IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 7

WCC No. 9905-8218

RANDELL JAMES SIMONS-TOLLEFSON,
a minor child

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BIG Z TRUCKING

Employer.

ORDER APPOINTING GUARDIAN *AD LITEM* AND
DENYING MOTION TO DISMISS

Summary: Insurer moved to dismiss petition for benefits filed on behalf of minor child of deceased worker on ground that 39-71-601, MCA (1991) requires written claim "within 12 months…either by the claimant or someone legally authorized to act for him in his behalf."

Held: Against the background of case law and other statutes, WCC held no one was legally authorized to act for the minor until a guardian or guardian ad litem had been appointed for the purpose of seeking workers' compensation benefits, even though the minor's mother was authorized to act on his behalf in other contexts. Where a guardian had not yet been appointed, the statute had not yet commenced and the motion to dismiss was denied.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-601, MCA (1991).** Insurer moved to dismiss petition for benefits filed on behalf of minor child of deceased worker on ground that 39-71-601, MCA (1991) requires written claim "within 12 months…either by the claimant or someone legally authorized to act for him in his behealf." Against the background of case law and other statutes, WCC held no one was legally authorized to act for the minor until a guardian or guardian ad litem had been appointed for the purpose of seeking workers' compensation benefits, even though the minor's mother was authorized to act on his behalf in

other contexts. Where a guardian had not yet been appointed, the statute had not yet commenced and the motion to dismiss was denied.

Benefits: Death Benefits: Dependents. Insurer moved to dismiss petition for benefits filed on behalf of minor child of deceased worker on ground that 39-71-601, MCA (1991) requires written claim "within 12 months...either by the claimant or someone legally authorized to act for him in his behealf." Against the background of case law and other statutes, WCC held no one was legally authorized to act for the minor until a guardian or guardian ad litem had been appointed for the purpose of seeking workers' compensation benefits, even though the minor's mother was authorized to act on his behalf in other contexts. Where a guardian had not yet been appointed, the statute had not yet commenced and the motion to dismiss was denied.

Guardians and Conservators: Guardian ad Litem. Insurer moved to dismiss petition for benefits filed on behalf of minor child of deceased worker on ground that 39-71-601, MCA (1991) requires written claim "within 12 months...either by the claimant or someone legally authorized to act for him in his behealf." Against the background of case law and other statutes, WCC held no one was legally authorized to act for the minor until a guardian or guardian ad litem had been appointed for the purpose of seeking workers' compensation benefits, even though the minor's mother was authorized to act on his behalf in other contexts. Where a guardian had not yet been appointed, the statute had not yet commenced and the motion to dismiss was denied. Where insurer did not object to mother's qualifications, WCC appointed her guardian ad litem.

¶1 The petitioner in this case is Randell James Simons-Tollefson (Randell), the minor son of Randell James Tollefson (Tollefson).[(1)] Tollefson was killed August 2, 1992, in a trucking accident. At the time of his death he was living with, but not married to Shelly Simons (Shelly), who is Randell's mother. Randell was born posthumously, approximately four months after the accident.

¶2 The Petition for Trial alleges Tollefson died within the course and scope of employment with Big Z Trucking. The State Fund denies liability. Among other defenses, it argues that the claim is barred by section 39-71-601, MCA, which requires that a claim be filed within one year of the accident. Both parties agree that no claim was filed within the one-year limitations period, and the State Fund moved to dismiss.[(2)] The motion was briefed and orally argued. During oral argument the Court questioned counsel whether Shelly has legal standing to pursue the claim on behalf of her son lacking her appointment as his general guardian or his guardian *ad litem*. At the Court's request, the parties filed supplemental briefs addressing the question, and the matter is now deemed submitted for decision.

