

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 57

WCC No. 2001-0310

TAMI AABY, on Behalf of Her Minor Daughter,

REBEKAH GLASSCOCK, for

JAMES GLASSCOCK (DECEASED)

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent/Insurer for

THE CITY OF TROY

Employer

CORRIENNA P. KING

Former Spouse.

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT ON CLAIM OF REBEKAH
GLASSCOCK AND SETTING HEARING ON DEFAULT OF CORRIENNA P. KING**

Summary: A petition for death benefits was filed on behalf of the decedent's daughter, Rebekah Glasscock. The petition was brought by Rebekah's mother, Tami Aaby, who was divorced from the decedent prior to his injury. When the petition was filed, Aaby had not been appointed guardian *ad litem* to represent her daughter's interests in the death benefits claim, but was so appointed this year by the WCC. After the petition was filed, the insurer moved to join Corrienna P. King, who was married to the decedent at the time of his injury but not at the time of his death. The motion to join was granted and a summons was issued for King, which was served upon her at her residence in Florida. King has not timely responded to the Petition For Trial, to discovery requests, or to the present motion for

summary judgment. The insurer asks for summary judgment on the claims of both Rebekah and King, arguing that they did not file a claim for benefits within a year of the decedent's death (see 39-71-601, MCA (1993), and, in the alternative, for default against King.

Held: The motion for summary judgment against Rebekah is denied. In *Randall James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7, this Court held that the limitations period on a minor's claim for death benefits commences only upon appointment of a guardian *ad litem* for purposes of pursuing the claim and that the statute begins to run only with appointment. Even though Aaby is Rebekah's mother, the limitations period of section 39-71-601, MCA (1993), did not commence until Aaby was appointed guardian *ad litem* by this Court and the time for filing a claim has not yet elapsed. With regard to King, a hearing on default is ordered pursuant to ARM 24.5.327, the default rule adopted by the Workers' Compensation Court in 2000. Because King has not appeared in this case, a ruling on the motion for summary judgment against her is neither necessary nor appropriate. If she appears and asserts a claim for benefits, the merits of the summary judgment motion will be reached.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-601, MCA (1993). Insurer moved for summary judgment against minor daughter and ex-wife of decedent, arguing neither filed claim for death benefits within a year of the decedent's death. The motion regarding the daughter is denied where no guardian or guardian *ad litem* was appointed to represent her interests until this year. Under *Randall James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7, no one is authorized to bring a claim for death benefits on behalf of a minor child until a guardian or guardian *ad litem* is appointed for that purpose and the statute does not begin to run until appointment. The Court does not reach the merits of the summary judgment motion against the ex-wife where the insurer has also moved for default against her, which motion must first be resolved after notice and hearing.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.327. Insurer which joined decedent's ex-wife into case involving death benefits moved for default against her where she was served with a Summons, and failed to timely respond to the petition, discovery requests, or a motion. Court issued Order To File Response Or To Show Cause Regarding Default, which sets a hearing on default pursuant to ARM 24.5.327.

Claims: Limitations Period. Insurer moved for summary judgment against minor daughter and ex-wife of decedent, arguing neither filed claim for death benefits within a year of the decedent's death pursuant to section 39-71-601, MCA (1993). The motion regarding the daughter is denied where no guardian or guardian *ad litem* was appointed to represent her

interests until this year. Under *Randall James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7, no one is authorized to bring a claim for death benefits on behalf of a minor child until a guardian or guardian *ad litem* is appointed for that purpose and the statute does not begin to run until appointment. The Court does not reach the merits of the summary judgment motion against the ex-wife where the insurer has also moved for default against her, which motion must first be resolved after notice and hearing.

Limitations Periods: Claim Filing: Generally. Insurer moved for summary judgment against minor daughter and ex-wife of decedent, arguing neither filed claim for death benefits within a year of the decedent's death pursuant to section 39-71-601, MCA (1993). The motion regarding the daughter is denied where no guardian or guardian *ad litem* was appointed to represent her interests until this year. Under *Randall James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7, no one is authorized to bring a claim for death benefits on behalf of a minor child until a guardian or guardian *ad litem* is appointed for that purpose and the statute does not begin to run until appointment. The Court does not reach the merits of the summary judgment motion against the ex-wife where the insurer has also moved for default against her, which motion must first be resolved after notice and hearing.

