

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MT WCC 18

WCC No. 2004-1135

KAREN LANZ

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

and

BOZEMAN DEACONESS HEALTH SERVICES

Employer.

ORDER DENYING MOTION TO DISMISS

Summary: Employer moves to dismiss as untimely the claimant's petition seeking relief on account of the employer's alleged failure to provide the claimant with an employment preference as required by section 39-71-317(2), MCA (1999).

Held: The statutes of limitation cited by the employer, §§ 39-71-601, 39-72-403, and 39-71-318, MCA (1999), are inapplicable to a dispute involving the employment preference. Having cited no other applicable statute of limitation, the motion to dismiss is denied.

Topics:

Pretrial Procedure: Motion to Dismiss. A statute of limitations defense may be raised by motion to dismiss where it appears from the face of the petition that the claim is time-barred.

Limitation Periods: Employment Preference. Sections 39-71-601 and 39-72-403, MCA (1999), which provide time limitations for the filing of workers' compensation and occupational disease claims, respectively, apply only to claims for workers' compensation and occupational disease benefits and not to

disputes involving the employment preference provided in section 39-71-317(2), MCA.

Limitation Periods: Employment Preference. The limitations period in section 39-71-318, MCA (1999), applies only to proceedings over which the Department of Labor and Industry has original jurisdiction, not to proceedings over which the Workers' Compensation Court has jurisdiction, and has no application to an employment preference under section 39-71-317, MCA (1999), since disputes involving the preference must be brought in the Workers' Compensation Court, § 39-71-317(3), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-601, MCA (1999). Section 39-71-601, MCA (1999), which provides time limitations for the filing of workers' compensation claims, applies only to claims for workers' compensation benefits and not to disputes involving the employment preference provided in section 39-71-317(2), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-601, MCA (1999). Section 39-71-403, MCA (1999), which provides time limitations for the filing of occupational disease claims, applies only to claims for occupational disease benefits and not to disputes involving the employment preference provided in section 39-71-317(2), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-318, MCA (1999). The limitations period in section 39-71-318, MCA (1999), applies only to proceedings over which the Department of Labor and Industry has original jurisdiction, not to proceedings over which the Workers' Compensation Court has jurisdiction, and has no application to an employment preference under section 39-71-317, MCA (1999), since disputes involving the preference must be brought in the Workers' Compensation Court, § 39-71-317(3), MCA (1999).

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preference under section 39-71-317, MCA (1999), since disputes involving the preference must be brought in the Workers' Compensation Court, § 39-71-317(3), MCA (1999).

¶1 The matter before the Court is employer Bozeman Deaconess Health Services' (Bozeman Deaconess) motion to dismiss. Bozeman Deaconess has also filed a separate motion for judgment on the pleadings, however, that motion has not been fully briefed and has not been submitted for decision.

Factual Background

¶2 The petition alleges that Bozeman Deaconess failed to provide the petitioner, who suffers from an occupational disease, with an employment preference. The preference is found in section 39-71-317, MCA (1999),¹ which provides in relevant part:

Employer not to terminate worker for filing claim - preference - jurisdiction over dispute. . . .

(2) When an injured worker is capable of returning to work within 2 years from the date of injury and has received a medical release to return to work, the worker must be given a preference over other applicants for a comparable position that becomes vacant if the position is consistent with the worker's physical condition and vocational abilities.

(3) This preference applies only to employment with the employer for whom the employee was working at the time the injury occurred.

The Workers' Compensation Court has exclusive jurisdiction over disputes concerning the employment preference. § 39-71-317(4), MCA (1999).

¶3 According to her petition, the petitioner was released to return to work with restrictions and applied for a position within her restrictions for which she was qualified. (Amended Petition for Hearing, ¶s 18, 20.) She alleges that Bozeman Deaconess failed to hire her for the position and thereby failed to grant her the preference required by section 39-71-317(2).

