

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 22

WCC No. 9305-6783

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JOYCE MOORE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BRANDIN IRON MOTEL

Employer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Although motel housekeeper testified that she immediately reported fall down stairs to her supervisor, and had further conversation about workers' compensation a couple of weeks later, supervisor contradicted that testimony and said claimant did not report an injury and had no conversation with her about workers' compensation.

**Held:** Where Court credited supervisor's testimony and disbelieved claimant, she failed to prove notice required under section 39-71-603, MCA (1991) and her petition is dismissed.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-603, MCA (1991).** Although motel housekeeper testified that she immediately reported fall down stairs to her immediate supervisor, and had further conversation about workers' compensation a couple of weeks later, supervisor contradicted that testimony. Where Court credited supervisor's testimony and disbelieved claimant, claimant has not proved the notice required under section 39-71-603, MCA (1991) and her petition is dismissed.

**Limitations Periods: Notice to Employer.** Although motel housekeeper testified that she immediately reported fall down stairs to her immediate supervisor, and had further conversation about workers' compensation a couple of weeks later, supervisor contradicted that testimony. Where Court credited supervisor's testimony and disbelieved claimant, claimant has not proved the notice required under section 39-71-603, MCA (1991) and her petition is dismissed.

The trial in this matter was held on February 28, 1995, in Butte, Montana. Petitioner, Joyce Moore (claimant), was present and represented by Ms. Lynda S. Weaver. Respondent, State Compensation Insurance Fund (State Fund), was represented by Ms. Ann E. Clark. The claimant, Norvin Hanna, Dennis Small, Mary Hitzler, Jerry Schmier, Verlene Schmier and George Hitzler testified. Exhibits 1 through 17 were admitted without objection. Exhibit 18 was admitted for demonstrative purposes only. The depositions of claimant, Dr. Lee Lofgren and Mary Hitzler were submitted for the Court's consideration.

Issues presented: The claimant contends that she suffered an industrial injury to her lower back on April 22, 1992. The issues to be decided by the Court are whether the claimant notified her employer of an accident within thirty (30) days, as required by section 39-71-603, MCA, and whether an industrial accident in fact occurred.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the Court makes the following:

#### FINDINGS OF FACT

1. At the time of trial claimant was fifty-one years old. She attended school until twelfth grade but did not graduate from high school.
2. Claimant was born and raised in Georgia. Her adult work history primarily consists of working for cotton mills in Georgia for a period totalling approximately fifteen (15) years. She also worked in a television manufacturing plant between 1985 and 1987. (Moore Dep. at 7.)
3. In 1989, while still living in Georgia, claimant divorced her first husband. Several months later she married Eddy Farmer (Farmer).
4. Following her marriage to Farmer, claimant and Farmer lived a nomadic life, travelling from city to city, finding employment for a couple of months, and then moving on.
5. In the late summer of 1991, claimant and Farmer arrived in West Yellowstone, Montana. In mid-August claimant found employment at the Brandin Iron Motel located in West Yellowstone. Within a few short months Farmer moved on; claimant stayed and

eventually divorced Farmer. Two weeks prior to trial she married Norvin Hanna (Hanna), who is a long-time resident of West Yellowstone. She now uses her married name of Hanna. However, since this case has been pending for some time, the Court will continue to use the old caption which identifies claimant as Joyce Moore.

6. The claimant was initially employed by the Brandin Iron Motel as a housekeeper but was transferred to the laundry sometime during the winter of 1991.

7. In addition to wages, after the first month or two of claimant's employment, the Brandin Iron Motel provided claimant with living quarters at the motel. Prior to moving into motel quarters, claimant and her husband lived and slept in their van.

8. Claimant testified that she hurt her low back on April 22, 1992, when she stumbled down approximately thirteen (13) or fourteen (14) stairs while carrying a load of laundry at the Brandin Iron Motel. She testified that she did not fall or drop her laundry but that she felt jolted and "shook-up" from stumbling. (*Id.* at 48.) Claimant testified that she was not in any great pain immediately after the accident and completed her shift. According to claimant, she had a few aches and pains the next day and by the next week her back pain was more pronounced. She continued working.

9. On April 22, 1992, the Brandin Iron Motel was insured by the State Fund. The State Fund has denied liability for the alleged accident.

10. Claimant testified that she immediately reported the accident to her immediate supervisor, Mary Hitzler. She further testified that a couple of weeks following her accident she asked Mary Hitzler about workers' compensation and that Mary replied, "You don't want to do that." According to claimant, Mary told her that if she pursued a workers' compensation claim, she would have to be off work for at least a week and that she could not afford the time off.

11. Claimant concedes that she did not report the accident to the motel owners, Jerry and Verlene Schmier, even though she had daily contact with them.

12. The State Fund does not deny that notice to Mary Hitzler would constitute notice to the employer. However, it denies that such notice was ever given.

