IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 16

WCC No. 2013-3191

BRIAN RICHARDSON

Petitioner

vs.

INDEMNITY INS. CO. OF NORTH AMERICA

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 10/18/18

ORDER DENYING PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO CLAIM FILING AND GRANTING RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner, a security guard at a hospital, asserts that he suffered an injury to his nose after helping his supervisor detain a patient in 2006. Respondent has denied liability, asserting, *inter alia*, that Petitioner did not timely submit a claim under § 39-71-601, MCA, which requires a claimant to submit a written claim within 12 months of the date of his accident, although in cases involving lack of knowledge of disability, latent injury, or equitable estoppel, the time limitation can be extended up to 36 months from the date of the accident. Petitioner moves for partial summary judgment, arguing that his employer's Daily Activity Report from the day of the incident constitutes his written claim. In the alternative, Petitioner argues that the First Report of Injury or Occupational Disease he filed nearly four years after the incident constitutes a timely claim because he lacked knowledge of his disability and because Respondent is equitably estopped from maintaining a statute of limitations defense. Respondent cross-moves for summary judgment, contending that the employer's Daily Activity Report does not constitute a claim because Petitioner's entry did not indicate that he sustained an injury. Respondent also argues that even if Petitioner were entitled to the waiver for cases involving lack of knowledge of disability or equitable estoppel, Petitioner filed his First Report of Injury or Occupational Disease beyond the 36-month absolute deadline, which Respondent asserts is a statute of repose.

Held: Petitioner's Motion for Partial Summary Judgment as to Claim Filing is denied. Respondent's Cross-Motion for Summary Judgment is granted. Petitioner's entry in his employer's Daily Activity Report did not indicate that he was injured; thus, it did not contain sufficient information to inform his employer or Respondent of the nature and basis of a potential workers' compensation claim and does not constitute a claim under § 39-71-601, MCA. And, even if Petitioner were entitled to the statutory waiver of the 12-month limitations period, he submitted his First Report of Injury or Occupational Disease beyond the 36-month absolute deadline for submitting a claim. Petitioner's claim is time-barred.

¶ 1 Petitioner Brian Richardson moves for partial summary judgment on the issue of his compliance with the claim-filing requirements of § 39-71-601, MCA. He argues that his employer's Daily Activity Report constitutes a claim or, in the alternative, that his First Report of Injury or Occupational Disease was timely.

¶ 2 Respondent Indemnity Ins. Co. of North America (Indemnity) cross-moves for summary judgment, arguing that Richardson failed to timely file a claim because his employer's Daily Activity Report was substantively insufficient to constitute a claim and because the First Report of Injury or Occupational Disease was filed too late.

FACTS

¶ 3 Making all inferences in Richardson's favor, the following are the facts for purposes of this ruling.[1]

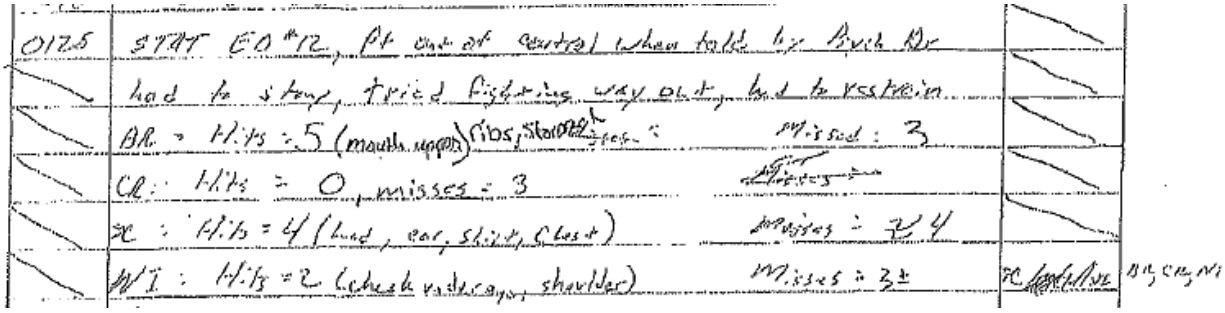
¶ 4 In November 2006, Richardson was working as a security officer for Securitas at the Billings Clinic, on the night shift.

¶ 5 On November 29, 2006, Richardson, his two coworkers, and his supervisor, Kurtis Cihak, detained a violent patient in the Emergency Room. During the altercation, the patient hit Richardson five times. Immediately after the altercation Richardson told Cihak "about the patient assault on me, how many times the patient hit me and where the patient hit me."

¶ 6 Per Securitas's regular business practice, its officers prepared a Daily Activity Report the same day, which summarized what they did during their shifts. At the top of the Daily Activity Report, the officers wrote their names and which radio, pager, and key set they had. Below that, the Daily Activity Report has three columns. In the first, the officers wrote the time of an event in military time. In the second, which was labeled "Activity," the officers wrote a short description of their activities; e.g., "Assisted getting patient into ED from ambulance bay." In the third, the officers wrote their initials.

[1] *See Lunday v. Liberty Northwest*, 2017 MTWCC 20, ¶ 31 (ruling that at the summary judgment stage, this Court makes all reasonable inferences in favor of the party opposing summary judgment).

