

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 29

WCC No. 9602-7505

KATHERINE J. NELSON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

CAN AM CONVENIENCE STORE AND TRUCK STOP

Employer.

**ORDER DENYING MOTION TO DISMISS AND
DIRECTING THE PARTIES TO REQUEST MEDIATOR'S RECOMMENDATION**

Summary: Respondent moves to dismiss for failure to mediate. Two mediation conferences were held, but no mediation report issued. Affidavit from claimant's counsel indicates respondent requested additional medical records following mediation, leading to claimant's provision of medical releases.

Held: Motion to dismiss denied. Under section 39-71-2411(5), MCA (1995), mediation reports shall be issued within a reasonable time specified by rule. ARM 24.28.108(2) sets the time at ten days. While the parties may agree to postpone the report to permit further investigation, unilateral postponement for investigation is not permitted. If a party fails to cooperate with mediation, a party may seek a report stating the failure, which triggers repeat of the mediation process. Under the present circumstances, the mediator should be permitted opportunity to issue a report. The parties are directed to request issuance of a report; if they wish additional information to be considered by the mediator, they should submit it.

Topics:

Constitutions, Statutes, Regulations and Rules: section 39-71-2411, MCA (1995). Although respondent moved to dismiss petition for failure to mediate,

affidavit from claimant's counsel indicated that two mediation conferences were held, but no mediation report issued where respondent had asked for additional medical information, which claimant cooperated in allowing respondent to obtain. Although section 39-71-2411(5), MCA (1995) and ARM 24.28.108(2), require that a mediation report issue within ten days, there are provisions for postponement, but not unilateral postponement. The parties are directed to contact the mediator and request that a report issue forthwith. They should provide any additional information they wish to provide to the mediator.

Constitutions, Statutes, Regulations and Rules: ARM 24.28.108. Although respondent moved to dismiss petition for failure to mediate, affidavit from claimant's counsel indicated that two mediation conferences were held, but no mediation report issued where respondent had asked for additional medical information, which claimant cooperated in allowing respondent to obtain. Although section 39-71-2411(5), MCA (1995) and ARM 24.28.108(2), require that a mediation report issue within ten days, there are provisions for postponement, but not unilateral postponement. The parties are directed to contact the mediator and request that a report issue forthwith. They should provide any additional information they wish to provide to the mediator.

Mediation. Although respondent moved to dismiss petition for failure to mediate, affidavit from claimant's counsel indicated that two mediation conferences were held, but no mediation report issued where respondent had asked for additional medical information, which claimant cooperated in allowing respondent to obtain. Although section 39-71-2411(5), MCA (1995) and ARM 24.28.108(2), require that a mediation report issue within ten days, there are provisions for postponement, but not unilateral postponement. The parties are directed to contact the mediator and request that a report issue forthwith. They should provide any additional information they wish to provide to the mediator.

Jurisdiction: Mediation. Although respondent moved to dismiss petition for failure to mediate, affidavit from claimant's counsel indicated that two mediation conferences were held, but no mediation report issued where respondent had asked for additional medical information, which claimant cooperated in allowing respondent to obtain. Although section 39-71-2411(5), MCA (1995) and ARM 24.28.108(2), require that a mediation report issue within ten days, there are provisions for postponement, but not unilateral postponement. The parties are directed to contact the mediator and request that a report issue forthwith. They should provide any additional information they wish to provide to the mediator.

Respondent moves to dismiss based on petitioner's failure to complete mediation as required by section 39-71-2401, MCA. The facts appear by way of an affidavit of petitioner's counsel. The affidavit establishes that two mediation conferences were held, one on November 14, 1994, and the second on December 5, 1995, at which time the respondent's attorney requested additional medical records. According to the affidavit the respondent was provided with a signed authorization to obtain the records shortly after the mediation conference. However, to date, no recommendation has been issued. In the meantime, on February 20, 1996, the petitioner went ahead and filed her Petition for Hearing to meet the Court's deadline for the next round of trials.

Section 39-71-2411(5), MCA, provides that following a mediation conference the mediator shall issue a report within a reasonable time specified by rule. That time is ten days. ARM 24.28.108(2). While parties may agree to postpone the report to facilitate further investigation, one party may not unilaterally postpone the time for the report. If a party fails to cooperate in the mediation process, the cooperating party's remedy is to seek a report stating that the non-cooperating party has failed to cooperate, thereby triggering the repeat of the mediation process. § 39-71-2411(7), MCA. Alternatively, a party may seek dismissal if pre-mediation settlement requirements, including that of adequate documentary support for the party's demand, is not provided. § 39-71-2401(4), MCA.

In this case there is no indication that the petitioner agreed to an indefinite postponement. The affidavit suggests that the medical records were made available in time for the mediation process to be completed prior to the Court's filing deadline.

On the other hand, this does not appear to be a case where the mediator has ignored or failed to meet the administrative deadline. If that had happened, then the petitioner would have been authorized to petition the Court under ARM 24.28.108 (2).

Under the present circumstances, the mediator should be provided the opportunity to issue a report. Petitioner should not be penalized for filing her Petition for Hearing.

THEREFORE, IT IS ORDERED AS FOLLOWS:

1. The motion to dismiss is denied.
2. The parties are ordered to forthwith request the mediator to issue a report. If the parties wish the mediator to consider any additional information secured since the conference, they should submit the information with their request.
3. The parties shall consider and respond to the mediator's recommendation.

DATED in Helena, Montana, this 4th day of April, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Marvin L. Howe

Mr. Thomas E. Martello

Submitted: April 3, 1996