

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 8

WCC No. 2000-0188

MALVERN ALSBURY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

RON TERRY CONSTRUCTION, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a carpenter, was injured while working on a house. He worked for a small company but failed to report the injury within 30 days to the owner of the company. He did report the injury to a co-employee, who he claims was his supervisor. However, the co-employee was off work that day and the entire next week. Although the co-employee provided advice as to construction details when asked, the owner of the company was working nearby, lined out claimant's work on a daily basis, collected time cards, hired and fired employees, and approved leave time.

Held : The claim is untimely. The co-employee was not claimant's supervisor at the time of the injury and the report to him was insufficient. Claimant failed to provide persuasive evidence that he was precluded or deterred from notifying his employer in a timely manner.

Topics:

Claims: Notice to Employer: Supervisor. A more experienced carpenter, who provides advice and instruction to another carpenter in response to questions arising during work assigned and overseen on a daily basis by the construction company's owner, and who was off work on the day of the claimant's injury and the week thereafter, was not claimant's supervisor. Claimant's report of his injury to him did not constitute notice to the employer under section 39-71-603, MCA.

Claims: Notice to Employer: Generally. Failure to give notice of industrial accident to employer or employer's supervisor, as required by section 39-71-603, MCA, bars workers' compensation claim.

Claims: Notice to Employer: Estoppel. An insurer is not estopped from asserting that a claimant failed to timely notify his employer of his injury where the evidence fails to establish that employer discouraged workers' compensation claims or made representations which prevented claimant from providing timely notice of his injury.

Limitations Periods: Notice to Employer. A more experienced carpenter, who provides advice and instruction to another carpenter in response to questions arising during work assigned and overseen on a daily basis by the construction company's owner, and who was off work on the day of the claimant's injury and the week thereafter, was not claimant's supervisor. Claimant's report of his injury to him did not constitute notice to the employer under section 39-71-603, MCA.

Limitations Periods: Notice to Employer. Latent injury doctrine is inapplicable where at the time of the industrial accident the claimant is aware he had injured himself and reported the injury to a co-employee.

Claims: Notice to Employer: Latent Injury. Latent injury doctrine is inapplicable where at the time of the industrial accident the claimant is aware he had injured himself and reported the injury to a co-employee.

Montana Code: 39-71-603 (1999). A more experienced carpenter who provides advice and instruction to another carpenter in response to questions arising during work assigned and overseen on a daily basis by the construction company's owner, and who was off work on the day of the claimant's injury and the week thereafter, was not claimant's supervisor. Claimant's report of his injury to him did not constitute notice to the employer under section 39-71-603, MCA.

Montana Code: 39-71-603 (1999). Latent injury doctrine is inapplicable where at the time of the industrial accident the claimant is aware he had injured himself and reported the injury to a co-employee.

1 The trial in this matter was held on November 9, 2000, in Kalispell, Montana. Petitioner, Malvern Alsbury (claimant), was present and represented by Mr. David W. Lauridsen. Respondent, State Compensation Insurance Fund, was present and represented by Mr. David A. Hawkins.

2 Exhibits: Exhibits 1 through 6 were admitted without objection.

3 Witnesses and Depositions: The parties submitted the depositions of claimant and Ron Gilbert for the Court's consideration. Claimant, Ron Terry, and Ron Gilbert testified.

4 Issues Presented: As set forth in the pretrial order, the issues are:

1. Whether Petitioner is entitled to acceptance of liability for his claim by the Respondent and payment of temporary total and medical benefits.
2. Whether Petitioner is entitled to an increase in award for unreasonable delay or refusal to accept liability and pay proper workers' compensation benefits pursuant to 39-71-2907, MCA.
3. Whether Petitioner is entitled to costs and attorneys' fees, pursuant to 39-71-611, MCA.

(Pretrial Order at 2-3.)

5 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, and exhibits, the Court makes the following:

FINDINGS OF FACT

6 Claimant is a carpenter. Since 1997, he has frequently worked for Ron Terry Construction, Incorporated (Terry Construction), a Kalispell company owned and operated by Ron Terry (Terry). The company builds homes and does concrete work. Terry supervises the overall operations of the company. His wife serves as bookkeeper and handles payroll.

7 Terry Construction is a small operation. In January 2000, it had three construction workers in addition to Terry. The workers were claimant, Ron Gilbert (Gilbert) and "Joel", whose last name is unknown to the Court.

