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Workman's Compensation Claim Denied for Failure of Claimant To Give Timely Notice of Accident to Proper Person

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mitted to the people there can be little concern with the separation of powers. But if there is still concern for the ideal of a system of checks and balances, it inheres in the right of the people,[15] instead of the executive, to reject a proposal of the legislative assembly. The Montana court has stated:[16]

> In express words, section 12 [article VII] provides that "every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it and thereupon it shall become a law." Can it be doubted, then, that by the use of the words in this amendment [article V, section 1], "The veto power of the governor shall not extend to measures referred to the people by the legislative assembly or by initiative referendum petitions," the power so to reject an enactment was intended to be as effectual to annul such Act as veto of it by the governor?

Cooley, in his work, indicates that "a proposed amendment which has duly passed the legislature does not require to be passed upon by the governor before it can be submitted to the people."[17] The result of the instant case is to give the governor a veto power over constitutional amendment proposals even though he has none over a referendum measure to enact or amend statutes. This is contrary to the basic theory of the constitution as to the responsibility and participation of the people in law making and is not required by a fair interpretation of all the relevant provisions of the Montana Constitution.

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WORKMAN'S COMPENSATION CLAIM DENIED FOR FAILURE OF CLAIMANT TO GIVE TIMELY NOTICE OF ACCIDENT TO PROPER PERSON.— A miner wrenched his back loading coal just before going off shift, and required hospitalization for several days. About a week after the accident, while picking up his paycheck, he allegedly told one Clark, who was then working in the employer's office, that he had suffered injury in the mine. Claimant's wife corroborated this testimony, but Clark denied recollection of such conversation. The employer resisted a claim for workmen's compensation on the ground that the claimant had failed to give the employer notice of the accident within thirty days thereof, as required by statute.[1] The Industrial Accident Board denied compensation on the ground that no actual knowledge of accidental injury existed on the part of the employer or any

[15]"The two important, vital elements in any constitutional amendment are the assent of two-thirds of the legislature, and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to the essentials is secured. But they are not themselves the essentials." *Id.* at 474, 219 Pac. at 823.

[16]State ex rel. Esgar v. District Court, 56 Mont. 464, 470, 471, 185 Pac. 157, 159 (1919).

[17]1 COOLEY, CONSTITUTIONAL LIMITATIONS 87 (8th ed. 1927).

[1]REVISED CODES OF MONTANA, 1947, § 92-807. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.)

managing agent or superintendent in charge of the work, nor had the claimant given timely written notice. The district court upheld the ruling of the Board. Upon appeal to the Montana Supreme Court, *held,* affirmed. The evidence sustained the findings of the Board and of the district court that neither the employer, its managing agent, nor the superintendent in charge of the work had actual knowledge of the accident and injury. *Bender v. Roundup Mining Co.*, 356 P.2d 469 (Mont. 1960) (Justice Adair dissenting, and Justice Angstman withdrawing his support from the majority opinion upon a denial of the claimant's petition for rehearing).

Three questions faced the Board and the district court: first, whether the claimant had actually suffered a compensable industrial accident; second, whether he had actually told the office worker of the accident and injury; and, third, whether the office worker's knowledge could be imputed to the employer.

Neither the Board nor the district court answered these questions clearly. Neither made specific findings of fact on whether claimant had actually suffered an industrial accident,[2] or whether he had actually told the office worker of such accident,[3] nor did the conclusions of law answer these questions.[4] The emphasis is upon the claimant's failure to give sufficient notice. Under these circumstances it would have been appropriate for the supreme court to have assumed that the Board and the district court found for the claimant on the first two questions. Larson, in his treatise on workmen's compensation, takes the view that while the Board may refuse to follow even uncontradicted evidence in the record, "when it does so, its reasons for rejecting the only evidence in the record should appear . . . . Unless some explanation is furnished for the disregard of all the uncontradicted testimony in the record, the Commission may find its award reversed as arbitrary and unsupported."[5] The Montana Supreme Court did not, however, follow this position. It held that under all the circumstances the Board and district court were justified in disbelieving the claimant's uncontradicted testimony that he had informed Clark of the accident and injury. While this *could* have been the basis for their denying the claim, neither the Board nor the district court indicated that this was the case.

