

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 23

WCC No. 9306-6807

JAMES D. LARSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BARRY SMITH LOGGING, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on September 22, 1993 in Missoula, Montana. Petitioner, James D. Larson was present and represented by Timothy J. Lape. Respondent, State Compensation Insurance Fund, was represented by Susan C. Witte. The petitioner and petitioner's wife, Virginia Larson, were sworn and testified. Exhibit No. 1 was offered and admitted without objection. The depositions of Barry Smith, Dr. Gregory Chapman, Marlene Catulli, Charlotte Payne, Linda Johnson and William DeCou were filed with the Court. The parties stipulated that the Court may consider those depositions. Having considered the PRETRIAL ORDER, the testimony presented at trial and through depositions, the demeanor of petitioner and Virginia Larson and the exhibits, the Court makes the following:

FINDINGS OF FACT

1. Petitioner is 41 years old. He has worked in the timber industry for over 20 years. Fourteen (14) of those years have been as a sawyer.
2. Petitioner was employed as a sawyer for Barry Smith Logging, Inc. between January 1992 and June 5, 1992.
3. Petitioner alleges that he injured his back on April 9, 1992 while working for Barry Smith Logging at a timber site near Schwartz Creek. Since the issue in this case is notice, the Court does not determine whether an industrial accident in fact occurred.

4. At the time of the alleged injury, Barry Smith Logging was insured by the State Fund.
5. On the same day as his alleged injury, petitioner told John Rockenbaugh, another sawyer working on the Schwartz Creek job site, that he had "taken a bad spill" and was "feeling kind of poorly." (Tr. at 53.)
6. Following his injury, petitioner took a couple of days off work because his back was sore. He then sought treatment for his back on April 17, 1992, from chiropractor Greg Chapman, D.C. Dr. Chapman treated petitioner on four occasions between April 17 and May 1, 1992. Petitioner paid for the treatments and did not request Dr. Chapman to submit a first report of treatment to the State Fund until early June 1992. On June 9, 1992, at petitioner's request, Dr. Chapman referred the petitioner to a neurologist.
7. Petitioner notified Barry Smith of the April 9, 1992 accident 39 days later on May 18, 1992. He filed a written claim for compensation on June 3, 1992.
8. The State Fund denied liability for petitioner's claim because petitioner failed to notify his employer of his injury within 30 days.
9. Petitioner could have notified Barry Smith of his injury within 30 days, and spoke to him in early May without informing him of the injury. Prior to his April 9, 1992 injury, petitioner had called Barry Smith at home to report another work-related injury. During previous employments he had also reported other workers' compensation injuries.
10. Barry Smith is the owner and sole stockholder of Barry Smith Logging, Inc. The company's business office is located in Smith's home in Missoula, Montana. Two-thirds of his employees work on yarding crews and the other third are employed as sawyers.
11. Petitioner claims that his April 9, 1992 conversation with John Rockenbaugh, wherein he told Rockenbaugh of his fall in the woods, constituted notice to his employer. He asserts that Rockenbaugh was his direct supervisor.
12. Petitioner was hired and paid by Barry Smith. Petitioner sent pay information directly to Smith.
13. Barry Smith assigned sawyers to different timber stands which he had contracted to cut. Typically two sawyers were assigned to an area.
14. Once assigned to an area and given general instructions, the sawyers worked separately and independently, each taking a part of the area to cut.
15. John Rockenbaugh was employed by Smith as a sawyer. Both he and the petitioner were paid by the piece. Both performed the same duties felling trees, limbing them and cutting them to length. At the time of the petitioner's injury, Rockenbaugh had worked for Smith for approximately six years. He was not employed as a supervisor.

16. Barry Smith often had one sawyer inform other sawyers as to the location of their next job site and the specific areas they were to work. He did not designate any particular individual to convey the information. He used "whoever happened to be the handy guy, I would show them the next job site or tell them where it was at." (Dep. of Smith at 28.)

