IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 41

WCC No. 2010-2598

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION AND GRANTING RESPONDENT'S MOTION TO STRIKE

Summary: Petitioner moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, contending that the Court erred in refusing to grant her relief on an issue presented for determination where the Court had previously orally ruled and indicated that it would set forth the ruling in its written findings of fact, conclusions of law, and judgment. Respondent, while disagreeing with the Court's oral ruling, agreed with Petitioner that the Court should grant reconsideration and set forth its rationale for the oral ruling. Respondent moved to strike Petitioner's reply brief on the grounds that a reply brief is not permitted under ARM 24.5.337.

Held: Petitioner's motion for reconsideration is well-taken. The Court overlooked its previous ruling on the issue when it published its Findings of Fact, Conclusions of Law and Judgment, and the parties are entitled to a written order setting forth the Court's rationale. Respondent's motion to strike Petitioner's reply brief is also well taken and is consistent with this Court's previous rulings.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.337.** Since ARM 24.5.337 does not provide for a reply brief, the Court granted Respondent's motion to strike Petitioner's reply brief to her motion for reconsideration.

Procedure: Reconsideration. Since ARM 24.5.337 does not provide for a reply brief, the Court granted Respondent's motion to strike Petitioner's reply brief to her motion for reconsideration.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.29.1409. Petitioner's challenge to the validity of ARM 24.29.1409 is in line with the cases she cites. Most pertinently, in another case, the Montana Supreme Court held that a rule which attempted to engraft an additional statutory provision was invalid. If the legislature had envisioned a time limitation for § 39-71-704, MCA (1991), it would have included it in the statute. Therefore the version of ARM 24.29.1409 which was in effect at the time of Petitioner's industrial injury is invalid insofar as it attempts to engraft a time limitation upon § 39-71-704, MCA (1991).

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Petitioner's challenge to the validity of ARM 24.29.1409 is in line with the cases she cites. Most pertinently, in another case, the Montana Supreme Court held that a rule which attempted to engraft an additional statutory provision was invalid. If the legislature had envisioned a time limitation for § 39-71-704, MCA (1991), it would have included it in the statute. Therefore the version of ARM 24.29.1409 which was in effect at the time of Petitioner's industrial injury is invalid insofar as it attempts to engraft a time limitation upon § 39-71-704, MCA (1991).

Statutes and Statutory Interpretation: Validity of Related Rules. Petitioner's challenge to the validity of ARM 24.29.1409 is in line with the cases she cites. Most pertinently, in another case, the Montana Supreme Court held that a rule which attempted to engraft an additional statutory provision was invalid. If the legislature had envisioned a time limitation for § 39-71-704, MCA (1991), it would have included it in the statute. Therefore the version of ARM 24.29.1409 which was in effect at the time of Petitioner's industrial injury is invalid insofar as it attempts to engraft a time limitation upon § 39-71-704, MCA (1991).

Benefits: Travel Expenses. Respondent authorized the medical treatment for which Petitioner incurred and sought reimbursement for travel expenses. Although Respondent argued that the travel expenses were not reasonable expenses, the Court concluded that since the medical treatment itself was reasonable, then the travel Petitioner

undertook in order to avail herself of the approved medical treatment was likewise reasonable.

Uninsured Employers' Fund: Reasonableness of Claims Handling. The Court concluded the UEF unreasonably denied reimbursing Petitioner for travel expenses where the only justification the UEF offered until this Court denied the UEF summary judgment on the issue was an interpretation of case law which the Court found unreasonable. While an insurer may have more than one basis for a denial and is not necessarily expected to set forth every potential justification for denial at the time it denies a claim, in the present case, the only apparent reason for the UEF's denial of the travel reimbursement was the UEF's reliance on an incorrect version of the WCA. Applying the wrong year of the WCA is not a reasonable error, and subsequently searching for alternate justifications for the denial does not erase the unreasonableness of the UEF's denial.

