IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 6

WCC No. 9411-7177

JOHN A. GOMEZ

Petitioner

vs.

MONTANA MUNICIPAL INSURANCE AUTHORITY

Respondent/Insurer for

CITY OF MISSOULA

Employer.

ORDER GRANTING IN PART/DENYING IN PART THE MOTION TO DISMISS

Summary: In response to claimant's petition for occupational disease benefits, respondent self-insurer moved to dismiss on jurisdictional grounds, arguing that claimant must pursue his claims in proceedings before the Montana Department of Labor and Industry.

Held: Motion to dismiss granted with respect to claimant's demand for $10,000 under section 39-72-405, MCA (1991), but otherwise denied. Where the insurer has accepted liability, but disputes arise as to amount and nature of benefits, the procedures of sections 39-72-602 and -611, MCA (1991), leading to a Department of Labor and Industry order and hearing, are not applicable. In those situations, sections 39-71-2401 and -2411, provide the Workers' Compensation Court with original jurisdiction over disputes over benefits under the Occupational Disease Act following mediation. However, because the 1991 version of section 39-72-405, MCA authorized "the department" to allow compensation of up to $10,000 under that statute, and *Carmichael v. Workers' Compensation Court*, 234 Mont. 410 (1988) does not allow this Court to apply new statutory provisions to claimant's request under section 405, that dispute must first be heard in the Department of Labor.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-405, MCA (1991). Where the insurer has accepted liability, but disputes arise as to amount and nature of benefits, the procedures of sections 39-72-602 and -611, MCA (1991), leading to a Department of Labor and Industry order and hearing, are not applicable. In those situations, sections 39-71-2401 and -2411, provide the Workers' Compensation Court with original jurisdiction over disputes over benefits under the Occupational Disease Act following mediation. However, because the 1991 version of section 39-72-405, MCA authorized "the department" to allow compensation of up to $10,000 under that statute, and *Carmichael v. Workers' Compensation Court*, 234 Mont. 410 (1988) does not allow this Court to apply new statutory provisions to claimant's request under section 405, that dispute must first be heard in the Department of Labor.

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Occupational Disease: Indemnity (39-72-405) Awards. Where the insurer has accepted liability, but disputes arise as to amount and nature of benefits, the procedures of sections 39-72-602 and -611, MCA (1991), leading to a Department of Labor and Industry order and hearing, are not applicable. In those situations, sections 39-71-2401 and -2411, provide the Workers' Compensation Court with original jurisdiction over disputes over benefits under the Occupational Disease Act following mediation. However, because the 1991 version of section 39-72-405, MCA authorized "the department" to allow compensation of up to $10,000 under that statute, and *Carmichael v. Workers' Compensation Court*, 234 Mont. 410 (1988) does not allow this Court to apply new statutory provisions to claimant's request under section 405, that dispute must first be heard in the Department of Labor.

Administrative Procedure: Contested Case Hearing: DLI Jurisdiction. Where the insurer has accepted liability, but disputes arise as to amount and nature of benefits, the procedures of sections 39-72-602 and -611, MCA (1991), leading to a Department of Labor and Industry order and hearing, are not applicable. In those situations, sections 39-71-2401 and -2411, provide the Workers' Compensation Court with original jurisdiction over disputes over benefits under the Occupational Disease Act following mediation. However, because the 1991 version of section 39-72-405, MCA authorized "the department" to allow compensation of up to $10,000 under that statute, and *Carmichael v. Workers' Compensation Court*, 234 Mont. 410 (1988) does not allow this Court to apply new statutory provisions to claimant's request under section 405, that dispute must first be heard in the Department of Labor.

The petitioner in this matter seeks benefits under the Montana Occupational Disease Act (ODA). Respondent has moved to dismiss on jurisdictional grounds, arguing that the questions presented by the Petition for Hearing must be pursued in proceedings before the Montana Department of Labor and Industry (DLI). After considering the motion and briefs, the Court dismisses one of the claims but otherwise denies the motion.

The petitioner is John A. Gomez (Gomez). In his Petition for Hearing Gomez initially alleges that on August 12, 1991, he suffered an industrial accident involving the inhalation of paint fumes. However, as he clarifies in his Petitioner's Brief Opposing Defendant's Motion to Dismiss, the allegations concerning this accident are for informational purposes only:

> The industrial accident Workers' Compensation claim is noticed for the court's information, and it is not known at this time whether it has caused any permanent disability. All medical and other benefits arising under that claim are believed already paid. [Capitalization in the original.]

