

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 103A-1

WCC No. 9511-7444

CAROL GIEST

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY

Respondent/Insurer for

BUTTREY FOOD AND DRUG

Employer.

ORDER REAFFIRMING PRIOR ORDER DENYING MOTION TO DISMISS

Summary: Insurer notes that Mediator's report, consistent with Department of Labor and Industry Rule, requires waiting period post-mediation, during which parties are directed to attempt to resolve their dispute, prior to filing of petition in the Workers' Compensation Court.

Held: Department Rule (ARM 24.28.108) and statement in Mediator's report conflicts with section 39-71-2411(6), MCA (1995). Rule is invalid.

Topics:

Mediation: General. Where mediator's report and Department Rule (ARM 24.28.108) prohibit party who rejects mediator's report from immediately filing petition for hearing in Workers' Compensation Court, they conflict with section 39-71-2411(6), MCA (1995).

On December 8, 1995, the Court issued an Order Denying Motion to Dismiss. The motion at issue was based on petitioner's alleged failure to complete mediation requirements prior to the filing of her petition. Noting that the petitioner had rejected the mediator's recommendation the same day that she filed her petition, the Court held that all mediation requirements had been met and that jurisdiction of the Court had been properly invoked.

On December 11, 1995, the Court received a reply brief from respondent. (The brief was dated and signed December 7, 1995.) While the reply brief does not change the original

ruling, it raises matters which should be addressed. Specifically, the brief points out that the mediator's recommendation contained the following proviso:

Within 20 days from the date of this report, each party shall notify the mediator whether this recommendation is acceptable. If **both** parties cannot reach a solution after 20 days, either party may petition the Workers' Compensation Court. A petition may be filed with the Court **prior to the expiration of the 20 days if both parties agree** they cannot resolve the dispute. [Emphasis and underlining added.]

The brief also directs the Court's attention to the following rule of the Department of Labor and Industry found at ARM 24.28.108:

(3) If **both** parties cannot reach a solution after 45 days, either party may petition the workers' compensation court for a resolution of the dispute. Nothing in this rule shall prevent a party from petitioning the workers' compensation court **prior to the expiration of the 45 days, if both parties agree that they cannot resolve the dispute.** [Emphasis and underlining added.]

The Department of Labor cannot adopt rules which modify or conflict with the plain terms of a statute:

[A rule] must not engraft additional and contradictory requirements on the statute, and it must not engraft additional non-contradictory requirements on the statute which were not contemplated by the legislature.

Bick v. State, Dept. of Justice, Div. of Motor Vehicles, 224 Mont. 455, 458, 730 P.2d 418, 421 (1986). Section 39-71-2411(6), MCA (1995), provides that any party may petition the Workers' Compensation Court when "**either** party does not accept the mediator's recommendation." It provides:

(6) A party shall notify the mediator within 25 days of the mailing of the mediator's report whether the party accepts the mediator's recommendation. If **either** party does not accept the mediator's recommendation, the party may petition the workers' compensation court for resolution of the dispute. [Emphasis added.]

(The 1995 legislature amended the section by inserting 25 days in place of the prior 45 days, but the section was otherwise unchanged.) The section is plain on its face. Rejection of the mediator's report by **either** party triggers the right to petition the Court. The Department's rule requiring rejection by **both** parties conflicts with the statute. **The rule is invalid and of no effect.**

Dated in Helena, Montana, this 14th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. R. Russell Plath

Mr. Steven S. Carey

Mr. Mark E. Cadwallader - Courtesy Copy

Mr. Kevin M. Braun - Courtesy Copy

Mr. Chuck Hunter - Courtesy Copy