

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 29

WCC No. 9609-7611

**JEANNETTE BOWERS, as beneficiary and on behalf of
MEADE BOWERS, deceased**

Appellant

vs.

**DEPARTMENT OF LABOR & INDUSTRY and
STATE COMPENSATION INSURANCE FUND**

Respondents.

ORDER ON APPEAL

Summary: Widow alleged work-place exposure to chemicals caused or hastened her husband's death. After her claim was denied by the State Compensation Insurance Fund, it was brought to the attention of the Department of Labor & Industry, which declined to designate two physicians to conduct an evaluation of the worker's condition pursuant to section 39-72-605, MCA (1993), unless specifically requested by claimant. Under protest, claimant requested the evaluation. Following the evaluation and report, the bill from at least one physician was submitted to the claimant. She declined to pay and requested a hearing regarding responsibility for the charges. A Department hearing officer found that claimant, as the requesting party, was responsible for the charges.

Held: Under the specific language of section 39-72-608, MCA (1993), "when the occupational disease causes death, the expense of any examinations and reports, as provided in 39-72-605, must be borne by the party requesting the examination." Because causation has not yet been determined in this case, the charges may not yet be assessed against claimant and must initially be borne by the Department. Should it ultimately be determined that the worker in fact died on account of an occupational disease, claimant/appellant will be liable for the bills since she requested the evaluation.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-605, MCA (1993). Widow seeking occupational disease benefits disputed Department's determination she must pay for medical evaluation of

question whether chemical exposure contributed to death of her husband. Under the specific language of section 39-72-608, MCA (1993), "when the occupational disease causes death, the expense of any examinations and reports, as provided in 39-72-605, must be borne by the party requesting the examination." Because causation has not yet been determined in this case, the charges may not yet be assessed against claimant and must initially be borne by the Department. Should it ultimately be determined that the worker in fact died on account of an occupational disease, claimant/appellant will be liable for the bills since she requested the evaluation.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-608, MCA (1993). Widow seeking occupational disease benefits disputed Department's determination she must pay for medical evaluation of question whether chemical exposure contributed to death of her husband. Under the specific language of section 39-72-608, MCA (1993), "when the occupational disease causes death, the expense of any examinations and reports, as provided in 39-72-605, must be borne by the party requesting the examination." Because causation has not yet been determined in this case, the charges may not yet be assessed against claimant and must initially be borne by the Department. Should it ultimately be determined that the worker in fact died on account of an occupational disease, claimant/appellant will be liable for the bills since she requested the evaluation.

This is an appeal from a finding by the Department of Labor and Industry (Department) that appellant, Jeannette Bowers, must bear the expense of an occupational evaluation by a medical panel designated by the Department.

Factual and Procedural Background

The appellant, Jeannette Bowers (Jeannette), is the widow and beneficiary of Meade Bowers (Meade), who died April 24, 1994. She alleges that Meade suffered from an occupational disease caused by work-place exposure to chemicals and that his disease caused or hastened his death. After Meade's death she filed a claim. The claim was presented to and denied by the State Compensation Insurance Fund (State Fund).

Jeannette's claim was brought to the attention of the Department of Labor and Industry, which declined to designate two physicians to conduct an evaluation of Meade's condition pursuant to section 39-72-605, MCA, unless specifically requested to do so by Jeannette. Under protest, Jeannette requested the evaluation. The Department then appointed two physicians to study the matter. Following their evaluation and report, and at the direction of the Department, the bill from at least one of the panel physicians was submitted to Jeannette for payment. She declined to pay and requested a hearing before the

Department for the purpose of determining who is responsible for the cost of the evaluations.