The Petition for Hearing goes on to allege, and respondent does not dispute, that between May of 1989 and June of 1992 Gomez also suffered an occupational disease arising out of his exposure to various paints, solvents and chemicals. (Petition for Hearing, ¶2-2a.) Gomez filed a claim for occupational disease and the claim was accepted by his employer's insurer, Montana Municipal Insurance Authority (MMIA). (Petition for Hearing ¶s 2b and 3; Response to Petition ¶ 2.) The MMIA, however, determined that only fifty (50%) percent of Gomez' condition was attributable to occupational exposure and that the remaining fifty (50%) percent was attributable to non-occupational factors. (Petition for Hearing ¶ 3; response to petition ¶ 2.) Accordingly, during a period of temporary total disability MMIA paid only fifty (50%) percent of the temporary total disability rate. (Petition for Hearing¶ 3; response to petition ¶ 2.) The benefits were based on Gomez' 1989 wages rather than his 1992 wages. (Petition for Hearing ¶ 4.[1]) The parties agree that Gomez is no longer totally disabled, having returned to work in a different job. (Petition for Hearing ¶ 5; response to petition ¶ 9.)

Gomez asks this Court to make several determinations. First, he requests it to find that his condition is entirely attributable to his occupational exposure. In the alternative, he asserts his condition is seventy-five (75%) percent due to occupational exposure. He asks

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[1]MMIA does not specifically admit or deny this allegation. In its response it merely states that "[p]etitioner has been paid all the temporary total disability benefits to which he is entitled pursuant to the terms and conditions of the Occupational Disease Act." (Response to Petition ¶ 7.)

that his temporary total disability benefits be increased accordingly. Second, he asks that the Court determine that his benefits should be based on his 1992 wages. Third, he requests a $10,000 award under section 39-72-405, MCA.[2] Finally, he requests attorney fees and a penalty. The issue presented by the motion to dismiss is whether the Court has jurisdiction over any of these matters.

Discussion

Apportionment between occupational and non-occupational factors is permitted under the Occupational Disease Act (ODA). Section 39-72-706(1), MCA (1991), provides:

> **Aggravation.** (1) If an occupational disease is aggravated by any other disease or infirmity not itself compensable or if disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable under this chapter must be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease as a causative factor bears to all the causes of such disability or death.

MMIA made a unilateral determination that claimant's condition is fifty (50%) percent due to non-occupational factors.

Citing this Court's decision in ***Wunderlich v. Lumbermen's Mutual Casualty Company,*** *WCC Nos. 9310-6907 and 9310-6915 (June 28, 1994)(on appeal),* MMIA argues that Gomez' sole remedy respecting its apportionment determination is to request a hearing before the DLI. In ***Wunderlich*** the Court stated that "[t]he Department of Labor and Industry, not the Workers' Compensation Court, has original jurisdiction to resolve cases of disputed liability under the Occupational Disease Act . . . ." (***Wunderlich*** Opinion at 9.) That statement, however, was in the context of a claim the insurer had denied in its entirety. The decision did not address jurisdiction in a case where an insurer accepts liability but apportions some of the claimant's condition to non-occupational factors.

The ODA contains specific provisions for DLI hearings in contested liability cases. Those provisions are tied to the Occupational Disease medical panel provisions of the Act.

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[2]This request is contained in the body of his Petition, ¶ 5, although it is not specifically reiterated in his prayers for relief.

Section 39-72-601, MCA, provides for the creation of medical panels. Section 39-72-602, MCA (1991), specifies the role of the panel in a case of disputed liability, providing in part:

> **39-72-602. Insurer may accept liability -- procedure for medical examination when insurer <u>has not</u> accepted liability.** (1) An insurer may accept liability for a claim under this chapter based on information submitted to it by a claimant.
>
> (2) In order to determine <u>the compensability of claims</u> under this chapter <u>when an insurer has not accepted liability</u>, the following procedure must be followed:
>
> (a) The department shall direct the claimant to a member of the medical panel for an examination. The panel member shall conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. The panel member shall submit a report of his findings to the department.
>
> (b) Either the claimant or the insurer may, within 20 days after the receipt of the report by the first panel member, request that the claimant be examined by a second panel member. If a second examination is requested, the department shall direct the claimant to a second panel member who shall conduct an examination to determine whether he believes the claimant is totally disabled and is suffering from an occupational disease. The panel member shall submit a report of his findings to the department. When a second examination has been requested, the reports of the examinations shall be submitted to three members of the medical panel for review. A medical panel member or the panel may, in order to assist the panel member or the panel in reaching a conclusion, consult with the claimant's attending physician. The three panel members shall issue a report concerning the claimant's physical condition and whether the claimant is suffering from an occupational disease.
>
> (c) If a second examination is not requested, the department shall issue its order determining whether the claimant is entitled to occupational disease benefits based on the report of the first examining physician. If a second examination is requested, the department shall issue its order based on the report of the three members of the medical panel.
>
> (d) For the purpose of reviewing the reports of the examinations and issuing the report under subsection (2)(b),

> the three members of the medical panel shall be the two members of the panel who examined the claimant and the panel chairman. If the panel chairman has examined the claimant, the panel chairman shall appoint another member of the medical panel to be the third member. [Underlining added.]