17. Barry Smith showed petitioner the job site for petitioner's first job.

18. Petitioner was shown the second logging site at Schwartz Creek by John Rockenbaugh. Barry Smith instructed petitioner to meet Rockenbaugh at the Schwartz Creek exit near Clinton, Montana, and he did so on April 3, 1992. Rockenbaugh told petitioner to "follow me" to the logging site. (Tr. at 45.) At the site he showed petitioner the boundaries of the unit they were to cut, provided instructions concerning the felling of trees near the boundaries, told him the types or species of trees they were to cut and the lengths they were to be cut, told him how much rot could be taken when cutting a tree, and advised petitioner of the type of skidding equipment which would be used in the area. Later on Mr. Rockenbaugh also gave petitioner directions concerning an alternate route to the Schwartz Creek logging site so he could avoid skidding equipment. Rockenbaugh told petitioner that if he had any questions or problems, to ask him.

19. Each of the sawyers then selected an area to cut. Rockenbaugh presumed they selected their respective areas by coin toss; Larson thought that "since I was starting out there, that John gave me the option to start where I wanted. I believe he told me it didn't make any difference to him." (Tr. at 46:23-25, 47:1-2.)

20. The two sawyers proceeded to cut in their respective areas. They were some distance apart although within shouting distance of one another.

21. John Rockenbaugh exercised no supervision over petitioner's work. He did not tell petitioner that he was in charge of the job site, or that he was a supervisor.

22. Petitioner testified that following his injury John Rockenbaugh called him to tell him where the next job site was. In his testimony Rockenbaugh denied doing so, and the Court finds Mr. Rockenbaugh to be the more credible witness.

23. Petitioner testified that he reported his April 9, 1992 injury to John Rockenbaugh because he felt he was his closest contact and that he should know about his injury. He said he reported it to John Rockenbaugh because "Barry's hard to catch", and John Rockenbaugh "had been with Barry longer than anyone else and seemed to know more about what was transpiring as far as the operations were." (Tr. at 56-57.)

24. On June 24, 1992, petitioner was asked by a claims examiner for the State Fund if he worked with a supervisor and he replied, "No." (Dep. of Catulli at 11.)

25. Petitioner's claim that he believed that John Rockenbaugh was his supervisor is inconsistent with other testimony in which petitioner stated in effect that he deliberately

did not report his injury to Barry Smith because he considered it a minor injury and did not want to get a reputation for "comping out." (Tr. at 59-65.) This later testimony indicates that petitioner did not expect Mr. Rockenbaugh to tell Smith about the injury.

26. John Rockenbaugh was not a supervisor for Barry Smith Logging.

27. John Rockenbaugh testified that he believed it would be reasonable for petitioner to assume that he was petitioner's supervisor. However, at the time of his employment with Barry Smith Logging, the petitioner in fact did not believe that Rockenbaugh was his supervisor. Moreover, the reasonableness of any belief that petitioner might have had is a matter for the Court to determine.

28. Petitioner testified that he had sustained injuries in the past which caused soreness and stiffness similar to that of his April 9, 1992 injury. He testified that these injuries would typically resolve themselves over time and with chiropractic treatments. Petitioner also testified that prior to May 18, 1992, he did not believe the injury to be a serious one.

29. Petitioner's back pain became progressively worse, and he quit working on June 5, 1992, because he was physically unable to perform his job as a sawyer.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

2. Section 39-71-603, MCA, required petitioner to notify his employer of his industrial accident within 30 days of its occurrence. The section provides:

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, 743 P.2d 104 (1987) (citing *Bender v. Roundup Mining Co.*, 138 Mont. 306, 309, (1960)).

Petitioner concedes he did not notify Barry Smith or the insurer within thirty days of his injury. He did not provide notice until the 39th day after his injury. He argues, however, that his reporting of the injury to John Rockenbaugh was sufficient because Rockenbaugh was a supervisor for Barry Smith Logging. In the alternative he contends that his delay is excused

because (1) the logging industry generally discourages claims, (2) he did not appreciate the severity of his injury and (3) the delay did not prejudice either the employer or the insurer.

