

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 38

WCC No. 2010-2598

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

ORDER DENYING PARTIAL SUMMARY JUDGMENT

Summary: Respondent moved for partial summary judgment, arguing that Petitioner failed to timely appeal the Uninsured Employers' Fund's denial of her claim for reinstatement of temporary total disability benefits to mediation within 90 days of the determination and did not petition this Court within 60 days of the mailing of the mediator's report on two occasions. Petitioner argued that her claim is not susceptible to the time limits set forth in § 39-71-520, MCA, because those time limits did not exist on the date of her industrial injury.

Held: Although Respondent argued that Petitioner's claims were subject to the statutes of limitations set forth in § 39-71-520, MCA, because the time limits are procedural and not substantive, the Montana Supreme Court held in *Fleming v. Int'l Paper Co.* that the statutes of limitations in effect on the date of the worker's industrial injury are the time limits which apply. Since the time limits set forth in § 39-71-520, MCA, did not exist on the date of Petitioner's industrial injury, they do not apply to her claim. Respondent's motion for partial summary judgment is denied.

Topics:

Statutes and Statutory Interpretation: Procedural. Statutes of limitation are procedural. The Montana Supreme Court held in *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶¶ 26, 28, 346 Mont. 141, 194 P.3d 77, that procedural statutes are not an exception to the rule that the statutes in effect on the date of the accident or injury control in workers' compensation cases.

Statutes and Statutory Interpretation: Applicable Law. Statutes of limitation are procedural. The Montana Supreme Court held in *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶¶ 26, 28, 346 Mont. 141, 194 P.3d 77, that procedural statutes are not an exception to the rule that the statutes in effect on the date of the accident or injury control in workers' compensation cases.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520. The correct statutes of limitations to apply to a workers' compensation claim are those statutes which were in effect on the date of the claimant's industrial injury. Where Petitioner was injured while the 1991 statutes were in effect, the limitations now found within § 39-71-520, MCA, do not apply because they did not exist in the 1991 WCA.

Limitation Periods: UEF Determination. The correct statutes of limitations to apply to a workers' compensation claim are those statutes which were in effect on the date of the claimant's industrial injury. Where Petitioner was injured while the 1991 statutes were in effect, the limitations now found within § 39-71-520, MCA, do not apply because they did not exist in the 1991 WCA.

Limitation Periods: Workers' Compensation Court Petitions. The correct statutes of limitations to apply to a workers' compensation claim are those statutes which were in effect on the date of the claimant's industrial injury. Where Petitioner was injured while the 1991 statutes were in effect, the limitations now found within § 39-71-520, MCA, do not apply because they did not exist in the 1991 WCA.

¶ 1 Respondent Uninsured Employers' Fund (UEF) moves this Court for partial summary judgment pursuant to ARM 24.5.329. The UEF alleges that Petitioner Ginger Dostal failed to timely appeal the UEF's determinations regarding Dostal's claims for reinstatement of temporary total disability (TTD) benefits and reimbursement of travel expenses pursuant to § 39-71-520, MCA.¹ Dostal opposes the UEF's motion and

¹ Uninsured Employers' Fund's Amended Motion for Partial Summary Judgment and Brief in Support Thereof (Opening Brief). Docket Item No. 7.

responds that the UEF incorrectly relies upon statutes of limitations which were not in effect at the time of her industrial injury.²

Undisputed Facts³

¶ 2 Dostal sustained an industrial injury on May 24, 1993, while performing duties for an employer who was not enrolled in a workers' compensation plan and therefore the UEF accepted liability for the claim.

¶ 3 On or around April 8, 2008, Dostal demanded travel reimbursement from the UEF. The UEF orally denied the reimbursement. Dostal appealed the denial to mediation within 90 days of the UEF's denial.

¶ 4 On September 25, 2008, Dostal and the UEF participated in mediation over several issues, including her entitlement to travel expenses. The mediator issued a report and recommendation dated December 31, 2008, which was mailed on January 2, 2009.

¶ 5 On February 2, 2009, the UEF responded to the mediator's recommendation. Dostal did not file any response or appeal to the Workers' Compensation Court within 60 days.

¶ 6 On or around March 15, 2010, Dostal again demanded travel reimbursement from the UEF. The UEF again denied the reimbursement. Dostal appealed the denial to mediation within 90 days of the UEF's denial.

¶ 7 Since the issue of travel reimbursement had already been mediated and the mediator's report and recommendation became final on March 3, 2009, the mediator issued an Order of Dismissal signed April 2, 2010, and mailed April 22, 2010. Dostal did not appeal to the Workers' Compensation Court within 60 days.

