IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 12

WCC No. 2001-0360

DANIELLE WHITLOCK

Petitioner

vs.

FREMONT INDUSTRIAL INDEMNITY COMPANY

Respondent/Insurer for

TOWN PUMP, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant was involved in three incidents involving her lifting of 16 gallon beer kegs. In the first and second incidents, she felt a sting between her neck and right shoulder, however, the sting was transitory and she thereafter experienced a mild aching which did not indicate a need for medical care and did not interfere with her performing her job. However, a week after the second incident, she began to experience numbness in her arm and realized the need for and shortly thereafter sought medical care. She suffered a third incident which worsened her condition, which was ultimately diagnosed as a herniated cervical disk. She thereafter underwent surgery. The insurer denies liability based upon claimant's failure to report her injuries within 30 days as required by section 39-71-603, MCA (1999).

Held: Since the claimant had not reached maximum medical improvement with respect to the first injury, that claim is the one considered for purposes of determining liability. The first injury appeared insignificant at the time and the claimant did not experience symptoms which put her on notice that she might need medical care or be entitled to benefits. Therefore, the latent injury doctrine applied. *Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992). Since she reported her initial injury within 30 days of when she began experiencing significant symptoms, her report was timely under section 39-71-603, MCA (1999).

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: § 39-71-603, MCA (1999). The 30-day requirement for notice to the employer, § 39-71-603, MCA (1999), does not begin to run until the claimant realizes that she may need medical care or recognizes the possible compensability of her injury. *Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: § 39-71-603, MCA (1999). Where a worker experiences a fleeting sting between her neck and shoulder and thereafter has some mild aching which does not affect her ability to work or indicate the need for medical care, the 30-day period for notifying her employer, § 39-71-603, MCA (1999), does not begin running until some other, more significant symptom emerges. *See Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992). Where the worker thereafter experiences the onset of numbness in the arm and begins dropping things, those symptoms trigger the running of the 30-day period.

Limitations Period: Notice to Employer. The 30-day requirement for notice to the employer, § 39-71-603, MCA (1999), does not begin to run until the claimant realizes that she may need medical care or recognizes the possible compensability of her injury. *Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992).

Limitations Period: Notice to Employer. Where a worker experiences a fleeting sting between her neck and shoulder and thereafter has some mild aching which does not affect her ability to work or indicate the need for medical care, the 30-day period for notifying her employer, § 39-71-603, MCA (1999), does not begin running until some other, more significant symptom emerges. *See Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992). Where the worker thereafter experiences the onset of numbness in the arm and begins dropping things, those symptoms trigger the running of the 30-day period.

¶1 The trial in this matter was held on November 6, 2001 in Missoula, Montana. Petitioner, Danielle Whitlock (claimant), was present and represented by Ms. Charla K. Tadlock. Respondent, Fremont Industrial Indemnity Company (Fremont), was represented by Mr. Kelly M. Wills and Mr. Thomas J. Harrington.

¶2 Exhibits: Exhibits 1 through 18 were admitted without objection.

¶3 Witnesses and Depositions: Claimant, Martha Arnold and Alyssa Nicol testified at trial. The Court also received and has considered the depositions of claimant, Sherry Stewart, Dr. Bruce R. Belleville, and Dr. Robert Hollis.

¶4 Issues Presented: The issues as set forth in the Pre-Trial Order are as follows:

1. Whether Petitioner is entitled to acceptance of her 9/1/00 claim by the insurer.
2. Whether Petitioner is entitled to acceptance of her 10/31/00 claim by the insurer.
3. Whether petitioner is entitled to acceptance of her 11/25/00 claim by the insurer.
4. Whether Petitioner suffered a compensable occupational disease as a result of her employment with Town Pump.
5. Whether Petitioner is entitled to temporary total disability benefits beginning on December 15, 2000, and continuing to the present.
6. Whether Petitioner is entitled to payment of past and future medical benefits.
7. Whether Petitioner is entitled to her attorney fees, costs, and penalty in this action.

(Pre-Trial Order at 2.)