Limitations Periods: Tolling. Insurer moved for summary judgment against minor daughter and ex-wife of decedent, arguing neither filed claim for death benefits within a year of the decedent's death pursuant to section 39-71-601, MCA (1993). The motion regarding the daughter is denied where no guardian or guardian *ad litem* was appointed to represent her interests until this year. Under *Randall James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7, no one is authorized to bring a claim for death benefits on behalf of a minor child until a guardian or guardian *ad litem* is appointed for that purpose and the statute does not begin to run until appointment. The Court does not reach the merits of the summary judgment motion against the ex-wife where the insurer has also moved for default against her, which motion must first be resolved after notice and hearing.

Procedure: Default. Insurer which joined decedent's ex-wife into case involving death benefits moved for default against her where she was served with a Summons, and failed to timely respond to the petition, discovery requests, or a motion. Court issued Order To File Response Or To Show Cause Regarding Default, which sets a hearing on default pursuant to ARM 24.5.327.

1 This case involves a claim for death benefits. The following facts are undisputed: James Glasscock (Glasscock) was injured on August 11, 1994, in the course and scope of employment with the City of Troy. Montana Municipal Insurance Authority (MMIA) accepted liability for the injury. Glasscock died on June 30, 1996. Whether Glasscock's death was the result of the injury is disputed.

2 The question presently before the Court on motion for summary judgment is whether a claim for death benefits was timely filed on behalf of Rebekah Glasscock, the daughter of the decedent, and/or by Corrienna P. King (King), a former spouse of the decedent who was joined into the case on the motion of MMIA. Also at issue is whether default should be taken against King. The situations of Rebekah Glasscock and King are entirely different, so will be addressed separately.

Rebekah Glasscock

3 The pending petition was filed April 6, 2001, by attorney Garry D. Seaman in the name of "Tami Aaby, on behalf of her minor daughter, Rebekah Glasscock, for James Glasscock (Deceased)." At that time, no guardian or guardian *ad litem* had yet been appointed to represent Rebekah on the claim for death benefits. Following conversations between the Court and counsel, Tami Aaby was appointed guardian *ad litem* for that purpose. My order of appointment is dated May 8, 2001.

4 MMIA has moved for summary judgment on Rebekah's claim, arguing that no claim on her behalf was filed within one year of her father's death. The insurer cites section 39-71-601, MCA (1993), which provides:

(1) In cases of personal injury or death, all claims 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 department 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;
- (c) equitable estoppel.

5 MMIA also references section 39-71-604(2), MCA (1993), which requires as follows:

If death results from an injury, the parties entitled to compensation or someone in their behalf shall file a claim with the insurer. The claim must be accompanied with proof of death and proof of relationship, showing the parties entitled to compensation, certificate of the attending physician, if any, and such other proof as may be required by the department.

6 Although section 39-71-601, MCA (1993), requires filing of a claim within twelve months from the date of happening "of the accident," the insurer appears to concede the year would run from the date of death in this case. (Montana Municipal Insurance Authority's Brief in Support of Motion for Default/Summary Judgment on Beneficiary Claims at 4.) It would be difficult to argue otherwise in a situation where death follows injury by a matter of years.

7 In *Randall James Simons-Tollefson v. State Compensation Insurance Fund*, 2000 MTWCC 7, this Court faced the argument that a minor beneficiary's claim was barred by the one-year limitation period of section 39-71-601, MCA (1993), because no timely claim was filed on behalf of the child. The insurer argued that the child's mother was obligated to bring the claim within a year on the child's behalf. I rejected that argument, based upon my reading of Montana statutes and case law (see, 40-6-232, MCA; 27-1-511; *Maloney v. Schandelmier*, 65 Mont. 531, 212 P.2d 493 (1923); *Davis v. Industrial Accident Board*, 92 Mont. 503, 15 P.2d 919 (1932); *Lazich v. Belanger*, 111 Mont. 48, 105 P.2d 738 (1940); and *Simons-Tollefson*, *supra*, 5-8). In light of that law, I concluded the child's mother was "not authorized to file and pursue a claim on [the child's] behalf until and unless she is appointed his guardian or guardian *ad litem*." (*Id.* 12).

8 This case is indistinguishable. The only difference suggested by the insurer involves a letter written by attorney Garry D. Seaman within the year following Glasscock's death. Mr. Seaman informed the insurer that "Ms. Aaby is the legal guardian of Rebekah Glasscock, daughter of the deceased, James Glasscock." (Reply Brief in Support of MMIA's Motion for Default/Summary Judgment on Beneficiary Claims at 3.) The insurer contends this letter constitutes a concession that Tami Aaby was guardian and proves that the minor was, at that point, represented by counsel, who should have filed a timely claim with all the information required by section 39-71-604, MCA (1993).