¶ 7 The following picture is of the entries in the Daily Activity Report regarding the incident in which Richardson and his coworkers detained the patient in the Emergency room on November 29, 2006:



The first two lines in the Activity column state, "STAT ED #12, Pt out of control when told by Psych Dr. had to stay, tried fighting way out, had to restrain." The third line is the entry regarding Richardson. Cihak wrote out the description of the incident on each line in the Activity column, except that Richardson filled out the details of where he was hit on the third line, which states, "(mouth upper) ribs, stomach."[2] Richardson signed his initials in the Initial column to the right of Cihak's.

¶ 8 The day after the altercation, Richardson told Ron Berglund, who was Securitas's on-site manager, that "the patient had hit me in the nose with an upward strike of his elbow while [I was] attempting to restrain the patient." In response, Berglund told Richardson, *inter alia*, that he "did not have to fill out any more paperwork unless [he] was seeking treatment." Richardson did not complete any additional paperwork at that time.

¶ 9 Between July 2007 and May 2008, Richardson saw several medical providers with complaints of right-ear ringing and plugging, headache, nose bleeds, nasal obstruction, and facial pain and pressure. However, none of the medical providers recorded that Richardson said he was hit in the nose. After a CT scan in the spring of 2008, Scott D. Price, MD, of Billings Clinic Otolaryngology, diagnosed him with a "very prominent left concha bullosa," a "septal deviation with impingement of the septum upon the right middle turbinate," and an "area where the left middle turbinate is pressing upon the septum."

¶ 10 The first medical record to mention Richardson suffering a blow to the nose, was from a June 17, 2008, visit with Cynthia A. Kennedy, MD, of Yellowstone Medical Center Ear, Nose & Throat Associates. On that date, Dr. Kennedy wrote in pertinent part:

> Brian is a 32 year old male who is here for evaluation of chronic headaches, nasal obstruction since being hit in the nose about a year and a half ago. . . . He was working security at the Billings Clinic in the emergency room

[2] The initials written to the right of the third column were entered by Securitas's on-site manager, Ron Berglund, as reminders for the other officers to review the entry and initial.

> when he had to detain someone. He got hit at the bottom of the nose with an elbow ve[r]y hard. He felt and heard it crack. He did not have much bleeding immediately. In fact, he did not even have anything come out anteriorly, but could taste blood posteriorly.

Dr. Kennedy's assessment of Richardson included the following:

> Nasal septal deviation with two distinct contact points. These occurred acutely after trauma and could very well be causing his new onset of facial headaches. . . . I have recommended a septoplasty, as well as very limited anterior ethmoidectomies endoscopically with removal of concha bullosa.

¶ 11 Richardson's appointment with Dr. Kennedy was the first time he had a medical confirmation that he injured his nose at work.

¶ 12 Richardson left his job at Securitas within a week after his appointment with Dr. Kennedy.

¶ 13 Thereafter, on June 25, 2008, Dr. Kennedy performed the recommended surgery. Upon his discharge, Richardson was instructed not to engage in strenuous physical activity for seven days.

¶ 14 When asked whether he had any reason to think that he should fill out paperwork, such as an incident report or workers' compensation claim form, when he was treated in June 2008, Richardson responded:

> At that point in time it was a very difficult place and environment to work in. I had thought that I had just had a broken nose and I had insurance and I thought if I was just to get my nose fixed, I would never have to deal with these guys again and I'm moving to a new job. 'Cause what happened is I scheduled my surgery to happen a day or two after my last day with Securitas and then as I was cleared by the doctor I started at Lockwood Water. I was already employed by Lockwood Water before my actual start date.

¶ 15 In August 2008, following his recuperation, Richardson began his new job.

¶ 16 Richardson submitted the bills from his surgery to his health insurer, but it denied liability.

¶ 17 Consequently, in August or September 2008, Richardson went to see Berglund because he wanted to fill out a workers' compensation claim for his nose injury. Berglund told Richardson he would have to see the branch manager. Richardson then went to Securitas's branch manager, Mike Anderson, and told Anderson he needed to fill out a workers' compensation claim for his nose injury, which Richardson stated occurred during

the incident on November 29, 2006. However, Anderson told Richardson it was too late for him to file a claim.

¶ 18 According to Dr. Kennedy's records, Richardson got along reasonably well following surgery but began having increased headaches and facial pressure in the spring of 2009. In 2010, she documented that Richardson was also struggling with facial pain, vertigo, and imbalance, and struggling with work as a result; she thought he may have sphenopalatine neuralgia or Sluder's syndrome.

¶ 19 Richardson stopped working due to his nose injury in September 2010.

¶ 20 Later that fall, Richardson's attorney wrote to Dr. Kennedy posing a number of questions concerning Richardson's condition. The questions included whether Richardson's condition was the result of being struck at the bottom of his nose while trying to detain someone at work, and whether he had to stop working as the result of the symptoms of his condition. Dr. Kennedy responded "Yes" to both questions.

¶ 21 On October 14, 2010, Richardson submitted a First Report of Injury or Occupational Disease regarding the incident at work, stating that the incident occurred in approximately October 2007 and describing it as follows: "While attempting to restrain a violent patient, I was struck in the nose by the patient's elbow." He described the nature of the injury as "Upward impact to nose," and the part of the body affected as "Nose/face/nerve damage."

