

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 13

WCC No. 2021-5445

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CONTESSA BRYER, GUARDIAN AND CONSERVATOR  
FOR JOHNNY LEE SHELDON

Petitioner

vs.

ACCIDENT FUND GENERAL INS. CO.

Respondent/Insurer.

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ORDER DENYING RESPONDENT/INSURER'S  
MOTION FOR SUMMARY JUDGMENT

**Summary:** Respondent argues that Petitioner filed her Petition for Hearing beyond the statute of limitations in § 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."

**Held:** The Court denied Respondent's summary judgment motion. Section 39-71-602, MCA, states that no statute of limitations in the Workers' Compensation Act runs "against any injured worker who is mentally incompetent and without a guardian." Because the statute of limitations in § 39-71-2905(2), MCA, was tolled during the two and a half years that the worker was mentally incompetent and without a guardian, Petitioner timely filed her Petition for Hearing.

¶ 1 Respondent Accident Fund General Ins. Co. (Accident Fund) moves for summary judgment, asserting that Petitioner Contessa Bryer, Guardian and Conservator for Johnny Lee Sheldon, filed her Petition for Hearing beyond the two-year statute of limitations in § 39-71-2905(2), MCA.

¶ 2 Bryer opposes Accident Fund's motion, asserting that she timely filed her Petition for Hearing because, under § 39-71-602, MCA, the statute of limitations in § 39-71-2905(2), MCA, was tolled during the two and a half years that Sheldon was mentally incompetent and without a guardian.

¶ 3 Neither party requested a hearing.

¶ 4 For the following reasons, this Court denies Accident Fund's summary judgment motion.

### FACTS

¶ 5 On July 3, 2017, Sheldon was found unconscious at work. He has been incapacitated and mentally incompetent since then.

¶ 6 On July 7, 2017, a First Report of Injury or Occupational Disease was filed.

¶ 7 Accident Fund insured Sheldon's employer.

¶ 8 On July 24, 2017, the Montana Thirteenth Judicial District Court appointed Alexis Danielle Calley as Sheldon's temporary guardian. Attorney Cory R. Laird represented Calley in the guardianship proceeding.

¶ 9 On July 27, 2017, Calley, in her capacity as Sheldon's temporary guardian, retained Laird and attorney Mark Kovacich to pursue a workers' compensation claim for Sheldon's alleged industrial injury. The Department of Labor & Industry approved the Attorney Retainer Agreement.

¶ 10 Accident Fund asserts that on July 27, 2017, Nicole Palagi, the adjuster handling the claim, sent a letter informing Laird, Sheldon, and the Department of Labor & Industry that Accident Fund was denying liability for Sheldon's alleged injury.<sup>1</sup>

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<sup>1</sup> Bryer asserts that there is an issue of material fact as to the date Accident Fund denied liability because the "true and correct copy of the denial letter" submitted as Exhibit 1 to the Declaration of Nicole Palagi is dated February 14, 2020. Bryer also points out that when she received a copy of the claim file, the date on the denial letter was February 14, 2020. In its reply brief, Accident Fund asserts that there is no issue of material fact because Palagi attested that she actually sent this letter on July 27, 2017, and its attorney explains that the "true and correct copy of the denial letter" attached to Palagi's Declaration, and the copy of the letter in the claim file, states "February 14, 2020," because it is an "automated date in a Word document"; i.e., on the day Palagi opened the letter on her computer to print it and convert it to a PDF document, Microsoft Word automatically changed the date to that day. Accident Fund also filed the Declaration of Cory R. Laird, in which Laird asserts that on July 27, 2017, Palagi sent him an email with the denial letter attached. However, the copy of the denial letter attached to Laird's Declaration is dated April 13, 2021. Accident Fund's attorney again blames Microsoft Word. Notwithstanding, there is no merit whatsoever to Accident Fund's claim that the discrepancies in the dates is a "nonissue" nor to its argument that Bryer's attorneys violated the Rules of Professional Conduct by pointing out these discrepancies and arguing that they create an issue of material fact. Because Accident Fund moved for summary judgment, it had the burden of establishing that there are no issues of material fact. See ARM 24.5.329(2). Accident Fund cannot meet that burden on its statute of limitations defense when its witness's sworn statement as to the date on which she sent a denial letter is contradicted by the date on the "true and correct copy" of the letter. Nevertheless, for purposes of judicial economy, this Court will, for purposes of this decision only, rule on the merits of Accident Fund's statute of limitations defense with the assumption that Palagi sent the denial letter on July 27, 2017. This Court notes that it is ruling in Bryer's favor on Accident Fund's statute of limitations defense with this assumption and, therefore, that Bryer will suffer no prejudice.

¶ 11 On January 24, 2018, Calley's temporary guardianship lapsed by operation of law pursuant to § 72-5-317(2), MCA, which provides that a temporary guardianship is limited to 6 months.

¶ 12 On January 26, 2018, the Montana Thirteenth Judicial Court granted Laird's Motion to Withdraw as counsel of record for Calley.

