

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 9

WCC No. 2019-4651

HIDEAWAY BUILDERS, LLC
Petitioner

vs.

ERIK L. RASMUSSEN
Respondent/Claimant

UNINSURED EMPLOYERS' FUND
Respondent

MONTANA STATE FUND
Intervenor.

ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENTS

Summary: The UEF determined that Claimant was an employee of Petitioner. Petitioner filed this case to appeal the UEF's determination. Claimant moved to dismiss, asserting that Petitioner filed this case after the 60-day statute of limitations in § 39-71-520(2)(b) and (c), MCA, ran. The UEF joined Claimant's motion. Petitioner initially conceded that it filed its Petition for Hearing a day late but argued that this Court should invoke the doctrine of equitable tolling and rule that it was timely. Intervenor argued that the Petition for Hearing was timely, asserting that under this Court's procedural rules, 3 days are added to the statute of limitations because the mediator mailed her Report and Recommendation. For the first time at the hearing, Petitioner argued that its Petition for Hearing was timely under this Court's procedural rules.

Held: The Court converted the motion and granted summary judgment in favor of Respondents because the Petitioner's Petition for Hearing is time barred and the UEF's determination is final. This Court's rules of procedure state that filing occurs "upon receipt by the court." This Court did not receive the Petition for Hearing until after the limitations period had run. The Montana Supreme Court and this Court have ruled that, as a matter

of law, 3 days for mailing are not to be added to the statutes of limitations in § 39-71-520, MCA. The doctrine of equitable tolling does not apply because the current version of § 39-71-520, MCA, is not ambiguous, and this is simply a case of neglect.

¶ 1 Petitioner Hideaway Builders, LLC (Hideaway Builders) filed a Petition for Hearing, challenging Respondent Uninsured Employers' Fund's (UEF) determination that Claimant Erik L. Rasmussen was an employee of Hideaway Builders at the time of his industrial injury. Hideaway Builders contends that Rasmussen was an independent contractor and that it is not liable to reimburse the UEF for benefits the UEF has paid on Rasmussen's claim.

¶ 2 Rasmussen moved to dismiss Hideaway Builders' Petition for Hearing on the ground that it missed the 60-day statute of limitations to appeal the UEF's determination in § 39-71-520(2)(b) and (c), MCA. Rasmussen asserted that the UEF's determination that he was an employee is now final under § 39-71-520(2)(c), MCA.

¶ 3 Hideaway Builders initially conceded that its Petition for Hearing was untimely under § 39-71-520(2)(b) and (c), MCA, but asserted that this Court should apply the doctrine of equitable tolling and rule that its Petition for Hearing was timely.

¶ 4 Although Rasmussen moved to dismiss, he attached exhibits to his brief. Hideaway Builders also relied on exhibits. At a hearing on June 25, 2019, the parties stipulated to the authenticity of the exhibits and agreed that they are part of the record. Thus, pursuant to M.R.Civ.P. 12(d), this Court notified the parties that it intended to convert Rasmussen's Motion to Dismiss into a motion for summary judgment and gave them an opportunity to present additional evidence and the opportunity for a hearing. The parties requested a hearing, which was held on Friday, August 2, 2019. Before the hearing, Rasmussen filed the Affidavit of Kendra Sorensen.

¶ 5 This Court also allowed Montana State Fund (State Fund) to intervene. State Fund opposed Rasmussen's motion, asserting that, pursuant to ARM 24.5.320 — which provides that when a party is required to act after service by mail during litigation before this Court, this Court adds 3 days to the prescribed period — this Court should add 3 days for mailing to the statute of limitations in § 39-71-520(2)(b) and (c), MCA. Thus, State Fund argued that Hideaway Builders' Petition for Hearing was actually timely.

¶ 6 At the hearing, Hideaway Builders adopted State Fund's argument, asserting that it timely filed its Petition for Hearing.

FACTS

¶ 7 Rasmussen suffered an injury on July 5, 2018, when a wood truss fell on him.

¶ 8 Rasmussen filed a workers' compensation claim, asserting that he was an employee of Hideaway Builders and in the course of his employment when he was injured.

¶ 9 Because Hideaway Builders did not have workers' compensation coverage, Rasmussen's claim was forwarded to the UEF. The UEF determined that Rasmussen was an employee of Hideaway Builders and that Hideaway Builders was an uninsured employer.