¶ 22 Indemnity denied liability for Richardson's claim, asserting, *inter alia*, that Richardson did not timely submit his written claim under § 39-71-601, MCA.[3]

LAW AND ANALYSIS

¶ 23 This case is governed by the 2005 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Richardson's alleged industrial accident.[4]

¶ 24 This Court renders summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[5] After the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary

[3] This Court issued a separate Order Denying Petitioner's Motion for Partial Summary Judgment as to Notice, 2018 MTWCC 10.

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

[5] ARM 24.5.329(2).

judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment.[6]

¶ 25 To commence and maintain a workers' compensation claim, an injured employee must comply with two separate time limitations. First, under § 39-71-603(1), MCA, the employee must, within 30 days of an accident, give notice to his employer or the employer's insurer of the "time and place where the accident occurred and the nature of the injury." If the employee has a latent injury, the 30-day notice requirement is tolled until he discovers that he suffered an injury.[7] "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 to minimize its effect."[8]

¶ 26 Second, under § 39-71-601(1), MCA, the employee must submit a written claim within 12 months of the accident. However, under subsection (2), this time limitation can be extended up to an additional 24 months in cases of lack of knowledge of disability, latent injury, or equitable estoppel. This statute states, in pertinent part:

> **Statute of limitation on presentment of claim – waiver**. (1) . . . [A]ll claims in the case of personal injury or death must be forever barred unless signed by the claimant or the claimant's representative and 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 on the claimant's behalf.
>
> (2) The insurer may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:
>
> (a) lack of knowledge of disability;
>
> (b) latent injury; or
>
> (c) equitable estoppel.

The purpose of this statute is "to give the employer written notice of the worker's claims within twelve months of the injury or accident in order to allow the employer to investigate the claim and, if necessary, prepare a defense."[9]

¶ 27 Indemnity asserts that Richardson did not file a timely claim under § 39-71-601, MCA, because Richardson's entry on Securitas's Daily Activity Report does not constitute a claim and because Richardson did not submit his First Report of Injury or Occupational Disease until October 14, 2010, nearly a year after the 36-month deadline for Richardson to file a claim, which Indemnity asserts is a statute of repose.

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[6] *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71 (citation omitted).

[7] *Siebken v. Liberty Mut. Ins. Co.*, 2008 MT 353, ¶ 16, 346 Mont. 330, 195 P.3d 803 (citations omitted).

[8] *Siebken*, ¶ 12 (quoting *Hanks v. Liberty Northwest Ins. Corp.*, 2002 MT 334, ¶ 13, 313 Mont. 263, 62 P.3d 710).

[9] *Grenz v. Fire & Cas. of Conn.*, 260 Mont. 60, 64, 857 P.2d 730, 733 (1993) (citations omitted).

¶ 28 Richardson maintains that he timely submitted his claim because his entry on his employer's Daily Activity Report, which he made on the day of the incident, is sufficient to constitute a written claim under § 39-71-601(1), MCA. In the alternative, Richardson argues that the First Report of Injury or Occupational Disease he submitted on October 14, 2010, constitutes a timely claim under § 39-71-601(2), MCA.

A. Sufficiency of Securitas's Daily Activity Report

¶ 29 Section 39-71-601, MCA, is silent as to the content required of a "claim" for injury. In *Partin v. State Compensation Ins. Fund*, this Court summarized cases from the Montana Supreme Court and explained the general rule is that the claim need not be submitted on the Department of Labor & Industry's First Report of Injury or Occupational Disease form and "need only contain information which is sufficient to inform the employer or insurer of the nature and basis of the possible claim, and to enable it to investigate the claim and, if necessary, prepare a defense."[10]

¶ 30 The statement of the general rule, of course, begs the question: what information is sufficient? Indemnity maintains that Securitas's Daily Activity Report did not contain sufficient information because Richardson did not indicate that he suffered an injury. Richardson contends that his employer's Daily Activity Report contained sufficient information because he did not know his nose was injured and that he gave all the information he knew.

¶ 31 Although a case interpreting the requirement that a worker give notice of his accident and injury to his employer within 30 days under § 39-71-603, MCA, the Montana Supreme Court's decision in *Siebken* is instructive as to what information is sufficient to put an employer or insurer on notice of a potential workers' compensation claim. The facts of *Siebken* are similar to those in this case. Siebken, a law enforcement officer for the Federal Reserve Bank, had an altercation with a resisting trespasser in which Siebken spun the trespasser around, pinned him against the wall, and handcuffed him.[11] Siebken told his supervisor of the incident and he and his coworkers filled out written incident reports in which they conveyed that they had "used physical force to subdue and restrain a resisting trespasser."[12] But, Siebken did not perceive he had suffered an injury and did not mention that he was injured.[13] However, he began suffering symptoms in the following weeks and, six months later, learned that he had cervical spinal stenosis, requiring surgery.[14] After his surgery, Siebken's surgeon informed him that the altercation with the

[10] *See Partin*, 1997 MTWCC 11 (citations omitted).

