

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 38

WCC No. 9310-6922

SAMUEL J. GRENZ

Appellant

vs.

FIRE AND CASUALTY OF CONNECTICUT

Respondent.

DECISION ON APPEAL;
ORDER REVERSING AND REMANDING

This is an appeal by Samuel J. Grenz (Grenz) from a decision of the Montana Department of Labor and Industry (DLI) dismissing his claim for occupational disease as time-barred. Without hearing, in an Order on Motion Dismissal [sic] the DLI hearing examiner granted the insurer's motion to dismiss.

Mr. Grenz is well known to the Montana courts, having prosecuted some six petitions before the Workers' Compensation Court, four separate civil actions in Montana district courts, one civil action in the United States District Court for Montana, and eleven appeals to the Montana Supreme Court. All of these cases were driven by Grenz' claim for compensation following an industrial accident on August 22, 1984, and are described in detail in briefs filed by the insurer, Fire and Casualty of Connecticut (F&C), with both the DLI and this Court. In the DLI proceeding F&C vigorously argued: "He [Grenz] has litigated enough. The time to end this stream of disputation is now." (DLI Record on Appeal, Brief in Support of Insurer's Motion at 12.) All of this, however, cannot distract this Court from its obligation to consider the present appeal on its own merits. As Justice Gray stated in her opinion in **Grenz v. Fire & Casualty of Connecticut**, 255 Mont. 121, 124, 841 P. 2d 494 (1992):

It is appropriate to note here that we sympathize with the frustration and expense these proceedings have caused all involved. Indeed, we previously have expressed our concern over the multiplicity of claimant's proceedings and the overall "cost" of those proceedings to the finite resources of the judicial system. **See Grenz v. Medical Management Northwest** (1991), 250 Mont. 58, 64, 817 P.2d 1151, 1155. We reiterate that concern here; it has not lessened. **We must be ever**

vigilant, however, in ensuring that human propensities to frustration over seemingly endless litigation do not result in less than the full and fair consideration on legal principles to which litigants are entitled in Montana's courts. [Emphasis added.]

After carefully reviewing the record below and the DLI Order, I find that the proceedings were irregular and that the conclusion of the hearing examiner was erroneous as a matter of law.

Procedural History and Decision Below

The record on appeal consists of the DLI file. The file begins on **August 20, 1993** with the filing of Insurer's Motion to Dismiss; Insurer's Motion for Judicial Notice; and Brief in Support of Insurer's Motion to Dismiss. In addition to motions and orders for extension, the file contains further legal memoranda by both parties; a copy of the 1993 Supreme Court decision in ***Grenz v. Fire and Casualty of Connecticut*, 857 P.2d 730 (Mont. 1993)**; a short affidavit of Mr. Grenz in which he states, in part, that "I, up until September of 1990, did not know that my arthritic condition may be the result of a [sic] occupational disease"; two pages of a transcript of a September 17 and 18, 1990 hearing before the Workers' Compensation Court (attached by Grenz to Claimant's Reply Brief); miscellaneous correspondence; the hearing examiner's Order on Motion Dismissal [sic]; and notices regarding appeal. There was no hearing; there is no transcript. The case was summarily decided.

Based on the record, it appears that Grenz filed an occupational disease (OD) claim in February 1992. We use the word "appears" because neither the original nor a copy of the claim can be found in the DLI record. In February 1992 Grenz also filed a worker's compensation claim alleging an injury due to micro-trauma while employed in 1984 and 1985. He also filed a Petition seeking adjudication of the micro-trauma claim. (***Grenz v. Fire & Casualty of Connecticut*, WCC No. 9202-6378, Order on Remand (April 21, 1993).**) This Court ultimately determined that the micro-trauma claim was time-barred by the one year statute of limitations applicable to workers' compensation claims, section 39-71-601, MCA, and the Supreme Court affirmed, ***Grenz v. Fire and Casualty of Connecticut*, 857 P.2d 730 (Mont. 1993)**.

While Grenz was litigating his micro-trauma claim, the DLI apparently took no action on the OD claim. The Insurer's Motion to Dismiss, filed below, refers to a December 16, 1992, DLI letter "advis[ing] that no action would be taken on the above claim of Occupational Disease benefits until a final decision was reached is [sic] WCC No. 9202-6378."⁽¹⁾ A copy of the DLI letter is not a part of the DLI record.