8 On the morning of January 11, 2000, claimant was "backing out a house." "Backing out" refers to final framing to make sure that studs are in place so the house can be sheet rocked. Claimant was lifting an 80 pound sheet of plywood when he "felt a strain in [his] left shoulder." (Ex. 1; Trial Test.)

9 The fact of claimant's accident and injury are not seriously disputed, and I find that the incident and injury in fact occurred.

10 On the day of the claimant's injury, Gilbert was off work due to his own back injury. He had taken the day off to see his doctor. Gilbert stopped by the job site after his doctor's visit to "see what was going on," to check whether claimant had any questions about backing out the house, and to "shoot the bull" because he had nothing else to do. Gilbert also went to see Terry to tell him he would be off work for approximately another week on account of his injury. In fact, Gilbert was off work for another week to two weeks.

11 The strain claimant suffered at work on January 11th was sufficiently significant to claimant that he told Gilbert about it when Gilbert stopped by. Claimant told him "that he tweaked his shoulder when he was picking up that piece of plywood." (Trial Test.) Gilbert did not pass the information on to Terry or Mrs. Terry.

12 On the day of the injury, Terry was working on a duplex 150 to 200 yards away from the house on which claimant was working. Claimant admitted he did not report his injury to Terry or Mrs. Terry within 30 days of the injury even though he saw Terry on numerous occasions during that time. Claimant testified he first reported his injury to Terry on Friday night, March 17, 2000, over two months after the date of injury.

13 Claimant's explanation for not reporting the injury to Terry is summarized in the medical notes of the physician who saw claimant three months later:

[H]e did not report it because he thought it was a minor thing and also because his employer becomes upset when an employee reports an industrial injury. Kasey [sic][claimant] also states that his employer was upset at that particular time because another employee was out of work with a back injury. **He continued to work without reporting it for these reasons**

(Ex. 5, emphasis added.) According to claimant, Terry had said that he was unhappy about Gilbert's back injury and had also remarked that "sometimes you have to work hurt." Claimant testified that he did not report his injury to Terry because, "Ron Terry was . . . under a lot of stress with what we were doing, with the work that had to get finished, digging new holes to start a new job, a new house, and he was complaining about Gilbert's second recurrence of his back injury and filing a second claim." When questioned as to what Terry was complaining about, claimant testified, he was "pacing back and forth, saying, that's - you know, another claim. That's the same claim, you know. And one more claim and I'm going to get investigated. . . is what he said. That's why I didn't report it." (*Id.*)

14 Terry testified about a conversation which apparently gave rise to claimant's impression that Terry frowned upon employees reporting their industrial injuries. He testified that Gilbert reinjured his back by not honoring his light-duty restrictions. He was unsure whether he was required to report the exacerbation as a new injury or whether it was simply an extension of the prior injury and required no new report. He was also upset that Gilbert exceeded his light-duty restrictions when another employee was present and could have done the heavy lifting which led to the exacerbation. Terry's explanation was credible and persuasive. Moreover, Gilbert testified that Terry never complained about his filing a workers' compensation claim. In fact, Terry told him to go to the doctor and Mrs. Terry set up a doctor's appointment for Gilbert. I am unpersuaded that Terry said anything to discourage claimant from filing a claim.

15 Claimant argues that his report of the injury to Gilbert was sufficient because Gilbert was his supervisor. The evidence, however, establishes that Terry was his supervisor.

- Terry was in general charge of all work performed. He lined out the work on a daily basis, meaning that he told the employees, including Gilbert and claimant, what he wanted done that day. He testified, "I would give them three, four hours on the job

and then I would go and check it and make sure every thing was done right, and then line them out again what was supposed to be done on the job." (Trial Test.) He explained the expression "line them out" referred to "what to do as far as where I want stuff put, where to put studs in, to hold the sheet rock, show them where I want attic access, crawlspace accesses." (*Id.*)

- Terry or Mrs. Terry collected time cards. Occasionally, Gilbert took claimant's timecard to Mrs. Terry along with his own.
- Claimant understood he had to obtain Terry's permission to take a day off. He also knew that when he was sick, he had to report his illness to Terry or Mrs. Terry.

