

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 23

WCC No. 2010-2512

TIMOTHY JAMES CHARLSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

Summary: Respondent moves to dismiss Petitioner's Petition for Hearing for lack of subject matter jurisdiction. Respondent contends the mediation requirements have not been fully satisfied because Petitioner did not reject the mediator's recommendation. Alternatively, Respondent moves the Court to dismiss Petitioner's claim for attorney fees and penalty because there is no evidence Respondent acted unreasonably in the adjustment of Petitioner's claim. Respondent contends that Petitioner can move to amend his petition to reinstate his claim for attorney fees and penalty if discovery reveals unreasonable conduct by Respondent.

Held: Respondent's motion is denied. Petitioner's counsel's letter to the mediator constituted a rejection of the mediator's recommendation. Regarding Petitioner's claim for attorney fees and penalty, the Court has a well-established procedure for pursuing a claim for attorney fees and penalty. ARM 24.5.301(3) required Petitioner to claim attorney fees and penalty in his petition or risk waiving that claim. Petitioner is required to file a particularization of the grounds or basis for his claim in accordance with the Court's scheduling order. Both the parties and the Court are better served by following the procedure established by the Court's rules and scheduling order.

Topics:

Attorneys: Conduct and Tactics. Petitioner responded to a mediator's report and recommendation by letter, and agreed with the mediator that additional information needed to be obtained, but indicated that he would file a petition for hearing. Respondent believed Petitioner's letter was ambiguous and filed a motion to dismiss the petition. The Court noted that an easier way to settle the perceived ambiguity would have been for Respondent's counsel to communicate with Petitioner, rather than file a motion.

Constitutions, Statutes, Regulations and Rules: Montana Codes Annotated: 39-71-2411, MCA. Because § 39-71-2411(7), MCA, requires neither a written rejection of the mediator's recommendation nor specific verbiage to reject the recommendation, Petitioner's letter to the mediator in which he indicated that he would file a petition for hearing satisfied the Court that Petitioner had rejected the mediator's recommendation.

Jurisdiction: Mediation. Because § 39-71-2411(7), MCA, requires neither a written rejection of the mediator's recommendation nor specific verbiage to reject the recommendation, Petitioner's letter to the mediator in which he indicated that he would file a petition for hearing, satisfied the Court that Petitioner had rejected the mediator's recommendation. Accordingly, the Court rejected Respondent's motion to dismiss for lack of subject matter jurisdiction.

Procedure: Motion to Dismiss. Where Petitioner responded to a mediator's report and recommendation by letter and agreed with the mediator that additional information needed to be obtained, but indicated that he would file a petition for hearing, Respondent's contention in its motion to dismiss for lack of subject matter jurisdiction that Petitioner's counsel "essentially agreed with the mediator's recommendation" was meritless.

Constitutions, Statutes, Regulations and Rules: Administrative Rules of Montana: ARM 24.5.301. Respondent attempted to subvert the procedure specified in ARM 24.5.301(3) by moving to dismiss Petitioner's claim for attorney fees and penalty, alleging that no evidence indicated that Respondent acted unreasonably in the adjustment of Petitioner's claim. Respondent suggested that if Petitioner learned through discovery that Respondent unreasonably denied his claim, Petitioner could amend his petition to reinstate the claims. The Court denied Respondent's

motion, noting that both the parties and the Court are better served by following the procedure established by the Court's rules and scheduling order.

Attorney Fees: Request For. Respondent attempted to subvert the procedure specified in ARM 24.5.301(3) by moving to dismiss Petitioner's claim for attorney fees and penalty, alleging that no evidence indicated that Respondent acted unreasonably in the adjustment of Petitioner's claim. Respondent suggested that if Petitioner learned through discovery that Respondent unreasonably denied his claim, Petitioner could amend his petition to reinstate the claims. The Court denied Respondent's motion, noting that both the parties and the Court are better served by following the procedure established by the Court's rules and scheduling order.

Penalties: Particularization. Because this Court requires only notice pleading, the Court's scheduling order sets a deadline for filing a particularization of the grounds or basis for any penalty or attorney fees sought by a claimant. The scheduling order also sets forth a procedure if the insurer finds the particularization inadequate. Where Petitioner claimed attorney fees and a penalty in his petition for hearing, the Court denied Respondent's motion to dismiss the claims for attorney fees and penalty in which Respondent argued the claims should be dismissed for lack of evidence.