¶ 10 On November 13, 2018, the UEF sent a letter to Rasmussen, with a copy to Hideaway Builders, stating in relevant part:

The Uninsured Employers' Fund (UEF) will pay benefits relative to the above-referenced Industrial Injury in accordance with the provisions of the Montana Workers' Compensation Act and Administrative Rules of Montana. Pursuant to section 39-71-520, MCA, this determination is not considered final until ninety (90) days has passed and if an appeal is not filed. All benefits are being paid under a full reservation of rights until such time this determination becomes final.

¶ 11 Also on November 13, 2018, the UEF sent a letter to Hideaway Builders, informing it, *inter alia*, that under § 39-71-504, MCA, Hideaway Builders had a legal obligation to reimburse the UEF for all benefits paid to Rasmussen. The UEF also informed Hideaway Builders that if it disagreed with the UEF's determination, it had 90 days under § 39-71-520, MCA, to appeal to mediation. The UEF's letter also informed Hideaway Builders that if it did not petition for mediation within 90 days, "the determination will be considered final."

¶ 12 On February 8, 2019, Hideaway Builders filed a Petition for Mediation. Hideaway Builders requested mediation on three issues:

1. The finding that they were the employer on the underlying claim.
2. If they are found to be the employer that a credit should be provided as Hideaway LLC has already paid a substantial amount for the Claimant's injuries. Evidence for this information is being supplemented to all parties.
3. Any issues raised by the Claimant in their recent request for mediation.

¶ 13 On March 4, 2019, Kristie Wolter, a Workers' Compensation Mediator with the Department of Labor & Industry (DLI), conducted the mediation conference.

¶ 14 On March 12, 2019, Wolter mailed her Report and Recommendation to the parties. The Report and Recommendation recounts:

The issues mediated were whether Hideaway Builders was Mr. Rasmussen's employer; if Hideaway Builders was found to be the employer, that a credit be provided as they have already paid a substantial amount for Mr. Rasmussen's injuries; and to address any issues raised by Mr. Rasmussen in his recent mediation request.

The Report and Recommendation also states, "Claims involving the Uninsured Employers' Fund with injury dates of July 1, 2003 or later, must be filed with the Court within 60 days of the mailing of the mediator's report."

¶ 15 On Friday, May 10, 2019, Hideaway Builders mailed its Petition for Hearing to this Court. Hideaway Builders asserts that Rasmussen was not an employee; rather, Hideaway Builders asserts that Rasmussen was a contractor and that it "only contracted with Mr. Rasmussen through his company, Classic Timber and Earthworks." In its prayer for relief, Hideaway Builders asks this Court to declare that Rasmussen was an independent contractor, and that this Court rule that it is not liable to reimburse the UEF for any benefits paid to Rasmussen.

¶ 16 The 60th day following the mailing of the Report and Recommendation was Saturday, May 11, 2019.

¶ 17 This Court received Hideaway Builders' Petition for Hearing on Tuesday, May 14, 2019. This Court filed the Petition for Hearing and served it upon Rasmussen and the UEF pursuant to ARM 24.5.303.

LAW AND ANALYSIS

¶ 18 This case is governed by the 2017 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Rasmussen's injury.¹

¶ 19 The WCA contains short time limitations for appealing the UEF's determinations, which become final if not timely appealed. Section 39-71-520, MCA, states:

Time limit to appeal to mediation — petitioning workers' compensation court — failure to settle or petition. (1) A dispute concerning uninsured employers' fund benefits must be appealed to mediation within 90 days from the date of the determination by the department or the determination is considered final.

(2) (a) If the parties fail to reach a settlement through the mediation process, any party who disagrees with the department's determination may file a petition before the workers' compensation court.

¹ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

(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.

(d) A mediator's report is not a determination by the department for the purposes of this section. A determination by the department is final if an appeal to mediation described in subsection (1) or a petition described in subsection (2)(a) is not filed within the required time period.