[11] *Siebken*, ¶ 4.

[12] *Siebken*, ¶¶ 4, 13, 15.

[13] *Siebken*, ¶¶ 5, 15.

[14] *Siebken*, ¶ 7.

trespasser probably caused his neck condition and need for surgery.[15] Approximately 38 days later, Siebken filed a workers' compensation claim.[16]

¶ 32 The court held that Siebken's claim was time-barred because he did not give his employer notice of his injury within 30 days of when he first learned that he suffered an industrial injury, as required by § 39-71-603(1), MCA.[17] In reaching its holding in *Siebken*, the court rejected Siebken's argument that his verbal and written incident reports were sufficient notice because Siebken did not indicate that he was injured:

> However, because the incident reports do not describe an unusual strain or trauma, it was incumbent on Siebken to notify his employer when he learned that he suffered an unusual strain because, under these facts, the employer could not have reasonably understood an injury had occurred. Even Siebken, with the assistance of his initial physicians, was not able to identify the bank incident as the cause of his neck injury until Dr. Sorini came to this conclusion in May 2006. Therefore, it was unreasonable to expect that Siebken's supervisor, without more information, could have deduced that Siebken was injured in the incident. There must be something in the notice that would indicate "to a reasonably conscientious manager that the case might involve a potential compensation claim."[18]

The court further explained:

> We have previously held that 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."[19]

The court reasoned that since Siebken did not indicate that he was injured, his statements were insufficient to constitute notice. The court explained, "Here, the reports describe the apprehension of a trespasser, but do not mention any injury, pain or other facts which would prompt an employer to investigate further."[20]

¶ 33 Because §§ 39-71-603 and -601, MCA, have the same underlying purpose – to put the employer and insurer on notice of a potential workers' compensation claim so they

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[15] *Siebken*, ¶ 8.

[16] *Id.*

[17] *Siebken*, ¶ 16.

[18] *Siebken*, ¶ 14 (citation omitted).

[19] *Siebken*, ¶ 15 (citations omitted).

[20] *Id.*

can investigate – the reasoning of *Siebken* applies to § 39-71-601, MCA, as well. In short, since § 39-71-603(1), MCA, requires notice of an accident and the nature of the injury so that the employer can investigate,[21] it stands to reason that at least as much is required in the subsequent filing of the written claim under § 39-71-601, MCA, so the insurer, which is liable for paying the benefits, and the employer, can investigate. Thus, as a matter of law, this Court concludes that to constitute a claim under § 39-71-601, MCA, the document must indicate that the worker was injured.

¶ 34 This Court notes that this conclusion of law follows the majority rule. Professor Larson explains that even though the workers' compensation system is typically less formal than the tort system, to constitute a claim in the workers' compensation system, a submission must indicate that the claimant was injured:

> Even under a statute that specifically requires the filing of a claim, most courts will accept as the equivalent of a statutory claim any paper that contains the substance usually supplied by a formal claim, although the form may be defective.[22]
>
> At the minimum, the informal substitute for a claim should identify the claimant, ***indicate that a compensable injury has occurred***, and convey the idea that compensation is expected.[23]

¶ 35 Here, Securitas's Daily Activity Report does not contain sufficient information to constitute Richardson's claim under § 39-71-601, MCA, because it did not indicate that he was injured. Although Richardson asserts in his brief that his employer's Daily Activity Report shows "the time and place of the accident/injury and the nature of the injury," this statement is unsupported by the evidence. Securitas's Daily Activity Report merely says that Richardson was hit five times, in the "upper mouth," ribs, and stomach. Like the incident report in *Siebken*, the Daily Activity Report does not say any of these hits resulted in an injury to Richardson or provide any other facts that would have prompted Securitas or Indemnity to further investigate a potential workers' compensation claim. In *Siebken*, the court made it clear that a report of a physical altercation without an indication of injury is insufficient to put the employer on notice of a potential workers' compensation claim.[24] Nor should Securitas have assumed as much as not every hit causes an "injury";[25] indeed, Richardson claims no injury with respect to his upper mouth, ribs, or stomach.

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[21] *See Wight v. Hughes Livestock Co.*, 194 Mont. 109, 113, 634 P.2d 1189, 1191 (1981) (citation omitted).

[22] 11 Larson's Workers' Compensation Law, § 124.03[1] (2017).

[23] 11 Larson's Workers' Compensation Law, § 124.04[1] (2017) (emphasis added), citing *inter alia Weigand v. Anderson-Meyer Drilling Co.*, 232 Mont. 390, 758 P.2d 260 (1988).

[24] *Siebken*, ¶¶ 14 – 15.

