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

**2004 MTWCC 71**

**WCC No. 2004-1044**

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**WILLIAM H. FLYNN**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**DEAN CASTERLINE**

**Employer.**

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## ORDER DENYING MOTION TO RECONSIDER

**Summary:** Motion for reconsideration of dismissal of petition on account of the petitioner's failure to timely seek mediation.

**Held:** The motion for reconsideration is denied. The statute is clear on its face. It requires that any dispute involving an Uninsured Employers' Fund determination be presented for mediation within ninety days of the determination. The ninety-day period begins on the date of determination, not the date of mailing or a date allowing for three days for mailing. Department regulations cannot extend the period and a Supreme Court decision cited by the claimant is inapposite since it concerns a provision for appeal dating from "service" of a determination rather than from the determination itself.

**Topics:**

> **Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-520, MCA (2001, 2003).** Since section 39-71-520, MCA (2001, 2003), clearly and expressly states that a determination of the Uninsured Employers' Fund is final unless a request for mediation is made within ninety days of the determination, mediators of the Department of Labor and Industry lack jurisdiction to consider a late request. Since mediation is a prerequisite to the Court acquiring jurisdiction over a disputed Uninsured Employers' Fund determination, the Court lacks jurisdiction to adjudicate the dispute where petitioner requested mediation

ninety-three days after the Uninsured Employers' Fund's determination. As set forth in section 39-71-520, MCA (2001 and 2003), the Uninsured Employers' Fund's determination became final ninety days after the determination.

**Mediation: Department Jurisdiction.** Since section 39-71-520, MCA (2001, 2003), clearly and expressly states that a determination of the Uninsured Employers' Fund is final unless a request for mediation is made within ninety days of the determination, mediators of the Department of Labor and Industry lack jurisdiction to consider a late request. Lacking a timely request for mediation, any mediation which might take place is void and fails to satisfy the mediation requirement which is a prerequisite to commencing any petition in the Workers' Compensation Court. §§ 39-71-2408 and -2905, MCA (2001, 2003).

**Jurisdiction: Mediation.** Since section 39-71-520, MCA (2001, 2003), clearly and expressly states that a determination of the Uninsured Employers' Fund is final unless a request for mediation is made within ninety days of the determination, mediators of the Department of Labor and Industry lack jurisdiction to consider a late request. Lacking a timely request for mediation, any mediation which might take place is void and fails to satisfy the mediation requirement which is a prerequisite to commencing any petition in the Workers' Compensation Court. §§ 39-71-2408 and -2905, MCA (2001, 2003). Thus, the Workers' Compensation Court lacks jurisdiction to entertain a petition where the petitioning party has failed to request mediation in a timely fashion.

¶1 Petitioner, William H. Flynn (claimant), moves to reconsider this Court's Decision and Judgment Dismissing Petition, 2004 MTWCC 67. I dismissed the petition because claimant's request for mediation was untimely. Timely mediation is a prerequisite to the filing of any petition to this Court. The claimant's request for mediation was made ninety-three days after the date of the Uninsured Employers' Fund (UEF) determination. The determination is the subject of his petition.

¶2 In my Decision and Judgment Dismissing Petition, I held that section 39-71-520, MCA (2001, 2003),[(1)] on its face required claimant to file a request for mediation within ninety days of the determination. Claimant was injured in 2002. The UEF decision was made on November 21, 2002, but not mailed until November 25, 2002. Claimant's own time line shows that he filed his request for mediation on February 22, 2003, which was ninety-three days after the decision but only eighty-nine days after the decision was mailed to him.

¶3 In his motion to reconsider, the claimant cites regulations of the DLI and a Supreme Court decision in support of an argument that the limitations period for requesting mediation is extended by three days for mailing or at least does not commence running until the date the determination was mailed. The regulations and decision are unavailing. A Department rule cannot overrule the express provision of a statute. See § 2-4-305(6)(a),

MCA (2003) and *Safeway, Inc. v. Montana Petroleum Release Comp. Bd.*, 281 Mont. 189, 195, 931 P.2d 1327, 1330 (1997). And, the Supreme Court decision cited - *MCI Telecommunications Corp. v. Montana Department of Public Service Regulation,* 260 Mont. 175, 858 P.2d 364 (1993) - is inapposite. The provision at issue there provided for an appeal period commencing after "service" of a determination. Section 39-71-520, MCA (2001,2003), requires the period for requesting mediation to be calculated from the date of the determination, not from the date of service of the determination.

¶4 Claimant further argues that his claim is not barred because section 39-71-520, MCA (2001), did not provide a time limit for petitioning the Court. The present case, however, does not involve time limits for petitioning the Court, rather it involves the time limit for requesting mediation. Whether the 2001 or 2003 version of the Workers' Compensation Act is applied, mediation is a prerequisite to the filing of any petition in this Court. §§ 39-71-2408 and -2905, MCA (2001, 2003). For mediation to occur, the claimant was required to file his request for mediation with ninety days of the UEF decision. Having failed to do so, the mediators of the DLI had no jurisdiction to consider his belated request; insofar as they did so, any such mediation was void and did not satisfy the statutory requirement for mediation. Thus, the Court cannot acquire jurisdiction over the dispute. As set forth in section 39-71-520, MCA (2001 and 2003), the UEF's decision became final and non-appealable ninety-one days after its decision.

¶5 Finally, I need not consider whether the UEF's failure to immediately mail its determination might toll the limitations period under the doctrine of estoppel. The ninety-day period was fashioned to allow ample time to appeal even if a few days pass before mailing. Claimant was mailed the determination in plenty of time to request mediation within the ninety-day period.

¶6 The motion for reconsideration is denied.

DATED in Helena, Montana, this 21st day of October, 2004.

(SEAL)

\s\ MIKE McCARTER
JUDGE

c: Mr. Darrell S. Worm
Ms. Julia Swingley
Mr. Thomas E. Towe
Submitted: October 15, 2004

1. Additional provisions were added to section 39-71-520, MCA by the 1993 legislature. Ordinarily, current statutes governing procedure apply, whereas the substantive statutes governing benefits which were in effect at the time of the claimant's injury apply to

substantive issues. In this case, claimant was injured while the 2001 version of the Workers' Compensation Act was in effect. It was unnecessary for me to determine whether the provisions of section 39-71-520, MCA, are substantive since under either version I reached the same result.