

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 74

WCC No. 9508-7368

JERRY G. McNEESE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND/
DEPARTMENT OF LABOR AND INDUSTRY

Respondent/Insurer for

ASSOCIATED GLASS, INCORPORATED

Employer.

ORDER DENYING MOTION TO DISMISS, STAYING PROCEEDINGS, AND
REQUIRING FURTHER ACTION BY THE PARTIES

Summary: State Fund moved to dismiss petition for (1) failing to state claim upon which relief can be granted and (2) failure to complete mediation.

Held: Where the petition seeks a determination that claimant suffered a compensable injury and is entitled to benefits, it states a claim on which relief can be granted in this Court. However, where the record indicates that no written mediation recommendation ever issued because claimant agreed to see a physician, but has since refused to see the physician, the mediator must now issue a recommendation. While the Court is currently without jurisdiction to act in the case, the matter will be held in abeyance pending issuance of the mediation report.

Topics:

Pleading: Statement of a Claim. Where the petition seeks a determination that claimant suffered a compensable injury and is entitled to benefits, it states a claim on which relief can be granted in this Court.

Mediation: General. Where the record indicates that no written mediation recommendation ever issued because claimant agreed to see a physician, but has since refused to see the physician, the mediator must now issue a recommendation and the Workers' Compensation Court lacks jurisdiction until the mediation report issues.

Jurisdiction: Mediation. Where the record indicates that no written mediation recommendation ever issued because claimant agreed to see a physician, but has since refused to see the physician, the mediator must now issue a recommendation and the Workers' Compensation Court lacks jurisdiction until the mediation report issues.

The petitioner, Jerry G. McNeese (claimant), claims that in December 1989 he was injured in an industrial accident. However, he failed to file a claim for compensation within the one year prescribed by section 39-71-601(1), MCA (1989). He did not submit a written claim until April 9, 1992, nearly two and a half years later.

In light of the lateness of his claim, the claimant applied to the Department of Labor and Industry for a waiver of the statute of limitations. The Department denied a waiver and claimant appealed to this Court, which held that he was entitled to a waiver of the one-year statute of limitation. *Jerry G. McNeese v. State Compensation Ins. Fund*, WCC No. 9407-7084 (May 5, 1995). We remanded the matter to the Department of Labor and Industry and directed it to grant claimant a waiver under section 39-71-601(2), MCA (1989).

This Court's March 5, 1995 decision did **not** find that claimant suffered a compensable injury or require the State Fund to accept his claim. Those issues were not presented. The decision merely removed the statutory bar to claimant's prosecuting his claim. Claimant's current petition advises the Court that his workers' compensation claim has not been accepted and seeks a determination that he is entitled to workers' compensation benefits.

The State Fund has moved to dismiss the current petition on two grounds. First, it argues that the mediation requirements have not been met. Second, it asserts that the petition fails to state a claim upon which relief can be granted. The arguments will be considered in reverse order.

The petition seeks a determination that claimant suffered a compensable industrial accident and is entitled to benefits under the Workers' Compensation Act. Therefore, it plainly states a claim upon which relief can be granted.

The mediation issue is more troublesome. According to the Motion to Dismiss, the State Fund is paying temporary total and medical benefits under a reservation of rights pending its determination of whether claimant's condition should be treated as resulting from an industrial injury or an occupational disease. The motion further states that while mediation took place on August 23, 1995, no written recommendation was ever issued because claimant agreed to an examination by Dr. Enrico Arguelles for the purpose of determining whether his condition is the result of an industrial accident or an occupational disease. (According to the motion, Dr. Arguelles is claimant's treating physician.) Claimant has since refused to see Dr. Arguelles.

In light of his apparent repudiation of any agreement to see Dr. Arguelles, claimant is entitled to the mediator's written recommendation. The mediator should be notified that his recommendation is now required, thus triggering the 10-day period for issuance of that recommendation. ARM 24.28.108 and § 39-71-2411(5), MCA. Issuance of the written recommendation, or the failure to timely do so, will trigger the 45-day period in which either party may reject the recommendation. § 39-71-2411(6), MCA. Upon rejection by either party, the matter may then be pursued before the Workers' Compensation Court.

In the meantime, the Court is without jurisdiction to consider the petition since it was filed prematurely. Indeed, the petition was filed on August 21, 1995, two days prior to the mediation conference. However, rather than generate more work and paper, we will hold the petition in abeyance pending completion of the mediation requirements. When those requirements are completed, the parties shall notify the Court and a new scheduling order will be issued.

Finally, I note the State Fund's assertion that the dispute with claimant can be resolved without the aid of the Court "if Mr. McNeese will comply with the requests of the State Fund to be evaluated by his treating physician and if he will contact the State Fund directly for adjustment of his claim." (Motion to Dismiss at 2.) Section 39-71-605, MCA, specifically provides that a claimant shall submit to medical examinations by a physician or physicians designated by the insurer or the Department. A copy of the statute is attached to this Order.

In a prior case, the Court has held that it may order an examination if requested by an insurer. *EBI/ORION Group (Connecticut Indemnity) v. Michael S. Blythe*, WCC No. 9407-7089, Order for Independent Medical Examination (June 6, 1995). However, at this time the Court lacks jurisdiction to do so since the mediation requirements have not been fully met. If, upon satisfaction of the mediation requirements there still exists an issue

concerning a medical examination, the State Fund may apply for an order for an examination, to dismiss for failure to submit to an examination, or for other relief.

Based on the forgoing discussion,

IT IS HEREBY ORDERED AS FOLLOWS:

1. These proceedings are **stayed** until the Court is notified that all mediation requirements have been met and/or until further order of the Court.
2. The scheduling order and trial setting are **vacated**.
3. The parties shall notify the mediator that he must issue his written recommendations within 10 days of their notice.

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

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Jerry G. McNeese - Certified Mail
Mr. Daniel J. Whyte
Enclosure (Section 39-71-605, MCA)