

FILED

AUG - 8 2008

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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7 **Appointed Mediator**

8 **IN THE SUPREME COURT OF THE STATE OF MONTANA**

9 **DALE REESOR,**

10 **Petitioner and Appellee,**

11 **vs.**

12 **MONTANA STATE FUND,**

13 **Respondent and Appellant,**

Supreme Court Case No. DA 08-0314

PRE-MEDIATION ORDER
PURSUANT TO RULE 7, M.R.App.P.

14
15 A Notice of Appeal was filed on June 30, 2008 with the Clerk of the Supreme Court of
16 the State Montana by Petitioner and Appellee, DALE REESOR. The appeal is taken from the
17 final judgment entered in this case by the Workers' Compensation Court on June 4, 2008.
18 Pursuant to the provisions of Rule 7(4)(d), M.R.App.P, David B. Gallik, the undersigned, has
19 been appointed as mediator by Order of the Clerk of the Supreme Court of the State of Montana
20 dated August 4, 2008.

21 The purpose of mandatory appellate alternative dispute resolution, as is set forth in Rule
22 7(1), M.R.App.P, is designed to achieve the following goals:

- 23 a. Provide an alternative means to resolve certain civil appeals and to enhance public
24 confidence in the appellate process;
- 25 b. Help the parties avoid the additional legal expense and emotional cost of an appeal;
- 26 c. Reduce the court's mounting backlog of civil appeals by settling cases with a
27 minimal use of court resources;
- 28 d. Help the parties realistically explore a settlement; and

DOCKET ITEM NO. 476

1 e. Provide a speedy and just resolution of the dispute.

2 The following pre-mediation order is provided to assist the parties in presenting their case
3 and for the expeditious determination of this matter.

4 **1. GOVERNING LAW:** This mediation is governed by the Montana Rules of
5 Appellate Procedure, of the Montana Code Annotated. For convenience the full text of Rule 7 of
6 the Montana Rules of Appellate Procedure is annexed hereto.

7 **2. TIME LIMITATIONS:** Upon filing a notice of appeal in the manner and time
8 required by Rules 4 and 5, M.R.App.P, the parties and mediator shall have seventy-five (75) days
9 within which to complete this mediation process pursuant to Rule 7(3)(a), M.R.App.P.

10 Therefore, the mediation must occur on or before the 75th day after the filing of the Notice of
11 Appeal, which will be September 15, 2008

12 **3. MEDIATION PROCESS:** This mediation process shall comply with Rule 7(5)
13 M.R.App.P. Specifically, this mediation will be an informal, confidential, nonadversarial process
14 in which mediator, will attempt to assist the parties to this appeal to resolve their differences.
15 The decision-making authority remains with the parties and the mediator has no authority to
16 compel a resolution or to render a judgment on any issue. The role of the mediator will be to
17 encourage and assist the parties to reach their own mutually-acceptable settlement by facilitating
18 communication; helping to clarify issues, interests, and the appellate perspective; fostering joint
19 problem-solving; and exploring settlement alternatives.

20 **4. DISCLOSURE OF ANY POTENTIAL MEDIATOR CONFLICTS OF**
21 **INTEREST, POSSIBLE BIAS, OR PREJUDICE.**

22 The undersigned appointed mediator's believes he does not have any conflicts of interest,
23 possible bias or prejudice as he has no knowledge of the facts of this case nor has he had any
24 relationships with any of the parties or their respective counsel which create a conflict of interest,
25 bias or prejudice.

26 **5. CONFIDENTIALITY OF PROCEEDINGS:** Pursuant to Rule 7(6)

1 M.R.App.P, all proceedings held, submissions tendered and statements made by anyone in the
2 course of the mediation process constitute offers to compromise and statements made in
3 compromise negotiations pursuant to Rule 408 of the Montana Rules of Evidence and are
4 inadmissible pursuant to the terms of that Rule. The mediator shall preserve and maintain the
5 confidentiality of all mediation proceedings.

