

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2009 MTWCC 10**

**WCC No. 2008-2089**

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**BETTY K. EMMONS**

**Petitioner**

**vs.**

**MHA WORKERS COMPENSATION RECIPROCAL**

**Respondent.**

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ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT, AND  
RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT,  
GRANTING RESPONDENT'S MOTION TO STRIKE PETITIONER'S ADDENDUM TO  
HER SUMMARY JUDGMENT BRIEF, AND  
GRANTING RESPONDENT'S MOTION TO STRIKE PETITIONER'S REPLY BRIEF

**Summary:** Petitioner moved for summary judgment. Respondent cross-motivated for summary judgment, alleging Petitioner failed to provide notice of her injury within thirty days, as required by § 39-71-603(1), MCA. Respondent further moved the Court to strike two of Petitioner's pleadings related to the motions for summary judgment on the grounds that Petitioner's pleadings contained inadmissible information regarding confidential mediation proceedings.

**Held:** Petitioner's motion for summary judgment is denied because Petitioner failed to comply with the requirements of ARM 24.5.329(3). Irrespective of Petitioner's failure to comply with this rule, it is readily apparent from the briefs that Petitioner's claim is not appropriate for summary judgment because there are facts in dispute. Respondent's cross-motion for summary judgment is denied because Petitioner timely provided notice to her employer of her alleged injury in compliance with § 39-71-603(1), MCA. Respondent's motions to strike two of Petitioner's pleadings are granted on the grounds that the substance of Petitioner's pleadings attempted to place confidential mediation information before the Court which is specifically prohibited under § 39-71-2410, MCA. Petitioner has made multiple attempts to introduce information from the confidential mediation proceedings in contravention of § 39-71-2410, MCA. Petitioner is cautioned that

any further attempts will result in an order to show cause why sanctions should not be imposed.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2410.** Since department mediation proceedings and all communications during those proceedings are confidential, and the mediator's report and the information contained within it are inadmissible, this Court cannot consider information from the mediator's report which a party attempts to introduce into the record. The mediation report is of no persuasive value to the Court and none of the information contained within it will be considered by the Court.

**Mediation: Confidentiality.** Since department mediation proceedings and all communications during those proceedings are confidential, and the mediator's report and the information contained within it are inadmissible, this Court cannot consider information from the mediator's report which a party attempts to introduce into the record. The mediation report is of no persuasive value to the Court and none of the information contained within it will be considered by the Court.

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329.** Where a claimant fails to comply with the rule requiring a statement of uncontroverted facts as described in ARM 24.5.329(3), her motion for summary judgment will not be considered.

**Summary Judgment: Motion for Summary Judgment.** The Court will not consider the summary judgment motion of a claimant who fails to comply with the requirements of ARM 24.5.329(3) in setting forth a statement of uncontroverted facts.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-603.** Where the claimant notified her employer of her alleged injury within 30 days, but more than 30 days later amended the date of her alleged injury, the claimant nonetheless provided timely notice under § 39-71-603(1), MCA. While the insurer may argue that the claimant's change of date-of-injury goes to her credibility, the purpose of the notice statute is to enable the employer to protect himself by prompt investigation; Respondent was on notice of the claimant's alleged injury within 30 days of

its occurrence and had the opportunity to protect itself by prompt investigation.

¶ 1 Petitioner moves this Court for summary judgment in this matter, asserting that no material facts are in dispute, and arguing that she is entitled to summary judgment as a matter of law.<sup>1</sup> Respondent opposes Petitioner's motion, and argues that it is entitled to summary judgment in its favor.<sup>2</sup> Additionally, Respondent has moved this Court to strike two additional filings which Petitioner has submitted with respect to the summary judgment motions – an addendum to Petitioner's opening brief,<sup>3</sup> and in Petitioner's brief filed in reply to Respondent's summary judgment response and brief in support of its cross-motion.<sup>4</sup> This Order resolves all four pending motions.

