

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

**2018 MTWCC 6**

**WCC No. 2017-3947**

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**CARMEN HEICHEL**

**Petitioner**

**vs.**

**LIBERTY MUTUAL INSURANCE**

**Respondent/Insurer.**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**

**Summary:** Petitioner asserts she injured her neck and shoulder in an industrial accident and told her manager of the accident and injury later that shift. Petitioner also asserts she told two other managers of her accident and injury within 30 days. The managers deny that Petitioner told them she suffered an industrial injury. Two of the managers testified that Petitioner initially said she was injured in a fall at her home.

**Held:** After weighing the evidence, this Court finds that Petitioner did not give her employer notice of her alleged industrial accident and injury within 30 days. Therefore, Petitioner's claim is not compensable under § 39-71-603(1), MCA.

¶ 1 The trial in this matter was held on February 22, 2018, in Kalispell. Kraig W. Moore represented Petitioner Carmen Heichel. Morgan M. Weber represented Respondent Liberty Mutual Insurance (Liberty).

¶ 2 **Exhibits:** This Court admitted Exhibits 1 through 26, 28 through 30, and 32 through 58 without objection. Petitioner withdrew her hearsay objections to Exhibits 27 and 31, and this Court admitted them.

¶ 3 **Witnesses and Depositions:** This Court admitted the depositions of Heichel, Donna Hadley, Brandon Hice, Mark McCollom, Justin Ridinger, Allen Reidhead, and Heidi Brown into evidence. Heichel, Deanna Guertin, f/k/a Deanna Hegdahl (Guertin), Ridinger, and Brown were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues in the Pretrial Order as follows:

Issue One: Did Heichel timely notify her employer of her alleged industrial injury under § 39-71-603(1), MCA?

Issue Two: Did Heichel suffer an injury to her shoulder and neck at work on September 21, 2015?

Issue Three: Did Liberty unreasonably refuse to accept liability for Heichel's claim, thereby entitling Heichel to her attorney fees under § 39-71-611 and -612, MCA, and a penalty under § 39-71-2907, MCA?

#### FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 Heichel worked as an assistant baker at Manito Super 1 Foods (Super 1) in Kalispell. Super 1 is open 24 hours a day, and always has a manager on duty.

¶ 7 Super 1's Employee Handbook states that employees are required to report all injuries to a manager, who is to have the employee fill out an incident report. The managers do not receive a bonus, or any other incentive, based on the number of Super 1's workers' compensation claims.

¶ 8 In the fall of 2015, Guertin was the store director. Ridinger was the grocery manager. Brown was the bakery manager. Guertin, Ridinger, and Brown each had a good working relationship with Heichel.

¶ 9 Heichel worked alone from 1:00 a.m. until around 5:00 a.m., when the assistant bakery manager and/or Brown would start their shift. Heichel worked until 9:00 or 10:00 a.m., depending on the bakery's needs.

¶ 10 Heichel alleges that on Monday, September 21, 2015, at some point between 1:00 a.m. and 2:30 a.m., she injured her right shoulder and neck while lifting a 50- to 60-pound bucket of corn syrup. Heichel testified that she lifted the bucket to the countertop to open it, but that she got the bucket only partly on the countertop, and that as the bucket began to fall, she tried to grab it, and the bucket yanked her arm. She testified that she heard a loud "popping" in her shoulder and neck and felt pain and a burning sensation.

¶ 11 Heichel did not inform the manager on duty that night of her alleged accident and injury.

¶ 12 Heichel testified that shortly after this accident, she told McCollom, who worked the night shift as a stocker, about the accident and that she hurt her neck and shoulder, but that she was going to continue working. However, McCollom did not recall Heichel

telling him that she injured her neck and shoulder in the bakery and did not know if Heichel had ever been injured in the bakery.

