

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 23

WCC No. 2008-2046

KATHY BENTON

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

**ROBERT AND SUSAN HARRYMAN of Oregon,
and/or ALAN MEYER and ERICA RODRIGUEZ,
d/b/a ROGUE TRANSPORTATION of Oregon**

Respondent/Uninsured Employer.

**ORDER GRANTING RESPONDENT UNINSURED EMPLOYERS' FUND'S
MOTION TO DISMISS**

Summary: Respondent Uninsured Employers' Fund moves the Court to dismiss Petitioner's Petition for Hearing because the petition was not timely filed pursuant to § 39-71-520, MCA, which requires a petition for trial in this Court be filed within sixty days of the mailing of the mediator's report. Petitioner's response brief to the UEF's motion to dismiss challenging the constitutionality of § 39-71-520, MCA, was untimely filed and the UEF argues that Petitioner's constitutional challenge should not be considered.

Held: Because Petitioner's response brief was not timely filed pursuant to ARM 24.5.316, Petitioner's substantive argument that § 39-71-520, MCA, is unconstitutional will not be considered. Pursuant to § 39-71-520, MCA, a party must file a petition with this Court within sixty days of the mailing of the mediator's report if the parties fail to reach a settlement and the parties do not stipulate in writing to a longer time period. If a petition is not filed within sixty days, the Department's determination is final. In the present case, the mediator's report was mailed on October 29, 2007. Petitioner filed the Petition for

Hearing on February 27, 2008. Petitioner's petition was filed several days late and therefore must be dismissed with prejudice.

Topics:

Constitutions, Statutes, Regulations and Rules: Administrative Rules of Montana: 24.5.316. Where Petitioner failed to timely file her response to a motion to dismiss and failed to set forth any circumstances establishing good cause for her untimely response, the argument contained in her untimely response will not be considered by the Court.

¶ 1 Mickey Benton died in a motor vehicle crash near Superior, Montana, on July 3, 2006. He was survived by some of his family members, including his wife, Petitioner Kathy Benton, and his daughter, Shannon Benton.¹ Petitioner filed a Petition for Hearing in this Court on February 27, 2008, seeking workers' compensation benefits related to Mickey's accident.²

¶ 2 Respondent Uninsured Employers' Fund (UEF) has moved this Court to dismiss Petitioner's Petition for Hearing, contending that Petitioner filed her petition more than 60 days after the mediator's report was mailed to the parties. The UEF argues that the petition is barred as untimely pursuant to § 39-71-520, MCA (2005).^{3, 4} Petitioner filed a response in opposition to UEF's motion to dismiss on April 11, 2008, arguing that § 39-71-520, MCA, is unconstitutional because it violates her right to equal protection under both the Montana and United States Constitutions.⁵ The UEF contends that Petitioner's argument that § 39-71-520, MCA is unconstitutional should not be considered in the present matter pursuant to ARM 24.5.316, because Petitioner's response brief was not timely filed.

¹ Uninsured Employers' Fund[s] Motion to Dismiss and Brief in Support [Motion to Dismiss] at 2.

² Docket Item No. 1.

³ This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Mickey Benton's accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321 730 P.2d 380, 382 (1986).

⁴ In the UEF's motion to dismiss, it also argued that Petitioner, who originally petitioned the Court in her capacity as personal representative of the estate of her husband, Mickey Benton, lacked standing to bring an action in this Court, and therefore failed to state a claim upon which relief could be granted. However, the Court need not consider the merits of this argument as the present claim is dismissed on the grounds that the petition was not timely filed.

⁵ Petitioner's Response in Opposition to Respondent's Motion to Dismiss [Petitioner's Response to Motion to Dismiss].

¶ 3 Under ARM 24.5.316, a party must file a response to a motion within 10 days of service, with 3 additional days allowed when service is made by mail. In this case, the UEF filed its original motion to dismiss by mail on March 27, 2008.⁶ Petitioner's response, including the additional 3 days, was due on or before April 9, 2008. Petitioner filed a response in opposition to the UEF's motion to dismiss with this Court on April 11, 2008.⁷

¶ 4 In *Schoenen v. UEF*⁸, this Court denied the UEF's motion to compel an independent medical examination (IME) because the UEF's IME request was untimely pursuant to the scheduling order.⁹ Although the IME request was denied based on a failure to abide by the scheduling order, I noted that the UEF had also failed to set forth any circumstances justifying its untimeliness.¹⁰ I find the situation at hand to be analogous to that in *Schoenen* in that Petitioner failed to meet the required deadlines and has failed to set forth any circumstances establishing good cause for her untimely response. Because Petitioner's response was untimely, her argument that § 39-71-520, MCA, is unconstitutional will not be considered.

¶ 5 Since Petitioner's constitutional argument will not be considered, I consider the merits of the UEF's motion on the law as it currently stands. Section 39-71-520, MCA, reads as follows:

(1) A dispute concerning uninsured employer's 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.

⁶ Motion to Dismiss.

⁷ Petitioner's Response to Motion to Dismiss.

⁸ *Schoenen*, 2008 MTWCC 1.

⁹ *Id.* at ¶ 5.

¹⁰ *Id.*

¶ 6 Petitioner and the UEF mediated the present dispute and the mediator's Report and Recommendation was mailed to the parties on October 29, 2007.¹¹ Petitioner had sixty days after this date to file a petition in this Court. Because the sixtieth day following October 29, 2007, was Saturday, December 29, 2007, pursuant to § 1-1-307, MCA, Petitioner had until Monday, December 31, 2007, to file her petition. Petitioner filed a Petition for Hearing in this Court on February 27, 2008, several days after the sixty day deadline had passed. Because the petition was not timely filed pursuant to § 39-71-520, MCA, the Department's determination is final and Petitioner's petition must be dismissed.

ORDER

¶ 7 Respondent UEF's motion to dismiss is **GRANTED**.

¶ 8 Petitioner's Petition for Hearing is **DISMISSED WITH PREJUDICE**.

¶ 9 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 15th day of May, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James P. O'Brien
Mark Cadwallader
Charles G. Adams
Kelly M. Wills
Submitted: April 18, 2008

¹¹ Ex. 2 to Motion to Dismiss.