IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 19

WCC No. 2001-0464

EDNA HANKS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

PARTNERS IN HOME CARE, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 12/20/02

Summary: Claimant injured her back at work but did not report the injury to her employer for more than 60 days after it occurred. The insurer denied liability for failure to comply with the 30 day notice requirement in section 39-71-603(1), MCA (1999). She alleges that her back condition is nonetheless compensable either as an injury or occupational disease.

Held: The claim is barred by section 39-71-603(1), MCA (1999). The injury was not latent since she was aware within a few days of her need for medical care and in fact sought medical care. While she thought her increased symptoms were caused by arthritis, the lack of a prior history of back pain and the experiencing of pain due to a specific work-related incident put her on notice of the connection between her back condition and the incident. Moreover, she acknowledged thinking on a couple of occasions that it was related. Her occupational disease claim fails because the triggering event was singular and she offered no medical evidence that her preexisting back disease was occupationally caused.

Topics:

> **Limitations Periods: Notice to Employer.** The 30-day requirement for notice to the employer, § 39-71-603, MCA (1999), begins to run when the claimant is aware of a work-related event and realizes that she may need medical care. *Cf. Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992).

Limitations Periods: Notice to Employer. Where the claimant heard a pop in her back and experienced pain in a work-related incident and thereafter her back pain increases and extends to her leg, triggering medical care, she was aware of facts sufficient to require her to report the incident to her employer. The 30-day reporting requirement of section 39-71-603(1), MCA (1999), was therefore triggered and applicable.

Limitations Periods: Notice to Employer. The thirty day notice provision of section 39-71-603(1), MCA, may be tolled if the employee has a reasonable belief at the time of an accident that he or she has suffered no injury which will require treatment or is otherwise compensable until he or she learns otherwise. Where the employee's own testimony confirms that severe pain followed within a few days after an incident where she felt a "krik" in her back, her testimony indicated she was on notice of the possible relationship between the "krik" incident and her increasing pain. Where notice was not given within thirty days of the pain commencing, claimant was barred from recovery.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-105, MCA. The general intent of the Workers' Compensation Act to provide wage supplement and medical benefits to a worker suffering an occupational injury is qualified by the particular intent of the 30-day notice provision of section 39-71-603(1), MCA.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603(1), MCA (1997). The 30-day requirement for notice to the employer, § 39-71-603, MCA (1999), begins to run when the claimant is aware of a work-related event and realizes that she may need medical care. *Cf. Killebrew v. Larson Cattle Co.,* 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603(1), MCA (1997). Where the claimant heard a pop in her back and experienced pain in a work-related incident and thereafter her back pain increases and extends to her leg, triggering medical care, she was aware of facts sufficient to require her to report the incident to her employer. The 30-day reporting requirement of section 39-71-603(1), MCA (1999), was therefore triggered and applicable.

Occupational Disease: Disease. A single incident on a single day which aggravates or makes symptomatic an underlying non-occupational disease is an injury and not an occupational disease. An occupational disease requires that the harm be caused by events occurring on more than one day. §§ 39-71-119 and 39-72-102(10), MCA (1999).

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Occupational Disease: Disease. To establish an occupational disease, the claimant must provide medical evidence that her disease is caused at least in part by her work.

¶1 The trial in this matter was held on December 10, 2001, in Missoula, Montana. Petitioner, Edna Hanks (claimant), was represented by Mr. Eric Rasmussen. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones.

¶2 Exhibits: Exhibits 1 through 4 were admitted without objection.

¶3 Witness and Depositions: The claimant's sworn statement, taken with counsel present on October 10, 2001, was admitted and has been considered by the Court in the same manner as a deposition. Claimant was sworn and testified. At the close of trial, at the urging of the Court, the parties agreed to take the deposition of Dr. Randale C. Sechrest. That deposition was taken on December 20, 2001, and filed with the Court on December 26, 2001, at which time the case was deemed submitted.

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

1. Whether or not Petitioner had an injury or an occupational disease.

2. If Petitioner suffered an injury, did she give proper notice of said injury.

3. Whether Liberty is liable to Claimant for payment of a penalty, attorneys' fees and costs.

(Pretrial Order at 2.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witness, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is presently 66 years old.

¶7 On July 31, 1995, claimant went to work for Partners in Home Care, Incorporated (Partners), as a home-care aide. Her job entailed helping patients with baths and with their basic personal care, including helping wheelchair bound patients into and out of their wheelchairs.