### Respondent's Motion to Strike Petitioner's Addendum

¶ 2 Petitioner filed her motion for summary judgment and supporting brief on August 21, 2008. On August 26, 2008, she filed an "addendum" to that brief in which she purports to correct a "typographical error" in her supporting brief.<sup>5</sup> Petitioner asserted that in her opening brief, she incorrectly referred to the wrong paragraph of her petition. She then quotes the paragraph of her petition to which she wished to refer. The paragraph which Petitioner quotes verbatim contains details of the department mediation regarding her claim. Respondent points out that this Court, *sua sponte*, had already stricken this language from Petitioner's petition because § 39-71-2410, MCA, prohibits the use of information from the mediation in proceedings before this Court. Respondent argues that Petitioner's addendum should therefore be stricken from the record.

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<sup>1</sup> Motion for Summary Judgment in Favor of the Claimant, Docket Item No. 4; Brief in Support of Motion for Summary Judgment, Docket Item No. 5.

<sup>2</sup> Motion for Summary Judgment, Docket Item No. 14; Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of Respondent's Cross-Motion for Summary Judgment (Respondent's Brief in Opposition), Docket Item No. 15.

<sup>3</sup> Addendum to Brief in Support of Motion for Summary Judgment to Correct Typographical Error (Petitioner's Addendum to Brief in Support), Docket Item No. 8, objected to in [Respondent's] Motion to Strike "Addendum to Brief in Support of Motion for Summary Judgment to Correct Typographical Error," Docket Item No. 13.

<sup>4</sup> Reply to Respondent's Brief and Refusal to Acknowledge Claim and Pay Benefits (Petitioner's Reply Brief), Docket Item No. 23, objected to in [Respondent's] Motion to Strike "Reply to Respondent's Brief and Refusal to Acknowledge Claim and Paid Benefits" and Supporting Brief, Docket Item No. 26.

<sup>5</sup> Petitioner's Addendum to Brief in Support.

¶ 3 Pursuant to § 39-71-2410, MCA, department mediation proceedings and all communications during these proceedings are confidential. The statute further provides that the mediator's report and the information contained within it are inadmissible. Therefore, I cannot consider the information which Petitioner attempts to reintroduce into the record. The mediation report is of no persuasive value to this Court. Petitioner's addendum is therefore stricken in its entirety. None of the information contained within it will be considered by the Court in any fashion in deciding this case.

#### Respondent's Motion to Strike Petitioner's Reply Brief

¶ 4 Petitioner filed her reply brief to her summary judgment motion and Respondent's cross-motion for summary judgment on October 2, 2008. On October 17, 2008, Respondent moved to strike Petitioner's reply brief on the grounds that Petitioner again set forth confidential information from the mediation proceeding in violation of § 39-71-2410, MCA. Petitioner filed an objection to Respondent's motion to strike on October 22, 2008, in which she argued that Respondent's motion was untimely, and further argues that § 39-71-2410, MCA, prohibits only the admission of the mediator's report itself.

¶ 5 Section 39-71-2410, MCA, states in pertinent part:

(1) . . . [M]ediation proceedings must be . . .

. . .

(c) confidential.

(2) All communications, verbal or written, from the parties to the mediator and any information and evidence presented to the mediator during the proceedings are confidential.

. . .

(4) . . .

(b) The mediator's report and any of the information or recommendations contained in the report are not admissible as evidence in any action subsequently brought in any court of law.

¶ 6 Section 39-71-2410, MCA, is plain on its face and clearly prohibits the introduction of the evidence which Petitioner has repeatedly sought to place in front of the Court. In fact, although Petitioner asserts in her objection to Respondent's motion to strike that she is not attempting to get the mediator's report into the record, Petitioner quotes directly from the mediator's report as a substantive basis in support of her position.<sup>6</sup> Petitioner's reply brief is stricken.

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<sup>6</sup> Petitioner's Reply Brief at 3.

¶ 7 Petitioner has made multiple attempts to introduce information from the confidential mediation proceedings in contravention of § 39-71-2410, MCA. Petitioner is cautioned that any further attempts will result in an order to show cause why sanctions should not be imposed.

### Petitioner's Motion for Summary Judgment

¶ 8 Under ARM 24.5.329, a party may move for summary judgment, and such judgment shall be rendered if the record demonstrates that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists. However, summary judgment is proper if the facts material to the motion are undisputed and entitle the party to summary judgment.<sup>7</sup>

¶ 9 In the present case, Petitioner has failed to demonstrate that she is entitled to summary judgment. Her brief fails to comply with ARM 24.5.329(3), which requires:

Any party filing a motion under this rule shall include in its brief a statement of uncontroverted facts, which shall set forth in full the specific facts on which the party relies in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific pleading, affidavit, or other document where the fact may be found. . . .

