IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 9

WCC No. 2000-0027

KEVIN SMITH

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

STATE OF MONTANA/DEPARTMENT OF TRANSPORTATION

Employer.

MEMORANDUM AND ORDER DENYING BENEFITS UNDER
SECTION 39-71-610, MCA

Summary: After DOL denied claim for interim benefits under section 39-71-610, MCA, (1997), claimant "appealed" to WCC. The parties agreed the 1999 revisions to section 39-71-610, MCA, gave the WCC jurisdiction over the case.

Held: 1999 revisions to section 39-71-610, MCA, contemplate de novo hearing at WCC. Given emergency nature of 49-day benefits issues, speedy resolution is necessary, usually accomplished through presentation of information to the court through documents and telephone conference with counsel, the procedure followed in this case. Here, request for 49-day benefits denied where the insurer never accepted liability and the insurer has what appears to be a good argument the claim is time-barred.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-610, MCA (1999). 1999 revisions to section 39-71-610, MCA, contemplate de novo hearing at WCC. Given emergency nature of 49-day benefits issues, speedy resolution is necessary, usually accomplished through presentation of information to the court through documents and telephone conference with counsel, the procedure followed in this case. Resolution of 49-day benefits cases will be guided by facts and circumstances of each case. In an accepted liability case where benefits have been paid for a lengthy period of time, where the claimant will suffer severe financial

hardship from any interruption of benefits, and where the claimant has, at least at first glance, a strong prima facie case for reinstatement of benefits, an order for 49-day benefits will likely issue. On the other hand, in a case of contested liability where there is an absolute defense of likely merit, where the case for reinstatement of benefits is facially weak, or where little financial hardship will result, the facts may go against claimant. Here, request for 49-day benefits denied where the insurer never accepted liability and the insurer has what appears to be a good argument the claim is time-barred.

Benefits: Interim (39-71-610) Benefits. Resolution of 49-day benefits cases will be guided by facts and circumstances of each case. In an accepted liability case where benefits have been paid for a lengthy period of time, where the claimant will suffer severe financial hardship from any interruption of benefits, and where the claimant has, at least at first glance, a strong prima facie case for reinstatement of benefits, an order for 49-day benefits will likely issue. On the other hand, in a case of contested liability where there is an absolute defense of likely merit, where the case for reinstatement of benefits is facially weak, or where little financial hardship will result, the facts may go against claimant. Here, request for 49-day benefits denied where the insurer never accepted liability and the insurer has what appears to be a good argument the claim is time-barred.

¶1 The claimant herein seeks interim benefits under section 39-71-610, MCA (1997), while he pursues his workers' compensation claim. His request for 610 benefits was initially made to the Department of Labor and Industry (Department), which denied the request. He appealed that decision to this Court on February 7, 2000. A telephone conference call was held February 9, 2000, to discuss the appeal. Mr. William Dean Blackaby represented claimant and Mr. David A. Hawkins represented the insurer, State Compensation Insurance Fund, in the conference. The claims adjuster, Gina Keltz, also participated.

¶2 The parties agreed to proceed informally, by way of the telephone conference, on the merits of the request. A wide ranging, forty-five minute discussion was then held with counsel and Ms. Keltz. At the end of the conference, the Court requested counsel to forward an affidavit which had been prepared by claimant and a history of workers' compensation claims filed by claimant. The parties agreed to do so and the Court received the materials the next day.

¶3 Based on the representations of counsel and the documentation furnished the Court, I glean the following facts:

¶4 Claimant suffered a work-related back injury in approximately 1989.

¶5 On May 1, 1998, claimant was involved in another work-related accident, the exact nature of which is unclear to the Court. However, the incident was sufficiently significant to cause his employer to call a safety meeting to discuss the incident.

¶6 According to claimant:

> At the time of the incident, I experienced temporary symptoms such as numbness, but because I had injured my back in the past, I felt that these symptoms might be temporary in nature.

(Affidavit of Kevin E. Smith ¶ 4.)

¶7 Claimant did not seek treatment for his back until June of 1999, at which time he reported back problems. He was put on light duty by his physician.

¶8 In early July 1999, the claimant filed a claim reporting that he had been injured at work sometime in the spring or summer of 1999.

¶9 Claimant asserts he did not learn of the relationship of his back problems to the May 1, 1999 accident until his doctor appointments in late June and early July 1999.

¶10 On July 15, 1999, the State Fund commenced paying temporary total disability benefits pursuant to section 39-71-608, MCA, under a reservation of rights pending further investigation.

¶11 In August 1999, the State Fund notified claimant it was terminating benefits because it had determined after further investigation that his claim is barred by the statute of limitations set out in section 39-71-601, MCA. The State Fund also questioned whether the claimant's back problems were related to the May 1, 1998 incident.