¶ 1 On February 16, 2012, I entered my Findings of Fact, Conclusions of Law and Judgment in this matter.[1] On February 24, 2012, Petitioner Ginger Dostal moved for reconsideration. Dostal noted that in my Conclusions of Law, I refused to consider her argument that Respondent Uninsured Employers' Fund (UEF) unreasonably denied reimbursement of certain travel expenses on the grounds that Dostal's entitlement to reimbursement of travel expenses was not before the Court.[2] In moving for reconsideration, Dostal draws the Court's attention to an earlier proceeding in which I granted Dostal summary judgment on the issue of travel reimbursement.[3]

¶ 2 The UEF responded to Dostal's motion for reconsideration, stating that while it disagrees with the Court's previous grant of summary judgment, it nonetheless agrees with Dostal's position that the Court should have included its rationale in the decision.[4] The UEF further contends that insufficient evidence supports a finding that the UEF acted unreasonably regarding travel pay. The UEF argues that it followed the applicable statute and administrative rule when it determined that Dostal was not entitled to travel pay reimbursement.

---

[1] *Dostal v. Uninsured Employers' Fund*, 2012 MTWCC 5.

[2] *Dostal*, ¶ 59.

[3] Petitioner's Motion for Reconsideration Regarding Travel Pay Issues and Memorandum in Support, Docket Item No. 89 (*citing* Minute Book Hearing No. 4263, Docket Item No. 64).

[4] Uninsured Employers' Fund's Response to Petitioner's Motion for Reconsideration, Docket Item No. 90.

¶ 3 Dostal filed a reply brief on February 28, 2012.[5] The UEF moved to strike this brief, arguing that this Court has previously held that ARM 24.5.337 does not allow for the filing of a reply brief.[6] The UEF's motion to strike is well-taken and I therefore do not consider Dostal's reply brief in resolving her motion for reconsideration.

¶ 4 On April 12, 2011, I orally ruled that Dostal was entitled to the travel expenses she claimed.[7] The issue remains as to whether the UEF's denial of certain travel expenses is unreasonable as Dostal contends. In this Order, I will first set forth my rationale for my oral ruling granting Dostal's request for travel expenses and I will then address whether the UEF's denial of these expenses was reasonable.

Dostal's Entitlement to Reimbursement of Travel Expenses

¶ 5 In her Petition for Trial, Dostal represented that on March 15, 2010, she submitted a demand for travel expenses to the UEF which the UEF had not paid. The dates of travel ranged from August 5, 2004, through February 1, 2010, and the total claimed amounted to $2,796.25.[8] Dostal contended that the UEF's refusal to pay these travel expenses was unreasonable.[9] She asked the Court to order the UEF to pay these benefits and to conclude that she is entitled to her costs, attorney fees, and a penalty against the UEF.[10]

¶ 6 The UEF admitted that it denied Dostal's March 15, 2010, demand for reimbursement of travel expenses. The UEF contended that on April 22, 2010, a Department mediator issued an order dismissing Dostal's complaint, and that Dostal failed to timely appeal the order within the statutory time period of § 39-71-520(2), MCA.[11] The UEF contended that this Court lacks subject matter jurisdiction over the issue of travel expense reimbursement since Dostal neither appealed the mediator

[5] Petitioner's Reply Memorandum in Support of Motion for Reconsideration Regarding Travel Pay Issues, Docket Item No. 92.

[6] Uninsured Employers' Fund's Rule 12(f) Motion to Strike Petitioner's Reply Memorandum in Support of Petitioner's Motion for Reconsideration Re: Travel Pay, Docket Item No. 94 (*citing Fleming v. Int'l Paper Co.*, 2005 MTWCC 57, ¶ 2).

[7] Minute Book Hearing No. 4263.

[8] Petition for Trial, Docket Item No. 1, at 6.

[9] Petition for Trial at 6-7.

[10] Petition for Trial at 8.

