

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 10

WCC No. 2016-3760

TIMOTHY HALL

Petitioner

vs.

NEW HAMPSHIRE INS. CO.

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AND DENYING
RESPONDENT'S MOTION TO STRIKE AS MOOT

Summary: Respondent moved to dismiss the Petition for Hearing, arguing that this Court lacks jurisdiction because Petitioner filed his petition in this Court prior to the issuance of the mediator's Report and Recommendation. Petitioner objected to Respondent's motion, arguing that he could cure any jurisdictional defect because the mediator had issued a Report and Recommendation after Respondent filed its motion to dismiss, and alternatively arguing that he could file his Petition for Hearing because more than 10 working days had passed since the mediation conference, in accordance with ARM 24.28.108(2).

Held: This Court granted Respondent's motion to dismiss. A supplemental pleading cannot cure this jurisdictional defect because it would defeat the purpose of the mediation statutes. Furthermore, since the parties agreed that they pended the mediation to allow them to submit additional evidence for the mediator's consideration, Petitioner failed to prove precisely when the case was no longer in a pending status and that more than 10 working days had passed since the mediation conference.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2408. Since *Preston v. Transportation Ins. Co.*, this Court has strictly construed the mediation requirement of § 39-71-2408, MCA, and dismissed petitions filed prior to the completion of the mediation

process, including this case in which the claimant filed his petition prior to the issuance of the mediator's Report and Recommendation.

Jurisdiction: Workers' Compensation Court: Mediation Requirement. Since *Preston v. Transportation Ins. Co.*, this Court has strictly construed the mediation requirement of § 39-71-2408, MCA, and dismissed petitions filed prior to the completion of the mediation process, including this case in which the claimant filed his petition prior to the issuance of the mediator's Report and Recommendation.

Pleading: Supplemental Pleading. Since this Court's rules contain no express provision regarding supplemental pleadings, this Court is guided by M.R.Civ.P. 15(d) to determine when a party may file a supplemental pleading. Supplemental pleadings may cure subject-matter jurisdiction deficiencies if "dismissing the petition for lack of jurisdiction would serve no other purpose than to create an additional procedural technicality."

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2408. The mediator's Report and Recommendation is not a mere procedural technicality, but is a meaningful part of the mediation process. Parties should consider the mediators' recommendations before moving forward with litigation. If this Court were to forego the requirement of a mediator's Report and Recommendation before the petition filing, it would defeat the purpose of § 39-71-2408, MCA.

Mediation: General. The mediator's Report and Recommendation is not a mere procedural technicality, but is a meaningful part of the mediation process. Parties should consider the mediators' recommendations before moving forward with litigation. If this Court were to forego the requirement of a mediator's Report and Recommendation before the petition filing, it would defeat the purpose of § 39-71-2408, MCA.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.28.108. For ARM 24.28.108(2) to apply to a case in which the parties agreed to postpone the issuance of the mediator's Report and Recommendation, a party must prove that the mediator failed to comply with the deadline. Where this Court has no dates from which to determine when the mediator received all of the additional information needed to remove the case from its pending status, this Court cannot conclude that

the mediator failed to comply with the deadline set forth in ARM 24.28.108(2).

¶ 1 Respondent New Hampshire Ins. Co. (New Hampshire) moves to dismiss Petitioner Timothy Hall's Petition for Hearing on the grounds that the parties had not satisfied the statutory mediation procedure at the time Hall filed his petition. Hall opposes the motion, arguing that the mediator has subsequently issued a written Report and Recommendation and therefore the parties have satisfied the mediation procedure. Hall further argues that he could file his petition pursuant to ARM 24.28.108(2) because more than 10 working days had passed since the mediation conference. New Hampshire has also moved to strike a portion of Hall's brief on the grounds that Hall disclosed confidential communications made at the mediation conference, in violation of § 39-71-2410 (2), MCA.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 On May 10, 2015, Hall suffered an industrial injury in the course of his employment at The Home Depot in Helena.

¶ 3 On October 21, 2015, the parties participated in a mediation conference pursuant to Title 39, Ch. 71, Part 24, of the Workers' Compensation Act (WCA).

¶ 4 On April 6, 2016, Hall filed his Petition for Hearing in this matter. He alleged that the parties had complied with the statutory mediation procedure. However, at the time that Hall filed his petition, the mediator had not issued a Report and Recommendation, as the parties and the mediator had agreed to place the case in a "pending" status.

¶ 5 After New Hampshire moved to dismiss the Petition for Hearing for lack of subject matter jurisdiction due to the purported failure to complete the mediation process, the mediator issued her Report and Recommendation.

¶ 6 After reviewing the parties' briefs, this Court asked the parties to present arguments regarding the potential applicability of *In re Marriage of Buck*.¹

¶ 7 On June 15, 2016, New Hampshire filed a position statement and this Court heard oral argument on the motion to dismiss from both parties.

¹ 2014 MT 344, 377 Mont. 393, 340 P.3d 546.

