IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
2000 MTWCC 44
WCC No. 2000-0082

ANNE MARIE HOFF

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

LAUBACH & LAUBACH, L.L.C., d/b/a YANKEE JIM TRADING POST

Employer.

ORDER DENYING MOTION TO DISMISS

Summary of Case: The UEF moves to dismiss a petition requesting reinstatement of temporary total disability (TTD) benefits, arguing that the petition is untimely under section 39-71-520, MCA (1999), since claimant failed to request mediation within 90 days of a UEF letter advising her that she was entitled to a 5% impairment award because her treating physician had found her at maximum healing, able to return to work, and suffering from a 5% impairment.

Held: Under section 39-71-520, MCA (1999), a request for mediation must be made within 90 days of a UEF "determination." The only determination made in the UEF letter concerned permanent partial disability (PPD) benefits. While one conversant in the law may have figured out that by implication the UEF was denying further TTD benefits, a "determination" cannot be made by implication; it must be express and unequivocal. Therefore, the limitations period with respect to the TTD claim was not triggered by the letter and the TTD claim is not time barred.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated, section 39-71-520, MCA (1993-2001).** Although the statute requires a dispute concerning uninsured employers' fund benefits to be appealed to mediation within 90 days from the date of the determination or the date the determination became final, a letter from the UEF to claimant discussing permanent partial disability benefits was not a determination regarding temporary total disability benefits and thus did not commence the running of the appeal period regarding TTD entitlement.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated, section 39-71-520, MCA (1993-2001). The triggering event for running of the 90 days to appeal to mediation from a determination of the uninsured employers' fund is not receipt of the determination, but the determination itself.

Limitations Periods: UEF Determinations. Although section 39-71-520, MCA (1999) requires a dispute concerning uninsured employers' fund benefits to be appealed to mediation within 90 days from the date of the determination or the date the determination became final, a letter from the UEF to claimant discussing permanent partial disability benefits was not a determination regarding temporary total disability benefits and thus did not commence the running of the appeal period regarding TTD entitlement.

Limitations Periods: UEF Determinations. The triggering event for running of the 90 days to appeal to mediation from a determination of the uninsured employers' fund under section 39–71-520, MCA (1999) is not receipt of the determination, but the determination itself.

Uninsured Employers' Fund: Appeal of UEF Benefits Determination. Although section 39-71-520, MCA (1999) requires a dispute concerning uninsured employers' fund benefits to be appealed to mediation within 90 days from the date of the determination or the date the determination became final, a letter from the UEF to claimant discussing permanent partial disability benefits was not a determination regarding temporary total disability benefits and thus did not commence the running of the appeal period regarding TTD entitlement.

Uninsured Employers' Fund: Appeal of UEF Benefits Determination. The triggering event for running of the 90 days to appeal to mediation from a determination of the uninsured employers' fund under section 39–71-520, MCA (1999) is not receipt of the determination, but the determination itself.

¶1 The petitioner/claimant (claimant) in this case suffered an industrial accident on August 5, 1999. Her employer was uninsured but the Uninsured Employers' Fund (UEF) accepted liability for her claim and initiated temporary total disability (TTD) benefits. On November 16, 1999, the UEF converted her benefits to permanent partial disability (PPD) benefits. She now seeks reinstatement of her TTD benefits. The UEF and the employer seek dismissal of her request on the ground that she failed to request mediation within 90 days, as provided in section 39-71-520, MCA (1999).

Stipulated Facts

¶2 For purposes of the pending motions, the parties have entered into a stipulation of facts. The facts, paraphrased and abbreviated by the Court, are as follows:

- On August 31, 1999, the claimant filed a claim for compensation for an August 5, 1999, back injury at work.

- At the time of claimant's injury, her employer was uninsured. Therefore, the claim was submitted to the UEF.

- The UEF accepted liability for the claim and commenced paying TTD benefits.

- On October 8, 1999, claimant's treating physician, Dr. John Vallin, found claimant to be at maximum medical improvement (MMI) and rated her impairment at 5%. He released her to return to work.

- On November 16, 1999, the UEF wrote to claimant. In its letter it notified claimant of Dr. Vallin's determinations and told her that the UEF would pay PPD benefits from October 8, 1999 through February 7, 2000. The letter further stated that if claimant did not agree with the decision, she could request mediation but must do so within 90 days.

- The November 16, 1999, letter does not mention TTD benefits or the termination of those benefits. (Ex. B.)

- The UEF did not enclose a copy of Dr. Vallin's determinations.

- On November 23, 1999, claimant hired an attorney.

- On February 18, 2000, which was 94 days after the UEF's November 16, 1999 letter, claimant's attorney wrote to the UEF to dispute Dr. Vallin's finding of MMI. He demanded reinstatement of TTD benefits.

- The UEF refused the demand on the ground that claimant failed to object within 90 days as required by section 39-71-520, MCA.

