**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2004 MTWCC 77**

**WCC No. 2004-1071**

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**TONI WARREN**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent/Insurer.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Claim for compensation denied on account of the claimant's alleged untimely reporting of her accident to her employer.

**Held:** After assessing the credibility of the witnesses, the Court finds as a matter of fact that the claimant reported her industrial accident within thirty days as required by section 39-71-603, MCA (2003), and that the accident in fact occurred. The claim is therefore compensable.

**Topics:**

> **Credibility.** Based on the Court's observation of the demeanor and testimony of the witnesses at trial, and taking into consideration the claimant's explanation of the circumstances surrounding the filing of her written claim, the Court finds the claimant credible and enters its findings accordingly.

¶1 The trial in this matter was held in Kalispell, Montana, on November 8, 2004. The petitioner was present and represented by Mr. Kevin A. Duff. Respondent was represented by Mr. David A. Hawkins.

¶2 Exhibits: Exhibits 1 through 3 were admitted without objection.

¶3 Witnesses and Deposition: Toni Warren, Rod Bauer, Cheryl Brenno, and Shane Brenno testified at trial. The parties also submitted the deposition of Toni Warren for the Court's consideration.

¶4 Issues Presented: The Court restates the issues as follows:

¶4a Whether the petitioner injured her elbow and shoulder in the course and scope of her employment.

¶4b If so, whether she reported her injury to her employer within thirty days as required by section 39-71-603, MCA (2003).

¶4c Whether the insurer unreasonably denied the petitioner's claim, thereby entitling the petitioner to attorney fees and a penalty.

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

FINDINGS OF FACT

¶6 The petitioner in this case is Toni Warren and I will refer to her hereinafter as "claimant."

¶7 The claimant was employed by the Silver Bullet Bar in Columbia Falls, Montana, from October 2003 until August 10, 2004. She worked as a bartender.

¶8 The claimant was a credible witness. I found her testimony concerning the reporting of her injury and her explanation of the facts surrounding the filing of her written claim both plausible and convincing. The findings of fact that follow reflect that assessment.

¶9 On January 6 or 8, 2004, the claimant was injured in the course and scope of her employment while taking bar garbage out to a dumpster. She slipped on the outside steps, hitting and injuring her elbow and shoulder.

¶10 The claimant reported the incident to Shane Brenno (Shane), the bar manager the next day, telling him she had slipped on the stairs and hurt her shoulder and elbow. A week or two later, she also reported to Merle Brenno (Merle), one of the bar's owners, that she had fallen and hit her shoulder although she did not tell him the time and place of her fall.

¶11 The claimant initially did not believe she had been seriously injured and did not seek medical care. However, her shoulder continued to bother her and she mentioned her injury to a nurse practitioner she saw on February 12, 2004. (Ex. 2 at 1.) The nurse practitioner reported that the claimant described her injury as having occurred a "month and a half ago" (*id.*), although the claimant testified that she believes she told the nurse practitioner the injury happened three to four weeks previous to her office visit.

¶12 On February 26, 2004, the claimant discussed filing a written claim with Shane. At that time she could not recall the date of her injury. Shane believed that the claim had to be filed within thirty days of the injury and suggested they use January 28, 2004, as the injury date.

¶13 The claimant returned to the nurse practitioner on February 27, 2004, because of continuing pain. (*Id*. at 2.) She was diagnosed with a possible rotator cuff injury. *(Id*.)

¶14 The claim was signed by Merle on March 1, 2004, and submitted to the Montana State Fund (State Fund), which insured the bar. The claim was assigned to Ms. Bridget Scevers, an adjuster for the State Fund. She requested medical records. Upon receiving the records of the nurse practitioner, Ms. Scevers apparently noted the entry indicating that the claimant's injury had occurred a month and a half prior to February 12, 2004. In light of the written claim indicating the claimant did not report the injury to her employer until February 26, 2004, Ms. Scevers denied the claim. This litigation ensued.

¶15 I find as a matter of fact that the claimant reported her injury to her employer the day after it occurred and that she in fact suffered injuries to her elbow and shoulder in a work-related incident occurring on January 6 or 8, 2004.

¶16 However, in light of the date set out in the written claim, which was signed by the claimant, the Montana State Fund acted reasonably in denying the claim.

CONCLUSIONS OF LAW

¶17 This case is governed by the 2003 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).

¶18 The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶19 The claimant must first establish that she suffered an injury in a work-related accident. Injury and accident are defined in section 39-71-119, MCA (2003), which provides in relevant part:

> **Injury and accident defined**. (1) "Injury" or "injured" means:
> (a) internal or external physical harm to the body that is established by objective medical findings;
> (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
> (c) death.
> (2) An injury is caused by an accident. An accident is:
> (a) an unexpected traumatic incident or unusual strain;
> (b) identifiable by time and place of occurrence;
> (c) identifiable by member or part of the body affected; and
> (d) caused by a specific event on a single day or during a single work shift.

The claimant has satisfied all of the foregoing criteria. I therefore conclude that she suffered a compensable industrial injury.

¶20 The State Fund urges that the claim is barred because the claimant failed to give her employer timely notice of her injury. It relies on section 39-71-603, MCA (2003), which provides in relevant part:

> **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.

I have found as a matter of fact that the claimant reported her industrial accident the day after it occurred. That report was timely under section 39-71-603, MCA (2003), therefore her claim is not barred by the section.

¶21 Accordingly, the claim in this case is compensable and the State Fund is liable for benefits to the extent provided by law. It is liable for medical expenses related to her injury. § 39-71-704, MCA (2003). The Court presently does not have before it any dispute involving the amounts payable or whether the claimant may be entitled to any indemnity benefits. It therefore does not address those matters.

¶22 The claimant has also asked for attorney fees and a penalty. Those requests are governed by sections 39-71-611 and -2907, MCA (2003). Both require proof that the insurer has unreasonably denied benefits. While I have resolved this case in the claimant's favor, the timeliness of the claim raised a significant, bona fide issue of fact. The State Fund had reasonable grounds to deny the claim.

## JUDGMENT

¶23 The claimant suffered an industrial injury on January 6 or 8, 2004, involving her left shoulder and elbow. She timely reported the claim to her employer and timely filed a written claim. The State Fund is therefore liable for her industrial injuries. It shall pay medical expenses incurred to date with respect to the injuries and any future medical expenses related to the injuries. The Court retains jurisdiction to determine the amount of past-due medical benefits in the event the parties are unable to agree on an amount.

¶24 The Court makes no determination as to the claimant's present or future entitlement to indemnity benefits since her entitlement to specific indemnity benefits was not an issue raised in the present proceeding.

¶25 The claimant is entitled to costs but not to attorney fees or a penalty.

¶26 The claimant's attorney has a lien for attorney fees on medical benefits payable as a result of this decision. *Lockhart v. New Hampshire Ins. Co.,* 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

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

¶28 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 23rd day of November, 2004.

(SEAL)

MIKE McCARTER
JUDGE

c: Mr. Kevin A. Duff
Mr. David A. Hawkins
Submitted: November 10, 2004