

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 22

WCC No. 2014-3346

ROBERT WOMMACK

Petitioner

vs.

NATIONAL FARMERS UNION PROPERTY & CASUALTY CO.,
NATIONWIDE MUTUAL FIRE INS. CO., MONTANA STATE FUND,
CHS, INC., LIBERTY MUTUAL FIRE INS. CO.,
DOES 1-5, inclusive

Respondents/Insurers.

ORDER DISMISSING PETITION

Summary: During oral argument on pending motions it was revealed that Petitioner had recently undergone an occupational disease evaluation in August 2014, pursuant to § 39-72-602(2), MCA (1995-2003). Since Petitioner had filed the Petition for Trial before the OD evaluation, the Court required the parties to brief the issue of subject matter jurisdiction. While Petitioner maintains that an OD panel evaluation is not a prerequisite to filing a petition before this Court, all Respondents agree that sufficient doubt exists as to this Court's continued subject matter jurisdiction of the pending Petition for Trial so as to warrant dismissal without prejudice in order to remove any cloud over this Court's authority to proceed to hearing.

Held: This Court did not have jurisdiction when this case was filed, as § 39-72-602, MCA (1997), contains "mandatory language" that "an OD evaluation must occur *before* a dispute can be presented to and resolved by the WCC." The post-petition OD evaluation at least places a cloud of uncertainty over this Court's continued subject matter jurisdiction. As this Court has done in similar circumstances since 2005, this case is dismissed without prejudice.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-72-602. The plain language of § 39-72-602, MCA, provides that the OD evaluation must be completed before a petition for

hearing is filed with the Workers' Compensation Court. Therefore, the Court will dismiss any case filed before completion of the OD evaluation due to the "jurisdictional defect."

Jurisdiction: Workers' Compensation Court: OD Panel Evaluation.

The plain language of § 39-72-602, MCA, provides that the OD evaluation must be completed before a petition for hearing is filed with the Court. Therefore, the Court will dismiss any case filed before completion of the OD evaluation due to the "jurisdictional defect."

Occupational Disease: Medical Panels. The plain language of § 39-72-602, MCA, provides that the OD evaluation must be completed before a petition for hearing is filed with the Court. Therefore, the Court will dismiss any case filed before completion of the OD evaluation due to the "jurisdictional defect."

Statutes and Statutory Interpretation: Plain Meaning. The plain language of § 39-72-602, MCA, provides that the OD evaluation must be completed before a petition for hearing is filed with the Court. Therefore, any case filed before completion of the OD evaluation will be dismissed due to the "jurisdictional defect."

Jurisdiction: Dismissal. Despite there being pending motions, once the Court determines that it lacks jurisdiction, it can take no further action in a case other than to dismiss it.

¶ 1 On December 3, 2014, this Court heard oral argument on pending motions, during which it was revealed that Petitioner Robert Wommack underwent an occupational disease (OD) evaluation pursuant to § 39-72-602(2), MCA (1995-2003), in August 2014.¹ Since Wommack filed his Petition for Trial on April 15, 2014, the Court questioned whether it had jurisdiction over this case since Wommack filed his petition over four months before his OD evaluation. By e-mail dated December 9, 2014,² the Court set a briefing schedule on the issue of continuing jurisdiction over Wommack's petition. While Wommack argues that it is not mandatory that the OD evaluation be conducted before the filing of a petition for hearing,³ Respondents National Farmers

¹ See Petitioner's Brief in Support of WCC Jurisdiction, Ex.'s F and G, Docket Item No. 81.

² Docket Item No. 78.

³ Petitioner's Brief in Support of WCC Jurisdiction.

Union Property & Casualty Co.,⁴ Nationwide Mutual Fire Ins. Co.,⁵ CHS, Inc.,⁶ Montana State Fund,⁷ and Liberty Mutual Fire Ins. Co.⁸ all agree that the Court's jurisdiction is in question and that it is better to dismiss the matter now than face a jurisdictional challenge at a later date.

Analysis and Decision

¶ 2 Until shown otherwise, this case is governed by the 1997 version of the Workers' Compensation Act (WCA) and Occupational Disease Act (ODA), since those were the laws in effect on Wommack's last day of employment and consequently, his alleged last injurious exposure.⁹

¶ 3 The only pertinent facts here are undisputed: that the Petition for Trial was filed over four months before the day when Robert Wommack underwent an OD evaluation. The 1997 ODA required that an OD panel evaluation occur with a contested case hearing followed by an appeal to this Court when an insurer denied liability for an OD.¹⁰ However, the statutes were retroactively amended by 1999 Mont. Laws, ch. 442, streamlining the process and making a dispute following a single evaluation an issue over which this Court has original jurisdiction after mediation.¹¹

¶ 4 The changes in § 39-72-602, MCA (1997),¹² read in relevant part:

⁴ Respondent National Farmers Union Property & Casualty Co.'s Brief on the Court's Subject Matter Jurisdiction, Docket Item No. 84.

⁵ Nationwide Mutual Fire Insurance Company's Brief Regarding Workers' Compensation Court Jurisdiction, Docket Item No. 85.