LAW AND ANALYSIS

¶ 8 This case is governed by the 2013 version of the WCA since that was the law in effect at the time of Hall's industrial accident.²

¶ 9 Section 39-71-2401(1), MCA, states:

A dispute concerning benefits arising under this chapter, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

¶ 10 Likewise, § 39-71-2408(1), MCA, states:

Except as otherwise provided, in a dispute arising under this chapter, the insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court.

¶ 11 Finally, § 39-71-2905(1), MCA, states in relevant part:

After parties have satisfied dispute resolution requirements provided elsewhere in this chapter, the workers' compensation judge has exclusive jurisdiction to make determinations concerning disputes under this chapter

. . . .

¶ 12 In *Preston v. Transportation Ins. Co.*, the Montana Supreme Court stated that this Court does not have jurisdiction over a dispute over benefits until the parties satisfy the mandatory mediation process:

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

² *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

otherwise provided” in the Workers’ Compensation Act—such as mandatory mediation.³

¶ 13 New Hampshire correctly argues that, since *Preston*, this Court has strictly construed the mediation requirement and consistently dismissed petitions in circumstances similar to the case at bar.⁴ This Court has reasoned that while it may be more convenient to stay the proceedings, the failure to complete the process is a jurisdictional defect for which the appropriate remedy is dismissal.⁵ For example, in *Young v. New Hampshire Ins. Co.*, this Court dismissed a petition which a claimant filed before the mediator issued a report.⁶ Likewise, in *Burke v. Roseburg Forest Products Co.*, this Court dismissed a petition in a case similar to Hall’s: the claimant filed her Petition for Hearing prior to the issuance of the mediator’s report, the insurer moved to dismiss, and the mediator then issued a report.⁷ Although the claimant argued that this Court should exercise jurisdiction because the “purpose of the mediation [had] been served,” this Court explained, “Although Burke’s argument may be well-taken from a practical standpoint, practicality cannot operate as a source of jurisdiction.”⁸ As this Court explained in *Wommack v. National Farmers Union Property & Casualty Co.*, where serious doubt exists as to whether a statutorily-prescribed process for this Court to obtain jurisdiction was met, this Court should not conduct a trial when a “cloud of uncertainty” rests over its jurisdiction.⁹

¶ 14 Shortly after this Court decided *Wommack*, the Montana Supreme Court decided *In re Marriage of Buck*, in which it held that some jurisdictional defects could be cured via supplemental pleading.¹⁰ In *Buck*, Susan petitioned for dissolution of marriage.¹¹ Pursuant to the applicable statute, a district court does not have jurisdiction unless one of the parties resided in Montana for 90 days preceding “the filing of the action.”¹² In her petition, Susan alleged that she had been a Montana resident in excess of 90 days,

³ *Preston v. Transp. Ins. Co.*, 2004 MT 339, ¶ 36, 324 Mont. 225, 102 P.3d 527.

⁴ See *Kutzler v. Montana State Fund*, 2005 MTWCC 5, ¶ 11 (“[A]ll petitions which are filed before completion of mandatory mediation will be dismissed.”)

⁵ *Kutzler*, ¶ 11.

⁶ 2015 MTWCC 14.

⁷ 2009 MTWCC 32.

⁸ *Burke*, ¶ 9 (citing *Thompson v. State of Montana*, 2007 MT 185, ¶ 34, 338 Mont. 511, 167 P.3d 867).

⁹ 2014 MTWCC 22, ¶ 12 (citations omitted).

¹⁰ *Buck*, ¶ 23.

¹¹ *Buck*, ¶ 7.

¹² *Buck*, ¶ 14 (quoting § 40-4-104(1)(a), MCA).

although she further alleged that she “now temporarily resides in Florida.”¹³ Her husband contested jurisdiction, alleging that neither of them had resided in Montana for 90 days prior to the filing of the petition.¹⁴ Susan then filed an amended petition in which she alleged that she currently resided in Montana and had been a resident in excess of 90 days.¹⁵ On appeal, Susan argued that if the district court did not have jurisdiction when she filed her petition, she cured the jurisdictional defect with her amended petition.¹⁶

¶ 15 In its decision, the Montana Supreme Court clarified that Susan’s second filing was technically a supplemental pleading, because it alleged facts that occurred after she filed her initial petition.¹⁷ Under M.R.Civ.P. 15(d), parties may file such pleadings to cure defects in earlier pleadings.¹⁸ The court stated that supplemental pleadings may cure subject-matter jurisdiction deficiencies if “dismissing the petition for lack of jurisdiction would serve no other purpose than to create an additional procedural technicality.”¹⁹ The court found no legislative purpose harmed by allowing the supplemental pleading to cure the alleged jurisdictional defect.²⁰ Therefore, the court concluded that Susan had cured any resulting jurisdictional defect and the district court did not err in denying the motion to dismiss.²¹

¶ 16 New Hampshire argues that *Buck* does not apply because allowing a supplemental pleading²² would defeat the legislative purpose of the mediation statutes. New Hampshire points to § 39-71-2406, MCA, which states:

The purpose of this part is to prevent when possible the filing in the workers’ compensation court of actions . . . if an equitable and reasonable resolution . . . may be effected at an earlier stage. To achieve this purpose, this part provides for a procedure for mandatory, nonbinding mediation. It is the intent of this part that the mediation process be used to resolve cases . . .

