IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 33

WCC No. 9407-7084

JERRY G. McNEESE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

DECISION AND ORDER ON APPEAL

Summary: Claimant appeals from decision of the Department of Labor and Industry denying his request under section 39-71-603(2), MCA, for a waiver of the one year claim filing requirement.

Held: Failure of employer to file a workers' compensation claim for claimant is not grounds to extent the one-year claim filing requirement of section 39-71-603, MCA (1989). As stated in *Grenz v. Fire & Casualty of Connecticut*, 260 Mont. 60, 65 (1993), the "employer has no duty to pursue the employee's claim for him." However, where the evidence indicates claimant delayed pursuing his claim because he was not aware of the nature or severity of his injury, he is entitled to waiver of the filing requirement.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603, MCA (1989).** Failure of employer to file a workers' compensation claim for claimant is not grounds to extent the one-year claim filing requirement of section 39-71-603, MCA (1989). As stated in *Grenz v. Fire & Casualty of Connecticut*, 260 Mont. 60, 65 (1993), the "employer has no duty to pursue the employee's claim for him."
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> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603, MCA (1989).** Where the evidence indicates claimant delayed pursuing his claim because he was not aware of the nature

or severity of his injury, he is entitled to waiver of the one-year filing requirement of section 39-71-603, MCA (1989).

Limitations Periods: Claim Filing: Generally. Failure of employer to file a workers' compensation claim for claimant is not grounds to extent the one-year claim filing requirement of section 39-71-603, MCA (1989). As stated in *Grenz v. Fire & Casualty of Connecticut*, 260 Mont. 60, 65 (1993), the "employer has no duty to pursue the employee's claim for him."

Limitations Periods: Claim Filing: Waiver of Time: Latent Injury. Where the evidence indicates claimant delayed pursuing his claim because he was not aware of the nature or severity of his injury, he is entitled to waiver of the one-year filing requirement of section 39-71-603, MCA (1989).

Limitations Periods: Claim Filing: Wavier of Time: Lack of Knowledge. Where the evidence indicates claimant delayed pursuing his claim because he was not aware of the nature or severity of his injury, he is entitled to waiver of the one-year filing requirement of section 39-71-603, MCA (1989).

Claims: Filing. Failure of employer to file a workers' compensation claim for claimant is not grounds to extent the one-year claim filing requirement of section 39-71-603, MCA (1989). As stated in *Grenz v. Fire & Casualty of Connecticut*, 260 Mont. 60, 65 (1993), the "employer has no duty to pursue the employee's claim for him."

This is an appeal by Jerry G. McNeese (claimant) from a decision of the Department of Labor and Industry (DLI) denying McNeese's request under section 39-71-603(2), MCA, for an extension of time in which to file his workers' compensation claim.

Objection to Medical Records

As a preliminary matter, the Court will address claimant's Objection to Medical Records which he filed on October 13, 1994. Attached to his Objection were two letters written by Dr. William Shaw, one dated November 9, 1993, and another dated April 15, 1994, plus a third letter dated May 31, 1994, signed by Dr. Wolter. Claimant asserts that all other medical records introduced before the DLI are out of date, are irrelevant to the issues in this case, and should be "dismissed."

The Objection is overruled. The scope of review of the decision below is governed by the Montana Administrative Procedures Act (MAPA). § 39-71-2903, MCA. Section 2-4-704, MCA, which is part of the MAPA, provides in relevant part:

> **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. [Emphasis added.]

The record in this case consists of the DLI file, the exhibits introduced at hearing, and a transcript of the hearing. The Court will not expand that record or disregard it.

Facts

The claimant was the sole witness at the hearing below. In addition to his testimony, a number of exhibits were introduced. The essential facts are neither complex nor disputed.

In December 1989 the claimant was employed as a glazier for Associated Glass, Inc. in Billings, Montana. He was lifting and installing an insulated picture window at a residence in Hardin when he felt pain in his upper back and neck. His back became "tighter" and "hotter" during the drive back to Billings. By that evening the pain was severe. Despite his pain, the next morning the claimant and his son flew to Disneyland for a vacation that had been planned for some time. (Tr. at 17.) Claimant was gone for a period of six to eight days, during which time his back and neck did "loosen up." (Tr. at 17, 25.)

Upon returning from Disneyland claimant returned to work as a glass estimator, which is principally a desk job. (Tr. at 24-26.) The change in jobs had been arranged prior to his vacation and prior to the accident. (*Id.*) Claimant continued working. He did not lose time from work due to neck or back pain until July 1992, two and a half years after the accident. (Tr. at 27-28.) Claimant ceased working in July of 1992. He has apparently not returned to any sort of employment.