¶ 13 Heichel also testified that shortly after Brown arrived at work, she told Brown about the accident, describing it in detail, and told Brown she thought she was injured. Heichel testified that she told Brown she thought she would need to see a doctor, but could finish her shift and would let Brown know if “it starts acting up.” According to Heichel, Brown encouraged her to see a doctor. Heichel testified that she thought Brown would report her accident and injury to Guertin.

¶ 14 Brown denied that Heichel said she had an accident or suffered an injury in the bakery on September 21, 2015. If Heichel had, Brown would have instructed her to go to the office and fill out an incident report with the manager and would have followed up with Heichel and the manager, as Brown had done with another employee who reported that she injured her knee in the bakery. Brown also denied that Heichel said anything about lifting a bucket of corn syrup, said anything about her shoulder hurting, and denied that Heichel exhibited any signs of pain, or asked for any help with her work duties. Brown explained that she would have remembered if Heichel had said she injured herself, because “it would just be something that would stick with you.” Brown also explained that she would have remembered if Heichel stated she had injured herself lifting a bucket of corn syrup to the counter, because the only time bakery employees lift full buckets of corn syrup is when they move them from a pallet onto a flat cart, which is then wheeled around the bakery. Brown trained Heichel to open the buckets of corn syrup while they are on the floor, which is easily done. Brown explained that there is no reason to lift the buckets of corn syrup to the counter and that she had not seen any of her employees do that. Brown had observed Heichel opening buckets of corn syrup while they were on the floor.

¶ 15 Heichel was not scheduled to work on Tuesday, September 22, or Wednesday, September 23, but returned to work on Thursday, September 24, 2015. Heichel testified at trial that she told Brown her shoulder was sore but she was “going to try and work through it.” At her deposition, Heichel testified that she again told Brown she hurt her shoulder while lifting a bucket of corn syrup. But at trial, Heichel testified that she did not tell Brown the cause of her shoulder pain “because I had already told her that on the 21<sup>st</sup>. I didn’t feel I had to repeat it over again when she knew that I had already hurt it.” Heichel testified that she again told Brown she thought she needed to see a doctor. Heichel testified that Brown again encouraged her to schedule a doctor’s appointment.

¶ 16 Brown denied that Heichel said anything about her shoulder hurting on September 24, 2015. Brown did not recall Heichel moving as if she had hurt her shoulder, nor asking for help with her work duties.

¶ 17 Heichel worked on Friday, September 25, and Saturday, September 26, 2015. Super 1 had doughnut holes and old-fashioned doughnuts on sale that weekend. Consequently, Heichel spent hours cranking doughnuts, which required her to

continuously use her right arm and shoulder. Heichel testified that her shoulder pain worsened.

¶ 18 On Sunday, September 27, 2015, Heichel tripped and fell over one of her dogs in her driveway. She testified that she had a “little” road rash on her elbow. She denies injuring her shoulder in this fall.

¶ 19 Heichel worked on Monday, September 28, 2015. When Heichel was washing dishes, Brown and Heichel had a conversation about their weekends. Brown saw the scab on Heichel’s arm, which she described as “large,” and asked Heichel what had occurred. Heichel told Brown about falling over her dog. They laughed about Heichel’s story, as Brown explained that it did not appear that Heichel was seriously injured in this fall, and it was a light-hearted conversation. Heichel testified that Brown was the only person at Super 1 she told about falling over her dog. Heichel testified that, during this shift, she again told Brown her shoulder pain was worsening and she thought she needed to see a doctor.

¶ 20 Heichel was not scheduled to work on Tuesday, September 29 or Wednesday, September 30, 2015. On September 30, 2015, Heichel made a doctor’s appointment for the following day. She called Brown at 8:21 p.m. and told Brown she could not work her shift starting at 1:00 a.m., because she had unbearable shoulder pain and she needed to be seen by a doctor. Heichel did not tell Brown she injured her shoulder in an accident in the bakery; Heichel testified that because she told Brown on September 21, 2015, that she injured her shoulder in the bakery, she assumed that Brown knew that was why her shoulder was hurting. On the Absent Report, Brown wrote “called in sick.”

