

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 59

WCC No. 9606-7558

MARGARET EPPERSON

Appellant

vs.

WILLIS CORROON ADMINISTRATIVE SERVICE CORPORATION

Respondent.

ORDER ON APPEAL

Summary: Appellant sought occupational disease benefits and was referred to a medical examination, which found her not to suffer from an OD. The Department of Labor duly issued an order of determination denying her claim. Although the order stated she must request a hearing within 20 days, she did not. She later requested a hearing, which was dismissed by the DOL as untimely. She appealed to the Workers' Compensation Court.

Held: While section 39-72-612(1), MCA, requires appeal within 20 days, the 20-day period does not commence to run until expiration of the time for administrative review of the determination, which is ninety days under ARM 24.29.215(1). Until that period has run, the order is not final. Claimant's appeal was filed within ninety days of the initial order and is hence timely. (Note: WCC affirmed in Epperson v. Willis Corroon Administrative Services Corporation, 281 Mont. 373, 934 P.2d 1034 (1997) (No. 96-610).)

Topics:

Appeals (To Workers' Compensation Court): Timeliness. Occupational disease claimant's appeal of "order of determination" denying her occupational disease claim was timely, even though not filed within 20 days after "order of determination." While section 39-72-612(1), MCA, requires appeal within 20 days, the 20-day period does not commence to run until expiration of the time for administrative review of the determination, which is ninety days under ARM 24.29.215(1). Claimant's appeal was filed within ninety days of the initial order and is hence timely. (Note: WCC affirmed in Epperson v. Willis Corroon Administrative Services Corporation, 281 Mont. 373, 934 P.2d 1034 (1997) (No. 96-610).)

This is an appeal from a Department of Labor and Industry (Department) decision dismissing the appellant's request for hearing in an occupational disease case.

The relevant facts are straightforward. On September 26, 1995, the appellant, Margaret Epperson (claimant), submitted to a medical examination by Dr. J. Michael Sadaj to determine if she suffered from an occupational disease. Dr. Sadaj was designated by the Department to perform the examination and submitted a report of his findings to the Department. On November 1, 1995, the Department issued an Order Referring Copy of Medical Reports to Parties. The order indicated that based on Dr. Sadaj's report claimant's occupational disease claim "would be denied" but notified her of her right to a second examination. (Appellant's Brief Ex. C.)

Claimant did not request a second examination and on November 27, 1995, the Employment Relations Division (ERD) issued an Order of Determination denying her claim. The order further notified claimant of a right to request a hearing within 20 days of the order, stating:

Pursuant to 39-72-612, MCA, the parties are hereby notified a party adversely affected by this Order of Determination has twenty (20) days from the date of this Order to request a hearing before the Department of Labor & Industry Legal Division.

(Appellant's Brief Ex. D.) Finally, the order stated that lacking a request for a hearing the order would become final.

Claimant did not request a hearing within 20 days. However, thereafter on January 30, 1996, the claimant, through counsel, requested a hearing. The insurer moved to dismiss the request as untimely and on May 31, 1996, a Department hearing officer issued a Ruling on Insurer's Motion to Dismiss finding that the request for hearing was in fact untimely. He dismissed the case. This appeal followed.

On appeal, the claimant argues that the dismissal of her request for a hearing was in violation of the applicable statutes and Department regulations; was made upon unlawful procedures; was affected by an error of law; and was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. (Appeal from Ruling on Insurer's Motion to Dismiss.) While the final ground appears to raise factual issues, the claimant's arguments are legal ones questioning the legal correctness of the Department's decision. The decision will therefore be reviewed to determine if it is correct. *Steer, Inc., v. Dep't of Revenue of the State of Mont.*, 245 Mont. 470, 803 P.2d 601 (1990).

Discussion

The time for requesting a Departmental hearing in an occupation disease case is prescribed by section 39-72-612, MCA, (1989) which provides:

39-72-612. Hearing and appeal to workers' compensation judge. (1) Within 20 days after the department has issued its order of determination as to whether the claimant is entitled to benefits under this chapter, a party may request a hearing. In order to perfect an appeal to the workers' compensation judge, the appealing party shall request a hearing before the department. The department shall grant a hearing, and the department's final determination may not be issued until after the hearing.

(2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. The judge, after a hearing held pursuant to 39-71-2903 and 39-71-2904, shall make a final determination concerning the claimant's claim. 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. [Emphasis added.]

The section specifically fixes the time in which to request a hearing. An untimely request must be dismissed. *Cf. First Security Bank of Havre v. Harmon*, 255 Mont. 168, 172, 841 P.2d 521, 523 (1992) (Time limits fixed for appeal are mandatory and jurisdictional and failure to perfect an appeal within the time allowed requires dismissal of the appeal).