3. Section 39-71-603 is satisfied if 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" learns of the injury within the prescribed 30 day period. The provision is satisfied only where someone with supervisory status or authority is notified or has actual knowledge of the injury. **Bender v. Roundup Mining Co.**, 138 Mont. 306, 312-3, 356 P.2d 469 (1960). Notice to a co-employee does not satisfy this section. **Maki v. Anaconda copper Mining, Co.**, 87 Mont. 314, 320-322, 287 P.2d 170 (1930); **Hartl v. Commercial Union Assurance Co.**, 176 Mont. 540, 544, 579 P.2d 1239 (1987).

The question which must be answered in this case is whether Barry Smith's use of John Rockenbaugh to communicate information regarding the job site and timber specifications clothed Rockenbaugh with either actual or ostensible supervisory authority for the company.

While neither the Workers' Compensation Act nor case law provide specific criteria, or a facile test, for determining whether one is a supervisor, the determination must be made in the context of the purpose of the notice requirement:

The purpose of the notice requirement or actual knowledge in lieu thereof is to enable the employer to protect himself by prompt investigation of the claimed accident and prompt treatment of the injury involved with a view toward minimizing its effects by proper medical care. Thus the only common sense interpretation of [the requirement] . . . is that there must be actual knowledge of the accident and injury on the part of *someone in authority* in respondent's business occupying a supervisory status as a representative of the employer, *so that in the ordinary course of business, steps will be taken to protect the employer in line with the purpose of the statute.*

Bender v. Roundup Mining Co., 138 Mont. at 313 (citations omitted). Thus, a supervisor is someone who can be reasonably expected to take action when an injury occurs and to protect the employer's interest.

In **Bender** the Supreme Court rejected a contention that a co-employee was a supervisor where the co-employee was an old company "firehorse" who had retired but then returned to assist and help in the paymaster's office, "kind of acting as an assistant to fill in for the assistant secretary-treasurer." *Id.* On the other hand, a company nurse whose job entails treating injured workers is deemed the company's "managing agent insofar as notice of the injury is concerned." **Ackerman v. Pierce Packing Co.**, 206 Mont. 508, 510, 672 P.2d 267 (1983). Because **Bender** and **Ackerman** are fact specific they do not provide a ready answer to the question in this case.

Bender does, however, make reference to "someone in authority", and the statute itself speaks in terms of a "managing agent or superintendent in charge." These terms, as well as the term "supervisor", suggest that substantive power or control is a characteristic of a supervisor.

While not defined in the Workers' Compensation Act, "supervisor" is statutorily defined in the context of the Collective Bargaining Act For Public Employees, Title 39, Part 31, MCA. Section 39-31-103(3) provides:

(3) "Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature **but requires the use of independent judgment.**" [Emphasis added.]

The definition mirrors the one contained in the National Labor Relations Act, 29 U.S.C. § 152(11). In connection with the latter Act one court has observed:

The mere fact that an employee may give some instructions to others, or that he may command their respect, does not indicate that he must identify with the interests of the employer rather than the employees. **The test must be the significance of his judgments and directions.**

Stop & Shop Companies, Inc. v. N.L.R.B., 548 F.2d 17, 19 (1st Cir. 1977)(citations omitted; emphasis added). Another court found that despite the fact an employee assigned work to other employees, he was *not* a supervisor since he spent almost all of his time performing manual labor and did not have any authority over hiring, firing or discipline. **N.L.R.B. v. Orr Iron, Inc.**, 508 F.2d 1305 (7th Cir. 1975). Not only must there be authority to act on behalf of the employer, the authority must involve a use of "true independent judgment." **N.L.R.B. v. Aquatech, Inc.**, 926 F.2d 538, 548 (5th Cir. 1991); **N.L.R.B. v. Concord Furniture Industries, Inc.**, 675 F.2d 426, 428 (1st Cir. 1981).