¶ 21 On October 1, 2015, Heichel saw Timothy J. Stutzman, MD. Heichel testified that she told Dr. Stutzman and his nurse her injury occurred on September 21, 2015, when she lifted a bucket of corn syrup at work. She testified that she also told Dr. Stutzman she had fallen over her dog. However, in the history section of his report, Dr. Stutzman did not document a workplace injury. He wrote:

10 days of right shoulder/neck pain. ***Not sure what triggered the pain.*** Significant pain with adduction of the right shoulder. Worse with movements of the neck with radiation down into the right arm. Fell a couple of days ago on the right arm. Severe pain with lifting. Burning and sharp pain that is constant with severe jolting pains with movement. Unable to sleep due to the pain. 10/10 pain. Taking [Aleve] and did take a [P]ercocet last night due to the pain as well. Did help for around 3 hrs but now pain is back.<sup>1</sup>

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<sup>1</sup> Emphasis added.

Dr. Stutzman's assessment was: "Acute pain of right shoulder . . . . I suspect this is either related to rotator cuff inflammation or injury versus radiculopathy from the neck, difficult to assess on exam due to severity of the pain." Dr. Stutzman wrote her an off-work slip stating:

Pt seen today with Right shoulder pain. I would recommend she remain off work for the next week.

¶ 22 After her appointment, Heichel took this off-work slip to Super 1 and went directly to the main office. She testified that she gave it to Ridinger, who managed the grocery department, and told him that she had hurt herself in the bakery.

¶ 23 However, Ridinger does not recall Heichel giving him any off-work slip and denies Heichel telling him she hurt herself in the bakery. He states that if she had told him that, he would have had her fill out an incident report and sent it to Liberty, as he had done on the approximately 20 occasions an employee has reported a workplace injury to him. Ridinger also explained that he would have discussed Heichel's injury claim with Brown and Guertin.

¶ 24 On October 2, 2015, Heichel and Brown spoke at Super 1. Brown filled out an Absent Report for October 2-8, 2015, stating that Heichel had an "Issue w/ shoulder." During this conversation, Heichel did not say she hurt her shoulder when she fell over her dog. However, Brown assumed Heichel injured her shoulder when she fell over her dog because a few days after that incident, she reported shoulder pain that prevented her from working and because she had not given Brown any other explanation as to how she had been injured.

¶ 25 Heichel returned to Dr. Stutzman on October 8, 2015. Dr. Stutzman noted that Heichel had significant pain from her shoulder blade which radiated to her elbow. Dr. Stutzman did not state a cause of Heichel's injury. Dr. Stutzman wrote an off-work slip stating:

Carmen Heichel evaluated in the office today. I recommend she remain off work until reevaluation on 10/15/15.

¶ 26 Heichel took this slip to Super 1, and first spoke to Brown, who told Heichel to take the off-work slip to the office. As Heichel left the bakery, Brown jokingly told Heichel to watch out for her dogs. In response, Heichel stated her injury was not from falling over her dog; rather, Heichel said her injury was probably from cranking doughnut holes. Brown took this as a joke, because Heichel laughed after she said it. When asked why she did not fill out an incident report, Brown explained: "I didn't think she was being serious. I thought she was joking around."

¶ 27 Heichel denies telling Brown that she injured her shoulder cranking doughnuts.

¶ 28 Heichel went to the office and gave the off-work slip to Ridinger. At her deposition, Heichel testified that she again told him she had hurt her arm, shoulder, and neck lifting a bucket of corn syrup in the bakery.

¶ 29 Ridinger denies that Heichel told him she was injured in the bakery.

¶ 30 On October 13, 2015, Heichel returned to Dr. Stutzman. Dr. Stutzman noted that she was still in significant pain, which increased with activity. Dr. Stutzman ordered an MRI. Dr. Stutzman wrote an off-work slip stating:

Carmen Heichel seen again today and is in need of further imaging and specialist evaluation. At this time she is unable to work with return pending upon further evaluation.