¶ 13 Sheldon was without a guardian from January 24, 2018, when Calley's temporary guardianship lapsed, until July 28, 2020, when the Montana Twelfth Judicial District Court appointed Bryer as his temporary guardian.

¶ 14 On September 22, 2020, Bryer, in her capacity as Sheldon's guardian, retained Sydney E. McKenna to pursue a workers' compensation claim. The Department of Labor & Industry approved the Attorney Retainer Agreement.

¶ 15 On November 23, 2020, the Montana Twelfth Judicial District Court appointed Bryer as Sheldon's full guardian.

¶ 16 On March 23, 2021, Bryer, in her capacity as Sheldon's guardian, filed her Petition for Hearing, alleging that Sheldon suffered a compensable injury on July 3, 2017.

#### LAW AND ANALYSIS

¶ 17 This Court grants summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.<sup>2</sup>

¶ 18 Section 39-71-2905(2), MCA, states, "A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied."

¶ 19 However, § 39-71-602, MCA, states:

No limitation of time as provided in 39-71-601 or in this chapter, known as the Workers' Compensation Act, shall run as against any injured worker who is mentally incompetent and without a guardian or an injured minor under 18 years of age who may be without a parent or guardian. A guardian in either case may be appointed by any court of competent jurisdiction, in which event the period of limitations as provided for in 39-71-601 shall begin to run on the date of appointment of such guardian or when such minor arrives at 18 years of age, whichever date is earlier.

¶ 20 Accident Fund argues that Bryer's Petition for Hearing is time-barred under § 39-71-2905(2), MCA, because there was no Petition for Hearing filed within two years of

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<sup>2</sup> ARM 24.5.329(2).

July 27, 2017, the day it claims to have denied liability. Accident Fund asserts that because Sheldon had a guardian when it claims to have denied liability, the statute of limitations began running under the second sentence of § 39-71-602, MCA, and continued running even after Calley's temporary guardianship lapsed. Thus, Accident Fund maintains that even though Sheldon was mentally incompetent and without a guardian from January 24, 2018, to July 28, 2020, and thereby without anyone who could legally act on his behalf during this two and a half years, the statute of limitations ran on July 27, 2019.

¶ 21 Bryer argues, *inter alia*, that she timely filed her Petition for Hearing because, under § 39-71-602, MCA, the statute of limitations in § 39-71-2905(2), MCA, was tolled when Sheldon was mentally incompetent and without a guardian.

¶ 22 Under the plain and unambiguous language of § 39-71-602, MCA, Bryer is correct. There is no merit to Accident Fund's argument that "[t]here is nothing in § 39-71-602 that states the statute of limitations stops running because the guardianship has expired . . . ." To the contrary, the first sentence of § 39-71-602, MCA, plainly and unambiguously states that the statutes of limitations in the Workers' Compensation Act do not "run . . . against any injured worker who is mentally incompetent and without a guardian." In actuality, there is nothing in § 39-71-602, MCA, stating that once the statute of limitations begins running, it keeps running even though the injured worker is mentally incompetent and no longer has a guardian, and thereby does not have anyone with legal authority to act on his behalf. In sum, § 39-71-602, MCA, clearly states that when an injured worker is mentally incompetent and without a guardian, the statutes of limitations in the Workers' Compensation Act are tolled.<sup>3</sup>

¶ 23 Here, Bryer filed her Petition for Hearing well within the two-year statute of limitations in § 39-71-2905(2), MCA. The statute of limitations began running, at the earliest, on July 27, 2017, when Accident Fund claims to have denied liability for Sheldon's alleged injury, because Calley was Sheldon's guardian at that time. However, under the plain language of § 39-71-602, MCA, the statute of limitations stopped running approximately six months later, on January 24, 2018, when Calley's temporary guardianship lapsed, because Sheldon was "mentally incompetent and without a guardian" and, therefore, had no one who could legally act on his behalf. The statute of limitations remained tolled for the next two and a half years, until July 28, 2020, when the Montana Twelfth Judicial District Court appointed Bryer to be Sheldon's temporary guardian. When Bryer was appointed Sheldon's temporary guardian on July 28, 2020, the statute of limitations began running again. At that time, Bryer had approximately a year and a half to file a Petition for Hearing to contest Accident Fund's denial of liability. Bryer filed her Petition for Hearing approximately eight months later, on March 23, 2021, approximately ten months before the statute of limitations ran.

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<sup>3</sup> See *Simons-Tollefson v. State Comp. Ins. Fund*, 2000 MTWCC 7, ¶ 10 (ruling that § 39-71-602, MCA, "tolls" the statutes of limitations in the Workers' Compensation Act when an injured minor is without a parent or guardian).

¶ 24 Because Accident Fund failed to meet its burden of establishing that it is entitled to judgment as a matter of law, even if it did deny liability on July 27, 2017, this Court now enters the following:

ORDER

¶ 25 Respondent/Insurer's Motion for Summary Judgment is **denied**.

DATED this 10<sup>th</sup> day of August, 2021.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Sydney E. McKenna, Justin Starin, and Steven S. Carey  
Jon T. Dyre

Submitted: August 2, 2021