In the absence of express findings on this issue by the lower court, the supreme court clearly exceeded its proper scope of inquiry in ruling upon the claimant's credibility. Had it not been for the finding of lack of

[2]The findings of fact include such phrases as "alleging accidental injury," "at the time of the alleged accident," and "on the day of the alleged accident."
[3]The findings read only: "That upon his return to work, the claimant did not notify his foreman, or anyone in authority at the mine of accidental injury."
[4]The conclusions of law read, in part: "That no actual knowledge of accidental injury on the part of the said Philip Bender existed on the part of the employer or any managing agent or superintendent in charge of the work the said employee was engaged in at the time of the claimed accidental injury within the provisions of Section 92-807 of the Revised Codes of Montana of 1947."
[5]See 2 LARSON, WORKMEN'S COMPENSATION LAW § 80.20 (1952). This sometimes occurs when the Board denies compensation on a record which contains nothing but testimony favorable to claimant, with no indication whether all or part of the testimony was disbelieved and, if so, why.

notice, the proper disposition of the case on appeal would have called for its being remanded for clarification or further findings. The only issue which was clearly the proper concern of the supreme court on review was the lower court's determination that since Clark was neither employer, managing agent nor superintendent in charge of the work, notice to him was not binding upon the company. On this issue the majority of the court said:[6]

> [T]here must be actual knowledge of the accident and injury on the part of someone in authority in respondent's business occupying a supervisory status as a representative of the employer, so that in the ordinary course of business, steps will be taken to protect the employer in line with the purpose of the statute. It is clear that Sid Clark did not occupy such status and was not the employer, his managing agent or superintendent in charge of the work upon which appellant was engaged at the time of the alleged injury.

The majority opinion points out that Clark, whom claimant asserted he had told of the accident and injury, was neither corporate officer nor stockholder, but only a part-time office worker, and easily concludes that he was not a person in such authority that his knowledge would bind the corporation. If these were all of the facts one could hardly disagree.

The majority opinion, however, ignores certain very relevant considerations. Shortly before the accident Clark had been the corporation's president and majority stockholder, and thus undoubtedly a "managing agent" whose knowledge of an accident and injury would be imputed to the corporate employer. Clark had resigned his position and had sold his stock, but remained on in an "advisory" capacity as a part-time worker. As the dissenting opinion points out, and as the record plainly indicates, claimant was illiterate, it appears that he may not have been aware of Clark's change in status from a "managing agent" to subordinate employee. These facts seem clearly to raise the issue whether principles of apparent agency are applicable, yet the majority opinion by-passed the issue.

By the general rules of agency, where one not an actual agent is held out by the principal as his agent, an apparent[7] or ostensible[8] agency results. The knowledge acquired by such apparent or ostensible agent will bind his principal where another relies on the appearance of agency.[9] The Workmen's Compensation Act, by its own provisions, must be "liberally construed,"[10] and this has been held to mean liberally construed in favor of the claimant.[11] Liberal construction applied to the matter of giving notice should permit the use of apparent agency principles. The dissenting opinion thought that the elements of equitable estoppel were present and

[6] 356 P.2d at 473.
[7] See RESTATEMENT (SECOND), AGENCY §§ 8, 27 (1958)
[8] R.C.M. 1947, § 2-106.
[9] RESTATEMENT (SECOND), AGENCY § 273 (1958); R.C.M. 1947, § 2-124.
[10] R.C.M. 1947, § 92-838.
[11] Grief v. Industrial Accident Fund, 108 Mont. 519, 93 P.2d 961 (1939).

that an apparent agency existed. Assuming all the facts could be established in claimant's favor—that he was injured in a compensable accident and notified Clark in reliance upon a belief that he was still the company president—the claimant should have been entitled to recover. As the case developed, however, it is not clear that these facts were fully established.