13. Mary Hitzler testified at trial. She denied that claimant told her in April of 1992 that she had stumbled down stairs or had suffered any sort of accident or injury. She denied that the claimant asked her about workers' compensation or that she discouraged claimant from filing a claim. She testified that the first time she was ever aware of any alleged accident was in July 1992, when claimant wanted to fill out a claim.

14. There is no evidence of any other communication to the employer about the accident until July 9, 1992, when claimant asked to fill out a claim.

15. On July 9, 1992, Dr. James Bischoff, a physician in Ennis Montana, examined claimant with respect to her back complaints and took her off work for ten (10) days. (Ex. 4 at 21.) Claimant delivered Dr. Bischoff's note to her employer that same day and asked for a workers' compensation claim form. An employer's first report was completed and signed on July 13, 1992. (Ex. 6.) Claimant filled out the parts entitled "Employee" and "Employee's Claim for Compensation." Verlene Schmier filled out the remaining parts of the form.

16. Claimant's last day of work was July 8, 1992.

17. Claimant was later diagnosed as suffering a herniated disc at the L4-5 level and underwent an automated percutaneous discectomy on August 6, 1992. Despite the surgery, she continues to suffer from back pain.

18. At the time the employer's first report was completed, no specific date of injury was provided by the claimant. It was not until December of 1992 that claimant determined that her injury had occurred on April 22, 1992.

19. After weighing the conflicting testimony and judging the witnesses' credibility, I find that claimant did not report her alleged industrial accident until July 9, 1992. Based on my observation of the witnesses, I am persuaded that Mary Hitzler testified truthfully when she denied that any accident had ever been reported to her. Claimant's testimony regarding her alleged conversations with Mary was not credible. My determination concerning claimant's credibility is based not only on my personal observation of her testimony but also on a number of other facts, especially the following ones:

a. Claimant sought chiropractic care from Dr. Lee Lofgren on April 27 and 29, 1992 and May 1, 1992. Claimant did not tell Dr. Lofgren that her back pain was a result of an accident at the Brandin Iron Motel and paid Dr. Lofgren by check after each visit. (Lofgren Dep. at 11.) During her first visit with Dr. Lofgren, claimant filled out a Confidential Health History form. On that form she stated that the primary reason she was seeking chiropractic care was "lower back pain." (Ex. 3 at 13.) She answered "yes" to the question, "Have you had similar problems before?" When asked to explain prior problems, she wrote: "[S]ame as now, pain in lower back -- causing (Eggs) oops! Legs to hurt." (Ex. 3.) The form also asked claimant to state the cause of her condition, and provided check off boxes for accident, illness and gradual onset. She checked the gradual onset box. (*Id.*) Finally, the form asked for information specifically pertaining to any accident; claimant wrote nothing in this section of the form. (*Id.*)

b. Dr. Lofgren testified that he customarily spends an hour and fifteen minutes to an hour and a half with the patient on an initial visit. (Lofgren Dep. at 38.) During that time he takes a medical history. The medical history taken of claimant is found in Exhibit 3 at 14. Dr. Lofgren's notes indicate that claimant's low-back pain started "a few years ago." (Ex. 3 at 14.) The quotation marks are Dr. Lofgren's. The doctor testified that based on his interview of claimant, she had a "long history" of sciatica in the right leg but had experienced sciatica in her left leg "just in the past few days." (Lofgren Dep. at 12.) The history taken by Dr. Lofgren reflects that claimant had low back pain "for a few y[ea]rs" and that an "M.D. told her to stretch." (Ex. 3 at 15.)

c. According to Dr. Lofgren, claimant never told him about any incident of stumbling down stairs. (Lofgren Dep. at 11 and 38.) Had she told him about a work-related incident, he said that he would certainly have written it down and would have also given her a different health history form specifically tailored for workers' compensation injuries. (Lofgren Dep. at 11, 39.)

d. At trial claimant denied any prior history of back pain. She denied ever previously seeing a doctor about back pain. Her testimony is irreconcilable with the health history form she filled out at Dr. Lofgren's and with Dr. Lofgren's testimony. It is unlikely that the details reflected in Dr. Lofgren's history were the result of any misunderstanding on his part and there is no evidence that Dr. Lofgren fabricated the history. I find it more likely that the history reflected in Dr. Lofgren's notes is accurate and that claimant indeed had a prior history of back problems, including radiating pain into her right leg. I conclude that claimant was not truthful in her trial testimony.

e. The Hitzlers and Schmiers also testified that claimant had complained of back problems virtually from the time she went to work at the motel. George Hitzler provided claimant with a piece of plywood to put under her mattress when she was still living in the van. He provided the plywood because she complained about her back. The Hitzlers and Schmiers were credible witnesses.