¶ 31 After her doctor's appointment, Heichel took her off-work slip to Super 1. Heichel gave the slip to Ridinger, who was near his office. Heichel and Ridinger then went into Guertin's office. Mary Dahlke, a cashier, was also in Guertin's office. Ridinger gave Heichel's off-work slip to Guertin.

¶ 32 Heichel gave conflicting accounts as to whether she told Guertin and Ridinger that she had suffered injuries while lifting a bucket of corn syrup at the bakery, and as to what she told them. On direct examination, Heichel testified that when she met with Guertin and Ridinger on October 13, 2015, she only "assume[d] they knew about it at that point, to the best of [her] knowledge." Heichel explained that she assumed they knew she was injured in the bakery because she thought Brown had told them about her accident and injury. Heichel then testified that she told Guertin and Ridinger she had hurt her shoulder by lifting, but that Guertin did not give her a chance to elaborate. However, on redirect examination, Heichel testified that she told them: "that I had hurt my shoulder in the bakery, and that I wouldn't be able to work due to the injury." Heichel then testified that she "didn't specifically say lifting to them."

¶ 33 Heichel testified that Guertin commented about the amount of time she had missed, which gave Heichel concerns about keeping her job. Heichel testified that Guertin stated that if she was not back by a certain time, Super 1 would have to fill her position. Heichel testified that she told Guertin and Ridinger she had an MRI scheduled for October 16, 2015, and her doctor would not know her prognosis until then. Heichel testified that Guertin told her not to worry, and that "everything should be taken care of." Guertin had her fill out paperwork for a MetLife disability policy.

¶ 34 Guertin, Ridinger, and Dahlke recall this meeting differently; they recall that Heichel blamed her shoulder injury on her fall over her dog. Shortly after the meeting ended, Guertin wrote a statement:

Carmen Heichel came into my office to drop by her doctor's note about being off of work. I asked her what had happened and she said that [she]

tripped over her dog and hurt her shoulder, after wards [sic], by the other dogs being on top of her. Mary Dahlke was also in the office at the time of this statement.

During his recorded statement, Ridinger stated that Heichel said “she tripped over her dogs and then, um, that that’s what did it. ‘Cause I remember when she was telling us it was, you know, she even made the comment of dang dogs.” Ridinger then stated, “[Guertin] and I were both in the office together when we had that conversation with her when she was saying the ‘dang dogs’ part.” Likewise, Dahlke wrote a statement in which she recounted that before this meeting, Heichel told her at her cash register that she hurt her shoulder when she tripped on her dogs and that, at this meeting, “We were talking about her injury and her dang dog[s] and how they’d caused her problem.”

¶ 35 Guertin did not prepare an incident report “because it wasn’t a work-related issue.”

¶ 36 Heichel denied telling Dahlke at Dahlke’s register that she hurt her shoulder when she tripped over her dog, and testified that at the October 13, 2015, meeting, “there was no conversation in regards to dogs.”

¶ 37 On October 20, 2015, Heichel spoke to Guertin about filling out the forms for leave under the Family Medical Leave Act (FMLA). Guertin gave the forms to Heichel and told her that she needed to take one of the forms to Dr. Stutzman’s office and, after he filled out the physician’s part of the form, bring the originals back to Super 1.

¶ 38 Heichel filled out the Employee FMLA Leave Request Form in Guertin’s office, on which she wrote: “Shoulder injury due to lifting.” Heichel testified that she did not specifically state she injured her shoulder in the bakery, as she still assumed Guertin knew she had injured her shoulder lifting a bucket of corn syrup in the bakery. On the Certification of Health Care Provider form, which Dr. Stutzman filled out on October 20, 2015, Dr. Stutzman wrote that Heichel had, “Subacute onset of severe right shoulder pain and movement limitation consistent with rotator cuff tear or tendinopathy.” Dr. Stutzman also wrote, “Started 9/21/15, duration unknown due to unknown current cause and prognosis.”

