IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 10

WCC No. 2013-3191

BRIAN RICHARDSON

Petitioner

vs.

INDEMNITY INS. CO. OF NORTH AMERICA

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 10/18/18
AFFIRMED – 07/16/19, 2019 MT 160 (DA 18-0594)

ORDER DENYING PETITIONER'S MOTION
FOR PARTIAL SUMMARY JUDGMENT AS TO NOTICE[1]

Summary: Petitioner claims he suffered an injury to his nose after helping his supervisor detain a patient at work in 2006. He moves for partial summary judgment on the issue of notice, arguing that between a written Daily Activity Report detailing where and how many times the patient hit him, and oral conversations shortly after the incident with his superiors giving similar information, Petitioner provided proper notice to his employer pursuant to § 39-71-603(1), MCA. Petitioner also argues that he could only be required to give notice of what he knew at the time, and that because he had a latent injury, he could not have notified his employer of his injury until his doctor informed him nineteen months later that he suffered an injury in the incident. Respondent opposes the motion, contending that there are genuine issues of material fact as to whether Petitioner actually hurt his nose in the 2006 workplace incident, and therefore, whether he gave the appropriate notice. Respondent also argues that even though the notice requirement can

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[1] This Court will issue a separate Order on Petitioner's Motion for Partial Summary Judgment as to Claim Filing and Respondent's Cross Motion for Summary Judgment in due course.

be tolled for latent injuries, Petitioner failed to provide the required notice within 30 days of when he says he learned of his injury.

Held: Petitioner's Motion for Partial Summary Judgment as to notice is denied. There are genuine issues of material fact as to whether Petitioner was hurt at work where he claims he felt and heard his nose crack and tasted blood during the altercation, but neither his Daily Activity Report nor his medical records over the next seventeen months mention that he was hit in or otherwise injured his nose at work. If he was not hurt at work, there was no injury to report to his superiors. Further, Petitioner did not produce sufficient evidence that he is entitled to judgment as a matter of law as to Respondent's notice defense. The Daily Activity Report in and of itself did not say anything about an injury and Petitioner did not submit any evidence that he notified his employer about hearing a crack or having a bloody nose following the incident. And, even if the notice requirement were tolled for a latent injury, from the evidence Petitioner presented, the first time he told his employer of a work-related injury was more than 30 days after he learned of it.

¶ 1 Petitioner Brian Richardson moves for partial summary judgment, arguing that he gave proper notice under § 39-71-603(1), MCA.

¶ 2 Respondent Indemnity Ins. Co. of North America (Indemnity) opposes Richardson's motion, contending there are genuine issues of material fact as to whether the underlying injury occurred at work, and whether the information Richardson gave his employer was sufficient to fulfill statutory notice requirements. Moreover, Indemnity contends that even though the notice requirement can be tolled for latent injuries, Richardson failed to provide the required notice within 30 days of when he says he learned of his work-related injury.

FACTS

¶ 3 In November of 2006, Richardson was working as a security officer for Securitas at the Billings Clinic.

¶ 4 On November 29, 2006, Richardson and his supervisor, Kurtis Cihak, helped detain a violent patient in the Emergency Room.

¶ 5 A Daily Activity Report was prepared the same day, stating, in pertinent part:

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Time	Activity	Initial
0125	STAT ED #12, Pt out of control when told by Psych Dr	
	had to stay, tried fighting way out, had to restrain	
	BR: Hits = 5 (mouth upper) ribs, stomach []2 Missed = 3	
	CR: Hits = 0, misses = 3 []3	
	KC: Hits = 4 (head, ear, shirt, chest) Misses ≈ 4	
	NI: Hits = 2 (check undereye, shoulder) Misses = 3 ±	KC, BR, CR, NI

BR, CR, NI

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, including "(mouth upper) ribs, stomach." Cihak was the first to sign his initials in the Initial column. "The initials written outside and to the right of the grid on the Report were entered by Ron Berglund," as reminders for the other officers to review the entry and initial, as well. Richardson signed his initials in the Initial column to the right of Cihak's.

