IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 49

WCC No. 9312-6968

LARSON CATTLE COMPANY

Appellant

vs.

CHARLES T. KILLEBREW

Claimant/Respondent

and

UNINSURED EMPLOYER'S FUND

Co-Respondent.

DECISION AND ORDER ON APPEAL

This proceeding involves an application of section 39-71-603, MCA, which requires a claimant suffering an industrial injury to notify his employer about the accident and his injuries. Petitioner, Larson Cattle Company (Larson), appeals from a November 17, 1993 Department of Labor and Industry (DLI) Order on Remand from Workers' Compensation Court. The Order determined that respondent (claimant) provided adequate notice to his employer concerning industrial accidents occurring on December 17, 1989 and March 17, 1990. Larson was claimant's employer on those dates but was uninsured.

Larson advances two grounds in this proceeding for judicial review. First, it argues that the DLI hearing examiner incorrectly interpreted the Montana Supreme Court's decision in ***Killebrew v. Larson Cattle Company,*** *254 Mont. 513, 839 P.2d 1260 (1992)*, as mandating a finding for claimant and therefore failed to make an independent determination concerning what claimant told the employer about his injuries. Second, Larson argues that even if claimant's version of what he told to the employer is accurate, claimant still did not provide the employer with adequate notice of his injuries.

Factual background

Claimant, Charles Killebrew, worked for Larson Cattle Company as a ranch hand between July 1989 and mid-May 1990. On December 17, 1989, he was involved in a tractor accident. The tractor flipped on its side; claimant struck his shoulder against the side of the tractor

cab. Three months later, on March 17, 1990, claimant was run over by two cows. Larson was aware of both accidents but disclaimed knowledge of any injuries the claimant suffered. Claimant testified that following the December injury he told Larson that he "had hurt his shoulder a little bit but that he thought it was going to be okay," and that following the March incident he had "showed his employer the physical evidence of trauma on his body." ***Killebrew,*** *254 Mont. at 521*. Larson denied that claimant told him of any injury or physical discomfort arising from either injury.

The injuries did not appear serious at the time of the accidents. However, later on claimant required treatment of his shoulder and was also diagnosed as suffering from a torn medial meniscus in the right knee and an impingement syndrome of the right ankle. On May 15, 1990, claimant filed a claim for compensation based on injuries to his shoulder, knee and ankle.

Larson was uninsured at the time of the accidents. Therefore, the Uninsured Employers' Fund stepped in and ordered Larson to pay claimant the equivalent of workers' compensation benefits. Larson disagreed with the Order and requested a contested case hearing before a DLI hearing examiner. The hearing was held on September 28, 1990, after which the hearing examiner held that claimant was not entitled to benefits because he failed to comply with the notice requirement of section 39-71-603, MCA. This Court affirmed. Claimant then appealed and the Montana Supreme Court reversed, holding that if the claimant's testimony about what he reported to Larson was credible, then adequate notice was provided to the employer. ***Killebrew,*** *254 Mont. at 521-2*. Because it could not determine whether the hearing examiner's decision was based on a determination that claimant's testimony was incredible, or on a determination that what claimant said he told his employer was insufficient in any event, the Court remanded the case to the DLI with instructions to resolve the factual dispute over what was said to the employer and to enter judgment accordingly.

Following remand, on November 17, 1992, the DLI hearing examiner issued an Order on Remand. The hearing examiner made supplemental findings of fact which effectively adopted claimant's testimony as fact and determined that the notice requirement had been satisfied. However, in its discussion of the Supreme Court decision, the hearing examiner made the following observation:

> The Supreme Court's interpretation of events is reflected in the supplemental findings of fact as set forth above. It follows that the credibility factor has swayed in favor of the claimant and, in deference to the Court's ruling, notice was timely and adequately given to the employer that injuries had resulted from the subject accidents. . . .

(Order on Remand at 6.) Reading this paragraph, and some others, my predecessor concluded that the hearing examiner believed that the Supreme Court decision required

him to resolve credibility issues in claimant's favor and acted accordingly. On July 9, 1993, the matter was remanded by this Court to the hearing examiner with specific instructions to issue findings "based on the hearing examiner's independent judgment, not on what he perceives the Supreme Court wants found as fact." (Order on Appeal at 10.)