16 Gilbert did perform supervisory duties in two circumstances. The first was with respect to pouring foundations. Gilbert had greater experience in foundations, and Terry testified that he stood aside and let Gilbert ramrod foundation work. The second was when Terry was on vacation or hunting; Terry designated Gilbert supervisor in his absence. In this case, neither of those circumstances apply.

17 Claimant testified that on the day of his injury he believed Gilbert was his supervisor:

Q. Why do you consider him to be the supervisor if you do as opposed to just an equal co-worker?

A. Because, like I said, he knew more about the framing than I did, and when Ron Terry was gone, or not around, Ron Gilbert was in charge.

Q. How often would Mr. Terry not be around? And we're not suggesting that he's out golfing or not paying attention.

A. No.

Q. But he just might not be in the area. How often would that occur?

A. Well, quite often if he had errands to run on his vacations hunting. He went to Salt Lake for a week, went to Disneyland.

(Trial Test.)

18 The testimony fails to persuade me that claimant had a reasonable belief that Gilbert was his supervisor on that day. Terry was not on vacation or hunting, indeed he was working nearby. Gilbert did provide guidance to claimant with respect to specific carpentry details in backing out the house, however, that was on account of his greater experience. As noted

in paragraph 15, Terry lined out the carpentry jobs, telling both Gilbert and claimant what he wanted done that day and his approval was required for days off and sick leave. Moreover, in a statement to his physician made three months after the injury, claimant expressly admitted he did not report the matter to his employer, thus belying his present contention that he thought his report to Gilbert was sufficient.

Reasonableness of the Insurer's Denial

19 The insurer's denial of the claim was reasonable. Even if I were to decide this case in favor of the claimant, there were significant questions of fact and law which justified the insurer's denial of the claim.

CONCLUSIONS OF LAW

20 Claimant's entitlement to benefits is governed by the 1999 version of the Workers' Compensation Act (Act), which was the law in effect at the time of the injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 392 (1986.)

21 Claimant bears the burden of proving by a preponderance of 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). Claimant's burden extends to proving he complied with the notice requirements of the Act.

22 The dispositive issue in this case is whether claimant gave notice to his employer of his injury within 30 days of its occurrence, as required by section 39-71-603, MCA (1999), which provides in relevant part:

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.

Notice is mandatory; absent evidence establishing an estoppel, failure to give notice as required by the statute is fatal to any claim. *Buckentin v. State Comp. Ins. Fund*, 365 Mont. 518, 523, 878 P.2d 262, 265 (1994).

23 The notice requirement is satisfied if notice is given to the "employer or his managing agent or superintendent in charge of the work upon which the injured employee was engaged at the time of injury" or if someone in that capacity learns of the injury within the prescribed 30-day period. *Bender v. Roundup Mining Co.*, 138 Mont. 306, 312, 356 P.2d 469

(1960). The provision is satisfied only where someone with supervisory status or authority is notified or has actual knowledge of the injury. *Id.* Notice to a co-employee is insufficient. *Maki v. Anaconda Copper Mining Co.*, 87 Mont. 314, 320-22, 287 P.2d 170 (1930); *Hartl v. Commercial Union Assurance Co.*, 176 Mont. 540, 544, 579 P.2d 1239 (1987).

24 Claimant in this case alleges that Gilbert, to whom he initially reported his injury, was his supervisor and therefore section 39-71-603, MCA, is satisfied. While the facts of this case present a closer question, *Bogle v. Ownerrent Rent to Own*, 264 Mont. 515, 872 Mont. 800 (1994), is controlling. In *Bogle* a similar argument was made. The claimant and a coworker were deliverymen working as a team. Claimant testified as to his belief that his coworker was his supervisor. That belief was predicated upon the following facts:

- The coworker always jumped into the driver's seat.
- The coworker mentioned that in his hiring interview he had been told that the company was looking for someone who could be appointed warehouse manager.
- The coworker filled out the paperwork for the deliveries.

25 In determining whether the coworker was an employee, I applied an ostensible agency analysis since the coworker's role was based on claimant's belief rather than actual designation of the coworker as a supervisor. On appeal the Supreme Court affirmed my analysis and my conclusion that claimant's belief was not reasonable. It quoted my rationale, as follows:

In rejecting the claimant's argument that Collins was an ostensible supervisory agent, the [Workers' Compensation] court found:

Whether ostensible authority existed must be determined from all facts and circumstances surrounding the matter.

