injury claim within 30 days of the injury, claimant testified: "After the first one I filed, the way I was treated, the - - the way I was made to feel, I didn't believe it was going to be as serious as it turned out to be, and I could handle it on my own." (*Id*. at 46-47.) Claimant testified that Steve Ghekiere, the high school principal, made her feel "stupid" after the first claim she filed. (*Id*. at 47.) She agreed he was not her supervisor and that no one else made her feel stupid. (*Id*.)

¶21 I observed claimant's testimony, and in particular her responses to cross-examination. If anything, she was assertive in testifying and did not impress me as easily intimidated. Moreover, in her February 19, 2001 letter to the School Board, she said she had hurt her knee in December but had not reported it at that time. She provided the following explanation for her failure to report the injury at that time:

> This was an old injury, that I rehurt while I was on the job. I did not go thru [sic] the workmen comp. as I thought it wouldn't help because it was an old injury. I have since found out that I could file a claim . . . .

(Ex. 11 at 65.) The explanation is at odds with the explanation she gave at trial and is just one of many instances in which her statements have been inconsistent or contradictory.

¶22 Further, at trial claimant was very definite that her injury occurred on Saturday night, December 16, 2000. However, she failed to identify any date in her written claim for compensation. In the box for "date and time of injury" she only filled in the time (11:30 p.m.) (Ex. 1.) Moreover, in a statement made to the Montana Human Rights Commission in September 2001, claimant specifically stated that she was injured on December 15, 2000, not on December 16, 2000, as she now claims. (Ex. 20 at 2.) From her note it is clear that she was not confused by the dates and days, as she indicated she set up the gym on 15th, took it down on "Saturday" the 16th, and went to the bowling party on "Sunday" the 17th. Dr. Young's note of December 18, 2000, states that claimant injured herself "3 days ago" (Ex. 3 at 1), which is consistent with the December 15th date given the claimant in her Human Rights statement. These inconsistencies add to my conviction that claimant did not report her injury to fellow employees or supervisors and that claimant's supervisors were not aware of any work-related injury within 30 days after it allegedly occurred.

¶23 Finally, I find that the claimant's supervisors were not aware of facts which should have led them to further investigate the cause of claimant's knee injury. Both Hill and Barrows observed claimant on Sunday, December 17th, at a bowling party and nothing was amiss.

Claimant did not work between that time and Monday morning, thus it was reasonable for them to assume that something had occurred after the bowling party. Manska testified that he specifically asked claimant whether she had injured herself at work and she replied in the negative. Barrows similarly testified that on December 18th claimant specifically told him it was an old injury which she had re-injured over the weekend. Claimant testified that the conversation did not occur, however, I did not find claimant's testimony on this point and many other points to be credible. I therefore credit Manska's testimony. Moreover, given claimant's prior, prompt reporting of a work-related eye injury to Manska, it would not have been unreasonable for him to assume that claimant would tell him if her knee injury occurred at work.

CONCLUSIONS OF LAW

¶24 This case is governed by the 1999 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).

¶25 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she 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).

¶26 Section 39-71-603(1), MCA (1999), required that claimant give notice that her injury was work-related within 30 days. The section required:

> **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.

The notice requirement in section 39-71-603, MCA, is "mandatory and compliance with [the requirements of the statute] are indispensable to [maintaining] a claim for compensation ..." *Reil v. Billings Processors, Inc.,* 229 Mont. 305, 309, 746 P.2d 617, 619 (1987) (quoting from *Dean v. Anaconda Co.*, 135 Mont. 13, 16, 335 P.2d 854, 856 (1959).

¶27 Claimant failed to comply with the section. She concedes she did not give notice within the 30-day period and she has failed to persuade me that her employer had "actual knowledge" that her knee condition was attributable to a work-related incident. Knowledge

that she had a knee condition did not constitute knowledge that the condition arose from a work-related incident. *Reil v. Billings Processors, Inc.,* 229 Mont. 305, 312, 746 P.2d 617, 621-622 (1987). "The employer must have notice that the claimant considers his injury work-related." *Lee v. Lee,* 234 Mont. 197, 199, 761 P.2d 835, 837 (1988). This case is not like *Kuzara v. State Compensation Ins. Fund,* 279 Mont. 223, 928 P.2d 136 (1996), where the claimant told her supervisor that she suffered a work-related injury, that she was unable to talk to him further on account of a headache, and informed him that he could get the details from a fellow employee. None of that occurred here.

¶28 Claimant is not entitled to attorney fees, a penalty, or her costs since she has not prevailed in this proceeding.

JUDGMENT

¶29 The claimant's claim for compensation for an alleged December 16, 2000 work-related injury, is barred by her failure to provide notice to her employer within 30 days as required by section 39-71-603(1), MCA (1999). Her petition is **dismissed with prejudice**.

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

¶31 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 25th day of January, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Leo S. Ward
Submitted: January 18, 2002