IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 14

WCC No. 2000-0048

EVERETT D. SCHELIN

Petitioner

vs.

CIGNA a/k/a ACE

Respondent/Insurer for

STRUCTURAL SYSTEMS, INCORPORATED

Employer.

MEMORANDUM AND ORDER DISMISSING PETITION

Summary: Claimant who had not mediated dispute with insurer filed petition seeking mandatory writ of injunction ordering insurer to authorize surgery.

Held: Requirement that parties mediate workers compensation dispute prior to filing petition in WCC is jurisdictional. Petition asking WCC to order "emergency" surgery without requiring mediation dismissed. WCC suggests claimant seek expedited mediation.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-2408, MCA. Requirement that parties mediate workers compensation dispute prior to filing petition in WCC is jurisdictional. Petition asking WCC to order "emergency" surgery without requiring mediation dismissed. WCC suggests claimant seek expedited mediation.

Jurisdiction: Mediation. Requirement that parties mediate workers compensation dispute prior to filing petition in WCC is jurisdictional. Petition asking WCC to order "emergency" surgery without requiring mediation dismissed. WCC suggests claimant seek expedited mediation.

Mediation. Requirement that parties mediate workers compensation dispute prior to filing petition in WCC is jurisdictional. Petition asking WCC to order "emergency"

surgery without requiring mediation dismissed. WCC suggests claimant seek expedited mediation.

Procedure: Emergency Petition. Requirement that parties mediate workers compensation dispute prior to filing petition in WCC is jurisdictional. Petition asking WCC to order "emergency" surgery without requiring mediation dismissed. WCC suggests claimant seek expedited mediation. New filing of emergency petition should be supported by letter from physician addressing urgency of situation, not just need for surgery.

¶1 The petition in this matter seeks an emergency hearing to determine claimant's entitlement to arm surgery, and states, *inter alia*:

Because this is an emergency situation and petitioner believes the time involved in mediation will dangerously prolong the surgery so that his permanent impairment will be increased, petitioner requests the Court issue a mandatory writ of injunction ordering insurer to authorize this necessary surgery.

(Petition for Emergency Hearing ¶ 5.) The quoted paragraph shows that claimant has not mediated the claim.

¶2 As should be apparent from the following statutes, mediation is a jurisdictional prerequisite to this Court's consideration of any petition:

> **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.
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> . . . .
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> **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**. [Emphasis added.]
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> . . . .
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> **39-71-2905. Petition to workers' compensation judge -- time limit on filing.** (1) A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the

> dispute **after satisfying dispute resolution requirements otherwise provided in this chapter.** . . . **After parties have satisfied dispute resolution requirements provided elsewhere in this chapter**, the workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under chapter 71, except as provided in 39-71-317 and 39-71-516. [Emphasis added.]

No exceptions are made. Thus, petitioner must mediate his claim regarding surgery before this Court can assume jurisdiction and schedule any hearing.

¶3 I suggest that petitioner immediately seek mediation and request that those proceedings be conducted on an expedited basis. In doing so, and in filing any new petition with the Court, it will be helpful if claimant attaches a letter from his physician addressing the *urgency* of the surgery. I note that letter attached to his current petition only indicates the need for surgery.

ORDER

¶4 The petition is **dismissed without prejudice**.

DATED in Helena, Montana, this 21st day of March, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Robert C. Kelleher
Ms. Michelle Fairclough
Mediation Unit