IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 13

WCC No. 2005-1286

LORI AUCHENBACH

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

UPPER DECK BAR & GRILL

Respondent/Employer.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Summary: Respondent Uninsured Employers' Fund filed a motion to dismiss based on lack of jurisdiction due to Petitioner's failure to file her Petition for Hearing with the Workers' Compensation Court within sixty days after the mailing of the Mediator's Report and Recommendation, as required under § 39-71-520(2), MCA (2003). The UEF, however, had failed to respond to the Mediator's Report and Recommendation within twenty-five days, as required under § 39-71-2411(6), MCA (2003). Moreover, Respondent failed to respond to the Recommendation within sixty days, leaving Petitioner in the dark regarding Respondent's position on the Recommendation and whether settlement had been achieved. Pursuant to § 39-71-520(2)(c), MCA (2003), Petitioner could not file a petition before this Court until there had been a failure to reach settlement through mediation. Until Respondent fulfilled its statutory obligation to either accept or reject the Mediator's Report and Recommendation, there was no failure to reach settlement.

Held: Respondent's motion to dismiss is denied. As a fundamental matter of equity, this Court cannot allow a party to sit on its hands while a time limitation runs on a *pro sé* petitioner while, at the same time, ignoring its own affirmative statutory duty to act. Respondent is equitably estopped from relying on § 39-71-520(2)(c), MCA (2003), because it failed to comply with § 39-71-2411(6), MCA (2003), by failing to respond to the Recommendation within twenty-five days. The elements of both equitable estoppel and

estoppel by silence or acquiescence are satisfied in this case. Respondent cannot stay silent in the face of a statute requiring it to respond, continue its silence after receiving a letter from the Mediation Unit requesting Respondent's response, and then rely on a time limitation set forth in a statute which precludes Petitioner from filing a petition with this Court prior to Respondent's response to the Recommendation.

¶1 Petitioner Lori Auchenbach and Respondent Uninsured Employers' Fund (Respondent or UEF) agree to the relevant facts leading up to the mediation conference in this case. Petitioner alleges that she was injured in the course and scope of her employment on July 10, 2004. On July 20, 2004, Petitioner submitted a First Report of Injury and Occupational Disease to the UEF, documenting the alleged injury. Petitioner's employer, Upper Deck Bar & Grill, submitted a First Report of Injury and Occupational Disease contesting liability. The UEF then denied Petitioner's workers' compensation claim.

¶2 On October 12, 2004, a mediation conference was held. Petitioner acted *pro sé* throughout the entire mediation process. The mediator mailed the Mediation Report and Recommendation (Recommendation) on October 25, 2004.[1] Pursuant to § 39-71-2411(6), MCA (2003),[2] the parties were required to respond to the Recommendation within twenty-five days. Petitioner timely responded to the Recommendation.[3] Having received no response from the UEF after fifty-one days, the Workers' Compensation Mediation Unit (Mediation Unit) sent a notice to Respondent on December 16, 2004, requesting its acceptance or rejection of the Recommendation.[4] Despite this prompting from the Mediation Unit, the UEF still did not respond to the Recommendation for another twenty-seven days. Finally, on January 12, 2005, seventy-nine days after the Recommendation was issued, the UEF responded, rejecting the Recommendation.[5] Petitioner then filed her Petition for Hearing with the Workers' Compensation Court on April 4, 2005.[6]

¶3 Respondent argues that Petitioner's case should be dismissed because Petitioner failed to comply with the time limitation set forth in § 39-71-520(2)(b), MCA. Respondent

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[1] Ex. 33 to Petitioner's Brief in Support of Amended Petition for Hearing and in Opposition to Respondents' Motion to Dismiss (hereinafter Petitioner's Exhibits).

[2] This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Any reference to statutes cited from the Montana Code will employ the language from the 2003 version.

[3] Petitioner's Reply Brief at 5.

[4] Ex. 11 to Petitioner's Exhibits.

[5] Ex. 12 to Petitioner's Exhibits.