¶ 39 On November 13, 2015, Heichel saw Benjamin Ward, MD, an orthopedist. Dr. Ward noted:

Ms. Heichel is a 50-year old female, referred by Dr. Stutzman, for evaluation of right shoulder pain. She was working in the bakery in September, when she was lifting a heavy pot of corn syrup and felt a pop in the right shoulder. She had immediate pain. She has had persistent pain in the anterior aspect of the right shoulder since then. She saw Dr. Stutzman, and an MRI was obtained. She has not had any formal physical therapy as of yet.

. . . The right Shoulder Pain has been present for about months [sic]. The onset was noted suddenly. The right Shoulder Pain is secondary to an acute injury. The cause of the injury was: "Lifted heavy object an[d] then fell." The patient denies pain prior to the injury. The patient has pain which is felt constantly. The pain is located in the anterior shoulder, in the posterior shoulder, in the upper arm, in the body of the scapula and is described in nature as a moderate, deep, stabbing, aching. On a scale of 1 to 10 the pain is judged a "9."

¶ 40 On November 16, 2015, Heichel received a letter from Super 1 stating she was going to be terminated. Heichel became very upset, and went to Super 1, where she met with Guertin. Heichel gave her FMLA paperwork to Guertin. According to Heichel, she told Guertin she should not be terminated because she was injured in the bakery.

¶ 41 Guertin recalls this meeting differently. Guertin recalls that Heichel was concerned as to how she was going to pay for her surgery, and that Heichel said she thought work should cover it because her shoulder injury was caused by cranking doughnuts. Guertin then asked how that could be true, given that Heichel had previously told her she hurt her shoulder when she fell over her dog, a statement that Heichel indicated was true. After this exchange, Guertin "knew at some point there was going to be a problem," and called her supervisor and Super 1's Human Resources manager, who advised her to document the conversation. Thus, Guertin wrote another statement:

Carmen Heichel came to see me today with her FMLA paperwork in hand. She wanted to talk to me about her insurance and how cobra got started. She shared her concerns about how she was going to pay for the possible upcoming surgery. She said, at that point, that she didn't understand why work wasn't covering it because it was due to the donut frying. I reminded Carmen at that point, that she had told me and others at the time of the original accident, (at the beginning of October) that she had hurt her shoulder by tripping over her dogs. She said she knew that but maybe it was from donut frying. I just said again that she had told us it was from tripping over her dogs. She didn't say anything back to me.

¶ 42 Heichel testified that she assumed Guertin knew she injured her shoulder in the bakery because she thought Brown had told Guertin, and denied telling Guertin she hurt her shoulder from falling over her dog or from cranking doughnuts.

¶ 43 Heichel's FMLA expired on November 20, 2015.

¶ 44 On November 23, 2015, Heichel mailed a First Report of Injury or Occupational Disease to the Department of Labor and Industry, Employment Relations Division. In the Accident Description section, she wrote: "lifted 5 gallon bucket of corn syrup (50-60 lbs) and dropped it to the floor – felt popping in shoulder (right), arm and neck." Heichel wrote that she reported the accident to Brown on September 21, 2015.

¶ 45 On December 16, 2015, Guertin informed Brown that Heichel filed a workers' compensation claim. This was the first time Brown knew that Heichel was claiming a workplace accident. Brown wrote a statement for Guertin stating, "I was never informed of any work place accidents involving Carmen H."

¶ 46 On January 1, 2016, Liberty denied liability for Heichel's claim, asserting that Heichel did not suffer a compensable injury at work. Liberty noted that Dr. Stutzman wrote in the history section of his October 1, 2015, note that Heichel was "not sure what triggered the pain." In the alternative, Liberty asserted that Heichel did not timely notify Super 1 of her alleged injury, pursuant to § 39-71-603, MCA.