Section 39-72-602, MCA, contains several important features. It applies to, and only to, claims which have been denied by insurers. When a claim is denied, the section requires an initial
examination of claimant by a single panel member. In the event the claimant or the insurer is dissatisfied with the panel member's report, either may request a second examination. That request automatically triggers the appointment of two additional panel members, resulting in a panel of three. If an additional examination is not requested, then the solo panel member makes his report to the DLI. If an additional examination is requested, the three members make a joint report.

Following the receipt of the panel report, the DLI is required to issue an order determining liability. Section 39-72-602(2)(c), MCA, provides that if only one examination is requested, the DLI's determination shall be based on the solo examiner's report. If a second examination is requested, then the determination is based on the report of the three panel members.

The provisions governing DLI hearings are set forth in sections 39-72-611 and -612, MCA (1991). Section 39-72-611, MCA, provides:

> **39-72-611. Hearing on determination -- when.** Upon the department's own motion or if a claimant or an insurer requests that a hearing be held by the department prior to the time the department issues its final determination concerning the claimant's entitlement to occupational disease benefits, the department shall hold a hearing. [Underlining added.]

Section 39-72-612, MCA (1991), provides in relevant part:

> **39-72-612. Hearing and appeal to workers' compensation judge.** (1) Within 20 days after the department has issued its order of determination as to whether the claimant is entitled to benefits under this chapter, a party may request a hearing. In order to perfect an appeal to the workers' compensation judge, the appealing party shall request a hearing before the department. The department shall grant a hearing, and the

> department's final determination may not be issued until after the hearing.
>
> (2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. . . . [Underlining added.]

Under the plain language of these sections, the right to a Department hearing is linked to the Department's authority under section 39-72-602(2)(c), MCA, to determine liability. That authority is limited to cases in which "an insurer has not accepted liability." § 39-72-602(2), MCA. Thus, DLI's jurisdiction under sections 39-72-611 and -612, MCA, extends only to cases in which insurers have denied liability.

In this case the insurer accepted liability for the claim and agreed that it is compensable. The dispute in this case is not over liability for the claim, rather, it is over the amount of benefits due claimant. The procedures specified by sections 39-72-602 and -611 through -612, MCA, are inapplicable.

MMIA argues, however, that the Court's own original jurisdiction over benefit disputes is limited to cases arising under the Workers' Compensation Act. It cites section 39-71-2905, MCA, which is a general provision governing the Court's jurisdiction. Section 39-71-2905, MCA, provides that the Court, with enumerated exceptions, has exclusive jurisdiction over disputes "concerning any benefits under chapter 71 of this title." Chapter 71, of course, is the Worker's Compensation Act. The ODA is codified in chapter 72.

However, sections 39-71-2401 and -2411, MCA, contain a separate, broader jurisdictional provision applicable to the Court. Section 39-71-2401, MCA (1989), provides in relevant part:

> **39-71-2401. Disputes - jurisdiction - evidence - settlement requirements - mediation.** (1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.
>
> (2) A dispute arising under this chapter that does not concern benefits or a dispute for which a specific provision of this chapter gives the department jurisdiction must be brought before the department.

> (3) An appeal from a department order may be made to the workers' compensation court. [Underlining added.]

Section 39-71-2411, MCA (1991), provides in relevant part:

> **39-71-2411. Mediation procedure.** (1) Except as otherwise provided, a claimant or an insurer having a dispute relating to benefits under chapter 71 <u>or 72</u> of this title may petition the department for mediation of the dispute.
>
> . . . .
>
> (6) A party shall notify the mediator within 45 days of the mailing of his report whether the party accepts the mediator's recommendation. If either party does not accept the mediator's recommendation, the party may petition the workers' compensation court for resolution of the dispute. [Underlining added.]

Except where the legislature has otherwise provided, these sections expressly provide for mediation of disputes under chapter 72, and a direct cause of action in the Workers' Compensation Court if mediation fails.