[25] *See, e.g.*, *TG v. Mont. Schs. Grp. Ins. Auth.*, 2018 MTWCC 1, ¶¶ 30 – 32 (ruling that paraprofessional who suffered bruising as a result of being hit and pinched by a special needs student did not suffer compensable physical injuries because, "This Court has previously held that minor wounds for which the claimant did not seek medical

¶ 36 Richardson suggests that this Court should interpret his employer's Daily Activity Report in conjunction with what he told Berglund the day after the incident, which he claims was sufficient information to put Securitas on notice of a potential workers' compensation claim. However, there is no evidence that Richardson told Berglund that he was injured. In his affidavit, Richardson merely states that he told Berglund "the patient had hit me in the nose with an upward strike of his elbow while [I was] attempting to restrain the patient." Richardson then avers that Berglund responded by telling him that he did not need to fill out any additional paperwork unless he was seeking treatment. Richardson chose, at that time, not to complete the additional paperwork. The only inference that can be drawn from this evidence is that Berglund knew that Richardson had been hit in the altercation but did not need medical treatment. Like the supervisors in *Siebken*, Berglund could not have reasonably been expected to conclude from the Daily Activity Report and his conversation with Richardson that Richardson was injured or potentially had a workers' compensation claim.

¶ 37 Richardson also cites many cases that he claims support his position that his employer's Daily Activity Report constitutes a claim. However, none of these cases actually supports him; in fact, they support Indemnity.

¶ 38 First, Richardson states he did not know he was injured and argues that pursuant to *Wight v. Hughes Livestock Co.*,[26] and *Killebrew v. Larson Cattle Co.*,[27] he was under no obligation to identify an injury in his employer's November 2006 report since he only learned he was injured in the incident when Dr. Kennedy told him on June 17, 2008.[28] He asserts that he gave all the information he knew at that time. While it goes without saying that one can only provide the information one has at any given time, neither *Wight* nor *Killebrew* stands for the proposition that whatever information one happens to have will constitute a claim; to the contrary, the Supreme Court held the claimant's notice sufficient in each of these cases precisely because he provided notice of some injury, thereby triggering the duty to investigate a potential workers' compensation claim.[29]

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treatment, that did not require medical attention, resolved on their own, did not result in any restrictions, nor cause any residual problems or disability, and which were not substantiated by objective medical findings, are not compensable injuries under the Workers' Compensation Act.") & cases cited at n.6.

[26] *Wight*, 194 Mont. 109, 634 P.2d 1189 (1981).

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

[28] To the extent this is an implicit argument that the statute of limitations should be waived due to a "latent injury," *see* Section B. below.

[29] *See* 2018 MTWCC 10, ¶¶ 31 – 34.

¶ 39 Second, Richardson relies on *Scott v. Utility Line Contractors*,[30] *Weigand v. Anderson-Meyer Drilling Co.*,[31] *Partin*,[32] and *Baxter v. Uninsured Employers' Fund*[33] in support of his position that the report "gave Securitas sufficient information to investigate the claim and prepare a defense if one were available." However, as Indemnity points out, *Scott*, *Weigand*, *Partin*, and *Baxter* are distinguishable because, unlike Richardson's, each of those claimant's submissions indicated that he had been injured at work.

¶ 40 In *Scott*, the claimant assisted his supervisor in completing an Employer's First Report, which, along with a medical report and bill for treatment, was forwarded to the Division of Workers' Compensation within a month of his accident.[34] The Montana Supreme Court held that the claimant had presented his claim within one year because the employer's report, which included "information about how the accident occurred and how he was injured; [as well as] the name of the physician and the place the injury was treated,"[35] "contained ample information to clearly inform the employer and the division of the nature and basis of Mr. Scott's possible claim," and the medical report "also gave indications that a claim could likely result out of this injury."[36]

¶ 41 In *Weigand*, the claimant assisted in completing the Employer's First Report, and the attending surgeon filled out the physician's first report, both of which were submitted to the insurer within 12 months of his accident.[37] The Supreme Court held that the mandate of § 39-71-601(1), MCA, had been satisfied because "the defendant was provided with and received ample information to be informed of the nature and the basis of Weigand's possible claim."[38]

¶ 42 In *Partin*, the claimant testified that the day after his accident, he filled out and left for his supervisor an Association of Service Contractors (AOSC) accident report, which, according to the employer, typically triggered the preparation of a workers' compensation claim. The AOSC report described the accident and identified the part of the claimant's body injured. This Court ruled that if the claimant filled out and submitted the AOSC form as he testified, which was to be determined at a *de novo* trial, he satisfied the filing requirements of § 39-71-601(1), MCA, and his claim was timely because the "report

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[30] *Scott*, 226 Mont. 154, 734 P.2d 206 (1987), *superseded by Rule on other grounds*.

[31] *Weigand*, 232 Mont. 390, 758 P.2d 260 (1988).

[32] *Partin*, 1997 MTWCC 11.

[33] *Baxter*, 2000 MTWCC 65.

[34] *Scott*, 226 Mont. at 155, 157, 734 P.2d at 207, 208.

[35] *Scott*, 226 Mont. at 157, 734 P.2d at 208.

[36] *Id.*

[37] *Weigand*, 232 Mont. at 393, 758 P.2d at 262.

[38] *Weigand*, 232 Mont. at 394, 758 P.2d at 262.

provided sufficient information for the employer to readily identify the worker and investigate the claim."[39]

¶ 43 Finally, in *Baxter*, the claimant sought medical care at a hospital the day after his accident.[40] He filled out an accident information sheet at the time of his care, and the hospital forwarded it to his employer several weeks later.[41] This Court ruled that the accident information sheet, which described the accident, identified the part of the body injured, and specifically noted that the injury was due to employment, satisfied the written claim requirement of § 39-71-601(1), MCA, because "[i]t provided ample information for the employer to readily identify the worker and investigate the claim."[42]

¶ 44 In short, the claimants in *Scott*, *Wiegand*, *Partin*, and *Baxter* each gave sufficient information from which the employer and insurer would have reasonably understood that he suffered a workplace injury while Richardson did not. Richardson has not cited any case in which the Montana Supreme Court or this Court has held that a written report of an incident without any mention of an injury constitutes a claim.