¶ 20 Rasmussen argues that Hideaway Builders did not file its Petition for Hearing within 60 days of the mailing of the mediator's Report and Recommendation. Rasmussen correctly notes that the 60th day after the mediator mailed her report was Saturday, May 11, 2019. Thus, the deadline for Hideaway Builders to file a Petition for Hearing challenging the UEF's determination that Rasmussen was an employee was Monday, May 13, 2019.² However, Hideaway Builders did not file its Petition for Hearing until Tuesday, May 14, 2019. Thus, because the statute of limitations ran, Rasmussen argues that the UEF's determination that Rasmussen was an employee of Hideaway Builders is now final under § 39-71-520(2)(c), MCA.

¶ 21 Hideaway Builders acknowledged in its Response to Motion to Dismiss that it did not file its Petition for Hearing within 60 days of the mailing of the mediator's Report and Recommendation. However, it cited the Supreme Court's decision in *Weidow v. Uninsured Employers' Fund*³ and asserts that this Court should apply the doctrine of equitable tolling and rule that its Petition for Hearing was timely.

¶ 22 In *Weidow* — which was decided under a prior version of § 39-71-520, MCA — the UEF denied liability for Weidow's claim.⁴ Weidow petitioned for mediation and thereafter accepted the mediator's recommendation to negotiate a settlement.⁵ The UEF rejected the mediator's recommendation.⁶ Because § 39-71-520, MCA (2005), was ambiguous as to whether the determination that was to be appealed was the UEF's decision on liability or the DLI's mediator's recommendation,⁷ Weidow reasonably thought that the mediator's recommendation would become a final determination unless the UEF

² M.R.Civ.P. 6(a)(1)(C) (providing, in relevant part, that when computing a time period "in any statute that does not specify a method of computing time," "include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.").

³ 2010 MT 292, 359 Mont. 77, 246 P.3d 704.

⁴ *Weidow*, ¶ 13.

⁵ *Weidow*, ¶ 15.

⁶ *Id.*

⁷ *Weidow*, ¶ 30.

appealed within 60 days.⁸ Weidow petitioned this Court to appeal the UEF's denial of liability 69 days after the mediator mailed the Report and Recommendation.⁹ The Supreme Court held that the 60-day statute of limitations in § 39-71-520(2), MCA (2005), was equitably tolled and that Weidow's appeal was timely. The court reasoned that because of the ambiguity in § 39-71-520(2), MCA (2005), Weidow reasonably and justifiably thought that the UEF had the obligation to appeal.¹⁰ The court also reasoned that Weidow timely pursued his claim in good faith, that the alleged employer had notice of Weidow's claims, and that the alleged employer was not prejudiced by the 9-day delay.¹¹

¶ 23 Hideaway Builders makes several arguments in support of its claim that this Court should follow *Weidow* and apply equitable tolling. However, none have merit.

¶ 24 First, Hideaway Builders emphasizes that the *Weidow* court held that § 39-71-520, MCA (2005), is ambiguous. Hideaway Builders asserts that because of the ambiguity, and because there were multiple mediation proceedings, it was unclear as to when the statute of limitations ran. However, the 2009 Legislature fixed the ambiguity in § 39-71-520, MCA. Subsection (2)(d) now provides, in relevant part, "A mediator's report is not a determination by the department for the purposes of this section." Thus, under the plain and unambiguous language of § 39-71-520, MCA (2009-present), the party who disagrees with the UEF's determination must file its Petition for Hearing within 60 days of the mailing of the mediator's Report and Recommendation.

¶ 25 Because § 39-71-520, MCA (2009-present), is not ambiguous, Hideaway Builders could not have reasonably been confused over its duty to file a Petition for Hearing on the issue of whether Rasmussen was an employee with this Court within 60 days. While the other mediation proceedings arose out of the same injury, the issues were different. Given the plain language of § 39-71-520(2), MCA (2009-present), Hideaway Builders could not have reasonably nor justifiably thought that Rasmussen had the duty to appeal a determination with which he agreed, or that the UEF had the obligation to appeal its own determination. In short, it was clear under the statute that Hideaway Builders had the duty to petition this Court within 60 days of the mailing of the mediator's report.

¶ 26 Second, Hideaway Builders argues that it would be inequitable to apply the statute of limitations because it mailed its Petition for Hearing on Friday, May 10, 2019 — before the statute of limitations ran — and "it typically does not take four days for a letter to go from Missoula to Helena."¹² However, the day Hideaway Builders mailed its Petition for

⁸ *Weidow*, ¶¶ 21, 29.

