

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 2

WCC No. 2019-4864

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CHANCEY ANDREWS

Petitioner

vs.

MONTANA STATE FUND

Respondent.

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ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

**Summary:** Respondent asserts that Petitioner did not timely file this case under the two-year statute of limitations in § 39-71-2905(2), MCA.

**Held:** Respondent is not entitled to summary judgment. The evidence Respondent submitted shows that there is a material issue of fact as to whether the parties mediated the dispute over Respondent's denial of liability for his SI joint condition at the first mediation conference. If the parties mediated that dispute, then the statute of limitations was tolled during the first mediation proceeding, and Petitioner filed his Petition for Hearing approximately one month before the statute of limitations ran.

¶ 1 Respondent Montana State Fund (State Fund) moves for summary judgment, asserting that Petitioner Chancey Andrews did not timely file his Petition for Hearing under the statute of limitations in § 39-71-2905(2), MCA. However, based on the evidence State Fund submitted, it did not meet its initial summary judgment burden of establishing that there are no issues of material fact. Thus, this Court denies State Fund's Motion for Summary Judgment.

FACTS

¶ 2 On August 10, 2016, Andrews suffered an industrial injury.

¶ 3 On February 22, 2017, State Fund accepted liability for Andrews' injury at L3-L5. However, State Fund expressly denied liability for Andrews' preexisting SI joint condition.

¶ 4 On May 14, 2018, Andrews petitioned the Department of Labor & Industry (DLI) for mediation under §§ 39-71-2401, et seq., MCA. He asserted that his dispute with State Fund was, "claim is denied."

¶ 5 The parties participated in a mediation conference but agreed to have the mediator place the case in "pending" status, meaning that the mediator kept her file open but did not issue a report with her recommendation under § 39-71-2411(6), MCA, and ARM 24.28.108.

¶ 6 On January 25, 2019, State Fund notified Andrews that Allen M. Weinert, Jr., MD, had determined that he was at maximum healing for his injury. State Fund began paying him permanent partial disability benefits under § 39-71-703, MCA.

¶ 7 On March 12, 2019, the mediator issued her Mediation Report and Recommendation. It states, in relevant part:

The issue mediated was Mr. Andrews' entitlement to acceptance of liability for his claim. [Andrews' attorney] amended the petition to correct the issue to whether MSF should authorize the trial spinal cord stimulator requested by the consulting neurosurgeon, Dr. VanGilder and requested by treating physician Dr. Weinert.

¶ 8 On June 4, 2019, State Fund denied a request for authorization for a left SI joint injection on the grounds that it had denied liability for Andrews' SI joint condition.

¶ 9 On October 15, 2019, Andrews again petitioned the DLI for mediation. He asserted that his dispute with State Fund was, "Payment of all medical bills/expenses related to his back injuries and to reinstate TTD benefits retroactively."

¶ 10 On December 9, 2019, Andrews filed his Petition for Hearing. Andrews alleges that State Fund is liable for retroactive temporary total disability (TTD) benefits, ongoing TTD benefits or permanent total disability (PTD) benefits, and medical benefits.

## LAW AND ANALYSIS

¶ 11 This case is governed by the 2015 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Andrews' injury.<sup>1</sup>

¶ 12 Summary judgment is only appropriate when the moving party establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.<sup>2</sup>

¶ 13 State Fund asserts that it is entitled to summary judgment because Andrews can no longer challenge its denial of liability for his SI joint condition under § 39-71-2905(2), MCA, which states: "A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied."

¶ 14 Before a dispute over benefits can be brought to this Court, the parties must mediate their dispute before a DLI mediator.<sup>3</sup>

¶ 15 In *Preston v. Transportation Ins. Co.*, the Montana Supreme Court held that this statute of limitations is tolled during the pendency of the mandatory mediation proceeding.<sup>4</sup> In *Hardie v. Montana State Fund*, this Court ruled that this tolling period is calculated from the date the mediation petition is filed through the deadline for both parties to respond to the mediator's recommendation which, under § 39-71-2411(7), MCA, is within 25 days following the mailing of the mediator's report and recommendation.<sup>5</sup>

¶ 16 Here, State Fund is not entitled to summary judgment because, when this Court views the evidence in the light most favorable to Andrews and draws all inferences in his favor, as this Court is required to do at this time,<sup>6</sup> he timely filed his Petition for Hearing. There were 445 days between February 22, 2017, the day State Fund denied liability for Andrews' SI joint condition, and May 13, 2018, the day before Andrews petitioned for mediation on the issue that his "claim is denied." Because State Fund expressly denied liability for Andrews' SI joint condition, a reasonable inference is that Andrews disputed that denial and petitioned to mediate that dispute. If that is the case, the two-year statute of limitations for that dispute was tolled during the first mediation proceeding, which lasted

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<sup>1</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

<sup>2</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

<sup>3</sup> § 39-71-2401(1), MCA.

