

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 63

WCC No. 9801-7897

ROBERT KEMP

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer for

SLETTEN CONSTRUCTION COMPANY

Employer.

ORDER LIMITING ISSUES

Summary: Insurer sought order that litigation over implementation of rehabilitation plan proposed by claimant was premature because threshold question existed regarding whether claimant suffered a wage loss entitling him to rehabilitation benefits.

Held: Section 39-71-1006, MCA (1995) requires actual wage loss as a result of an injury as a prerequisite to entitlement to rehabilitation benefits. If a wage loss exists, the section requires development of a rehabilitation plan and approval or disapproval by the insurer. While the Court ultimately has jurisdiction to resolve a dispute over a rehabilitation plan, or to compel the insurer to follow statutory procedures relating to development of a plan, those questions are properly deferred until resolution of the threshold question, whether claimant has a wage loss. Request that Court approve a specific plan is dismissed as premature.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-1006, MCA (1995). Section 39-71-1006, MCA (1995) requires actual wage loss as a result of an injury as a prerequisite to entitlement to rehabilitation benefits. If a wage loss exists, the section requires development of a rehabilitation plan and approval or disapproval by the insurer. While the Court ultimately has jurisdiction to resolve a dispute over a rehabilitation plan, or to compel the insurer to follow statutory procedures relating to development of a plan, those questions are properly deferred

until resolution of the threshold question, whether claimant has a wage loss. Request that Court approve a specific plan is dismissed as premature.

Benefits: Rehabilitation Benefits. Section 39-71-1006, MCA (1995) requires actual wage loss as a result of an injury as a prerequisite to entitlement to rehabilitation benefits. If a wage loss exists, the section requires development of a rehabilitation plan and approval or disapproval by the insurer. While the Court ultimately has jurisdiction to resolve a dispute over a rehabilitation plan, or to compel the insurer to follow statutory procedures relating to development of a plan, those questions are properly deferred until resolution of the threshold question, whether claimant has a wage loss. Request that Court approve a specific plan is dismissed as premature.

¶1 The matter before the Court is the respondent insurer's Motion to Dismiss for Lack of Jurisdiction (June 23, 1998). The motion seeks dismissal of claimant's request for rehabilitation benefits on the ground that the request is premature.

¶2 Claimant was injured on October 19, 1995, therefore the 1995 version of the Workers' Compensation Act applies in determining his entitlement to benefits, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Section 39-71-1006, MCA (1995), governs rehabilitation benefits, providing as follows:

39-71-1006. Rehabilitation benefits. (1) A disabled worker as defined in 39-71-1011 is eligible for rehabilitation benefits if:

(a) the worker has an actual wage loss as a result of the injury;
(b) a rehabilitation provider, as designated by the insurer, certifies that the injured worker has reasonable vocational goals and reemployment opportunity and will have a reasonable reduction in the worker's actual wage loss with rehabilitation;
and

(c) a rehabilitation plan agreed upon by the injured worker and the insurer is filed with the department. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning and completion date. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of public health and human services to use the funds.

(2) After filing the rehabilitation plan with the department, the disabled worker is entitled to receive biweekly compensation benefits at the injured worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. The rehabilitation plan must be completed within 26 weeks of the completion date specified in the plan.

Rehabilitation benefits must be paid biweekly while the worker is satisfactorily

progressing in the agreed-upon rehabilitation plan. Benefits under this section are not subject to the lump-sum provisions of 39-71-741.

(3) A worker may not receive temporary total benefits and the benefits under subsection (2) during the same period of time.

(4) A rehabilitation provider authorized by the insurer shall continue to assist the injured worker until the rehabilitation plan is completed.

(5) To be eligible for benefits under this section, a worker is required to begin the rehabilitation plan within 78 weeks of reaching maximum medical healing.

(6) A worker may not receive both wages and rehabilitation benefits without the written consent of the insurer. A worker who receives both wages and rehabilitation benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.

¶13 On its face the section requires that claimant demonstrate an "actual wage loss" to be eligible for rehabilitation benefits. The insurer denies that he has suffered any wage loss, hence it asserts he is ineligible. It urges that the only issue ripe for adjudication is whether claimant suffered a wage loss.

¶14 This is not an issue of jurisdiction, as urged by both parties. Jurisdiction is the power of a Court to adjudicate a matter. *Estate of Wilhelm*, 233 Mont. 255, 259, 670 P.2d 718, 721 (1988). As previously held, this Court has jurisdiction over disputes involving rehabilitation benefits.

¶15 Rather, the question raised by the insurer is whether the claim for rehabilitation benefits has accrued and is ripe for determination. Where a statute specifies the specific procedure which must be followed for a claim to arise, then the prescribed procedure must be fulfilled before the matter may be presented to the Court. *Cf. Eagle Communication, Inc. v. Treasurer of Flathead County*, 211 Mont. 195, 685 P.2d 912 (1984). Section 39-71-1006(b) and (c) specifically requires that a rehabilitation plan be reviewed by a rehabilitation provider and then approved or disapproved by the insurer. Thus, even if the Court finds that claimant suffered a wage loss, claimant's proposed rehabilitation plan must still be evaluated by a rehabilitation provider **and** rejected by the insurer on its merits before the Court may exercise its jurisdiction.

¶16 I recognize that this ruling may delay claimant's attempt to secure rehabilitation benefits. However, the delay should be minimal. If the Court determines that claimant suffered an actual wage loss, the insurer has a duty to promptly appoint a rehabilitation provider and pass upon the merits of his proposed rehabilitation plan. As a part of its broad jurisdiction over disputes involving workers' compensation benefits, the Court has jurisdiction to enforce the duty.

¶17 THEREFORE, IT IS HEREBY ORDERED that the Court shall determine whether claimant has suffered a wage loss entitling him to rehabilitation services under section 39-71-

1006(b), MCA (1995). The claimant's request that the Court approve a specific rehabilitation plan is **dismissed without prejudice** as premature.

DATED in Helena, Montana, this 20th day of August, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Thomas J. Murphy

Mr. Peter J. Stokstad

Submitted: July 16, 1998