I. Death Benefits

¶3 Under section 39-71-721, MCA (1991), the "beneficiaries" of a worker who dies as a result of a work-related injury are entitled to benefits. The section provides in relevant part:

> **39-71-721. Compensation for injury causing death - limitation**. (1)(a)If an injured employee dies and the injury was the proximate cause of such death, then the beneficiary of the deceased is entitled to the same compensation as though the death occurred immediately following the injury. A beneficiary's eligibility for benefits commences after the date of death, and the benefit level is established as set forth in subsection (2).
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> . . . .
>
> (2) To beneficiaries as defined in 39-71-116(3)(a) through (3)(d), weekly compensation benefits for an injury causing death are 66 2/3% of the decedent's wages. The maximum weekly compensation benefit may not exceed the state's average weekly wage at the time of injury. The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death.
>
> (3) To beneficiaries as defined in 39-71-116(3)(e) and (3)(f), weekly benefits must be paid to the extent of the dependency at the time of the injury, subject to a maximum of 66 2/3% of the decedent's wages. The maximum weekly compensation may not exceed the state's average weekly wage at the time of injury.

Section 39-71-116(3)(b), MCA, provides that a minor child of a deceased worker is a beneficiary, thus Randell's entitlement to benefits is governed by subsection (2) of section 39-71-721, MCA.

¶4 Randell's claim is also governed by sections 39-71-604 and -601, MCA. Section 39-71-604, MCA, requires that a beneficiary seeking death benefits must file a written claim.[(3)] Since Randell must file a claim, he is a "claimant" and therefore subject to section 39-71-601, MCA, which provides:

> **39-71-601. Statute of limitation on presentment of claim - waiver.** (1) In case of personal injury or death, all claims must be forever barred unless presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf.
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> (2) The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:
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> (a) lack of knowledge of disability;
>
> (b) latent injury; or

(c) equitable estoppel.

II. Standing of Shelly

¶5 As a general rule, albeit one with exceptions, parents do not have standing to enforce the rights of their children. Section 40-6-232, MCA, provides, "The parent, as such, has no control over the property of the child." A claim for benefits is a property right. Further, section 27-1-511, MCA, provides:

> A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age **except that a guardian must conduct the same**. [Emphasis added.]

A guardian becomes such "by acceptance of a testamentary appointment or upon appointment by the court." § 72-5-201, MCA. Thus, while parents may be "guardians" of their children in a general and loose sense, absent "appointment by the court" they are not guardians as defined in Montana statutes.

¶6 At least three Montana cases have addressed the status of a parent to act on behalf of a child in absence of the parent's appointment as a guardian or a specific statute authorizing the parent to act without appointment. In *Maloney v. Schandelmier*, 65 Mont. 531, 212 P.2d 493 (1923), a minor child was named a defendant in a lawsuit and served with a summons. He gave the summons to his father shortly after service but failed to appear, leading to the entry of a default against him. The trial court set aside the default and appointed the father guardian *ad litem* for purposes of defending the case. The Supreme Court affirmed, holding that prior to appointment of the guardian *ad litem* the "defendant [minor] could not have appeared, had he so desired." 65 Mont. at 535, 212 P.2d at 494. According to the Court, "the rule . . . seems well established that no legal right of parentage or of natural guardianship will enable one to act for an infant without an appointment as guardian . . . ." *Id.* The Court also noted: "It is the well-established policy of the law to protect the rights of minors, and in this respect the courts are charged with vigilance." 65 Mont. at 536, 212 P.2d at 494.

¶7 *Lazich v. Belanger*, 111 Mont. 48, 105 P.2d 738 (1940), is even closer on point. In that case, a minor child had a personal injury claim against the city of Butte. Under statutes governing claims against the city, claimants were required to provide written notice of their claims within 60 days of injury. Neither the injured child nor his parents gave the required notice, however, thereafter the child's mother was appointed his guardian, promptly gave notice to the city, and then filed a personal injury action on behalf of her son. Upon demurrer invoking the 60-day notice requirement, the District Court dismissed the complaint. The Supreme Court reversed, holding that, even though the notice statute was applicable to a minor, the rights of the minor should not "be prejudiced by the omission of the parents to give the notice." 111 Mont. at 53, 105 P.2d at 739. Noting the minor was not able to act on his own, the Court stated:

> It would be unreasonable to require that to be done which plaintiff was incapable of doing. Neither should his right of action be frittered away because of the omission of the parents to give the notice. To so hold would be to impute the negligence of the parents to the child - a doctrine which has long since been repudiated by this court.