This case also suggests the broader question of the attitude to be taken toward the notice requirements, and particularly the periods within which notice must be given and a claim filed. An employee now has, under the Montana statute, 60 days within which to notify the employer of the accident[13] and one year within which to file his claim.[13] Previously the periods were 30 days and 6 months.

An early Montana case held that impossibility of compliance with the 6 month limitation did not prevent its application.[14] Documents essential to the claim had to be obtained from Poland and, despite due diligence, the period for filing a claim elapsed before the documents were procured. This represents the rigid view that the requirement is jurisdictional. Where, however, the employer or the Board has been asked by the workman what steps he must take to perfect a claim and it fails to make him aware of the time limitations, equitable estoppel has been held to prevent a denial of the claim solely for tardy filing.[15] The instant case offers a related situation. Here the claimant has allegedly given timely notice to one apparently a proper person to receive it. Where the deceptive appearance is the result of the employer's acts, the notice should be held sufficient, or at least the running of the notice period should be suspended between the time notice was thought to have been given and discovery of the error. These cases of estoppel are not necessarily in conflict with decisions treating the notice requirement as jurisdictional.

Still another situation is that in which the injury suffered is a latent one. Under the letter of the statute, if the employer is not notified of the accident within 60 days the claim will be barred,[16] and this is the result which usually follows under statutes like Montana's. The Supreme Court of Nebraska, however, has held that in such a case the time begins to run only when the injury becomes apparent.[17] This result, though unfortunately unique, is desirable. It accords with the objective of the Act to provide compensation for the workman injured as a result of his employment, irrespective of questions of negligence, and to pass the economic burden on to the ultimate consumers of the products of his employer. The Montana Supreme Court has said:[18]

> We again state that the Workmen's Compensation Act is not legislation for the benefit of doctors, neither is it an act for the benefit of lawyers, nor for the benefit of the Board. This act is fundamental legislation enacted first for the protection and benefit of

[13]R.C.M. 1947, § 92-807.
[13]R.C.M. 1947, § 92-601.
[14]Chmielewska v. Butte & Superior Mining Co., 81 Mont. 36, 261 Pac. 616 (1927).
[15]Lindblom v. Employers' Liab. Assur. Corp., 88 Mont. 488, 295 Pac. 1007 (1930).
[16]R.C.M. 1947, § 92-807.
[17]Keenan v. Consumers Pub. Power Dist., 152 Neb. 54, 40 N.W.2d 261 (1949).
[18]Kindrew v. Industrial Accident Board, 132 Mont. 77, 83, 314 P.2d 866, 870 (1957).

> the injured workman, his wife and children, and other dependents. By force of the law the employee surrenders his right of an action *in tort* for injury or death. The act however assures him and his dependents of the protection of certain benefits in case of injury or death.

If the result reached by the Nebraska court cannot be reached by interpretation, it is time that the statute is changed.

The purpose of the notice requirement is to enable the employer to protect himself by prompt investigation of the accident and by prompt treatment of the injury. Under the workmen's compensation acts of most states, the employee may be excused from giving notice for various reasons. Larson gives two reasons for excusing the employee's failure to give timely notice of an industrial accident.[19] First, from the *employer's* standpoint, enforcement of the statute may not be necessary to safeguard his interests. Statutes of many states expressly provide that lateness may be excused where the employer is not prejudiced.[20]