¶12 The claimant requested mediation and a mediation conference was held on September 10, 1999. At that time, the State Fund agreed to reinstate his benefits under the reservation of rights pending further investigation.

¶13 In December of 1999, the State Fund again sent notice of termination of benefits, denying the claim based on the statute of limitations and a lack of proof of a relationship between claimant's 1998 accident and his back problems. Benefits were terminated effective December 27, 1999, and have not been reinstated.

¶14 Claimant, through his attorney, then requested the State Fund to agree to extend the filing period pursuant to section 39-71-601(2), MCA. On January 13, 2000, the request was denied.

¶15 On January 19, 2000, the claimant requested the Department to order 49 days of interim benefits while claimant mediated his claim. On February 4, 2000, the Department denied the request for reasons which will be discussed later in this Order.

¶16 On February 7, 2000, claimant, through his attorney, wrote the Court requesting that it issue an order directing payment of benefits under section 39-71-610, MCA.

¶17 In his affidavit claimant states that when he reported his accident in May 1998, his supervisor "did not offer any additional documentation to me to fill out" and he [claimant] "did not ask additional questions at that time because my supervisor discourages injury claims and does not want any record of injury claims reflected on his safety record." (Affidavit of Kevin E. Smith ¶ 3.)

¶18 Information furnished by the State Fund shows that claimant has filed six claims, including the present one, since 1994 while working for the Montana Department of Transportation. One was filed for an April 20, 1998 accident, which was just days before the accident at issue here, and another was filed with respect to a November 24, 1998 accident. Two accidents in 1994 and one in 1996 were also reported to the insurer.

¶19 According to his attorney, claimant is in dire financial straits and unable to meet his home mortgage payments; foreclosure is pending. However, counsel acknowledged that even if 49 days of benefits are ordered the claimant will be in the same position at the end of those 49 days.

Statute Involved

¶20 At the time of the claimant's 1998 accident, section 39-71-610, MCA (1997), provided:

> **Termination of benefits by insurer -- department order to pay disputed benefits prior to hearing -- limitation on order -- right of reimbursement.** If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing, but in no event may the biweekly compensation benefits be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of a hearing. If after a hearing it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for such payments by the claimant.

The 1999 legislature amended the section to provide for a hearing before the Court. As revised, the section now provides:

> **Termination of benefits by insurer -- department order to pay disputed benefits prior to hearing or mediation -- limitation on order -- right of reimbursement**. If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing before the workers' compensation court or prior to mediation, but

> in no event may the biweekly compensation benefits be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of the hearing or mediation. A party may appeal this order to the workers' compensation court. If after a hearing before the workers' compensation court it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for the payments by the claimant.

The revisions are retroactive, 1999 Montana Laws, ch. 442, § 31(1), and neither party contests the jurisdiction of the Court to make a *de novo* determination of claimant's entitlement to benefits under the section.

Procedural Discussion

¶21 Prior to the 1999 revision, a request for 610 benefits triggered an initial administrative order from the Department. The order was issued without benefit of hearing; if either party disagreed with the order the party could request a contested case hearing under Department rules. ARM 24.29.205 and .207(1)(i). After hearing and the issuance of a final Department decision, the matter could be appealed to the Workers' Compensation Court for judicial review. § 39-71-2401(3), MCA; ARM 24.29.205(3).

¶22 The 1999 revision still provides for a determination by the Department and an "appeal" to the Workers' Compensation Court, however, that language must be construed together and coordinated with the remaining language of the section. "In construing a statute, the statute must be read as a whole and its terms must not be isolated from the context in which the legislature has used them." *State v. Thomas,* 285 Mont. 112, 122, 946 P.2d 140, 146 (1997). The revision specifically provides for a hearing, not just judicial review, before the Workers' Compensation Court. Thus, even though not artfully drafted, the statute contemplates an initial order issued by an administrative officer of the Department, then, if a party disagrees with the order, a *de novo* hearing before the Court. While the Department rules still provide for a hearing, the statute supercedes that requirement. Construing the statute as requiring a hearing both before the Department and the Court would be duplicative and contrary to the fundamental rule of statutory construction that statutes are to be construed to avoid absurd results, *Clover Leaf Dairy v. State,* 285 Mont. 380, 388, 948 P.2d 1164, 1169 (1997).

¶23 A "hearing" contemplates a proceeding at which both parties may appear and present the testimony of witnesses. It is usually preceded by discovery. However, in the case of the benefits afforded under section 39-71-610, MCA, there is greater urgency for an expedited decision than in other cases. The benefits are emergency in nature, plainly intended to afford interim funds to a claimant while he or she seeks reinstatement of full benefits through mediation and a petition to this Court. Thus, the nature of the benefits demand a speedy resolution.

