IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 46

WCC No. 2012-3026

MICHAEL D. MACKEY

Petitioner

vs.

ACE AMERICAN INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION TO EXLUDE EVIDENCE OR ARGUMENT REGARDING PETITIONER'S OCCUPATIONAL DISEASE CLAIM, STRIKING CONFIDENTIAL MEDIATION INFORMATION FROM PETITIONER'S RESPONSE BRIEF, AND VACATING SCHEDULING ORDER

Summary: Respondent moved *in limine* to preclude Petitioner from presenting any evidence or argument regarding a newly-asserted occupational disease claim. Petitioner opposes Respondent's motion, arguing that although he had filed a petition for trial contending that he had suffered an industrial injury and his petition for mediation stated that his claim did not involve an occupational disease, the parties had in fact mediated the occupational disease issue, and Respondent could not argue that it was surprised by Petitioner's assertion of this claim.

Held: The evidence presented establishes that the parties did not mediate the issue of an occupational disease claim. As mediation of an issue is a jurisdictional prerequisite, the parties must mediate the issue before the Court can hear it. The portion of Petitioner's response brief in which he sets forth information from the parties' mediation before the department is stricken as it is inadmissible pursuant to § 39-71-2410, MCA. The Scheduling Order is vacated pending mediation of the occupational disease claim.

¶ 1 Respondent Ace American Insurance Company (Ace) moves this Court *in limine* to preclude Petitioner Michael D. Mackey from presenting evidence or argument regarding an occupational disease claim.[1] Mackey opposes Ace's motion and responds

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[1] Respondent's Motion in Limine to Exclude Evidence or Argument Regarding Petitioner's Occupational Disease Claim and Request for Conference Call (Opening Brief), Docket Item No. 10.

that the parties have mediated the occupational disease entitlement issue and that Ace cannot contend that it is surprised by his intention to argue a "hybrid occupational disease/injury claim."[2]

¶ 2 On December 7, 2012, I convened a conference call regarding this matter.[3] At that time, I made several oral rulings pertinent to Ace's motion. This Order formalizes my oral rulings.

¶ 3 Ace has moved to exclude evidence or argument regarding Mackey's occupational disease claim. Ace contends that the parties had participated in a Department of Labor and Industry (department) mediation after Mackey alleged that his dispute involved an industrial injury claim. As proof of its contention, Ace points to Mackey's Petition for Workers' Compensation Mediation Conference, in which Mackey responded "no" to the question, "Is this dispute regarding the initial compensability of an occupational disease?"[4] Ace further notes that the Petition for Trial Mackey filed in this case asks the Court to determine whether he is entitled to medical benefits as the result of an alleged industrial injury on February 20, 2012.[5] Ace argues that the Court should not permit Mackey to argue that he has an occupational disease because he did not assert this claim in his Petition for Trial, and furthermore, that this Court lacks the jurisdiction to hear Mackey's claim because he has failed to complete the prerequisite department mediation.[6]

¶ 4 Mackey opposes Ace's motion. Mackey argues that Ace cannot claim that it is surprised by his "hybrid" occupational disease/injury claim because Ace was on notice that Mackey's claim did not involve a "singular injury" from the inception of the claim.[7]

¶ 5 In support of his argument, Mackey submitted a quotation from the Mediation Report and Recommendation and argues his interpretation of that quotation.[8] Under

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[2] Petitioner's Answer Brief to Respondent's Motion *in Limine* to Exclude Evidence or Argument Regarding Petitioner's Occupational Disease Claim (Response Brief) at 2-3, Docket Item No. 11.

[3] See Minute Book Hearing No. 4436, Docket Item No. 13.

[4] Opening Brief at 1; Ex. A to Opening Brief.

[5] Opening Brief at 1-2; Petition for Trial, Docket Item No. 1.

[6] Opening Brief at 2-5.

[7] Response Brief at 2.

[8] Response Brief at 2, specifically, the first two full paragraphs, beginning "In her Mediation Report . . . " and "To require the return of . . . " respectively.

§ 39-71-2410(4)(b), MCA, the mediator's report and any of the information or recommendations contained in the report are not admissible as evidence in any action subsequently brought in any court of law.[9] Therefore, the quotation and argument thereon presented by Mackey in his response brief are inadmissible and are stricken from the record.

¶ 6 Mediation of a claim for benefits is a jurisdictional prerequisite.[10] Section 39-71-2408(1), MCA, provides:

> Except as otherwise provided, in a dispute arising under this chapter, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court.

¶ 7 Under the Workers' Compensation Act, an injury[11] and an occupational disease[12] are separate and distinct claims. Mackey must mediate his occupational disease claim prior to filing a petition in this Court. Section 39-71-2406, MCA, provides in pertinent part: "If a new issue is raised at the workers' compensation court that was not raised at mediation, the court shall remand the issue to the mediator for consideration." Mackey's occupational disease claim is a new issue raised in this Court which was not raised at mediation. The parties must mediate this issue before it can be heard by this Court.

¶ 8 Mackey's counsel's argument can be summed up as follows: The Court should consider evidence in violation of § 39-71-2410(4)(b), MCA. The Court should disregard the requirements of § 39-71-2406, MCA. The Court should ignore the part of the mediation petition that he filed with the department in which he unambiguously stated that his claim did ***not*** involve an occupational disease. The Court should ignore the petition that he filed in this Court in which he unambiguously pled his claim as an industrial injury with no mention of an occupational disease. The Court should do all of the foregoing so that the Court can then proceed to hear a claim over which the Court

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[9] See also *Emmons v. MHA Workers Compensation Reciprocal*, 2009 MTWCC 10, ¶¶ 3, 6; *Schreckendgust v. Montana Schools Group Ins. Auth.*, 2009 MTWCC 23, ¶ 4; and *Rose v. Montana State Fund*, 2004 MTWCC 36, ¶ 3.

[10] §§ 39-71-2905(1), -2401(1), and -2408(1), MCA.

[11] § 39-71-119, MCA.

[12] § 39-71-116(23), MCA.

unambiguously lacks subject matter jurisdiction because Mackey's counsel considers the application of the mediation rules and law to be a "pointless delay." If Mackey's counsel's dismissive attitude towards the statutes and rules of this Court could vest the Court with subject matter jurisdiction, his argument might be well-taken. However, since committing clearly reversible error by proceeding to hear a case over which the Court lacks subject matter jurisdiction would result in a far more pointless delay due to the inevitable appeal it would invite, the more sensible course would be to require Mackey's counsel to adhere to the same statutes and procedures as everyone else.

¶ 9 In the present case, Mackey filed a Petition for Trial alleging an industrial injury and the parties agree that the injury claim is properly before the Court. There is no basis to dismiss the injury claim pending mediation of the occupational disease claim. Therefore, I am ordering the Scheduling Order and trial date vacated to allow the parties time to mediate the occupational disease issue so that we may proceed to trial on both issues in one proceeding.

ORDER

¶ 10 The portion of Petitioner's response brief which sets forth mediation information in contravention of § 39-71-2410, MCA, as set forth above, is **STRICKEN**.

¶ 11 The Scheduling Order in this matter is **VACATED** pending mediation of Petitioner's occupational disease claim.

¶ 12 After the mediation requirements of Petitioner's occupational disease claim are satisfied, he may move the Court for leave to file an amended petition.

¶ 13 In light of the above orders, Respondent's motion *in limine* is **DENIED** as moot.

¶ 14 Petitioner will provide a status report to the Court on or before January 7, 2013.

DATED in Helena, Montana, this 27th day of December, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas C. Bulman
Kelly M. Wills
Submitted: December 7, 2012