⁶ Respondent CHS, Inc.'s Brief on the Court's Subject Matter Jurisdiction, Docket Item No. 86.

⁷ Respondent Montana State Fund's Breif (sic) Regarding Jurisdiction of the Worker's (sic) Compensation Court, Docket Item No. 87.

⁸ Liberty Mutual Fire Ins. Co.'s Brief in Response to this Court's Briefing Scheduling Order Regarding Whether this Court has Subject Matter Jurisdiction over Petitioner's Pending Petition, Docket Item No. 89.

⁹ *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citing *Grenz v. Fire & Cas.*, 278 Mont. 268, 272, 924 P.2d 264, 267 (1996)). *But cf. Nelson v. Cenex, Inc.*, 2008 MT 108, ¶¶ 29 - 33, 342 Mont. 371, 181 P.3d 619 (indicating that the law in effect on the last day of an employee's exposure to the hazards of an occupational disease controls).

¹⁰ §§ 39-72-602(2), -612, MCA.

¹¹ 1999 Mont. Laws, ch. 442, §§ 23, 31.

¹² All references to § 39-72-602, MCA (1997), herein apply the retroactive changes by the 1999 Montana Legislative Session.

(2) In order to determine the compensability of claims under this chapter when an insurer has not accepted liability, the following procedure **must be followed**:

(a) The department **shall** direct the claimant to an evaluator on the list of physicians for an examination. The evaluator **shall** conduct an examination to determine whether the claimant is totally disabled and is suffering from an occupational disease. In the case of a fatality, the evaluator shall examine the records to determine if the death was caused by an occupational disease. The evaluator **shall** submit a report of the findings to the department.

(b) Within 7 working days of receipt, the department **shall** mail the report of the evaluator's findings to the insurer and claimant.

(c) **Upon receipt of the report, if a dispute exists over initial compensability of an occupational disease, it is considered a dispute that, after mediation pursuant to department rule, is subject to the jurisdiction of the workers' compensation court.** (Emphasis added.)

¶ 5 In *Kessel v. Liberty Northwest Ins. Corp.*,¹³ the Montana Supreme Court held that this Court does not have jurisdiction over an OD case under the law in effect from 1997 to 2003 until the OD evaluation is completed. The issue in *Kessel* was: When did the two-year statute of limitation for filing a petition for hearing after benefits are denied found at § 39-71-2905, MCA, begin to run? The parties disputed whether it began running when the insurer refused to accept the claim before the OD evaluation, or when it denied liability after the OD evaluation. In the lower ruling, this Court held that the statute of limitations does not begin running until after the insurer denies the claim following the OD evaluation. Relying on *Preston v. Transportation Ins. Co.*,¹⁴ this Court based its decision on jurisdictional grounds: **“Thus, the Workers’ Compensation Court lacks jurisdiction over an occupational disease claim which has not been accepted by an insurer until the medical panel provision is satisfied, and until such time, section 39-71-2905(2), MCA (1995-2003), does not come into play.”**¹⁵

¶ 6 The Montana Supreme Court approved this Court’s reasoning that both statutes (§§ 39-72-602 and 39-71-2905, MCA) had to be read together, so that the initial, non-medical panel “non-acceptance” letter denying benefits did not trigger the two-year statute of limitations. The Court explained: “[T]he statute plainly, and without ambiguity, states that a **petition for hearing** before the workers’ compensation judge must be filed within 2 years **after** benefits are denied. Again, however, interpreted in the context of

¹³ *Kessel*, 2007 MT 305, 340 Mont. 92, 172 P.3d 599.

¹⁴ *Preston*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527.

¹⁵ *Kessel*, 2005 MTWCC 45, ¶ 7. (Emphasis added.)

§ 39-72-602, MCA, such a denial in an OD claim can take place only **after** an OD evaluation has been conducted.”¹⁶ The Court further explained that § 39-72-602, MCA, contains “mandatory language” that “an OD evaluation must occur *before* a dispute can be presented to and resolved by the WCC.”¹⁷

¶ 7 Therefore, this Court undoubtedly lacked subject matter jurisdiction when Wommack filed his Petition for Trial. In fact, citing *Kessel*, Wommack acknowledges that “the WCC lacks jurisdiction until the medical panel provision is satisfied.”¹⁸ Wommack, however, argues that this case should not be dismissed because this Court now has jurisdiction because “there is no statutory mandate that a panel evaluation precede a petition for benefits with the WCC.”¹⁹ The Court disagrees for two reasons.

¶ 8 First, the Court concludes that the plain language of § 39-72-602(2)(c), MCA (1997), provides that the OD evaluation and mediation must be completed before a petition for hearing is filed with this Court. By stating that the process starts “[u]pon receipt of the report,” this statute contemplates that the evaluator would issue her report, the parties would then mediate any dispute over compensability, and this Court would then have jurisdiction to decide the dispute over initial compensability. It is apparent to this Court that the Supreme Court in *Kessel* understood that this was the statutorily-prescribed sequence for this Court to obtain jurisdiction.