A hearing was held before a hearing officer of the Department on February 28, 1996. (Tr. at 2.) On August 7, 1996, the hearing officer issued his Findings of Fact; Conclusions of Law; and Final Order (Findings), determining that Jeannette, "as the requesting party, is responsible for the payment of medical examinations/record reviews in this matter." (Findings at 9.) The hearing officer held that "the language of 608 is clear relative to payment for examinations and reports provided for in 605 - the party requesting the examination must bear the expense." (*Id.* at 8) He also noted that the Department has an existing policy which provides that any party filing a claim under section 39-72-605, MCA, must also file a written request for the examination. (*Id.* at 9.) He found that Jeannette filed a claim and, "under protest, submitted a written request for the examination." (*Id.*)

On September 5, 1996, Jeannette appealed the hearing officer's Findings to this Court. (Court File, Notice of Appeal and Request for Oral Argument.) She alleged that, contrary to the hearing officer's determination, the Department is responsible for the costs of the evaluation. After reviewing the initial briefs in the matter, another possibility occurred to the Court, namely that the insurer might be responsible for payment. Therefore, in an Order dated December 9, 1996, this Court joined the State Compensation Insurance Fund (State Fund) as a necessary and indispensable party. (Order Joining State Compensation Insurance Fund as a Necessary Party.) The State Fund participated in further briefing, which is now complete.

Jeannette initially requested oral argument. However, the Court has contacted counsel for Jeannette and has been advised that oral argument is unnecessary. The matter is therefore deemed submitted and ready for decision.

Record on Appeal

The record on appeal consists of a transcript of the hearing below and the Department's complete file.

Issue Raised on Appeal

The Court rephrases the issue on appeal as follows: "Who is responsible for the payment of the cost of an occupational disease evaluation conducted under section 39-72-605, MCA?"

Standard of Review

Section 39-72-612(2), MCA, provides for a direct appeal to the Workers' Compensation Court from a final order of the Department in an occupational disease case. The section provides:

The judge may overrule the department only on the basis that the department's determination is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The hearing officer's Findings of Fact are not challenged by Jeannette. (Notice of Appeal and Request for Oral Argument at 2.) Rather, she argues that the Department has misinterpreted and misapplied the occupational disease statutes.

Thus, the standard of review in this case is whether the Department's interpretation of the law is correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601 (1990).

Discussion

Meade Bowers died on April 24, 1994, therefore, the 1993 version of the Occupational Disease Act (ODA) applies. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).

At issue in this case are sections 39-72-605 and -608, MCA (1993). Those sections provide:

39-72-605. When occupational disease causes death. When an occupational disease is claimed to have caused death and a claim for death benefits is filed therefor, the department **shall** select at least two physicians who in the department's judgment could properly determine the condition regarding the decedent's death in relation to a possible occupational disease, and the physicians shall examine all available evidence pertaining to the claim and shall make findings and report to the department. The report is prima facie evidence of fact as to the matters therein contained. [Emphasis added.]

39-72-608 Payment of medical examination, report, and autopsy expenses. The expense of the first medical examination and report as provided in 39-72-602 must be borne by the insurer. The expense of a reexamination and panel report must be borne by the dissatisfied party requesting the reexamination. The expense of the periodic medical examinations and reports, as provided in 39-72-607, must be

borne by the party requesting the periodic medical examination. The expense of the autopsy, as provided for in 39-72-606, must be borne by the party requesting the autopsy. **When the occupational disease causes death, the expense of any examinations and reports, as provided in 39-72-605, must be borne by the party requesting the examination.** [Emphasis added.]

Jeannette's argument concerning these statutes is straightforward. She argues that where a claim is filed alleging that an occupational disease has caused death, the language of section 39-72-605, MCA, imposes a mandatory, non-discretionary duty upon the Department to select two physicians to evaluate the claim. § 39-72-605, MCA. (Appellant's Brief at 2.) She then argues, that since the duty is mandatory, the Department is the "party requesting the examination" and is therefore responsible for payment of the examination pursuant to section 39-72-608, MCA. As read by Jeannette, the two sections, construed together, require that in **every case** the Department pay the cost of an evaluation conducted under section 39-72-605, MCA.

There are two problems with Jeannette's logic. First, the statute does not require the "Department" to pay the cost of the examination, it requires the "party requesting the examination" to pay. Where the legislature wished to rest liability on only one specific person or entity to pay for an examination, it has used language which specifically identifies the person or entity. Section 39-72-608, MCA, for example states that the examination provided in section 39-72-602, MCA, must be borne by the insurer. The use of the words "requesting party" suggests that the legislature contemplated more than one potential requestor.

