IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 5

WCC No. 9812-8106

SYNTHETIC TECHNOLOGIES CORPORATION
AND WEATHERGUARD CORPORATION

Appellants

vs.

EMPLOYMENT RELATIONS DIVISION
UNINSURED EMPLOYERS' FUND

Respondent.

ORDER DENYING MOTION TO DISMISS

Summary of Case: Appeal from decision of DOL was originally tendered to the Court as a hybrid appeal/petition which failed to include a certificate of service on the opposing party as required by ARM 24.5.350. The Clerk of the WCC refused to file the document and returned it to counsel. Because this was the 30th day after the decision below, respondent moved to dismiss the appeal, arguing it was not timely under section 2-4-702(2)(a), MCA.

Held: Section 2-4-702(2)(a), MCA, which is jurisdictional, was satisfied by the document appellant attempted to file. The Clerk of Court should have filed that document, then required compliance with Court rules. Although service was not made on the opposing party within 30 days, section 2-4-702, MCA only requires "prompt" service, not service within 30 days as a matter of jurisdiction by the appellate court. Motion to dismiss denied.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 2-4-702, MCA.** Where appeal from decision of DOL was tendered to the WCC as a hybrid appeal/petition failing to include a certificate of service on the opposing party as required by ARM 24.5.350, the Clerk of the WCC refused to file the document and returned it to counsel. Because this was the 30th day after the decision below, respondent moved to dismiss the appeal, arguing it was not timely under section 2-4-702(2)(a), MCA. The WCC denied the motion to dismiss, holding that section 2-4-702(2)(a), MCA, while a jurisdiction statute, was satisfied by the document appellant attempted to file. The Clerk of Court should have filed that document,

then required compliance with Court rules. Although service was not made on the opposing party within 30 days, section 2-4-702, MCA only requires "prompt" service, not service within 30 days as a matter of jurisdiction of the appellate court.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.350. Where appeal from decision of DOL was tendered to the WCC as a hybrid appeal/petition failing to include a certificate of service on the opposing party as required by ARM 24.5.350, the Clerk of the WCC refused to file the document and returned it to counsel. Because this was the 30th day after the decision below, respondent moved to dismiss the appeal, arguing it was not timely under section 2-4-702(2)(a), MCA. The WCC denied the motion to dismiss, holding that section 2-4-702(2)(a), MCA, while a jurisdiction statute, was satisfied by the document appellant attempted to file. The Clerk of Court should have filed that document, then required compliance with Court rules. Although service was not made on the opposing party within 30 days, section 2-4-702, MCA only requires "prompt" service, not service within 30 days as a matter of jurisdiction of the appellate court.

Procedure: Motion to Dismiss. Where appeal from decision of DOL was tendered to the WCC as a hybrid appeal/petition failing to include a certificate of service on the opposing party as required by ARM 24.5.350, the Clerk of the WCC refused to file the document and returned it to counsel. Because this was the 30th day after the decision below, respondent moved to dismiss the appeal, arguing it was not timely under section 2-4-702(2)(a), MCA. The WCC denied the motion to dismiss, holding that section 2-4-702(2)(a), MCA, while a jurisdiction statute, was satisfied by the document appellant attempted to file. The Clerk of Court should have filed that document, then required compliance with Court rules. Although service was not made on the opposing party within 30 days, section 2-4-702, MCA only requires "prompt" service, not service within 30 days as a matter of jurisdiction of the appellate court.

¶1 The matter before the Court is respondent's motion to dismiss the present appeal. The appeal is from a decision of the Department of Labor and Industry. Respondent alleges it is untimely.

¶2 The salient facts are as follows:

- The decision below was dated and filed October 28, 1998.
- On November 27, 1998, the Court received a document entitled Appeal of Department of Labor's Final Determination and Petition for Hearing. The document was neither an appeal nor a petition but a hybrid of both. As an appeal, it failed to

set forth a certificate of service indicating that it had been served on the opposing party, as required by Rule 24.5.350.

- The Clerk of Court returned the document to appellant's/petitioner's attorney, notifying him of non-compliance.
- Thereafter, on December 2, 1998, the Court received and filed an Appeal of Department's Final Determination and Request for Oral Argument. The new, revised Appeal contained a certificate of service certifying it had been sent to the Court, however, it did not certify that it had been sent to the opposing party.

¶3 An appeal of an agency decision must be filed within 30 days. § 2-4-702(2)(a), MCA. In this case the appeal was tendered to the Court on the 30th day and was therefore timely. While it did not comply with the Court's rule regarding a certificate of service on the opposing party, the Montana Administrative Procedure Act requires only that an appeal (petition for judicial review) be "promptly served upon the agency and all parties of record." *Id*. Simultaneous service, while required by the Court rule, is not required by MAPA and is not a jurisdictional prerequisite. Since the document received by the Court on November 27, 1998, otherwise set forth the information required by Court rule 24.5.350 and section 2-4-702(b), MCA, it was timely and should have been accepted and filed.

¶4 THEREFORE, IT IS HEREBY ORDERED that the appeal in this matter be and is hereby deemed filed on November 27, 1998, and that the motion to dismiss is **denied**.

DATED in Helena, Montana, this 14th day of January, 1999.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Gary S. Deschenes
Mr. Daniel B. McGregor
Submitted: December 24, 1998