¶ 9 Second, Wommack cites no law in support of his argument that this Court can acquire jurisdiction for the first time more than four months after the case has been filed. Given the absence of authority for this argument, this Court has ruled in cases in which parties have not completed the mandatory mediation procedures – a nearly identical situation to that in the case at bar – that the best procedure is to dismiss the case without prejudice. In *Preston*, the Montana Supreme Court held: “As § 39-71-2408(1), MCA, states, mediation is mandatory under the Workers’ Compensation Act **before** a party can even petition the Workers’ Compensation Court for relief. In addition, the Workers’ Compensation Court does not have jurisdiction during the pendency of a statutorily-mandated mediation, given that a claimant may only petition the Workers’ Compensation Court ‘**after** satisfying dispute resolution requirements otherwise provided’ in the Workers’ Compensation Act”²⁰

¹⁶ *Kessel*, 2007 MT 305, ¶ 17. (Emphasis added.)

¹⁷ *Id.*, ¶ 18. (Emphasis in original.)

¹⁸ Petitioner’s Brief in Support of WCC Jurisdiction at 3.

¹⁹ *Id.*

²⁰ *Preston*, 2004 MT 339, ¶ 36. (Emphasis added.)

¶ 10 In *Kutzler v. Montana State Fund*,²¹ where the claimant failed to mediate her claim before filing her Petition for Hearing, this Court cited to *Preston* in holding that it had no jurisdiction over any case filed before the mediation procedure was completed. In *Kutzler*, the result of dismissal was a harsh one as the statute of limitations ran two days after she filed her Petition for Hearing. Montana State Fund argued that the dismissal should have been with prejudice, as any petition filed after dismissal would be time-barred. But this Court held further that it had no jurisdiction to even consider a statute of limitations defense and thus dismissed the case without prejudice. In addition, although this Court had previously held some cases in abeyance while the parties completed the mediation procedure, this Court gave unambiguous notice that henceforth all petitions filed before completion of the mediation procedure would be dismissed on jurisdictional grounds.²² This Court explained:

[I]n the future, all petitions which are filed before completion of mandatory mediation will be dismissed. While it may be more convenient to simply stay proceedings until mediation is completed, the failure to complete mediation is a jurisdictional defect and the appropriate remedy is dismissal. The mediation requirement is notorious and there is no excuse for failing to comply with it.²³

¶ 11 Subsequently, in *Burke v. Roseburg Forest Products Co.*,²⁴ this Court noted that the mediation process had been completed two months after the Petition for Hearing was filed. Questioning whether jurisdiction could be “retroactively restored” once the mandated mediation requirements were met, this Court held: “As impractical as it may seem to dismiss the petition and restart the process at this juncture, it is much more impractical to proceed to trial with the specter of restarting the process after an appeal.”²⁵

¶ 12 The foregoing cases are instructive due to the similarity in the statutes governing mediation and OD evaluations. Based upon the plain language of § 39-72-602, MCA (1997), and the holding of *Kessel*, there is – at the least – a serious doubt as to whether this Court obtained jurisdiction over this case following the OD evaluation. As in *Burke*, it would be impractical for the Court to rule on the pending summary judgment motions and then conduct a trial when there is a “cloud of uncertainty” over whether this Court now has jurisdiction. “[T]he issue of subject matter jurisdiction may be raised by a party,

²¹ *Kutzler*, 2005 MTWCC 5, ¶ 7.

²² *Id.*, ¶¶ 10, 11.

²³ *Id.*, ¶ 11.

²⁴ *Burke*, 2009 MTWCC 32.

²⁵ *Id.*, ¶ 10.

or by the court itself, at any stage of a judicial proceeding.”²⁶ This Court will follow the reasoning of *Kutzler* and *Burke* and dismiss this case and all future cases in which the OD medical evaluation procedure is not completed before the Petition for Hearing is filed due to the “jurisdictional defect.”

¶ 13 Despite there being pending motions, “[o]nce a court determines that it lacks jurisdiction, then it can take no further action in the case other than to dismiss it.”²⁷ This process will start anew with a new Petition for Hearing and responses to the petition. This Court will not entertain motions to incorporate previous motions or briefs filed in this case. Due to limitations of this Court’s docketing software, the parties are further asked to discontinue the practice of filing “combined” briefs that address two separate motions.

ORDER

¶ 14 Based on the foregoing, **IT IS HEREBY ORDERED** that the Petition for Trial in this matter is **dismissed without prejudice**.

¶ 15 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 26th day of December, 2014.

(SEAL)

/s/ DAVID M. SANDLER

JUDGE

c: Ben A. Snipes
Charles G. Adams
Michael P. Heringer
Kelly M. Wills
Joe C. Maynard
Melissa C. Quale
Submitted: December 19, 2014

²⁶ *In re Workers’ Compensation Benefits of Noonkester*, 2006 MT 169, ¶ 29, 332 Mont. 528, 140 P.3d 466 (citing *State v. Tweedy*, 277 Mont. 313, 315, 922 P.2d 1134, 1135 (1996)).

²⁷ *Kutzler*, ¶ 10 (citing *Thompson v. Crow Tribe of Indians*, 1998 MT 161, ¶ 12, 289 Mont. 358, 962 P.2d 577).