IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 40

WCC No. 2008-2046

KATHY BENTON
as Personal Representative
of the Estate of Mickey 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 PETITIONER'S MOTION FOR RECONSIDERATION

Summary: Petitioner moves the Court for reconsideration of its Order Granting the Uninsured Employers' Fund's Motion to Dismiss because Petitioner's brief in opposition to the Uninsured Employers' Fund's Motion was not timely.

Held: Petitioner's motion is granted. The Court granted the UEF's motion to dismiss with prejudice because Petitioner failed to set forth any circumstances establishing good cause for the untimely filing of her response brief. In her Motion for Reconsideration, Petitioner explained that her brief was untimely because her counsel mistakenly calendared the deadline pursuant to Mont. R. Civ. P. 6(a) instead of ARM 24.5.303. In light of the dispositive nature of the Order granting UEF's motion and the explanation Petitioner has

now offered, the Court is satisfied that Petitioner's motion for reconsideration should be granted.

¶ 1 On May 15, 2008, this Court granted the Uninsured Employers' Fund's Motion to Dismiss the Petition because it was not timely filed pursuant to § 39-71-520, MCA, which requires a petition for trial in this Court to be filed within sixty days of the mailing of the mediator's report. The Court did not consider Petitioner's constitutional challenge to § 39-71-520, MCA, because Petitioner's response brief was not timely filed pursuant to ARM 24.5.316 and Petitioner had failed to set forth any circumstances establishing good cause for her untimely response.

¶ 2 Petitioner moves for reconsideration of the Court's Order dismissing her Petition. In her brief in support of her motion for reconsideration, Petitioner explained that the reason for her untimely filing was because Petitioner's counsel incorrectly calendared the deadline for her response brief. Petitioner explained that, rather than calendaring the response brief deadline according to ARM 24.5.303, which includes Saturdays and Sundays in the ten-day deadline calculation, her counsel inadvertently calendared the deadline pursuant to Mont. R. Civ. P. 6(a), which excludes Saturdays and Sundays in the deadline calculation.

¶ 3 Petitioner argues that a recent Montana Supreme Court opinion[1] stands for the proposition that the Rules of Civil Procedure take precedence over the administrative rules of procedure. She correctly notes that her brief would have been timely pursuant to Mont. R. Civ. P. 6(a). It is well-established, however, that proceedings in the Workers' Compensation Court are governed not by the Rules of Civil Procedure, but by the Montana Administrative Procedure Act.[2] Therefore, Petitioner's argument that the Court should apply Mont. R. Civ. P. 6(a) instead of ARM 24.5.303 is not well-taken. Nevertheless, Petitioner's explanation that her brief was untimely because her counsel mistakenly calendared the deadline pursuant to Mont. R. Civ. P. 6(a) is well-taken.

¶ 4 This Order should not be viewed as a de facto modification of the rules that govern this Court's procedure. However, in the matter at hand, I granted a motion to dismiss with prejudice because Petitioner failed to set forth any circumstances establishing good cause for the untimely filing of her response brief. In light of the dispositive nature of this Order and the explanation Petitioner has now offered, I am satisfied that Petitioner's motion for reconsideration should be granted.

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[1] *In re Formation of East Bench Irrigation District*, 2008 MT 210, 344 Mont. 184, 186 P.3d, 1266.

[2] *Moen v. Peter Kiewit & Sons' Co.*, 201 Mont. 425, 433, 655 P.2d 482, 486 (1982).

JUDGMENT

¶ 5 Petitioner's Motion for Reconsideration is **GRANTED**.

DATED in Helena, Montana, this 14th day of August, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James P. O'Brien
Mark Cadwallader
Kelly M. Wills
Charles G. Adams
Submitted: July 1, 2008