6 **6. MEDIATION CONFERENCE:** Subject to the parties and the mediator agreeing
7 to an alternative time, date and place for the mediation conference, a mediation conference is
8 scheduled for Monday, August 25, 2008, at 10:00 o'clock, a.m., at the Mediator's Office, 1124
9 Billings Avenue, Helena, Montana 59601. The conference will be held in person with the parties
10 and their respective counsel of record being in attendance. In addition, the individuals having
11 authority to resolve the matter, for all parties shall be personally present at the mediation
12 conference.

13 Should the parties to the Mediation have a conflict with the date and time set for this
14 mediation, the parties shall contact all other parties to the mediation and provide the Mediator
15 with alternative dates that will work for all parties involved with the Mediation to the Mediator
16 for scheduling purposes.

17 **7. MEDIATION FEES AND EXPENSES:** The mediators fees are \$150.00 per
18 hour and all other expenses which may be incurred are billed at actual cost. The mediator's fee
19 and expenses being equally divided between the parties pursuant to Rule 7(4)(f), M.R.App.P.

20 **8. POSITION STATEMENTS:** Within 15 days of the appointment of the mediator,
21 pursuant to Rule 7(5)(d), M.R.App.P, the Appellant shall serve on the mediator and opposing
22 counsel a written statement of position, substantially complying with Form 7 in the Appendix of
23 Forms, M.R.App.P, and containing, at a minimum, the following:

- 24 (i) a statement of issue(s) on appeal and the manner in which each issue was
25 preserved; and
26 (ii) a statement of the standard of review applicable to each issue; and

27 **PRE-MEDIATION ORDER**

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1 (iii) the position of each party with respect to each issue, with citations to legal
2 authority; and

3 (iv) in the case of the appellant and any cross-appellant, a copy of the order or
4 judgment from which the appeal is taken.

5 The Appellee shall have seven (7) days thereafter to shall have seven (7) days thereafter
6 to submit a responsive statement of position. Appellee shall serve on the mediator and opposing
7 counsel a copy of its written responsive statement of position.

8 All position statements shall not exceed ten (10) pages in length, double spaced, on
9 standard letter-sized paper; provided, however, that the parties may attach such exhibits of record
10 and transcripts excerpts as the parties may wish the mediator to consider.

11 **9. CONFIDENTIAL SUBMISSION:** In addition to the position statements, each
12 party may submit to the mediator a separate confidential submission containing such additional
13 information relative to its position regarding settlement as it may wish to tender in order to
14 facilitate the mediation process. Unless otherwise agreed, such submissions shall not exceed five
15 (5) pages. Such additional submissions, if any, shall be served on the mediator
16 contemporaneously with the service of the party's position statement.

17 **10. FILING:** All statements, submissions, exhibits and other applicable
18 documentation shall be filed by U.S. mail, or by fax, with the mediator addressed as follows:

19 David B. Gallik
20 Attorney at Law
21 1124 Billings Avenue
22 Helena, MT 59601

23 FAX 406-443-0609

24 **11. SERVICE:** Copies of all statements, excluding confidential submissions, which
25 are filed herein must be served upon opposing counsel, or the opposing parties if not represented
26 by counsel. Each original filed statement or document must contain a certificate of service
27 indicating that opposing counsel, and/or parties (if unrepresented by counsel), have been mailed a

1 copy of the pleadings and/or documents which are being filed.

2 **12. EX PARTE COMMUNICATIONS:** There shall be no ex parte
3 communications with the mediator concerning any issue of fact or law in a contested case.
4 Please contact opposing counsel before you communicate with the mediator.

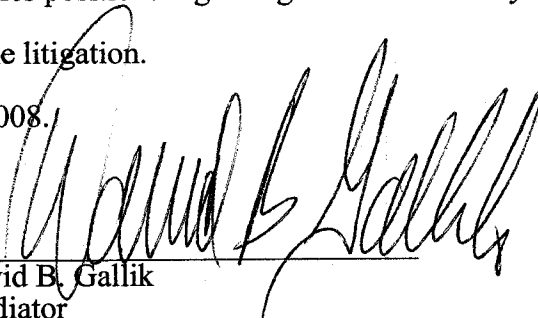
5 **13. COMPLETION OF MEDIATION PROCESS:** The mediator shall file a
6 mediator's report with the Clerk of the District Court and concurrently shall provide a copy to the
7 Clerk of the Supreme Court and the parties, immediately upon conclusion of the mediation
8 conference, pursuant to the requirements of Rule 7, M.R.App.P.

