

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 41

WCC No. 9802-7918

DEBRA KASTENS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

RANDALL JOHNSON, D.D.S.

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Petitioner asks the WCC to find that the statute of limitations in effect at the time she was diagnosed with an occupational disease applies to her filing of a claim. She agrees that if a later-enacted statute applies, her claim was not timely. Respondent argues that the WCC does not have jurisdiction to resolve the issue because (1) the Department of Labor earlier refused to extend the deadline for claimant's claim and (2) the DOL in any event has original jurisdiction over the timeliness issue. Respondent also argues the later-enacted statute applies.

Held: The WCC has jurisdiction to resolve the issue. The DOL's earlier refusal to extend the deadline for filing a claim was not a ruling on the question of which statute applies. While the DOL has jurisdiction over disputes as to whether a claimant suffers from a compensable occupational disease, the WCC has original jurisdiction over other disputes arising in the occupational disease context such as this issue. As a general proposition, if the controversy is a legal one not involving any factual determination as to whether claimant has an OD, then the Court, not the DOL, has original jurisdiction. Finally, the earlier statute applies where the Supreme Court has previously held that any statute shortening the time for filing a civil action is not applicable to causes arising prior to the enactment unless expressly so indicated by the legislature. See, *Penrod v. Hoskinson*, 170 Mont. 277, 552 P.2d 325 (1976).

Topics:

Jurisdiction: Original Jurisdiction. While the DOL has jurisdiction under the 1991 or 1995 OD Act to determine whether a claimant suffers from a compensable occupational disease, the WCC has original jurisdiction over other disputes arising in the occupational disease context. As a general proposition, if the controversy is a legal one not involving any factual determination as to whether claimant has an OD, then the Court, not the DOL, has original jurisdiction. Issue of whether 1991 or 1995 statute of limitations for OD claim should apply is within original jurisdiction of WCC.

Limitations Periods: Claim Filing: Generally. 1991 statute applies to claim for occupational disease benefits where that was statute in effect when claimant was diagnosed with an occupational disease. The Supreme Court has previously held that any statute shortening the time for filing a civil action is not applicable to causes arising prior to the enactment unless expressly so indicated by the legislature. See, *Penrod v. Hoskinson*, 170 Mont. 277, 552 P.2d 325 (1976).

¶1 The petitioner (claimant) in this case seeks a determination that the statute of limitations in effect at the time she was diagnosed with an occupational disease applies to the filing of her claim. Her petition arises because, subsequent to the diagnosis of her occupational disease, the Montana legislature amended the statute of limitations. The amendment, if applicable, would cut off her claim.

Factual Background

¶2 This matter is submitted to the Court on cross-motions for summary judgment. The non-controverted material facts for purposes of the motions are either set forth in the admitted allegations of the petition or in the facts set forth by claimant in her initial brief and admitted by respondent in its answer brief. While the uncontested facts are not as neatly set out and supported as they should be under the rules governing summary judgment, the essential facts are as follows:

1. On July 16, 1992, the claimant was diagnosed as suffering from work-related carpal tunnel syndrome (CTS).
2. The respondent, State Compensation Insurance Fund (respondent), insured claimant's employer at the time of the diagnosis.
3. Based on her CTS, the claimant filed an occupational disease (OD) claim for compensation on August 18, 1997.
4. The respondent denied the OD claim on the ground that claimant failed to file her claim within one year as required by section 39-72-403(1), MCA, as amended in 1995.

5. Pursuant to section 39-72-403(2), MCA, claimant requested the Department of Labor and Industry (Department) to waive the one-year filing requirement. The Department denied the request and no appeal was taken from that decision.

Discussion

¶13 Despite the simplicity of the facts, the present petition presents complex questions of law.

I. Jurisdiction

¶14 Initially, respondent argues that the Court does not have jurisdiction since the Department denied claimant's application to extend the time for filing her claim and she did not timely appeal the decision. Claimant, however, is not seeking an extension of time, rather she urges that her claim is timely. The Department's decision under section 39-72-403(2), MCA, which provides that the Department may extend the time for filing an OD claim, did not address the timeliness of the claim. Its decision is therefore not conclusive of the present claim since it did not address the issue presented herein. *Hustad v. Reed*, 133 Mont. 211, 225, 321 P.2d 1083, 1091 (1958).

¶15 However, respondent further urges that since claimant had an "opportunity to litigate" the Department's determination . . . [but] chose not to do so," her present petition is nonetheless barred. (Brief in Opposition of Motion for Summary Judgment at 2.) It cites *Tisher v. Norwest and Capital Management and Trust Co., Inc.*, 260 Mont. 143, 149, 859 P.2d 984, (1993), as authority for its position.

¶16 *Tisher* is distinguishable. That case involved a complex set of facts arising out of a revocable trust, the amendment of the trust, then the revocation of the trust, the execution of wills, the execution of new wills, and the competency of the trustors/testators. An action was initially brought in 1978, then settled. A later action was brought by some of the heirs, who were also parties to the first action, to enforce the amendment to the trust, which the settlement had invalidated. The Supreme Court held that the action was barred by the doctrine of res judicata.