⁹ *Weidow*, ¶ 15.

¹⁰ *Weidow*, ¶¶ 29, 31.

¹¹ *Weidow*, ¶¶ 29-31.

¹² In this Court's experience, it is not unusual for a letter mailed from Missoula to take several days to be delivered to Helena. And here, the four days it actually took is not atypical. There is no mail delivery to the Workers'

Hearing is irrelevant because the Rules of the Workers' Compensation Court expressly state that this Court "deems filing complete upon receipt by the court."¹³ Moreover, there is nothing inequitable about enforcing the statute of limitations because this Court allows parties to file Petitions for Hearing by fax and by email.¹⁴ Therefore, Hideaway Builders could have timely filed even though its attorney is in Missoula and this Court is in Helena.

¶ 27 Third, Hideaway Builders argues that it would be inequitable to strictly enforce the statute of limitations because its filing was not "substantially late" and that Rasmussen was neither surprised by its position nor prejudiced by the late filing. Notwithstanding, the Legislature has set a firm deadline for filing a petition if the parties fail to reach a settlement through the mediation process, and this Court is bound to apply it.¹⁵ Indeed, this Court has dismissed a claimant's Petition for Hearing under § 39-71-520(2), MCA, because he filed it 62 days after the mediator mailed the Report and Recommendation; i.e., this Court dismissed his case because he was two days late.¹⁶ Likewise, a party asserting a statute of limitations defense does not need to prove prejudice.¹⁷ And it does not matter that Rasmussen was not surprised. Since the parties have to mediate their dispute before this Court has jurisdiction,¹⁸ they will never be surprised by the other's position regarding the UEF's determination.

¶ 28 In *Weidow*, the Supreme Court cautioned "that the doctrine of equitable tolling has been applied only sparingly," warning "against application of it to 'what is at best a garden variety claim of excusable neglect.'"¹⁹ This is just such a case; Hideaway Builders is asserting excusable neglect.

¶ 29 Finally, there is no merit to Hideaway Builders' new argument that its Petition for Hearing was actually timely under ARM 24.5.320(1)(b), which provides that "Whenever a party has the right or is required to do some act within a prescribed period of time after the service by mail . . . of a notice or other paper upon the party, the court adds 3 days to the prescribed period." Hideaway Builders asserts that because the mediator mailed her

Compensation Court on Saturdays or Sundays. While this Court cannot answer why Hideaway Builders' Petition for Hearing was not delivered until Tuesday, May 14, 2019, that was the risk of mailing it so close to the statutory filing deadline.

¹³ ARM 24.5.303(2)(c).

¹⁴ ARM 24.5.303(2)(b).

¹⁵ See § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.").

¹⁶ See *Bailey v. Uninsured Employers' Fund*, 2010 MTWCC 34 (granting motion to dismiss Petition for Hearing under § 39-71-520(2), MCA, that was filed 62 days after mediator mailed her Report and Recommendation).

¹⁷ See *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 62, *aff'd*, 2019 MT 160 (ruling that party relying on time limitation in § 39-71-601, MCA, need not prove prejudice).

¹⁸ See §§ 39-71-520(2)(a), -2905(1), MCA.

¹⁹ *Weidow*, ¶ 28 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990)).

Report and Recommendation, this Court should add 3 days to the 60-day period for filing, making the deadline Tuesday, May 14, 2019, the day Hideaway Builders filed its Petition for Hearing.

¶ 30 Because the time limitations in § 39-71-520, MCA, do not begin running on the date of service, the Supreme Court rejected essentially the same argument Hideaway Builders now makes in *Flynn v. Uninsured Employers' Fund*.²⁰ In *Flynn* the Supreme Court held that because § 39-71-520(1), MCA, states that the 90-day statute of limitations for appealing a determination of the UEF to mediation began running on “the date of the determination,” and not on the date of “service,” a procedural rule providing that 3 days are added after service by mail was inapplicable.²¹

¶ 31 This Court followed *Flynn* in *Bailey v. Uninsured Employers' Fund*,²² and ruled that the statute of limitations in § 39-71-520(2), MCA, starts running upon the mailing of the mediator's Report and Recommendation, and that 3 days are not to be added for mailing. This Court explained:

