IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 57

WCC No. 2000-0015

GREGORY MARSH

Appellant

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER DISMISSING APPEAL

Summary: Appellant appeals from a decision of a hearing officer of the Department of Labor and Industry denying his claim for occupational disease benefits. The hearing was held after the 1999 amendments to the Workers' Compensation Act vested original jurisdiction over denied OD claims in this Court. However, as permitted by the amendments, 1999 Mont. Laws, ch. 442, § 31(2), the appellant elected to stay in the Department for his hearing. The appeal was filed more than 30 days after the Department Decision.

Held: The appeal is dismissed for lack of jurisdiction. The Department hearing and the appeal to this Court are governed by section 39-71-612 (1997), which remains in effect for those cases in which the election to stay in the Department is made. The section requires an appeal to be filed "within 30 days after the department has issued its final determination." Even if 3 days is added for mailing, the appeal in this case was untimely. The deadline is jurisdictional: an untimely appeal (request for judicial review) is ineffective for any purpose.

Topic:

> **Appeals to Workers' Compensation Court: Timeliness.** Claimant appealed to the Workers' Compensation Court following denial of his claim for occupational disease benefits by a hearing officer for the Department of Labor. Under section 39-71-612, MCA (1997), appeal dismissed for lack of jurisdiction where not filed within 30 days after the department issued its final determination, even adding three days for mailing. Although the 1999 statutes transferred original jurisdiction over occupational disease claims to the WCC, this claim was properly heard in the

Department of Labor where claimant filed his claim before enactment of the 1999 statutes and elected to remain in the DOL contested case process.

¶1 This is an appeal from a decision of the Department of Labor and Industry (Department) denying appellant's claim that he suffers from an occupational disease involving his lower back, stomach problems, and blackout spells.

¶2 The record on appeal consists of the sworn statements of the appellant, who represents himself, 23 exhibits submitted by the State Fund, and a transcript of the November 23, 1999 hearing, including testimony from appellant Gregory Marsh (Marsh) as well as Dr. Gary Rapaport.

Procedural and Factual Background

¶3 Appellant filed a claim for compensation on February 19, 1999, contending he suffered an occupational disease during the course of employment with Miller Oil Company. (December 10, 1999, order at 3.) On March 3, 1999, he filed a second claim stating he suffered an occupational disease in the course of employment with Can Am Convenient Stores. (*Id.*) The Department scheduled a medical examination of appellant with Dr. Gary Rapaport. (*Id.*)

¶4 Dr. Rapaport examined Marsh on June 29, 1999, and determined that his chronic mechanical back pain syndrome relates to three motor vehicle accidents between 1993 to 1997. (*Id.* at 4.) Dr. Rapaport further noted that Marsh's chronic back pain appeared to be a pre-existing condition, existing independent of specific workplace and employment activities, although workplace activities, such as kitchen grill work, may aggravate appellant's pain. (*Id.* at 4-5.)

¶5 Appellant's treating physician, Dr. James Nichols, also concluded that appellant's back pain resulted from injuries sustained in two motor vehicle accidents. (*Id.* at 2.) Dr. Nichols also diagnosed Marsh's stomach symptoms as Barrett's esophagus and opined that the condition was not related to work. (*Id.*)

¶6 Following Dr. Rapaport's evaluation, the Department issued an order referring copy of medical reports to the parties on July 13, 1999, denying Marsh's claim for occupational disease benefits. (*Id.* at 5.) Marsh then requested a hearing. (*Id.*)

¶7 A hearing was held on November 23, 1999, by telephone. The hearings officer, Michael T. Furlong, issued his findings of fact; conclusions of law; and final order on December 10, 1999, finding appellant ineligible for occupational disease benefits and dismissing his claim. The hearings officer determined that the record did not contain any medical evidence causally connecting Marsh's conditions to his employment. (findings of fact; conclusions of law; and final order at 3.)

¶8 The appellant's handwritten [letter] notice of appeal was signed on January 18, 2000, and received and filed in the Workers' Compensation Court on January 20, 2000. An amended notice of appeal was signed on January 21, 2000, and received by the Court on February 2, 2000.

¶9 The appeal has been fully briefed and is now ready for decision.

Discussion

¶10 The respondent, State Compensation Insurance Fund, raises a threshold issue which is dispositive of this appeal. It argues that the appeal is untimely and the Court therefore lacks jurisdiction to consider the merits of the appeal.

¶11 As noted in paragraph 8, appellant's first notice of appeal was in the form of a letter addressed to the Court. The letter was signed on January 18, 2000, and received by the Court on January 20, 2000. In his letter appellant stated he had "just received" the Department's decision "this last week." He went on to state, "I had my sister bring my mail in S.D. and now I'm back in Montana." The letter did not contain any grounds for appeal, as required by Court rule. Rule 24.5.350(1).

¶12 Appellant thereafter filed a second notice of appeal, captioned as such, utilizing a form provided by the Court. It was signed on January 21, 2000, and received by the Court on February 2, 2000. In this notice of appeal, he wrote that all of his medical problems are work related, however, he did not set forth the legal grounds for his appeal.