Claimant's testimony regarding his symptoms after returning from Disneyland is not clear. Viewed most favorably to the State Fund, it establishes that he continued to have some pain or tightness of his neck or upper back, at least on an intermittent basis, and that in October 1991, his condition worsened. In a letter of July 2, 1992, claimant stated that "[t]he intense muscal [sic] knots in my back eased up in about a week, but the neck pain never went away." In his opening statement to the hearing examiner, claimant said: "So and the pain and problem did not persist after the first (INAUDIBLE) damage, or whatever happened, you know." (Tr. at 11.) When questioned by the State Fund's attorney, Dan Whyte, about this period of time he responded:

> WHYTE: Okay, basically then you had intermittent pain from the time of the injury until the time that you began to see physicians, is that correct?
>
> MCNEESE: It was ah, it started out as just a kink in the neck and it didn't, once the pain went away initially, you know for I couldn't say how many months, or something like that. You know there is a snap and a kink and it would set in its way or something but it didn't cause pain down the arm or across the shoulders or in the neck not until about October of '91.
>
> . . .
>
> WHYTE: But you had some pain in your neck and then it eventually moved to your shoulders and your arm?
>
> MCNEESE: It was, yeah, it wasn't like it is now.
>
> WHYTE: Okay.
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> MCNEESE: You know it was, you know if it was like it was in October '91 or now or something like that, you know it would have been, I mean I would have been at a doctor.

(Tr. at 18, 19.)

Claimant also told the physicians who later examined him that he continued to experience some pain after his return from Disneyland. Dr. Scott D. Callaghan, a neurologist who examined claimant on October 14, 1992, wrote that claimant reported that over the previous two and three-fourths years he had "intermittent problems with a tense feeling in his neck and pain shooting into the left medial aspect of his upper extremity." (Ex. J-1.) Dr. Shaw, who examined claimant on February 2, 1993, reported claimant as telling him that after returning from Disneyland `his symptoms gradually improved leaving only a "kink" in the neck' but that he also reported that "[h]e would have catching and popping and some aching in the neck ever since." (Ex. L-1.)

However, claimant did not seek medical treatment for his condition until March 31, 1992, at which time he was seen by Dr. Jerome R. Stewart. (Tr. at 26, 27, Ex. 7-2.) Dr. Stewart diagnosed the claimant as suffering from "[c]hronic cervical/thoracic myositis probably due to old injury and aggravated by present condition at work when he uses his head to one side when he answers the phone." (Ex 7 at 2.) "Myositis" means an

inflammation of muscle (Dorland's Illustrated Medical Dictionary, 27th Ed), thus indicating a soft-tissue injury.

Dr. Stewart continued to treat claimant over the next few months but with little success. (Ex. 7.) Dr. Stewart's treatment included physical therapy. Claimant continued to have neck and upper back pain and burning in his shoulder. (*Id.*) Dr. Stewart's office notes over those months show that he continued to consider claimant's condition to be one involving muscle or soft tissue. (*Id.*) The doctor did order cervical x-rays on August 26, 1992, but those x-rays did not show any significant abnormality. (Ex. 7.)

On October 5, 1992, claimant sought permission to change physicians and received approval to see an orthopedic physician. On October 14, 1992, he was examined by Dr. Callaghan, who performed a neurologic exam and ordered a cervical MRI and an EMG nerve conduction study. Dr. Callaghan reported the results of those procedures as showing

> . . . a bulging disc at the C5-6 region that was more to the left and compromising the C-6 root on the left. EMG nerve conduction studies done on 10-16-92 revealed evidence of denervation in the cervical paraspinals as can be seen in radiculopathy.

(Ex. 14 at 1.) The doctor concluded that claimant "has a C-6 radiculopathy on the left with very severe myofascial pain. . . . I think most definitely that Mr. Jerry McNeese has a documented lesion to his cervical spine as stated in previous notes from your office which differed with us." He also concluded the claimant was unable to work. (Ex. 14 at 1-2.)

Dr. Shaw conducted an independent medical examination on February 2, 1993. He concurred in Dr. Callaghan's diagnosis of C6 radiculopathy. In his report he states, "Mr. McNeese presents with signs and symptoms suggestive of a left C6 radiculopathy." (Ex. L-3.) After interrogating claimant about the history of his condition, Dr. Shaw also observed that the development of the "radicular syndrome" did not develop until October of 1991. (*Id.*) Surgery to remove a cervical disc, decompress the nerve root and fuse vertebrae at the C6 level was considered by the physicians treating claimant in 1993. (Ex. M-1.) However, the medical records submitted to the hearing examiner indicate that no final decision has been made. (Ex. M at 1-4.)

