

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 34

WCC No. 2010-2582

KENNETH BAILEY

Petitioner

vs.

UNINSURED EMPLOYERS' FUND and LONGHORN APARTMENT COMPLEX

Respondents

AND

UNINSURED EMPLOYERS' FUND

Third-Party Petitioner

vs.

LONGHORN APARTMENT COMPLEX LLC

Third-Party Respondent.

ORDER GRANTING THIRD-PARTY RESPONDENT'S MOTION TO DISMISS

APPEALED TO MONTANA SUPREME COURT 01/31/2011
CROSS APPEALED TO MONTANA SUPREME COURT 02/15/2011
APPEAL AND CROSS APPEAL DISMISSED WITH PREJUDICE 04/11/2011

Summary: Third-Party Respondent moves to dismiss Petitioner's Petition for Hearing because it was filed more than 60 days after the mediator's report was mailed to the parties and was therefore untimely pursuant to § 39-71-520(2), MCA. Petitioner filed his petition 62 days after the mediator's report was mailed. Petitioner responds that Rule 6(e), M.R.Civ.P., applies to the 60-day deadline set forth in § 39-71-520(2), MCA, and extends the time Petitioner had to file his petition by 3 days. Petitioner argues that his petition was therefore filed timely.

Held: Third-Party Respondent's motion is granted. Rule 6(e), M.R.Civ.P., does not apply to the time limit prescribed by § 39-71-520(2), MCA. Petitioner's petition was therefore untimely.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. Section 39-71-520(2), MCA, requires that a petition to this Court must be filed within 60 days of the mailing of the mediator's report. Rule 6(e), M.R.Civ.P., does not apply to this time limit because the statute does not rely on "service" as the basis for commencing the 60-day time period. Therefore, delivering the report by mail does not add three additional days to the time limit,

Constitutions, Statutes, Regulations, and Rules: Montana Rules of Civil Procedure – by section: Rule 6(e). Section 39-71-520(2), MCA, requires that a petition to this Court must be filed within 60 days of the mailing of the mediator's report. Rule 6(e), M.R.Civ.P., does not apply to this time limit because the statute does not rely on "service" as the basis for commencing the 60-day time period. Therefore, delivering the report by mail does not add three additional days to the time limit.

Limitation Periods: Petition Filing. Section 39-71-520(2), MCA, requires that a petition to this Court must be filed within 60 days of the mailing of the mediator's report. Rule 6(e), M.R.Civ.P., does not apply to this time limit because the statute does not rely on "service" as the basis for commencing the 60-day time period. Therefore, delivering the report by mail does not add three additional days to the time limit.

¶ 1 Third-Party Respondent Longhorn Apartment Complex LLC (Longhorn) moves to dismiss Petitioner Kenneth Bailey's Petition for Hearing as untimely pursuant to § 39-71-520(2), MCA. Respondent and Third-Party Petitioner Uninsured Employers' Fund (UEF) has filed a brief in support of Longhorn's motion. Bailey opposes Longhorn's motion, contending that his petition was timely filed after adding 3 additional days for mailing pursuant to M.R.Civ.P. 6(e).

¶ 2 The facts in this case are not in dispute. Bailey suffered a work-related injury on January 2, 2010. The parties attempted mediation on June 14, 2010. The mediator mailed her report and recommendation to the parties on July 16, 2010. On July 19, 2010, Bailey wrote a letter to the mediator, stating that he disagreed with the mediator's

findings and that he intended to bring the matter before the Workers' Compensation Court. Bailey filed a Petition for Hearing with this Court on September 16, 2010, 62 days after the mediator's report was mailed to the parties.

¶ 3 Section 39-71-520(2), MCA, provides:

(a) If the parties fail to reach a settlement through the mediation process, any party who disagrees with the department's determination 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.

(d) A mediator's report is not a determination by the department for the purposes of this section. A determination by the department is final if an appeal to mediation described in subsection (1) or a petition described in subsection (2)(a) is not filed within the required time period.

¶ 4 Bailey acknowledges that he did not file his petition within 60 days of the mailing of the mediator's report. As framed by Bailey, "the issue before this Court is whether Rule 6(e) of the Montana Rules of Civil Procedure is applicable to Section 39-71-520(2) MCA."¹ Bailey argues that because the mediator's report was mailed to him, he should be afforded 3 extra days to the 60-day time limit prescribed by § 39-71-520(2), MCA.

¶ 5 Rule 6(e), M.R.Civ.P., provides:

Additional time after service by mail

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Bailey's reliance on Rule 6(e), M.R.Civ.P., to extend the 60-day limitations period of § 39-71-520(2), MCA, is misplaced.

¹ Brief Opposing Respondents' Motion to Dismiss at 1.