The same rationale the Supreme Court employed [in *Flynn*] in finding M.R.Civ.P. 6(e) inapplicable to § 39-71-520(1), MCA, applies equally to § 39-71-520(2), MCA. Section 39-71-520(2), MCA, does not rely on “service” as the basis for commencing the 60-day time period. The statute's 60-day time limit to file a petition in the Workers' Compensation Court begins to run with “the mailing of the mediator's report.” *Bailey* does not argue that he was confused as to what constituted “the mailing of the mediator's report.” He simply argues, without support, that because mailing was the mode by which the report was transmitted, the Court should automatically add 3 days for mailing pursuant to M.R.Civ.P. 6(e). However, as the Supreme Court noted in [*MCI Telecommunications Corp. v. Montana Department of Public Service Regulation*]²³, and reiterated in *Flynn*, “[w]here the time for filing an appeal is dictated by the statute which confers the right to appeal, Rule 6(e) cannot be applied to extend the time for filing as this would be an extension of the court's jurisdiction.”²⁴

¶ 32 Hideaway Builders asserts that *Flynn* and *Bailey* are distinguishable because they involved the Montana Rules of Civil Procedure while it is relying upon this Court's rules of procedure. However, Hideaway Builders' argument fails under the plain language of ARM 24.5.320. Subsection (1)(a) of this rule applies when “computing the time for any

²⁰ 2005 MT 269, 329 Mont. 122, 122 P.3d 1216 (overruled on other grounds in *Weidow*, ¶ 23, where the Supreme Court held that this Court could apply equitable tolling).

²¹ *Flynn*, ¶¶ 15-18

²² 2010 MTWCC 34.

²³ 260 Mont. 175, 858 P.2d 364 (1993).

²⁴ *Bailey*, ¶ 10.

response as provided for in these rules.” The 60-day time limitation to file a Petition for Hearing to appeal a UEF determination is not provided for in this Court’s rules; rather, it is provided for in § 39-71-520(2), MCA, part of the Workers’ Compensation Act. While this Court can promulgate rules for the time deadlines in cases pending before it, this Court does not have authority to promulgate a rule to extend a statutory statute of limitations,²⁵ and did not do so in ARM 24.5.320. Moreover, subsection (1)(b) of this rule applies when a party has the right to act “after . . . service by mail.” But, the limitations period in § 39-71-520(2), MCA, does not start running upon *service* of the mediator’s Report and Recommendation. By the plain language of § 39-71-520(2)(b), MCA, the time limitation starts running upon *mailing* of the mediator’s report. Thus, as in *Bailey*, this Court does not add 3 days for mailing. In short, this Court’s rules of procedure apply to cases being litigated before this Court; they do not extend the statutory statutes of limitations setting forth the times a party has to commence a case with this Court.

¶ 33 In sum, under § 39-71-520(2)(b) and (c), MCA, the deadline for Hideaway Builders to file a Petition for Hearing challenging the UEF’s determination that Rasmussen was an employee was Monday, May 13, 2019. Hideaway Builders filed its Petition for Hearing on Tuesday, May 14, 2019, which was untimely. Hideaway Builders’ attempt to invoke the doctrine of equitable tolling is without merit, and this Court is bound by the statute of limitations.

¶ 34 Accordingly, this Court makes the following:

ORDER

¶ 35 Rasmussen and the UEF are granted summary judgment on their statute of limitations defense under § 39-71-520(2)(b) and (c), MCA. The UEF’s determination that Rasmussen was an employee of Hideaway Builders is final pursuant to § 39-71-520(2)(c) and (d), MCA.

¶ 36 Because the only claim in this case is Hideaway Builders’ appeal of the UEF’s determination that Rasmussen was an employee of Hideaway Builders, there are no other claims in this case for this Court to adjudicate. Therefore, this Judgment is certified as final under ARM 24.5.348, and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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²⁵ See *MCI Telecomms. Corp.*, 260 Mont. at 178, 858 P.2d at 366 (“Where the time for filing an appeal is dictated by the statute which confers the right to appeal, [a procedural rule adding 3 days for service by mail] cannot be applied to extend the time for filing as this would be an extension of the court’s jurisdiction.”).

DATED this 6th day of August, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Jason A. Williams
Eric Rasmusson
Lee M. McKenna/Mark E. Cadwallader
Charles G. Adams/Melissa Quale

Submitted: August 2, 2019