The foregoing history provides the background for the present dispute, which arises because claimant failed to file a written claim for compensation within the one-year period prescribed by section 39-71-601(1), MCA. While claimant timely reported his December 1989 injury to his employer, he did not submit his written claim until April 9, 1992 (Ex. H), a few days after he first saw a physician. Thus, his claim was more than a year late.

The claim and an employer's first report (Ex. S) were received by the State Fund on April 10, 1992. On April 22, 1992, the State Fund denied the claim as untimely but notified claimant that it would pay his medical expenses because he had timely notified his employer of the injury. (Ex. 5.) On July 2, 1992, the claimant wrote to the State Fund requesting "that the time limitation be lifted due to my circumstances." (Ex. 6 at 3.) He explained that he had not done anything about his industrial accident because he believed his condition would go away. (*Id.*)

Eventually, the Employment Relations Division of the DLI reviewed claimant's request for an extension of time. On October 13, 1993, the DLI issued an initial order denying a waiver of the one-year filing requirement. (Ex. G.) Claimant then requested a hearing. After the hearing, Stephen L. Wallace, a DLI hearing examiner, affirmed the Department's initial denial. (Findings of Fact; Conclusions of Law; Order (June 7, 1994).)

In the meantime, in October of 1992, the State Fund accepted liability for claimant's condition under the Occupational Disease Act and began paying wage loss benefits as of October 16, 1992. (Ex. 16.) The wage loss benefits were paid following receipt of Dr. Callaghan's letter stating that claimant "has been unable to work since June 1992." (Ex. J-1.) However, the State Fund has continued to deny liability for wage loss benefits under the Workers' Compensation Act.

Claimant, who has represented himself throughout the proceedings, filed a Petition for hearing on July 1, 1994. In his petition he requested the Court to find that he suffered a compensable injury under the Workers' Compensation Act. After a conference call among the Court's hearing examiner, Mr. McNeese and counsel for the State Fund, it was agreed that claimant's petition should be treated as an appeal from the DLI determination. Thus, the sole issue presented is whether the DLI erred in denying claimant's request for a waiver of the one-year filing requirement.

Standard of Review

The scope of review in this case is limited by section 2-4-704(2), MCA, which provides in relevant part:

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

. . .

(iv) affected by other error of law;

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

. . .

The hearing examiner's findings of fact may be overturned on judicial review only where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." ***State Compensation Mutual Insurance Fund v. Lee Rost Logging,*** 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA.). However, the scope of review of the hearing examiner's conclusions of law is plenary: The Court must determine whether the hearing examiner's interpretation of the law is correct. ***Steer, Inc. v. Department of Revenue,*** 245 Mont. 470, 474, 803 P.2d 601 (1990).

Discussion

Section 39-71-601 MCA (1989), provides that claims made under the Workers' Compensation Act are barred unless presented within twelve months of the date of the industrial accident. However, another subsection to the statute permits the DLI to extend the limitations period up to an additional twenty-four months. More fully, the section provides:

> **39-71-601. Statute of limitation on presentment of claim -- waiver.** (1) In case of personal injury or death, all claims must be forever barred unless presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf.
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> (2) The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:
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> (a) lack of knowledge of disability;
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> (b) latent injury; or
>
> (c) equitable estoppel.

The sole question presented in this appeal is whether the DLI erred in refusing to grant claimant a waiver under subsection (2).

Initially, claimant argues that he is entitled to the waiver because his employer failed to file a written report after it learned of the injury. His contention has previously been

considered and rejected. In ***Grenz v. Fire & Casualty of Connecticut,*** 260 Mont. 60, 65, 857 P.2d 730 (1993), the Supreme Court expressly held, "The employer has no duty to pursue the employee's claim for him." That holding was consistent with its prior decisions. *See* ***Wassberg v. Anaconda Copper Co.,*** 215 Mont. 309, 320, 697 P.2d 909 (1985) and cases cited therein.

The evidence presented at the hearing below also failed to establish even a prima facie case for equitable estoppel. Equitable estoppel arises only "where an employer or insurer has taken some *positive action* which either prevents a claimant from filing a timely claim or leads him reasonably to believe he need not file such a claim." ***Wassberg,*** 215 Mont. 320 (quoting from ***Davis v. Jones,*** 203 Mont. 464, 661 P.2d 859, 860 (1983)(italics in original)). Claimant presented no evidence at the hearing below which would establish that his employer took any sort of positive action which discouraged him from filing a claim or misled him in any way.

Claimant further argues that the one- year filing requirement should be waived because he did not have "medical verification" of his condition until October of 1992, when an MRI disclosed that he had a "significant[ly] bulging disc posteriorly and to the left at C5-C6." (Appeal Seeking Judicial Review of the Department's (Timeliness Issue, Findings of Fact; Conclusions of Law; Order) filed 12/5/94 at 7-8.) The lack of medical verification is not one of the specifically enumerated grounds for granting a waiver. However, since claimant is appearing pro sé in this case, the Court will not confine its consideration to the particular language he has used. Rather it will address the broader essence of his argument, which is: he did not pursue his claim at an earlier time because he did not appreciate the nature or severity of his injury.