¶ 45 In sum, Securitas's Daily Activity Report does not constitute Richardson's claim under § 39-71-601, MCA, because Richardson did not indicate he was injured in the incident.

B. Timeliness of the First Report of Injury or Occupational Disease

¶ 46 As set forth above, pursuant to § 39-71-601(2), MCA, the 12-month time period from the date of an accident to file a claim can be extended up to an additional 24 months if the claimant proves lack of knowledge of disability, latent injury, or equitable estoppel.[43]

¶ 47 Richardson submitted his First Report of Injury or Occupational Disease on October 14, 2010, nearly four years after the incident in which he now asserts his nose was injured. However, he asserts that his claim was timely under § 39-71-601(2), MCA for two reasons.

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[39] *Partin*, 1997 MTWCC 11.

[40] *Baxter*, ¶ 7.

[41] *Baxter*, ¶¶ 8, 9.

[42] *Baxter*, ¶ 25.

[43] Notwithstanding the language in the statute, which appears to vest the insurer with the sole discretion to waive the time requirement, this Court has previously noted that "[Section 39-71-601(2), MCA] required claimant to submit [a] written claim for compensation within twelve months unless ***the Court*** finds grounds under section 39-71-601(2), MCA, for waiving the requirement." *Tinker v. Mont. State Fund*, 2008 MTWCC 33, ¶ 25 (alterations and emphasis in original) (citations and internal quotation marks omitted), *aff'd* 2009 MT 218, 351 Mont. 305, 211 P.3d 194. "Waiver of the time requirement is not discretionary if the claimant would otherwise qualify for waiver under the statute." *Id.*

¶ 48 First, Richardson asserts that his First Report of Injury or Occupational Disease was timely under § 39-71-601(2)(a), MCA. Relying on *Tinker v. Montana State Fund*,[44] where the Supreme Court held that a claimant does not have a "disability" under the WCA until he suffers a wage loss, Richardson asserts that he lacked knowledge of his disability until September 2010, since that is when he started having a loss of wages, and that is when the 12-month statute of limitations began running. Because he filed his First Report of Injury or Occupational Disease on October 10, 2010, he asserts it is timely.

¶ 49 Second, Richardson asserts that Indemnity is equitably estopped from raising a statute of limitations defense and that his First Report of Injury or Occupational Disease was timely under § 39-71-601(2)(c), MCA. Relying upon *Lako v. Uninsured Employers' Fund,*[45] *Schaub v. Vita Rich Dairy*,[46] and *Davis v. Jones*,[47] Richardson argues that he did not file a claim because Berglund told him the day after the incident he did not need to fill out any paperwork unless he was seeking treatment and because Anderson told him in August or September 2008, that it was too late to do so. Richardson also asserts that he was entitled to presume that Securitas would file a claim on his behalf under § 39-71-307(1), MCA, and ARM 24.29.801(1), which provide that upon notice of an injury, an employer insured by a plan No. 2 insurer shall file a report with its insurer and provides that if an employer fails to do so, the Department of Labor & Industry shall assess a penalty from $200 to $500 against the employer.[48]

¶ 50 Indemnity disagrees that Richardson's First Report of Injury or Occupational Disease was timely. Indemnity challenges Richardson's claims that he lacked knowledge of his disability and that it is equitably estopped from raising a time limitation defense. But, it asserts that this Court need not reach these arguments because under *Bain v. Liberty Mutual Fire Ins. Co.*,[49] and *Morse v. Liberty Northwest Ins. Corp.*,[50] even if any of the exceptions apply, a claim must still be filed within three years of the accident under the plain language of § 39-71-601(2), MCA, which it argues is a statute of repose. Indemnity argues that since Richardson failed to file his First Report of Injury or Occupational Disease within that time, his claim is time-barred.

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[44] *Tinker*, 2009 MT 218, 351 Mont. 305, 211 P.3d 194.

[45] *Lako*, 2004 MT 290, 323 Mont. 334, 100 P.3d 142.

[46] *Schaub*, 236 Mont. 389, 770 P.2d 522 (1989).

[47] *Davis*, 203 Mont. 464, 661 P.2d 859 (1983).

[48] This Court notes it is established Montana law that it is the claimant's legal duty to submit his claim under § 39-71-601, MCA, not his employer's. *Ricks v. Teslow Consol.*, 162 Mont. 469, 483, 512 P.2d 1304, 1312 (1973); *see also Wassberg v. Anaconda Copper Co.*, 215 Mont. 309, 320, 697 P.2d 909, 916 (1985) (emphasis in original) ("We have already held that mere notice of an injury does not put upon an employer a duty to solicit a claim. The duty to act first is *not* on the employer, it is on the employee."); *Mont. Contractor Comp. Fund v. Liberty Northwest Ins. Corp.*, 2003 MTWCC 54, ¶ 22 (alteration added) (citing *Ricks*, 162 Mont. at 484, 512 P.2d at 1312) ("[The employer] did not have a duty to solicit a claim; it was claimant's burden to follow through and file the claim.").