In any event, the proceeding below was triggered by F&C's filing of the Insurer's Motion to Dismiss. The motion stated:

On December 16, 1992, Claims Examiner Barb Gullickson wrote to claimant and Insurer to advise that no action would be taken on the above claim for Occupational Disease benefits until a final decision was reached is [sic] WCC No. 9202-6378. A copy of that final decision is attached hereto. **Insurer now moves for a determination that the above Occupational Disease claim is time-barred, on the same grounds and for the same reasons as set forth in the decision of the Montana Supreme Court affirming dismissal of WCC No. 9202-6378, thereby effectively dismissing said Occupational Disease Claim.**

Contested case treatment of this motion is requested. [Emphasis added.]

In conjunction with the motion, F&C also filed an Insurer's Motion for Judicial Notice requesting that the hearing examiner "take judicial notice of the entirety of the contents of **Grenz v. Fire and Casualty of Connecticut**, WCC No. 9202-6378, including, but not limited to, the Final Decision on Appeal, No. 93-232, *Supreme Court of Montana*, August 17, 1993. A copy of the Supreme Court decision was provided to the hearing examiner and is part of the DLI file. However, there is nothing in the DLI file indicating that the hearing examiner reviewed the file of the Workers' Compensation Court in WCC No. 9202-6378, and there is no reference to the file or to file documents in the hearing examiner's Final Order.

The hearing examiner's Order is brief, consisting of two pages. The first page contains a brief historical overview of Grenz's claims and prior litigation. Other than a quotation of the applicable statute of limitations, section 39-72-403, MCA, the actual decision consists of one paragraph, which states in its entirety:

The Insurer moved to dismiss this claim as time barred. Supporting Brief, Claimant Reply Brief as well as Insurer Reply Brief were submitted and considered. The undisputed facts relating to the injury and the Claimant's knowledge of the injury and its cause as found in the "protracted litigation" as well as the Claimant's awareness of the law support dismissal of this occupational disease claim as time barred. The Claimant knew his total disability condition resulted from an occupational disease or was simply as time passed deciding under what worker compensation statute to proceed. Regardless of how the Claimant wishes to describe his medical condition, he has demonstrated he knew or should have known his condition resulted from an occupational disease and did not file timely.

ORDER

The Insurer's motion to dismiss is hereby granted.

Entered and dated this 19th day of October, 1993.

Scope and Standard of Review

On appeal both parties have filed affidavits and attached numerous documents. Some of the documents are Court decisions, but others are not. The attempt to factually supplement the record is improper, especially in light of the DLI's dismissal of the claim without a hearing or an opportunity to present evidence. Our review of the decision below the Court will be limited to the DLI record.

In his Amended Notice of Appeal, Grenz, who appears pro sé, makes a point-by-point rebuttal to the hearing examiner's Order. In sum and substance, he alleges that the decision below is wrong both as a matter of law and a matter of fact.

The standard of review is provided by section 39-72-612(2), MCA, which provides:

(2) Appeals for 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.

In reviewing the legal conclusions of the hearing examiner, the Court must determine whether the hearing examiner's conclusions are correct. ***Steer, Inc. v. Department of Revenue***, 245 Mont. 470, 475, 803 P.2d 601, 603 (1990). Whether the decision was "made upon unlawful procedure" is also a legal issue to be decided by this Court.

Discussion

No hearing was ever held by the DLI; the hearing examiner summarily dismissed Grenz' claim. A prior decision of this Court held that a hearing is required under the Occupational Disease Act and that the Act does not contemplate summary rulings by the DLI. ***Pergo v. State Compensation Ins. Fund***, WCC No. 9205-6448 (August 7, 1992). However, since the decision below must be reversed in any event, it is unnecessary to determine if ***Pergo*** is applicable in this case.

The DLI has adopted Rule Nos. 8 through 21 and No. 28 of the Attorney General's model procedural rules (ARM 1.3.212 through 225 and 1.3.233) for contested case hearings. ARM 24.29.207(6). Those rules contain no provision for motions to dismiss or for summary judgment. The Court will therefore look to the Montana Rules of Civil Procedure, and cases decided thereunder, for guidance in reviewing the decision below.

A motion to dismiss based on a statute of limitations is deemed a motion to dismiss for failure to state a claim and may be granted only where the pleading discloses that the claim is time barred:

. . . A motion to dismiss for failure to state a claim for failure to state a claim on which relief can be granted will lie when the complaint *on its face* establishes that the claim is barred by the statute of limitations, and the usual requirement that such a defense be affirmatively plead need not be followed. . . .

Beckman v. Chamberlain, 673 P.2d 480, 482 (Mont. 1983) (*emphasis added; citations omitted*). Ordinarily, the adjudicator cannot consider any matters appearing outside of the complaint:

A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., only tests whether a claim has been adequately stated in the complaint. Therefore, the court's inquiry is properly is limited to the content of the complaint.

