

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 56

WCC No. 2005-1404

CHARLES LAWRENCE

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

MAHLON DONALD HESS

Employer/Respondent.

FILED

DEC 19 2005

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ORDER DENYING MOTION TO DISMISS

Summary: The petitioner sought a recalculation of his benefits from the Uninsured Employers' Fund (UEF) based on a Form 1099 which was untimely provided to him by his employer. The Form 1099 reflected a higher wage than that used by the UEF to originally calculate the petitioner's benefits. The UEF denied the petitioner's request pursuant to § 39-71-520, MCA (2003), which requires a dispute concerning UEF benefits to be appealed to mediation within ninety days from the date of the determination.

Held: The motion to dismiss is denied. The limitations period found at § 39-71-520, MCA (2003), begins to run when the facts are such that the party seeking relief would have discovered the mistake in the exercise of ordinary diligence. *Colmore v. Uninsured Employers' Fund*, 2005 MT 239, ¶ 42, 328 Mont. 441, 121 P.3d 1007. In the present case, the employer did not provide the petitioner with the Form 1099 until months after he was required to do so. The petitioner notified the UEF of the discrepancy between his own calculation and the wages reflected on the Form 1099 within the same month of receiving it from his employer. Accordingly, the petitioner exercised reasonable diligence and to bar him from seeking a recalculation based on the employer's untimely withholding of the Form 1099 would result in the inequitable result of punishing the petitioner for the employer's dereliction. Whether the Form 1099 is an accurate reflection of the petitioner's wages while working for the employer is a factual issue that should be determined at trial.

DOCKET ITEM NO. 14

Topics:

Limitations Periods: UEF Determinations. The limitations period found at § 39-71-520, MCA (2003), begins to run when the facts are such that the party seeking relief would have discovered the mistake in the exercise of ordinary diligence. *Colmore v. Uninsured Employers' Fund*, 2005 MT 239, ¶ 42, 328 Mont. 441, 121 P.3d 1007. Where the petitioner exercises ordinary diligence in determining his correct wage and the employer has withheld evidence that may provide for a calculation different from that which was originally arrived at, § 39-71-520, MCA (2003), will not operate as a bar to consideration of the withheld evidence. Whether the wage information contained in the new evidence is an accurate reflection of the petitioner's wage is a question of fact to be determined at trial.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-520, MCA (2003). The limitations period found at § 39-71-520, MCA (2003), begins to run when the facts are such that the party seeking relief would have discovered the mistake in the exercise of ordinary diligence. *Colmore v. Uninsured Employers' Fund*, 2005 MT 239, ¶ 42, 328 Mont. 441, 121 P.3d 1007. Where the petitioner exercises ordinary diligence in determining his correct wage and the employer has withheld evidence that may provide for a calculation different from that which was originally arrived at, § 39-71-520, MCA (2003), will not operate as a bar to consideration of the withheld evidence. Whether the wage information contained in the new evidence is an accurate reflection of the petitioner's wage is a question of fact to be determined at trial.

¶1 The Uninsured Employers' Fund (UEF) has moved to dismiss the petition of Charles Lawrence (petitioner) pursuant to § 39-71-520, MCA (2003), which requires a dispute concerning UEF benefits to be appealed to mediation within ninety days from the date of the determination. Specifically, the UEF contends that the petitioner did not timely appeal the UEF's recalculation of benefits which was made on October 28, 2004. For the reasons set forth below, the UEF's motion is denied.

Standard of Review

¶2 A motion to dismiss has the effect of admitting all well-pleaded allegations in the petition. In considering the motion, the petition is construed in the light most favorable to the petitioner and all allegations of fact contained therein are taken as true. Dismissal of the petition would be proper only if the Court can conclude that the petitioner would not be entitled to relief based on any set of facts. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316.

Factual Background

¶3 On June 17, 2004, the petitioner suffered multiple injuries in the course of his employment with Mahlon Donald Hess (Hess) in Hill County, Montana. At the time of his injuries, the petitioner's employer was uninsured. Accordingly, benefits have been paid by the UEF.

¶4 The UEF initially notified the petitioner that it would pay benefits on September 16, 2004. On October 1, 2004, the petitioner provided evidence to the UEF, via letter from his counsel, that he had earned more wages while working for Hess than the figure upon which the UEF based its initial calculation. Accordingly, the petitioner requested a recalculation of benefits. The UEF recalculated the petitioner's benefits based on this new evidence and communicated this recalculation to the petitioner's counsel on October 28, 2004.

¶5 In April 2005, Hess sent a Form 1099 to the petitioner. This form reflected that the wages earned by the petitioner in 2004 were, in fact, higher than previously calculated. Within weeks after receiving the 1099 Form from Hess, the petitioner forwarded it to the UEF and requested another recalculation. The UEF denied this request based on § 39-71-520, MCA (2003), claiming that the request was untimely.