The hearing examiner took another stab at it and on November 17, 1993, issued his Order on Remand from Workers' Compensation Court, reaffirming the previous determination that adequate notice was given.

Discussion and Order

The applicable standard of review is whether the hearing examiner's findings are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S***tate Compensation Mutual Insurance Fund v. Lee Rost Logging,*** *252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA).* The Court will not reweigh the evidence; the findings and conclusions of the fact-finder will be upheld if they are supported by substantial credible evidence in the record. ***Nelson v. EBI Orion Group,*** *252 Mont. 286, 288, 829 P.2d 1 (1992).* Conclusions of law are reviewable to determine if they are correct. ***Steer, Inc. v. Department of Revenue,*** *245 Mont. 470, 474, 803 P.2d 601 (1990).*

In its first ground of appeal, Larson argues that in issuing his latest Order the hearing examiner still failed to exercise his own independent judgment in resolving factual issues. While the latest Order is not a paradigm of clarity, a complete reading of the decision shows that the hearing examiner did resolve the remaining factual issues based on his own perceptions of the testimony.

Initially, the hearing examiner reaffirmed his adoption of both his original findings of fact and the supplemental findings he had made in his November 18, 1992 Order on Remand. The supplemental findings effectively adopted claimant's version of what he told Larson:

> 1. Mr. K supplied Mr. L with a description of both the December 17, 1989 and March 17, 1990 accidents within one or two days after the happening of the accidents. (Testimony of Mr. K and Mr. L.)
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> 2. At no time prior to May of 1990 did Mr. K state to Mr. L that he had injured his right shoulder as a result of the December 17, 1989 accident other than a vague reference during his first discussion with Mr. L after the accident about his right shoulder hurting and stated something to the effect that the shoulder was ". . . OK . . . no big deal." (Testimony of Mr. K-Trans. p. 31 @ 11. 14-16.)
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> 3. Following the March 17, 1990 injury which resulted from an attack by two cows, the claimant was bruised and generally sore all over. Upon seeing Mr. L a day or two following the accident, Mr. K mentioned the attack and lifted his shirt to show Mr. L

> the bruises to his upper body. No mention was made of any specific injury, particularly to the [sic] Trans. p. 42, 11. 13-16; and Mr. L--Trans. p. 111, 11. 15-19 and p. 112, 11. 5-7.)

The first issue requires this Court to determine whether these supplemental findings were based on the hearing examiner's independent evaluation of the evidence or were made merely because he believed the Supreme Court required him to make them.

Some of the language in the latest Order, if read in isolation, might be read as indicating the hearing examiner's belief that the Supreme Court required him to find claimant more credible than the employer. However, read in its entirety, it is reasonably clear that the hearing examiner exercised independent judgment in resolving credibility issues in favor of claimant. Based on that resolution he then concluded, and properly so, that the Supreme Court mandated that judgment be entered for claimant.

The language most suggestive of a misapplication of the Supreme Court's mandate is in the following passage:

> The hearing examiner, in his November 1992 ORDER ON REMAND, then followed what he saw as a mandate based on his view of the high court's interpretation of the law and **how it would apply to this particular set of circumstances.** Judge Reardon took great exception to this view of the Court's decision, but the undersigned hearing examiner, using his independent judgment, still views the Killebrew Court discussion as **mandating a finding in favor of the claimant** and continues to agree that the current case**, given all the facts found and considered,** fits within the scenario described by the high court. [Emphasis added.]

(Order on Remand from Workers' Compensation Court at 6.) Other discussion puts the passage in context and shows that the hearing examiner's discussion of the Supreme Court mandate was in the context of the additional findings of fact he had already made and was not intended to indicate that he believed that he was required to resolve the credibility issue in claimant's favor. Earlier in the Order on Remand from the workers' compensation court, the hearing examiner states: "In the November 17, 1992, Order on Remand, the hearing examiner found in favor of the claimant **based on the facts and the weight of the credibility, both of which fell in his favor.**" *(**Id.** at 4; emphasis added.)* He goes on to state that his first decision (holding for the employer) was based on his conclusion that 'the claimant failed to notify his employer of the "nature of the injury," ' and that in his decision after remand he had "reversed himself when it was concluded (whether with firm conviction or not), that **the weight of credibility fell to the claimant**." (***Id.*** *at 5; emphasis added.*) Later on, referring to language in the Supreme Court opinion holding that claimant's testimony, if believed, showed adequate notice to the employer, the hearing examiner states that the language "was viewed by the hearing examiner as the Court's

majority opinion **in the event the weight of credibility fell to the claimant.**" (***Id.*** *at 5-6; emphasis added.*)

Thus, a full reading of the latest Order shows that the hearing examiner found the claimant's testimony credible and interpreted the Supreme Court decision as requiring him to find in claimant's favor based on that determination. As discussed below, he did not misapprehend the Supreme Court's mandate.