Claimant, however, seeks to avoid the harsh consequence of the statute by arguing that a regulation of the Department provides a separate, longer period for making her request. She relies on ARM 24.29.215(2) (1987), which provides:

- (2) A party seeking a contested case hearing under ARM 24.29.207 must make a written request to the division [Department⁽¹⁾] for a contested case hearing within thirty days of notice of the results of an administrative review or within ninety days of notice of adverse action. [Emphasis added.]

She requests that the longer, 90-day appeal period mentioned by the rule should be applied.

Initially, a reading of the Department's regulation supports claimant's interpretation of ARM 24.29.215(2) as applying to occupational disease cases, as well as to workers' compensation cases. ARM 24.29.207, to which the former rule refers, expressly extends to occupational disease hearings. ARM 24.29.207(4) (1983) provides:

(4) A contested case under Title 39, chapters **72** or 73 . . . is administered by the workers' compensation division in accordance with 24.29.207(6). [Emphasis added.]

The ODA, of course, is found in chapter 72 of Title 39. ARM 24.29.207(6), mentioned in subsection (4), merely provides that the Attorney General's model procedural rules regarding contested case hearings shall apply to Department proceedings. Thus, claimant has properly read ARM 24.29.215(2) (1987) as affording her 90 days in which to file her request for hearing.

The Department, however, cannot adopt regulations contrary to or conflicting with an express statute, *Bick v. Montana Department of Justice*, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986), and any such regulation is void, *Michels v. Department of Social and Rehabilitation Services*, 187 Mont. 173, 177, 609 P.2d 271, 273 (1980). Thus, the 20-day limit prescribed by section 39-72-612, MCA, is applicable in this case. The Department's longer, 90-day rule, as it applies to an occupational disease determination, is void.

The claimant does not argue, or provide the Court with facts supporting an argument that the Department is estopped by its rule from relying on the statutes. Estoppel requires proof of reliance on the rule, and none is shown. *Mellem v. Kalispell Laundry*, 237 Mont. 439, 774 P.2d 390 (1989).

She does contend, however, that the Department and the insurer should be estopped from imposing the statutory limitation because the Department failed to furnish her with the Department's letter to Dr. Sadaj. A copy of the letter is set forth in the appendix and asks the doctor to first determine if claimant is suffering from an occupational disease. If he so determined, then he was to determine whether the disease was proximately caused by her employment. If both of those questions were answered in the affirmative, then the letter asked a number of additional questions. Claimant asserts that the doctor failed to comply with the letter and that because the Department failed to furnish her a copy of the letter she was unaware of that fact and could not have known whether she had grounds to request a hearing. Hence, she argues, the Department deprived her of essential information and should be estopped.

Estoppel requires proof of six elements, as follows:

"1. There must be conduct -- acts, language, or silence -- amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances

must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon . . . 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse . . . "

Davis, 661 P.2d at 861 (quoting *Lindholm v. Employers' Liability Assurance Corp.* (1930), 88 Mont. 488, 494, 795 P.1007, 1009).

Mellem at 442, 774 P.2d at 392.

The difficulty with claimant's position is that unless Dr. Sadaj found that she suffered from an occupational disease, none of the following questions were applicable. Claimant was aware of the first question put to the doctor since the very purpose of the examination was to determine whether she suffered from an occupational disease. Dr. Sadaj did not so find, thus there was no reason for him to respond to the remaining questions. The real deficiency in the process was the failure of the Department to follow up on Dr. Sadaj's recommendation for further testing, but that deficiency was apparent from the face of the doctor's report and the Department's Order Referring Copy of Medical Reports to Parties. Since claimant was aware of the general purpose of Dr. Sadaj's examination, and that general purpose was reflected in the first question of the Department's letter, and since the remaining questions were not material, the claimant has failed to satisfy the first element of estoppel.

Nonetheless, I find that the claimant's appeal was timely and that the hearing officer erred in dismissing claimant's request for hearing. The Department's November 27, 1995 order in this case was not an order of determination within the meaning of section 39-72-612, MCA. The section refers to the Department and "*its* order of determination." The quoted section connotes finality, with a hearing as the next recourse. The order contemplated by the section is the **last and final** order issued by the Department **without** hearing, and not some initial or non-final order.

