

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 81

WCC No. 9808-8038

JEFFERY LEE BURNER

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

MARK NEWSOM, d/b/a ROCKY MOUNTAIN ROOFING

Employer, Third-Party Respondent.

ORDER DENYING MOTION TO DISMISS

Summary: Uninsured Employers' Fund denied liability for claim, asserting claimant was not employed. Claimant pursued mediation, followed by a petition to the WCC after the mediation failed. One week prior to trial week, the UEF accepted liability for the injury, but disputed the amount of benefits claimant sought. The UEF moved to dismiss the petition because the precise issues of entitlement to TTD and benefit rate had not been mediated. The claimant objected.

Held: Under section 39-71-2408(1), MCA, mediation is a prerequisite to filling a petition with the WCC. Where an insurer (or the UEF) has denied liability for a claim, however, the claimant is prevented from mediating specific issues lying behind the denial, such as benefit rate or entitlement to particular benefits. Requiring dismissal and return to mediation if an insurer accepts liability would raise the possibility of multiple dismissals and mediations, which would contravene the public policy of speedy entitlement to benefits set out in section 39-71-105, MCA. Motion to dismiss denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2408(1), MCA. Under section 39-71-2408(1), MCA, mediation is a prerequisite to filling a petition with the WCC. Where an insurer (or the UEF) has denied liability for a claim, however, the claimant is prevented from mediating

specific issues lying behind the denial, such as benefit rate or entitlement to particular benefits. In those circumstances, WCC refused to dismiss pending petition after UEF accepted liability despite UEF's argument that mediation had not been conducted on specific issues left in the case. Requiring dismissal and return to mediation if an insurer accepts liability would raise the possibility of multiple dismissals and mediations, which would contravene the public policy of speedy entitlement to benefits set out in section 39-71-105, MCA.

Mediation. Under section 39-71-2408(1), MCA, mediation is a prerequisite to filling a petition with the WCC. Where an insurer (or the UEF) has denied liability for a claim, however, the claimant is prevented from mediating specific issues lying behind the denial, such as benefit rate or entitlement to particular benefits. In those circumstances, WCC refused to dismiss pending petition after UEF accepted liability despite UEF's argument that mediation had not been conducted on specific issues left in the case. Requiring dismissal and return to mediation if an insurer accepts liability would raise the possibility of multiple dismissals and mediations, which would contravene the public policy of speedy entitlement to benefits set out in section 39-71-105, MCA.

¶1 The putative employer in this case is uninsured and claimant submitted his claim for compensation to the Uninsured Employers' Fund (UEF). The UEF denied liability, alleging that he was not employed. The matter then went to mediation, which failed. Following mediation, on August 11, 1998, claimant filed his Petition for Hearing. The petition requested that the Court determine that the UEF is liable for his claim and that the UEF is responsible for medical benefits and temporary total disability benefits "as may be provided by law."

¶2 On August 12, 1998, the Court issued its Scheduling Order fixing pretrial deadlines and setting the case for trial during the week of November 9, 1998, in Helena.

¶3 On November 2, 1998, one week prior to the scheduled trial week, the UEF filed a motion to dismiss. The motion states that by letter dated October 19, 1998, the UEF accepted liability for claimant's injury and would "pay benefits . . . in accordance with the provisions of the Workers' Compensation Act and the Administrative Rules of Montana." Uef's Motion to Dismiss at 1. It goes on to state that the UEF disputes the amount of temporary total disability (TTD) benefits sought by the claimant and that the prior mediation did not address claimant's benefit rate. Accordingly, the motion seeks to dismiss claimant's TTD request on the ground that, based on a failure to mediate, the Court lacks jurisdiction to determine the TTD rate.

¶4 On November 2, 1998, the Court participated in the pretrial conference with the intent of resolving the motion to dismiss and other pretrial motions. At the time of the conference,

I was unpersuaded and unimpressed with the UEF's position regarding its motion. I orally denied the motion, to be followed by my written order.

¶5 Section 39-71-2408(1), MCA, mandates mediation as a prerequisite to the filing of a petition with this Court. The section provides:

39-71-2408. Mandatory, nonbinding mediation.

(1) Except as otherwise provided, in a dispute arising under chapter 71 or 72 of this title, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court.

The UEF would have the Court interpret the section as requiring claimant to mediate each and every separate issue that may arise from a claim as a prerequisite to litigating each issue. Its interpretation would permit the UEF, and any insurer, (1) to deny liability, force claimant to mediate that issue, force claimant to then file a petition, admit liability at or shortly before trial, and, based on the admission, obtain dismissal of the petition; (2) to thereafter argue that the claimant was not temporarily totally disabled, force claimant to seek new mediation, force claimant to file a second petition requesting that the Court determine that claimant was TTD, shortly before trial admit that claimant was temporarily totally disabled, and, based on its admission, obtain dismissal of the second petition; (3) to then dispute the benefit rate, force claimant to mediation with respect to the rate and to file a third petition, shortly before trial admit the benefit rate, and, based on its admission, obtain dismissal of the third petition; and (4) to then argue that TTD benefits were due for a shorter time than asserted by claimant, force claimant to a fourth mediation, and force a fourth petition.

¶6 The mediation requirement does not countenance or permit the slash and burn advocacy urged by the UEF. How could claimant get beyond the UEF's denial to specifically mediate other issues? In denying the claim altogether, the UEF did not have to address claimant's disability, his disability rate or the duration of his disability. How then could claimant meaningfully request a mediator to address them? When the UEF denied the claim, it denied claimant's entitlement to **all** benefits. When the claimant sought mediation, TTD, medical and all other benefits were put in controversy.

¶7 The UEF's insistence that mediation nevertheless must specifically address benefits issues despite its unqualified denial of liability flies in the face of one of the most basic principles underlying Montana's Workers' Compensation.

39-71-105. Declaration of public policy.

For the purposes of interpreting and applying Title 39, chapters 71 and 72, the following is the public policy of this state:

...

(3) Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering. **Claimants should be able to speedily obtain benefits**, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities. [Emphasis added.]

¶8 The UEF's motion is without merit and is **denied**.

DATED in Helena, Montana, this 6th day of November, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Thomas A. Budewitz

Mr. Patrick A. Trammelle

Mr. Mark Newsom

Submitted: November 2, 1998