

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1995 MTWCC 108**

**WCC No. 9508-7382**

---

**JERRY RICH**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent.**

---

**ORDER DISMISSING PETITION**

**Summary:** Respondent moved to dismiss PTD petition for claimant's alleged failure to exhaust rehabilitation panel provisions of 1987 law.

**Held:** Section 39-71-1011, MCA (1987), et seq., requires rehabilitation services for disabled workers, including a rehabilitation panel designed by the DOL, and DOL hearing procedures, with the right of appeal of the DOL determination to the WCC. Where the rehabilitation procedures were invoked, and are still pending, claimant may not circumvent those procedures by filing a permanent total disability petition in the WCC.

**Topics:**

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-1011, MCA (1987), et seq.** Section 39-71-1011, MCA (1987), et seq., requires rehabilitation services for disabled workers, including a rehabilitation panel designed by the DOL, and DOL hearing procedures, with the right of appeal of the DOL determination to the WCC. Where the rehabilitation procedures were invoked, and are still pending, claimant may not circumvent those procedures by filing a permanent total disability petition in the WCC.

**Appeals (To Workers' Compensation Court): Generally.** Section 39-71-1011, MCA (1987), et seq., requires rehabilitation services for disabled workers, including a rehabilitation panel designed by the DOL, and DOL hearing procedures, with the right of appeal of the DOL determination to the WCC. Where the rehabilitation procedures were invoked, and are still pending, claimant may not circumvent those procedures by filing a permanent total disability petition in the WCC.

**Benefits: Rehabilitation Benefit: Rehabilitation Panel.** Section 39-71-1011, MCA (1987), et seq., requires rehabilitation services for disabled workers, including a rehabilitation panel designed by the DOL, and DOL hearing procedures, with the right of appeal of the DOL determination to the WCC. Where the rehabilitation procedures were invoked, and are still pending, claimant may not circumvent those procedures by filing a permanent total disability petition in the WCC.

The claimant in this matter seeks a determination that he is permanently totally disabled. Respondent moves to dismiss the petition on account of claimant's failure to exhaust the rehabilitation panel provisions set forth in Title 39, chapter 71, part 10. The motion is **granted**.

According to the petition, claimant was injured on May 16, 1989. Therefore, the 1987 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

Under the 1987 law an injured worker who is unable to return to work after reaching maximum medical improvement is required to undergo evaluation by a rehabilitation provider designated either by the insurer or the Department of Labor and Industry.<sup>(1)</sup> Section 39-71-1011(2), MCA (1987), defines "disabled worker" as a worker "who has a medically determined restriction resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury." Section 39-71-1014(1), MCA (1987), states, "Rehabilitation services are **required** for disabled workers. . . ." [Emphasis added.] Section 39-71-1014, MCA, goes on to provide for designation of a rehabilitation provider by either the insurer or the Department of Labor and Industry. Section 39-71-1015, MCA (1987), requires the designated rehabilitation provider to determine if the worker is capable of returning to work and, if so, determine the first appropriate return-to-work option. Those options are set forth in section 39-71-1012, MCA (1987), as follows:

**39-71-1012. Rehabilitation goal and options. . . .**

(2) The first appropriate option among the following must be chosen for the worker:

- (a) return to the same position;
- (b) return to a modified position;
- (c) return to a related occupation suited to the claimant's education and marketable skills;
- (d) on-the-job training;
- (e) short-term retraining program (less than 24 months);
- (f) long-term retraining program (48 months maximum); or
- (g) self-employment.

Options (a) through (d) are the return-to-work options which the provider must consider.

In the event the worker does not then return to work, section 39-71-1015, MCA, provides that the insurer shall notify the Department of such fact. Upon that notice the Department is required to designate a rehabilitation panel, § 39-71-1015(3), MCA (1987), and the panel must then recommend the first appropriate option from among all of the options listed above. Once an option is selected, the Department is required to issue a preliminary determination setting out its own determination concerning the first appropriate option. § 39-71-1018(1), MCA (1987). If the option selected by the Department differs from the option recommended by the panel, the order of determination must set forth the reasons for the difference.

The 1987 statutes further provide that the initial order of determination shall become final unless either the claimant or insurer requests a hearing, in which case a hearing must be held. § 39-71-1018(3), MCA. In either event, only after a final order issues may the jurisdiction of the Court be invoked. Section 39-71-1018(4), MCA, provides, "Within 10 working days after the date of mailing of the division's final order of determination, an appeal may be taken to the workers' compensation court."

The rehabilitation procedures were invoked in this case and the matter is still pending before the Department. The certified record of those proceedings shows that on August 31, 1995, the rehabilitation panel issued a report recommending option (c) -- return to a related occupation -- as the first appropriate reemployment option. On September 19, 1995, the Department issued an Initial Order of Determination adopting the panel recommendation. On September 25, 1995, claimant submitted a written request for a hearing. An in-person hearing has been set for February 6, 1996.<sup>(2)</sup>

Meanwhile, on August 31, 1995, the same day the rehabilitation panel made its recommendation, the claimant petitioned the Court. His petition alleges that he is permanently totally disabled and entitled to wage loss benefits.

The petition is plainly designed to circumvent the statutory procedures outlined in this Order. Those procedures are mandatory and the Court's jurisdiction to determine whether a worker is able to return to work or not is limited to its appellate jurisdiction over the Department's final decision and to original jurisdiction in cases where the Department ultimately determines that none of the return-to-work options are appropriate.

The petition is **dismissed**.

Dated in Helena, Montana, this 20th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Torger S. Oaas

Mr. Thomas E. Martello

Submitted: December 18, 1995.

1. The 1987 statute refers to the old Division of Workers' Compensation. In 1989 the Division was eliminated by the Legislature and its duties transferred to the Department of Labor and Industry. See § 39-71-1015, MCA (1989).

2. It appears that the filing of the present petition has delayed the hearing. On November 1, 1995, this Court requested the Department to provide it with a certified copy of its file in this matter. The hearing examiner read the Court's Order as staying the Department's proceedings. The hearing examiner thereafter determined that the Court's Order did not in fact stay the Department's proceedings, and a prehearing conference and hearing were then scheduled.