IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9212-6663

LARSON CATTLE COMPANY

Employer/Appellant

vs.

CHARLES T. KILLEBREW

Claimant/Respondent

and

UNINSURED EMPLOYERS FUND

Co-Respondent.

ORDER ON APPEAL

On December 17, 1990, the Department of Labor and Industry (DOLI) issued its final order in the contested case in the above-entitled matter. In that order, the DOLI hearing examiner found:

> 1) Charles Killebrew was an employee of Clifford Larson d/b/a Larson Cattle Company during the period covering July, 1989 through May 11, 1990.
>
> 2) Charles Killebrew sustained injuries to his right shoulder on December 17, 1989 and to his right knee and ankle on March 17, 1990 while in the course and scope of his employment.
>
> 3) Charles Killebrew did not notify his employer of his injuries within 30 days as required by law and the employer had no knowledge of those injuries within that period of time. As such, he is not entitled to benefits under the Montana Workers' Compensation Act.

Thereafter, the claimant appealed to the Workers' Compensation Court which affirmed the DOLI order. Claimant successfully appealed to the Montana Supreme Court which reversed the ruling on the issue of proper notice (39-71-603, MCA) and remanded the case to the DOLI with specific directions. The Supreme Court stated:

[T]his 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.

On remand, the DOLI accepted supplemental briefs and proposed findings of fact consistent with the directive of the Supreme Court. No additional hearing was conducted. On November 17, 1992, the DOLI issued the ORDER ON REMAND.

The DOLI entered three additional facts and further concluded and ordered:

> 1. Charles Killebrew provided Clifford Larson d/b/a Larson Cattle Company adequate and timely notice of accident and injury within 30 days of the December 17, 1989 and March 17, 1990 job-related accidents.
>
> 2. Charles Killebrew is entitled to benefits under Title 39, Chapter 71, Part 5 of the Workers' Compensation Act for his December 17, 1989 and March 17, 1990 injuries.

Discussion and Order

The employer appealed the November 17, 1992 DOLI decision. On appeal this Court's authority and scope of review are limited as set forth in ARM 24.5.350 and section 2-4-704, MCA (1989). They read respectively:

> 24.5.350 APPEALS TO WORKERS' COMPENSATION COURT UNDER TITLE 39, CHAPTER 71 and 72 (1)An appeal from a final decision of the department of labor and industry under Title 39, chapters 71 and 72, MCA, shall be filed with the court by filing a notice of appeal which should include:
>
> (a) the relief to which the appellant believes he is entitled;
>
> (b) the grounds upon which the appellant contends he is entitled to that relief.
>
> (2) Service deadlines for filing an appeal are as follows:
>
> (a) from an order of determination following a rehabilitation panel evaluation, within ten working days of the final order;
>
> (b) from an order regarding noncooperation with the rehabilitation provider, within ten working days of the department order;
>
> (c) from all other proceedings within thirty days of service of the final order of the department of labor and industry.
>
> (3) The filing of the notice shall not stay the department decision. However, the court may, upon application of a party, order a stay upon terms which the court considers proper.

(4) Within ten days after the service of the petition, the department shall transmit to the court the original or a certified copy of the entire record of the proceedings under review.

(5) Because of the overriding concern in a workers' compensation case to render a prompt decision, especially in matters concerning the payment of a workers' biweekly compensation benefits, and because of the time delays inherent in remanding a case to the department to hear additional evidence, the provisions of section 2-4-701, MCA, are not appropriate in workers' compensation court proceedings within the meaning of section 39-71-2903, MCA. In lieu thereof, if a motion is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material, and that there were good reasons for failure to present it in the proceedings before the department, the court may order that the additional evidence be presented to the court.

(6) The court shall base its decision on the record, and additional evidence (if allowed). The court shall require briefs to be filed by the parties, and a proposed order.

(7) ARM 24.5.344, relating to new trials, applies to decisions under this rule. However, the decision of the court may or may not be in the form of findings of fact and conclusions of law.

2-4-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (b) because findings of fact, upon issues essential to the decision, were not made although requested.

The employer has failed to specify the basis of his appeal pursuant to the provisions of the rule or statute. In his brief, he frames the issues as:

I. DOES SECTION 39-71-603, MCA, REQUIRE THE EMPLOYEE TO NOTIFY THE EMPLOYER BOTH AS TO THE TIME AND PLACE OF THE ACCIDENT AND THE NATURE OF THE INJURY RECEIVED.