Second, from the *employee's* standpoint, literal compliance with the statute may demand more than can reasonably be expected of a prudent man in the protection of his rights. If a workman sustained a minor injury—one which did not require immediate medical attention, and which the "reasonably prudent man" would not have thought necessary to report —and this accident did, in fact, produce a latent injury which took 61 days to become apparent, in Montana his claim would be barred. Larson severely criticizes this type of statute,[21] which provides for limitations running from the "accident" rather than from the "injury," since most courts[22] in applying "accident"-type statutes have construed them against the employee, barring him from recovery even though he has exercised all reasonable diligence. It may be said that the prudent employee should protect his interests by reporting every accident, whether major or minor. This contention, however, is open to two criticisms: first, it is unreasonable to expect the ordinary worker to report every scratch, and hence only the claim-conscious man would give timely notice in many cases; and second, even if the worker reported the *accident* within the prescribed period, if the *injury* should remain latent for more than a year, he would be barred from recovery for failure to file his claim with the Industrial Accident Board within one year after the accident as required by statute.[23] In this event, even the claim-conscious man would be barred, for if a claim were filed within the year's time, compensation would be denied on the ground that at that time there was no injury! Thus, compensation for an injury becoming apparent only after the one year's limitation has run would be completely barred even though every technicality of the Act had been followed with preciseness.[24] The Montana Supreme Court has not yet had

[19] 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.20 (1952).
[20] *Id.* at § 78.32.
[21] Such as R.C.M. 1947, §§ 92-601, 92-807.
[22] The Nebraska court has taken a contrary view. See Note 17, *supra.*
[23] R.C.M. 1947, § 92-601.
[24] See 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.42(e) (1952), where Larson questions the constitutionality of a provision which imposes an inherently insurmountable procedural bar to recovery.

to rule on this point, but cases concerning it have arisen in other jurisdictions.[25]

A liberal view should characterize the interpretation and application of the workmen's compensation law, with the object of providing compensation for every employee suffering injury from an industrial accident, regardless of his mere technical or unavoidable non-compliance with the provisions for notice and filing claims. It is submitted that the policy of the Act would have justified employing principles of apparent agency in the instant case, and would justify extension of the statutory period in the case of a latent injury. If, however, the statutory limitation on notice is jurisdictional as a number of cases suggest, this is a place where fairness calls for amendment of the statute.

JAMES W. THOMPSON

UNAVOIDABLE ACCIDENT INSTRUCTION HELD REVERSIBLE ERROR IN NEGLIGENCE ACTIONS.—The deceased, while shoveling sand onto a slippery highway from the back of a highway maintenance truck, fell into the path of the defendant's transport truck and was killed. The plaintiffs claimed as negligence the transport driver's failure to see the turn signal indicator on the maintenance truck, his failure to sound the horn of his own truck, and his failure to slow down for a potentially dangerous situation. The court gave an unavoidable accident instruction and the jury returned a verdict for the defendants. On appeal to the Montana Supreme Court, *held,* reversed and remanded for a new trial. If there is any evidence from which the jury can infer negligence on the part of the defendant, an instruction on unavoidable accidents is reversible error. *Leach v. Great Northern Ry. Co.,* 360 P.2d 94 (Mont. 1961) (Justice Castles dissenting).

Jury instructions should "outline the elements of legal liability, explain the concept of burden of proof . . . and describe the respective functions of judge and jury."[1] The formulation of brief and clear instructions is the best assurance that the jury will give them the proper weight. In the instant case the question is whether the instruction given on unavoidable accidents was necessary in order for the jury to completely understand the substantive law or whether it was superfluous, misleading, and confusing. The disputed instruction read as follows:[2]

> In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply de-

[25]See Rutledge v. Sandlin, 181 Kan. 369, 310 P.2d 950 (1957), 19 MONT. L. REV. 170 (1958). See also cases cited in 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.42(b) (1952), and supplement thereto.

[1]2 HARPER AND JAMES, THE LAW OF TORTS 886 (1956).

[2]Instant case at 97. The wording of the instruction is identical with the unavoidable accident instruction found in 1 CALIFORNIA JURY INSTRUCTIONS, CIVIL (B.A.J.I.) 319, No. 134 (4th ed. 1956).