

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 12

WCC No. 2014-3490

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PHILLIP SPENCER

Petitioner

vs.

MONTANA SCHOOLS GROUP INS. AUTHORITY

Respondent/Insurer.

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ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

**Summary:** Respondent moves for summary judgment on the grounds that Petitioner did not timely file his claim under § 39-71-601(3), MCA, and that he did not timely petition this Court for trial under § 39-71-2905(2), MCA.

**Held:** Petitioner did not file his Petition for Hearing within two years of Respondent's denial of liability of his occupational disease claim, even taking into account the time the statute of limitations was tolled while his claim was in the mandatory mediation process. Thus, his case is time-barred under § 39-71-2905(2), MCA.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-601.** Summary judgment was proper where, even assuming that the two-year statute of limitations for filing a claim after benefits were denied was tolled during the pendency of the second mediation, the mediation process was concluded on the twenty-fifth day after mailing the mediator's second report, which was well over a month before the Petition for Hearing was filed.

**Limitations Periods: Petition Filing.** Summary judgment was proper where, even assuming that the two-year statute of limitations for filing a claim after benefits were denied was tolled during the pendency of the second mediation, the mediation process was concluded on the twenty-fifth

day after mailing the mediator's second report, which was well over a month before the Petition for Hearing was filed.

¶ 1 Respondent Montana Schools Group Insurance Authority (MSGIA) moves for summary judgment on the grounds that Petitioner Phillip Spencer did not file his occupational disease claim within one year, as required by § 39-71-601(3), MCA, and that he did not file his Petition for Hearing within two years of the day Respondent denied liability for his occupational disease claim, even taking into account the time the statute of limitations was tolled, as required by § 39-71-2905(2), MCA.<sup>1</sup> Spencer counters that there are issues of material fact as to whether he timely filed his occupational disease claim,<sup>2</sup> and that because MSGIA did not raise § 39-71-2905(2), MCA, as an affirmative defense under M.R.Civ.P. 8(c) in its response to the Petition for Hearing, MSGIA waived its right to assert it now.<sup>3</sup> However, by separate Order, this Court granted MSGIA's motion to amend its response to the Petition for Hearing to add this second affirmative defense.<sup>4</sup> Therefore, Spencer's argument on those grounds is moot.

#### Uncontroverted Facts

¶ 2 Spencer worked for the Libby School District from 1998 to March 2011.<sup>5</sup> He alleges he was exposed to asbestos during his entire period of employment.<sup>6</sup>

¶ 3 On May 30, 2012, Spencer filed his First Report of Injury or Occupational Disease with the Department of Labor & Industry.<sup>7</sup>

¶ 4 On June 28, 2012, MSGIA sent Spencer's attorney a letter stating, *inter alia*: "At this time, we do not have sufficient information to accept liability for Mr. Spencer's claim as an occupational disease and therefore must respectfully deny liability for Mr. Spencer's above referenced claim as an occupational disease as well."<sup>8</sup>

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<sup>1</sup> Montana Schools Group Insurance Authority's Motion for Summary Judgment (Summary Judgment Motion), Docket Item No. 16; Montana Schools Group Insurance Authority's Brief in Support of Motion for Summary Judgment (Summary Judgment Brief) at 3-5, Docket Item No. 17.

<sup>2</sup> Petitioner's Response to Respondent's Motion for Summary Judgment at 4, Docket Item No. 28.

<sup>3</sup> *Id.* at 3-4 (incorporating by reference Petitioner's Response to Respondent's Motion to Amend Response to Petition, Docket Item No. 27).

<sup>4</sup> *Spencer v. Montana Sch. Group Ins. Auth.*, 2015 MTWCC 11.

<sup>5</sup> Spencer Dep. 51:21 – 52:23 (attached to Summary Judgment Brief); Petition for Hearing at 1-2, Docket Item No. 1.

<sup>6</sup> Petition for Hearing at 1-2; see Spencer Dep. 51:21 – 52:23.

<sup>7</sup> First Report of Injury or Occupational Disease, Spencer Dep., Ex. 1.

<sup>8</sup> Summary Judgment Brief, Ex. 1 at 1.