II. DID CHARLES T. KILLEBREW PROVIDE THE EMPLOYER LARSON CATTLE COMPANY NOTICE OF THE NATURE AND EXTENT OF HIS INJURIES WITHIN THE TIME ESTABLISHED BY SECTION 39-71-603, MCA.

It is difficult for this Court to determine whether the employer is challenging any of the facts or supplemental facts found by the hearing examiner. After reading the briefs, there is little, if any, insight into the statutory basis of the employer's appeal.

It would appear that the employer is arguing that the DOLI erred as a matter of law in that the DOLI shifted the proof burden to the employer and further that the DOLI failed to accurately apply the ". . . nature of the injury" provision of section 39-71-603, MCA.

While somewhat confused over the basis of the appeal by the employer, the Court has nonetheless considered it both from the standpoint of whether there are sufficient facts or "substantial evidence" for the record to support the fact finding and second, whether there is any error of law.

As to the former, the issue of substantial evidence must be considered in light of *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 827 P.2d 85, 49 St. Rptr. 102 (1992). Even though the employer does not reference any specific fact as not being in the record, the Court reviewed the record completely. Of particular import are the DOLI facts relative to the claimant's report of the accident and injury to the employer. That is, the essence of this litigation.

While the testimony of the employer and claimant differ, the hearing examiner found as fact that the employer knew of both accidents within two days of when they occurred. The claimant told the employer that his shoulder hurt after the first accident and that he was bruised about the upper body in the second accident. (See supplemental findings.)

These supplemental facts, combined with the original DOLI findings of fact and considered in light of the hearing examiner's opinion, clearly pose the crux of this case, which is whose testimony is to be believed, the claimant or the employer.

It is the credibility of the testimony issue on which the Supreme Court opinion hinges. This can be gleaned from the following excerpts from the Supreme Court opinion:

> Claimant testified that he saw his employer, Clifford Larson, on either the day following the tractor accident or two days later. He testified that he told Larson about the accident, stating, "I hurt my shoulder a little bit, but I said you know 'I'm okay it's no big deal I don't think.'"
>
> . . . .

Claimant's employer, Clifford Larson, testified that on the date of claimant's tractor accident he came out to the ranch, saw the tractor lying on its side, and knew that claimant had been involved in an accident. However, he denied that claimant had ever advised him of any injury or physical discomfort resulting from that accident.

Similarly, the high Court noted the following from the transcript testimony of the March 17, 1990 accident:

> Claimant testified that on the day following the incident with the cattle he told his employer he had been beaten up by a couple of cows and that he showed his employer the physical marks on his body which resulted from that experience. He did not describe any specific injury to his employer, and there is no evidence that he was aware of any specific injury at that time.
>
> . . . .

Clifford Larson acknowledge that in March 1990 he was aware that his employee had been "in a wreck with the cows." However, he denied having been advised that claimant was injured as a result of that incident.

On appeal, the Montana Supreme Court considered two specific issues relative to the notice defense of the employer. First, whether the claimant satisfied the statutory language of section 39-71-603, MCA, requiring notice of the ". . . nature of the injury" and second, whether the DOLI believed the employer or the claimant as the testimony was directly contradictory. The latter concern is the primary reason for the remand. The Supreme Court stated in its opinion:

> In concluding that the claimant had not satisfied the notice requirement, the hearing examiner did not specifically resolve the direct conflict between the testimony of Killebrew and Larson.

Further,

> It is not clear, therefore, whether the hearing examiner found that Killebrew had given Larson no description of any physical consequences from the accidents he described, or whether the hearing examiner simply concluded that, presuming Killebrew's testimony was true, his description of his injury was inadequate.

Later in the opinion,

> 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 the 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. [Emphasis added.]

The sufficiency of the notice of the nature of the injury was resolved by the Supreme Court in claimant's favor relying on *Wight v. Mountain West Farm Bureau Mutual Insurance Co.*, 194 Mont. 109, 634 P.2d 1189 (1981). In other words, the claimant's reference to his shoulder and upper body pain, fit within the sufficiency of *Wight* and also *Wilson v. Glacier General Assurance Co.*, 206 Mont. 63, 670 P.2d 931 (1983).

The remand was predicated on the credibility of which witness was being accepted by the DOLI.