A review of Department regulations shows that ERD's November 27, 1995 Order of Determination was not a final order and was subject to further review and modification by the Department without hearing. As quoted above, ARM 24.29.215(2) refers to administrative review and sets a time limit for requesting a hearing following administrative review. "Administrative review" is an informal review of "any division [Department] order" by the Commissioner of Labor or her designee and is governed by ARM 24.29.206 (1983). ARM 24.29.205(5) (1983) provides that "[a]ny division [Department] order may be appealed for administrative review." It goes on to provide that "any party may first seek administrative

review of an order, prior to a contested case hearing without affecting that party's statutory remedies." After review, the Commissioner of Labor may "rescind, alter or amend" the order. ARM 24.29.206(5) (1983). Thus, a Department order becomes final only after the Commission has completed her administrative review *or after the time for seeking such review expires*. The time for seeking administrative review is 90 days. ARM 24.29.215(1).⁽²⁾

In this case the claimant filed her request for hearing prior to the expiration of the 90-day period in which she could have sought administrative review. The request for hearing amounted to a waiver of her right to an administrative review and the ERD order became final upon that waiver.⁽³⁾ Thus, the order became final on January 30, 1996, and claimant's appeal was timely under section 39-72-612, MCA, since it was filed that same day.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that the Ruling on Insurer's Motion to Dismiss is **reversed** and this matter is **remanded** for a hearing on the merits.

This ORDER AND JUDGMENT is certified as final for purposes of appeal to the Montana Supreme Court.

DATED in Helena, Montana, this 29th day of August, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Joe Seifert

Mr. Norman H. Grosfield

Ms. Christine L. Noland

Submitted: August 19, 1996

Appendix & Letter attached

APPENDIX

24.29.205 ISSUING DIVISION ORDERS (1) "Order" means any decision, rule, direction, requirement, or standard of the division, or any other determination arrived at or decision determining a person's opportunity for benefits or to do business. All orders are in writing and signed by a division official delegated with such authority in the division's organizational rule or in writing by the administrator.

(2) An order may issue solely as the result of action initiated by the division, or the division's response to inquiries from the public; or

(3) An order may issue as a result of division investigation, mandated statutorily; or

(4) An order may issue upon receipt of a petition. A condition precedent to the division issuing an order in this situation is receipt of a petition which must include:

(a) the name and address of the petitioner;

(b) a detailed statement of the facts upon which the petitioner requests the division to issue an order; (c) the rule, statute or case law under which the request for an order is made; and

(d) a short, plain statement of petitioner's contentions based upon rule 24.29.205(4)(b) and (c).

(5) Any division order may be appealed for administrative review (see rule 24.29.206), or if required statutorily, as a contested case (see rule 24.29.207).

However, any party may first seek administrative review of an order, prior to a contested case hearing without affecting that party's statutory remedies. [Effective 7/29/83.]

24.29.205 ISSUING ORDERS (1) All orders issued pursuant to 39-71-116, MCA, must be in writing and signed by a department employee.

(2) An order may be issued:

(a) as a result of action initiated by the department;

(b) as the department's response to inquiries from the public;

(c) as a result of department investigation, mandated statutorily; or

(d) upon receipt of a petition.

(3) Any department order may be appealed for administrative review (see ARM 24.29.206), or if required statutorily, as a contested case (see ARM 24.29.207) or considered as a mediation case (see ARM 24.28.101). Appeals can be made to the workers' compensation court after prior statutory remedies have been exhausted (see ARM 24.5.101). However, any party may first seek administrative review of an order, prior to a contested case hearing without affecting that party's statutory remedies.

(a) Before a party may request a contested case hearing on an order which is issued by either the uninsured employers' fund or the underinsured employers' fund and establishes only the amount of penalty owed and no other issue, the party must first obtain an administrative review of that order.

(b) Department determinations rendered by the independent contractor central unit regarding employment status issues are not considered department orders for purposes of these rules. These determinations are issued pursuant to ARM Title 24, chapter 35, subchapters 2 and 3. [Effective 7/1/96.]

24.29.206 ADMINISTRATIVE REVIEW (1) The workers' compensation division administrator or his designee shall conduct an administrative review of any division order construed by a party in interest to be adverse to his interest, upon:

- (a) receipt of a petition for administrative review which must conform to the requirements for petitions in rule 24.29.205; or
 - (b) receipt of a petition for a contested case hearing and the parties' joint written waiver of formal proceedings in accordance with 2-4-603, MCA.
- (2) An administrative review shall be conducted with the purpose of resolving the case and avoiding an unnecessary hearing.
- (3) An administrative review caused by a petition pursuant to rule 24.29.206(1)(a) includes:
- (a) at the discretion of the party in interest, an informal conference with the division by telephone or person-to-person at the division office in Helena; and
 - (b) a review by the administrator or his designee of all relevant facts and applicable laws involved in the action by the division. Such a review will not be subject to the rules of civil procedure or evidence.
- (4) An administrative review caused by a petition and waiver of formal proceedings pursuant to rule 24.29.206(1)(b) must be conducted as an informal proceeding in accordance with the provisions of section 2-4-604, MCA.
- (5) The workers' compensation division administrator may rescind, alter or amend any action at any time during the administrative review, in which case a hearing will not be held unless a party in interest does not concur with the order and requests that the hearing be held. [Effective 7/29/83.]

