

1994 MTWCC 43

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

VERNON I. INGEBRETSON,

Petitioner,

WCC No. 9403-7030

vs.

LOUISIANA-PACIFIC CORPORATION,

Respondent/Insurer/Employer.

FILED

MAY - 2 1994

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ORDER DENYING MOTION TO DISMISS;
ORDER REQUIRING RESPONSE

The PETITION filed in this case concerns matters arising under the Montana Occupational Disease Act, Title 39, Part 72, MCA. The petitioner, Vernon I. Ingebretson (claimant), suffers from an occupational disease arising during his employment with respondent, Louisiana-Pacific Corporation (Louisiana-Pacific). The PETITION alleges, inter alia:

On August 4, 1993, the Employment Relations Division {of the Department of Labor and Industry} entered an order finding that "claimant is suffering from bilateral epicondylitis which in fact arose out of and was contracted from [his] employment".

(PETITION at 1, paragraph 4.) (Bracketed material in the original.) The PETITION goes on to allege that Louisiana-Pacific then accepted liability for the claim and paid benefits.

Louisiana-Pacific has moved to dismiss the complaint on the ground that the Workers' Compensation Court does not have jurisdiction over the controversy since no hearing has been held by the Montana Department of Labor and Industry (DLI). It cites section 39-72-612, MCA, as requiring a DLI hearing before the Court can acquire jurisdiction. The section provides:

39-72-612. Hearing and appeal to workers' compensation judge. (1) Within 20 days after the department has issued its order of determination as to whether the claimant is entitled to benefits under this chapter, a party may request a hearing. In order to perfect an appeal to the workers' compensation judge, the appealing party shall request a hearing before the department. The department shall grant a hearing, and the department's final determination may not be issued until after the hearing.

(2) Appeals from a final determination of the department must be made to the workers' compensation judge within 30 days after the department has issued its final determination. The judge, after a hearing held pursuant to 39-71-2903 and 39-71-2904, shall make a final determination concerning the claimant's claim. The judge may overrule the department only on the basis that the department's determination is: [Emphasis added.]

In citing the section Louisiana-Pacific omitted the first sentence of subsection one, a significant omission since that first sentence imposes a time limit for requesting a hearing before the DLI, and also specifies the nature of the DLI hearing covered by the section.

The section, with its provision for a hearing before the DLI and judicial review by the Workers' Compensation Court, applies only to initial DLI orders determining liability under the Act. *Dykman v. Pacific Employers Insurance Co., WCC No. 9302-6690 (May 19, 1993 ORDER)*. (Holding that the Workers' Compensation Court has jurisdiction to determine benefit disputes under the Occupational Disease Act after the DLI has determined that a claimant suffers from an occupational disease.) If that is not clear from the first sentence of the section, it is clear from other sections to which it relates. Section 39-72-602, MCA, sets forth the initial procedures governing occupational disease claims. Subsection (1) provides that an insurer may accept liability for a claim. Section (2) applies where the insurer does not do so, providing that the DLI shall then direct the claimant to a medical panel for examination and setting out the procedures to be followed in designating the panel. Section 39-72-609, MCA, then specifies that the report of the panel "is prima facia evidence as to the matters contained in the report," while section 39-72-610, MCA, creates a rebuttable presumption of panel correctness in any hearing held by the DLI or the Workers' Compensation Court. Specific provision for a hearing before the DLI is made in section 39-72-611, MCA, which provides:

39-72-611. Hearing on determination -- when. Upon the department's own motion or if a claimant or an insurer requests that a hearing be held by the department prior to the time the department issues its final determination concerning the **claimant's entitlement to occupational disease benefits, the department shall hold a hearing.** [Emphasis added.]

It is thus apparent from these provisions that the DLI hearing authorized under Chapter 6 of the Occupational Disease Act concerns the initial determination of whether a claimant suffers from a compensable occupational disease.

The Supreme Court decision in *Cocking v. Ranger Ins. Co.*, 225 Mont. 369, 732 P.2d 1333 (1987), is consistent with this interpretation. *Cocking* held that the Workers' Compensation Court is without jurisdiction to award benefits under the Occupational Disease Act where the Division of Workers' Compensation (DLI's predecessor in these matters) had not finally acted on the initial occupational disease claim. In *Cocking* the procedures contemplated by sections 39-72-602, 609, 610, and 611, MCA, were only partially complete when the Workers' Compensation Court issued a preemptive decision holding that claimant was suffering from an occupational disease. *Cocking* did not restrict the Court's jurisdiction in disputes which arise after the DLI has determined that the claimant suffers from an occupational disease, or in cases where the insurer accepts the occupational disease claim.

As pled by the petition in this case, Louisiana-Pacific accepted liability for claimant's occupational disease after the DLI issued an initial determination, and it has since paid medical benefits. Louisiana-Pacific thus forewent its right to a hearing under section 39-72-611, MCA, and to appeal under section 39-72-612, MCA. The initial question of whether claimant is suffering from an occupational disease is thus closed.

Section 39-71-2401, MCA, provides,:

39-71-2401. Disputes - jurisdiction - evidence - 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.** [Emphasis added.]

Pursuant to this section, this Court, not the DLI, has jurisdiction over claimant's further entitlement to benefits.

THEREFORE, the Motion To Dismiss is denied. Louisiana-Pacific is ordered to serve its response to the PETITION on or before May 13, 1994.

DATED in Helena, Montana, this 2nd day of May, 1994

(SEAL)



JUDGE

c: Mr. Jon L. Heberling
Mr. Starr Kelso

Order Denying Motion to Dismiss;
Order Requiring Response - Page 3