[11] Uninsured Employers' Fund's Response to Petition for Hearing, Docket Item No. 4, ¶¶ 27, 28.

determination of January 2, 2009, nor the mediator's order of dismissal of April 22, 2010, within 60 days as required by § 39-71-520(2), MCA.[12]

¶ 7 On November 26, 2010, the UEF filed a motion for partial summary judgment.[13] On November 30, 2010, the UEF filed an amended motion for partial summary judgment.[14] Pertinent to the present Order, the UEF sought summary judgment on the issue of Dostal's entitlement to travel expense reimbursement. The UEF argued that Dostal's failure to timely appeal the determination and order of dismissal of the mediator pursuant to § 39-71-520(2), MCA, made the UEF's denial final.[15] The UEF conceded that § 39-71-520, MCA, did not exist at the time of Dostal's injury. However, the UEF argued that § 39-71-520, MCA, is nonetheless applicable because the statute is procedural.[16]

¶ 8 Dostal responded that the UEF is mistaken in relying on the current version of § 39-71-520, MCA. Relying on *Fleming v. Int'l Paper Co.*,[17] Dostal argues that the 1991 statutes apply to her claim because that law was in effect at the time of her industrial injury.[18]

¶ 9 On December 22, 2010, I denied the UEF's motion for partial summary judgment. In that Order, I held that *Fleming* "is unambiguous, and [is] unambiguously applicable to the present case."[19]

¶ 10 On January 10, 2011, Dostal moved for partial summary judgment. Among other issues, Dostal sought summary judgment in her favor on the travel pay issue.[20] Dostal contended that the UEF based its denial of her travel expenses request on the grounds that it should not have to pay travel expenses "when comparable medical treatment was

---

[12] *Id*. ¶ 41.

[13] Uninsured Employers' Fund's Motion for Partial Summary Judgment and Brief in Support Thereof, Docket Item No. 5.

[14] Uninsured Employers' Fund's Amended Motion for Partial Summary Judgment and Brief in Support Thereof (Summary Judgment), Docket Item No. 7. (Submitted per Order of the Court for failure to include page numbers and footers in initial submission.)

[15] Summary Judgment at 3.

[16] Summary Judgment at 3-4.

[17] *Fleming*, 2008 MT 327, ¶¶ 26, 28, 346 Mont. 141, 194 P.3d 77.

[18] *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[19] *Dostal v. Uninsured Employers' Fund*, 2010 MTWCC 38, ¶ 21.

[20] Petitioner's Motion for Partial Summary Judgment and Memorandum in Support (Opening Brief), Docket Item No. 25.

available 'near where Petitioner resided at the time.'"[21] Dostal argued that the 1991 workers' compensation statutes do not contain any provision which would allow the UEF to deny reimbursement of these travel expenses.[22] Dostal argues that the statute applicable to her claim is § 39-71-704(1)(c), MCA (1991), which states, in pertinent part:

> (c) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury pursuant to rules adopted by the department. . . .

¶ 11 Dostal argues that while later versions of § 39-71-704(1), MCA, provide that travel expenses are not allowed for travel outside the community in which the worker resides if comparable medical treatment is available within the community, the 1991 version of the statute does not contain this exception.[23] Dostal notes that in response to her discovery request that the UEF state the factual and legal bases for its failure to pay her travel expenses, the UEF responded that it denied these expenses because, "it was unreasonable to pay when comparable medical treatment was available near where Petitioner resided at the time. See Section 39-71-704(1)(c), MCA (1991)."[24] However, although the UEF claimed in its discovery response that it was relying on the 1991 version of the statute, Dostal posits that the UEF must be relying on an inapplicable later version of the statute.[25]

¶ 12 The UEF denies that its only basis for denying Dostal's claim for travel expenses was because comparable medical treatment was available near where Dostal resided at the time. The UEF asserted that it also denied payment because Dostal did not timely request reimbursement as provided for in ARM 24.29.1409(2)(e),[26] which states:

> (2) For claims arising during the period July 1, 1989, through June 30, 1993, . . .
>
> . . . .
>
> (e) [c]laims for reimbursement of travel expenses must be submitted within 90 days of the date the expenses are incurred, on a form

---

[21] Opening Brief at 5.