While the definitions and decisions accruing to the National Labor Relations Act are not binding in this case, they nonetheless are helpful in analyzing Mr. Rockenbaugh's position. As in **Orr**, almost all of Mr. Rockenbaugh's time was spent performing manual labor. The directions he relayed to petitioner were informational. He had no substantive authority over petitioner's work, and no power to hire, fire or discipline him. While he offered to answer any questions petitioner might have had, that offer was in the context of the information he had been authorized to convey to petitioner. Both Rockenbaugh and petitioner were experienced sawyers. They worked independently and their earnings were based on their individual output. Barry Smith selected job sites, collected wage information, and paid both men. Petitioner reported his earlier work-related injury to Smith.

In **Stop & Shop Companies** the Court of Appeals for the First Circuit suggested a crude, visceral test for determining supervisory status:

To put the issue in homely terms, do the other employees feel, assuming the alleged supervisor is one who reasonably respects his duties, "Here comes that so-and-so, get to work," or is he, basically, but one of the gang who merely gives routine instructions?

548 F.2d at 19. The evidence in this case fails to support the "so-and-so" characterization. In fact, when asked on June 24, 1992 whether he had worked with a supervisor, petitioner replied, "No." He also had no expectation that Mr. Rockenbaugh would report petitioner's injury to Barry Smith. In fact, he testified at trial that he initially did not report the injury to Smith because he considered it a minor injury and he did not want to get a reputation for "comping out." (Tr. 59-65.)

Kane Plumbing, Inc. v. Small, 371 S.E. 2d 828 (Va.App. 1988), which is cited by petitioner, is inapposite. In **Kane**, a plumber's helper injured his knee. He reported his injury to the plumber. The court held that the plumber was the helper's supervisor because he was directing him in his work. The helper's job in that case was to do "[w]hatever the [plumber] tells me to do." 371 S.E.2d at 829 (*bracketed material in the original*).

In conclusion, Mr. Rockenbaugh was not a managing agent, superintendent in charge, or supervisor. Petitioner's report of his injury to Mr. Rockenbaugh did not constitute notice to the employer under section 39-71-603, MCA.

4. Petitioner argues that if Mr. Rockenbaugh was not a supervisor in fact, then he was at least an ostensible supervisor.

Ostensible agency is defined in § 28-10-103, MCA, 1991, as follows:

An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him.

Whether an ostensible agency exists must be determined from all the facts and circumstances surrounding the transaction.

". . . The test is found in a determination of the exact extent to which the principal held the agent out or permitted him to hold himself out as authorized, and what a prudent person, acting in good faith, under the circumstances would reasonably believe the authority to be."

Butler Mfg. Co. v. J & L Imp. Co., 167 Mont. 519, 527, 540 P.2d 962 (1975). Ostensible agency must be based on "some act or want of ordinary care" which leads another to believe that an agency exists even though it in fact does not. **Hartt v. Jahn**, 59 Mont. 173, 182, 196 P.2d 153 (1921); **Miller v. Cascade Northern Co.**, 181 Mont. 66, 592 P.2d 156 (1979); **Elkins v. Husky Oil Co.**, 153 Mont. 159, 168, 455 P.2d 329 (1969). The belief that

another is an agent must be reasonable. **Kraus v. Treasure Belt Mining Co.**, 146 Mont. 432, 435-6, 408 P.2d 151 (1965).

In this case neither Barry Smith nor John Rockenbaugh told petitioner that Rockenbaugh was his supervisor. The only authority given Rockenbaugh was to pass information on to petitioner regarding the cutting area and cutting specifications. Barry Smith did nothing to create any impression that Mr. Rockenbaugh could direct or control petitioner's work. Moreover, at the time of his employment, petitioner did not believe Rockenbaugh to be his supervisor. The elements for creation of an ostensible agency are lacking.

4. Petitioner argues that sawyers are discouraged from reporting every accident that occurs on the job, and that they only report injuries when they become serious or when they affect their ability to work. He also argues that his notice to Barry Smith 39 days after the accident was sufficient because he did not realize the seriousness of his injury.