¶ 6 In *Flynn v. Uninsured Employers' Fund*,² the Montana Supreme Court rejected the same argument Bailey makes in this case, as applied to the 90-day limitations period set forth at § 39-71-520(1), MCA. In *Flynn*, the Uninsured Employers' Fund (UEF) denied Flynn's claim. Flynn requested mediation of the UEF's denial 93 days after the UEF's determination -- 3 days beyond the 90-day time limit prescribed by § 39-71-520(1), MCA. This Court dismissed Flynn's petition because of his untimely request for mediation. Flynn appealed this Court's dismissal, arguing to the Montana Supreme Court that his mediation request was timely because "the three extra days provided by Rule 6(e), M.R.Civ.P., when service is by mail, is applicable to the time period under § 39-71-520, MCA"³ The Supreme Court disagreed, concluding: "Rule 6(e), M.R.Civ.P., is not applicable to § 39-71-520, MCA (2001)"⁴

¶ 7 Bailey argues that *Flynn* is distinguishable from this case, arguing:

Because the triggering factor which starts the sixty day period [under § 39-71-520(2), MCA] involves the mailing of document [sic] to provide notice, Rule 6(e) of the Montana Rules of Civil Procedure is applicable. This is in contrast to the "triggering" event under Section 39-71-520(1) MCA, which requires a "final" determination by the Uninsured Employer's [sic] Fund.⁵

¶ 8 Bailey's ostensible distinction between *Flynn* and the present case is without merit. In deciding in *Flynn* that M.R.Civ.P. 6(e) did not apply to the time limit set forth in § 39-71-520(1), MCA, the Supreme Court distinguished § 39-71-520(1), MCA, from the statute analyzed in an earlier decision, *MCI Telecommunications Corp. v. Montana Dep't of Pub. Serv. Regulation*.⁶ In *MCI Telecommunications*, the Supreme Court held that Rule 6(e), M.R.Civ.P., applied to § 2-4-702, MCA, a provision of the Montana Administrative Procedure Act, which required filing an appeal of an administrative decision "within 30 days *after service* of the final decision." Because the term "service" was undefined in that statutory scheme, and therefore created confusion as to when service was effected, the Supreme Court affirmed the district court's application of Rule 6(e), M.R.Civ.P., to extend the appeal time by 3 days.⁷

² 2005 MT 269, 329 Mont. 122, 122 P.3d 1216.

³ *Flynn*, ¶ 14.

⁴ *Flynn*, ¶ 17. (Although this case involves the 2009 version of § 39-71-520, MCA, whereas *Flynn* involved the 2001 version of the statute, the language at issue has not changed.)

⁵ Brief Opposing Respondent's Motion to Dismiss at 2.

⁶ 260 Mont. 175, 858 P.2d 364 (1993).

⁷ *Flynn*, ¶ 16.

¶ 9 The *Flynn* Court found the reasoning of *MCI Telecommunications* inapplicable to the time limit set forth at § 39-71-520, MCA, holding:

In contrast to the statute at issue in *MCI Communications [sic]*, § 39-71-520, MCA (2001), does not rely on “service” as the basis for commencing the ninety-day time period. Instead, the statute’s ninety-day mediation request window runs “from the date of the determination” Section 39-71-520, MCA (2001). Therefore, unlike the statute in *MCI Telecommunications*, § 39-71-520, MCA (2001), is not subject to, nor does it need, the assistance of Rule 6(e), M.R.Civ.P. For that reason, we conclude that Rule 6(e), M.R.Civ.P., is not applicable to § 39-71-520, MCA (2001), and hold that the ninety-day time period to request mediation under § 39-71-520, MCA (2001), begins to run on the date of the UEF’s determination.⁸

¶ 10 The same rationale the Supreme Court employed in finding M.R.Civ.P. 6(e) inapplicable to § 39-71-520(1), MCA, applies equally to § 39-71-520(2), MCA. Section 39-71-520(2), MCA, does not rely on “service” as the basis for commencing the 60-day time period. The statute’s 60-day time limit to file a petition in the Workers’ Compensation Court begins to run with “the mailing of the mediator’s report.” Bailey does not argue that he was confused as to what constituted “the mailing of the mediator’s report.” He simply argues, without support, that because mailing was the mode by which the report was transmitted, the Court should automatically add 3 days for mailing pursuant to M.R.Civ.P. 6(e). However, as the Supreme Court noted in *MCI Telecommunications*, and reiterated in *Flynn*, “[w]here the time for filing an appeal is dictated by the statute which confers the right to appeal, Rule 6(e) cannot be applied to extend the time for filing as this would be an extension of the court’s jurisdiction.”⁹

¶ 11 Section 39-71-520(2), MCA, requires that a petition to this Court must be filed within 60 days of the mailing of the mediator’s report. Rule 6(e), M.R.Civ.P., does not apply to this time limit. Therefore, Bailey’s petition to this Court is untimely.

ORDER

¶ 12 Third-Party Respondent’s motion to dismiss Petitioner’s Petition for Hearing is **GRANTED**.

¶ 13 The petition is **DISMISSED**.

⁸ *Flynn*, ¶ 17.

⁹ *Flynn*, ¶ 15. (Quoting, *MCI Telecommunications*, 260 Mont. at 178, 858 P.2d at 366.)

¶ 14 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 14th day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Oliver H. Goe
Leanora O. Coles
Submitted: November 15, 2010