[22] *Id.*

[23] Opening Brief at 6.

[24] Opening Brief at 2-3.

[25] Opening Brief at 6.

[26] Response to Petitioner's Motion for Partial Summary Judgment and Uninsured Employers' Fund's Cross Motion for Partial Summary Judgment and Brief in Support Thereof (Response Brief), Docket Item No. 28, at 2-3.

> furnished by the insurer. Claims for reimbursement that are not submitted within 90 days may be denied by the insurer.

¶ 13 The UEF argues that under ARM 24.29.1409(2)(e), it properly denied Dostal's claims for travel reimbursement except for her claim of travel expenses for July 13, 2007, as that claim was timely made within 90 days of occurrence.[27] However, the UEF further argues that it correctly denied all the travel expenses at issue because § 39-71-704(1)(c), MCA (1991), provides that an insurer need only reimburse a worker for "reasonable" travel expenses, and that it was neither reasonable for Dostal to submit these expenses more than 90 days from the date they were incurred, nor were the expenses reasonable because comparable medical treatment was available to Dostal within the community in which she resided.[28]

¶ 14 In reply, Dostal argues that no comparable medical treatment was available to her in the community in which she resided, and that the travel expenses she incurred were for medically necessary treatment and, in one instance, to attend an impairment evaluation requested by the UEF.[29] Dostal further argues that the UEF is reading requirements into § 39-71-704, MCA (1991), and ARM 24.29.1409 which do not exist when it insists that travel is only reimbursed if no comparable care is available near where the claimant resides or in her community.[30]

¶ 15 Dostal further noted that the UEF, in its response brief to her motion, claimed for the first time that it did not pay Dostal's requested travel expenses because she did not request the reimbursement as set forth in ARM 24.29.1409. Dostal alleges that when she inquired of the UEF regarding its form for travel pay reimbursement, she was informed that the UEF had no form and that it did not pay travel expenses. Dostal later submitted travel reimbursement requests to the UEF using forms she obtained from Montana State Fund.[31]

¶ 16 Dostal acknowledges that the version of ARM 24.29.1409 which was in effect at the time of her industrial injury contained the 90-day time limit the UEF cites, although she further notes that the 1991 version of § 39-71-704, MCA, did not contain a 90-day

---

[27] Response Brief at 3-4.

[28] *Id*.

[29] Petitioner's Reply Memorandum in Support of Motion for Partial Summary Judgment and Answer Memorandum Opposing UEF's Cross Motion for Partial Summary Judgment (Reply Brief), Docket Item No. 38, at 2-3.

[30] Reply Brief at 4.

[31] *Id*.

time limit and the statute did not do so until 2001. Dostal argues that the time limitation found in the applicable version of ARM 24.29.1409 is invalid because an administrative rule cannot be more restrictive than the statutory language it implements.[32]

¶ 17 Dostal draws the Court's attention to three Montana Supreme Court decisions to support her position. In *Bell v. Dep't of Licensing*, the court invalidated an administrative rule which purported to set instructor requirements in order for a barber college to be approved by the applicable licensing board where the related statutes made no such requirements. Citing previous cases, the court set forth the following rule:

> [A]dministrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute" or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature.

