

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 59

WCC No. 2006-1587

MONTANA MUNICIPAL INSURANCE AUTHORITY

Petitioner

vs.

JOHN E. ROCHE, JR.

Respondent.

ORDER DENYING RESPONDENT'S PETITION FOR REHEARING

Summary: Respondent petitioned the Court for a rehearing of his case so that he might present a constitutional challenge to § 39-71-701, MCA.

Held: Prior to the trial in this matter, Respondent moved this Court to amend his response and his pretrial contentions to include this constitutional challenge. I denied his motion at that time on the grounds that it was untimely and no justifiable excuse for its untimeliness was proffered. This Court has previously adopted the requirements of § 25-11-102, MCA, in granting a petition for a new trial and these requirements have not been met in this case. Respondent's petition is therefore denied.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.344. The grounds for granting a new trial under ARM 24.5.344 are as enumerated in § 25-11-102, MCA. Where none of the factors are present, a new trial will not be granted.

¶ 1 Respondent John E. Roche, Jr., petitions this Court for a rehearing of his case which was decided on November 14, 2007.¹ Petitioner Montana Municipal Insurance Authority (MMIA) responds, arguing that the Court should not disturb its decision.

¹ *MMIA v. Roche*, 2007 MTWCC 47.

¶ 2 In *MMIA v. Roche*, I concluded that Respondent had received a wage from his business during the time that he received temporary total disability (TTD) benefits from Petitioner.² I held that since Respondent had not received written consent from Petitioner as required by § 39-71-701(7), MCA, he was not entitled to the TTD benefits he had received.³ Respondent now asks for a rehearing in this matter because he wishes to challenge the constitutionality of § 39-71-701, MCA.⁴

¶ 3 Petitioner responds that prior to the trial in this case, Respondent moved this Court to amend his response to Petitioner's petition and to amend his contentions in the Pretrial Order. Among the amendments Respondent sought to make was to add the constitutional argument he now wishes the Court to consider.⁵ Petitioner points out that this Court had a telephonic hearing on this matter on February 23, 2007, and at that time, the Court ruled that Respondent's motion to amend was untimely and Respondent offered no justifiable excuse for the untimeliness. I therefore denied Respondent's motion to amend.⁶

¶ 4 The Minute Book entry for the February 23, 2007, telephonic hearing states that at the outset, I explained that I was inclined to deny Respondent's motion on the basis that no justification for the untimeliness of Respondent's motion to amend was provided. Respondent's counsel then explained that he did not recognize that a constitutional issue might exist until the time of the pretrial conference because he learned at that time that Petitioner intended to hire an accountant. I questioned how Petitioner's hiring of an accountant could have affected counsel for Respondent's reading of the petition so as to add a constitutional argument, as that is a purely legal argument. Respondent's counsel conceded that he would have presented the constitutional argument sooner if he had recognized it sooner. I then denied Respondent's motion to amend on the grounds that it was untimely and that the untimeliness had not been adequately justified.⁷

² *MMIA*, ¶ 52.

³ *MMIA*, ¶ 54.

⁴ Respondent's Petition for Rehearing to Challenge Constitutionality of MCA §39-71-701, Docket Item No. 33. Respondent further filed a reply brief on December 12, 2007 (Jack Roche's Reply to MMIA's Response to Petition for Rehearing; Clarification of Request, Docket Item No. 35). Neither ARM 24.5.344, which governs petitions for new trials, nor ARM 24.5.337, which governs motions for reconsideration, allow for a reply brief to be filed. Respondent did not move for leave of Court to file this brief and it therefore will not be considered.

⁵ Petitioner, Montana Municipal Insurance Authority's Response Brief Opposing Respondent's Petition for Rehearing, Docket Item No. 34.

⁶ Minute Book Hearing No. 3814, Volume XIX, Docket Item No. 20.

⁷ *Id.*

¶ 5 Respondent now seeks to have this case reheard so that he might present the constitutional argument which he was precluded from presenting in the first place by reason of his untimely attempt to amend his response and pretrial contentions without adequate justification. This Court has previously held that the grounds for granting a new trial under ARM 24.5.344 are enumerated in § 25-11-102, MCA.⁸ As it pertains to cases tried by the Court sitting without a jury, the following are grounds for granting a new trial:⁹

The . . . decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:

(1) irregularity in the proceedings of the court . . . or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

. . .

(3) accident or surprise which ordinary prudence could not have guarded against;

(4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial

¶ 6 None of these factors are present in this matter. In fact, Respondent does not even allege the presence of any of these factors in his petition for rehearing. Rather, he simply asks the Court to consider the same constitutional challenge, which I already declined to consider because it was not raised in a timely fashion. Having failed to satisfy the requirements for granting a new trial, Respondent's petition for rehearing is denied.

ORDER

¶ 7 Respondent's petition for rehearing is **DENIED**.

⁸ *Thayer v. UEF*, 1995 MTWCC 7.

⁹ § 25-11-103, MCA.

DATED in Helena, Montana, this 26th day of December, 2007.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: Oliver H. Goe
Chad E. Adams
Bernard J. Everett
Submitted: December 12, 2007