

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

**2005 MTWCC 30**

**WCC No. 2005-1295**

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**MARK PETERSON**

**Petitioner**

**vs.**

**MONTANA SCHOOLS GROUP INSURANCE AUTHORITY**

**Respondent/Insurer.**

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**DECISION AND ORDER DENYING EMERGENCY SETTING  
AND DISMISSING PERMANENT TOTAL DISABILITY CLAIM**

**Summary:** The petitioner/claimant previously filed a petition seeking temporary total disability benefits. After two continuances, the claimant gave notice of his intent to seek attorney fees. When the Court indicated it would not allow the claimant to amend his petition to seek such fees because the request was far too late, the claimant chose to voluntarily dismiss his petition. He then filed a new petition seeking not only temporary total disability benefits and attorney fees but also permanent total disability benefits and a penalty. He asked that the case be set on an emergency basis. The respondent opposed an emergency setting and moved to dismiss the permanent total disability claim on account of the claimant's failure to mediate that issue.

**Held:** The request for an emergency setting is denied since no facts supporting the request were alleged in the petition as required by Court rules. Moreover, the claimant's own conduct indicates there is no emergency. The motion to dismiss the permanent total disability claim is granted since the issue was not mediated. Lacking mediation, the Workers' Compensation Court lacks jurisdiction to adjudicate the issue.

**Topics:**

**Procedure: Emergency Petition.** Rule 24.5.311 of the Rules of the Workers' Compensation Court requires a petitioner seeking an emergency trial setting to set forth in the petition sufficient facts showing that an

emergency setting is necessary. Where the petition sets out no facts supporting the request, the request will be denied.

**Constitutions, Statutes, Rules, and Regulations: Workers' Compensation Court Rules: Rule 24.5.311.** Rule 24.5.311 of the Rules of the Workers' Compensation Court requires a petitioner seeking an emergency trial setting to set forth in the petition sufficient facts showing that an emergency setting is necessary. Where the petition sets out no facts with respect to the request, the request will be denied.

**Procedure: Emergency Petition.** Where the claimant filed a previous petition and did not allege an emergency; the trial setting for that prior petition was continued three times; and the claimant ultimately dismissed his prior petition to enable him to file a new, second petition adding a claim for attorney fees, there is no emergency with respect to the second petition.

**Mediation: General.** The Workers' Compensation Court does not have jurisdiction to adjudicate a request for permanent total disability benefits where the claimant has not mediated his request. Mediation with respect to a request for temporary total disability benefits does not satisfy the mediation requirement since "any" issue raised in the Workers' Compensation Court must be first mediated. A request for permanent total disability benefits is a separate and distinct issue.

**Attorney Fees: Request For.** A request for attorney fees must be pled in the petition. (Refer to Footnote 1.)

**Attorney Fees: Request For.** Pursuant to the scheduling order of the Workers' Compensation Court, a claimant seeking attorney fees must provide the respondent with "a particularization of the grounds or basis for any penalty or attorney fees sought by the claimant" and must do so by the date fixed in the order. (Refer to Footnote 1.)

¶1 Two matters are before the Court. The first is the petitioner's request, set forth in his petition, that his petition be set for trial on an emergency basis. The second is the respondent's motion to dismiss the petitioner's claim for permanent total disability benefits since that claim has not been mediated.

## Factual Background

¶2 On May 20, 2004, the petitioner (hereinafter “claimant”) filed his first Petition for Hearing. (WCC No. 2004-1052.) He requested the Court to order a reinstatement of his temporary total disability benefits. He did not ask for attorney fees or a penalty. He did not request an emergency trial setting.

¶3 On March 28, 2005, the claimant filed a Notice Regarding Attorney’s Fees in which he stated his intention to seek attorney fees. The notice was filed despite the lack of any request for attorney fees in the petition<sup>1</sup> and after the deadline had expired for notifying other parties of the particularized grounds for seeking attorney fees. It also came after three continuances of the trial setting. After this Court indicated that it would not permit the claimant to add a late claim for attorney fees, the petitioner chose to voluntarily dismiss his first petition.

¶4 Thereafter, the claimant filed a new petition. That petition, filed herein, seeks “retroactive reinstatement of temporary total disability benefits **and** permanent total disability,” as well as attorney fees and a penalty. (Petition For Hearing - Request For Expedited Hearing, ¶ 3, emphasis added.)

¶5 In the title of the petition, the claimant included a request for expedited hearing. However, no grounds supporting that request were set out in the body of the petition.