Discussion

¶6 The UEF argues that *Colmore v. Uninsured Employers' Fund*¹ controls the outcome of this case and mandates dismissal. In *Colmore*, a worker (Mr. Forgey) died while working for an uninsured employer (Colmore). Because Colmore was uninsured, the worker's widow (Mrs. Forgey) applied to the UEF for benefits. In her application, Mrs. Forgey noted that her deceased husband's weekly wage while working for Colmore was \$450.² The UEF accepted the claim. Because of a mathematical error which the UEF acknowledged, however, the UEF miscalculated Mr. Forgey's weekly wage while working for Colmore at \$300. The UEF notified Mrs. Forgey by letter dated July 27, 2001, that she was entitled to death benefits based on this erroneous calculation.³ The same notice alerted Mrs.

¹ 2005 MT 239, 328 Mont. 441, 121 P.3d 1007.

² *Id.* at ¶ 12.

³ *Id.* at ¶ 37.

Forgey that if she disagreed with the UEF's determination, she must appeal the determination within ninety days.⁴

¶7 Colmore then filed a Petition for Dispute Resolution with this Court on October 17, 2002. Trial was held on February 12, 2003. On May 1, 2003, Mrs. Forgey filed a motion to amend the wage and compensation rate paid by the UEF, requesting an increase in the average weekly wage from \$300 to \$443. The UEF stipulated that a calculation error was made and \$443 was the proper average weekly wage. Counsel for all parties submitted the issue on an agreed statement of facts and documents. This Court entered Findings of Fact, Conclusions of Law and Judgment in which it concluded, *inter alia*, that Mrs. Forgey was entitled to payment based on an average wage of \$443 per week.⁵

¶8 Colmore appealed and the Montana Supreme Court held that this Court erred in determining that a miscalculation in benefits could be corrected nearly two years after benefits were determined because § 39-71-520, MCA (2003), required a dispute concerning benefits to be appealed within ninety days. In holding that the statute of limitations found in § 39-71-520, MCA (2003), precluded the recalculation of benefits in that case, the Court found:

[T]he limitations period begins to run when the facts are such that the party seeking relief would have discovered the mistake had he exercised ordinary diligence. In the exercise of ordinary diligence UEF should have realized that it miscalculated the average weekly wage, as should have Mrs. Forgey.⁶

¶9 Such is not the situation in the present case. In this case, the facts indicate that the petitioner exercised, at a minimum, ordinary diligence in seeking a recalculation of benefits as information became available to him. When the UEF made its first determination of benefits on September 16, 2004, the petitioner provided additional evidence and sought a recalculation just fifteen days later. Likewise, when the petitioner received his Form 1099 from Hess in April, he notified the UEF and sought a recalculation the same month as his receipt of the Form 1099.

¶10 The Form 1099 ostensibly reflects the wages Hess paid to the petitioner during the taxable year 2004. This figure was known to Hess at the conclusion of this taxable year. As the employer, Hess was required to furnish the petitioner with this form no later than

⁴ *Id.*

⁵ *Id.* at ¶¶ 14-15.

⁶ *Id.* at ¶ 42 (citation omitted).

January 31, 2005.⁷ Yet, whether intentionally or negligently, Hess did not furnish the petitioner with the Form 1099 until April 2005. In either case, it would be manifestly unjust for the petitioner to suffer because of Hess's misfeasance.

¶11 It may ultimately prove to be the case, as the UEF contends, that the higher wages reflected on the Form 1099 prepared by Hess are inaccurate. This is a factual dispute, however, that is best left for trial.

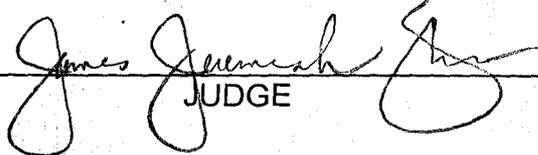
ORDER

¶12 The motion to dismiss of the Uninsured Employers' Fund is **denied**.

¶13 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 19th day of December, 2005.




JUDGE

c: Mr. Thomas J. Murphy
Mr. Joseph R. Nevin
Mr. Mahlon Donald Hess
Attachment
Submitted: October 26, 2005

⁷ For the parties' reference, the "Instructions for Payers" section of a 2004 Form 1099 are attached to this opinion as Exhibit A.

Instructions for Payers

General and specific form instructions are provided as separate products. The products you should use to complete Form 1099-MISC are the **2004 General Instructions for Forms 1099, 1098, 5498, and W-2G** and the separate specific instructions, **2004 Instructions for Form 1099-MISC**. A chart in the general instructions gives a quick guide to which form must be filed to report a particular payment. To order these instructions and additional forms, call 1-800-TAX-FORM (1-800-829-3676).

Caution: *Because paper forms are scanned during processing, you cannot file with the IRS Forms 1096, 1098, 1099, or 5498 that you print from the IRS website.*

Due dates. Furnish Copy B of this form to the recipient by January 31, 2005.

File Copy A of this form with the IRS by February 28, 2005. If you file electronically, the due date is March 31, 2005.

EXHIBIT A