¶1 Respondent Montana State Fund (State Fund) moves to dismiss Petitioner Timothy James Charlson's (Charlson) Petition for Hearing. State Fund argues that the petition should be dismissed for lack of subject matter jurisdiction because the mediation requirements have not been fully satisfied. Alternatively, State Fund argues that the Court should dismiss Charlson's claim for attorney fees and penalty because there is no evidence State Fund acted unreasonably in the adjustment of Charlson's claim.

BACKGROUND

¶2 Charlson originally filed his Petition for Hearing on this claim before the mediator's report and recommendation had been issued.¹ State Fund moved to dismiss for lack of subject matter jurisdiction. I granted State Fund's motion to dismiss on May 24, 2010. Charlson filed the present action after the mediator's report had been issued and after both parties had responded to the report. State Fund accepted the mediator's recommendation.² Charlson responded to the mediator's report and recommendation, in pertinent part, as follows:

You are correct in your report that additional information needs to be obtained. We appreciated your recommendation and will move forward in the form of filing a petition.³

DISCUSSION

Motion to Dismiss for Lack of Subject Matter Jurisdiction

¶3 State Fund acknowledges that "it would appear that all the niceties of the mandatory mediation process had been met."⁴ State Fund argues, however, that "[Charlson's] counsel, like counsel for the State Fund, has essentially agreed with the mediator's recommendation."⁵ On this premise, State Fund argues that there is a question of jurisdiction because § 39-71-2411(7), MCA, specifically requires as a condition precedent to filing a petition before this Court that at least one of the parties not accept the mediator's recommendation. State Fund contends that in this case both parties have agreed with the mediator's recommendation. This contention is without merit.

¶4 In his letter, Charlson's counsel stated that the mediator's report was correct that additional information needed to be obtained, that he appreciated the recommendation, and that he was moving forward with filing a petition. I fail to see how the letter can reasonably be construed as "essentially agree[ing] with the mediator's recommendation." State Fund's interpretation of the letter is essentially, "Thank you for your hard work. I agree with your proposed resolution of the dispute, but I am going to Court anyway." I do not find this to be a reasonable interpretation.

¹ WCC No. 2010-2499.

² Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, to Dismiss Petitioner's Demand for Attorney Fees and Penalty With Supporting Brief (State Fund's Motion to Dismiss), Appendix A at 1.

³ *Id.* at 2.

⁴ State Fund's Motion to Dismiss at 2.

⁵ *Id.*

¶5 If there was any doubt that Charlson was not accepting the mediator's recommendation, his refileing of the petition, as he advised the mediator he was going to do, should have dispelled that doubt. State Fund's counsel copied Charlson on his May 12, 2010, letter in which State Fund unambiguously accepted the mediator's recommendation. With the knowledge that State Fund was accepting the mediator's recommendation, Charlson refiled his petition in this Court on May 21, 2010. If Charlson was accepting the mediator's recommendation as he knew State Fund had already done, then the refileing of the petition was pointless.

¶6 I would be inclined to characterize State Fund's argument as exalting form over substance except there is no form to exalt in rejecting a mediator's recommendation. As State Fund acknowledges, § 39-71-2411(7), MCA, does not require a written rejection of the mediator's recommendation.⁶ Nor are there any specific words that must be uttered to reject the mediator's recommendation. The entire basis of State Fund's motion is its perceived ambiguity of Charlson's letter. State Fund argues that this "raised legitimate concerns as to whether the specific mandate of the statute conferring jurisdiction upon the Court had been met."⁷ I would suggest that there is a more time-effective and cost-effective method for addressing these concerns than filing a motion to dismiss.

¶7 "What we've got here is a failure to communicate."⁸ There are myriad ways to communicate in the digital age. There is no reason why one of them would not have served to resolve this issue before it got to the point of a fully briefed dispositive motion. It is obvious from the extraneous disputes that have been injected into this motion that Charlson's counsel and State Fund's counsel have gotten off on the wrong foot with each other. It is fair to assume that this played some role in this matter getting to its current impasse. As this matter moves forward, counsel would be well-advised to get back on the right foot.