¶ 6 Richardson's Affidavit states, "I told Kurtis immediately after the assault about the patient assault on me, how many times the patient hit me and where the patient hit me."

¶ 7 Richardson's Affidavit also states that he spoke with Ron Berglund, the Securitas on-site manager about the incident the following day: "I told him the patient had hit me in the nose with an upward strike of his elbow."

¶ 8 On July 1, 2007, Richardson saw Beth Hamilton, PA-C, of Billings Clinic Same Day Care, for ringing in his right ear. He reported that "his right ear has felt plugged for about the past one to one and a half months" and that "[e]very once in a while he will get kind of a low-pitched ringing." The note for the visit mentions nothing about Richardson suffering a blow to the nose. Hamilton felt that eustachian tube dysfunction was causing the decreased hearing in the right ear and recommended nasal spray and an oral decongestant.

¶ 9 On April 19, 2008, Richardson saw Steve Williamson, MD, of Billings Clinic Family Medicine, for a headache. He complained that his migraines had been "increasing in

[2] Indecipherable word, crossed out and initialed.

[3] The word "Misses:," crossed out and initialed.

frequency since he moved from Oregon where he lived at sea level." The note for the visit mentions nothing about Richardson suffering a blow to the nose. Dr. Williamson prescribed several medications.

¶ 10 On April 30, 2008, Richardson saw Scott D. Price, MD, of Billings Clinic Otolaryngology, for "[n]ose bleeds and nasal obstruction." Richardson reported " 'dark blood, deep in my nose,' " "persistent nasal congestion, facial pain, pressure, headaches and thick postnasal drainage." He described what was coming out of his nose as "a blood-tinged mucus." Upon physical examination of Richardson's nose, Dr. Price noted a "very prominent right inferior turbinate" and a "right posterior bony septal spur." However, the note for the visit mentions nothing about Richardson suffering a blow to the nose. Dr. Price thought "this may actually be related to dryness here since we are in such an arid environment," recommended he use nasal spray, and ordered a coronal CT scan of the paranasal sinuses.

¶ 11 The CT scan, performed on May 15, 2008, showed normal paranasal sinuses, but "mild deviation of the superior portion of the nasal septum to the left."

¶ 12 The same day, Richardson had a follow-up evaluation with Dr. Price. Upon physical examination of Richardson's nose, Dr. Price noted a "right septal deviation with a bony spur that impinges upon the right middle turbinate," "some prominence of the left middle turbinate, consistent with a concha bullosa," and a "prominent right inferior turbinate hypertrophy." According to Dr. Price, the CT scan of the paranasal sinuses showed 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." Dr. Price's impression included: "Headaches . . . [which] may actually represent Sluder's type neuralgia pain secondary to the septal compression upon the turbinates, as well as the possibility of some obstruction of the left concha bullosa," "Inferior turbinate hypertrophy," "Septal deviation," "Nasal obstruction," and "Recurrence of mild epistaxis." The note for the visit documents that Richardson complained that his nasal obstruction had been present approximately two years and had not improved with medications, but mentions nothing about him suffering a blow to the nose. Dr. Price discussed several treatment options with Richardson, including "endoscopic sinus surgery with excision of concha bullosa, being performed in conjunction with septoplasty and inferior turbinate submucous resection."

¶ 13 The first treatment note to mention Richardson suffering a blow to the nose, was 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 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.

¶ 14 Richardson's Affidavit states, in regard to his visit with Dr. Kennedy, "This is the first time I had a medical confirmation that I injured my nose at work."

¶ 15 Richardson left his job at Securitas within a week of his appointment with Dr. Kennedy.

¶ 16 Dr. Kennedy performed the recommended surgery on June 25, 2008.