In ***Conn v. Quality Inn,*** 242 Mont. 190, 789 P. 2d 1213 (1990), the claimant, a maid, hurt her back and hip sometime between January and March of 1986, when she tripped over a vacuum cleaner cord at work. 242 Mont. at 191. Although she suffered sporadic pain after the accident, she continued her employment and did not miss work. *Id.* She then suffered a second injury to her back on June 22, 1987, when she tripped over a bed spread. *Id.* Her pain increased and she sought medical care Her condition initially improved and she continued to work without any loss of wages. *Id.* However, in the summer of 1988 her work load increased and her pain began to interfere with her work. *Id.* In early November of 1988, she quit work on her doctor's advice. She filed her claim with respect to the second injury on November 4, 1988, and a claim for the first injury on December 21, 1988. *Id.* Because her claims were filed more than a year after her injuries, she requested a waiver from the Division of Workers' Compensation. *Id.* "The Division disallowed the waiver, reasoning that Conn knew that she was injured and that the injury affected her job performance prior to the running of the statute of limitations." *Id.* at 191-192. The Workers' Compensation Court reversed the decision, and on appeal the Supreme Court affirmed that reversal.

In ***Conn*** the focus of both the Workers' Compensation Court and the Supreme Court was on the word "disability." At the time of Ms. Conn's injury in 1986, section 39-71-601(2), MCA (1985), provided: "(2) The division may, upon a reasonable showing by the claimant of lack of knowledge of *disability*, waive the time requirement up to an additional 24 months." (Italics added.) This Court held that `"disability," as referred to in the waiver provision, requires a loss of earning occasioned by the injury.' On appeal the Supreme Court reached a similar conclusion:

> The plain language of the statutes leaves no doubt that a disability occurs only when the claimant suffers a loss in the ability to engage in gainful employment. The definitive indicator of a loss in ability is a loss in wages, present or future.

242 Mont. at 193. The Court concluded that since the claimant had lost no work over the two and one-half years following her injury, she did not have knowledge of her disability and was entitled to a waiver. *Id.* It reached that conclusion even though the claimant knew she had been injured, had sought medical care, and knew that her injuries affected her ability to work. *Id.* For the Court, the fact of consequence was that she continued working at undiminished wages:

> She had no indication that she could not continue to work, though with some inconvenience, until her doctor advised her to quit in November of 1988. We agree with the Workers' Compensation Court that she had no knowledge of her disability until that time, and, therefore is entitled to the twenty-four month extension under § 39-71-601(2), MCA (1985).

Id. Section 39-71-601(2), MCA, was amended in 1989. However, the amendment retained the "lack of knowledge of disability" as one ground for granting a waiver. Therefore, ***Conn*** is still good law.

The DLI hearing examiner held that ***Conn*** is "distinguishable from the facts in Mr. McNeese's instant case." (Findings of Fact; Conclusions of Law; Order at 11; emphasis omitted.) In the discussion following this statement the hearing examiner states that the claimant was "fully aware of the nature and potential seriousness of his injury and probable compensable character of his 1989 injury." *(Id.)* He based his conclusion on claimant's statement in his July 2, 1992 letter that on the day following the accident he considered going to the emergency room but elected to fly to Disneyland; the intensity of claimant's initial pain; and the fact that claimant's pain never fully subsided. *(Id.)* The hearing examiner further found that the fact that claimant's physician did not *order* him to quit work distinguishes this case from ***Conn.***

None of the perceived distinctions survives careful scrutiny. In ***Conn,*** the claimant was aware she had been injured and even sought medical treatment after her second injury. 242 Mont. at 191. In this case claimant did not seek medical treatment and continued to work until his pain eventually worsened and he then sought medical care. He filed his claim within days after he first saw a doctor. If the lack of a physician's order to quit work is of any consequence, then it is a fact that *favors* claimant since knowledge of disability in ***Conn*** was not complete *until* the doctor ordered Ms. Conn off work.

The DLI hearing examiner misinterpreted and misapplied the law. Claimant was entitled to a waiver of the one-year statute of limitations. Upon remand the DLI shall grant the waiver.

ORDER

The June 7, 1994, decision of the hearing examiner is **reversed** and remanded to the Department of Labor and Industry for further proceedings consistent with this opinion.

DATED in Helena, Montana, this 5th day of May, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jerry G. McNeese - Certified Mail
Mr. Daniel J. Whyte