Id.

¶8 The third case is a workers' compensation case involving death benefits. In *Davis v. Industrial Accident Board*, 92 Mont. 503, 15 P.2d 919 (1932), the father of two children died as a result of an industrial accident. The children's mother filed a claim for death benefits on her and the children's behalf. The claim was accepted. Thereafter, the mother petitioned for a lump-sum conversion which encompassed both her and the children's future benefits. The Industrial Accident Board approved the settlement and the lump sum was paid. The mother then died and a guardian was appointed for the children. The guardian sought reinstatement of death benefits, arguing that the mother had no authority to bind the children since she had not been appointed the children's legal guardian. The Supreme Court agreed:

> . . . The parent, as such, has no control over the property of the child. . . .
>
> The board is not authorized to act [on a lump-sum request] until an application in writing is made by the beneficiary. A minor is not authorized by the Compensation Act, or by any other provision of the law, to make such application in his own behalf. Such authority as to a minor is contained in the Compensation Acts of a number of the states.
>
> At the time of the passage of the Compensation Act, there were in force, and there now are in force, general statutes relating to the appointment, qualifications, powers, and duties of guardians. It was the intention of our Legislature, in a fact situation such as exists here, that these general statutes should apply. Under the facts in this case **the only person authorized to sign the application [for lump-sum settlement] is the duly appointed, qualified, and acting guardian of the minors**.

92 Mont. at 510, 15 P.2d at 921 (emphasis added; citations omitted). Since the mother had not been appointed legal guardian for the children, the Court held, "The order of the board allowing the full lump sum settlement was and is null and void because no application therefor was filed as provided by law or at all." 92 Mont. at 511, 15 P.2d at 922.

¶9 There are currently a number of statutory exceptions to the general, well-established rule laid down in the cited cases. Section 27-1-512, MCA, provides:

> Either parent may maintain an action for the injury to a minor child and a guardian for injury to a ward when such injury is caused by the wrongful act or neglect of

> another. Such action may be maintained against the person causing the injury or, if such person be employed by another person who is responsible for his conduct, also against such other person.

On its face, the section authorizes the parent, without resort to appointment as a guardian, to bring a personal injury action on behalf of a minor child. The section is further reflected in Rule 17(c), Mont.R.Civ.P., which authorizes a civil action to be commenced on behalf of a minor by the minor's "next friend," a term which means "[o]ne acting for benefit of infant, or other person not sui juris (person unable to look after his or her own interests or manage his or her own lawsuit), **without being regularly appointed guardian**." Westlaw Edition of Blacks Law Dictionary (emphasis added). But the statute applies only to personal injury actions, not to workers' compensation claims.

¶10 Section 39-71-602, MCA, also sets an exception in certain workers' compensation cases, providing:

> **39-71-602. Statute of limitation not to apply during minority or mental incompetency unless guardian appointed.** No limitation of time as provided in 39-71-601 or in this chapter, known as the Workers' Compensation Act, shall run as against any **injured worker** who is mentally incompetent and without a guardian or an **injured minor** under 18 years of age who may be without a parent or guardian. A guardian in either case may be appointed by any court of competent jurisdiction, in which event the period of limitations as provided for in 39-71-601 shall begin to run on the date of appointment of such guardian or when such minor arrives at 18 years of age, whichever date is earlier.

As the bolded language states, the section extends to "injured workers", including minors. It tolls the limitations period specified in section 39-71-601, MCA, during minority but only if the minor has neither guardian nor parent. By necessary implication, *cf. Montana State University v. Ransier,* 167 Mont. 149, 152, 536 P.2d 187, 189 (1975) ("When a statute grants power in general terms, it includes, by implication, a grant of all powers incidental and necessary to make the general grant effective"), both a guardian **and** a parent not appointed guardian are authorized to file a claim on behalf of a minor who is injured in a work-related accident. But the section says nothing about the parent of a beneficiary of an injured worker. It does not authorize the parent of a beneficiary to execute a claim on the minor's behalf, although as a practical matter the parent's filing of a claim on his or own behalf, as a beneficiary spouse, may trigger benefits allocable to the minor, section 39-71-723, MCA.[(4)] In this case, Shelly concedes she is not the spouse of Tollefson and failed to file any claim, either on her own behalf or on Randell's behalf, within the time permitted under section 39-71-601, MCA.