¶ 17 In August 2008, following the surgery and his recuperation, Richardson began a new job.

¶ 18 Richardson's Affidavit states:

> I . . . went to see Ron Berglund sometime in August or September 2008 and told him I wanted to fill out a workers' compensation claim for the 11/28/06 nose injury because the private insurance would not pay all the medical bills related to Dr. Kennedy's nose surgery, and he told me to see the branch manager. When Ron told me this, the same day or within a few days, I went to see the Securitas branch manager Mike Anderson and I told him I needed to fill out a workers' compensation claim for the incident described in the 11/29/06 report and he said it was too late [sic] file a claim.

¶ 19 In the fall of 2010, counsel for Richardson 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. Dr. Kennedy responded "Yes."

¶ 20 On October 14, 2010, Richardson filed 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."

¶ 21 On November 4, 2010, Richardson gave a recorded statement. 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 treated in June 2008, Richardson responded:

> At that point in time it was a very difficult place & environment to work in. I had thought that I had just had a broken nose & I had insurance & I thought if I was just to get my nose fixed, I would never have to deal with these guys again & 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 Securitus [sic] & 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.

¶ 22 Indemnity denied liability for Richardson's claim by letter dated November 5, 2010.

¶ 23 In its response to Richardson's Petition for Hearing, Indemnity raised several affirmative defenses, one being that Richardson did not give timely notice of his alleged injury to Securitas under § 39-71-603(1), MCA.

LAW AND ANALYSIS

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

¶ 25 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 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] For purposes of summary judgment, "[t]he evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn in favor of the party opposing summary judgment."[7]

¶ 26 Section 39-71-603, MCA, provides in pertinent part:

> (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

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[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).

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

[7] *In Re Thornton*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395.

> 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.

¶ 27 Richardson argues that, between working alongside Cihak to detain the patient, immediately informing Cihak where and how many times he was hit, detailing the same information in that day's Daily Activity Report, and telling Berglund the next day that he had been struck in the nose during the altercation, he provided all of the information required of him pursuant to § 39-71-603, MCA. At the hearing, Richardson referenced *Wight v. Hughes Livestock Co.*,[8] and *Killebrew v. Larson Cattle Co.*,[9] though not by name, for the proposition that he could only be required to give notice of what he knew at the time, and that because he had a latent injury, he could not have notified Securitas of his injury until Dr. Kennedy informed him on June 17, 2008, that he suffered an injury in the incident.

¶ 28 Indemnity contends that genuine issues of material fact preclude determination at the summary judgment stage of whether Richardson's nose was injured at work on November 29, 2006, and, therefore whether Richardson gave proper notice of an injury to his employer. Indemnity further points out that even though the notice requirement can be tolled for latent injuries, Richardson failed to provide the required notice within 30 days of when he says he learned of his work-related injury as required by *Siebken v. Liberty Mutual Ins. Co.*[10]

¶ 29 Summary judgment is not appropriate on the issue of notice for two reasons. First, Richardson has failed to meet his burden of demonstrating an absence of a genuine issue of material fact as to whether he was hit in the nose and injured in the incident. Making inferences in favor of Indemnity, as this Court must, the fact that the Daily Activity Report, as well as Richardson's medical notes through May 2008 — regarding problems with his right ear, nose, and headaches — do not mention that he suffered a blow to the nose at work, raises a genuine issue of material fact as to whether such blow actually occurred at work.[11] If he did not hurt his nose at work, there was no injury for Richardson to report to his superiors. And, while Dr. Kennedy opines that Richardson's nasal condition was caused by the November 29, 2006, incident at work, the entire basis for that opinion is

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[8] 194 Mont. 109, 634 P.2d 1189 (1981).

[9] 254 Mont. 513, 839 P.2d 1260 (1992).

[10] 2008 MT 353, 346 Mont. 330, 195 P.3d 803.