¶ 10 Petitioner has failed to comply with this requirement. I therefore will not consider her motion for summary judgment. However, it is readily apparent from the briefs that Petitioner's claim is not appropriate for summary judgment in any event because there are facts in dispute. As Respondent correctly points out, it is Petitioner's burden to establish by a preponderance of the evidence that she sustained an industrial injury.<sup>8</sup> Respondent has established that there are material facts in dispute whether Petitioner was injured where and when she claims. The disputes at issue necessarily require a credibility finding regarding Petitioner and possibly witnesses from her employer as well. Petitioner's motion for summary judgment is denied.

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<sup>7</sup> *Sandru v. Rochdale Ins. Co.*, 2004 MTWCC 49, ¶ 14 (citations omitted).

<sup>8</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973).

## Respondent's Cross-Motion for Summary Judgment

¶ 11 Respondent responded to Petitioner's motion for summary judgment and cross-motivated for summary judgment in its favor. Respondent argues that it is entitled to summary judgment because Petitioner failed to provide notice of her injury within thirty days, as required by § 39-71-603(1), MCA. The dispositive facts relative to Respondent's cross-motion for summary judgment are as follows:<sup>9</sup>

¶ 11a On November 21, 2007, Petitioner met with her direct supervisor, Shawn Ward, and her employer's human resource director, Judy Marshall. During this meeting, Petitioner advised Ward and Marshall that she was injured at work on November 7, 2007, when she was cleaning under a bed and struck her wrist on the bed frame. Petitioner further advised Ward and Marshall that the injury had not bothered her until November 16, 2007, at which time she sought medical assistance.

¶ 11b After a review of payroll records, Petitioner's employer determined that she had not worked on November 7, 2007. Based on this fact, Petitioner's claim was denied.

¶ 11c In a letter dated January 16, 2008, Petitioner's counsel stated that Petitioner's injury actually occurred on November 9, 2007, rather than November 7, 2007.

¶ 12 Respondent argues that, although Petitioner notified her employer of her alleged injury within thirty days, her report was nevertheless untimely because more than thirty days had passed by the time Petitioner amended the date of her alleged injury. Both parties agree that Petitioner initially claimed the industrial injury occurred on one date and then later claimed that it had actually occurred two days later. Clearly, Respondent may use this information in an attempt to impeach Petitioner's credibility at trial. For purposes of determining whether Petitioner provided timely notice under § 39-71-603(1), MCA, however, her November 21, 2007, notice to her employer was within thirty days of her date of injury, regardless of whether Petitioner's alleged injury occurred on November 7, 2007, or November 9, 2007. As Respondent points out in its brief, the purpose of the notice statute<sup>10</sup> is "to enable the employer to protect himself by prompt investigation of the claimed

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<sup>9</sup> See Respondent's Brief in Opposition.

<sup>10</sup> § 39-71-603, MCA.

accident.”<sup>11</sup> Respondent was on notice of Petitioner’s alleged injury within thirty days and had the opportunity to protect itself by prompt investigation. Respondent’s motion is denied.

ORDER

¶ 13 Petitioner’s motion for summary judgment is **DENIED**.

¶ 14 Respondent’s cross-motion for summary judgment is **DENIED**.

¶ 15 Respondent’s motion to strike Petitioner’s Addendum to Brief in Support of Motion for Summary Judgment to Correct Typographical Error is **GRANTED**.

¶ 16 Petitioner’s Addendum to Brief in Support of Motion for Summary Judgment to Correct Typographical Error is **STRICKEN** from the record and shall not be considered.

¶ 17 Respondent’s motion to strike Petitioner’s Reply Brief is **GRANTED**.

¶ 18 Petitioner’s Reply to Respondent’s Brief and Refusal to Acknowledge Claim and Pay Benefits is **STRICKEN** from the record and shall not be considered.

DATED in Helena, Montana, this 9<sup>th</sup> day of March, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
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JUDGE

c: Wade J. Dahood  
Oliver H. Goe

Submitted: September 12, 2008, October 2, 2008, and October 22, 2008

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<sup>11</sup> *Citing Neil v. Billings Processors, Inc.*, 229 Mont. 305, 312, 746 P.2d 617, 622 (1988).