¶5 Having considered the Pre-Trial 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 Claimant has an eleventh grade education.

¶7 In June or July 2000, claimant began working for Town Pump, Incorporated (Town Pump) at its Lucky Lil's Casino in Thompson Falls, Montana. Claimant was employed as a floor runner. Her duties also included changing soft drink supplies and 16 gallon beer kegs, stocking shelves, vacuuming, and cleaning.

¶8 On or about September 1, 2000, while helping lift a 16 gallon keg, claimant felt a sting between her neck and her right shoulder. The sting lasted only a few seconds. While she filled out a chiropractic intake form on December 11, 2000, in which she stated that numbness in her right shoulder had "started approx 3 months ago" (Whitlock Dep. Ex. 9), she testified that the statement was erroneous - that she had meant to write "3 **weeks** ago." I found her explanation credible and persuasive. I take note that her written claim for compensation states that "3 weeks ago my right arm started to loose [sic] feeling." (Ex. 1.) I further note the 3-week period corresponds to the timing (last part of November) of notes claimant left her supervisor in which she noted she was having problems with her arm. It also corresponds more closely to a written accident report claimant filled out on December 1, 2000, in which she stated that after the September incident her "shoulder started to ack [sic]" but "3 weeks ago my right arm started to loose [sic] feeling." (Ex. 8 at 1.)

¶9 Claimant did not seek medical care, did not lose work, and did not report the incident to her employer following the September incident.

¶10 Thereafter, on October 31, 2000, while changing out another beer keg, claimant felt a similar stinging sensation across her right shoulder. She testified that approximately a week later she began experiencing a tingling sensation and numbness in her right thumb and thereafter in her right arm, and also felt pain in her shoulder and arm.

¶11 Claimant first sought medical care from Dr. Randy J. Lovell, an osteopathic physician, on November 17, 2000. Dr. Lovell's notes reflect that claimant was experiencing pain in the shoulder with numbness into the middle of her hand. He treated her with medications. (Ex. 17.)

¶12 In November, claimant began dropping objects and had trouble vacuuming at work.

¶13 In the latter part of November, near Thanksgiving, claimant left a series of notes for Martha Arnold (Arnold), her supervisor, telling of her problems. (Ex. 7.) Meanwhile, on or about November 25, 2000, she helped another employee lift yet another keg. The other employee dropped his end and the keg fell a few inches, jerking her arm. The incident significantly increased her pain and numbness. She testified that after that incident she could not hold onto anything with her hand.

¶14 In one of the notes to Arnold, left shortly after the November incident, she indicated that her helping to change out a keg "didn't help." (Ex. 7 at 4.) Arnold testified that this note alerted her that claimant may have suffered a work-related injury.

¶15 On November 27, 2000, which was the Monday after Thanksgiving, Arnold talked with claimant. Arnold testified that the conversation was very brief but that claimant told her she had hurt herself while helping another employee. According to Arnold, claimant did not tell her when the incident occurred, and she [Arnold] did not inquire further but rather she gave claimant a blank accident report to fill out.

¶16 On December 1, 2000, claimant provided a written accident report to Arnold, along with another note. (Exs. 7 at 2 and 8.) Arnold testified that the report was given to her a couple of days after their November 27th conversation (Trial Test.), while claimant in her deposition thought that she provided the report after she saw Dr. Konan, which was on December 11th. The report is dated December 1st, which is more consistent with Arnold's recollection, and I find that it was on that date it was furnished. This first accident report referred back to the September incident and did not mention either the October 30th or November 25th incidents.

¶17 At the time of all three of the incidents described above, Town Pump was insured by Fremont Industrial Indemnity Company (Fremont).

¶18 On December 15, 2000, claimant submitted a written claim for compensation with respect to the September incident. (Ex. 8.)

