IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 48

WCC No. 2007-1855

RICHARD A. SIEBKEN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANY

Respondent/Insurer.

DECISION AND JUDGMENT

Appealed to the Montana Supreme Court on January 17, 2008; AFFIRMED October 21, 2008

Summary: Petitioner was involved in a work-related physical altercation on December 11, 2004. He reported the incident to his supervisor the same day, but did not report any injury because he did not know he was injured. On May 26, 2006, he learned that he had a cervical condition which was likely caused by the altercation. Petitioner filed a claim for compensation on July 3, 2006. Respondent argues that it is not liable for Petitioner's condition because Petitioner did not report an accident and injury within 30 days as required by § 39-71-603, MCA.

Held: Petitioner failed to notify his employer within 30 days of when he learned that his work-related incident was the probable cause of his injury. His claim is therefore time-barred under § 39-71-603, MCA.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-603.** The purpose of the notice requirement is to enable the employer to protect itself by prompt investigation of the claimed accident and prompt treatment of the injury with a view toward minimizing its effects by proper medical care. *Bender v. Roundup Mining Co.*, 138 Mont. 306, 313, 356 P.2d 469, 473 (1960). In the present case, Petitioner reported a work-

related altercation to his employer within 30 days and did not know at the time that he suffered an injury. However, Petitioner waited more than 30 days after he learned he was injured to file a claim for compensation. This claim for compensation does not fulfill the notice requirement of this statute.

Claims: Notice to Employer or Insurer: Generally. The purpose of the notice requirement is to enable the employer to protect itself by prompt investigation of the claimed accident and prompt treatment of the injury with a view toward minimizing its effects by proper medical care. *Bender v. Roundup Mining Co.*, 138 Mont. 306, 313, 356 P.2d 469, 473 (1960). In the present case, Petitioner reported a work-related altercation to his employer within 30 days and did not know at the time that he suffered an injury. However, Petitioner waited more than 30 days after he learned he was injured to file a claim for compensation. This claim for compensation does not fulfill the notice requirement of this statute.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-603. Petitioner was involved in a work-related altercation with a trespasser on December 11, 2004. He and his co-workers reported the altercation in incident reports filed soon afterward. Petitioner did not know that he suffered an injury during that altercation until May 26, 2006. Petitioner filed a workers' compensation claim on July 3, 2006, more than 30 days after he learned that he had suffered an injury during that altercation. The Court found the initial incident reports did not put the employer on notice that Petitioner experienced "an unexpected traumatic incident or unusual strain," and therefore the reporting requirements of § 39-71-603, MCA, were not met.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. Petitioner was involved in a work-related altercation with a trespasser on December 11, 2004. He and his co-workers reported the altercation in incident reports filed soon afterward. Petitioner did not know that he suffered an injury during that altercation until May 26, 2006. Petitioner filed a workers' compensation claim on July 3, 2006, more than 30 days after he learned that he had suffered an injury during that altercation. The Court found the initial incident reports did not put the employer on notice that Petitioner experienced "an unexpected traumatic incident or unusual strain," and therefore the reporting requirements of § 39-71-603, MCA, were not met.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-119. The incident reports filed by bank security guards which describe physically restraining a trespasser do not describe "an unexpected traumatic incident or unusual strain," and therefore do not describe an "accident" as that term is defined in the statute.

Injury and Accident: Unexpected Strain or Injury. The incident reports filed by bank security guards which describe physically restraining a trespasser do not describe "an unexpected traumatic incident or unusual strain," and therefore do not describe an "accident" as that term is defined in the statute.

Claims: Notice to Employer or Insurer: Latent Injury. Under the latent injury doctrine, the notice requirement does not apply until the claimant is aware that he has suffered an injury or may be entitled to compensation. In this case, Petitioner waited more than the thirty days allowed under § 39-71-603, MCA, after he learned of his injury until he informed his employer. Therefore, his claim is time-barred.

Claims: Filing. Under the latent injury doctrine, the notice requirement does not apply until the claimant is aware that he has suffered an injury or may be entitled to compensation. In this case, Petitioner waited more than the thirty days allowed under § 39-71-603, MCA, after he learned of his injury until he informed his employer. Therefore, his claim is time-barred.