¶ 47 On December 20, 2016, Dr. Stutzman responded to a letter from Heichel's attorneys, in which he agreed that a jolt from dropping a full 5-gallon bucket could have caused her injuries. Dr. Stutzman also wrote that his nurse made notes during the history portion of Heichel's examination on October 1, 2015, and that "they are documented in the Chief Complaint section of the Progress Note from 10-1-15."

#### Resolution

¶ 48 Although none of the witnesses who testified at trial were completely reliable, mainly because they had trouble recalling the dates on which events occurred and could not remember details given the passage of time, Heichel did not meet her burden of proving that she gave notice of her alleged injury to Super 1 by October 21, 2015. After assessing the witnesses' demeanor and weighing the evidence, this Court finds that Heichel did not give notice to Super 1 of her alleged industrial accident or injuries until she filed her First Report of Injury or Occupational Disease in November 2015, for three reasons.

¶ 49 First, there are too many inconsistencies in Heichel's testimony for this Court to find her a credible witness. Heichel gave conflicting accounts as to what she told Brown on September 24, 2015. And, Heichel's testimony that she told Ridinger on October 1 and 8, 2015, that she was injured in the bakery cannot be reconciled with her testimony that at the October 13, 2015, meeting she only assumed that Ridinger and Guertin knew she had injured herself in the bakery because she thought Brown told them. If Heichel had twice told Ridinger about her injury in the bakery before October 13, 2015, she would not have assumed he knew about it because Brown had told him; rather, she would have had actual knowledge that he knew she was injured in the bakery. Moreover, at trial, Heichel gave conflicting accounts as to what she told Guertin and Ridinger during the meeting on October 13, 2015.

¶ 50 Second, there is no contemporaneous evidence corroborating Heichel's testimony that she was injured in the bakery on September 21, 2015, and told Brown about it the following morning, or told Ridinger about it on October 1 or 8, 2015. This Court is convinced that Brown and Ridinger would have had Heichel complete an incident report if she had reported a workplace injury. Importantly, while Dr. Stutzman noted in his record

dated October 1, 2015, that Heichel said she had 10 days of shoulder pain — i.e., that her pain started on September 21, 2015 — Dr. Stutzman also noted that Heichel was “[n]ot sure what triggered the pain.” In Dr. Stutzman’s response to Heichel’s attorney’s letter on December 20, 2016, Dr. Stutzman did not say that either he or his nurse remembered Heichel saying anything about lifting a bucket of corn syrup at work; rather, he stated that his nurse took notes, which were set forth in the history section of his medical record. Because Dr. Stutzman’s record is otherwise complete and accurate, and because Heichel did not provide any evidence from which this Court could find that Dr. Stutzman or his nurse remembered Heichel telling them she injured herself while lifting a bucket of corn syrup, this Court is not persuaded that Dr. Stutzman failed to accurately document what Heichel said to him during her initial appointment. Since Heichel was not sure what triggered her pain on October 1, 2015, it follows that she did not tell Brown or Ridinger that she injured her shoulder while lifting a bucket of corn syrup in the bakery on September 21, 2015.

¶ 51 At trial, Heichel pointed out that Dr. Stutzman wrote, “Severe pain with lifting” in his October 1, 2015, record. She asserts that this means he was attributing her injury to lifting. Heichel argues that when Dr. Stutzman wrote, “[n]ot sure what triggered the pain,” he was saying that he was not sure what her injury was and, therefore, was not sure what was causing her pain. However, Heichel’s argument is unsupported by the plain language of Dr. Stutzman’s record, and the order in which he wrote it. It is clear that Dr. Stutzman was saying that Heichel was not sure what triggered her pain on September 21, 2015, and that, over the 10 days before her appointment, she experienced pain whenever she lifted something. Dr. Stutzman was not saying that Heichel reported she injured her shoulder while lifting.

