IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 8

WCC No. 9810-8069

HENRIETTA LaPLANTE

Petitioner

vs.

TOWN PUMP, INCORPORATED

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner sought medical and TTD benefits on the allegation she was injured at work during September 1990 by cold packs of beer falling onto her back. The insurer disputed the occurrence of an accident and compliance with the notice requirement of section 39-71-603, MCA.

Held: While the record makes clear claimant has serious back problems, neither claimant nor the witnesses testifying on her behalf were credible regarding the occurrence of the alleged accident or the report of the accident. In addition to the Court's observation of witnesses, the Court relied upon inconsistencies between claimant's description of the accident and the description of another witness testifying for her, records indicating claimant stopped working before the date she claimed the accident occurred, and the absence of any mention of a work injury in her medical records. With regard to the notice issue, the Court credited store supervisors who testified they received no report of an accident from claimant and did not credit a co-employee who claimed she had been a supervisor and was told of the accident. The credible evidence indicated the co-employee may have had lead cashier duties, but had no supervisory responsibility for claimant, who was a merchandise stocker. Petition dismissed with prejudice.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-603, MCA (1989).** WCC credited Town Pump supervisors who testified claimant, a merchandise stocker, did not report a work injury to them and that they had no knowledge of the alleged injury until well past the 30 day reporting period under section 39-71-603, MCA (1989). The Court did not credit a co-employee who

claimed she had been a supervisor and was told of the accident. The credible evidence indicated the co-employee may have had lead cashier duties, but had no supervisory responsibility for claimant, who was a merchandise stocker. Notice to a co-employee is insufficient; notice must be given to the employer or the employer's managing agent or supervisor in charge of the employee's work, or one of them must have knowledge of the accident.

Claims: Notice to Employer or Insurer: Generally. WCC credited Town Pump supervisors who testified claimant, a merchandise stocker, did not report a work injury to them and that they had no knowledge of the alleged injury until well past the 30 day reporting period under section 39-71-603, MCA (1989). The Court did not credit a co-employee who claimed she had been a supervisor and was told of the accident. The credible evidence indicated the co-employee may have had lead cashier duties, but had no supervisory responsibility for claimant, who was a merchandise stocker. Notice to a co-employee is insufficient; notice must be given to the employer or the employer's managing agent or supervisor in charge of the employee's work, or one of them must have knowledge of the accident.

Claims: Notice to Employer or Insurer: Supervisor. WCC credited Town Pump supervisors who testified claimant, a merchandise stocker, did not report a work injury to them and that they had no knowledge of the alleged injury until well past the 30 day reporting period under section 39-71-603, MCA (1989). The Court did not credit a co-employee who claimed she had been a supervisor and was told of the accident. The credible evidence indicated the co-employee may have had lead cashier duties, but had no supervisory responsibility for claimant, who was a merchandise stocker. Notice to a co-employee is insufficient; notice must be given to the employer or the employer's managing agent or supervisor in charge of the employee's work, or one of them must have knowledge of the accident.

Injury and Accident: Accident. While the record makes clear claimant has serious back problems, neither claimant nor the witnesses testifying on her behalf were credible regarding the occurrence of the alleged accident. In addition to the Court's observation of witnesses, the Court relied upon inconsistencies between claimant's description of the accident and the description of another witness testifying for her, records indicating claimant stopped working before the date she claimed the accident occurred, and the absence of any mention of a work injury in her medical records.

Limitations Period: Notice to Employer. WCC credited Town Pump supervisors who testified claimant, a merchandise stocker, did not report a work injury to them and that they had no knowledge of the alleged injury until well past the 30 day reporting period under section 39-71-603, MCA (1989). The Court did not credit a

co-employee who claimed she had been a supervisor and was told of the accident. The credible evidence indicated the co-employee may have had lead cashier duties, but had no supervisory responsibility for claimant, who was a merchandise stocker. Notice to a co-employee is insufficient; notice must be given to the employer or the employer's managing agent or supervisor in charge of the employee's work, or one of them must have knowledge of the accident.

