

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 58

WCC No. 9607-7571

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KEITH HART

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

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ORDER DISMISSING APPEAL

**Summary:** Claimant appealed from order of DOL denying his request for an extension of time in which to file a workers' compensation claim. Respondent moved to dismiss on ground that jurisdiction still lies with DOL, not with WCC.

**Held:** Respondent's motion to dismiss is granted. Claimant's appeal is premature because the DOL order was not a final and appealable order. The Montana Administrative Procedures Act (MAPA) requires that claimant be afforded a contested case hearing within the DOL. Section 39-71-204, MCA (1995), of the WCA states the DOL has continuing jurisdiction over its orders before they become final.

**Topics:**

**Administrative Procedure: Failure to Exhaust Administrative Remedies.** In case alleging 1995 injury, claimant failed to exhaust contested case procedure before DOL where he filed appeal from DOL's denial of his request for an extension of time, but had not requested a hearing on that denial within the DOL.

The present case is an appeal from an order of the Department of Labor and Industry denying the appellant's/claimant's request for an extension of time in which to file his workers' compensation claim. The respondent, State Compensation Insurance Fund (State Fund), moves to dismiss on the ground that jurisdiction over appellant's request still lies with the Department of Labor and Industry, not with the Court.

The salient facts, as alleged by claimant and assumed to be true for purposes of the appeal, *Farris v. Hutchinson*, 254 Mont. 334, 336, 838 P.2d 374, 376 (1992), are set forth in claimant's Appeal from 6/21/96 MDOLI-ERD Order Denying Waiver of Claim Time Period

("Appeal") and Attached Exhibits, and a June 21, 1996 Order Denying Waiver of Claim Time Period. They are as follows:

1. Claimant suffered an industrial injury on October 15, 1992, when he slipped at work. He was treated and diagnosed as suffering from low-back strain.

2. Claimant submitted a written incident report to his employer (Appeal Ex. B) but did not file a written workers' compensation claim within one year following the injury.

3. On July 11, 1995, which is less than three years after the accident, the claimant's employer filed an Employer's First Report. In relevant part, the report related:

Employee describes lower back pain of gradual onset, for approximately one month prior to pain changing, and running down (L) leg and into (L) foot, causing him to seek medical advice. Keith state[s] no specific incident contributing to this current onset of pain. *He feels that it is part of an old injury in 10/92, when he slipped on a pool of urine on [the] floor.*

(Appeal Ex. A.) Claimant, as well as the employer, signed the claim. (*Id.*) The matter was thereafter treated as an occupational disease. (Appeal at 3.)

4. By July 1995 claimant was no longer able to work on account of low-back pain and resumed medical treatment.

5. In April 1996, more than three years after the accident, claimant submitted a written claim for compensation. The claim was denied by respondent, State Compensation Insurance Fund, as untimely. (Appeal Ex. H.)

6. Pursuant to section 39-71-601, MCA, claimant thereafter petitioned the Department of Labor and Industry (Department) for a waiver of the one-year filing requirement.

7. On June 21, 1996, the Department issued an Order Denying Waiver of Claim Time Period. The Department mailed the order to the parties but did not set up a file on the matter. (July 17, 1996 letter of Gary Holt to Judge McCarter.) However, a copy of the order has been provided to the Court by the State Fund.

8. The Department's order was signed by Carol Gleed, a workers' compensation benefits examiner for the Workers' Compensation Claims Assistance Bureau, which is a bureau within the Employment Relations Division of the Department.

9. The order denied the requested extension on the ground that the Department lacked jurisdiction to extend the time for filing beyond three years:

The Department can ONLY GRANT AN EXTENSION UP TO A PERIOD OF 3 (three) YEARS AFTER THE ACCIDENT. THE FILING OF CLAIM EXCEEDS OUR STATUTORY AUTHORITY TO GRANT AN EXTENSION. [Capitals in original.]

The order went on to notify the parties as follows:

This Order is signed by the Claims Examiner Supervisor of the Dispute Resolution Bureau under delegated authority of the Administrator of the Employment Relations Division of the Department of Labor & Industry. **Any party in interest may appeal this order to the Hearings Unit, Legal Services Division, P.O. Box 1728, Helena, Montana 59624.** [Emphasis added.]

10. Apparently uncertain whether the Department could hold a hearing regarding his request, the claimant then filed both a request for hearing with the Department and an appeal to this Court. (Response to Motion to Dismiss at 1.)

#### Discussion

The claimant requests the Court to overturn the Department's denial of an extension of time for filing his claim. His appeal, however, is premature since the Department's order was not a final and appealable order. Thus, he has failed to exhaust his administrative remedies.

The Montana Administrative Procedure Act (MAPA) provides in section 2-4-601(1), MCA, that "[i]n a contested case, all parties must be afforded an opportunity for hearing . . . ." MAPA defines a "contested case" as "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing." § 2-4-102(4), MCA.

