IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 58

WCC No. 9903-8171

JOSEPH ROBERT DAVIS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

DAVIS EXCAVATION

Employer.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND REHEARING

Summary: Following this Court's ruling that the State Fund was estopped from asserting the 30-day notice provision of section 39-71-603(2), MCA (1997), the insurer moved for reconsideration or rehearing, arguing that the Court erroneously "presumed" that notice of the 30-day provision was not contained within materials provided to the insured. To prove notice was in fact provided, State Fund offers a copy of a 1995 Legislative Update which was not offered at trial.

Held: No presumption was employed by the Court. Rather, the Court inferred from testimony of State Fund's policy services supervisor and claimant's business manager that notice of the 30-day provision was not given. State Fund's failure to offer the actual notice at trial is no grounds to allow post-trial introduction of new evidence (see sections 25-11-102, 103, MCA).

Topic:

> **Evidence: Generally.** Insurer's failure to offer evidence at trial proving that it did notify insured of statutory change in reporting requirement was not grounds to allow post-trial introduction of new evidence.

¶1 After trial, and based on findings that (1) the State Compensation Insurance Fund furnished its insureds with Employee Notices and Legislative Updates, (2) had knowledge of a 1995 amendment to section 39-71-603(2), MCA, requiring sole proprietors, partners, and certain other business owners to report injuries to the insurer within 30 days, and (3)

failed to provide its insureds, including claimant in this matter, with notice of that requirement, I held that the State Fund is estopped from asserting the 30-day reporting requirement. The State Fund now moves for reconsideration or for rehearing, arguing that the Court improperly "presumed" that the 1995 Legislative Update did not refer to the requirement and that its use of the presumption tainted the estoppel analysis.

¶2 Contrary to the State Fund's argument, no presumption was employed by the Court in reaching its decision. The existence of a 1995 notice was established by the testimony of Jay Phillips, who is a policy services supervisor for the State Fund. She testified that such a notice was provided in 1995, however, her file did not contain a copy of the notice and the notice was never offered as an exhibit. Kay Ann Davis, the claimant's wife and business manager, testified that she read the legislative updates and did not recall any mention of the reporting requirement for sole proprietors and business owners. From these facts, I **inferred** that the 1995 notice did not contain information about the reporting requirement. The inference is supported by the evidence and is proper.

¶3 The big problem, of course, is that the State Fund did not offer the 1995 Legislative Update at trial. Its attempt to offer it at the present time is untimely. Insofar that it is seeking a new trial in which it could offer the evidence, its motion is governed by sections 25-11-102 and 103, MCA. The former section enumerates seven grounds for a new trial in a case tried to a jury. The latter section provides that the only grounds for a new trial following a bench trial are those grounds mentioned in "subsections (1), (3), and (4) of 25-11-102," which are:

> (1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
>
> . . . .
>
> (3) accident or surprise which ordinary prudence could not have guarded against;
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> (4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial . . .
>
> State Fund does not urge any irregularity or abuse of discretion in the conduct of the trial. It cannot claim surprise with respect to the 1995 Legislative Update since other updates were offered into evidence and its own witness testified that one was sent to policy holders in 1995. In addition, State Fund has failed to establish that with reasonable diligence it could not have produced the document at trial. State Fund

obviously found the document after trial. Its policy services supervisor merely testified it was not in her file.

¶4 The Court need not consider whether in light of the actual 1995 Legislative Update, the evidence was sufficient to support the finding of estoppel. Accordingly, the motions are **denied**.

DATED in Helena, Montana, this 15th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Mr. David A. Hawkins
Submitted: August 10, 2000