¶ 1 Petitioner Richard A. Siebken petitions this Court for resolution of a legal question set forth below. The parties have agreed to submit this case for decision by this Court based on stipulated facts which are as follows:

STIPULATED FACTS[1]

¶ 2 On December 11, 2004, while in the course and scope of his employment as a Federal Law Enforcement Officer for the Federal Reserve Bank of Minneapolis, Helena Branch, Petitioner was involved in a physical altercation with a private citizen. The altercation required him to spin the individual around, shove him up against the wall and subdue him. A co-worker helped Petitioner subdue and handcuff the individual.

[1] All stipulated facts originate in Petitioner's Brief in Support of Petition for Benefits for Submission to the Court on Briefs ("Petitioner's Brief"), subject to Respondent's request that the word "altercation" be substituted for the word "accident," (*see* Liberty's Response Brief to Petitioner's Brief in Support of Petition for Benefits for Submission to the Court on Briefs ("Respondent's Brief").

Petitioner's supervisor, Gordon Lobdell, was immediately aware of the altercation involving Petitioner and his co-workers.

¶ 3 Petitioner gave written notice of the altercation and his employer had actual notice of the altercation after its occurrence on December 11, 2004.

¶ 4 Following the altercation, Petitioner did not believe he had sustained any injury and did not report that he had been injured. However, he developed a headache and took over-the-counter medications for it.

¶ 5 Over the next several weeks, Petitioner developed flu-like symptoms and low-back pain with pain into his right buttock. He attributed the low-back pain to wearing a utility belt for his gun, handcuffs, and other equipment, which weighed approximately 12 pounds. Because Petitioner believed his utility belt caused his symptoms, he filed a workers' compensation claim for his low-back condition in April 2005.

¶ 6 Petitioner also developed balance problems, headaches, nausea, and numbness which went from back to front on the left side of his body from his left nipple into his left extremities. Dr. Ben Bullington of the Bair Clinic, White Sulphur Springs, Montana, treated Petitioner for these conditions, but provided no relief.

¶ 7 On June 14, 2005, Respondent, the insurer for Petitioner's employer, directed Petitioner to see Dr. Max Iverson. Dr. Iverson examined Petitioner and recommended an MRI and EMG of his back. Following those tests, Dr. Iverson recommended that Petitioner see neurosurgeon Dr. Peter Sorini in Butte, Montana.

¶ 8 Petitioner saw Dr. Sorini on July 14, 2005, for the first time. Dr. Sorini advised Petitioner that he had a more significant problem than his lower back, possibly a tumor or a neck condition. A cervical MRI revealed cervical spinal stenosis. Dr. Sorini advised Petitioner that he needed surgery on his cervical spine, which Dr. Sorini performed on October 24, 2005.

¶ 9 During a follow-up visit, Dr. Sorini and Petitioner discussed the physical altercation in which Petitioner was involved on December 11, 2004. Petitioner reported that his symptoms developed gradually from that date. On May 26, 2006, Dr. Sorini advised Petitioner that the December 11, 2004, altercation was the probable cause of his neck condition and his need for surgery.

¶ 10 May 26, 2006, is the date when Petitioner became aware that the December 11, 2004, altercation was the cause of his neck condition. Petitioner filed a workers' compensation claim for that injury on July 3, 2006.

¶ 11 Respondent has denied liability for the claim on the basis that Petitioner did not comply with the notice requirements of § 39-71-603, MCA.

ISSUE

¶ 12 The parties disagree as to the specific wording of the issue to be decided in this case. I restate the issue as follows:

> ¶ 12a Does a claimant satisfy the notice requirement of § 39-71-603, MCA, if he reports to his employer that he was involved in a physical altercation while within the course and scope of his employment, but does not report that the altercation caused an injury until more than 30 days after he learns that he was probably injured during the altercation?

DISCUSSION

¶ 13 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 Petitioner's injury.[2]

¶ 14 Petitioner argues that he satisfied the reporting requirement of § 39-71-603, MCA, because he filed an "incident report" detailing the altercation to his employer on December 11, 2004, the date of its occurrence.

