

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 111

WCC NO. 9511-7442

MIKE RUSSELL

Petitioner

vs.

PROTECTIVE INSURANCE COMPANY

Respondent/Insurer for

NORTH PARK TRANSPORT

Employer.

ORDER DENYING MOTION TO DISMISS; AND ORDER VACATING SCHEDULING ORDER

Summary: Insurer moved to dismiss petition for failure to complete mediation, noting that mediator's recommendation had not issued at the time the petition was filed. The mediator was apparently waiting for additional information about a prior injury, which claimant had agreed would be provided to the mediator.

Held: Motion to dismiss denied because the practical solution in this case is to vacate trial and maintain the present Court file. A new date for trial will be set after notice from either party that the mediator's recommendation has issued and been rejected.

Topics:

Mediation: General. Where insurer moves to dismiss petition because the mediation process has not been completed, an alternative to dismissal is vacating the pending trial date. In either event, the petition cannot be scheduled for trial until the mediation process has been completed through issuance of a recommendation by the mediator and rejection of that recommendation by one or both parties.

Mediation: General. While discovery may not be contemplated in the mediation process, where the parties have agreed to provide additional information to the mediator and to postpone the mediator's recommendation, the mediation deadlines are suspended pending submission of the additional information. A party cannot agree to postpone the recommendation, then claim the matter is ready for trial in the WCC without completion of the mediation process.

Procedure: Motion to Dismiss. Where insurer moves to dismiss petition because the mediation process has not been completed, an alternative to dismissal is vacating the pending trial date. In either event, the petition cannot be scheduled for trial until the mediation process has been completed through issuance of a recommendation by the mediator and rejection of that recommendation by one or both parties.

The petition in this matter was filed on November 20, 1995. Respondent filed its MOTION TO DISMISS on November 29, 1995, contending that the mediation process had not been completed. Briefing is complete and the motion is ready for decision.

Claimant concedes that at the time the petition was filed the mediator's recommendation had not been issued. While a mediation conference was held, the mediator requested the parties to obtain additional workers' compensation records from Nevada and submit them for the mediator's consideration. It does not appear that claimant resisted the request at the time it was made.

Obviously, a mediator is in a better position to make a recommendation if s/he has all relevant information. Apparently, at the time of the mediation conference in this case, it became known that the claimant had a previous injury and may have received an impairment rating and an award at that time. If true, that could impact the amount of benefits to which the claimant may be entitled in this case.

Claimant now argues that the mediator's recommendation should have been issued immediately following the mediation conference and should have been based only on the information presented at the time of the conference. He argues that the mediation process is not the proper forum for discovery. While discovery may not be contemplated in the mediation process, when the parties agree at the time of the mediation conference to obtain additional information and, in the meantime, to postpone the mediator's recommendation, the mediation deadlines are suspended pending submission of the additional information. A party cannot agree to postpone the recommendation of the mediator and then claim foul.

In this instance, it does not appear that the mediator was ever advised that the claimant would not provide the requested information or that he would not agree to postpone the mediator's consideration of the case until the information was provided. If claimant changed his mind about supplying the information or going along with the delay, he should have so notified the mediator so s/he had the opportunity to issue a recommendation, albeit one based on the information at hand. Lacking such notice, claimant cannot petition the Court and claim that he has complied with mediation requirements.

The Court has granted dismissal in cases in which the mediation process was not completed. See *Rykowsky v. State Compensation Insurance Fund*, WCC No. 9411-7173,

(December 9, 1994). Under different circumstances, the Court has vacated trials pending the completion of mediation rather than dismiss the petition. In either event the petition cannot be scheduled for trial until the mediation procedure has been completed.

The practical solution in this instance is to vacate the trial and maintain the file, rather than to close the file and require the filing of a second petition.

At the time of a conference call to Mr. Sheehy and Mr. Maynard on December 18, 1995, the Court was advised that the mediator's recommendation has now been issued. Claimant's counsel, Mr. Patrick R. Sheehy, stated that the claimant would reject the recommendation. Nonetheless, he agreed to obtain the requested information and provide it to the insurer.

Respondent's Motion to Dismiss is **denied**. The current trial setting is **vacated**. A new trial date will be **set** upon receipt of written verification from either party stating that the mediator has been notified that his or her recommendation has been rejected.

DATED in Helena, Montana, this 27th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Patrick R. Sheehy
Mr. Joe C. Maynard