[6] Respondent's Motion to Dismiss at ¶ 5; Petition for Hearing.

contends that because Petitioner failed to file within this statutory period, this Court does not have jurisdiction to hear this matter. Section 39-71-520(2), MCA, reads as follows:

> (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.[7]

¶4 In construing a statute, this Court must "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."[8] Moreover, "[a] cardinal principle of statutory construction is that the intent of the legislature must first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further and apply any other means of interpretation."[9]

¶5 In the present case, the Court must endeavor to give effect to all of § 39-71-520, MCA. However, this statute does not contemplate a situation such as the one at hand. Specifically, the terms of § 39-71-520(2)(a), MCA, mandate that there must be a failure to reach a settlement through the mediation process before a party may file a petition with the Workers' Compensation Court. Section 39-71-520 (2)(b), MCA, requires a party to file the petition within sixty days of the mailing of the mediator's report. To further complicate matters, § 39-71-2411(6), MCA, mandates:

> A party ***shall*** notify the mediator within 25 days of the mailing of the mediator's report whether the party accepts the mediator's recommendation. ***If either party does not accept the mediator's recommendation, the party may petition the workers' compensation court for resolution of the dispute.***[10]

¶6 Applying the plain language of both §§ 39-71-520 and 39-71-2411, MCA, evinces a concurrent running of two statutory time limitations beginning with the mailing of the

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[7] § 39-71-520(2), MCA (emphasis added).

[8] § 1-2-101, MCA.

[9] *Montana Ass'n of Underwriters v. State,* 172 Mont. 211, 215, 563 P.2d 577, 579-80 (1977).

[10] § 39-71-2411(6), MCA (emphasis added).

mediator's report and recommendation. Moreover, both statutes require that at least one of the parties to the dispute must reject the mediator's recommendation before a petition may be filed with this Court. Therefore, if all parties to the dispute comply with the twenty-five-day response requirement, then the parties will have a minimum of thirty-five days to file a petition with the Court after determining that the mediator's recommendation has been rejected and, therefore, there has been a failure to reach settlement through the mediation process.

¶7 However, § 39-71-2411, MCA, does not provide a penalty for a party's failure to comply with the twenty-five-day statutory requirement. If, as in the case at bar, a party disregards its statutory obligation to respond to the mediator's recommendation for more than sixty days then, under the plain meaning of the words used in § 39-71-520(2)(b), MCA, the sixty-day time limit to file a petition would run without affording the opposing party the opportunity to file a petition. This is obviously not the result the legislature intended in enacting §§ 39-71-520(2)(b) and 39-71-2411, MCA.

¶8 As a fundamental matter of equity, this Court cannot prevent a party from filing a petition with the Court in circumstances such as those in the case at bar. Petitioner, acting *pro sé*, complied with the statutory mandate of § 39-71-2411(6), MCA. Petitioner reasonably expected Respondent to do the same. As set forth above, the statutory construction of §§ 39-71-520(2)(b) and 39-71-2411(6), MCA, precluded Petitioner from petitioning this Court until Respondent rejected the Recommendation. Yet, for whatever reason, Respondent ignored its obligation for seventy-nine days, even after being prompted for a response by the Mediation Unit.[11]

¶9 The Court also finds Petitioner's equitable estoppel argument to be well taken. The elements of equitable estoppel are:

> 1. There must be conduct – acts, language, or silence – amounting to a representation or a concealment of material fact. 2. These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. * * * 5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. 6. [The party claiming equitable estoppel] must in fact act upon it in such a manner as to change [its] position for the worse; in other words, [the party] must so act that [it] would suffer

[11] Exs. 11, 12.

> what [it] has done by reason of the first party being permitted to repudiate [its] conduct and to assert rights inconsistent with it.[12]

¶10 Petitioner argues that the first element of equitable estoppel is satisfied because Respondent failed to respond to the Recommendation within twenty-five days as required under § 39-71-2411(6), MCA. Petitioner further contends that Respondent's failure to respond to the Mediation Unit's request within sixty days after the Recommendation was sent to the parties also satisfies the first element.

