

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 13

WCC No. 9312-6975

BUD STRODE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

BLUE RIBBON BUILDERS

Employer.

ORDER DISMISSING PETITION

Petitioner, Bud Strode (claimant), filed a petition seeking review of an impairment rating rendered by Dr. Diggs. The initial petition was filed on December 30, 1993. Thereafter, on January 20, 1994, claimant filed a more detailed Petition for Hearing in which he renewed his request for review of Dr. Diggs' impairment rating and added a further request that he be awarded rehabilitation benefits. Respondent, State Compensation Insurance Fund (State Fund), filed a Motion to Dismiss on February 4, 1994. The motion was served on claimant by mail on February 3, 1994. No response has been filed by claimant within the time permitted by the Court's rules. The matter will therefore be considered on the basis of the motion.

The Motion to Dismiss, which also serves as the State Fund's brief in support of the motion, contains numerous factual statements. A motion to dismiss ordinarily must be based only on the pleadings. See Rule 12(b), Mont.R.Civ.P.; **Granger v. Time, Inc.**, 174 Mont. 42, 46, 568 P.2d 535 (1977); **Busch v. Kammerer**, 200 Mont. 130, 132, 649 P.2d 1339 (1982). On the other hand, the failure of a party to timely respond to a motion may be deemed an admission that the motion is well taken.

Rule 24.5.216(4) Failure to file briefs may subject the motion to summary ruling. Failure of the moving party to file a brief with the motion shall be deemed an admission that the motion is without merit. Failure of an adverse party to timely file an answer brief may be deemed an admission that the motion is well taken. Reply briefs are optional and failure to file a reply brief will not subject the motion to summary ruling.

However, irrespective of the any facts set out in the State Fund's motion, the motion should be granted.

The petition alleges that Mr. Strode was injured on September 25, 1989. The statutes in effect at that time therefore govern his claims. ***Buckman v. Montana Deaconess Hospital***, 224 Mont. 318, 730 P.2d 380 (1986).

Section 39-71-711, MCA (1989), provides the procedure which must be followed with respect to any impairment award. It provides for the designation of an evaluator (a doctor or chiropractor), who must then provide an impairment rating. If either the claimant or the insurer disagrees with the evaluator's rating, either may request that the claimant be evaluated by a second evaluator. The section goes on to provide for a third evaluator, who is required to consult with the other two evaluators and then render a "final report" regarding impairment. Finally, the section provides:

(6) A party may dispute a final impairment rating rendered under subsection (3)(b)(ii) by filing a petition with the workers' compensation court within 15 days of the evaluator's mailing of the report. Disputes over impairment ratings are not subject to 39-71-605 or to mandatory mediation.

In its motion the respondent asserts that Dr. Digg's was the first and *only* evaluator. Whether or not the assertion is true, it does not appear from the face of the petition that the petitioner exhausted the procedure provided by section 39-71-711. In particular, it does not appear that he is disputing a "final impairment rating." The petition therefore fails to set forth facts which demonstrate that the matter alleged therein is within the Court's jurisdiction.

The petition also fails to lay the required groundwork for any award of rehabilitation benefits. Controversies involving those benefits must be mediated. Section 39-71-2401(1), MCA. The procedural rules of this Court require that a petition *specifically allege* that the mediation requirement has been satisfied. The allegation is lacking.

IT IS THEREFORE ORDERED THAT the petition be and is hereby **dismissed** without prejudice.

DATED in Helena, Montana, this 22nd day of February, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Thomas M. White
Ms. Ann E.Clark