¶6 Following the filing of the new petition, the Court notified the parties that if both parties agreed it would set an early trial date. The respondent objected to an expedited trial. It also moved to dismiss the claim for permanent total disability benefits on the ground

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<sup>1</sup>The Court’s scheduling orders require that a claimant seeking either attorney fees or a penalty must provide “a particularization of the grounds or basis for any penalty or attorney fees sought by the claimant.” (Scheduling Order, ¶ 3(e).) A deadline for doing so is fixed in the scheduling order. The requirement does not relieve the claimant of specifically pleading his request for attorney fees in his or her petition. Indeed, Rule 24.5.301(3), of the rules of this Court, provides:

(3) Any claim for attorney fees and/or penalty with respect to the benefits or other relief sought by the petitioner shall be joined and pleaded in the petition. Failure to join and plead a claim for attorney fees and/or penalty with respect to the benefits or other relief sought in the petition shall constitute a waiver and shall bar any future claim with respect to such attorney fees and/or penalty.

that it had not been mediated. A copy of the claimant's request for mediation, as well as his response to the motion to dismiss (Petitioner's Brief in Opposition to Motion to Dismiss), show that the claimant mediated his request for temporary total disability benefits but did not mediate his claim for permanent total disability benefits.

## Discussion

### I. Trial Setting

¶7 Emergency trial settings are governed by Rule 24.5.311, which provides as follows:

24.5.311 EMERGENCY TRIALS (1) Trials may be held by the court upon less than 75 days notice when good cause is shown. Such trials shall be termed "emergency trials". **Facts constituting the emergency must be set forth in the petition in sufficient detail for the court to determine whether an actual emergency exists.** The court, on its own motion, may set a trial as an emergency trial. When an emergency trial is ordered, the court shall give reasonable notice of the time and place for a pretrial conference and for the trial.

(Workers' Compensation Court Rule 24.5.311, emphasis added.)

¶8 The claimant's request for an emergency setting must be denied in the first instance because his petition fails to set out facts showing any emergency. Indeed, the petition sets forth **no** facts regarding his request. For that reason, the Court notified both parties that it would set the trial on an expedited basis if both parties agreed. As is the custom of the Court, it will set trials virtually any time the parties agree to.

¶9 The request for an emergency setting must be denied not only on account of the claimant's failure to allege a sufficient basis for doing so but also on the merits. The claimant's own actions belie his assertion that there is an emergency. His original petition for temporary total disability benefits was filed a year ago. No request for an emergency setting was made in that petition and the claimant agreed to three continuances. The request for reinstatement of temporary total disability benefits would have been tried in April of this year but for the claimant's decisions to forego a trial at that time, dismiss his petition, and file a new petition adding claims for attorney fees and a penalty.

¶10 Moreover, the claimant also does not dispute the respondent's understanding, set out in its response to the request for an emergency setting,<sup>2</sup> that he is receiving disability income and retirement benefits and living with his mother rent free. Those facts are certainly relevant to any claim of emergency.

¶11 In summary, the claimant has failed to either properly allege or factually support his request for an emergency setting.

## II. PTD Claim

¶12 Mediation of a claim for benefits is a jurisdictional prerequisite. §§ 39-71-2905(1), 39-71-2401(1), and 39-71-2408(1), MCA (1997). The requirement extends to "any issue" the claimant wishes to litigate. Section 39-71-2408(1), MCA, provides:

(1) Except as otherwise provided, in a dispute arising under chapter 71 or 72 of this title, 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.

§ 39-71-2408(1), MCA (1997) (emphasis added).

¶13 A claimant's entitlement to permanent total disability benefits is a separate and distinct issue from his entitlement to temporary total disability benefits. The elements which must be shown for each type of benefits are different. Thus, the claimant was required to mediate his permanent total disability claim before filing a petition with this Court. Lacking mediation, the Court lacks jurisdiction over the claim. It must therefore be dismissed and remanded to the Mediation Unit of the Department of Labor and Industry for mediation. Section 39-71-2406, MCA (1997), provides in relevant part: "If a new issue is raised at the workers' compensation court that was not raised at mediation, the court shall remand the issue to the mediator for consideration."

## ORDER

¶14 The request for an emergency trial setting is **denied**.

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<sup>2</sup>Montana Schools Group Insurance Authority's Brief in Opposition to Emergency Trial Setting.

¶15 The petitioner's claim for permanent total disability benefits is **dismissed** for lack of jurisdiction and the issue remanded to the Mediation Unit of the Montana Department of Labor and Industry for further mediation proceedings.

DATED in Helena, Montana, this 2<sup>nd</sup> day of June, 2005.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. John C. Doubek  
Mr. Leo S. Ward  
Submitted: April 29, 2005