¶8 I am satisfied that Charlson rejected the mediator's recommendation. The mediation requirements have been satisfied. This Court has jurisdiction. State Fund's motion to dismiss on these grounds is denied.

Motion to Dismiss Claim for Attorney Fees and Penalty

⁶ Reply Brief in Support of Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, to Dismiss Petitioner's Demand for Attorney Fees and Penalty at 2.

⁷ *Id.*

⁸ *Cool Hand Luke*, Warner Bros. (1967).

¶9 State Fund argues that the Court should dismiss Charlson's claim for attorney fees and penalty because there is no evidence State Fund acted unreasonably in the adjustment of Charlson's claim. State Fund submits that the dismissal should be without prejudice so that in the event some unreasonable conduct by State Fund is discovered, Charlson can amend his petition to reinstate his claim for attorney fees and penalty.

¶10 This Court has a very specific procedure for claiming attorney fees and penalty. ARM 24.5.301(3) provides:

(3) Any claim for attorney fees and/or penalty with respect to the benefits or other relief sought by the petitioner **shall** be joined and pleaded in the petition. Failure to join and plead a claim for attorney fees and/or penalty with respect to the benefits or other relief sought in the petition shall constitute a waiver and shall bar any future claim with respect to such attorney fees and/or penalty.⁹

Because this Court requires only notice pleading, the Court's scheduling order sets a deadline for filing "a particularization of the grounds or basis for any penalty or attorney fees sought by the claimant."¹⁰ The scheduling order also sets forth a specific procedure if the insurer finds the particularization inadequate. Following the Court's established procedure, Charlson was required to claim attorney fees and a penalty in his petition or risk waiving that claim pursuant to ARM 24.5.301(3). He is required to file a particularization of the grounds or basis for his claim in accordance with the Court's scheduling order.

¶11 State Fund does not dispute that Charlson may conduct discovery into the reasonableness of its denial of his claim and ultimately pursue a claim for attorney fees and penalty if warranted. State Fund's motion effectively seeks to reverse the procedure for claiming attorney fees and penalty established by this Court's rules and scheduling order. Notwithstanding the mandates of ARM 24.5.301(3), State Fund would have the claim for attorney fees and penalty stricken at the outset of the case, before discovery, and require a motion to amend to reinstate the claim. The motion to amend would, of necessity, include a particularized basis for the penalty and attorney fees that would have otherwise been set forth in the particularization required by the scheduling order. Not coincidentally, the deadlines set forth in the scheduling order for filing a particularization and for amending pleadings are the same.

⁹ (Emphasis added.)

¹⁰ Scheduling Order, ¶ 3(d).

¶12 The procedure for pursuing a claim for attorney fees and penalty advocated by State Fund in its motion to dismiss would serve only to increase the pretrial motion practice in this case. Both the parties and the Court are better served by following the procedure established by the Court's rules and scheduling order.¹¹

ORDER

¶13 State Fund's motion to dismiss for lack of subject matter jurisdiction is **denied**.

¶14 State Fund's motion to dismiss Charlson's claim for attorney fees and penalty is **denied**.

DATED in Helena, Montana, this 1st day of July 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Daniel B. McGregor
Submitted: June 28, 2010

¹¹ With respect to Charlson's claim for attorney fees and penalty, in both its opening brief and its reply brief, State Fund raises the specter of § 39-71-2914, MCA; this Court's corollary to Rule 11, Mont. R. Civ. P. State Fund is not seeking sanctions pursuant to § 39-71-2914, MCA, and I see no basis for imposing them *sua sponte*. Since sanctions are not an issue before the Court, I do not think this comment is appropriate for the body of this order. I note State Fund's reference to the statute for two reasons: First, to clarify that this Court's procedures for claiming attorney fees and penalty obviously do not abrogate the requirements of § 39-71-2914, MCA. Second, to stress that this Court views invoking § 39-71-2914, MCA, to be a matter of considerable gravity. It appears to me that State Fund's reference to this statute in this instance is more the result of counsels' mutual acrimony rather than a serious intent to seek sanctions. Since I know both counsel to be reasonable and professional attorneys, I trust they will endeavor to resolve their acrimony as this matter moves forward.