[49] *Bain*, 2004 MTWCC 45, *aff'd in nonciteable opinion on other grounds*, 2005 MT 299N.

[50] *Morse*, 2012 MTWCC 16.

¶ 51 Neither the Montana Supreme Court nor this Court has referred to § 39-71-601(2), MCA, as a statute of repose. However, both the Montana Supreme Court and this Court have explained that under the plain language of § 39-71-601(2), MCA, the 36-month period in which to file a claim is an absolute time limit; i.e., it is not subject to further extension by this Court.[51]

¶ 52 In *Bain*, Bain alleged that she suffered injuries from two hepatitis B vaccinations she received at her employer's behest in January and March 1996.[52] Bain filed a claim on May 21, 1999, more than three years after her vaccinations.[53] As to the timeliness of her claim, this Court ruled that § 39-71-601(2), MCA, "permits a waiver of the limitations period for an additional twenty-four months, thus allowing up to a three-year period in which to file a claim."[54] This Court ruled that Bain missed this absolute time limit, which cannot be extended:

> The Court cannot extend [the] twenty-four-month limitation. § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.") Thus, even if the claimant were able to prove good cause under any three of the grounds listed in section 39-71-601(2), MCA, the period of time for filing her claim could be extended only to three years. Her claim was filed more than three years after her vaccinations, therefore it is time-barred.[55]

¶ 53 In *Morse*, this Court applied *Bain*, drawing a clear dividing line between those claims that are filed within the three-year outer limit and those that are not. Morse suffered two slip and fall accidents while in the course and scope of his employment, injuring the same hip both times.[56] The first fall occurred in approximately late fall or early winter of 2006,[57] the second about eight weeks later.[58] Morse reported both accidents to the safety officer, but did not seek medical treatment, assuming that he would heal on his own.[59] Morse did not realize the severity of his hip condition until the summer of 2009, when he

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[51] This Court notes that § 39-71-601(2), MCA, has the hallmarks of a statute of repose. *See, e.g., Hardgrove v. Transp. Ins. Co.,* 2004 MT 340, ¶ 8, 324 Mont. 238, 103 P.3d 999 ("A legislature can make clear it intends a statute to be a statute of repose if the statutory period for bringing the claim can lapse before the cause of action accrues.").

[52] *Bain*, ¶ 16.

[53] *Bain*, ¶ 125.

[54] *Bain*, ¶ 126.

[55] *Bain*, ¶ 127.

[56] *Morse*, ¶¶ 6, 7.

[57] *Morse* ¶¶ 10, 16, 29.

[58] *Morse*, ¶ 7.

[59] *Morse*, ¶¶ 6, 7.

sought medical treatment.[60] After learning that the safety officer had never filed a claim regarding his accidents, Morse filed a First Report of Injury or Occupational Disease on December 5, 2009.[61] Liberty argued, *inter alia*, that it was not liable for Morse's industrial injury because Morse failed to comply with the one-year claim-filing period found in § 39-71-601.[62] Morse argued that Liberty should be equitably estopped from asserting a timeliness defense.[63]

¶ 54 Regarding the first fall, this Court concluded:

> Morse has not met his burden of proving that the fall occurred after December 5, 2006. Therefore, even if Morse were able to avail himself of the 24-month time filing extension provided for in § 39-71-601(2), MCA, his December 5, 2009, FROI would be untimely regarding the first slip and fall accident . . . .[64]

¶ 55 With respect to the second fall, this Court stated:

> [I]t is more probable than not that Morse's second fall occurred after December 5, 2006. Clearly, this is beyond the one-year time limitation of § 39-71-601(1), MCA. However, under § 39-71-601(2), MCA, Morse had an additional 24 months to present his claim in writing upon a reasonable showing of . . . equitable estoppel. . . . If proven, this would make his December 5, 2009, FROI timely under the applicable statute.[65]

After determining that Morse had established all six elements of equitable estoppel, this Court ruled:

> [U]nder § 39-71-601(2)(c), MCA, the time requirement for filing his claim with Liberty was extended by 24 months. His second slip and fall accident occurred within 36 months of his December 5, 2009, FROI, and therefore Liberty is liable for this claim.[66]

¶ 56 Thus, Indemnity is correct that this Court need not decide whether Richardson is entitled to the waiver of the time limitation set forth in § 39-71-601(2), MCA, because even assuming without deciding that Richardson is entitled to a waiver, under *Bain* and *Morse*,

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[60] *Morse*, ¶ 8.

[61] *Morse*, ¶¶ 8 – 10.

[62] *Morse*, ¶ 24.

[63] *See Morse*, ¶¶ 30, 31.

[64] *Morse*, ¶ 29.

[65] *Morse*, ¶ 30.

[66] *Morse*, ¶ 45.

he would have had to submit his written claim by November 29, 2009. Because Richardson did not file it until October 14, 2010, Indemnity is correct that his claim is untimely.