¶17 In disposing of the case, the Court applied the usual four factor test of *res judicata*.⁽¹⁾ The key issue was the application of the third criteria, which requires that the "issues must be the same and relate to the same subject matter." The Court found that the criteria was met and that the issues raised in the second action were in fact determined in the first action. 260 Mont. at 149, 859 P.2d at 988-89. The Court then addressed plaintiffs' contention that the issues they sought to try in the second action "have never been heard or tried before a court." 260 Mont. at 152, 859 P.2d at 989. The Court answered the contention by finding that even if that were true the third criteria was still satisfied because the parties had the "opportunity" to litigate the issues in the first action.

¶18 That holding cannot be stripped of its context and applied willy-nilly. The statement was made in the context of a civil action where various legal theories and defenses were or could have been raised in pursuit of a single resolution or result. In *Tisher*, the distribution and control of property and money of the trustees/testators was at issue. In workers' compensation cases, there often is not, and cannot be, a single resolution of all controversies that may arise out of an industrial accident.

¶19 Moreover, in *Tisher* the issues sought to be raised in the second action had in fact been raised in the first action. While they were not in fact adjudicated, that was only because the settlement alleviated any need for adjudication.

¶110 The holding is also inapplicable because of the limited jurisdiction of the Department. The Department's decision in this case was made pursuant to section 39-72-403(2), MCA. That section authorizes the Department to extend the time for filing an OD claim. It does not authorize the Department to adjudicate whether the claim was in fact timely. It also does not require that issues related to the timeliness of the claim be joined with a request for an extension.

¶111 Finally, the holding in *Tisher* is distinguishable because the extension sought by claimant was not inextricably related to other issues. In *Tisher* the issues raised in the second action were inextricably and necessarily related to the issues raised in the first one. In this case, that is not true. The issue raised in the present proceeding involves a significant issue of law, specifically which version of the statute of limitations -- the 1991 version or the 1995 version -- applies to the claim. Had the Department granted claimant an extension of time to file her claim, the claim filed by claimant would be timely under either version, and there would be no need to address the issue. In seeking an extension of time from the Department, the claimant attempted to avoid the difficult issue now presented to this Court. She cannot be penalized for doing so.

¶112 A significant jurisdictional issue still remains. Does the Workers' Compensation Court or the Department have original jurisdiction to decide whether the claim was timely?

¶113 The issue arises because the Occupational Disease Act (ODA) specifies that when an insurer denies liability for an OD claim the Department must appoint a medical panel to examine the claimant. § 39-72-602, MCA. The statutes governing the panel procedure go on to provide for a hearing before the Department in the event the parties disagree with the medical panel determination. §§ 39-72-611 and -612, MCA. This Court's jurisdiction is limited to judicial review following a hearing. § 39-72-612, MCA.

¶114 Where the claim is accepted and the controversy relates to other matters, such as the extent of a claimant's disability and entitlement to benefits, the Workers' Compensation Court has original, rather than appellate, jurisdiction to hear and determine the controversy. *Gomez v. Montana Municipal Ins. Authority*, WCC No. 9411-7177, Order

Granting in Part/denying in Part the Motion to Dismiss (January 27, 1995). In *Gomez* I held that where the insurer accepted liability but contested the percentage of liability attributable to occupational factors, the panel procedures and Department hearing requirements do not apply, rather the matter is one for the Court to hear de novo.

¶15 In *Theda Bea Bouldin, v. Liberty Northwest Ins. Corp.*, WCC No. 9604-7536, Partial Summary Judgment and Decision (October 8, 1996), I held that where an insurer accepted liability for an OD claim and later repudiated its acceptance, this Court has jurisdiction to determine whether the repudiation was valid. The medical panel provisions and Department hearing provisions do not apply because the issue is one of law, not whether, as a matter of fact, the claimant suffered from an OD. The medical panel procedures, and the hearing provided in connection with those procedures, are on their face solely tailored to resolve factual disputes concerning whether or not a claimant suffers from an OD.

¶16 The *Bouldin* decision provides guidance as to jurisdiction in the present case. It holds, as a general proposition, that where the controversy is a legal one not involving any factual determination as to whether the claimant has an OD, then the Court, not the Department, has original jurisdiction to resolve the controversy. Section 39-72-403(2), MCA, provides a specific exception to that general rule since it requires that the Department, not the Court, initially decide a request for an extension of time to file a claim. But, as already noted, the exception is limited. It does not extend to adjudication of controversies involving the timeliness of a claim. *Bouldin* is therefore the controlling precedent and I find that this Court has jurisdiction to determine whether the claim in this case was timely under section 39-72-403(1), MCA.⁽²⁾

II. Merits

¶17 At the time claimant was diagnosed as suffering from carpal tunnel syndrome, the statute of limitations for her filing an OD claim read as follows:

Time when claims must be presented. (1) When a claimant seeks benefits under this chapter, his claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 2 years from the date the claimant knew or should have known that his total disability condition resulted from an occupational disease. When a beneficiary seeks benefits under this chapter, his claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.