In its brief Larson states the second issue as follows: **"Whether the claimant informed his employer of the accidents and, within 30 days of either the accident or his knowledge of injury, of the nature and extent of the injury as required by section 39-71-603, MCA?"** (Employer's/appellant's Brief at 8; emphasis in the original.) Under the umbrella of this issue, Larson argues that the notice requirement was not satisfied even if we accept claimant's version of what he told the employer. It contends that within 30 days after claimant became aware of the nature of his injuries, he had to advise his employer concerning those injuries. In essence, Larson contends that in cases where the nature of the injury is not clear a second 30-day-notice period commences at the time the claimant learns the nature of his injuries, requiring claimant to notify the employer about the nature of the injuries. Larson then concludes that claimant failed to comply with this notice requirement because he failed to provide the employer with further information within 30 days after a February 14, 1990 doctor's visit for his shoulder and within 30 days of April 19, 1990, the date he became aware of his knee injury.

The following excerpts from ***Killebrew*** are dispositive of Larson's arguments:

> In this case, it is undisputed that the employer was aware of both accidents which are the basis for claimant's claims for compensation. Furthermore, if the claimant's testimony is believed, then the employer was also provided with all the information available to the claimant at that time regarding the physical impact of these accidents on claimant. . . . The question in this case is whether, if the claimant's testimony is correct, the description of his injuries was adequate to meet the requirements of § 603.
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> . . . .
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> Based on these decisions, we conclude that the requirements of § 39-71-603, MCA (1987), are satisfied when an employee who is involved in a work-related accident reports that accident to his employer within 30 days from the date of its occurrence and apprises his employer, to the best of his ability, whether he suffered any adverse physical consequences from that accident. 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.

> Following his December 17, 1989, tractor accident, claimant testified that he advised his employer he had hurt his shoulder a little bit but that he thought it was going to be okay. Following his March 17, 1990, accident in which he was run into and trampled on by cattle, claimant testified that he showed his employer the physical evidence of trauma on his body and that his employer observed him limping thereafter when he had not limped before. This information following both incidents was sufficient to enable the employer to protect himself by prompt investigation of the accidents and to require prompt treatment or examination for any injuries that might have resulted from those accidents.
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> . . . .
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> However, in this case, the factual dispute created by the testimony of the claimant and his employer was not resolved by the hearing examiner. We cannot determine from his findings and conclusions whether he accepted the claimant's description of the notice given to his employer and simply concluded that it was legally inadequate, or whether he accepted the employer's testimony that no notice was given of any physical consequences from the accidents that occurred. . . .
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> For these reasons, the judgment of the Workers' Compensation Court is reversed, and this case is remanded to the hearing examiner for the Department of Labor and Industry for the purpose of resolving the factual dispute created by the testimony of the claimant and his employer.

Killebrew, *254 Mont. at 520-522.* From the quoted material it is clear that the Supreme Court considered the notice requirement satisfied if the claimant's testimony is believed. That decision is *res judicata* and we are bound by it. ***Central Montana Stockyards v. Fraser,*** *133 Mont. 168, 186-7, 320 P.2d 981 (1958).* The issue raised by Larson on this appeal has already been decided. Once the hearing examiner found that claimant's testimony was credible, the ***Killebrew*** decision mandated a finding that claimant satisfied the notice requirements of section 39-71-603, MCA.

CONCLUSIONS

The hearing examiner's latest Order is not clearly erroneous; is supported by substantial credible evidence; and correctly applied the law as determined in ***Killebrew.*** The Findings of Fact; Conclusions of Law; order entered by the Department of Labor and Industry on November 17, 1993, are **affirmed.**

DATED in Helena, Montana, this 25th day of May, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jerrold L. Nye
Mr. Paul E. Toennis
Mr. Daniel B. McGregor