Second, and more importantly, the word "party" refers to persons or entities who are involved in a dispute, not the *forum* for the dispute. See Black's Law Dictionary (5th ed.) at 1010. In construing the meaning of a statute, we presume "that the terms and words used were intended to be understood in their ordinary sense." *In re Woodburn's Estate* 128 Mont. 145, 153, 273 P.2d 391, 394-95 (1954). The Department is no more a party to a dispute over occupational disease than the Court is a party to this appeal.

The use of the word "shall" in section 39-72-605, MCA (1993), does not change my conclusion. While the word "shall" is ordinarily interpreted as mandatory, *In re Investigative Records of City of Columbus Police Dept.*, 265 Mont. 379, 381, 877 P.2d 470, 471 (1994), that is not always the case:

"Shall," as used in statutes, is not only, in many cases, superfluous from the standpoint of good writing, but has too many meanings to make its unnecessary use safe. The courts, in following their well-defined policy of looking to the intent, rather than to the language, have variously held that "shall" is imperative, is directory, means "may," expresses a mandate, either permissive or peremptory, applies to the past, to the future, and to the present.

1 A Sutherland Statutory Construction (5th ed.) at 763. A provision of a statute cannot be construed in isolation, it must be construed together with other provisions of a statute. *David v. State Compensation Mut. Ins. Fund*, 267 Mont. 435, 440, 884 P.2d 778, 781 (1994). Here, the reference to "requesting" party in section 39-72-608, MCA (1993), indicates that the Department's duty to designate physicians pursuant to section 39-72-605, MCA (1993), is not automatic, rather it is triggered by a request of either the insurer or the claimant.

However, both appellant and the Department overlook critical language which is dispositive of appellant's obligation. That language is contained in the sentence setting out the obligation. That sentence, with the critical language highlighted, reads:

When the occupational disease causes death, the expense of any examinations and reports, as provided in 39-72-605, must be borne by the party requesting the examination. [Emphasis added.]

§ 39-72-608, MCA (1993). Similar language is contained in section 39-72-605, MCA (1993), which requires the Department to designate two physicians "[w]hen an occupational disease is **claimed** to have caused death and **a claim for death benefits is filed** therefor . . ." There are, however, critical differences in the language. Section 39-71-605, MCA, is triggered by a "claim," whereas section 39-72-608, MCA, is phrased in terms of "cause." [Emphasis added.] The differences cannot be ignored. "The legislature, in enacting a law, is presumed to have understood the ordinary and elementary rules of construction of the English language." *State v. Miller*, 231 Mont. 497, 517, 757 P.2d 1275, 1287 (1988). Thus, it is presumed to understand the difference between making and submitting a "claim" for compensation, on the one hand, and the fact of compensability, on the other. The Court must give effect to the distinction. Section 39-72-608, MCA, speaks in terms of cause in fact, as distinguished from a mere claim. Thus, the obligation for payment imposed under section 39-72-608, MCA (1993), arises only where the occupation in fact causes death. The mere filing of a claim and a request for an evaluation are insufficient to trigger the obligation.

The State Fund continues to deny appellant's claim and there has been no adjudication of the claim. Since it has not been determined that Meade suffered from an occupational disease causing his death, the prerequisite to imposing liability for payment of the physicians' evaluations upon appellant has not been met. Jeannette is not liable for the bills. Should it ultimately be determined that Meade in fact died on account of an occupational disease, then upon such determination appellant will be liable for the bills since she requested the evaluation.

Then, upon whom does the obligation for payment presently rest? The statute is silent since it makes no provision for payment where causation and liability continue to be at issue. Under such circumstance, the initial responsibility for payment falls on the

Department since it has the obligation to designate the physicians and compel the evaluation.

ORDER AND JUDGMENT

1. The Findings of Fact; Conclusions of Law; and Final Order issued by the Department hearing officer on August 7, 1996, are **reversed**.
2. This matter is remanded to the Department for entry of an order finding that appellant is not presently responsible for payment of the physicians' bills.
3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
4. 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 29th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman L. Newhall

Mr. Robert J. Campbell

Ms. Christine L. Noland

Mr. Brian McCullough - zipped

Date Submitted: January 21, 1997