

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 62

WCC No. 9707-7785

SAMUEL CAL WYLIE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MONTANA DEPARTMENT OF JUSTICE

Employer.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS

Summary: Montana Highway Patrol employee alleging occupational deafness applied for writ of mandamus to compel the Department of Labor and Industry (DOL) to schedule a medical examination under the Occupational Disease Act (ODA).

Held: The WCC has jurisdiction to issue a writ of mandamus in appropriate cases. The DOL is incorrect that petitioner's sole remedy is under the occupational deafness provisions of the ODA; he could have another claim. However, the Court agrees with the DOL and insurer that a writ should not issue where petitioner has a plain and speedy remedy at law through a contested case hearing before the DOL, for which he has already filed.

Topics:

Jurisdiction: Writ of Mandamus. While the WCC has jurisdiction to issue a writ of mandamus in an appropriate matter relating to benefits, no writ will issue where claimant, who seeks to compel the Department of Labor to schedule a medical examination relating to his alleged deafness, has a plain and speedy remedy at law, to wit, a contested case hearing before the DOL, for which claimant has already filed.

Occupational Disease: Occupational Deafness. The WCC would not issue a writ of mandamus to compel the DOL to schedule a medical examination on claimant's alleged deafness where claimant has a plain and speedy remedy at law, to wit: a contested case hearing before the DOL, for which he has already filed.

Procedure: Mandamus. While the WCC has jurisdiction to issue a writ of mandamus in an appropriate matter relating to benefits, no writ will issue where claimant, who seeks to compel the Department of Labor to schedule a medical examination relating to his alleged deafness, has a plain and speedy remedy at law, to wit, a contested case hearing before the DOL, for which claimant has already filed.

Petitioner, Samuel Cal Wylie (Wylie), seeks a writ of mandamus directing the Department of Labor and Industry (Department) to schedule a medical examination under the Occupational Disease Act (ODA). Multiple issues are raised by the application.

Facts

The facts pertaining to the application are set out in the Application for Writ of Mandamus, an attached Affidavit in Support of Writ of Mandamus, the various exhibits attached to the affidavit, and the responses filed by the State Compensation Insurance Fund (State Fund) and the Department. No evidentiary hearing has been held and none is necessary since on its face the application must be denied as a matter of law.

As gleaned from the limited materials in the Court file, Wylie alleges he suffered a hearing loss as a result of exposure to "car high band radio" tones and squelch while employed by the Montana Highway Patrol. (Department's Response to Application for Writ of Mandamus, Ex. 8 - First Report of Occupational Injury or Occupational Disease.) He filed a claim for hearing loss with the State Fund on May 14, 1996. (*Id.*)

The State Fund denied liability for Wylie's claim for hearing loss, stating that the hearing loss did not meet the occupational deafness requirements of Part 8 of the Workers' Compensation Act (WCA), Title 39, chapter 71, MCA. It specifically invoked section 39-71-811, MCA, which provides that "[n]o claim shall be filed . . . unless the employee is exposed 8 hours daily and for a period of at least 90 days as above required to noise intensity levels above 90 decibels." Its investigation had adduced that the vehicle radios to which claimant was allegedly exposed did not produce noise level above 90 decibels and that, in any event, Wylie was not exposed to 8 hours daily of noise. (State Fund's Response to Application for Writ of Mandamus, Ex. 1.)

Wylie then wrote to the Department on several occasions demanding a medical panel examination under the ODA. (Application for Writ of Mandamus, Exs. 1, 3, 5; Department's Response to Application for Writ of Mandamus, Exs. 1, 3, 5.) His demands were denied by the Department's Employment Relations Bureau (ERD). (Application for Writ of Mandamus, Exs. 2, 4, 6; Department's Response to Application for Writ of Mandamus, Exs. 2, 4, 6; State Fund's Response to Application for Writ of Mandamus, Exs. 2 and 3.) ERD's denial of the request was based on its determination that Wylie's claim falls exclusively under the provisions of the Occupational Deafness provisions of Part 8 of the WCA and that the ODA

is inapplicable to his claim. (Application for Writ of Mandamus, Ex. 6; Department's Response to Application for Writ of Mandamus, Ex. 6; State Fund's Response to Application for Writ of Mandamus, Ex. 3.)

Following the refusal of ERD to designate an occupational disease medical panel to examine him, Wylie requested a contested case hearing before the Department. Hedging his bets, he also filed the current application, which if granted would circumvent a hearing before the Department.

Discussion

I. Introduction

Section 39-72-602, MCA, provides that the Department shall designate a medical panel to examine a claimant whose occupational disease claim is denied. The section provides in relevant part:

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 a member of the medical panel for an examination. The panel member shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. The panel member shall submit a report of the member's findings to the department.

(b) Either the claimant or the insurer may, within 20 days after the receipt of the report by the first panel member, request that the claimant be examined by a second panel member. If a second examination is requested, the department shall direct the claimant to a second panel member who shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. The panel member shall submit a report of the member's findings to the department. The medical panel member may, in order to reach a conclusion, consult with the claimant's attending physician. The reports from the two examining physicians must be sent by the department to the presiding officer of the panel. The presiding officer shall issue a report concerning the claimant's physical condition and whether the claimant is suffering from an occupational disease.

(c)(i) If a second examination is not requested, the department shall issue its order determining whether the claimant is entitled to occupational disease benefits based on the report of the first examining physician.

(ii) If a second examination is requested, the department shall issue its order based on the report of the presiding officer. If the panel presiding officer has examined the claimant, the department shall appoint another presiding officer.

On its face, the procedure is mandatory. It states that where a claim for occupational disease is made the panel procedure "must be followed."