24.29.206 ADMINISTRATIVE REVIEW (1) The department shall conduct an administrative review of any department order, other than employment status determinations referenced in ARM 24.29.205(4), for the purpose of resolving the case and avoiding an unnecessary hearing, upon:

- (a) receipt of a petition for administrative review which should contain:
 - (i) the name and address of the petitioner;
 - (ii) a short, plain statement of the petitioner's contentions; and
 - (iii) a statement of the resolution the petitioner is seeking; or
 - (b) receipt of a written mutual request by all of the parties to the dispute to agree to waive the formal contested case proceedings until an administrative review is conducted in accordance with 2-4-603, MCA.
- (2) An administrative review caused by a petition pursuant to ARM 24.29.206(1)(a) includes:
- (a) at the discretion of the petitioner, an informal conference with the department by telephone or in person at the department office in Helena; and

(b) a review by the department of all relevant facts and applicable laws involved in the action by the department. Such a review is not subject to the Rules of Civil Procedure or the Rules of Evidence.

(c) Upon completion of the informal conference and review, the department shall issue a notice to the parties in a timely manner.

(3) An administrative review caused by a petition and waiver of formal proceedings pursuant to ARM 24.29.206(1)(b) must be conducted as an informal proceeding in accordance with the provisions of 2-4-604, MCA.<

(4) The department may rescind, alter or amend any action at any time during the administrative review, in which case a contested case hearing will not be held unless a party does not concur with the notice and requests the hearing be held. [Effective 7/1/96.]

24.29.207 CONTESTED CASES (1) A contested case under Title 39, chapter 71, MCA, involving a dispute by a claimant or an insurer concerning any benefits provided under that chapter is administered in accordance with rules authorized by the workers' compensation court under ARM Title 2, chapter 52, subchapter 2.

(2) A contested case under Title 39, chapter 71, MCA, involving any disputed determination of legal rights, duties or privileges other than those in rule 24.29.207(1) or (3) is administered by the workers' compensation division in accordance with rule 24.29.207(6). Such cases include but are not limited to:

(a) disputes regarding attorneys' fee agreements in accordance with section 39-71-613, MCA;

(b) disputes regarding insurance premium payments to the state compensation insurance fund;

(c) disputes regarding state compensation insurance fund premium rates;

(d) disputes regarding wage equivalency determinations made by the division;

(e) disputes regarding applications of independent contractors not to be bound by workers' compensation coverage pursuant to section 39-71-401, MCA;

(f) disputes regarding applications by corporate officers not to be bound by workers' compensation coverage pursuant to section 39-71-410, MCA;

(g) disputes concerning certification of vocationally handicapped persons;

(h) disputes concerning payment of benefits or liability involving the subsequent injury fund;

(i) disputes concerning payments to medical providers when benefits available directly to claimants are not an issue.

(3) A contested case under Title 39, chapter 71, MCA, concerning employment classifications assigned to an employer by an insurer is administered by the classification and rating committee in accordance with section 33-16-1012, MCA.

(4) A contested case under Title 39, chapters 72 or 73, or Title 53, chapter 9, MCA, is administered by the workers' compensation division in accordance with 24.29.207(6).

(5) A contested case under Title 50, chapters 71, 72, 73, 74 or 76 is administered by the workers' compensation division in accordance with rule 24.29.207(6).

(6) The workers' compensation division hereby adopts and incorporates by reference the attorney general's model procedural rules 8 through 21 and 28 found in ARM 1.3.212 through 1.3.225 and in ARM 1.3.233, which set forth contested case procedures for the division.

(7) The workers' compensation court is an appeal court for final decisions made by the workers' compensation division pursuant to rule 24.29.207(2) and (4). Final decisions pursuant to rule 24.29.207(5) are appealed in accordance with Title 2, chapter 4, part 7, MCA. [Effective 7/29/83.]