¹³ *Buck*, ¶ 7.

¹⁴ *Buck*, ¶ 8.

¹⁵ *Buck*, ¶ 9.

¹⁶ *Buck*, ¶ 15.

¹⁷ *Buck*, ¶ 16 (citations omitted).

¹⁸ *Buck*, ¶ 17.

¹⁹ *Buck*, ¶ 18 (citations omitted).

²⁰ *Buck*, ¶ 21.

²¹ *Buck*, ¶ 23.

²² Since this Court’s rules contain no express provision regarding supplemental pleadings, this Court is guided by the Montana Rules of Civil Procedure pursuant to ARM 24.5.352. Therefore, M.R.Civ.P. 15(d) applies here.

[and] the parties are required to fully present their cases at the mediation level. . . .

New Hampshire argues that if Hall were allowed to cure the jurisdictional defect by filing a supplemental pleading, it would defeat the purpose of the mediation statutes because it would allow Hall to proceed in litigation without first considering the mediator's recommendations. New Hampshire argues that the mediator's Report and Recommendation is not a mere "procedural technicality," but is a meaningful part of the mediation process. Hall argues that under *Buck*, it is proper to proceed with a supplemental pleading.

¶ 17 This Court agrees with New Hampshire. Given the knowledge and expertise of the department mediators, the parties should consider their recommendations before moving forward with litigation. Unlike the statute at issue in *Buck*, if this Court were to forego the requirement of a mediator's Report and Recommendation before the petition filing, it would defeat the purpose of § 39-71-2408, MCA.

¶ 18 Hall also argues that ARM 24.28.108(2) permitted him to file the Petition for Hearing prior to the issuance of the mediator's Report and Recommendation. That rule states in relevant part:

Within 10 working days after a mediation conference, the mediator shall prepare a written report to the parties setting forth the mediator's recommended solution and the basis for the recommendation. If the mediator does not prepare a written report within 10 working days after a mediation conference, the parties may proceed directly to [the] workers' compensation court.

Hall argues that the mediation conference ended once the mediator received the supplemental information for which the parties had pended the mediation, and contends that more than 10 working days had passed since the mediator received the supplemental information.

¶ 19 The parties agree that they pended the mediation to submit additional information. In *Nelson v. State Compensation Ins. Fund*, this Court ruled that although § 39-71-2411(5), MCA (1995), provides that a mediator shall issue a report within a reasonable time following a mediation conference, as specified by rule, and ARM 24.28.108(2) sets that time as 10 working days, parties may agree to postpone the mediator's Report and Recommendation to facilitate further investigation.²³ In *Nelson*, this Court noted that it did

²³ 1996 MTWCC 29.

not appear that the mediator ignored or failed to meet the deadline, and that the parties should give the mediator the opportunity to issue a report.²⁴

¶ 20 In the present case, like in *Nelson*, the parties agreed to postpone the mediator's report to submit additional evidence. Hall maintains that the parties agreed to the postponement in order to provide "a very limited amount of [additional] information" for the mediator's consideration. Hall further contends that the parties provided that information promptly, and that he waited more than 10 working days prior to filing his Petition for Hearing. Hall, however, provides no dates from which this Court can make that determination. While this Court acknowledges that it is difficult for a party to provide evidence concerning a department mediation without running afoul of § 39-71-2410(2), MCA, a party must nonetheless provide evidence from which this Court can reach its conclusions. This Court does not know when the mediator received all of the additional information so as to remove this case from its pending status, nor does this Court know if either party informed the mediator that the matter was fully submitted and ready for consideration. In order for ARM 24.28.108(2) to apply to a case in which the parties agreed to postpone the issuance of the Report and Recommendation, a party must prove to this Court that the mediator failed to comply with the deadline. Hall has not done so in the present case.

¶ 21 New Hampshire has also moved to strike a paragraph from Petitioner's Brief in Opposition [to] Motion to Dismiss. However, this Court did not rely upon the challenged portion of Hall's brief and New Hampshire's motion is therefore denied as moot.

ORDER

¶ 22 Respondent's motion to dismiss is **granted**.

¶ 23 Respondent's motion to strike is **denied**.

DATED this 12th day of July, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: John C. Doubek
Kelly M. Wills
Submitted: June 15, 2016

²⁴ *Nelson* at 2. (*Nelson* preceded the Montana Supreme Court's decision in *Preston*, and therefore this Court did not require *Nelson* to refile her Petition for Hearing, but ordered the parties to request a report from the mediator and to subsequently consider and respond to it.)