Provisions within the Workers' Compensation Act provide for a right to hearing in matters over which the Department has adjudicatory jurisdiction. Section 39-71-204, MCA, provides:

**Rescission, alteration, or amendment by department of its orders, decisions, or awards -- effect -- appeal.** (1) The department has continuing jurisdiction over all its orders, decisions, and awards and may, at any time, upon notice, and after opportunity to be heard is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it upon good cause appearing therefor.

(2) Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award has the same effect as original orders or awards.

(3) If a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge.

Subsection (1) is all encompassing in that it refers to *all* Department orders, thus vesting the Department with jurisdiction to change an order whether or not the original order was considered final. The subsection specifically provides a right to a hearing before final agency action.

The legislature's intention to afford parties a right to a hearing in cases before the Department is further evidenced by the specific grant of judicial review in subsection (3). Under the Montana Administrative Procedure Act, judicial review is available only in contested cases. *Nye v. Department of Livestock*, 196 Mont. 222, 226, 639 P.2d 498, 500-501 (1982).

Pursuant to its rulemaking powers, § 39-71-203(2), MCA, the Department has adopted regulations implementing the right to hearing. ARM 24.29.207(2) defines a contested case as encompassing "any disputed determination of legal rights, duties or privileges" and ARM 24.29.207(6) provides that such cases are governed by the Attorney General's model rules for contested cases. Those rules provide for a hearing. ARM 1.3.212 and 1.3.219. Further, ARM 24.29.215 contains language which shows that any determination made without a hearing is **not** a final, appealable order. The rule provides in relevant part:

(2) A party seeking a contested case hearing under ARM 24.29.207 must make a written request to the division [Department]<sup>(4)</sup> 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* [Department] **after a contested case hearing** must file a petition with the workers' compensation court within thirty days after notice of the final order. [Italics and bold added for emphasis.]

"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. *After or in lieu of* such informal review, the order is subject to a contested case hearing.

Prior to judicial review the claimant is required to exhaust his administrative remedies. *B.G.M. Enterprises v. Montana Dept. of Social and Rehabilitation Services*, 673 P.2d 1205, 1206 (Mont. 1983.) He has not done so, therefore his appeal must be dismissed. *Id.*

Upon remand the Department shall conduct a hearing as provided by statute and the Department's rules. After hearing it shall make a final determination concerning its jurisdiction.

The Department must also address claimant's contention that he presented a written claim within the additional two years by which the Department may extend the filing deadline and that his request for extension therefore falls within the Department's express jurisdiction.

His contention is based on the Employer's First Report, Which Was Submitted less than Three Years after the Industrial Accident and Was Signed by Both the Employer and Claimant. In *Scott V. Utility Line Contractors*, 226 Mont. 154, 734 P.2d 206 (1987), the Supreme Court Considered Whether an Employer's First Report completed within one year of an industrial accident satisfied the one-year limitation of section 39-71-601(1), MCA. It held that the claimant's participation in preparing the report, which he did not sign, and his submission of a medical report satisfied the claim filing requirement under the section. A year later, in *Weigand v. Anderson-Meyer Drilling Co.*, 232 Mont. 390, 758 P.2d 260 (1988), the Supreme Court reached the same conclusion where, within the one-year limitation, the claimant assisted in preparing the Employer's First Report, Although He Too Failed to Sign It, and Claimant's Physician Submitted an Attending Physician's First Report. In this Case, the Employer's First Report is dated July 11, 1995, and **is** signed by claimant. Claimant also asserts that the employer paid medical bills related to her 1992 accident. The Department must determine whether the report is authentic and accurate, whether it and other information provided to the employer provides sufficient notice of the accident to the employer, and whether it is sufficient under the rationale of *Scott* and *Weigand*.

#### ORDER AND JUDGMENT

For the reasons set forth in the foregoing discussion, IT IS HEREBY ORDERED AND ADJUDGED that the appeal in this matter be and is hereby **dismissed without prejudice**. After a hearing and final decision by the Department of Labor and Industry both parties are free to appeal the Department's final decision. If the Department determines that it lacks jurisdiction, claimant may also file a petition invoking the Court's original jurisdiction.

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

DATED in Helena, Montana, this 26th day of August, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Howard Toole

Mr. Daniel J. Whyte

Ms. Christine L. Noland

Date Submitted: August 5, 1996

#### APPENDIX

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.]

24.29.215 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.]

1. The Department regulations cited and quoted in this Order refer to the old "Division" of Workers' Compensation and its administrator. The Division was abolished in 1989 and its duties transferred to the Department of Labor, however, many of the Department's regulations, including those cited herein, were just recently amended, effective June 30, 1996, to reflect this change.