"The test is found in a determination of the exact extent to which the principal held the agent out or permitted him to hold himself out as authorized, and what a prudent person, acting in good faith, under the circumstances would reasonably believe the authority to be.["]

Butler Mfg. Co. v. J & L Imp. Co., 167 Mont. 519, 527, 540 P.2d 962 (1975). The belief that another is an agent must be reasonable. *Kraus v. Treasure Belt Mining Co.*, 146 Mont. 432, 435-6, 408 P.2d 151 (1965). The circumstances in this case are inconsistent with the creation of an ostensible agency. Robinson, not Collins, assigned deliveries, determined work schedules, and signed off on time sheets. Collins performed no supervisory functions. Collins' "jumping" into the driver's seat when he made deliveries does not amount to supervision or provide a basis for petitioner to reasonably believe that Collins was his supervisor.

After reviewing the record, we conclude the court's decision that, under the facts in the record, the employer did not have notice within thirty days of the alleged work-related injury is not clearly erroneous. We affirm the decision of the Workers' Compensation Court. 264 Mont. at 519-20, 872 P.2d at 802-803.

26 In the present case, testimony established that Gilbert was claimant's supervisor when Terry was on vacation or hunting, at least as to supervision of actual work. Gilbert was also claimant's supervisor when the crew was pouring foundations. However, at the time of the claimant's industrial accident, Terry was neither hunting nor on vacation, nor did claimant's work involve pouring a foundation.

27 Claimant's characterization of Gilbert as his supervisor must therefore rest on the reasonableness of claimant's belief as to Gilbert's capacity in carpentry work. I have found as fact that claimant's belief that Gilbert was his supervisor when doing carpentry work, specifically backing out a house, was not reasonable. Terry lined out the carpentry jobs on a daily basis, telling both Gilbert and claimant what he wanted done that day. Claimant knew that he had to submit his request for days off and his reports of illness to Terry, not Gilbert. While Gilbert provided guidance to claimant with respect to specific carpentry details in backing out the house, that was on account of his greater experience and did not reflect any overall supervisory control over the claimant.

28 My conclusion is supported by two additional facts.

29 First, Gilbert was not working on the day of the claimant's injury and told claimant that he would not be working for several days thereafter. At the time of the accident, Terry was a few hundred yards away. Moreover, claimant saw Terry on a daily basis. Under these circumstances, he could not have reasonably believed that reporting his injury to Gilbert was sufficient.

30 Second, claimant's own conduct near the time of the injury establishes he was aware that he was required to report injuries to Terry, not to Gilbert. As set out in paragraph 13, when he first sought medical care three months after the accident, he told his physician

he did not report it because he thought it was a minor thing and also because his employer becomes upset when an employee reports an industrial injury. Kasey (sic)[claimant] also states that his employer was upset at that particular time because another employee was out of work with a back injury. **He continued to work without reporting it for these reasons**

(Ex. 5, emphasis added.) In this statement to his physician, claimant expressly admits he did not report the matter to his employer, belying his present contention that he thought his report to Gilbert was sufficient.

31 There are two possible grounds for relieving claimant of the reporting requirement, or, more accurately, for tolling the 30-day period. The first is the latent injury doctrine. The second is estoppel. Neither issue is expressly articulated in the issues set forth in the pretrial order. However, these two issues are within the broader issue of "[w]hether Petitioner is entitled to acceptance of liability for his claim," which is an articulated issue, and the facts tendered to the Court.

32 The latent injury doctrine arose under section 39-71-601, MCA, which requires that a written claim for compensation be submitted within one year of the injury. It was first articulated in *Bowerman v. Employment Security Commission*, 207 Mont 314, 673 P.2d 476 (1983). It applies to injuries which are not evident at the time of the accident. In *Bowerman*, the Supreme Court construed the requirement in section 39-71-601, MCA, for filing of a claim within one year as being tolled until such time as the claimant is aware of his injury and possible disability.

33 In *Bodily v. John Jump Trucking, Inc.*, 250 Mont. 274, 819 Mont. 1262 (1991), the Supreme Court extended the latent injury rule to the reporting requirement of section 39-71-603, MCA, however, the precedent established in that case must be examined in light of the particular facts and the specific law in effect at the time. The case involved "cumulative traumas," or what is commonly referred to as "micro-trauma." The micro-trauma doctrine was repealed by the 1987 legislature, which amended section 39-71-119, MCA, to provide that an industrial accident must occur during a single day or single work shift. In addition, the case relied on the "liberal construction rule," which has also been repealed.