¶11 Finally, I consider the effect of section 39-71-604(2), MCA, which requires that a claim be filed for death benefits. It provides:

> (2) If death results from an injury, the parties entitled to compensation or someone in their behalf shall file a claim with the insurer. The claim must be accompanied with proof of death and proof of relationship, showing the parties entitled to compensation, certificate of the attending physician, if any, and such other proof as may be required by the department.

The section does not define "someone on their behalf," however, under existing statutes and precedents, the only person authorized to act on behalf of the beneficiary-minor is a guardian.

¶12 In light of the case law cited above, and the lack of an express statutory exception to that law, I conclude that Shelly is not authorized to file and pursue a claim on Randell's behalf until and unless she is appointed his guardian or guardian *ad litem*.

III. Appointment of Shelly as Guardian *Ad Litem*

¶13 The Supreme Court has previously held that the Workers' Compensation Court has jurisdiction to appoint a guardian *ad litem* for the beneficiary of a deceased worker. *Hock v. Lienco Cedar Products,* 194 Mont. 131, 137, 634 P.2d 1174, 1177-78 (1981). The petition expressly requests this Court to appoint Shelly guardian *ad litem* for Randell. (Prayer for relief.) State Fund does not challenge her qualifications to serve as guardian and she has no conflict of interest, *compare with Hock*. Therefore, before considering the merits of the Motion to Dismiss, the Court appoints Shelly as guardian *ad litem* for Randell.

IV. The Motion to Dismiss

¶14 The discussion of Shelly's standing is dispositive of the Motion to Dismiss. As that discussion shows, until appointment of Shelly by this Order, no one was authorized to act for Randell. The limitations period prescribed in section 39-71-601, MCA, is inapplicable until the appointment of a guardian or guardian *ad litem*. *Lazich v. Belanger*, supra. Since no guardian was appointed until now, the limitations period commences running as of the date of this Order. The Motion to Dismiss must therefore be denied.

ORDER

¶15 For the reasons set forth in the foregoing memorandum,

IT IS HEREBY ORDERED that:

¶16 1. Shelly Simons, who is the natural mother of the petitioner, Randell James Simons-Tollefson, is appointed to act as petitioner's guardian *ad litem* with all the powers and responsibilities of such office.

¶17 2. The Motion to Dismiss is **denied**.

¶18 3. This matter shall be set for trial with regard to all remaining issues.

DATED in Helena, Montana, this 16th day of February, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Ms. Carrie L. Garber
Date Submitted: October 15, 1999

1. The State Fund does not dispute that Tollefson was Randell's father.

2. Motions to dismiss attack the facial sufficiency of the initial pleading. *See* Rule 12(b), Mont.R.Civ.P. The petition in this case lists a June 11, 1998 Claim for Compensation as an exhibit. Since the parties agree that no claim was filed within the one-year limitations period, the Court need not be overtechnical in construing the petition and will address the issue pursuant to the motion to dismiss.

3. The pertinent part of the section 39-71-604, MCA, is set out in paragraph 11 below.

4. Section 39-71-723, MCA, (1991) provides:

> **39-71-723. How compensation to be divided among beneficiaries.** Compensation due to beneficiaries must be paid to the surviving spouse, if any, or if none, then divided equally among or for the benefit of the children. In cases where beneficiaries are a surviving spouse and stepchildren of such spouse, the compensation shall be divided equally among all beneficiaries. Compensation due to beneficiaries, as defined in 39-71-116(3)(e) and (3)(f), where there is more than one, shall be divided equitably among them, and the question of dependency and amount thereof shall be a question of fact for determination by the department.

Since the section requires payment to the spouse even where there are other beneficiaries, such payment discharges the insurer's obligation to other beneficiaries.