IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 67

WCC No. 2004-1044

WILLIAM H. FLYNN

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

DEAN CASTERLINE

Employer.

DECISION AND JUDGMENT DISMISSING PETITION

Summary: The claimant sought benefits from the Uninsured Employers' Fund (UEF) because his employer was uninsured at the time of his alleged injury. The UEF denied liability and notified him of its denial. The claimant then requested mediation but did so after more than ninety days following the UEF's determination. Thereafter, he petitioned this Court for benefits.

Held: A claim for benefits from the UEF is barred unless the claimant requests mediation within ninety days of the UEF's determination denying benefits. The ninety-day period begins running on the date of the denial, not on the date the claimant receives the denial. The ninety-day period is not extended by the fact that the denial was mailed.

Topics:

> **Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-520, MCA (1993-2003).** Under the express terms of section 39-71-520, MCA (1993-2003), a claim for benefits from the UEF is barred unless the claimant requests mediation within ninety days of the UEF's determination denying benefits. The ninety-day period begins running on the date of the denial, not on the date the claimant receives the denial. The ninety-day period is not extended by the fact that the denial was mailed.

¶1 Before the Court are two motions, one by the Uninsured Employers' Fund (UEF) and the other by the employer, Dean Casterline (Casterline). Both motions request dismissal of the present petition for lack of jurisdiction. The UEF and Casterline argue that the petitioner, William H. Flynn (claimant), failed to timely request mediation of the UEF's denial of his claim and that this Court lacks jurisdiction to consider his petition in light of that failure. The Court agrees.

FACTUAL BACKGROUND

¶2 The claimant alleges that he suffered an industrial injury on July 25, 2002, while working for Casterline. (Petition for Hearing, ¶ 1.) At the time of the claimant's alleged injury, Casterline was uninsured. The claimant therefore filed a claim with the UEF.

¶3 The UEF denied the claim on November 21, 2002. In a letter of the same date written by Bernadette Rice, its claims adjuster, the UEF notified the claimant of its denial and of his right to request mediation regarding the denial. It further notified him that any request for mediation had to be filed within ninety days of the denial. In relevant part the letter read:

> Dear Mr. Flynn:
>
> I have received your First Report of Injury (FROI) for problems you indicate you are having as a result of your employment with E. Dean Casterline. Based on the documentation I have received, I am denying liability for your claim because there is insufficient evidence to indicate you suffered a compensable work-related injury and/or Occupational Disease.
>
> Based on the documentation I have received, it does not appear you were working as an employee but were performing household/domestic services. Household/domestic services are statutorily exempted from the requirements of coverage under the Workers' Compensation Act.
>
> **If you do not agree with this decision, you may request mediation. Under section 39-71-520 of the Workers' Compensation Act if you do not appeal this decision within 90 days this determination is considered final.**

(Motion to Dismiss; Supporting Brief, Ex. A (emphasis added).) Subsequent correspondence between the UEF and the claimant shows that the claimant received the denial letter. (*See,* Ex. B, Motion to Dismiss; Supporting Brief.)

¶4 The claimant mailed a request for mediation on February 22, 2003, some ninety-three days after the UEF's determination. (*See*, Ex. C, Motion to Dismiss; Supporting Brief.)

DISCUSSION

¶5 The legislature has established strict time limits for contesting UEF determinations. The law in effect in 2002, when this dispute arose, provided:

> **39-71-520. Time limit to appeal.** A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination or the determination is considered final.

In 2003 the legislature amended the section to add specific time limits for post-mediation proceedings. As amended, section 39-71-520, MCA (2003), provides:

> **39-71-520. Time limit to appeal to mediation - petitioning workers' compensation court - failure to settle or petition.** (1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination or the date that the determination is considered final.
>
> (2) (a) If the parties fail to reach a settlement through the mediation process, any party may file a petition before the workers' compensation court.
>
> (b) A party's petition must be filed within 60 days of the mailing of the mediator's report provided for in 39-71-2411 unless the parties stipulate in writing to a longer time period for filing the petition.
>
> (c) If a settlement is not reached through mediation and a petition is not filed within 60 days of the mailing of the mediator's report, the determination by the department is final.

It makes no difference to the Court's resolution in this case whether the 2003 or pre-2003 version of the statute is applied. Under both versions, the claimant was required to seek mediation within ninety days of the UEF's denial of benefits, otherwise the determination became final.

¶6 This Court's jurisdiction over any UEF denial of benefits is in turn limited to cases in which mediation requirements have been satisfied. Section 39-71-2905, MCA (1997-2003), provides:

> **39-71-2905. Petition to workers' compensation judge - time limit on filing.** (1) A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute **after satisfying dispute resolution requirements otherwise provided in this chapter**. [Emphasis added.]

Read together with section 39-71-520, MCA (1993-2003), this Court's jurisdiction over disputes involving a denial of benefits by the UEF is limited to cases in which the claimants have sought mediation within the ninety days provided in section 39-71-520, MCA (1993-2003).

¶7 The ninety-day period prescribed in section 39-71-520, MCA (1993-2003), begins on the day of the UEF's determination, not on the date the claimant received the determination. As I held in *Hoff v. Uninsured Employers' Fund,* 2000 MTWCC 44, ¶ 4, the triggering event under section 39-71-520, MCA,

> is not receipt of the determination, nor is a mailing period tacked on to it. The statute is clear on its face that the determination itself is the triggering event, and the section must be applied as it is written.

¶8 The claimant in the present case has not filed any brief in opposition to the motion to dismiss. Under ARM 24.5.316(4) that failure is "deemed an admission that the motion is well taken." As applied in the present case, the claimant's failure to file a brief opposing the motion to dismiss amounts to an admission of the facts set forth in the documents attached to the UEF's brief even though those documents are not verified. Those documents establish the claimant's failure to timely request mediation. Since the claimant's request was untimely, the UEF's determination became final and the petition is untimely.

ORDER AND JUDGMENT

¶9 The claimant's petition is barred on account of his failure to timely request mediation within the time allowed by section 39-71-520, MCA (1993-2003). Therefore, the claimant's petition is **dismissed with prejudice**.

¶10 This JUDGMENT is certified as final for purposes of appeal.

¶11 Any party to this dispute may have twenty days in which to request reconsideration of this decision and judgment.

DATED in Helena, Montana, this 24th day of September, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Darrell S. Worm
Ms. Julia W. Swingley
Mr. Thomas E. Towe
Submitted: July 20, 2004