f. Jerry Schmier testified that he worked closely with claimant and heard her complain about back pain prior to April 22, 1992. Prior to April 22, 1992, he purchased a rubber mat for claimant to stand on while folding laundry.

g. The Schmiers were good employers. In addition to providing housing to employees who needed it, they provided their employees with a medical plan and took a personal interest in their employees' welfare. George and Mary Hitzler worked closely with the Schmiers. I find it implausible that Mary Hitzler or the Schmiers would have discouraged workers' compensation claims.

h. At the time of his last treatment of claimant on May 1, 1992, Dr. Lofgren, who was going on vacation, told claimant to seek medical care in Bozeman if her condition worsened. (Ex. 3 at 17; Lofgren Dep. at 33.) Claimant did not seek medical care regarding her back until July 9, 1992, when she saw Dr. Bischoff. She testified that she did not seek treatment earlier because she did not have transportation to go out of town and did not wish to ask Hanna, whom she was dating at the time, to take her. However, medical records of the medical clinic in Ennis, Montana, where Dr. Bischoff practices, show that on May 19, 1992, claimant was examined at the clinic for problems unrelated to her back. Hanna drove her to the clinic on that occasion, thus contradicting her explanation for not seeking medical care at an earlier time.

20. In light of the resolution of the notice issue, it is unnecessary for the Court to determine whether an industrial accident in fact occurred on April 22, 1992.

21. At trial the Court heard testimony, without objection, that in September 1992 the claimant stole Hanna's car and was thereafter arrested in Oklahoma and extradited to Bozeman, Montana, where, at Hanna's request, Jerry Schmier loaned money to Hanna so he could post bail for claimant. Claimant did not deny that she took Hanna's car without his permission, but she testified that she did so because she was distraught because her family in Georgia was being threatened by Farmer. (Other testimony at trial demonstrates that Farmer was abusive.) I mention this testimony because I want to make it clear to the parties that this incident has not affected my determination in this case. Evidence of other bad acts is not ordinarily admissible. Moreover, claimant's explanation for her conduct was credible. Hanna's and Jerry Schmier's bailing claimant out of jail shows their basic faith in claimant's good character, and I have no reason to doubt their judgment. While working at the Brandin Iron Motel, claimant was a hard worker and an exemplary employee. Her back condition is real. I can understand her desperation. I can also understand the tension that this case has created among these good people in a small community. It is my sincere hope that the Schmiers, Hitzlers, and Hannas will put this case behind them.

#### CONCLUSIONS OF LAW

1. The statutes in effect on the date of injury must be applied in determining the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986). Claimant's alleged injury was on April 22, 1992, and the 1991 version of the Workers' Compensation Act applies.

2. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. ***Ricks v. Teslow Consolidated***, 162 Mont. 469, 483-484, 512 P.2d 1304 (1973); ***Dumont v. Aetna Fire Underwriters***, 183 Mont. 190, 598 P.2d 1099 (1979). The claimant failed to carry her burden of proof.

3. Section 39-71-603, MCA (1991), requires an injured worker to notify her employer of the injury within thirty (30) days. The section provides:

**Notice of injuries other than death to be submitted within thirty days.** No claim to recover benefits under the Workers' Compensation Act, for injuries not resulting in death, may be considered compensable unless, within 30 days after the occurrence of the accident which 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 upon which the injured employee was engaged at the time of the injury is equivalent to notice.

The notice requirement is "mandatory and compliance with [the requirements of the statute] are indispensable to [maintaining] a claim for compensation." *Buckentin v. State Fund*, 265 Mont. 518, 523, 878 P.2d 262 (1994) (quoting from *Reil v. Billings Processors, Inc.*, 229 Mont. 305, 308, 746 P.2d 617, 619 (1960)(brackets in original)). Claimant failed to persuade the Court that she gave notice of her alleged injury within thirty (30) days. To the contrary, I am persuaded that it was not until July 9, 1992, which was seventy-eight (78) days after the alleged injury, that claimant first notified her employer that she was injured at work. I did not believe claimant's testimony that she reported an injury on April 22, 1992. I also did not believe claimant's testimony that two (2) weeks later she talked to Mary Hitzler about filing for workers' compensation and that Mary discouraged her from doing so. In light of claimant's failure to provide her employer with timely notice of her alleged industrial accident, her claim for compensation is barred.

4. It is unnecessary for the Court to determine whether in fact an industrial accident occurred.

5. Since the insurer has prevailed, claimant is not entitled to either attorney fees or a penalty.

#### JUDGMENT

1. Claimant is not entitled to compensation because she failed to give proper notice to her employer pursuant to section 39-71-603, MCA.

2. Claimant is not entitled to an award of attorney fees or costs.

3. Claimant is not entitled to a penalty.
4. The JUDGMENT in this case is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 24th day of March, 1995.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Ms. Lynda S. Weaver  
Ms. Ann E. Clark