9 At the conclusion of the mediation, the mediator shall submit an evaluation form, and
10 shall furnish participating attorneys with attorneys and parties mediation evaluation forms, which
11 shall be submitted directly to the State Bar of Montana, by mailing the same to:

12 STATE BAR OF MONTANA
13 APPELLATE ADR PROJECT
14 P.O. Box 577
15 Helena, MT 59624

16 If the mediation results in resolution of the appeal, dismissal will be governed by Rule 36
17 and the parties shall execute a settlement agreement and file a stipulation for dismissal within 15
18 days of the filing of the mediator's report. None of the forms, notices or pleadings filed with the
19 Clerk of the Supreme Court shall contain any information relating to the parties' respective
20 positions regarding the issues on appeal, the parties positions regarding settlement or any
21 substantive matter which is the sole subject of the litigation.

22 DATED this 08th day of August, 2008.

23 
24 David B. Gallik
25 Mediator

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21 Norman H. Grosfield
22 MACO Workers Comp Trust
23 P.O. Box 5015
24 Helena, MT 59604

25 Todd Hammer
26 P.O. Box 7310
27 Kalispell, MT 59904

28 Ronald W. Atwood
333 SW Fifth, Ste. 200
Portland, OR 97204

I am readily familiar with the firms practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with the postage fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in this Proof of Service.

I declare under penalty of perjury that the forgoing is true and correct.

DATED this 7th day of August, 2008.



1
2 **Rule 7. Mandatory appellate alternative dispute resolution.** (1) Statement of purposes. The
3 mandatory appellate alternative dispute resolution procedure is designed to achieve the following
4 goals:

- 5 a. Provide an alternative means to resolve certain civil appeals and to enhance public confidence
- 6 in the appellate process;
- 7 b. Help the parties avoid the additional legal expense and emotional cost of an appeal;
- 8 c. Reduce the court's mounting backlog of civil appeals by settling cases with a minimal use of
- 9 court resources;
- 10 d. Help the parties realistically explore a settlement; and
- 11 e. Provide a speedy and just resolution of the dispute.

12 (2) Appeals subject to rule. The following categories of appeals shall be subject to the provisions
13 of this rule:

- 14 a. Workers' compensation. All appeals from the Workers' Compensation Court.
- 15 b. Domestic relations. Appeals in domestic relations cases, including but not limited to all
- 16 dissolution issues, child custody and support issues, maintenance issues and modifications of
- 17 orders entered with respect to those issues; but excluding proceedings regarding abused or
- 18 neglected children, paternity disputes, adoptions, and all juvenile and contempt proceedings when
- 19 the excluded matters constitute the only issues on appeal. In addition, if there has been a finding
- 20 by a district court that one of the parties has been a victim of domestic violence, the appellate
- 21 mediation may be conducted by telephone upon motion submitted to the mediator by either party.
- 22 c. Money judgments. Appeals in actions seeking monetary damages/recovery.
- 23 d. Appeals which the supreme court, in its discretion, designates as appropriate for mediation.

24 (3) Time Limitations and Supplementary Process.

- 25 a. Time limitations. Upon filing a notice of appeal in the manner and time required by rules 4 and
- 26 6, the parties and the mediator shall have 75 days within which to complete the process required
- 27 by this rule. However, in the event the parties are made subject to this rule only as a result of a
- 28 cross-appeal, the parties shall have 75 days from the filing of the notice of cross-appeal.
- a. Supplementary process. The process required by this rule shall be supplementary to, and have
- no effect on, the parties' duties, obligations, and time requirements otherwise provided for in these
- rules; provided, however, that the parties may, by stipulation filed with the clerk of the supreme
- court and served on the clerk of the district court, hold the time requirements of these rules in
- abeyance pending completion of the process required by this rule. In the event the parties stipulate
- to holding time requirements of these rules in abeyance, all such time requirements shall run from
- the earlier of the date of the filing of the mediator's report, or the expiration of the 75-day time
- limit.