34 More recently, in *Buckentin v. State Compensation Ins. Fund*, 265 Mont. 518, 878 P.2d 262 (1994), the Supreme Court considered an allegation that the 30-day reporting requirement should be tolled where the claimant did not appreciate the gravity of his injury. In *Buckentin*, the claimant was unloading sheetrock when he felt a "pull" in his back. He had a history of back problems and on one occasion had received chiropractic treatments; on other occasions "his back injuries would resolve themselves. . . ." 265 Mont. at 519, 878 P.2d at 263. Buckentin reported his injury to a coworker but not a supervisor, believing that with rest his "injury would resolve itself." *Id.* This Court found that *Bodily* did not apply and the Supreme Court affirmed:

The present case is easily distinguishable. Buckentin did not have a slowly-developing injury which made it difficult to provide precise notice to his employer. His injury occurred in a single incident, which he indicated was on December 1, 1992, while he was unloading sheetrock. He testified that when he felt something "pull" in his back on that day, he knew he had been injured. Moreover, Buckentin, unlike Bodily, failed to keep his employer apprised of all the information he had available about his injury nor did he associate his symptoms with activities occurring during employment.

265 Mont. at 522, 878 P.2d at 264.

35 In *Buckentin*, the Supreme Court went on to note that the rule of liberal construction, upon which it relied in deciding *Bodily*, had been repealed. "Therefore, Buckentin is not entitled to the liberal construction . . . that was afforded to *Bodily*." 265 Mont at 523, 878 P.2d at 265. The Court found no grounds to relieve the claimant from the 30-day notice requirement:

The statute clearly states that *no* claim shall be considered compensable unless the employer or employer's insurer is notified within 30 days. Notice under the statute is "mandatory and compliance with [the requirements of the statute] are indispensable to [maintaining] a claim for compensation ..." *Reil v. Billings Processors, Inc.* (1987), 229 Mont. 305, 308, 746 P.2d 617, 619. Buckentin knew he had injured himself on December 1, 1992, and he testified that in some respects, it was unlike his previous injuries which he had been able to overcome more easily. Even though Buckentin stated he did not report his injury because they usually improved without medical assistance or with chiropractic adjustment, and he did not realize the severity of the injury, "simple ignorance of compensability, absent any evidence of estoppel by the employer or medical disinformation [is insufficient] to toll the notice requirement." *Reil*, 746 P.2d at 623. There is no evidence here that Buckentin's employer prevented him from reporting his injury or that he was misinformed by medical personnel as to his condition.

265 Mont. at 523-24, 878 P.2d at 265.

36 The quoted material from *Buckentin* raises another issue, that is, whether the employer's conduct precluded or deterred the claimant from reporting his injury, thereby tolling the 30-day limit.

37 In *Kuzara v. State Compensation Ins. Fund*, 279 Mont. 223, 928 P.2d 136 (1996), the Supreme Court held that an insurer may be estopped from asserting the 30-day notice requirement if the "employer or insurer has taken some positive action which either prevents a claimant from filing a timely claim or leads the claimant reasonably to believe she need not file such a claim." 279 Mont. at 231, 928 P.2d at 141. Claimant's testimony suggests that he was deterred from notifying his employer because of statements made by Terry. However, I have found Terry's explanation persuasive, and I am not persuaded that claimant was deterred as he alleges. Further legal analysis of his assertion is therefore unnecessary.

38 Finally, claimant's request for attorney fees and a penalty requires proof that the insurer was unreasonable in denying his claim. 39-71-611, -612, -2907, MCA (1999). As a matter of fact, I have found that irrespective of my determination that claimant is not entitled to benefits, the insurer reasonably disputed the claim. Therefore, claimant is not entitled to attorney fees or a penalty.

JUDGMENT

39 1. Claimant failed to give his employer notice of his industrial injury within 30 days as required by section 39-71-603, MCA (1999). His claim is therefore barred. The petition is **dismissed with prejudice**.

40 2. Petitioner is not entitled to attorney fees and costs.

41 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

42 4. 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 9th day of February, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen

Mr. David A. Hawkins

Date Submitted: January 10, 2001