[11] *See* M.R.Evid. 803(7) (stating, in relevant part, "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (7) . . . Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.").

the information Richardson relayed to her. Thus, this Court can accept her opinion only if it finds the history Richardson gave her to be true.[12] As Richardson's credibility has been called into question by these issues of fact, summary judgment is not appropriate.[13]

¶ 30 Second, Richardson did not produce sufficient evidence for this Court to conclude that he is entitled to judgment as a matter of law on Indemnity's notice defense. In *Siebken*, the Montana Supreme Court explained that under § 39-71-603(1), MCA, a claimant must give timely notice of both the accident and injury and that "notice of an event or of pain is not enough if the information does not trigger an employer's need for further investigation."[14] "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."[15] Again, making inferences in favor of Indemnity, the Daily Activity Report, in and of itself, does not constitute sufficient notice under *Siebken* because it does not say anything about an injury. Notwithstanding Richardson's claim that he felt and heard his nose crack and could taste blood after the altercation, Richardson did not include in the report that he was hit in or otherwise injured his nose,[16] and did not submit any evidence that he notified anyone at Securitas about hearing a crack or having a bloody nose following the incident. Thus, making inferences in Indemnity's favor, there is currently insufficient evidence from which this Court could find that a "reasonably conscientious manager" would have thought that the incident might involve a workers' compensation claim.

¶ 31 While Richardson is obviously correct that one can only give notice of what one knows at any given time, the consequences of doing so are not always that the notice given is sufficient. The cases he cites are instructive, but distinguishable. In *Wight*, after a tractor accident, Wight timely filed a claim for injuries to his ribs and chest.[17] More than two years later, he filed a claim for injuries to his back from the same accident.[18] When Farm Bureau refused to pay for compensation benefits, Wight filed a petition with this Court, which found him permanently totally disabled.[19] On appeal, Farm Bureau argued that notice of Wight's rib and chest injuries was insufficient to notify it that he suffered

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[12] *See Christensen v. Rosauer's Supermarkets, Inc.,* 2003 MTWCC 62, ¶ 26 (rejecting the opinion of a treating physician because it was based entirely upon the history the claimant gave, which this Court found to be false).

[13] *Cole v. Montana State Fund*, 2015 MTWCC 4, ¶ 19 (citation omitted) ("Summary judgment is improper where the credibility of a witness is crucial to decisions of material fact.").

[14] *Siebken*, ¶ 15 (citation omitted).

[15] *Siebken*, ¶ 15 (citation omitted) (internal quotation marks omitted).

[16] § 39-71-603(1), MCA (explaining that proper notice requires notice of the accident and the nature of the injury).

[17] 194 Mont. at 111, 634 P.2d at 1190.

[18] *Id*.

[19] *Id*.

back injuries in the same accident.[20] The Montana Supreme Court disagreed, concluding that "There is no requirement that an employee must give notice of each separate injury received in an industrial accident" and holding that Wight had met the notice requirements of § 39-71-603, MCA, by informing Farm Bureau of his accident and the fact that he was injured.[21] As the court explained:

> "The purpose of the notice requirement . . . is to enable the employer to protect himself 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." The purpose underlying the requirement for early reporting of injuries was fulfilled in this case. The claim form submitted by Wight provided the insurer with all of the information it needed to enable it to investigate the accident and determine the extent of Wight's injuries.[22]

¶ 32 In *Killebrew*, after tipping a tractor on its side, Killebrew told his employer, Larson, "I hurt my shoulder a little bit," but "I'm okay it's no big deal I don't think."[23] Several months later, after increasing discomfort in his shoulder, he saw a doctor, who diagnosed a rotator cuff tear causally related to the tractor incident.[24] A month after that, Killebrew was trying to tag a newborn calf, when he was "run over by a cow."[25] The next day, he told Larson "he had been beaten up by a couple of cows and . . . showed his employer the physical marks on his body which resulted from that experience."[26] Although Killebrew did not describe any particular injury, Larson "observed him limping thereafter when he had not limped before."[27] The following month, after significant swelling, Killebrew's doctor referred him to an orthopedic surgeon, who diagnosed a right meniscal tear, and impingement syndrome of the right ankle.[28] One more month passed before Killebrew filed claims for compensation for his shoulder, knee, and ankle injuries.[29]