¶ 5 On June 24, 2014, Spencer filed his Petition for Workers' Compensation Mediation Conference with the Mediation Unit of the Department of Labor & Industry's Workers' Compensation Claims Assistance Bureau. Spencer stated that his dispute with MSGIA was: "The Respondent has failed to accept liability for the Claimant's occupational disease claim and payment of impairment and medical benefits."<sup>9</sup> The Mediation Unit mailed the mediator's first Mediation Report & Recommendation on August 13, 2014.<sup>10</sup>

¶ 6 On August 19, 2014, the Mediation Unit mailed a Notice of Reconvening of Telephone Mediation Conference to the parties. The issues to be determined at that mediation were: "Mr. Spencer's entitlement [to] permanent total disability (PTD) benefits."<sup>11</sup> On September 18, 2014, the Mediation Unit mailed the mediator's second Mediation Report & Recommendation.<sup>12</sup>

¶ 7 On December 11, 2014, Spencer filed his Petition for Hearing, contending that he has a compensable occupational disease and that he is entitled to medical benefits, permanent total disability benefits, and an impairment award.<sup>13</sup>

#### Law and Analysis

¶ 8 The 2009 version of the Workers' Compensation Act governs this case because that was the law in effect on Spencer's last day of employment.<sup>14</sup>

¶ 9 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.<sup>15</sup> The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 10 Section 39-71-2905(2), MCA, states, "A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied."

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<sup>9</sup> Summary Judgment Brief, Ex. 3.

<sup>10</sup> Summary Judgment Brief, Ex. 4 at 2.

<sup>11</sup> Summary Judgment Brief, Ex. 6 at 3-4.

<sup>12</sup> Summary Judgment Brief, Ex. 7 at 2.

<sup>13</sup> Petition for Hearing at 1, 4.

<sup>14</sup> *Hardgrove v. Transp. Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)).

<sup>15</sup> ARM 24.5.329(2); *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

¶ 11 In *Preston v. Transportation Insurance Co.*, the Court held that this statute of limitations is tolled during the pendency of the mandatory mediation process.<sup>16</sup> In *Hardie v. Montana State Fund*, this Court ruled that this tolling period is calculated from the date the mediation petition is filed through the deadline for both parties to respond to the mediator's recommendation which, under § 39-71-2411(7), MCA, is within 25 days following the mailing of the mediator's report and recommendation.<sup>17</sup>

¶ 12 The undisputed facts show that Spencer did not file his Petition for Hearing within two years after MSGIA denied liability for his occupational disease claim, even taking into account the tolling of the statute of limitations during the mediation process. MSGIA denied liability for his claim on June 28, 2012. Assuming *arguendo* that the statute of limitations was tolled during the pendency of the second mediation, the mediation process lasted from June 24, 2014, until October 13, 2014, which was the twenty-fifth day after the Mediation Unit mailed the mediator's second Mediator's Report and Recommendation. This period was 112 days. Thus, the last day for Spencer to timely file his Petition for Hearing with this Court was Monday, October 20, 2014.<sup>18</sup> However, Spencer did not file his Petition for Hearing until December 11, 2014. Therefore, his claim is barred by the statute of limitations at § 39-71-2905(2), MCA. MSGIA's summary judgment motion is therefore granted.

¶ 13 Since Spencer's Petition for Hearing is time-barred under § 39-71-2905(2), MCA, this Court need not address MSGIA's alternative argument that Petitioner's claim is untimely under § 39-71-601(3), MCA.

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<sup>16</sup> *Preston*, 2004 MT 339, ¶ 37, 324 Mont. 225, 102 P.3d 527.

<sup>17</sup> *Hardie*, 2012 MTWCC 2, ¶ 21 (citing *Preston*, 2004 MT 339, and *Fleming v. Int'l Paper Co.*, 2005 MTWCC 34).

<sup>18</sup> See *Bosch v. Town Pump, Inc.*, 2004 MT 330, ¶¶ 8-11, 324 Mont. 138, 102 P.3d 32.

ORDER

¶ 14 Respondent's motion for summary judgment is **granted**.

¶ 15 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 10<sup>th</sup> day of June, 2015.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Laurie Wallace/Jon Heberling/Ethan Welder/Dustin Leftridge  
Leo S. Ward

Submitted: May 4, 2015

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