9 This argument misses the point of my conclusion in *Simons-Tollefson*. Regardless of the statement made by Mr. Seaman during 1996, and regardless of whom he represented as attorney at law, no one had authority to file and pursue a workers' compensation claim on Rebekah's behalf until an appointment was made for that purpose. Since the order of appointment of Tami Aaby as guardian *ad litem* was not made until May 8, 2001, the statute has not yet run.

10 In her opposition to the motion for summary judgment, petitioner argues a claim was in fact filed in a timely fashion, in the form of a letter written by attorney Kenneth S. Thomas to the insurer, dated April 23, 1997. I need not reach the question whether that letter asserted a claim on behalf of Rebekah Glasscock or whether it was sufficient under sections 39-71-601 and -604, MCA (1993). Where the rights of a minor beneficiary are at issue, and no guardian was appointed for purposes of a workers' compensation claim until this year, the statute simply has not yet run.

Corrienna P. King

11 In moving to join King into this case, MMIA alleged that she was married to Glasscock at the time of his August 11, 1994 injury, but divorced from him prior to his death. As noted by the insurer, section 39-71-722, MCA (1993), provides that the "question of who constitutes a beneficiary shall be determined as of the date of the happening of the accident to the

employee, whether death shall immediately result therefrom or not." Given the concern that King might have a claim for death benefits, the motion for joinder was granted.

12 On June 13, 2001, the Court issued a summons for King's appearance in this action. The insurer filed a Return of Service, indicating King was served on August 23, 2001, at a residence in Port Richey, Florida.

13 Attached to the summons was the Petition For Trial filed on behalf of Rebekah. The summons required King to file a response "within twenty days after service of this Summons." No response has been filed.

14 MMIA's motion for default informs the Court that discovery requests were served on King by the insurer, the time for responding has elapsed, and no response was given by King. MMIA also points out that a copy of the motion for summary judgment and/or default was served upon King by mail on October 5, 2001, the time for responding has lapsed, and no response has been filed.

15 During 2000, the Workers' Compensation Court adopted a Court rule specifying default procedures. In pertinent part, the rule provides:

24.5.327 DEFAULT. (1) If a party required to file a responsive pleading under these rules fails to file a responsive pleading within the time specified, or otherwise fails to defend, the court at the request of the petitioner or upon its own motion may issue an order providing that the party shall file a responsive pleading within ten days, or in the alternative shall appear before the court at a specified date, time, and place to show cause why the party should not be found in default and the relief granted in accordance with the petition. The order shall be served by mail if upon an insurer, otherwise by certified mail or through personal service as directed by and at the discretion of the court.

(2) If the party fails to file a responsive pleading within the time provided or to appear at the show cause hearing, the court may enter judgment by default.

16 The procedures of ARM 24.5.327 will be followed in this matter. Simultaneous with the filing of this Order, the Court is issuing separately an Order To File Response Or To Show Cause Regarding Default, which will be served by certified mail upon King at the Florida address noted on the return of summons. A hearing on default is set for Tuesday, December 11, 2001, 10:00 a.m., in the Office of the Workers' Compensation Court, 1625 11th Avenue, Helena, Montana.

17 If King responds within the time period stated in the Order, desires to claim benefits and to appear in this action, and complies with outstanding discovery requests, the default hearing will be cancelled. Otherwise, the hearing will proceed. As noted in the separate Order, if King fails to respond and fails to appear at the show cause hearing, default will be entered against her, which will terminate her rights to claim workers' compensation death benefits on account of Glasscock's death.

18 MMIA has also moved for summary judgment against King, arguing that she failed to file a claim within a year following Glasscock's death. Without King's appearance in the case, reaching that motion is neither necessary nor appropriate. If King appears and complies with court orders, the Court will address the summary judgment motion against her on its merits.

ORDER

19 The motion for summary judgment on the claim of Rebekah Glasscock is **denied**.

20 A default hearing regarding any claim for benefits by King is set for Tuesday, December 11, 2001, 10:00 a.m., in the Office of the Workers' Compensation Court, 1625 11th Avenue, Helena, Montana. Ruling on the motion for summary judgment against King is deferred pending outcome of the motion for default.

DATED in Helena, Montana, this 5th day of November, 2001.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Garry D. Seaman

Mr. Oliver H. Goe

Ms. Corrienna P. King - Certified Mail

Submitted: October 29, 2001