Gebhardt v. D.A. Davidson & Co., 203 Mont. 384, 389 661 P.2d 855 (1983).

Claimant's OD claim, even though not part of the record, was the document which gave rise to this proceeding. Both parties agree that the claim was filed in February 1991, and that Grenz last worked in 1985. Those facts, at least, may be deemed undisputed and admitted for purposes of the motion to dismiss. Do those facts establish that Grenz's OD claim is time barred?

F&C argued below that the Supreme Court's latest ***Grenz*** decision, found at 857 P.2d 730 and decided August 17, 1993, compels dismissal of the OD claim without any further factual inquiry. The specific ground asserted by F&C as the basis for its motion to dismiss was

that the above Occupational Disease claim is time-barred, **on the same grounds and for the same reasons as set forth in the decision of the Montana Supreme Court affirming dismissal of WCC No. 9202-6378, thereby effectively dismissing said Occupational Disease Claim.** [Emphasis added.]

Insurer's Motion to Dismiss. In its opening brief to the DLI's hearing examiner, F&C pointed out that the Supreme Court had affirmed dismissal of Grenz's micro-trauma claim because it was not filed within one year after Grenz's employment ended. It argued that "[t]he reasoning of Justice Gray, writing the opinion for the Montana Supreme Court affirming

dismissal of the compensation claim, is equally applicable here." Brief in Support of Insurer's Motion at 2.

The hearing examiner did not say whether or not he agreed with F&C's argument concerning the 1993 Supreme Court decision; instead, he generally concluded, *without any specific findings*, that Grenz "knew or should have know his condition resulted from an occupational disease and did not timely file." Before we discuss this broad statement, the ground advanced by F&C in support of its motion must be addressed.

After carefully considering the Supreme Court's latest **Grenz** decision, I conclude that the decision is *not* "equally applicable here." The Court's resolution of the statute of limitations issue in that case does *not* by itself resolve the present dispute.

The statute of limitations applicable to workers' compensation claims, section 39-71-601, MCA, bars claims which are not presented in writing "within 12 months of the happening of the accident." All that is required to invoke the bar is the passage of 12 months following the accident. To be sure, the statute may be tolled under certain circumstances. Grenz's micro-trauma claim was rejected because more than 12 months had elapsed and because he failed to establish circumstances which would toll the 12 month period.

The statute of limitations applicable to the occupational disease claims is fundamentally different. Section 39-72-403, MCA currently provides:

Time when claims must be presented. (1) When a claimant seeks benefits under this chapter, his claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 2 years from the date the claimant knew or should have known that his total disability condition resulted from an occupational disease. When a beneficiary seeks benefits under this chapter, his claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.

(2) The department may, upon a reasonable showing by the claimant or a decedent's beneficiaries that the claimant or the beneficiaries could not have known that the claimant's condition or the employee's death was related to an occupational disease, waive the claim time requirement up to an additional 2 years.

The current statute incorporates amendments enacted in 1989 and 1985. The 1989 amendments merely replaced references to the Division of Workers' Compensation with references to the Department of Labor and Industry. The 1985 amendments, which were made applicable to "claims arising from exposures occurring on or after the effective date of this act," 1985 Montana Laws, ch. 112, sec. 6, made substantive changes. First, they extended the limitations period from one year to two. Second, they repealed subsection

(3), which had provided an absolute bar to any claim filed more than three years after the last day of employment with the employer against whom compensation is claimed. The differences between the 1985 and present versions of the statute are ignored for purposes of the Court's present discussion because they do not affect the ultimate result reached. They could, however, be important in any factual resolution which may occur following remand; for example, if Grenz' employment ended prior to the October 1, 1985 effective date of the statute, the three year absolute bar may apply.

Unlike the limitation applicable to workers' compensation claims, the limitation for occupational disease claims is not predicated on the mere passage of time. Rather, the limitations period is triggered at the time the claimant "knew or should have known that his total disability condition resulted from an occupational disease." Section 39-72-405(1), MCA. Knowledge and imputed knowledge are factual questions.

F&C strenuously argued in its briefs below that the knowledge requirement was met because "claimant has known since 1985 that he suffers from arthritic conditions which he has continuously contended are totally disabling"; he has always believed his condition was work-related; and he knew three years prior to his claim that the "insurer was not accepting liability of **any** 'work-related' conditions." Brief in Support of Insurer's Motion at 3. Under the statute, however, the bar does not arise unless the insurer can also show that Grenz **also "knew or had reason to know"** that his arthritis **"resulted from an occupational disease."** The 1993 **Grenz** decision does not hold that Grenz "knew" that his condition and disability were caused by an occupational disease. The Court specifically noted Grenz's steadfast position throughout the years following his original elbow injury that his arthritic condition "was caused by, and derivative from, his elbow injury of August 1984." 50 St. Rep. 942. The decision does not factually resolve, one way or the other, questions concerning Grenz's knowledge or imputed knowledge that his arthritic condition and disability "resulted from occupational disease."