¶ 57 Here again, none of the cases Richardson cites actually supports him.

¶ 58 Richardson's reliance on *Tinker* is misplaced because the facts are distinguishable; unlike Richardson, Tinker submitted his claim within 36 months of his injury. In *Tinker*, the Supreme Court held that Tinker lacked knowledge of his "disability" within the meaning of the WCA until he suffered a wage loss. Thus, the court held that he qualified for the waiver in § 39-71-601(2)(a), MCA, and his claim, which he submitted 26 months after his injury and within a month after he sought medical attention because he could no longer work, was timely.[67] If Tinker had submitted his claim more than 36 months after his accident, like Richardson, his claim would have been untimely.

¶ 59 Richardson's reliance on *Lako* is misplaced because it is unhelpful to his case. Lako asserted that she did not file a claim against the Uninsured Employers' Fund (UEF) within 12 months of her injury because the UEF's administrator told her husband in the month after her injury that the UEF was insolvent and not paying claims.[68] She filed a claim seven years later and argued that the UEF was equitably estopped from asserting a timeliness defense under § 39-71-601(1), MCA.[69] The Montana Supreme Court affirmed this Court's ruling that the waiver for equitable estoppel did not apply, and that Lako's claim was time-barred by § 39-71-601(1), MCA.[70] Importantly, however, the court also noted: "[E]ven if the exception [§ 39-71-601(2), MCA] was applied, Lako cannot avail herself of it because she did not file her claim until 1992, well outside the three-year limit."[71] The same is true for Richardson here.

¶ 60 Richardson's reliance on *Schaub* and *Davis* is misplaced because, when those cases were decided, § 39-71-601, MCA, did not contain an absolute deadline for cases involving equitable estoppel.[72] In *Schaub*, which was decided under the 1985 WCA, the court held that the insurer was estopped from denying liability for an injury claim on the grounds that the claimant filed his claim two-and-a-half years after his injury because the employer repeatedly assured claimant that he would file a claim.[73] In *Davis*, which was

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[67] *Tinker*, ¶¶ 26 – 34.

[68] *Lako*, ¶¶ 7, 15.

[69] *Lako*, ¶ 10.

[70] *Lako*, ¶ 21.

[71] *Lako*, ¶ 18.

[72] *See Bowerman v. Emp't Sec. Comm'n*, 207 Mont. 314, 319, 673 P.2d 476, 479 (1983) (holding that ¶ 39-71-601, MCA (1981), which contained a waiver of the 12-month limitations period for up to an additional 24 months for a reasonable showing of lack of knowledge of disability, did not bar a latent injury claim that was filed more than three years after the claimant's accident).

[73] *Schaub*, 236 Mont. at 390, 391, 393, 770 P.2d at 523, 525.

decided under the 1979 WCA, the court held that the insurer was estopped from denying liability on a widow's claim on the grounds that she missed the deadline to file a claim by six weeks because the employer told the widow he had no responsibility because her husband died at home.[74] However, the 1989 Legislature added subsections (2)(b) and (c) to § 39-71-601, MCA, thereby applying the absolute deadline of 36 months from the date of the accident to file a claim to cases involving latent injuries and equitable estoppel.[75]

¶ 61 In sum, Richardson's First Report of Injury or Occupational Disease was untimely because he failed to file it within the three-year outer limit set forth in § 39-71-601(2), MCA.

¶ 62 As a final point, this Court rejects Richardson's argument that this is a case of "no harm, no foul." He asserts that even if he had submitted a written claim within the allowable time, Indemnity's investigation would not have revealed any viable defense and, therefore, Indemnity has not been prejudiced. However, the Montana Supreme Court has held, "[t]he requirements of § 39-71-601, MCA, are mandatory, and compliance with the time limits is essential to the action."[76] Thus, this Court need not determine whether Indemnity suffered any prejudice as a result of Richardson's failure to timely submit his claim.

¶ 63 Accordingly, Richardson's claim is time-barred under § 39-71-601, MCA. This Court therefore enters the following:

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[74] *Davis*, 203 Mont. at 468, 661 P.2d at 861.

[75] *Compare* § 39-71-601(2), MCA (1987) *with* § 39-71-601(2), MCA (1989). *See also Bain*, ¶ 126 (citation omitted) (stating that the waivers for latent injury and equitable estoppel were codified in 1989).

[76] *Grenz*, 260 Mont. at 64, 857 P.2d at 732 (1993) (citation omitted); *see also Hogenson Constr. of N.D. v. Mont. State Fund,* 2007 MT 267, ¶ 14, 339 Mont. 389, 170 P.3d 471 (citation omitted); *Hanks*, ¶ 14 (citations omitted) (interpreting notice requirement in § 39-71-603(1), MCA, and stating that the time limitation is "mandatory" and "indispensable to maintaining a claim for compensation").

ORDER

¶ 64 Richardson's Motion for Partial Summary Judgment is **denied**.

¶ 65 Indemnity's Motion for Summary Judgment is **granted**.

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

DATED this 21st day of September, 2018.

(SEAL)

/s/ David M. Sandler
JUDGE

c: Larry W. Jones
Joe C. Maynard and Adrianna Potts

Submitted: May 9, 2018