In considering the challenge to the rule in *Bell*, the court concluded that while the rule did not contradict any statutes, it engrafted additional requirements which were not envisioned by the legislature. Therefore, the court held that the rule was void and unenforceable.[33]

¶ 18 In *Michels v. Dep't of Soc. and Rehab. Serv.*, the court invalidated a rule which set a five-day time limit on applying for certain medical benefits where the enacting statute had no time limit. The court held that an administrative regulation which added a five-day time limit to an application for benefits "changes the statute" and it further held that the district court had erred in concluding that the five-day rule did not engraft an additional requirement on the statutory provision.[34]

¶ 19 Finally, in *McPhail v. Mont. Bd. of Psychologists*, the court held that a rule was "out of harmony" with its enacting statute and therefore invalid where the rule imposed an additional requirement for licensure which, the court noted, the legislature "chose not to impose" when it drafted the statute.[35]

¶ 20 The challenge Dostal makes to the validity of ARM 24.29.1409 is clearly in line with the cases she cites. Most pertinently, *Michels* dealt with a time limitation which

---

[32] *Id.*

[33] *Bell*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979). (Internal citations omitted.)

[34] *Michels*, 187 Mont. 173, 177-78, 609 P.2d 271, 273-74 (1980).

[35] *McPhail*, 196 Mont. 514, 516-17, 640 P.2d 906, 907-08 (1982).

was set forth in a rule but not in the enacting statute. In that case, the Montana Supreme Court held that adding a time limitation engrafts an additional requirement onto a statutory provision, thereby invalidating the rule. In the case of ARM 24.29.1409, if the legislature had envisioned a time limitation, it would have included it in § 39-71-704, MCA (1991). The fact that the legislature later added a time limitation to the 2001 version of the statute further demonstrates that when the legislature decided that a time limit should be included in the statute, it did so. I therefore conclude that the version of ARM 24.29.1409 which was in effect at the time of Dostal's industrial injury is invalid insofar as it attempts to change § 39-71-704, MCA (1991), by engrafting a time limitation upon it.

¶ 21 As to the UEF's argument that Dostal's requested travel reimbursement is not a "reasonable" reimbursement under the statute, the fact remains that the UEF authorized the treatment Dostal received for which she has requested travel expense reimbursement. Surely if the treatment itself was reasonable, then the travel necessary for obtaining this treatment was reasonably undertaken. I therefore conclude Dostal is entitled to the reimbursement of the travel expenses she seeks.

Whether the UEF's Denial of Dostal's Travel Expenses Was Unreasonable

¶ 22 While I have concluded the UEF is liable for payment of the travel expenses Dostal has claimed, Dostal further asks the Court to find that the UEF's denial of these expenses was unreasonable.

¶ 23 As Dostal has alluded to in her briefs, the UEF's justification for its denial has been a moving target. I have found none of the UEF's arguments persuasive. Although I can readily envision situations in which reasonable minds can differ on the applicability or interpretation of case law, such is not the situation in the present case. UEF's argument regarding the applicability of *Fleming* is neither a correct nor a reasonable interpretation of applicable case law.[36] Furthermore, there is no indication that the UEF offered any other bases for its denial of Dostal's request until after I denied its motion for summary judgment on this issue. Certainly, an insurer may have more than one basis for a denial, and an insurer is not necessarily expected to set forth each and every one of its potential justifications for denial at the time that it denies a claim. However, in the present case, the facts indicate that the sole reason for the UEF's denial of Dostal's requested travel reimbursement at the time that it denied Dostal's request was the UEF's reliance on the incorrect version of the Workers' Compensation Act. Given the unambiguity of *Fleming*, I found the UEF's defense in arguing that *Fleming* was

[36] *See Dostal,* 2010 MTWCC 38.

somehow inapplicable in this particular instance to be a thin defense at best. Applying the wrong year of the Workers' Compensation Act is not a reasonable error, and the unreasonableness of the UEF's decision is not erased by its subsequent search for alternate justifications for the denial. I therefore conclude the UEF was unreasonable when it refused to reimburse Dostal for the travel expenses she incurred in obtaining her medical treatment.

JUDGMENT

¶ 24 Petitioner's motion for reconsideration is **GRANTED**.

¶ 25 Respondent's motion to strike is **GRANTED**.

DATED in Helena, Montana, this 5th day of November, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: February 24, 2012