

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 29

WCC No. 9904-8194

STATE COMPENSATION INSURANCE FUND

Petitioner

vs.

NANCY (ANDERSON) BLATNIK

Claimant/Respondent.

ORDER ON EMERGENCY APPEAL

Summary: State Fund filed a petition for emergency relief from a DOL order directing it to pay claimant/respondent up to 49 days of benefits under section 39-71-610, MCA (1997). State Fund argued that it claimant, whose claim was in mediation, decides not to further litigate her claim, she might receive a windfall through the 49-day benefits.

Held: Overruling Liberty Mutual Fire Ins. Co. v. Blancher, WCC No. 9511-7443, the WCC finds it does have jurisdiction to consider State Fund's present petition. The State Fund's concern is legitimate; it could be left without remedy if section 39-71-610, MCA (1997) is interpreted to require repayment by claimant of 49 day benefits only if she files a petition in the WCC seeking benefits. Thus, the WCC affirms the DOL order of 49-day benefits with the proviso that should the parties not resolve their dispute at mediation, the claimant shall diligently prosecute a petition with the WCC until settlement or judgment or shall repay the 49-day benefits. (See 1999 revisions to section 39-71-610, MCA and subsequent WCC decisions.)

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-610, MCA (1997). Overruling Liberty Mutual Fire Ins. Co. v. Blancher, WCC No. 9511-7443, the WCC finds it does have jurisdiction to consider State Fund's emergency petition challenging an order of the DOL awarding claimant 49-day benefits under section 39-71-610, MCA (1997). The State Fund's is legitimately concerned that it could be left without remedy if section 39-71-610, MCA (1997) is interpreted to require repayment by claimant of 49 day benefits only if claimant files a petition in the WCC seeking benefits and claimant fails to pursue her claim in the WCC. Thus, the WCC affirms the DOL order of 49-day

benefits with the proviso that should the parties not resolve their dispute at mediation, the claimant shall diligently prosecute a petition with the WCC until settlement or judgment or shall repay the 49-day benefits. (See 1999 revisions to section 39-71-610, MCA and subsequent WCC decisions.)

Benefits: Interim (39-71-610) Benefits. Overruling *Liberty Mutual Fire Ins. Co. v. Blancher*, WCC No. 9511-7443, the WCC finds it does have jurisdiction to consider State Fund's emergency petition challenging an order of the DOL awarding claimant 49-day benefits under section 39-71-610, MCA (1997). The State Fund's is legitimately concerned that it could be left without remedy if section 39-71-610, MCA (1997) is interpreted to require repayment by claimant of 49 day benefits only if claimant files a petition in the WCC seeking benefits and claimant fails to pursue her claim in the WCC. Thus, the WCC affirms the DOL order of 49-day benefits with the proviso that should the parties not resolve their dispute at mediation, the claimant shall diligently prosecute a petition with the WCC until settlement or judgment or shall repay the 49-day benefits. (See 1999 revisions to section 39-71-610, MCA and subsequent WCC decisions.)

¶1 In this proceeding the petitioner, State Compensation Insurance Fund (State Fund), seeks emergency relief from an Order of the Department of Labor and Industry (Department), directing it to pay claimant/respondent up to forty-nine days of benefits pursuant to section 39-71-610, MCA. Since the petition was based on legal rather than factual grounds, the Court held a telephone conference call with counsel to obtain the factual background and determine whether the issue can be resolved without further hearing or briefing.

¶2 During the conference, the Court ascertained that the claimant suffered an industrial accident for which the State Fund accepted liability. The State Fund initiated benefits on September 25, 1995, and continued paying benefits until August 28, 1996, at which time it terminated benefits.

¶3 Claimant is now represented by an attorney, who made demand for reinstatement of benefits. The State Fund refused and claimant requested mediation, as well as a Department Order reinstating her benefits under section 39-71-610, MCA. Mediation has been scheduled for the end of April 1999. Meanwhile, on March 12, 1999, the Department ordered payment of "forty-nine day" benefits pursuant to section 39-71-610, MCA, retroactive to March 2, 1999.

¶4 The State Fund's request that the Court set aside the Department's Order is based on the peculiar language of the last sentence of the section. In its entirety, the section provides:

39-71-610. 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.

Focusing on the last sentence, the State Fund argues that since a petition may never be filed, it may have no recourse to recover the Department ordered payments even though claimant is not entitled to the additional benefits. The State Fund correctly points out that a petition for hearing has not been filed with the Court at the present time; indeed, pending mediation the claimant is precluded from petitioning the Court. § 39-71-2401(1), MCA.

¶15 The State Fund's concern is legitimate. Section 39-71-610, MCA, does not condition the forty-nine day benefits upon the actual filing of a petition with the Court, as opposed to a request for mediation, and the Court may not write in such condition. § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). The section requires only a termination of benefits and a dispute over the termination as prerequisites to a Department's forty-nine day Order.⁽¹⁾ The filing of a request for mediation is sufficient evidence that a dispute exists, and no more is required.