2. Jurisdiction

Applications for writ of mandamus are governed by section 27-26-102, MCA, which provides:

27-26-102. When and by whom issued. (1) A writ of mandamus may be issued by the supreme court or the district court or any judge of the district court to any lower tribunal, corporation, board, or person to compel the performance of an act that the law specially enjoins as a duty resulting from an office, trust, or station or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by the lower tribunal, corporation, board, or person.

(2) The writ must be issued in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law.

The Workers' Compensation Court is not listed among the forums vested with jurisdiction to issue writs of mandamus.

On the other hand, the Court has broad jurisdiction to resolve disputes arising under the WCA and ODA where those disputes touch on benefits which may be due a claimant. *State ex rel. UEF v. Hunt*, 191 Mont. 514, 625 P.2d 539 (1981). In *Hunt*, the Supreme Court stated that:

the history of the court and the statute providing exclusive jurisdiction in the court indicate that the jurisdiction of the court goes beyond that minimum [a forum for adjudicating workers' claims only] whenever the dispute is related to benefits payable to a claimant. . . . Although the Workers' Compensation Court is not vested with the full powers of a District Court, it nevertheless has been given broad powers concerning benefits due and payable to claimants under the Act.

With respect to the subjects over which it has jurisdiction, the Workers' Compensation Court is empowered to "compel obedience to its judgments, orders, and process in the

same manner and by the same procedures as in civil actions in district court." § 39-71-2901(c), MCA.

District Court jurisdiction in workers' compensation matters is enumerated within the WCA and is limited to specific circumstances, §§ 39-71-304(2), -317, -506 and -516, MCA, none of which is implicated in the present case. The medical panel procedure is directly related to benefits since it is part of the process of determining whether a claimant suffers from a compensable occupational disease. It is not a matter over which the WCA posits jurisdiction in the district court. I therefore conclude that the Workers' Compensation Court has the jurisdiction to interpret and enforce the medical panel provision and, pursuant to section 39-71-2901(c), MCA, to issue such necessary orders and writs, including a writ of mandamus directed to the Department, to enforce its determination.

3. The Merits of the Application

Two arguments are advanced by respondents in support of their opposition to the application. First, the Department argues that it has no duty to designate a medical panel because Wylie's sole remedy for occupational deafness is under Part 8 of the WCA, hence his claim is not cognizable under the ODA. Second, both respondents argue that Wylie has a plain and speedy remedy at law via a contested case hearing before the Department.

If the Department is correct in its contention that claimant's exclusive remedy is under Part 8 of the WCA, then it is certainly correct that it has no duty to designate a medical panel, hence a writ of mandamus cannot issue. However, based on the brief argument advanced by the Department and a quick review of the statutes, it is not at all clear to the Court that the occupational deafness provisions found in Part 8 of the WCA set out Wylie's exclusive remedy. Nothing in Part 8 says that the part is the exclusive remedy. As evidenced by prior case law, e.g., *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 665 P.2d 783 (1983), the fact that a claim may be compensable under the ODA does not necessarily mean that it may not also be compensable under the WCA, or vice-versa. However, I express no opinion, nor do I have one at this point, on the matter since it should first be presented to the Department's hearing officer in a contested case proceeding.

Whether or not the Department has a duty to designate a medical panel, Wylie must still demonstrate that he has no "plain, speedy, and adequate remedy in the ordinary course of law." § 27-26-102(2), MCA. A writ of mandamus "is an extraordinary remedy, not to be had merely for the asking, but to be obtained only in those rare cases wherein there is not any plain, speedy and adequate remedy in the ordinary course of law" *State ex rel. Chisholm v. District Court*, 224 Mont. 441, 442, 731 P.2d 324, 324-25 (1986) (quoting *State ex rel. Duggan v. District Court*, 65 Mont. 197, 199, 210 P. 1062, 1063 (1922)). The availability of a plain, speedy and adequate legal remedy is dispositive because it "divests the court of authority to issue [a writ of mandate]." *Chisholm*, 224 Mont. at 443, 731 P.2d at

325 (quoting *State ex rel. County of Musselshell v. District Court*, 89 Mont. 531, 534, 300 P. 235, 236 (1931)).

Wylie has a plain, speedy, and adequate remedy available to him through a contested case hearing. The ODA provides that the "practice and procedure prescribed in the WCA applies to all proceedings under this chapter [the ODA]." Section 39-71-204, MCA, is a procedural section of the WCA which is thereby applicable to claims under the ODA. It provides:

39-71-204. Rescission, alteration, or amendment by department of its orders, decisions, or awards --effect -- appeal. (1) The department has continuing jurisdiction over all its orders, decisions, and awards and may, at any time, upon notice, and **after opportunity to be heard** is given to the parties in interest, rescind, alter, or amend any such order, decision, or award made by it upon good cause appearing therefor.

(2) Any order, decision, or award rescinding, altering, or amending a prior order, decision, or award has the same effect as original orders or awards.

(3) If a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge. [Emphasis added.]

Under this section, it is clear that the ERD Order is not a final Order and that Wylie has a right to a hearing. He has invoked that right by requesting a hearing before a Department hearing officer. The hearing officer can consider his arguments for a medical examination, and any adverse decision is appealable to this Court.

Nothing submitted to this Court indicates any emergency or other reason to circumvent the process provided by statute. Wylie's application is therefore **denied** and his application is **dismissed**.

SO ORDERED.

DATED in Helena, Montana, this 29th day of October, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Steve Fletcher

Ms. Susan C. Witte

Mr. Kevin Braun

Date Submitted: August 19, 1997