Discussion

¶4 Motions to dismiss are disfavored and are granted only where the complaint clearly shows that the petitioner does not have a claim. *Steele v. McGregor*, 1998 MT 85, ¶ 9, 288 Mont. 238, 956 P.2d 1364. Where a petition on its face establishes that a claim is time-barred,

¹According to the petition, the petitioner was diagnosed with a herniated disk in the summer of 2000. Her claim was initially denied as non-compensable under the Workers' Compensation Act but later accepted under the Occupational Disease Act. Since her condition arose in 2000, the 1999 versions of the two acts apply .

the statute of limitations defense may be raised by motion to dismiss. *Beckman v. Chamberlain*, 673 P.2d 480, 482 (1983).

¶5 In its motion to dismiss in this matter, Bozeman Deaconess contends that the claim against it is time-barred by sections 39-71-601, 39-72-403,² and 39-71-318, MCA (1999). The sections provide, respectively:

39-71-601. Statute of limitation on presentment of claim -- waiver. (1)

In case of personal injury or death, all claims must be forever barred unless signed by the claimant or the claimant's representative and presented in writing to the employer, the insurer, or the department, as the case may be, within 12 months from the date of the happening of the accident, either by the claimant or someone legally authorized to act on the claimant's behalf.

(2) The insurer may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:

- (a) lack of knowledge of disability;
- (b) latent injury; or
- (c) equitable estoppel.

(3) Any dispute regarding the statute of limitations for filing time is considered a dispute that, after mediation pursuant to department rules, is subject to jurisdiction of the workers' compensation court.

39-72-403. Time when claims must be presented. (1) When a claimant seeks benefits under this chapter, the claimant's claims for benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the claimant knew or should have known that the claimant's condition resulted from an occupational disease. When a beneficiary seeks benefits under this chapter, claims for death benefits must be presented in writing to the employer, the employer's insurer, or the department within 1 year from the date the beneficiaries knew or should have known that the decedent's death was related to an occupational disease.

(2) The insurer may, upon a reasonable showing by the claimant or a decedent's beneficiaries that the claimant or the beneficiaries could not have known that the claimant's condition or the employee's death was related to an occupational disease, waive the claim time requirement up to an additional 2 years.

(3) Any dispute regarding a claim filing time is considered a dispute that, after mediation pursuant to department rule, is subject to jurisdiction of the workers' compensation court.

²Respondent cites to section 39-72-404, MCA (1999). That section, however, concerns false representations of an employee. The section respondent obviously intended to cite is section 39-72-403, MCA (1999).

39-71-318. Hearings -- rules of evidence -- conduct -- filing limits -- exception. (1) The statutory and common-law rules of evidence do not apply to a hearing before the department under this chapter. A petition for a hearing before the department must be filed within 2 years after benefits are denied.

(2) Except for a hearing before the workers' compensation court, a hearing under this chapter may be conducted by telephone or by video conference.

¶6 None of the sections cited by Bozeman Deaconess applies to an employment preference dispute. Both sections 39-71-601 and 39-72-403, MCA (1999), provide time limitations for filing claims for workers' compensation and occupational disease benefits respectively. The two-year employment preference is not a claim for benefits under either section. Section 39-71-318, MCA (1999), deals with proceedings over which the Department of Labor and Industry has original jurisdiction. It is inapplicable because the Workers' Compensation Court, not the Department, has jurisdiction over disputes involving the preference.

¶7 Having invoked inapplicable statutes of limitation, and having failed to identify one which is applicable, the motion to dismiss must be dismissed.

ORDER

¶8 Employer's Motion to Dismiss is **denied**.

¶9 This ORDER is certified as final for purposes of appeal.

¶10 Any party to this dispute may have twenty days in which to request a rehearing from this Order Denying Motion to Dismiss.

DATED in Helena, Montana, this 12th day of April, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Ms. Lisa Levert
Submitted: March 17, 2005