¶16 Moreover, the State Fund's concerns would not be alleviated by limiting forty-nine day benefits to post-petition since the claimant could file a petition, collect the benefits, and then dismiss her petition before trial.

¶17 On the other hand, the statute must be construed reasonably and with common sense: absurd results should be avoided, *In re marriage of Swerson*, 281 Mont. 1, 19, 931 P.2d 691, 702 (1997). It must also be construed, if possible, in harmony with other provisions which govern claimant's entitlement to benefits. Courts must:

. . . interpret individual sections of an act in such a manner as to ensure coordination with the other sections of the act. *State v. Meader* (1979), 184 Mont. 32, 37, 601 P.2d 386, 389. In doing so, a statute will not be interpreted to defeat its evident object or purpose; the legislative [263 Mont. 287] objective is of prime consideration in interpreting statutes. *Lewis and Clark County v. Dep't of Commerce* (1986), 224 Mont. 223, 227, 728 P.2d 1348, 1351.

Howell v. State, 263 Mont. 275, 286-87, 868 P.2d 568, 575 (1994). This principle is critical here since the forty-nine day benefits are ultimately dependent upon claimant's

entitlement to further benefits under other sections of the WCA, hence the proviso that they be repaid if claimant does not prevail at hearing.

¶18 Plainly, the legislature did not contemplate the possibility that a claimant seeking forty-nine day benefits would abandon her quest for full reinstatement of benefits. The provision is a stopgap measure to alleviate part of the hardship of a cut-off of benefits while a claimant is pursuing legal remedies. The provision for repayment demonstrates legislative intent that a claimant not receive a windfall. It does not relieve the claimant of otherwise proving her entitlement to benefits.

¶19 The section implicitly contemplates that claimant will diligently pursue her claim for underlying benefits. She has a duty to do so. Her attorney agreed during the Court's conference that should mediation fail, and claimant then fail to diligently prosecute a petition with this Court, she will be obligated to repay the forty-nine day benefits.

¶10 In resolving this emergency appeal, the Court notes and overrules *Liberty Mutual Fire Ins. Co. v. Blancher*, WCC No. 9511-7443, Order Dismissing Appeal for Lack of Jurisdiction (February 9, 1996), insofar as that decision would preclude me from resolving the specific argument raised in this case. In *Blancher*, as in this case, the insurer was ordered to pay forty-nine day benefits upon the claimant's filing a request for mediation following termination of her temporary total disability benefits. As in this case, the insurer filed an immediate appeal alleging that the Department erred as a matter of law because no hearing on the merits of claimant's request for benefits had been scheduled. As in this case, the insurer did not request the Department to hold a contested case hearing with regard to the forty-nine day Order.

¶11 In *Blancher* I held that the Court lacked jurisdiction to entertain the appeal because the insurer had not exhausted its administrative remedies. The Department's Order, as in this case, was an initial order for forty-nine day benefits. That initial Order was not final: the insurer was entitled to request and obtain a contested case hearing before a Department hearing examiner. Section 2-4-702, MCA, requires exhaustion of administrative remedies prior to any petition for judicial review, thus I held that the insurer was required to pursue and exhaust its arguments in a contested hearing before the Department prior to appealing to the Court.

¶12 The exhaustion requirement, however, is not immutable. Section 2-4-701, MCA, provides an exception in cases in which judicial review after exhaustion of administrative remedies would not provide an adequate remedy. The section provides:

2-4-701. Immediate review of agency action. 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.

In *Blancher*, without discussion, I held that the issue did not require immediate review. Upon further consideration, I conclude I was wrong.

¶13 The State Fund's concern in this case is that section 39-71-610, MCA, might be interpreted as allowing claimant to seek and obtain forty-nine day benefits but not allow it to challenge the Department's forty-nine day Order **if** the statute is ultimately interpreted as requiring reimbursement of the benefits only if the claimant diligently pursues her underlying claim for benefits and loses. As discussed above, the State Fund is concerned that the claimant might obtain forty-nine day benefits without it ever having an opportunity to seek reimbursement. That concern is sufficient to require immediate judicial review of the statute in question.

¶14 The Department Order is **affirmed** with the proviso that should the parties not resolve their dispute at mediation, the claimant shall diligently prosecute a petition with this Court until settlement or judgment, otherwise she shall repay the benefits. If a judgment is adverse to her, she shall also repay the benefits. This decision is final.

SO ORDERED.

DATED in Helena, Montana, this 21st day of April, 1999.

(SEAL)

Mike McCarter

JUDGE

c: Mr. David A. Hawkins

Mr. Randall O. Skorheim

Date Submitted: April 12, 1999

1. The Court need not consider the scope of the Department's discretion to enter the Order, or whether it abused its discretion, since those matters are not raised by the emergency petition.