

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 32

WCC No. 9704-7739

MICHAEL BARE

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

UNITED PARCEL SERVICE

Employer.

ORDER AND JUDGMENT DISMISSING PETITION

Summary: Claimant seeks permanent total disability benefits under the 1989 WCA but did not exhaust administrative remedies under section 39-71-1012 through -1003, MCA (1989).

Held: Under the 1989 Act, the WCC jurisdiction to determine whether a worker is able to return to work or not is limited to its appellate jurisdiction over the Department of Labor's final decision regarding rehabilitation options under section 39-71-1012, et seq., MCA (1989). Only when the Department ultimately determines that none of the statutory return-to-work options are appropriate does the WCC have original jurisdiction over the issue.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-1012, et seq., MCA (1989). Where claimant's petition shows that he seeks permanent total disability benefits under the 1989 WCA, but he has not exhausted the rehabilitation procedures under section 39-71-1012 through -1003, MCA (1989), his petition must be dismissed. (**Note:** Affirmed at [Michael Bare v. Liberty Mutual Fire Ins. Co., 1998 MT 106, No. 97-434.](#))

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2905, MCA (1989). Where claimant's petition shows that he seeks permanent total disability benefits under the 1989 WCA, but he has not exhausted the rehabilitation procedures under section 39-71-1012 through -1003, MCA (1989), his petition must be

dismissed. (**Note:** Affirmed at [Michael Bare v. Liberty Mutual Fire Ins. Co., 1998 MT 106, No. 97-434.](#))

Administrative Procedure: Failure to Exhaust Administrative Remedies. Where claimant's petition shows that he seeks permanent total disability benefits under the 1989 WCA, but he has not exhausted the rehabilitation procedures under section 39-71-1012 through -1003, MCA (1989), his petition must be dismissed. (**Note:** Affirmed at [Michael Bare v. Liberty Mutual Fire Ins. Co., 1998 MT 106, No. 97-434.](#))

Jurisdiction: Ripeness. Where claimant's petition shows that he seeks permanent total disability benefits under the 1989 WCA, but he has not exhausted the rehabilitation procedures under section 39-71-1012 through -1003, MCA (1989), his petition must be dismissed. (**Note:** Affirmed at [Michael Bare v. Liberty Mutual Fire Ins. Co., 1998 MT 106, No. 97-434.](#))

Petitioner (claimant) in this matter seeks permanent total disability benefits. Respondent, Liberty Mutual Fire Insurance Company (Liberty), moves to dismiss the petition for lack of jurisdiction. The motion has been briefed and is ready for decision.

On a motion to dismiss for failure to state a claim, all well pleaded facts are deemed to be true for the purposes of the motion. *Fandrich v. Capital Ford*, 272 Mont. 425, 429, 901 P.2d 112, 114 (1995). Where the basis of the motion is a lack of jurisdiction, the Court may consider affidavits and other evidence relating to the jurisdictional challenge. *Knoepke v. Southwestern Ry. Co.*, 190 Mont. 238, 244, 620 P.2d 1185, 1188 (1980). In this case Liberty has referred to facts outside the petition but supported those facts only by unauthenticated exhibits. Since the facts are not verified, they will be disregarded. However, the face of the petition shows a lack of jurisdiction, thus requiring dismissal.

As alleged in the petition, the claimant was injured in a work-related accident on February 14, 1990, thus the 1989 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

His injury was accepted as compensable by Liberty, which thereafter paid temporary total disability benefits. Those benefits were terminated on May 7, 1997. Claimant alleges that at all times he "has been unable to return to work" and that he is "permanently and totally disabled as a result of the aforementioned industrial accident." He seeks permanent total disability benefits.

Liberty urges that the rehabilitation panel statutes in effect in 1990 apply to this proceeding and that this Court lacks jurisdiction over the matter until the rehabilitation panel procedures are exhausted. The Court agrees. Claimant alleges that he is a disabled worker. The rehabilitation panel statutes, §§ 39-71-1012 through 39-71-1033, MCA (1987), were enacted by the 1987 legislature and thereafter repealed in 1991, and were therefore in effect at the time of claimant's injury. In *Wood v. Montana School Groups Ins. Auth.*, WCC

No. 9401-6986, Order Granting Partial Summary Judgment (August 12, 1994), this Court held that the rehabilitation panel provisions are substantive and therefore apply to injuries occurring while the provisions were in effect. In *Rich v. State Compensation Ins. Fund*, WCC No. 9508-7382, Order Dismissing Petition (December 20, 1995), the Court held that disabled workers must follow those provisions and that 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 [set out in the statutes] are appropriate." *Rich* at 3. Copies of the *Wood* and *Rich* orders are attached. Thus, claimant is subject to the provisions.

Once he has exhausted the panel procedures he may appeal any Order of the Department which finds one of the options appropriate for him. If no option is found to be appropriate, then he may petition the Court for a determination of his benefits.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the petition is **dismissed**.

DATED in Helena, Montana, this 27th day of May, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace

Mr. Larry W. Jones

Enclosures

Submitted: May 5, 1997