

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 15

WCC No. 9511-7443

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Appellant/Insurer

vs.

ROSEMARIE BLANCHER

Respondent/Claimant.

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

Summary: Insurer appealed from DLI order reinstating biweekly compensation benefits pending a hearing, arguing the DLI had no authority to order continuation of benefits without setting a hearing as required by section 39-071-610, MCA (1995).

Held: Sua sponte, the WCC notes it has no jurisdiction in this matter where mediation has not taken place. Subject matter jurisdiction cannot be waived nor conferred by consent of a party where there is no basis for jurisdiction under the law.

Topics:

Mediation. Sua sponte, the WCC notes it has no jurisdiction over interim benefits matter under 1995 version of section 39-71-610, MCA, where mediation has not taken place. Subject matter jurisdiction cannot be waived nor conferred by consent of a party where there is no basis for jurisdiction under the law.

Jurisdiction: Mediation. Sua sponte, the WCC notes it has no jurisdiction over interim benefits matter under 1995 version of section 39-71-610, MCA, where mediation has not taken place. Subject matter jurisdiction cannot be waived nor conferred by consent of a party where there is no basis for jurisdiction under the law.

This is an appeal from a Department of Labor and Industry Order Reinstating Benefits Pending a Hearing. The order directed Liberty Mutual Fire Insurance Company to reinstate Rosemarie Blancher's temporary total disability benefits for an additional 49 days, or until hearing, whichever occurs first. Liberty is the appellant. It asserts that the Order is contrary to statute because no hearing has been set by either the Department or the Court.

Facts

Since this matter comes to the Court on appeal, the Court ordered the Department to transfer its record of the case to the Court. On November 29, 1995, Christine L. Noland of the Department's Hearings Unit informed the Court that they had no record of the claim and that "this appeal by-passed us completely."

The parties thereafter filed their briefs. The Appellant's Brief contains a statement of facts. In her brief, Blancher "agrees that this recitation is an adequate and accurate description of the facts underlying the dispute." The agreed facts are as follows:

1. Blancher was injured in an industrial accident on July 23, 1995.
2. Liberty accepted liability and thereafter paid medical and compensation benefits.
3. On October 27, 1995, Liberty gave Blancher 14 days notice it was terminating Blancher's temporary total disability benefits. (From this fact, the Court necessarily infers that Blancher was receiving temporary total disability benefits at the time of the notice.)
4. Pursuant to section 39-71-2411, MCA (1995), on October 27, 1995, Blancher petitioned the Department for mediation regarding the termination of her benefits.
5. On November 7, 1995, the Department entered an Order Reinstating Benefits Pending a Hearing. Reinstatement was for "a period not to exceed 49 days or up to the date of hearing, whichever occurs first."
6. The Order was signed by Carol Gleed, a supervisor for the Worker's Compensation Claims Assistance Bureau of the Department. It refers to a "request" received by the Department "for a continuation of biweekly payments pending a hearing" but no further information regarding that request has been furnished to the Court.

Statute Involved

The authority of the Department is section 39-71-610, MCA (1995). The section provides:

Termination of benefits by insurer -- department order to pay disputed benefits prior to hearing -- limitation on order -- right of reimbursement. If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing, but in no event may the biweekly compensation benefits be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of a hearing. If after a hearing it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for such payments by the claimant.

Discussion

Based on the fact that no hearing has been set or even requested, Liberty argues that the Department lacked authority under section 39-71-610, MCA, to order reinstatement of benefits. Respondent answers that the scheduled mediation proceedings constitute a hearing within the meaning of the section and that the Order was therefore proper. Thus, the parties present this case as one involving statutory construction.

The Court, however, cannot construe the statute unless it has jurisdiction to do so. The Workers' Compensation Court is a statutory Court and its jurisdiction is delimited by the legislature. Section 39-71-2905, MCA (1995), provides that the Court has jurisdiction over disputes concerning benefits only after the mediation requirements of the Act have been satisfied. The mediation requirements are found at section 39-71-2401, MCA (1995), and subsequent sections. Section 39-71-2401, MCA (1995), provides in relevant part:

Disputes - jurisdiction - settlement requirements - mediation. (1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

(2) A dispute arising under this chapter that does not concern benefits or a dispute for which a specific provision of this chapter gives the department jurisdiction must be brought before the department.

(3) An appeal from a department order may be made to the workers' compensation court.

In this case, the Department is specifically vested with the authority to award additional temporary total disability benefits under section 39-71-610, MCA. Subsections (2) and (3) of 39-71-2401, MCA, therefore apply, thereby limiting the Court's role to one of appellate review of Department decisions granting or denying benefits under section 39-71-610, MCA.

A prerequisite for appellate review of an agency decision is the exhaustion of administrative remedies. Section 2-4-702, MCA, which is part of the Montana Administrative Procedure Act (MAPA), provides for judicial review to any "person who has **exhausted all administrative remedies** available within the agency" (Emphasis added.) There is an exception to the rule. Section 2-4-701, MCA, provides, "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

The Department of Labor and Industry has adopted rules providing that any order of the Department "may be appealed" for either "administrative review" or "as a contested case,"

whichever is appropriate. ARM 24.29.205(5).⁽¹⁾ A contested case includes any dispute within the Department's original jurisdiction which involves benefits or the rights and duties of the parties, ARM 24.29.207(1)(2). The definition of contested case thus encompasses the present dispute.

The Department has further made the Attorney General's Model Rules applicable to contested case matters. ARM 24.29.207(6). Model Rule (ARM) 1.3.212, as well as section 2-4-601, MCA, require opportunity for a hearing prior to the issuance of a final administrative decision. Thus, under Department rules and MAPA, the Order signed by Gleed was a preliminary one which gave rise to a right to a hearing before a Department hearing officer. Indeed, the Order notified the parties of their right to a hearing before the Department.

Since no hearing has yet been requested or held, the order from which Liberty appeals is not a "final" order reviewable on judicial review. § 39-71-702(1), MCA. Neither is it a "preliminary, procedural, or intermediate agency action" which requires immediate review in order to afford one or both of the parties an adequate remedy. § 39-71-701, MCA.

Neither party has challenged the Court's jurisdiction in this case. Nonetheless, "subject matter jurisdiction cannot be waived nor conferred by consent of a party where there is no basis for jurisdiction under the law." *In re Marriage of Miller*, 259 Mont. 424, 427, 856 P.2d 1378, 1380 (1993). The issue of jurisdiction may be raised at any time and may be raised sua sponte by the Court. *Id.* at 426, 856 P.2d at 1380.

ORDER AND JUDGMENT

For the reasons set forth in the foregoing discussion,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The appeal in this matter is **dismissed, without prejudice.**
2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

Dated in Helena, Montana, this 9th day of February, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Larry W. Jones

Mr. Randall O. Skorheim

Ms. Christine L. Noland

Mr. Brian McCullough - Zip Mail

Submitted: January 29, 1996

1. This rule, as do the others cited herein, refer to the old Division of Workers' Compensation. The 1989 legislature substituted the Department for the Division. 1989 Montana Laws, ch. 613, § 64. However, the regulations have not yet been brought up to date.