¶8 In January 2001, while helping an Alzheimer's patient dress, the claimant felt a "krik" or "twinge" in her back. (Trial Test.; Hanks Sworn Statement at 6.) In her sworn statement she described the event as causing a "pop-type sound" and "a little pain." (Hanks Sworn Statement at 6-7.)

¶9 Prior to the "krik" incident, claimant had never had back problems. (*Id*. at 15.)

¶10 Following the "krik" incident, the claimant continued to experience pain (*id*. at 16), although at trial she testified that she did not pay much attention to it. However, two or three days after the incident she began having difficulty getting into and out of her car due to pain radiating into her right leg.

¶11 On February 8, 2001, claimant saw Dr. Susan Selbach, her family physician. Dr. Selbach's office note for that date states that claimant "complains that she has been having some right-sided lower back pain that goes down into her buttocks, has doubled her over on occasion." (Ex. 1 at 10.) Claimant also complained of groin pain. (*Id*.) Regarding possible etiologies of the pain, Dr. Selbach noted only, "She does not remember any recent falls. She had a fall in 1993-1994." (*Id*.) Claimant testified that her pain was predominantly in her right hip and leg and that she thought it was a symptom of arthritis, from which her mother had suffered.

¶12 Despite a trial of physical therapy, claimant continued to experience low-back pain radiating into her buttocks and leg. (*Id*. at 12-13.) An MRI was done on March 13, 2001. It disclosed a left-sided protruding disk at the L4-5 level, as well as significant degenerative changes at that level. (*Id*. at 2.) While the protruding disk was on the left side, claimant's pain was on the right side, including the right leg. (*Id*.)

¶13 Dr. Selbach restricted claimant to light duty on March 27, 2001, and referred her to Dr. Carter Beck, a neurosurgeon. (Ex. 1 at 15.)

¶14 The next day, March 28, 2001, claimant told her supervisor, Karen Harrison, about her back pain and the "krik" incident. (Trial Test.; Hanks Sworn Statement at 12.) Claimant could not recall the date of the incident, only that it had been a couple of months previous, probably sometime in mid-January. (Hanks Sworn Statement at 12-13.) A first report was filled out by Harrison indicating that the pain was "chronic" and that claimant was "not sure" of the cause of her pain. (Ex. 2.)

¶15 In her sworn statement the claimant testified that she did not inform her employer earlier about the "krik" incident because "I just didn't think about it. I just thought it would go away." (Hanks Sworn Statement at 18.) She went on to say that she thought her pain might be related to arthritis since her mother had arthritis. (*Id*. at 19.) When pressed about the fact that her pain started with the "krik" incident, she testified:

> Q. And with the krik and the symptoms beginning immediately, did you think at least some of your symptoms were related to that incident with the Alzheimer's patient?
>
> A. Well, I probably did, maybe once or twice. But then I just thought, No, it's something else. It's arthritis.

(*Id*. at 20.) By the time her statement was taken on October 10, 2001, she was certain that the incident gave rise to her pain. (*Id*. at 21.)

¶16 At trial claimant testified that she did not report the "krik" incident immediately after it occurred because she did not think "it was bad" and does not like to run to doctors. She also repeated that she thought her subsequent pain was related to arthritis.

¶17 Unfortunately, claimant's back condition was "bad." She was subsequently seen by Dr. Beck on April 3, 2001. He reviewed her MRI, which he read as showing "lumbar stenosis at L4-5 where there is bilateral neural foraminal stenosis and subarticular recess stenosis." (Ex. 1 at 22.) On May 9, 2001, he performed a "[b]ilateral L4-5 laminotomy and foraminotomy with partial mesial facetectomy." (*Id*. at 40.)

¶18 Liberty denies liability for claimant's injury on account of her failure to report it to her employer within 30 days as required by section 39-71-603, MCA (1999).

