

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 59

WCC No. 9507-7339

PATTY STOLLER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

LIBBY VENTURE MOTOR INN

Employer.

ORDER DENYING MOTION TO DISMISS

Summary: Respondent moved to dismiss petition because neither party notified mediator whether they accepted or rejected mediator's recommendation.

Held: Under section 39-71-2411(6), MCA (1995), at least one party must notify the mediator within 45 days of the mailing of the mediation report whether the mediation recommendation is accepted or rejected. Because this was a matter of first impression, the pending petition will not be dismissed, but future petitions may be dismissed, or trial dates vacated, if the notification requirement is not followed.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2411(6), MCA (1995). Section 39-71-2411(6), MCA (1995) requires that at least one party notify the mediator within 45 days of mailing of the mediation report whether the mediation recommendation is accepted or rejected. Where neither party complies, and a petition is filed with the Workers' Compensation Court, the petition may be dismissed, or the trial date vacated, pending completion of the requirement.

Mediation: General. Section 39-71-2411(6), MCA (1995) requires that at least one party notify the mediator within 45 days of mailing of the mediation report whether the mediation recommendation is accepted or rejected. Where neither party complies, and a petition is filed with the Workers' Compensation Court, the petition may be dismissed, or the trial date vacated, pending completion of the requirement.

Jurisdiction: Mediation. Section 39-71-2411(6), MCA (1995) requires that at least one party notify the mediator within 45 days of mailing of the mediation report whether the mediation recommendation is accepted or rejected. Where neither party complies, and a petition is filed with the Workers' Compensation Court, the petition may be dismissed, or the trial date vacated, pending completion of the requirement.

The respondent has moved to dismiss on account of the parties' failure to give the mediator notice that one or both of them were rejecting her written recommendation.

Section 39-71-2411(6), MCA, expressly requires the parties to notify the mediator whether they accept (or reject) the mediator's recommendation. Notice of rejection triggers the right to petition the Court. The section 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.

In this case the facts are somewhat confused. According to the briefs, the mediator contacted respondent's counsel prior to issuing any written recommendation. The ultimate recommendation was apparently for settlement on a permanent partial disability basis. (Petitioner is claiming permanent total disability benefits.) According to respondent's counsel the permanent partial disability resolution was neither rejected nor accepted. Indeed, there was no response to that specific recommendation, only a statement that the respondent would not consider a permanent total disability settlement.

On its face the statute requires at least one of the parties to specifically respond to the **written recommendation**. Apparently such response was never given in this case. Nonetheless, the Court declines to dismiss the petition as this is a matter of first impression and the petition itself constitutes a notice (albeit not to the mediator) of petitioner's rejection of the mediator's recommendation. No good purpose would be served by dismissing this case since the petition put respondent on notice of the rejection just as surely as a one sentence letter to the mediator would have. Nonetheless, parties practicing before the Court must in the future comply with section 39-71-2411(6), MCA, by specifically notifying the mediator whether the recommended settlement is accepted or rejected. In the future a

failure to do so may result in dismissal or in vacating the trial of the case until such notice is given.

IT IS HEREBY ORDERED that the motion is **denied**.

IT IS FURTHER ORDERED THAT petitioner shall forthwith notify the mediator that she has rejected the mediator's recommendation. Copies of the notice shall be served on respondent and filed with the Court.

Dated in Helena, Montana, this 10th day of August, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Garry D. Seaman
Mr. Daniel J. Whyte
Ms. Ann Komac