¶19 In January 2001, claimant was told by the claims adjuster for Fremont that her claim was being denied. On or about January 18, 2001, claimant submitted two additional accident reports to her employer, one for the October 31, 2000 incident, and the other for the November 25, 2000 incident. (Exs. 9 and 10.) These reports were the first notice to the employer about accidents allegedly occurring on those dates. Approximately a week later claimant submitted written claims for compensation for the two incidents. (Exs. 2 and 3.) Later on she also alleged she suffered an occupational disease based upon the three incidents. All claims were denied.

¶20 In February 2001, Dr. Robert F. Hollis, a neurosurgeon, diagnosed claimant with a "C6 radiculopathy with a C4-5 disc herniation." (Ex. 12 at 3.) Subsequent imaging also disclosed a compression fracture at C5. (Ex. 13 at 7; Hollis Dep. at 9.) On March 27, 2001, Dr. Hollis performed a "C4-5 anterior cervical diskectomy with interbody fusion." (Ex. 13 at 11-12.)

¶21 Dr. Hollis' medical history included two of the three incidents reported by claimant, specifically the early September and the October 31st incidents. (Hollis Dep. at 6-7.) He was deposed and testified unequivocally that the two "lifting injuries" reported by claimant caused "her pain syndrome that resulted in surgery." (*Id*. at 12, 20.) He attributed causation to both incidents. (*Id*. at 12-13, 20-21, 25.) Although he was unable to say with certainty which incident caused the actual herniation, he testified the first event more likely than not caused annular tears which then led to the herniation. (*Id*. at 12-13, 20-21.) (The annulus is the fibrous outer material of the disk. (*Id*. at 21.)) He said that the second event may have either caused further herniation or inflammation of the nerve. (*Id*. at 22.)

> And the spontaneous improvement of her radiculopathy following her September injury does not say - - does not mean that the disk herniation is gone. It just means that the nerve root is not inflamed, and the further lifting injury didn't necessarily cause a disk herniation. It may have just inflamed the nerve root such that she developed overt radiculopathy.

(*Id*. at 12-13.) When presented with the history of the third, November 25th incident, Dr. Hollis did not change his opinions, testifying that each incident was an "opportunity to provide her with pain and the possibility of causing change in the morphology of her disk." (*Id*. at 26.) He testified that the herniation and the compression fracture were consistent with an acute, traumatic incident. (*Id*. at 22-23.) He could not say that claimant reached maximum medical improvement (MMI) after the first, September incident. (*Id*. at 7.)

¶22 Claimant also underwent an independent medical examination (IME) by Dr. Bruce R. Belleville, a board certified specialist in occupational medicine, to determine if she was suffering from an occupational disease. Dr. Belleville examined claimant on August 20, 2001, and reviewed her medical history and medical records. He concluded that claimant's herniated disk "represents an occupational injury [rather] than an occupational disease." (Ex. 18 at 11.) In deposition he testified that claimant suffered two discrete injuries on

September 1 and October 31, 2000. (Belleville Dep. at 16.) Although he could not be absolutely certain, it was his opinion that she suffered an annular tear on September 1st. (*Id*. at 17, 30.) It was his further opinion that as of October 31st she had not reached MMI from the September 1st injury. (*Id*. at 21.)

¶23 After considering all of the testimony and the opinions of the two physicians, I am persuaded as follows:

> ¶23a Other than some minor, non-debilitating aching in her shoulder, claimant did not experience further symptoms following her September 1st accident.
>
> ¶23b The September 1st injury caused an initial tear or weakening of the annulus of her C4-5 disk.
>
> ¶23c Following the September 1st injury, the claimant did not appreciate the nature or severity of her injury or any need for medical treatment.
>
> ¶23d The evidence concerning MMI following the September 1st incident is conflicting in the sense that one of the testifying physicians could not determine whether or not MMI was reached. However, the other physician provided an opinion, on a more probable than not basis, that she had not reached MMI. Since that is the best medical evidence before the Court, I accept his opinion. For sure, there is no evidence that claimant had reached MMI after the September 1st injury.
>
> ¶23e A week after the October 31st incident, claimant began experiencing numbness and thereafter began dropping things. It was at this time she first realized that she had suffered a significant injury and was in need of medical treatment.
>
> ¶23f Claimant reported the nature and job-relatedness of her injury to her supervisor on or shortly before November 27, 2000. On December 1, 2000, she filed a written accident report setting forth additional details, including the date and time of the initial September 1, 2000 injury.