<sup>4</sup> 2004 MT 339, ¶ 37, 324 Mont. 225, 102 P.3d 527.

<sup>5</sup> 2012 MTWCC 2, ¶ 21 (citing *Preston*, 2004 MT 339; *Fleming v. Int'l Paper Co.*, 2005 MTWCC 34).

<sup>6</sup> See *Victory Ins. Co. v. Mont. State Fund*, 2015 MT 82, ¶ 27, 378 Mont. 388, 344 P.3d 977 (explaining, "[A] court considering summary judgment must view the evidence in a light most favorable to the non-moving party and all reasonable inferences are to be drawn in favor of the party opposing summary judgment . . .").

from May 14, 2018, to April 8, 2019,<sup>7</sup> a period of 330 days. Thus, Andrews had 285 days starting on April 9, 2019, to timely file his Petition for Hearing, which extended the statute of limitations to Monday, January 20, 2020.<sup>8</sup> Andrews filed his Petition for Hearing on December 9, 2019, more than a month before the statute of limitations ran.

¶ 17 State Fund asserts that the statute of limitations for its denial of liability for Andrews' SI joint condition was not tolled during the first mediation proceeding because the parties did not actually mediate their dispute over that denial during that mediation conference. According to State Fund, Andrews amended his first Petition for Mediation Conference and the only issue the parties mediated was State Fund's denial of a spinal cord stimulator trial. State Fund asserts that the mediator's Report and Recommendation from the first mediation confirms this fact. Without pointing to any evidence, State Fund asserts that they did not mediate the dispute over its denial of liability for his SI joint condition until the second mediation conference.

¶ 18 However, there is an issue of material fact as to what dispute or disputes the parties mediated during the first mediation proceeding. In the mediator's Report and Recommendation from the first mediation proceeding, she specifically stated, "The issue mediated was Mr. Andrews' entitlement to acceptance of liability for his claim." Because State Fund had denied liability for Andrews' SI joint condition, and because Andrews petitioned for mediation of the dispute that "claim is denied," a reasonable inference can be drawn that the parties mediated their dispute over State Fund's denial of liability for his SI joint condition during the first mediation proceeding. While the mediator's next sentence calls into question whether the parties actually mediated that dispute, or whether they only mediated the issue of State Fund's denial of a spinal cord stimulator trial, this Court cannot resolve this ambiguity at this time because, "at the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses."<sup>9</sup>

¶ 19 Because State Fund did not meet its initial burden of establishing that there are no issues of material fact, it is not entitled to summary judgment. Accordingly, this Court now enters the following:

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<sup>7</sup> The 25<sup>th</sup> day after March 12, 2019, was Saturday, April 6, 2019. Under § 1-1-307, MCA, the parties could notify the mediator as to whether they accepted her recommendation on Monday, April 8, 2019.

<sup>8</sup> Under 39-71-2905(2), MCA, Andrews had two years, or 730 days, to file his Petition for Hearing. Thus, this Court subtracted 445 days from 730 days to determine that Andrews had 285 days after April 8, 2019, to petition this Court. Because the 285<sup>th</sup> day after April 8, 2019, was Sunday, January 19, 2020, Andrews had until Monday, January 20, 2020, to file his claim under §§ 1-1-216(1)(a) and 1-1-306, MCA.

<sup>9</sup> See, e.g., *TG v. Mont. Sch. Grp. Ins. Auth.*, 2018 MTWCC 1, ¶ 24 (citation omitted). See also *Newman v. Mont. State Fund*, 2011 MTWCC 12, ¶ 23 (ruling that WCC cannot resolve an ambiguity in a physician's opinion letter on summary judgment).

ORDER

¶ 20 Respondent's Motion for Summary Judgment is **denied**.

DATED this 21<sup>st</sup> day of February, 2020.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Melissa Quale  
John Doubek