- Mediation nonetheless took place over the UEF's and employer's objections. Following mediation, on May 2, 2000, the claimant filed her present petition.

Both the UEF's November 16 and claimant's attorney's February 18 letters were provided to the Court in connection with the employer's initial motion to dismiss. The parties' stipulation refers to the attached letters and states they are true and correct. The letters are therefore part of the stipulation and are considered in resolving the motion.

Discussion

¶3 The UEF urges that claimant's petition for reinstatement of her TTD benefits is untimely because she failed to seek mediation within 90 days as required by section 39-71-520, MCA (1999). The section provides:

> A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination or the determination is considered final.

It argues that the February 18, 2000 letter was four days late since the triggering event for the commencement of the appeal period occurred on November 16, 1999.

¶4 The triggering event is not receipt of the determination, nor is a mailing period tacked on to it. The statute is clear on its face that the determination itself is the triggering event, and the section must be applied as it is written. *State ex rel. Cobbs v. Montana Dept. of Social and Rehabilitation Services,* 274 Mont. 157, 162, 906 P.2d 204, 207 (1995). **If** the UEF's November 16 letter constituted a determination respecting TTD benefits, claimant's appeal is untimely and her petition must be dismissed.

¶5 Claimant argues, however, that the letter was vague and failed to create a dispute concerning her TTD benefits. She also argues that the letter was constitutionally defective under the Due Process Clause because it was inadequate. I consider only the first argument since it is dispositive.

¶6 The only determination made in the letter concerned claimant's entitlement to PPD benefits. The letter, in its entirety, read:

> November 16, 1999
>
> Anna Marie Hoff
> Box 253
> Gardiner, MT 59030
>
> Re: 05-20000-00004
>
> Dear Ms. Hoff:
>
> I have received documentation verifying you have received an impairment rating for your injury. The maximum permanent partial disability benefits you are entitled to is $2,172.97 and is figured as follows:
>
> 5% percentage for impairment x 350 weeks = 17.5 weeks x $124.17
>
> The Uninsured Employers' Fund is unable to pay the award in a lump sum (Section 39-71-503, MCA) so you will receive the award in monthly installments. The next warrant you receive will reflect the first payment of this award. Since you reached maximum medical improvement and were released to return to your time of injury job, your permanent partial disability benefits will be paid from October 8,1999, through February 7, 2000.
>
> If you do not agree with this decision, you may request mediation. Under section 39-71-520 of the Workers' Compensation Act if you do not appeal this decision within 90 days this determination is considered final. To obtain the appropriate forms, contact the Workers' Compensation Claims Assistance Bureau, Mediation Unit, P.O. Box 1728, Helena, Montana 59624 or call (406) 444-6534.
>
> If you have any questions please contact me.

Sincerely,

\s\ Bernadette Rice

Claims Adjuster
Uninsured Employers' Fund
(406)444-6542

c: Workers' Compensation Claims Assistance Bureau
(Employer's Combined Motion to Dismiss and Supporting Brief - Ex. B)

¶7 The letter makes no mention of any determination concerning TTD benefits, nor does it provide notice that TTD benefits were being terminated. Of course, one familiar with the statutes governing workers' compensation benefits would recognize that *implicit* in the UEF's letter was a determination that claimant was no longer entitled to TTD benefits. But that requires an understanding of various Workers' Compensation statutes. If one looks only at section 39-71-737, MCA (1999), one might conclude that the award of PPD benefits was on top of continuing permanent partial benefits since the section expressly authorizes payment of the impairment award concurrently with other benefits, providing:

> Compensation must run consecutively and not concurrently, and payment may not be made for two classes of disability over the same period, except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits.

Only if one reads section 39-71-116(34), defining TTD as "a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing," and section 39-71-701, MCA, which provides for payment of TTD benefits until the worker reaches maximum healing,[(1)] does the implication become apparent.

¶8 To constitute a determination, the language used must be express. A decision must clearly and unequivocally state what is decided. Claimants should not need a legal education to determine what was encompassed in a UEF determination. If TTD benefits are being discontinued, the determination must expressly say so. I, therefore, find that the UEF's November 16, 1999 letter, constituted a determination of claimant's entitlement to PPD benefits but did not constitute a determination concerning claimant's entitlement to further TTD benefits. It therefore did not start the running of the 90 day limitations period with respect to her request for reinstatement of TTD benefits. Her petition is not time barred.

ORDER

¶9 The motion to dismiss are **denied**.

DATED in Helena, Montana, this 19th day of July, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Lucas J. Foust
Mr. Daniel B. McGregor
Ms. Kimberley D. Evans
Submitted: June 23, 2000

1. Section 39-71-701, MCA (1999), provides in relevant part:

> **39-71-701. Compensation for temporary total disability -- exception.**
>
> (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.