¶ 33 The Uninsured Employers' Fund of the Department of Labor and Industry (DLI) paid Killebrew's benefits, and then sought reimbursement from Larson.[30] Larson denied liability, arguing *inter alia*, that Killebrew had not notified him of his injuries in accordance

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[20] *Wight*, 194 Mont. at 112, 634 P.2d at 1191.

[21] *Wight*, 194 Mont. at 113, 634 P.2d at 1191.

[22] *Id*. (citation omitted).

[23] 254 Mont. at 515, 839 P.2d at 1261 (internal quotation marks omitted).

[24] *Killebrew*, 254 Mont. at 515, 839 P.2d at 1262.

[25] *Id*.

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

[27] *Killebrew*, 254 Mont. at 516, 521, 839 P.2d at 1262, 1265.

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

[29] *Killebrew*, 254 Mont. at 515, 516, 839 P.2d at 1262.

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

with § 39-71-603, MCA.[31] A hearing examiner for the DLI concluded that Killebrew had not disclosed the nature of his injuries specifically enough to comply with the statute.[32] This Court agreed.[33]

¶ 34 Before reversing and remanding "for the purpose of resolving [a] factual dispute created by the testimony of the claimant and his employer,"[34] the Montana Supreme Court concluded that:

> [T]he requirements of § 39-71-603, MCA (1987), are satisfied when an employee who is involved in a work-related accident 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.
> . . . .
> [The information Killebrew relayed] following both incidents was sufficient to enable the employer to protect himself by prompt investigation of the accidents and to require prompt treatment or examination for any injuries that might have resulted from those accidents.[35]

¶ 35 The notices in *Wight* and *Killebrew* contained more information as to the physical effects of the industrial injuries than Richardson's. Unlike Wight and Killebrew, Richardson has offered no evidence that he timely communicated he was injured following the 2006 altercation. From the evidence Richardson has presented, the first time he told his superiors of his injury was in August or September 2008.

¶ 36 And, even if Richardson had a latent injury, as he argued at the hearing, he did not produce sufficient evidence to prove that he gave Securitas notice of his injury within 30 days of discovering that he suffered an injury in the incident. In *Siebken,* the Montana Supreme Court held that in cases of latent injuries, the claimant must give notice to his employer within 30 days of discovering that he suffered an injury.[36] Richardson has not submitted any evidence that he notified anyone at Securitas that he injured his nose within 30 days of when he saw Dr. Kennedy on June 17, 2008, which he avers was "the first time [he] had a medical confirmation that [he] injured [his] nose at work." Again, from the evidence Richardson has presented, the first time he told his superiors of his injury was

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[31] *Id*.

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

[33] *Killebrew*, 254 Mont. at 518, 839 P.2d at 1263.

[34] *Killebrew*, 254 Mont. at 522, 839 P.2d at 1266.

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

[36] *See Siebken*, ¶ 16 (affirming this Court's conclusion that Siebken had failed to satisfy the notice requirements of § 39-71-603, MCA, where "even with equitable tolling for a latent injury, Siebken failed to notify his employer, as required by the statute, within 30 days of discovering that he had probably suffered an unusual strain due to the [workplace] incident.").

in August or September 2008. Because this was more than 30 days after Dr. Kennedy told Richardson he injured his nose at work, this notice was too late.

ORDER

¶ 37 Richardson's Motion for Partial Summary Judgment as to Notice is **denied**.

DATED this 19th day of June, 2018.

(SEAL)

/s/ DAVID M. SANDLER

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

Submitted: May 9, 2018