¶1 The trial in this matter was held on January 12, 1999, in Great Falls, Montana. Petitioner, Henrietta LaPlante (claimant), was present and represented by Mr. Cameron Ferguson. Respondent, Town Pump, Incorporated (Town Pump), was represented by Mr. Robert E. Sheridan. A transcript of the trial has not been made.

¶2 Exhibits: Exhibits1 through 13 were admitted without objection.

¶3 Witnesses and Depositions: Henrietta LaPlante, Kami Guardipee Gunhammer, Kimberly Wolftail, Opal Madplume Boggs, and Bruce Allred were sworn and testified. The deposition of Henrietta LaPlante was also submitted for the Court's consideration.

¶4 Issues Presented: As set forth in the Pre-trial Order, the following issues are presented for decision.

1. Whether Petitioner sustained an on the job [sic] injury as she contends on or about September 5, 1990 (she is not sure of the exact date) and whether such injury is compensable.

2. Whether Petitioner properly reported her accident to the employer or whether the employer had knowledge of the accident as required by §39-71-603 MCA.

The Pre-trial Order also sets forth additional issues concerning medical benefits and temporary total disability benefits. However, the Court and the parties agreed that those issues are not presently ripe for decision.

¶5 Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the parties' arguments, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant was employed by Town Pump, in Browning, Montana, between July 1990 and early September 1990. She was employed part-time as a merchandise stocker.

¶7 Claimant worked 32 hours a week, 5 days a week. (LaPlante Dep. at 5; Trial Test.) She testified that she did not work either Saturdays or Sundays.

Alleged Accident and Claim for Compensation

¶8 Claimant alleges that she was injured at work on or about Wednesday, September 5, 1990. She testified that she does not remember the exact date, however, on her Claim for Compensation she specifically stated that the injury occurred on September 5th at 4:00 p.m. (Ex. 1.) In any event, she was positive that she never returned to work after the day of the accident.

¶9 Claimant did not prepare a claim for compensation until nine months later. Her typewritten Claim for Compensation was signed and submitted on June 4, 1991. (Ex. 1.) At that time, she was represented by counsel.

¶10 The Claim for Compensation describes the alleged accident as follows:

> I was stocking merchandise, I reached 2 feet above my head to grab some merchandise to stock in the front cooler. Four cold packs (12 beers X 4) of beer fell on my back knocking me across the isle [sic] into another stack of beer. I felt the most excruciating pain I have ever felt. I managed to pick myself up off the floor and I left work because of the pain. I informed a co-worker, Mary Griffin, of what happend [sic] before I left work. . . .

(*Id*.)

¶11 At trial and in her deposition the claimant provided additional details concerning the accident. She testified that when the cold packs of beer began falling she bent herself forward to protect her face and that the cold packs struck her in the back. (LaPlante Dep. at 12, 27; Trial Test.)

Claimant's Corroborating Witnesses

¶12 Claimant's daughter, Kami Guardipee Gunhammer (Gunhammer), who was 10 or 11 at the time, testified that she witnessed the accident and helped the claimant to her feet and out of the store to her car. Her description of the accident differed in an important respect from her mother's. According to Gunhammer, when the cold packs fell the claimant fell over backwards.

¶13 At the time of the alleged accident the manager of the Town Pump was Bruce Allred (Allred). The assistant manager was Opal Madplume Boggs (Boggs). Claimant conceded that she did not report the alleged accident to either of them. However, she testified that she reported her accident to Kimberly Wolftail (Wolftail) and David Moore (Moore). She testified that both Wolftail and Moore were shift managers for Town Pump.

¶14 Wolftail, who was a cashier at Town Pump, testified that she was working on the day of the accident and saw the claimant immediately following the accident. She said she told claimant to go home or to the hospital. She further testified that she was a "shift manager" at the store and claimant's supervisor on the day of the injury. Wolftail claimed that she

reported the incident to the store manager the following day and that she filed a written incident report.