The legal standard for resolving motions to dismiss is well established:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Proto v. Missoula County, 230 Mont. 351-2, 749 P.2d 1094 (1988) (quoting with approval from ***Conley v. Gibson***, 355 U.S. 41, 45-6 (1957)). On its face, the OD statute of limitations recognizes that a worker suffering from occupational diseases may not immediately recognize that an occupational disease is the cause of his or her disability. Diagnosis of an occupational disease may be difficult; thus, the legislature has established a specialized medical panel to review occupational disease claims, sections 39-72-601 and 602, MCA. Evidence may ultimately show that Grenz knew, or should have known, more than two

years prior to the filing of his claim that he was suffering from an occupational disease. However, on the face of the claim it does not appear beyond doubt that Grenz can prove no set of facts which would bring his claim within the statute of limitations.

Insofar as the hearing examiner's Order can be construed as resolving factual issues in this case, it cannot stand. As an initial matter, the Order does not set forth the specific findings of fact upon which the hearing examiner bases his ultimate factual conclusion that Grenz knew that his condition resulted from an occupational disease. Thus, the Order does not comply with the requirements of section 2-4-623(1), MCA, which requires administrative decisions in contested case matters to set forth separate findings of fact.⁽²⁾ As in the recent case of **Baldrige v. Rosebud County School Dist. 19**, 51 St.Rptr. 166, 169 (March 10, 1994), the statements of the hearing examiner are too broad and conclusory to satisfy this requirement. In **Baldrige** the Supreme Court voided an administrative decision of a county superintendent of schools, stating:

Several of Barrick's findings of fact are no more than conclusory statements, not supported by a concise and explicit statement of the underlying facts, as required by rule and statute. None of her conclusions of law are supported by authority or reasoned opinion. Clearly, the County Superintendent did not follow the proper statutory or administrative requirements and did not fulfill her responsibility to produce a well-reasoned final order, citing specific facts to support her conclusions of law.

The Order also violates the requirement that, "Findings of facts shall be based exclusively on the evidence and on matters officially noticed." Section 2-4-623 (2), MCA. No hearing was ever held. While F&C requested the hearing officer take judicial notice of the Court files in the Grenz micro-trauma case, he did not do so and never indicated what, if any, materials he reviewed from those files.⁽³⁾

Finally, any resolution of factual issues was procedurally inappropriate. While a motion to dismiss may be converted to a motion for summary judgment, thus allowing an adjudicator to consider undisputed facts gleaned from affidavits, depositions, and discovery, notice of the conversion must first be given to the parties. The nature and purpose of the requirement is summarized as follows:

Previously we have held that before a court can convert a motion to dismiss into a motion for summary judgment, it must give notice to the parties of its intention to convert the motion. The purpose of the notice is to allow the parties a reasonable opportunity to present all material made pertinent to the motion and avoid surprise.

Formal notice by the court gives the party opposing the motion for summary judgment an opportunity to produce additional facts by affidavit or otherwise

which would create genuine issue of material fact to preclude summary judgment under Rule 56, M.R.Civ.P.

We hold that the District court erred in failing to give notice of its intention to convert a motion to dismiss into a motion for summary judgment.

Hoveland v. Petaja, 252 Mont. 268, 271, 828 P.2d 392 (1992) (citations omitted).

In arguing its case on appeal, F&C has attempted to bring numerous facts, including prior statements by Grenz, to the Court's attention. Those matters may well have a bearing on the timeliness of the OD claim. However, they are more properly presented to the DLI on remand and by following the proper legal procedures.

ORDER

For the reasons expressed in the foregoing discussion, the Order on Motion Dismissal [sic] is **reversed** and the matter **remanded** for further proceedings consistent with this decision.

DATED in Helena, Montana, this 21st day of April, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Samuel J. Grenz - Certified
Mr. Terry Spear

1. WCC No. 9202-6378 was the docket number for the micro-trauma petition.
2. Section 2-4-623 (1), MCA provides:

Final orders -- notification -- availability. (1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

3. There is no indication in the record that the hearing examiner ever obtained the Worker's Compensation Court file. The Court's own records do not indicate that he did so.