¶ 52 In contrast, there is evidence from the fall and early winter of 2015 that corroborates Brown’s, Guertin’s, and Ridinger’s testimony. Dr. Stutzman did not document a workplace injury in any of his records or off-work slips. Guertin documented the October 13, 2015, meeting, in which Heichel stated she injured her shoulder when she fell over her dog, “shortly after” the meeting occurred. Guertin documented the November 16, 2015, meeting the same day. In Dahlke’s written statement dated December 17, 2015, Dahlke recounted that Heichel told her at Dahlke’s cash register that Heichel injured her shoulder when she tripped over her dog and that Heichel again attributed her shoulder injury to her “dang dog” when they were in Guertin’s office on October 13, 2015. Although this Court cannot assess Dahlke’s credibility because she did not testify, Heichel did not provide any evidence from which this Court could conclude that Dahlke had a motive to lie. On December 16, 2015, Brown wrote that Heichel did not inform her of any workplace accidents, and reiterated that in her statement on December 29, 2015. Ridinger recounted that Heichel said she injured her shoulder when she fell over her “dang dogs” in his recorded statement, which Liberty took on December 29, 2015.

¶ 53 Third, there is insufficient evidence for this Court to find that Super 1 discouraged its employees from reporting workplace injuries; that Guertin, Ridinger, or Brown had an incentive to not report Heichel's alleged industrial injury; or that they had any animosity toward Heichel that would serve as a motive to lie.

¶ 54 This Court finds that Heichel did not tell Brown about any accident or injury occurring in the bakery. This Court also finds that Heichel did not tell Ridinger about any accident or injury occurring in the bakery when she gave him her off-work slips on October 1 and 8, 2015. This Court further finds that Heichel told Guertin and Ridinger on October 13, 2015, that she suffered her injuries when she fell over her dog, and that she did not inform Super 1 nor Liberty of her alleged September 21, 2015, industrial accident until she filed her First Report of Injury or Occupational Disease.

### CONCLUSIONS OF LAW

¶ 55 This case is governed by the 2013 version of the Workers' Compensation Act since that was the law in effect at the time of Heichel's alleged industrial injury.<sup>2</sup>

#### **Issue One: Did Heichel timely notify her employer of her alleged industrial injury under § 39-71-603(1), MCA?**

¶ 56 Section 39-71-603(1), MCA, states:

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.

¶ 57 Heichel did not give Super 1 timely notice under this statute. While the 30-day notice requirement is tolled if the employee reasonably believes that she suffered no injury requiring medical treatment,<sup>3</sup> that is not the case here. Heichel testified that on September 21, 2015, she thought she needed to see a doctor. Thus, October 21, 2015, was the last day for Heichel to give Super 1 notice of her accident. This Court has found that Heichel did not notify Super 1 or Liberty until after November 23, 2015, when she

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<sup>2</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

<sup>3</sup> *Siebken v. Liberty Mut. Ins. Co.*, 2008 MT 353, ¶ 16, 346 Mont. 330, 195 P.3d 803 (citation omitted).

mailed her First Report of Injury or Occupational Disease, more than 30 days beyond the deadline.

¶ 58 Heichel argues that the fact she reported issues with her shoulder within the 30-day window is sufficient notice, and that Super 1 should have investigated whether it was a workplace injury. However, the Montana Supreme Court has explained: “notice of an event or of pain is not enough if the information does not trigger an employer’s need for further investigation. ‘There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.’”<sup>4</sup> While Heichel notified Brown that her shoulder hurt on September 30, 2015, Heichel did not provide Brown with any other information from which Brown could have determined that Heichel had a potential workers’ compensation claim. And, because Heichel attributed her injury to falling over her dog at the meeting on October 13, 2015, Guertin and Ridinger had no reason to think Heichel’s shoulder injury involved a potential workers’ compensation claim.