¶11 Respondent argues that the conduct required to satisfy the first element must be a positive action. In support of its argument, Respondent cites *Lako v. Uninsured Employers' Fund.*[13] In *Lako*, the Montana Supreme Court stated:

> We have held that ***the doctrine of equitable estoppel applies where an employer or insurer has taken some positive action which either prevents a claimant from filing a timely claim*** or leads him reasonably to believe he need not file such a claim. *Davis v. Jones* (1983), 203 Mont. 464, 466, 661 P.2d 859, 860 (affirmed on appeal after remand at (1985), 216 Mont. 300, 701 P.2d 351) (citation omitted). Equitable estoppel is a flexible principle which should be applied when an employer or insurer misleads a claimant by foisting onto the claimant a misinterpretation of the Workers' Compensation Act. *Davis,* 203 Mont. at 466-67, 661 P.2d at 860.[14]

Respondent's reliance upon *Lako* is misplaced.

¶12 As set forth above, the first element of equitable estoppel is conduct – acts, language, or silence – amounting to a representation or a concealment of a material fact. As it pertains to this element, therefore, a party's silence can be action. This is precisely the situation in the present case. Respondent had an affirmative duty to respond to the Recommendation within twenty-five days pursuant to § 39-71-2411(6), MCA. Furthermore, when Respondent failed to meet its affirmative duty to respond, the Mediation Unit sent Respondent a letter on December 16, 2004, requesting Respondent's response. Yet, Respondent still failed to respond for *another* twenty-seven days, during which time the sixty-day time limit set forth in § 39-71-520(2)(b), MCA, had run. The first element is met.

¶13 The second element of estoppel is the facts must be known to the party estopped at the time of her said conduct or at least the circumstances must be such that knowledge of them is necessarily imputed to her. Respondent obviously was aware of its statutory

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[12] *Wassberg v. Anaconda Copper Co.*, 215 Mont. 309, 316, 697 P.2d 909, 914 (1985) (*citing Lindblom v. Employers Liability Assurance Corp*., 88 Mont. 488, 494, 295 P. 1007, 1009 (1930)).

[13] 2004 MT 290, 323 Mont. 334, 100 P.3d 142.

[14] *Id.* at ¶ 19 (emphasis added).

obligation to notify the Mediation Unit of whether it accepted the Recommendation within twenty-five days. It is also fair to impute to Respondent the knowledge that it intended to reject the Recommendation. Moreover, Respondent had to be aware that both §§ 39-71-520(2)(a) and 39-71-2411(6), MCA, required that at least one of the parties to the dispute must reject the Recommendation before a petition could be filed with this Court. Yet, despite this knowledge, Respondent took no action, one way or the other, until the sixty-day limitation of § 39-71-520(2)(b), MCA, had run. The second element is met.

¶14 The third element of equitable estoppel is the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when it was acted upon by her. Petitioner was acting *pro sé* until January 2005. Her knowledge of Respondent's rejection of the Recommendation was obviously unknown to her since it was unknown even to the Mediation Unit by virtue of Respondent's failure to meet its statutory obligation. Despite this statutory obligation, Respondent chose to withhold its rejection until all time limitations had run. Petitioner, meanwhile, was left with no choice but to wait for Respondent to fulfill its obligation before she could petition this Court. The third element is met.

¶15 The fourth element of equitable estoppel requires that the conduct be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. In the present case, it was not only natural and probable that Petitioner would not file her petition until Respondent rejected the Recommendation, it was a given in light of the terms of §§ 39-71-520(2)(a) and 39-71-2411(6), MCA, which require a rejection of the mediator's recommendation and a failure to reach settlement through the mediation process before a petition can be filed. The fourth element is met.

¶16 The fifth element of equitable estoppel is the conduct must be relied upon by the other party, and, thus relying, she must be led to act upon it. In the present case, Petitioner had no choice but to rely upon Respondent's response to the Recommendation since, until Respondent finally rejected the Recommendation, Petitioner could not file her petition with the Workers' Compensation Court. The fifth element is met.

¶17 The sixth element of equitable estoppel requires the party claiming the benefit of estoppel to have acted upon the other party's conduct in such a manner as to change her position for the worse. Petitioner's action was failing to file her petition within the sixty-day time limitation imposed by § 39-71-520(2)(b), MCA. Petitioner was constrained from filing her petition within sixty days because Respondent's rejection of the Recommendation was a necessary condition precedent to filing a petition and Respondent did not reject the Recommendation until nearly eighty days had passed. The sixth element is met.