The ODA makes no express provision for resolving apportionment disputes. There is also no provision authorizing the DLI to resolve disputes over the amount of wages to be used in computing benefits. Therefore, these matters are subject to the mediation provisions[3] and are properly before the Court.

The same result is reached by a different route. Section 39-72-402(1), MCA, provides:

> Except as otherwise provided in this chapter, the practice and procedure prescribed in the Workers' Compensation Act applies to all proceedings under this chapter.

Provisions for hearings are matters of practice and procedure. The making of an express provision for DLI hearings in disputed liability cases and the lack of similar provisions for the benefit disputes under the ODA are strong indications that through section 39-72-402(1), MCA, the legislature intended to grant the Court jurisdiction in cases not specifically delegated to the DLI.

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[3] The parties have mediated these disputes.

Gomez' request for $10,000 pursuant to section 39-72-405, MCA, is a different matter. The section allows for an award of not more than $10,000 to be made to a claimant who is unable to return to his usual employment but who is not totally disabled. Prior to 1993, the section provided that "the department may allow compensation on account thereof as it considers just, not exceeding $10,000." (Emphasis added.) In 1993, the legislature amended the section to provide that the claimant and insurer may agree on the amount and that in the event of their failure to agree, "the mediation procedures in Title 39, chapter 71, part 24, must be followed." Thus, the legislature has imposed a new mediation requirement and changed the forum for resolution of disputes arising under the section. The full text of the 1991 and 1993 versions of section 39-72-405, MCA, are set forth in an addendum to this opinion.

In ***Carmichael v. Workers' Compensation Court,*** *234 Mont. 410, 763 P.2d 1122 (1988)**,*** the Supreme Court held that newly enacted mediation provisions could not be applied to workers' compensation cases arising prior to the adoption of the provisions. The Supreme Court considered the right of a claimant to petition the Court without additional delay created by mediation to be a substantive right. In this case, the claim arose prior to the 1993 amendment to section 39-72-405. The 1993 amendment delays the claimant's right to obtain an adjudication of his entitlement under the section. Since the mediation requirement is tied to the change in forum, the 1993 statute cannot be applied retroactively. Gomez must therefore make his request to the Department.

Gomez' request for $10,000 is also premature. Under section 39-72-405, MCA, a medical panel must determine that it is "inadvisable for the employee on account of a nondisabling occupational disease to continue in employment." This prerequisite has not been met.

Finally, MMIA seeks to dismiss Gomez' request for attorney fees and a penalty. Again it cites this Court's ***Wunderlich*** decision as authority. ***Wunderlich*** is inapposite. The applicable case is ***Vernon L. Ingebretson v. Louisiana-Pacific Corporation,*** *WCC No. 9403-7030 (December 14, 1994),* in which the Court held that a penalty and attorney fees may be awarded in an occupational disease case over which the Court has original rather than appellate jurisdiction. MMIA's request to dismiss these claims is therefore **denied.**

In summary, with respect to Gomez' request for a $10,000 award under section 39-72-405, MCA, the motion to dismiss is **granted**. The motion is otherwise **denied**.

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Dated in Helena, Montana, this 27th day of January, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Julio K. Morales
Mr. Oliver H. Goe
Appendix

APPENDIX

[1991] **39-72-405. General limitations on payment of compensation.** (1) Compensation may not be paid when the last day of the injurious exposure of the employee to the hazard of the occupational disease has occurred prior to July 1, 1959.

(2) When any employee in employment on or after January 1, 1959, because he has an occupational disease occurred in and caused by such employment which is not yet disabling, is discharged or transferred from the employment in which he is engaged or when he ceases his employment and it is in fact, as determined by the medical panel, inadvisable for him on account of a nondisabling occupational disease to continue in employment and he suffers wage loss by reason of the discharge, transfer, or cessation, the department may allow compensation on account thereof as it considers jut, not exceeding $10,000.

[1993] **39-72-405. general limitations on payment of compensation.** (1) Compensation may not be paid when the last day of the injurious exposure of the employee to the hazard of the occupational disease has occurred prior to July 1, 1959.

(2) When an employee in employment on or after January 1, 1959, because the employee has an occupational disease incurred in and caused by the employment that is not yet disabling, is discharged or transferred from the employment in which the employee is engaged or when the employee ceases employment and it is in fact, as determined by the medical panel, inadvisable for the employee on account of a nondisabling occupational disease to continue in employment and the employee suffers wage loss by reason of the discharge, transfer, or cessation, compensation may be paid, not exceeding $10,000, by an agreement between the insurer and the claimant. If the parties fail to reach an agreement, the mediation procedures in Title 39, chapter 71, part 24, must be followed.