¶ 15 Respondent responds that Petitioner did not fulfill the reporting requirement of § 39-71-603, MCA. Respondent does not dispute that Petitioner did not know he had sustained an injury to his neck at the time he filled out the December 11, 2004, incident report, nor that it was not until May 26, 2006, that Dr. Sorini advised Petitioner that the altercation probably caused a cervical injury. Petitioner then sought counsel and filed a claim for compensation on July 3, 2006. Respondent argues that while Petitioner notified his employer that an altercation occurred on that date, § 39-71-603, MCA, specifically requires that the employee notify his employer of an ***accident*** and ***injury***, and that simply reporting an "altercation" is insufficient. Therefore, Petitioner's employer was unaware that an accident and injury occurred. Respondent further responds that even if Petitioner was not required to give notice of the accident and injury until he learned of the injury on May 26, 2006, Petitioner nonetheless did not give notice of an accident and injury until July 3, 2006 – more than 30 days later.

¶ 16 Section 39-71-603, MCA, states in pertinent part:

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[2] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

> (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.

¶ 17 The purpose of the notice requirement of § 39-71-603, MCA, is to enable the employer to protect itself 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.[3] Petitioner relies upon *Killebrew v. Larson Cattle Co.*,[4] in which an employer knew that the claimant was operating a tractor when it tipped over, and that on a separate occasion, the claimant was "in a wreck with the cows."[5] However, while the claimant testified that in both cases he reported minor injuries, the employer testified that the claimant reported no injuries until more than 30 days after each incident when medical examinations revealed significant injuries.[6] Although the record is not clear as to exactly when the claimant notified his employer about the injuries his medical examinations revealed, it is clear that the claimant informed the employer within 30 days of his medical examination regarding the second incident.[7] A department hearing examiner concluded that, although the employer was aware of both accidents within 30 days of their occurrence, the claimant did not disclose the nature of his injuries with sufficient specificity to satisfy the requirements of § 39-71-603, MCA.[8] This Court affirmed the hearing examiner's decision, but the Montana Supreme Court reversed, holding:

> [W]e conclude that the requirements of § 39-71-603, MCA (1987), are satisfied when an employee who is involved in a work-related accident

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[3] *Bender v. Roundup Mining Co.*, 138 Mont. 306, 313, 356 P.2d 469, 473 (1960).

[4] *Killebrew*, 254 Mont. 513, 839 P.2d 1260 (1992).

[5] *Killebrew*, 254 Mont. at 516, 839 P.2d at 1262.

[6] *Killebrew*, 254 Mont. at 515-16, 839 P.2d at 1261-62.

[7] *Killebrew*, 254 Mont. at 516, 839 P.2d at 1262.

[8] *Killebrew*, 254 Mont. at 517, 839 P.2d at 1263.

> reports that accident to his employer within 30 days from the date of its occurrence and apprises his employer, to the best of his ability, whether he suffered any adverse physical consequences from that accident. An employee who has a reasonable belief at the time of an accident that he has suffered no injury which will require treatment or is otherwise compensable, is not barred from recovery under § 603 because he learns otherwise beyond the 30-day period.[9]

¶ 18 It is undisputed that in this case, Petitioner reported the work-related altercation to his employer within 30 days and that he reported no injury at that time because he was unaware that he suffered an injury. Petitioner maintains that his filing of an incident report put Respondent on notice that an accident occurred on December 11, 2004, and that like the claimant in *Killebrew*, he reported that accident to his employer and he should likewise not be barred from recovery since he did not learn until more than 30 days later that he had suffered an injury from the accident.

¶ 19 Respondent argues that the *Killebrew* holding does not control in the present situation because Petitioner did not report an ***accident*** within 30 days. Respondent argues that in *Killebrew*, the employer had actual knowledge of an accident and injury within 30 days of the claimant learning of his injury. However, in the case at hand, Respondent argues that the employer merely knew that an incident occurred on December 11, 2004, but was not notified within 30 days of Petitioner learning that the incident was really an accident which caused an injury. Respondent points to the Montana Supreme Court's earlier holding in *Reil v. State Compensation Ins. Fund*,[10] which was later distinguished by *Killebrew*, and argues that the present case is more factually similar to *Reil*, in which the Montana Supreme Court, reversing this Court, determined that the notice requirements of § 39-71-603, MCA, had not been met.