¶ 59 Heichel also argues that Brown’s testimony — that on October 8, 2015, Heichel said she probably injured her shoulder cranking doughnuts — was sufficient to give Super 1 notice that she was claiming a workplace injury and that Brown should have investigated. However, Heichel does not contend that she was injured while cranking doughnuts; indeed, she unequivocally denies that is the cause of her injuries. And, a claimant cannot satisfy her duty of giving notice of an industrial accident and injury by notifying her employer of an entirely separate event occurring on a different day. Moreover, because Heichel denies that she ever made this statement, there is no evidence to contradict Brown’s explanation that Heichel laughed after she said she probably hurt her shoulder cranking doughnuts, and that it was meant as a joke.

¶ 60 Finally, Heichel argues that Liberty is equitably estopped from relying upon § 39-71-603(1), MCA, under *Kuzara v. State Compensation Ins. Fund*.<sup>5</sup> However, unlike the situation in *Kuzara*, Super 1 did not have a policy of discouraging workers’ compensation claims nor incentivize its employees for not filing workers’ compensation claims.<sup>6</sup> And, although Guertin did have Heichel fill out paperwork for a disability rather than a workers’ compensation claim, Guertin had no reason, at the time, to believe Heichel’s injury was work-related, and thus, her actions do not constitute the misrepresentation or concealment of material facts necessary to equitably estop Liberty.<sup>7</sup>

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<sup>4</sup> *Siebken*, ¶ 15 (citations omitted).

<sup>5</sup> 279 Mont. 223, 928 P.2d 136 (1996).

<sup>6</sup> See *Kuzara*, 279 Mont. at 230, 928 P.2d at 141 (explaining that the employer’s “gain-sharing plan discouraged employees from reporting injuries because if one employee reported a work-related injury, all employees stood to lose a percentage of their gain-sharing profits.”).

<sup>7</sup> See *Kuzara*, 279 Mont. at 226-27, 232-33, 928 P.2d at 138-39, 142 (holding that the insurer would be equitably estopped from relying upon § 39-71-603(1), MCA, if representatives of the employer knew claimant attributed

¶ 61 The Montana Supreme Court has explained that the notice requirement in § 39-71-603(1), MCA, “is mandatory, and compliance with the notice requirement is indispensable to maintaining a claim for compensation.”<sup>8</sup> Since Heichel did not give notice within 30 days, she did not timely notify her employer of her alleged industrial injury under § 39-71-603(1), MCA. Therefore, her claim is not compensable.

**Issue Two: Did Heichel suffer an injury to her shoulder and neck at work on September 21, 2015?**

¶ 62 Because this Court has found that Heichel did not timely notify her employer of her alleged industrial injury under § 39-71-603(1), MCA, this issue is moot.

**Issue Three: Did Liberty unreasonably refuse to accept liability for Heichel’s claim, thereby entitling Heichel to her attorney fees under § 39-71-611 and -612, MCA, and a penalty under § 39-71-2907, MCA?**

¶ 63 Because this Court has concluded that Heichel does not have a compensable claim, Liberty did not unreasonably refuse to accept liability for her claim, and she is not entitled to attorney fees under § 39-71-611 and -612, MCA, or a penalty under § 39-71-2907, MCA.

JUDGMENT

¶ 64 Heichel did not timely notify her employer of her alleged industrial injury under § 39-71-603(1), MCA; therefore, she does not have a compensable claim.

¶ 65 Liberty did not unreasonably refuse to accept liability for Heichel’s claim, and she is not entitled to attorney fees under § 39-71-611 and -612, MCA, or a penalty under § 39-71-2907, MCA.

¶ 66 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 12<sup>th</sup> day of March, 2018.

/s/ DAVID M. SANDLER  
JUDGE

c: Kraig W. Moore  
Morgan M. Weber  
Submitted: February 22, 2018

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her injury to work, yet told claimant that it would “take care of everything” and encouraged claimant to file a nonwork-related injury claim with the employer’s group health insurance carrier.).

<sup>8</sup> *Hanks v. Liberty Northwest Ins. Corp.*, 2002 MT 334, ¶ 13, 313 Mont. 263, 62 P.3d 710.