¶15 Moore did not testify. However, claimant testified that he came to her house the day after the accident and asked her to come to work. According to claimant she told him she could not work because she hurt her back.

Nature of Dispute

¶16 There is no question that the claimant has a serious back condition. Indeed, she underwent a lumbar laminotomy and discectomy at the L4-5 level on November 27, 1990 (Ex. 4 at 5), and a microdiscectomy at the L5-S1 level on May 6, 1996 (Ex. 8 at 5). However, her medical records for treatment prior to June 1991 indicate that she did not tell her physicians about any industrial accident. (See ¶ 25.)

¶17 Town Pump disputes both the alleged accident and claimant's assertion that she reported the accident to her supervisor within 30 days as required by section 39-71-603, MCA (1989).

Testimony of Allred and Boggs

¶18 Allred, the manager of the Town Pump in 1990, and Boggs, the assistant manager in 1990, denied that claimant ever notified them of any accident. Allred first learned of the alleged accident a few months ago. Boggs learned of it only after claimant had filed a written claim.

¶19 During the daytime hours, including weekends, either Allred or Boggs was present at the Town Pump. Boggs was typically at the store from 7:00 a.m. until 5:00 or 6:00 p.m. on the days she worked. Allred typically worked until 5:00 p.m., and on some days later.

¶20 Both Allred and Boggs testified that employees were required to report any work-related accidents to one of them. They alone were responsible for filling out accident reports. Their home phone numbers were posted at the Town Pump so employees could get ahold of them at any time when they were not in the store.

¶21 They further testified that neither Wolftail nor Moore were supervisors. Wolftail was a lead cashier, meaning that she was in charge of money from the safe and might give direction to other cashiers on duty during her shift. However, she had no supervisory authority over claimant. Moore, at the time, was a management trainee and was learning to do bookkeeping and ordering. He had no supervisory authority over claimant.

Resolution

¶22 Allred and Boggs were more credible witnesses than claimant and her witnesses. I find that claimant did not give notice of her alleged accident within 30 days, indeed she did not

notify the employer until she filed her written claim in June 1991. Further, I am not persuaded that claimant was injured in an industrial accident as she claims.

¶23 In reaching my decision in this case, I have relied upon my observations and assessment of the witnesses. The factors set forth in the following paragraphs also influenced me in reaching my decision.

¶24 The claimant's time card for the first week of September shows that she did not work September 5, 1990, the date on which she claims she was injured. (Ex. 13.) It shows her last day of work as September 2, 1990, a Sunday. Claimant agreed that she signed the time card.

¶25 Medical records for claimant's treatment prior to June 1991 disclose that claimant did not mention any accident of any sort as the cause of her back pain.

¶26 Claimant first sought medical attention on September 12, 1990, when she was seen at the Indian Health Service (IHS) in Browning for hip and ankle pain of two weeks duration. The IHS notes do not disclose any industrial accident. Using a symbol for "no", the notes specifically state "no injury." They read, in relevant part:

> x 2 weeks hip pain L [left].
>
> L [left] ankle pain - [no] injury
>
> Working partime [sic] Town Pump. Stocking shelves. Some lifting - Going to nursing school in Havre 9/27, and wants to have pain checked out - Duration 2 weeks - getting increasingly worse.

(Ex. 6 at 32.)

¶27 Claimant returned to the IHS on September 17, 1990. At that time she reported that her "pain began after 1 month of lifting at new job." (*Id*. at 31.) Again there is no mention of any accident or injury.

¶28 Claimant was next seen at the IHS on September 24, 1990. The medical notes indicate that the visit was for "follow up on 4 wks of pain in L [left] post thigh & ankle." There is no reference to any injury or accident. (*Id*. at 30.)

¶29 Claimant was next seen by Dr. Nolan, in Havre on October 26, 1990. Dr. Nolan noted:

> She complains today of what she describes as pain from her osteoporosis. However, as she describes her symptoms and her treatment it sounds as though she is being treated for osteoarthritis. . . .