¶24 Questions of claimant's credibility are resolved in accordance with the foregoing findings.

¶25 Finally, I find that the insurer did not act unreasonably in denying the liability. Claimant did not report any of the three incidents or injuries within 30 days of each one, and it is only by resorting to technical legal doctrines involving latent injuries and subsequent injuries that she prevails. Fremont's contentions and legal argument in this case were within the reasonable bounds of advocacy.

CONCLUSIONS OF LAW

¶26 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).

¶27 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).

¶28 Initially, claimant has failed to prove that she suffers from an occupational disease. Both Drs. Hollis and Belleville opined that claimant did not suffer from an occupational disease that proximately caused her herniated disk and surgery. They testified, and the evidence shows, that claimant suffered two, if not three, distinct, identifiable incidents. Each of hose incidents satisfy the injury definition of the Workers' Compensation Act, § 39-71-119, MCA (1999), and therefore fall under that Act.

¶29 Fremont does not seriously dispute the fact of claimant's accidents or the causal connection between them, her herniated cervical disk, and her surgery. However, it maintains that claimant is ineligible for benefits because she did not timely report the September 1 and October 31, 2000 injuries.

¶30 Section 39-71-603, MCA (1999), governs the reporting of injuries to the employer. It provides in relevant part:

> **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 provision is mandatory and compliance with the requirement is indispensable to maintain a claim for compensation. *Reil v. St. Comp. Ins. Fund*, 229 Mont. 305, 308, 746 P.2d 617, 619 (1987). However, under the latent injury doctrine, the notice requirement does not apply until the claimant is aware that she has suffered an injury or may be entitled to compensation: "An employee who has a reasonable belief at the time of an accident that he has suffered no injury which will require treatment or is otherwise compensable, is not barred from recovery under § 603 because he learns otherwise beyond the 30-day period." *Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992).

¶31 In this case I am persuaded that the claimant was not immediately aware she had suffered an injury requiring medical treatment or that she might be entitled to compensation. She had some aching in her shoulder, but not of a magnitude which either inhibited her work or led her to believe that she needed or would need medical care. Until November 7, 2000, the September 1st incident was trivial and inconsequential. Claimant reported the September 1st injury within 30 days after November 7th, thus her report was timely under section 39-71-603, MCA (1999).

¶32 Since claimant had not reached MMI with respect to the September 1st injury when she suffered exacerbations on October 31 and November 25, 2000, Fremont is liable for those subsequent exacerbations. *See Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983) *Caekaert v. State Comp. Mut. Ins. Fund* 268 Mont. 105, 115, 885 P.2d 495, 500-01 (1994); *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund,* 2001 MTWCC 56. Thus, it is liable for medical treatment, including surgery, for her cervical herniated disk and for her disability.

¶33 Claimant's requests for attorney fees and a penalty require proof that the insurer acted unreasonably when it denied her claims for compensation. §§ 39-71-611 and -2907, MCA (1999). I have found that the insurer's denial of her claims was not unreasonable, therefore she is not entitled to either attorney fees or the penalty. She is, however, entitled to her costs.

JUDGMENT

¶34 Fremont is liable for claimant's cervical herniated disk injury and for medical treatment and disability resulting from the herniated disk. The parties have not asked the Court to determine the amounts due in medical and compensation benefits. If the parties are unable to agree on those amounts, they may request the Court to do so. The Court maintains continuing jurisdiction solely for that purpose.

¶35 The claimant is not entitled to attorney fees or a penalty.

¶36 The claimant is entitled to her costs in an amount to be determined. She shall file her memorandum of costs in accordance with the Court's rules.

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

¶38 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 26th day of February, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Charla K. Tadlock
Mr. Kelly M. Wills
Submitted: November 6, 2001