In addition to the previous recitations from the record, the following specific instructions provide the DOLI with all the guidance needed:

> [I]n 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.

And finally,

> [T]his 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. [Emphasis added.]
>
> In reviewing the hearing examiner's opinion, it appears that he resolved the obvious conflict in testimony in claimant's favor. However, the hearing examiner's conviction is less than firm.

At page 4, line 22, the hearing examiner writes:

> He [claimant] claims to have made references to his employer on several occasions within the initial 30-day periods about his injuries but could not seem to relate any

specific conversation beyond the initial notification. The employer, Mr. L, denies any notification whatsoever.

The hearing examiner then proceeded to "interpret" the Supreme Court opinion. He states for example:

> The *Killebrew* Court presupposed that,
>
> "Claimant was not in a position to provide more information than he described because it was not until after 30 days that his injury from each of the . . . accidents worsened to the point where he sought medical treatment and was informed of the specific causes for his physical complaints."

This Court is unable to find any basis for the DOLI to attribute any presupposition of facts whatsoever. The hearing examiner has mistakenly shifted or credited the appellate court with finding facts when in fact that is his responsibility. If the DOLI hearing examiner does not find and establish the facts, the courts will review the record only to determine whether the facts that are found, are supported in the record. *Rost, supra*. It is simply erroneous to ascribe fact presupposition to the Supreme Court.

This Court is also concerned with the following statements from the hearing examiner's opinion:

> From this it seems the Court is excusing the claimant for his vagueness by viewing this as an injury which did not show its true nature and origin until after the expiration of the 30 day statute of limitations. However, since this case does not involve a latent injury, the interpretation to be given the Court's conclusion is that notification to an employer of "the nature of the injury" is waived under § 39-71-603, MCA, if a claimant, within the initial 30 day period, makes at least some attempt to bring to the employer's attention some nonspecific physical complaint and no medical examination is conducted until after expiration of the 30-day time limit. [Emphasis added.]

This Court finds nothing in the Supreme Court opinion which remotely suggests that claimants are being excused from complying with section 39-71-603, MCA, or that the notice provision of 603 are being "waived" as a result of this decision. In this regard, this Court can only conclude that the hearing examiner has misapprehended the Supreme Court opinion and its instructions on remand.

The essence of the Supreme Court's opinion is that if the claimant's testimony is to be believed, then the case law precedent of *Wight* and *Wilson, supra* have already decided the issue of how specific the "nature of the injury" report need be to comply with section 39-71-603. The dispositive question for the hearing examiner is simply put -- Do you believe the

claimant or the employer was testifying truthfully about the report of the shoulder, upper body soreness bruises, etc.

The hearing examiner's final paragraph is, unfortunately, subject to only one conclusion on review. That is that, for some reason, the hearing examiner viewed his role on remand as one dictated by the Supreme Court on the issue of credibility. That is simply not an appropriate conclusion to draw from the Supreme Court opinion nor should it be inferred.

The hearing examiner states:

> 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. The claimant is thus entitled to workers' compensation benefits for both of his accident-related injuries.

The hearing examiner appears to have concluded that the Supreme Court directed specific facts be found and that having done so, the key issue of witness credibility was necessarily weighed on behalf of the claimant. This Court is unable to ascribe the same directions from the Supreme Court to the hearing examiner. The Supreme Court was very clear in its directive to the hearing examiner. As the fact finder, he was to sort out the evidence and resolve the conflict in the testimony. Nothing in the Supreme Court opinion requires that resolution favor the claimant as it appears the hearing examiner concluded. The only dispositive element of the appellate opinion is that "the nature of the injury" component of section 39-71-603 must be consistent with prior case law, specifically *Wight* and *Wilson, supra*.

CONCLUSION

The protracted nature of this case in unfortunate. However, this Court is compelled to remand the issue once again to the DOLI to reconsider the Supreme Court's opinion and to issue findings of fact, credibility determinations, and conclusions based on the hearing examiner's independent judgment, not on what he perceives the Supreme Court wants found as fact.

IT IS HEREBY ORDERED that the above-entitled matter is **REVERSED** and **REMANDED** to the Department of Labor and Industry for further proceedings.

DATED in Helena, Montana, this 9th day of July, 1993.

(SEAL)

/s/ Timothy W. Reardon
JUDGE

c: Mr. Jerrold L. Nye
Mr. Paul E. Toennis