(Ex. 3 at 1.) Dr. Nolan took an extensive history. There is no mention of any injury or accident in his notes.

¶30 In November 1990, Dr. Lee Finney assumed claimant's care. He noted that she reported that she "began having left lower extremity pain the first part of **August**." (Ex. 4 at 1, emphasis added.)

¶31 Claimant was asked at the time of her deposition whether she told Dr. Nolan how she had hurt her back. She responded:

> A. I was afraid to.
>
> Q. Why were you afraid to?
>
> A. I didn't want to lose my Medicaid, and I knew the hospital in Browning would never pay for it.

(LaPlante Dep. at 42.) Claimant went on to explain her fear of losing benefits if she were to report how she was hurt to the doctor, ultimately stating that she "could have" told him about the beer falling on her and not mentioned it happened at the Town Pump. (*Id.* at 44.) At trial claimant was questioned as to why she did not tell her physicians about an injury. She testified that she "may" have told the doctors but due to the "doctor-client privilege" the doctors did not put the information into their records. I found her testimony conflicting and her explanations implausible.

¶32 I found Wolftail's testimony neither credible nor plausible. Despite claiming that she had been promoted to a supervisor, she conceded that she received no pay increase for additional responsibilities. Moreover, claimant's work was unrelated to the cashier's work. I find that she was not a supervisor and did not supervise the claimant. I also did not find credible her other testimony concerning the reporting of the alleged accident.

¶33 Similarly, I was unpersuaded that Moore was a supervisor or that claimant ever reported any accident to him.

¶34 As stated earlier, I find that claimant failed to report her alleged industrial accident within 30 days and I am unpersuaded that any work-related injury ever occurred.

CONCLUSIONS OF LAW

¶35 The 1989 version of the Workers' Compensation Act applies in this case since the alleged injury occurred in September 1990. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶36 The claimant has the burden of proving that she is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence. *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).

¶37 Section 39-71-603, MCA (1989), sets forth notice which must be given by a claimant to her employer, providing:

> **Notice of injuries other than death to be submitted within thirty days.** No claim to recover benefits under the Workers' Compensation Act, for injuries not resulting in death, may be considered compensable unless, within 30 days after the occurrence of the accident which 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 upon which the injured employee was engaged at the time of the injury is equivalent to notice.

The statute is "mandatory and compliance with its requirements is indispensable to the maintenance of a claim for compensation." *Masters v. Davis Logging,* 228 Mont. 441, 443-44, 743 P.2d 104 (1987) (quoting from *Bender v. Roundup Mining Company,* 138 Mont. 306, 309, 356 P.2d 469, 470 (1960)).

¶38 Notice to a co-employee is insufficient. § 39-71-603, MCA (1989) and *see Bogle v. Ownerrent Rent to Own,* 264 Mont. 515, 519, 872 P.2d 800, 802-03 (1994). Notice must be given to the employer or the employer's managing agent or supervisor in charge of the employee's work, or one of them must have knowledge of the accident. In this case, neither Wolftail nor Moore were managing agents for Town Pump nor did they supervise claimant. Any accident should have been reported to Allred or Boggs, and claimant concedes she did not report any industrial injury to either of them.

¶39 Moreover, I am unpersuaded that claimant reported the alleged accident to Wolftail, Moore or anyone else, or that the alleged accident even occurred.

JUDGMENT

¶40 1. The claimant failed to give notice of an injury to her employer within 30 days of the date of any incident and is not entitled to workers' compensation benefits.

¶41 2. The claimant was not injured in an industrial accident as she claims and is not entitled to benefits.

¶42 3. The petition is dismissed with prejudice.

¶43 4. The claimant is not entitled to costs or any other relief.

¶44 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶45 6. 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 January, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Cameron Ferguson
Mr. Robert E. Sheridan
Date Submitted: January 12, 1999