¶13 At the time the claim arose, it was governed by section 39-72-612, MCA (1997), which provides in relevant part:

> **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, which may be conducted by telephone or by videoconference. 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 entire section was repealed by the 1999 legislature. In its place, the legislature added a new provision to section 39-72-602, MCA, giving the Workers' Compensation Court original jurisdiction to hear disputes involving denial of occupational disease claims. 1999 Mont. Laws, ch. 442, § 17. The legislature also streamlined the medical panel procedure provided by the section. *Id*. As amended, the section now provides:

> **39-72-602. Insurer may accept liability -- procedure for medical examination when insurer has not accepted liability**. (1) An insurer may accept liability for a claim under this chapter based on information submitted to it by a claimant.
>
> (2) In order to determine the compensability of claims under this chapter when an insurer has not accepted liability, the following procedure must be followed:
>
> (a) The department shall direct the claimant to an evaluator on the list of physicians for an examination. The evaluator shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. In the case of a fatality, the evaluator shall examine the records to determine if the death was caused by an occupational disease. The evaluator shall submit a report of the findings to the department.
>
> (b) Within 7 working days of receipt, the department shall mail the report of the evaluator's findings to the insurer and claimant.
>
> (c) **Upon receipt of the report, if a dispute exists over initial compensability of an occupational disease, it is considered a dispute that, after mediation pursuant to department rule, is subject to the jurisdiction of the workers' compensation court.** [Emphasis added.]

¶14 The 1999 legislature also made a specific provision governing the retroactivity of the jurisdictional change. The amendment to section 39-72-602, MCA, was set out in section 23 of chapter 443, 1999 Montana Laws. In subsection (2) of section 31 of that chapter, the legislature provided in relevant part:

> (2) [Sections 21 through 25] apply retroactively, within the meaning of 1-2-109, to occupational diseases occurring before [the effective date of this act] **unless a party elects,** after notification by the department of labor and industry, to remain in the contested case process. [Emphasis added; previous brackets in original.]

Meanwhile, in section 26 of the chapter, it repealed section 39-72-612, MCA (1997), in its entirety. It made no provision for retroactivity of the repealer, thus making its applicability subject to the general applicability date of the act, which was upon passage and approval. 1999 Mont. Laws, ch. 442, § 29. Approval was on April 23, 1999, thus at first glance the repealer took effect on that date. However, the repealer must be read together with the retroactivity provision of section 31(2). "In construing a statute, a court must reject a construction that would leave any part of the statutory language without effect--the court must give effect to all relevant provisions of the statute." *Montco v. Simonich,* 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997). Section 31(2) specifically provides that a party with an occupational disease claim antedating the passage of the 1999 amendments shall have the option to have his or her case heard by the Department. In making that provision, the legislature clearly contemplated that section 39-72-612, MCA (1997), would continue to

apply in those cases in which an election is made. Any other interpretation would nullify the provision for the case to remain before the Department since section 39-72-612, MCA (1997), was the sole authority for the Department to conduct a hearing in a disputed occupational disease case.

¶15 In this case, the appellant elected to have his case heard by the Department. Accordingly, his appeal is governed by section 39-72-612, MCA (1997), and the 30-day time limit for appeal applies. The Supreme Court has previously held that an appeal from an agency decision must be timely. The filing deadlines for petitions for judicial review are jurisdictional in nature, and the failure to seek judicial review of an administrative ruling within the time prescribed by statute makes such an "appeal" ineffective for any purpose. *In re McGurran,* 295 Mont. 357, 1999 MT 192, ¶ 12, 983 P.2d 968, 971. Lacking statutory authority to extend the deadline, the deadline is absolute. *Id*.

¶16 In *MCI Telecommunications Corp. v. Montana Dept. of Public Service Regulation,* 260 Mont. 175, 858 P.2d 364 (1993), the Montana Supreme Court held that 3 days must be added to the 30 day period prescribed by the Montana Administrative Act Procedure, section 2-4-702(2)(a), MCA, where the decision appealed to district court is mailed. The addition of three days for mailing, however, was based upon the specific language of section 2-4-702(2)(a), MCA, which provided that judicial review "shall be instituted by filing a petition in district court within 30 days **after service of the final decision of the agency.**" § 2-4-702(2)(a), MCA. The Court held that the section did not define "service" and that it was therefore appropriate to look to the 3-day mailing rule set out in Rule 6(e) of the Montana Rules of Civil Procedure.

¶17 The language of section 39-72-612, MCA (1997), differs from that of section 2-4-702(2)(a), MCA. As set forth earlier, the appeal period begins from the date the Department "issues its final determination." That date was December 10, 1999. Thus, the last date for appellant to file his appeal was January 10, 2000. Even if three days were added for mailing, the deadline was January 13, 2000. Appellant did not mail his appeal until at least January 19, 2000. Even if the appeal in this case is deemed filed on the date the appellant signed or mailed it, *see* Rule 24.5.303(2), his appeal is untimely.

ORDER AND FINAL JUDGMENT

¶18 1. Since appellant's appeal was untimely, this Court lacks jurisdiction to consider the appeal. The appeal is therefore **dismissed with prejudice**.

¶19 2. This Order is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶20 3. Any party to this dispute may have 20 days in which to request a rehearing from this order dismissing appeal.

DATED in Helena, Montana, this 13th day of September, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Gregory Marsh - Certified Mail
Mr. David A. Hawkins
Ms. Sandy Duncan
Submitted Date: August 4, 2000