Petitioner testified that the logging industry frowns on employees who file workers' compensation claims. Even if his belief is genuine, he failed to establish the elements necessary to estop the respondent from asserting a defense based on the 30-day notice requirement. An employer does not have an affirmative duty to inform a worker of the right to file a workers' compensation claim; the duty to act is on the employee. **Schmidt v. Proctor & Gamble**, 227 Mont. 171, 175, 741 P.2d 382 (1987). Estoppel arises only where an employer or insurer "has taken some **positive** action which either prevents the claimant from making a claim or leads him reasonably to believe he need not file such a claim." **Ricks v. Teslow Consolidated**, 162 Mont. 469, 481, 512 P.2d 1304 (1973)(emphasis added). "[I]t is essential to establish an equitable estoppel that the party sought to be estopped have knowledge that he is misleading the claimant and an intention to mislead the claimant to his detriment." (*Id.* at 487.) The doctrine of equitable estoppel applies "when an employer or insurer misleads a claimant by foisting onto the claimant a misinterpretation of the Workers' Compensation Act." **Davis v. Jones**, 203 Mont. 464, 466-7, 661 P.2d 859 (1983). There was no credible evidence presented in this case that Barry Smith misled petitioner concerning the need for him to report any on-the-job injury, or discouraged him from reporting his injury.

Petitioner's argument that the 30-day period for reporting his injury did not commence until he realized the seriousness and possible compensability of his injury is similarly unsupported. Section 39-71-603 plainly requires that notice be given within 30 days after the accident occurs. "Simple ignorance of compensability, absent any evidence of estoppel by the employer or medical disinformation [is insufficient] to toll the notice requirement". **Reil v. Billings Processors**, 229 Mont. 305, 314, 746 P.2d 616 (1987). The experience of pain at the time of a job-related incident, and the continuation of that pain, are sufficient to put a worker on notice of the "nature, seriousness, and probable

compensable character of the injury." **Schmidt v. Proctor & Gamble**, 227 Mont. 171, 176, 741 P.2d 382 (1987).

A factually similar case, **Masters v. Davis Logging**, 228 Mont. 441, 743 P.2d 104 (1987), involved a sawyer who was flipped onto his back while sawing branches off a tree. As in this case, the claimant in **Masters** argued that the period for reporting his injury to his employer did not commence until he recognized the extent of his injury. The Montana Supreme Court rejected his contentions.

A review of the facts indicates that a reasonable person should have been aware that a serious injury had been sustained. Masters [the claimant] testified that he suffered pain which impaired his ability to work and that the pain progressively increased. The pain caused discomfort to the degree that Masters felt it was necessary to engage the services of a chiropractor on a regular basis. These facts do not indicate a latent injury.

Id. at 444-445. As in **Masters**, the petitioner in this case experienced immediate pain. He saw a chiropractor on four occasions within the three weeks following the injury. He was unable to work for two days following the incident due to his pain. The injury was not latent and petitioner's failure to report it within 30 days bars his claim.

The foregoing discussion assumes that the latent injury doctrine, which applies to the one-year statute of limitation for filing a written claim, has been extended to the 30-day notice requirement. It has not. **Masters**, 228 Mont. at 444; **Roessell v. Rivendale**, 244 Mont. 175, 797 P.2d 174 (1990).

6. Finally, petitioner argues that the 30-day notice requirement should not be applied because neither the employer nor the insurer were prejudiced by his belated notice. The statute is clear on its face. While one of its purposes is to avoid the prejudice which may occur in cases of stale claims, section 39-71-603 does not require proof of prejudice as a condition for invoking a bar.

7. Respondent was not unreasonable in denying petitioner's claim. It performed adequate investigation into the claim and had a reasonable basis to deny it, and the claim has been determined not to be compensable.

8. Petitioner is not entitled to an award of attorney fees or costs.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Petitioner failed to provide his employer with notice of his alleged injury within the 30 days prescribed by section 39-71-603, MCA.

3. Respondent's denial of petitioner's claim was not unreasonable.

4. Petitioner is not entitled to an award of attorney fees or costs.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 17th day of December, 1993.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Timothy J. Lape

Ms. Susan C. Witte