¶ 8 On February 4, 2010, the UEF issued a determination that found Dostal's treating physician had released her to return to work in various job analyses without restrictions and she was at maximum medical improvement as of June 17, 2009. The UEF concluded Dostal was no longer eligible for TTD benefits from the date she was released to return to work. The February 4, 2010, determination also informed Dostal

² Petitioner's Memorandum in Opposition to UEF's Amended Motion for Partial Summary Judgment (Response Brief). Docket Item No. 9.

³ As set forth in Opening Brief at 2-3. In her Response Brief, Dostal states that she does not agree with many of the putative facts set forth by the UEF in the Opening Brief, but she will accept them as true for the purposes of this motion.

that if she did not appeal the determination within 90 days from the date of the letter, the determination would be considered final pursuant to § 39-71-520, MCA.

¶ 9 On July 6, 2010, Dostal filed a request for mediation with the Department of Labor and Industry (Department).

¶ 10 On August 5, 2010, Dostal and the UEF participated in mediation over several issues, including her entitlement to reinstatement of TTD benefits. The mediator issued a report dated and mailed on August 19, 2010.

¶ 11 On October 15, 2010, Dostal filed a Petition for Hearing under WCC No. 2010-2598, alleging in part that she is entitled to TTD benefits from January 1, 2010, forward, and reimbursement of travel expenses.

DISCUSSION

¶ 12 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.⁴ The material facts necessary for disposition are undisputed for purposes of this motion. Accordingly, this case is appropriate for partial summary disposition.

¶ 13 The UEF argues that Dostal failed to comply with statutes of limitations in pursuing her claims for travel reimbursement and reinstatement of TTD benefits. Specifically, the UEF argues Dostal did not appeal the UEF's denial of her claim for reinstatement of TTD benefits to mediation within 90 days of the date of the UEF's determination, and she did not petition the Workers' Compensation Court within 60 days of the mailing of the mediator's report on two occasions in which the parties mediated her claim for travel reimbursement.

¶ 14 Under § 39-71-520(1), MCA (2009), a dispute concerning UEF benefits must be appealed to mediation within 90 days from the date of the determination by the Department or the determination is considered final. It is undisputed that Dostal did not appeal the determination regarding her claims for travel expense reimbursement and reinstatement of TTD benefits as of January 1, 2010, until after 90 days had passed. Under § 39-71-520(2)(b), MCA, a party's petition must be filed within 60 days of the mailing of the mediator's report unless the parties stipulate otherwise. It is undisputed that Dostal did not file her petition in this Court within 60 days of the mailing of the mediator's report regarding her travel reimbursement claim.

⁴ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

¶ 15 The UEF argues that Dostal's claims for these items should be dismissed as untimely under § 39-71-520, MCA. The UEF admits that this statute did not exist at the time of Dostal's industrial injury; however, the UEF argues that the statutes of limitations found within § 39-71-520, MCA, are procedural in nature. The UEF alleges that while the general rule is that in workers' compensation cases the law in effect on the date of injury establishes a claimant's right to benefits and substantive matters,⁵ this rule does not apply to a procedural amendment in cases arising prior to the amendment.

¶ 16 The UEF argues that mediation is a jurisdictional prerequisite to this Court's jurisdiction, and failure to request mediation within 90 days prevents this Court from reviewing a Department determination.⁶ The UEF argues that the time limits for filing an appeal in this Court are mandatory and jurisdictional, and absent compliance with the statutory time limits, this Court lacks jurisdiction to hear the appeal.⁷

¶ 17 Dostal responds that the statutes of limitations found within § 39-71-520, MCA, do not apply to her claim. Dostal's industrial injury occurred on May 24, 1993, prior to the enactment of § 39-71-520, MCA. Dostal contends:

The 60-day statute of limitation[s] for filing a petition for trial against the UEF set forth in § 39-71-520(2), MCA, was not enacted until 2003, becoming effective July 1, 2003. The 90-day statute of limitation[s] for filing a mediation petition set forth in §39-71-520(1), MCA, was not enacted until 1993, becoming effective July 1, 1993. Since the injury occurred prior to July 1, 1993, neither of these statutes of limitation[s] applies to Petitioner's claim.⁸

¶ 18 The UEF asserts that Dostal's argument that the statutes of limitations in § 39-71-520, MCA, do not apply to her claim stemming from her May 24, 1993, industrial injury is flawed because the statutes of limitations are procedural and not substantive in nature.⁹ The UEF argues that while under *Buckman*, the law in effect on the date of injury controls, this applies only to substantive and not to procedural provisions. In arguing that the statute of limitations found in § 39-71-520(1), MCA, is procedural, the UEF relies upon the following Workers' Compensation Court decisions: *Seger v.*

⁵ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁶ See, e.g., *Horizon Custom Homes, Inc. v. Uninsured Employers' Fund*, 2007 MTWCC 8.