¶19 Claimant has in the alternative pursued her claim as an occupational disease arising from her employment. On August 27, 2001, she was examined by Dr. Randale C. Sechrest, an orthopedic surgeon, at the request of the Department of Labor and Industry. Dr. Sechrest reported that claimant suffered from "long-standing degenerative changes in the lumbar spine" which "were rendered symptomatic in January or February of 2001 and most likely were aggravated by her activity at work." (*Id.* at 67.) He went on to state that her need for surgery "arose from her underlying degenerative disease" and "spinal stenosis secondary to [that] long-standing degenerative" disease. (*Id*.) In his deposition he reiterated that claimant had long-standing and extensive degenerative back disease but added that her condition was aggravated and made symptomatic by the "krik" incident. (Sechrest Dep. at 29-32, 36.) Lacking in his testimony and report is any indication that her underlying, preexisting back disease was in whole or in part an occupational disease.

Resolution

¶20 Dr. Sechrest's testimony establishes that claimant suffered from preexisting degenerative back disease which was aggravated and made symptomatic by a single incident which claimant described as a "krik." Claimant's own testimony establishes that the "krik" incident occurred in mid-January 2001, and that she was aware of it. Her testimony further establishes that prior to that time the claimant had not suffered from back problems and that within a couple of days of the "krik" incident her pain had progressed into her leg. Her pain was severe enough that in early February she sought

medical care. These facts were sufficient to put her on notice of the possible relationship between the "krik" incident and her increasing symptoms. While she may have thought worsening symptoms were the result of underlying arthritis, she admitted that at least on one or two occasions she thought her condition may have arisen from the "krik" incident. She failed to report her injury within 30 days and she has failed to provide credible evidence that her preexisting back disease was caused in whole or part by occupational factors.

CONCLUSIONS OF LAW

¶21 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).

¶22 Section 39-71-603, MCA (1999), required claimant to report her injury to her employer within 30 days. The section provides:

> **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).

¶23 Since the injury in this case occurred in mid-January 2001, claimant was required to report it by mid-February 2001. She was more than a month late in her reporting.

¶24 In the recent case of *Danielle Whitlock v. Fremont Industrial Indemnity Company,* 2002 MTWCC 12, I found that the 30-day period was tolled because the injury in that case appeared trivial at the time. I pointed out that

> 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).

The facts in *Whitlock*, however, are dissimilar to those in the present case. In *Whitlock* the claimant experienced minimal aching which was insufficient to alert her that she would need medical care. In this case, within two to three days, the claimant's pain had increased to the point that she had difficulty getting into and out of her car. In fact she sought medical care more than 30 days prior to her reporting her injury to her employer. That she had never experienced back pain prior to the "krik" incident, taken together with her experience of the onset of pain at the time of the "krik" and her need for medical care within days thereafter, were sufficient to alert her to the possibility that the "krik" incident was responsible for her condition; indeed she acknowledged that she thought of that possibility on one or two occasions before she reported the injury. These facts are more similar to those in *Larson v. Barry Smith Logging, Inc.,* 267 Mont. 444, 884 P.2d 786 (1994), a case in which the claimant's latent injury argument was rejected:

> Larson argues that although he knew that he injured himself on April 9, 1992, he did not realize the severity of the injury until 30 days had passed, thereby tolling the 30 day notice requirement. To support his position, Larson relies on Killebrew v. Larson Cattle Co. (1992), 254 Mont. 513, 839 P.2d 1260. In Killebrew, we concluded that an employee who reasonably believes at the time of an accident that he suffered no injury requiring medical treatment, is not barred by the 30 day notice requirement of § 39-71-603, MCA, when he discovers otherwise after the 30 day period has elapsed. The record shows that following the accident Larson took several days off from work because of the injury, and that he received a series of chiropractic treatments thereafter. These facts do not indicate a latent injury.

267 Mont. at 449, 839 P.2d at 789.

¶25 The "krik" incident was a single identifiable incident occurring in a single work shift, thus meeting the criteria of an injury. § 39-71-119, MCA (1999). It does not meet the definition of an occupational disease, which is defined as "harm, damage, or death as set forth in 39-71-119(1) arising out of or contracted in the course and scope of employment and caused by events occurring on more than a single day or work shift." § 39-72-102(10), MCA (1999) (emphasis added). And, there is no medical evidence that claimant's preexisting back disease was caused by claimant's prior work. She has therefore failed to prove that she suffers from a compensable occupational disease.

JUDGMENT

¶26 The claim in the present case is barred by claimant's failure to notify her employer of her injury within 30 days as required by section 39-71-603(1), MCA (1999). Her petition is therefore **dismissed with prejudice**.

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

¶28 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 22nd day of March, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Eric Rasmusson
Mr. Larry W. Jones
Submitted: December 26, 2001