IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 9

WCC No. 9812-8125

CHARLES C. HODGE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

FIGGINS SAND & GRAVEL, INCORPORATED

Employer.

ORDER ON MOTION TO DISMISS

Summary: Petitioner, who seeks permanent total disability benefits (PTD) and, in the alternative, permanent partial disability benefits (PPD), failed to mediate his PPD claim. The insurer moves to dismiss for failure to comply with mediation requirements.

Held: Section 39-71-2401, MCA requires that a dispute concerning benefits be mediated before it is brought to the WCC. The claim for PPD benefits in the alternative should have been mediated. Alternative claims for PTD and PPD benefits are distinguished from a claim for benefits where the insurer denies all liability, thereby putting everything at issue and frustrating mediation of individual benefits issues. Compare *Burner v. UEF*, 1998 MTWCC 81. The WCC will stay litigation of the PTD claim to permit mediation of the PPD claim; otherwise, the PPD claim will be dismissed.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2401, MCA.** Where claimant filed a petition asking for PTD benefits, or PPD benefits in the alternative, the claim for PPD benefits is subject to dismissal where not mediated. Alternative claims for PTD and PPD benefits are distinguished from a claim for benefits where the insurer denies all liability, thereby putting everything at issue and frustrating mediation of individual benefits issues. Compare *Burner v. UEF*, 1998 MTWCC 81. The WCC will stay litigation of the PTD claim to permit mediation of the PPD claim; otherwise, the PPD claim will be dismissed.

Mediation. Where claimant filed a petition asking for PTD benefits, or PPD benefits in the alternative, the claim for PPD benefits is subject to dismissal where not mediated as required by section 39-71-2401, MCA. Alternative claims for PTD and PPD benefits are distinguished from a claim for benefits where the insurer denies all liability, thereby putting everything at issue and frustrating mediation of individual benefits issues. Compare *Burner v. UEF*, 1998 MTWCC 81. The WCC will stay litigation of the PTD claim to permit mediation of the PPD claim; otherwise, the PPD claim will be dismissed.

¶1 Petitioner brings this action for permanent total disability benefits (PTD) and, alternatively, permanent partial disability benefits (PPD). He mediated his PTD claim but not his PPD claim. Respondent moves to dismiss for failure to comply with mediation requirements.

¶2 Respondent's motion is well taken. Section 39-71-2401(1), MCA, 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.

Section 39-71-2408, MCA, provides that the mediator shall mediate "any issue concerning benefits."

¶3 The petition in this case involves two issues and two disputes, although they are in the alternative. Petitioner could have requested mediation of both. This is unlike the case where the insurer denies all liability, thereby putting everything at issue and frustrating mediation of individual benefit questions. *Compare Burner v. UEF*, 1998 MTWCC 81 (11/6/98).

¶4 The Court dislikes piecemeal litigation. Therefore, if petitioner desires, the Court will stay the current proceeding until the PPD issue can be mediated. Once mediated, the stay can be lifted and the case can then proceed with respect to both issues. Lacking a request by petitioner, the Court will dismiss the PPD claim and the case will proceed as scheduled. Any request for a stay must be filed within 14 days of this Order.

¶5 SO ORDERED.

DATED in Helena, Montana, this 29th day of January, 1999.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Charles F. Angel
Mr. Greg E. Overturf