

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 65

WCC No. 9407-7086

CINDY L. HILL

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

FROSTY'S DRIVE-IN

Employer.

ORDER DISMISSING WITHOUT PREJUDICE

The petition commencing this proceeding is dated July 5, 1994, and was filed on July 6, 1994. Petitioner alleges that she is permanently partially disabled and thereby entitled to rehabilitation benefits. Rehabilitation benefits are governed by section 39-71-2001, MCA. Subsection (5) of that section provides that a claimant "may not receive temporary total or biweekly permanent partial disability benefits and rehabilitation benefits during the same period of time." In her statement of issues the petitioner seeks a determination concerning her entitlement to rehabilitation benefits. She does not make any alternative request for permanent partial disability benefits.

The respondent has moved to dismiss the petition on account of petitioner's failure to complete the mediation process required by section 39-71-2401, MCA. In its supporting brief the respondent represents that a mediation conference concerning rehabilitation benefits was held on July 5, 1994, but that the mediator issued no recommendation at that time. The petition was executed and forwarded to the Court on the same day as the conference.

Mediation is mandatory. Section 39-71-2401 (1), MCA (1993), provides:

39-71-2401. Disputes - jurisdiction - settlement requirements - mediation. (1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the

mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

Other provisions governing mediation preclude the filing of a petition prior to the issuance of the mediator's recommendation. Section 39-71-2408, MCA 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.

(2) The resolution recommended by the mediator is without administrative or judicial authority and is not binding on the parties. [Emphasis added.]

Section 39-71-2411 (6), MCA, provides:

(6) A party shall notify the mediator within 45 days of the mailing of his report whether the party accepts the mediator's recommendation. If either party does not accept the mediator's recommendation, the party may petition the workers' compensation court for resolution of the dispute.

Petitioner has not responded to the respondent's motion. The Court therefore accepts the respondent's factual representations. See ARM 24.5.316(4). Those representations show that the petition filed in this matter is premature. The petition must therefore be, and is hereby, **dismissed without prejudice**. Petitioner may refile her petition upon completion of the mediation process.

DATED in Helena, Montana, this 26th day of July, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Howard Toole
Ms. Ann E. Clark