§ 39-72-403(1) (1991). The statute is plain on its face and requires no interpretation. *State v. Sol*, 936 P.2d 307, 312 (Mont. 1997.) It requires that any OD claim be filed "within 2 years from the date the claimant knew or should have known that his **total disability condition**

resulted from an occupational disease." (Emphasis added.) The two-year limitation is not triggered by claimant's awareness that he or she suffers from an OD: it is triggered only when the claimant is *totally disabled* **and** is aware that his or her *total disability* is caused by an OD.

¶18 Respondent argues that the 1991 version of the statute of limitations does not apply, rather the 1995 version applies. Under the 1995 amendments, the claimant is required to present a written claim "within 1 year from the date the claimant knew or should have known that *the claimant's* condition resulted from an occupational disease." 1995 Mont. Laws, ch. 243, § 25. The 1995 amendment eliminated any reference to total disability. Thus, under the 1995 version, the triggering event is no longer a two prong test involving both knowledge of the OD **and** total disability, rather it is knowledge alone.

¶19 Under the 1995 amendments, claimant's OD claim is clearly barred, and she does not argue otherwise. Rather, she urges that the 1995 amendments do not apply and that her claim is governed by the 1991 version. The Court agrees.

¶20 In *Penrod v. Hoskinson*, 170 Mont. 277, 552 P.2d. 325 (1976), the Supreme Court held that any statute shortening the limitations for filing a civil action is inapplicable to causes arising prior to the enactment of the statute **unless** the new statute is expressly made retroactive by the legislature.

¶21 The facts of *Penrod* are instructive. The plaintiff underwent abdominal surgery in 1969. Plaintiff alleged that the surgeon negligently left a surgical drain in her abdomen. She did not discover the existence of the drain until September 1973. On August 15, 1974, she underwent further surgery to remove the drain.

¶22 At the time of the 1969 surgery, the statute of limitations applicable to plaintiff's cause of action was three years after discovery of the negligence. In 1971 -- after the surgery and prior to plaintiff's discovery of the mistake -- the legislature enacted a statute requiring that any medical malpractice action be brought within "five (5) years from the date of injury." 170 Mont at 280, 552 P.2d at 326 (1976). The district court held that the 1971 statute barred the action and dismissed. The Supreme Court reversed, holding that the 1971 statute was inapplicable since the legislature had not expressly made the 1971 statute retroactive.

¶23 The 1995 statute at issue in this case was not expressly made retroactive. 1995 Montana Laws, ch. 243, §§ 25 and 29. Therefore, *Penrod* precludes the application of the 1995 statute to the present claim.

¶24 *Martin v. State Fund*, 275 Mont. 190, 911 P.2d 848 (1996), cited by respondent, did not overrule *Penrod* and is distinguishable. The Supreme Court characterized the statute at issue in *Martin* as a purely procedural one concerning this Court's authority. It rejected this Court's analysis of the statute as a statute of limitations.

¶25 Other cases cited by respondent similarly do not overrule *Penrod* and are all distinguishable.

¶26 I therefore conclude that the statute in effect in 1992,⁽³⁾ when the claimant learned she was suffering from an OD, governs her claim for compensation. At that time, the statute did not commence running until claimant suffered some period of total disability on account of her disease.

III. Entitlement to Summary Judgment

¶27 While the Court is sufficiently informed to determine which version of the statute of limitations applies, it does not have sufficient information to determine whether the OD claim submitted by claimant was in fact timely. That is because the claimant has failed to establish that she has not suffered total disability or that she filed her claim within two years of suffering total disability. In her motion, she sets out as a statement of fact that she has suffered no period of total disability as a result of her OD. (Motion for Summary Judgement, Fact. 6.) However, the statement of fact is wholly unsupported by any admissible evidence, or for that matter any evidence whatsoever, as required by Rule 24.5.329(2) and (3). Respondent declined to admit the matter in its responsive brief and it must therefore be deemed controverted.

ORDER AND PARTIAL SUMMARY JUDGMENT

¶28 1. The 1991 version of section 39-72-403, MCA, is the applicable statute of limitations with regard to the claimant's OD claim.

¶29 2. This matter shall be set for trial to determine if her claim was in fact timely under section 39-72-403, MCA (1991).

DATED in Helena, Montana, this 13th day of May, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Andrew F. Scott

Mr. Charles G. Adams

Submitted: March 6, 1998

1. The four factors, as set out in *Tisher*, are:

- 1) the parties or their privies must be the same;
- 2) the subject matter of the action must be the same;
- 3) the issues must be the same and relate to the same subject matter; and

4) the capacities of the persons must be the same in reference to the subject matter and to the issues.

Tisher, 260 Mont. at 149, 859 P.2d at 988.

2. This conclusion may seem inconsistent with this Court's decision in *Grenz v. Fire and Casualty of Connecticut*, WCC N. 9310-6922, Decision on Appeal; order reversing and remanding (April 21, 1994). In that case, the Department found that Grenz' OD claim was time-barred and dismissed it. The Court reversed and remanded to the Department for reconsideration. However, the Court did not consider the jurisdictional issue raised in this case.

3. The 1991 version of the ODA was the statute in effect in 1992.