¶24 Since the 1999 revision of section 39-71-610, MCA, the Court has received, considered, and resolved several requests for benefits under the section. To expedite decisions in those cases, it has proceeded, as in this case, by immediately initiating a telephone conference with counsel for both parties and suggesting that the request be decided based upon information they furnish the Court in the conference. In every case to date, counsel have agreed to this informal procedure and it is the Court's hope that future requests can be handled in similar fashion. For the most part, the facts relevant to the request are not disputed and the procedure allows for an immediate decision and, where appropriate, immediate reinstatement of benefits. Should the parties not agree to telephonic resolution, the Court can and certainly will hold an *in personam* hearing at which the parties will be permitted to call witnesses whose testimony will be recorded by a court reporter. Such hearings will, however, have to be scheduled with short notice and may require the parties to appear in Helena even though the cases arise in other venues. The important thing is to get the matter submitted and decided quickly. The Court will work with parties and their counsel to assure that this goal is met.

Merits Discussion

¶25 Initially, the Court considers the Department's ground for denying claimant's request. The basis for the Department's denial was as follows:

Based on the information provided, the Department concludes it should deny the claimant's request to invoke the provisions of section 39-71-610, MCA, because all benefits were paid under 39-71-608, MCA, Reservation of Rights. The Department does not have jurisdiction to extend benefits when they are paid under 39-71-608, MCA.

(February 4, 2000 Order ¶2.) The Court is operating under the same statute as the Department, thus it would be precluded from ordering benefits if the Department is correct in its analysis.

¶26 I have previously set out, verbatim, the statute in question, both in its 1997 and 1999 forms. The statute does not preclude interim benefits where benefits were being paid under a reservation of rights. It requires only that (1) some sort of benefits were paid, (2) those benefits were then terminated, and (3) the claimant disputes the termination of benefits. All three of those criteria are met. I therefore conclude that interim benefits under the section are not precluded by the fact that the benefits were paid under a reservation of rights.

¶27 That does not mean, however, that the reservation of rights is wholly irrelevant to the inquiry under section 39-71-610, MCA, or that claimant is entitled, as a matter of right, to 610 benefits. Section 39-71-610, MCA, provides that the Department "may" order additional benefits. If the legislature intended the award to be non-discretionary it could have simply directed the insurer to continue benefits for an additional 49 days whenever a

claimant disputes termination of benefits. Moreover, the statute does not require 49 days of benefits, it merely established 49 days as the maximum duration of any benefits ordered under the section.

¶28 The more difficult question is what factors must the Department, and ultimately the Court, consider in determining whether to exercise its discretion in favor of the petitioning claimant. The section provides no guidance, however, common sense and experience suggest that the decision must be guided by facts and circumstances of the particular case. In an accepted liability case where benefits have been paid for a lengthy period of time, where the claimant will suffer severe financial hardship from any interruption of benefits, and where the claimant has, at least at first glance, a strong prima facie case for reinstatement of benefits, an order for benefits under section 39-71-610, MCA, will likely be entered. On the other hand, in a case of contested liability where there is an absolute defense of likely merit, where the case for reinstatement of benefits is facially weak, or where little financial hardship will result, the facts may preponderate against an order for benefits.

¶29 In this case there are numerous factors cutting against claimant's request. This is not an accepted liability case. As noted earlier, that in and of itself is not determinative. However, the claimant's own facts show that as of this time his claim is barred by the one-year filing requirement. Unless he can persuade the Court to waive the one-year requirement, he will not be entitled to any benefits. His case for waiving the one-year filing requirement is not at first glance overpowering. In his affidavit he states that "[a]t the time of the [May 1, 1998] incident, I experienced temporary symptoms such as numbness . . . ." Whether he can persuade the Court that his injury was nonetheless latent, as he claims, is at least reasonably debatable. As to his suggestion that he was discouraged from filing a claim, which if true may give rise to an estoppel, the fact that he filed claims for an industrial accident occurring 11 days prior to the injury at issue here and for another accident occurring afterwards at least raises a significant question as to that ground for waiver.

¶30 Claimant's strongest argument for benefits is his financial situation. Even then 610 benefits would only postpone the financial crises. More importantly, in light of the other factors, his financial situation is not enough to carry the day.

ORDER

¶31 The claimant's request for benefits under section 39-71-610, MCA, is **denied**.

DATED in Helena, Montana, this 17th day of February, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. William Dean Blackaby
Mr. David A. Hawkins
Submitted: February 10, 2000