¶ 20 In *Reil*, the claimant's employer knew that the claimant experienced pain in his arms due to a congenital condition. The claimant never informed his employer that he believed his job duties contributed to the pain in his arms until he filed a workers' compensation claim five months after he left that employment.[11] Although this Court concluded that the claimant's employer had sufficient actual knowledge to fulfill the notice requirement of

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[9] *Killebrew*, 254 Mont. at 521, 839 P.2d at 1265.

[10] *Reil*, 229 Mont. 305, 746 P.2d 617 (1987).

[11] *Reil*, 229 Mont. at 307, 746 P.2d at 618-19.

§ 39-71-603, MCA, the Montana Supreme Court disagreed and reversed.[12] The Supreme Court explained that while this Court "correctly recognized that '[a]ctual knowledge of the accident or injury, while equivalent of notice, must be more than simple knowledge that the claimant is ill, or that claimant is injured,'" knowledge that the claimant experienced pain does not satisfy the notice requirements.[13]

¶ 21 Ultimately, this case comes down to whether the incident reports which were filed by Petitioner and his co-workers were sufficient to give Petitioner's employer notice which fulfills the requirements of § 39-71-603, MCA. Petitioner's claim for compensation, filed July 3, 2006, will not suffice to otherwise fulfill this requirement since it was filed more than 30 days after Petitioner learned that he had been injured in the December 11, 2004, altercation.

¶ 22 Respondent points to the definition of "accident" found in § 39-71-119(2), MCA,[14] and argues that the incident reports do not report an "accident" because they merely report that Petitioner fulfilled his job duties by restraining a trespasser and do not report that Petitioner experienced "an unexpected traumatic incident or unusual strain" while performing his duties. Respondent argues:

> As a security officer all Siebken did was to report to his employer that he did his job - - provide security by restraining an unauthorized and uncooperative person trespassing on his employer's property. It is no different from a warehouseman going to his employer and reporting he just finished stacking 100 boxes of widgets. If there is actual notice in this case then there is actual notice in the warehouseman's case. To comply with actual notice requirement under Siebken's argument all an employee has to prove is that he told his employer earlier he actually did the work a physician later relates as the cause of the medical problem.[15]

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[12] *Reil*, 229 Mont. at 309, 746 P.2d at 619-20.

[13] *Reil*, 229 Mont. at 312, 746 P.2d at 621-22.

[14] 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.

[15] Respondent's Brief at 8.

¶ 23 Petitioner has provided copies of the December 11, 2004, incident reports for this Court's consideration.[16] Since the core of the present issue is whether these incident reports sufficiently alerted Petitioner's employer to an "accident," I find the portions which describe Petitioner's physical altercation with the trespassing individual to be of particular relevance. In his incident report, Petitioner stated in pertinent part:

> This person pushed past [Petitioner] and in doing so [Petitioner] grabbed both the upper left and right arms and advised this person to remove his hands from his pockets (pants). This person attempted to walk away while having a hold of him and [Petitioner] pulled back on his arms and pushed him into the bag room roll up door. [Petitioner] attempted to handcuff this person who would not place his hands behind his back. [Petitioner] getting one cuff on the left wrist Ofc Redfeather was attempting to restrain the right wrist. Ofc McAlpin arrived and assisted [Petitioner] in cuffing this person which was done by connecting Ofc Redfeathers cuff to [Petitioner's] cuff.[17]

¶ 24 The incident report of Officer Brandy Redfeather states in pertinent part:

> [Petitioner] ordered the man to stop; he kept going. [Petitioner] stepped up behind him and took hold of him by both arms and again ordered him to stop, the man stopped but began to try to pull away from [Petitioner]. [Petitioner] ordered the man to pull his hands out of his pockets, and the man did so, but would not place his hands behind his back when ordered to do so. The man began to twist around, trying to break away from [Petitioner]; at this point, I took hold of the man by his right arm, to help [Petitioner] restrain him. The man resisted firmly, and it was not until Officer McAlpin assisted us that we were able to bring the man under control and handcuff him. We attempted several times to get this man to comply with our orders . . . . I got one handcuff on his right wrist; [Petitioner] and Officer McAlpin at that point were able to handcuff him and bring him under control.[18]

¶ 25 The incident report of Gordon Lobdall, Petitioner's supervisor, states in pertinent part:

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[16] Identified as "Deposition" Exs. 1-3, attached to Petitioner's Brief.