(4) Selection or appointment and payment of mediator - immunity.

- a. Mediators shall be selected or appointed as provided in sections (4)(b) and (d) of this rule and
- shall enjoy such judicial immunity as the supreme court would enjoy if performing the same
- functions. Upon selection or appointment, the clerk of the supreme court shall mail to the
- mediator a copy of the notice of selection or order of appointment of mediator, the mediator
- instructions, and mediator's, attorneys', and parties' mediation evaluation forms.
- b. The parties may jointly select a mediator for purposes of complying with the mediation process
- required by this rule within 15 days of the filing of the notice of appeal or cross-appeal which
- subjects the case to the requirements of this rule; in the event the parties do not jointly select a
- mediator, one will be assigned by the clerk of the supreme court.
- c. In the event the parties voluntarily select a mediator, the appellant shall file with the clerk of the
- supreme court a notice of selection of mediator, substantially complying with Form 5 in the
- Appendix of Forms, within the above-referenced 15-day deadline.
- d. In the event the parties do not voluntarily and timely select a mediator, the clerk of the supreme

1 court shall appoint as a mediator for the appeal the next self-nominated attorney on a list
2 maintained by the clerk for that purpose pursuant to section (4)(e) of this rule. The order of
3 appointment, substantially complying with Form 6 in the Appendix of Forms, shall be signed by
4 the clerk of the supreme court and served upon the mediator and the parties to the appeal.

5 e. The clerk of the supreme court shall maintain 3 lists of resident Montana attorneys who are
6 members in good standing of the State Bar of Montana, have been licensed as attorneys for no
7 less than 5 years, and have indicated their desire to be appointed as mediators for purposes of this
8 rule by completing and submitting to the clerk an original and 2 copies of the mediator
9 background information form available from the clerk. The separate lists will reflect those
10 attorneys desiring appointment as mediators for the workers' compensation, domestic relations,
11 and/or money judgment appeals which are subject to this rule.

12 f. The parties shall share the mediator's fee and incidental expenses equally. However, in money
13 judgment cases where there is \$5,000 or less at issue and the judgment is for \$5,000 or less, any
14 mediator appointed by the clerk of the supreme court under section (4)(d) shall serve pro bono,
15 and the mediator's incidental expenses shall be shared equally by the parties. All pro bono
16 appointments shall be so indicated in the order of appointment.

17 (5) Mediation Process. The mediation process required by this rule shall comply with the
18 procedures provided in this section.

19 a. The mediation required by this rule is an informal, confidential, nonadversarial process in
20 which an impartial third person, the mediator, assists the parties to an appeal in resolving the
21 differences between them. The decision-making authority remains with the parties; the mediator
22 has no authority to compel a resolution or to render a judgment on any issue. The role of the
23 mediator is to encourage and assist the parties to reach their own mutually-acceptable resolution
24 by facilitating communication; helping to clarify issues, interests, and the appellate perspective;
25 fostering joint problem-solving; and exploring settlement alternatives.

26 b. Upon selection or appointment to mediate an appeal as provided by this rule, the mediator shall
27 schedule a mediation conference between the parties for the purpose of attempting to resolve the
28 issues on appeal.

29 c. The conference shall be held in person; provided, however, that if distance, time, or other
30 considerations make an in-person conference impractical, the mediator may hold the conference
31 by telephone at such time and place as the mediator may determine. The mediation shall proceed
32 in substantial compliance with the requirements of this rule and the guidelines and format set forth
33 in the mediator's instruction sheet.

