

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 16

WCC No. 9502-7240

LEWIS KARSTETTER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

**ORDER CLARIFYING MEDIATION REQUIREMENT;
ORDER DENYING MOTION TO DISMISS**

Summary: In response to petitioner's allegation of compliance with the mediation procedures set forth in section 39-71-2411, MCA (1993), the insurer alleged that forty-five days have not elapsed since the Mediation Report and Recommendation was issued.

Held: Because failure to comply with mediation requirements could be a jurisdictional defect, the Court considers whether section 39-71-2411, MCA (1993) imposes a forty-five waiting period for filing a case with the Workers' Compensation Court. It does not. Though the statute requires the parties to notify the mediator of their acceptance or rejection of mediation recommendations within forty-five days, the only prerequisite to filing a petition with the Workers' Compensation Court is that one of the parties reject the recommendation. To the extent the insurer's response intended a motion to dismiss, that motion is denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2411(6), MCA (1993). Though section 39-71-2411(6), MCA (1993) requires the parties to notify the mediator of their acceptance or rejection of mediation recommendations within forty-five days, the statute does not impose a forty-five day waiting period for filing a petition in the Workers' Compensation Court. The only prerequisite to filing a petition after mediation is that one of the parties reject the recommendation.

Mediation: Generally. Though section 39-71-2411(6), MCA (1993) requires the parties to notify the mediator of their acceptance or rejection of mediation recommendations within forty-five days, the statute does not impose a forty-five day waiting period for filing a petition in the Workers' Compensation Court. The only prerequisite to filing a petition after mediation is that one of the parties reject the recommendation.

Jurisdiction: Mediation. Though section 39-71-2411(6), MCA (1993) requires the parties to notify the mediator of their acceptance or rejection of mediation recommendations within forty-five days, the statute does not impose a forty-five day waiting period for filing a petition in the Workers' Compensation Court. The only prerequisite to filing a petition after mediation is that one of the parties reject the recommendation.

This case was commenced by a Petition for Trial filed February 10, 1995. Paragraph 5 of the petition affirmatively alleges that "[t]he mediation procedures set forth in the § 39-71-2411, MA (1993) have been complied with." In its response the State Fund denies the allegation and goes on to affirmatively allege that "[f]orty-five days have not elapsed since the Mediation Report and Recommendation was issued." (Response to Petition at ¶ 5.)

The State Fund has not moved to dismiss or requested any other action with regard to its assertion. However, in prior cases the Court has considered the failure to comply with mediation requirements to be a jurisdictional defect. It will therefore consider the matter here.

Section 39-71-2411(6), MCA, provides:

(6) A party shall notify the mediator within 45 days of the mailing of his 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.

The section is clear on its face. It does **not** impose a forty-five day waiting period for filing a case with the Court. It merely requires that *within* forty-five days the parties notify the mediator of their acceptance or rejection of his recommendations. The only prerequisite to petitioning the Court is that one of the parties reject the recommendation. Thus, upon notifying the mediator of rejection, whether that be on the first or the forty-fifth day following the recommendation, either party may then petition the Court.

The Fact that forty-five days may not have elapsed in this case is immaterial. Insofar as the State Fund may have intended its allegation to constitute a motion to dismiss, the motion is **denied**.

Dated in Helena, Montana, this 3rd day of March, 1995.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Steve M. Fletcher
Mr. Charles G. Adams