[17] "Deposition" Ex. 1, attached to Petitioner's Brief.

[18] "Deposition" Ex. 2 at 1-2, attached to Petitioner's Brief.

> [Petitioner] attempted to get identification from [the trespasser] before he was released to exit the property. [The trespasser] refused and attempted to leave the area. [The trespasser] was intoxicated and would not cooperate and was handcuffed by [Petitioner] and Redfeather when he became verbally abusive and still not compliant with Officer requests.[19]

¶ 26 Officer Curtis McAlpin's incident report states in pertinent part:

> I then observed Officers Readfeather [sic] and [Petitioner] trying to get [the trespasser] handcuffed . . . . While [the trespasser] was placed against the baghouse over head door by [Petitioner], I assisted [Petitioner] in getting [the trespasser's] arms behind his back, where he was handcuffed by [Petitioner] without further incident.[20]

¶ 27 In *Killebrew*, the incidents the claimant described to his employer – rolling a tractor and having a "wreck" with cows – clearly put his employer on notice that an accident had occurred. In the present case, however, the incident reports at issue were not sufficient to put Petitioner's employer on similar notice. While the reports convey that Petitioner, with the assistance of his co-workers, used physical force to subdue and restrain a resisting trespasser, the incident reports do ***not*** describe "an unexpected traumatic incident or unusual strain." No evidence has been presented to the Court that this incident was "unexpected" or "unusual" in Petitioner's execution of his duties. What the reports state are that the security officers appropriately performed their jobs and assisted each other in handcuffing a trespasser. In fact, even the stipulated facts in this case describe what Petitioner did to the trespasser – namely spinning him around, handcuffing him, and shoving him against a wall – but do not indicate that Petitioner suffered any unusual strain or traumatic incident in the process. Accordingly, the incident reports do not describe an "accident" as that term is defined in § 39-71-119(2), MCA.

¶ 28 Under the latent injury doctrine, the notice requirement does not apply until the claimant is aware that he has suffered an injury or may be entitled to compensation.[21] In this case, however, it is undisputed that Petitioner waited more than the thirty days allowed under § 39-71-603, MCA, before informing his employer that he had learned he was probably injured in the December 11, 2004, altercation. With respect to the incident reports, as I noted above, the purpose of the notice requirement of § 39-71-603, MCA, is

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[19] "Deposition" Ex. 3 at 1, attached to Petitioner's Brief.

[20] "Deposition" Ex. 3 at 2, attached to Petitioner's Brief.

[21] *See, e.g., Whitlock v. Fremont Indus. Indem. Co.*, 2002 MTWCC 12, ¶ 30.

to enable the employer to protect itself 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.[22] In order for Petitioner's and his co-workers' incident reports to fulfill the notice requirement, those reports would have had to be sufficient to put the employer on notice that an accident requiring investigation and possibly medical care had occurred. The reports were not sufficient for this purpose. Petitioner's claim is therefore time-barred.

[22] *Bender, supra.*, 138 Mont. at 313, 356 P.2d at 473.

ORDER AND JUDGMENT

¶ 29 Petitioner did not satisfy the notice requirement of § 39-71-603, MCA, and his claim is therefore **DENIED**.

¶ 30 Petitioner's petition is **DISMISSED WITH PREJUDICE**.

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

¶ 32 Any party to this dispute may have twenty days in which to request reconsideration from this DECISION AND JUDGMENT.

DATED in Helena, Montana, this 27th day of November, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Bernard J. Everett
Larry W. Jones
Submitted: August 17, 2007