¶18 In *Lako, supra*, the Montana Supreme Court summed up the doctrine of equitable estoppel as follows: "[T]he doctrine of equitable estoppel applies where an employer or insurer has taken some positive action which . . . prevents a claimant from filing a timely

claim . . . ."[15] This is precisely the situation at bar. Respondent's failure to meet its statutory obligation until the sixty-day time limit had run effectively tied Petitioner's hands and prevented her from filing a timely claim. If this Court were to grant Respondent's motion to dismiss, it would be sanctioning the Catch-22 Respondent created for Petitioner by ignoring its statutory obligations. Moreover, the Court would be achieving the perverse result in which Respondent's failure to adhere to a statutory time limit not only would be done without consequence, but Respondent would be allowed to benefit from it as well. The Court declines to reach such a result.

¶19 The Montana Supreme Court has also previously recognized the doctrine of estoppel by silence or acquiescence which this Court previously applied in a case in which a party failed to fulfill its statutory obligations. In *MP Livestock Trust/Perry Polzin Trucking v. Dept. of Labor and Industry, Uninsured Employers' Fund*,[16] the Department of Labor and Industry (DLI) attempted to assess a penalty against an employer who had been using employees furnished by a professional employee association (PEO) that had allowed its workers' compensation coverage to lapse.[17] This Court held that the DLI was estopped from assessing the penalty because it had failed to comply with its statutory obligation to order the PEO to cease and desist from doing business and to suspend its PEO license, or at least to notify the employer of the lapse of the PEO's insurance so it could secure insurance or stop doing business.[18] This Court held that the DLI was estopped from assessing the penalty based on the doctrines of both equitable estoppel and estoppel by silence.

¶20 With respect to the doctrine of estoppel by silence or acquiescence, this Court noted that the Montana Supreme Court had previously set forth the essential elements in the case of *Northwest Potato Sales, Inc. v. Beck*.[19] In this case, the Court held:

> "To constitute an estoppel by silence or acquiescence, it must appear that the party to be estopped was bound in equity and good conscience to speak, and that the party claiming estoppel relied upon the acquiescence and was misled thereby to change his position to his prejudice. [citing authority] Mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had an intent to mislead or a willingness

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[15] *Id.*

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[17] *Id.* at ¶¶ 7, 22.

[18] *Id.* at ¶ 52.

[19] 208 Mont. 310, 678 P.2d 1138 (1984).

that another would be deceived; and the other must have been misled by the silence."[20]

¶21 As discussed at length above, Respondent in the present case maintained its silence regarding its rejection of the Recommendation despite both its mandatory statutory obligation to respond within twenty-five days *and* prompting from the Mediation Unit. Petitioner was bound to rely upon Respondent's silence because, by statute, Petitioner could not petition this Court until Respondent rejected the Recommendation and there had been a failure to reach settlement through the mediation process. Petitioner was obviously prejudiced by Respondent's silence because, during the pendency of Respondent's silence, the sixty-day time limit to file a petition with this Court expired. Finally, this Court does not find it difficult to find that Respondent had a willingness that Petitioner would be deceived by Respondent's silence. This is so particularly in light of the fact that the Mediation Unit's notice to Respondent requesting its acceptance or rejection of the Recommendation was sent to Respondent within the sixty-day time limit to petition this Court, yet Respondent withheld its response to the Recommendation for another twenty-seven days and replied only after the sixty days had expired. Having satisfied all of these elements, therefore, Respondent is estopped from availing itself of the sixty-day time limit set forth in § 39-71-520(2)(b), MCA.

¶22 Petitioner has also raised a constitutional challenge to the statute at issue in response to Respondent's motion. Because the Court has denied Respondent's motion on the grounds set forth above, it need not address the merits of Petitioner's constitutional argument.

ORDER

¶23 For the foregoing reasons, Respondent's motion to dismiss is **DENIED**.

¶24 A new scheduling order resetting the trial to the next Missoula trial docket in June 2006 shall issue simultaneously with this Order.

DATED in Helena, Montana, this 29th day of March, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Mr. Steven S. Carey
Mr. Arthur M. Gorov
Upper Deck Bar & Grill c/o Jim and Karen Laconte
Submitted: August 9, 2005

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[20] *Id.*, 208 Mont. at 317, 678 P.2d at 1141 (quoting from *Sherlock v. Greaves*, 106 Mont. 206, 217, 76 P.2d 87, 91 (1938)).