⁷ See *Colmore v. Uninsured Employers' Fund*, 2005 MT 239, ¶ 39, 328 Mont. 441, 121 P.3d 1007 (citations omitted).

⁸ Response Brief at 2.

⁹ Opening Brief at 3-4.

Magnum Oil, Inc.,¹⁰ *Sears v. Travelers Ins.*,¹¹ *Maggs v. State Compens. Ins. Fund*,¹² *Horizon Custom Homes, Inc. v. Uninsured Employers' Fund*,¹³ and *James v. Uninsured Employers' Fund*,¹⁴ and the Montana Supreme Court's decision *Wolfe v. Webb*.¹⁵ The UEF argues that in *Seeger*, *Sears*, and *Maggs*, this Court has upheld the general rule that while the law in effect on the date of injury establishes a claimant's right to benefits and substantive matters, the rule does not apply to a procedural amendment in cases arising prior to the amendment.¹⁶

¶ 19 Dostal responds that the UEF fails to note the "definitive ruling on the issue"¹⁷ in *Fleming v. Int'l Paper Co.*¹⁸ In *Fleming*, the Montana Supreme Court held that the statute of limitations in effect on the date of an injured worker's industrial injury is the appropriate statute of limitations to apply to the claim. Regarding this Court's determination that because statutes of limitations are procedural, the limitations period in effect at the time the petition is filed applies,¹⁹ the Supreme Court stated:

For almost 75 years, this Court has held that the statutes in effect on the date of the accident or injury control in workers' compensation cases. . . .

. . . .

. . . .

We made no exception in these cases for statutes of limitation[s] or other procedural statutes, and we decline to do so now.²⁰

¹⁰ *Seeger*, 1999 MTWCC 67.

¹¹ *Sears*, 1997 MTWCC 18.

¹² *Maggs*, 1995 MTWCC 36.

¹³ *Horizon*, 2007 MTWCC 8.

¹⁴ *James*, 2002 MTWCC 51.

¹⁵ *Wolfe*, 251 Mont. 217, 824 P.2d 240 (1992).

¹⁶ Opening Brief at 4.

¹⁷ Response Brief at 3.

¹⁸ *Fleming*, 2008 MT 327, ¶¶ 26, 28, 346 Mont. 141, 194 P.3d 77.

¹⁹ *Fleming*, ¶ 19.

²⁰ *Fleming*, ¶¶ 26, 28. (Citations omitted.)

¶ 20 The UEF argues that *Fleming* is distinguishable because it involved an amendment to an existing statute and not the creation of a statute which did not exist at the time of the claimant's industrial injury. The UEF argues that *Fleming* dealt with retroactivity, whereas in the present case, the UEF does not ask this Court to apply a statute retroactively, but rather to treat the matter as procedural.²¹ This argument lacks merit. Even if the Court treats the statute as procedural, as the UEF requests, this does not change the pronouncement in *Fleming*, as noted above, in which the Supreme Court held that it makes no exception to the date of injury rule for statutes of limitations "or other procedural statutes."

¶ 21 The Supreme Court's ruling in *Fleming* – which succeeds the cases upon which the UEF relies – is unambiguous, and unambiguously applicable to the present case. The correct statutes of limitations to apply to a workers' compensation claim are those statutes which were in effect on the date of the claimant's industrial injury. In the present case, since Dostal's industrial injury occurred on May 24, 1993, the 1991 Workers' Compensation Act applies. The statutes of limitations which are now found within § 39-71-520, MCA, did not exist in the 1991 Workers' Compensation Act. Therefore, Dostal's mediation petition and her petition to this Court were not untimely. The UEF's motion for partial summary judgment is denied.

ORDER

¶ 22 Respondent's motion for partial summary judgment is **DENIED**.

DATED in Helena, Montana, this 22nd day of December, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: December 15, 2010

²¹ Uninsured Employers' Fund's Reply Brief on Amended Motion for Partial Summary Judgment at 2. Docket Item No. 13.