24.29.207 CONTESTED CASES (1) Parties having a dispute involving legal rights, duties or privileges, other than disputes over benefits available directly to a claimant under Title 39, chapters 71 and 72, MCA, must bring the dispute to the department for a contested case hearing. Such disputes include but are not limited to:

(a) disputes regarding attorneys' fee agreements (39-71-613, MCA);

(b) disputes regarding the value of work paid for in property other than money (39-71-303, MCA);

(c) disputes regarding applications for exemption of independent contractors and employment status determinations (39-71-401, MCA);

(d) disputes regarding certification as vocationally handicapped under Title 39, chapter 71, part 9, MCA;

(e) disputes regarding payment of benefits or liability involving the subsequent injury fund;

(f) disputes regarding payments to medical providers when benefits available directly to claimants are not an issue (ARM 24.29.1404);

(g) disputes regarding the waiver of the one year statute of limitations up to an additional 24 months (39-71-601, MCA);

(h) disputes regarding the medical condition of a claimant when the department has been requested to order an independent evaluation (39-71-605, MCA);

- (i) disputes regarding suspension of payments pending receipt of medical information (39-71-607, MCA);
 - (j) disputes regarding requests for orders requiring insurers to pay benefits pending a termination hearing (39-71-610, MCA);
 - (k) disputes regarding department orders concerning palliative or maintenance care under 39-71-704, MCA;
 - (l) disputes regarding the renewal, revocation or suspension of certification as a managed care organization (39-71-1103 and 39-71-1105, MCA);
 - (m) disputes regarding applications to modify a managed care organization plan (39-71-1103 and 39-71-1105, MCA); and
 - (n) disputes regarding department orders that determine occupational disease issues (Title 39, chapter 72, part 6, MCA).
- (2) A contested case concerning employment classifications assigned to an employer by an insurer is administered by the classification review committee in accordance with 33-16-1012, MCA.
- (3) A contested case under Title 39, chapters 71, 72 or 73, MCA, other than of the type referenced in ARM 29.29.207(2), is administered by the department in accordance with ARM 24.2.101 and 24.29.201(2).
- (4) The workers' compensation court is an appeal court for final orders, other than employment status decisions, made by the department pursuant to ARM 24.29.207(1), (2) and (3). Final decisions regarding employment status issues pursuant to ARM 24.29.207(1)(c) and ARM Title 24, chapter 35, subchapters 2 and 3 are appealable to the board of labor appeals pursuant to ARM 24.35.213. [Effective 7/1/96.]

24.29.215 TIME LIMITS (1) A party seeking administrative review under ARM 24.29.206 must make a written request for administrative review to the division within ninety days of notice of adverse action.

(2) A party seeking a contested case hearing under ARM 24.29.207 must make a written request to the division for a contested case hearing within thirty days of notice of the results of an administrative review or within ninety days of notice of adverse action.

(3) A party seeking judicial review of a final order of the division after a contested case hearing must file a petition with the workers' compensation court within thirty days after notice of the final order.

(4) A party is considered to have been given notice on the date a written notice is personally delivered or three days after a written notice is mailed to him. A request for administrative review, contested case hearing, or judicial review must be received in the division or court within the time limits set forth above. The time limits

for request for administrative review or contested case hearing may be extended by the division for good cause. [Effective 7/31/87.]

24.29.215 TIME LIMITS (1) A party seeking administrative review under ARM 24.29.206 must make a written request for administrative review to the department within 30 days of notice of adverse action.

(2) A party seeking a contested case hearing under ARM 24.29.207 must make a written request to the department for a contested case hearing within 10 days of notice of the results of an administrative review or within 30 days of notice of adverse action.

(3) A party seeking judicial review of a final order of the department after a contested case hearing must file a petition with the workers' compensation court within 30 days after notice of the final order.

(4) A party is considered to have been given notice on the date a written notice is personally delivered or 3 days after a written notice is mailed. A request for administrative review, contested case hearing or judicial review must be received in the department or court within the time limits set forth above. The time limits for request for administrative review or contested case hearing may be extended by the department for good cause. [Effective 7/1/96.]

1. The rule refers to the old "Division of Workers' Compensation." Under 1987 legislation the Division was superseded by the Department. As of June 30, 1996, the Department revised the rules cited herein to reflect that change. However, the substantive parts of the rules relied on in this decision are unchanged. The old rules and the recently amended rules are attached to this decision as an appendix.

2. ARM 24.29.215(1) (1987) provides:

(1) A party seeking administrative review under ARM 24.29.206 must make a written request for administrative review to the division [Department] within ninety days of notice of adverse action.

3. An administrative review may still be requested after the request for hearing but both parties have to concur in the request. ARM 24.29.206(1)(b). Thus, claimant's request for hearing amounted to a waiver of her right to unilaterally request administrative review.