34 d. The appellant, or the cross-appellant in those cases where only the cross-appeal results in the
35 case being subject to this rule, shall submit the required statement of position to the mediator and
36 to the responsive party within 15 days of the date the notice of selection or order of appointment
37 of the mediator is filed under section (4) of this rule. The responsive party shall have 7 days to
38 submit a responsive statement of position. In the event of a cross-appeal, the appellant shall have
39 an additional 7 days to submit its statement of position relative to the issues raised by the cross-
40 appeal.

41 e. The parties' respective submissions shall not exceed 10 pages in length, double spaced, on
42 standard letter-sized paper; provided, however, that the parties may attach such exhibits of record
43 and transcript excerpts as the parties may wish the mediator to consider.

44 f. The parties shall serve on the mediator and each party their written statement of position
45 substantially complying with Form 7 in the Appendix of Forms and containing, at a minimum, the
46 following:

47 i. A statement of issue(s) on appeal and the manner in which each issue was preserved;

48 ii. A statement of the standard of review applicable to each issue;

49 iii. The position of the party with respect to each issue, with citations to legal authority; and

50 iv. In the case of the appellant and any cross-appellant, a copy of the order or judgment from
51 which the appeal is taken.

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1 g. In addition to the statements of position to be served on the mediator and opposing parties, each
2 party may submit to the mediator a separate confidential submission containing such additional
3 information relative to its position regarding settlement as it may wish to tender in order to
4 facilitate the mediation process required by this rule. Unless otherwise agreed, such a submission
5 shall not exceed 5 pages. The confidential submission, if any, shall be served on the mediator
6 contemporaneously with the service of the party's statement of position.

7 h. Each party, or a representative of each party with authority to participate in settlement
8 negotiations and affect a complete compromise of the case, shall participate in the mediation
9 conference. If an insurance carrier, other indemnitor, or self-insurance administrator is involved, a
10 representative with ultimate settlement authority shall participate in the mediation conference.

11 (6) Proceedings confidential. The mediation process shall be confidential. All proceedings held,
12 submissions tendered, and statements made by anyone in the course of the mediation process
13 required by this rule constitute offers to compromise and statements made in compromise
14 negotiations pursuant to M. R. Evid. 408 and are inadmissible pursuant to the terms of that rule.

15 (7) Completion of mediation process.

16 a. Immediately upon the conclusion of the mediation conference, the mediator shall file a
17 mediator's report substantially complying with Form 8 in the Appendix of Forms with the clerk of
18 the supreme court, and serve copies on the parties.

19 b. Where the mediation results in resolution of the appeal, dismissal will be governed by rule
20 16(5) of these rules. In the event the appeal is resolved, the parties shall execute a settlement
21 agreement and file a stipulation for dismissal within 15 days of the filing of the mediator's report.

22 c. None of the forms, notices, or stipulations to be filed with the clerk of the supreme court shall
23 contain any information relating to the parties' respective positions regarding the issues on appeal,
24 the parties' positions regarding settlement, or any substantive matter which is the subject of the
25 litigation; the exclusive and sole purposes of forms and notices to be filed with the clerk of the
26 supreme court are to maintain status records and statistics, to ensure orderly compliance with the
27 process required by this rule, and to provide a mechanism for returning the case to the ordinary
28 appeal process where mediation has not resolved the case and resulted in a stipulation for
29 dismissal.

30 d. The parties are encouraged to continue to pursue settlement efforts in the event the mediation
31 process required by this rule does not resolve the appeal and the case returns to the ordinary
32 appeal process.

33 (8) Sanctions. Substantial noncompliance with this rule may, on motion of a party or by the
34 supreme court sua sponte, result in the assessment of mediator fees, imposition of monetary
35 sanctions, costs, dismissal of the appeal, or such other sanction as the supreme court deems
36 appropriate.

37 (9) Self-executing, no motion practice. Except as provided in section (8) of this rule and in
38 addressing a motion to determine whether an appeal is subject to section (2) of this rule, the
39 provisions of this rule are designed to be and are self-executing and not subject to motion practice.
40 Motions to opt out of mediation, to substitute mediators, or for extensions of time to complete
41 mediation will be subject to summary denial.