



## Revenue and Transportation Interim Committee

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### 63rd Montana Legislature

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TO: Revenue & Transportation Interim Committee

FROM: Megan Moore, Research Analyst

RE: Workers' Compensation Mediation Statutorily Required, Other Mediation Optional

DATE: June 30, 2014

This memorandum responds to information requested at the May 6, 2014, committee meeting about mandatory mediation required by other state agencies or for other kinds of disputes. Information was requested about mediation in the following areas: workers' compensation disputes, parenting plans, water rights, and human rights complaints. Of these, workers' compensation disputes are the only ones in which the parties are required to participate in mediation.

#### Mandatory Workers' Compensation Mediation

[Title 39, chapter, 71, part 24](#), provides for mediation of workers' compensation issues. The purpose of the part, contained in section [39-71-2406](#), is "to prevent when possible the filing in the workers' compensation court of actions by claimants or insurers relating to claims under this chapter if an equitable and reasonable solution of the dispute may be effected at an earlier stage."

Section [39-71-2401](#) requires parties to enter into mediation with a department mediator before filing a petition with the Workers' Compensation Court.<sup>1</sup> There is a Mediation Unit within the Department of Labor and Industry (DLI) that employs six mediators.

#### Mediation Costs

Section [39-71-2407](#)(3) requires that the costs of administering the mediation program be paid from the Workers' Compensation Administration Fund. The fiscal year 2013 mediation program costs were \$626,419, which includes personal services and operations costs for 8 FTE. The fiscal year 2014 costs are \$582,359 as of June 23, 2014, and include expenses for 7.5 FTE.<sup>2</sup> The mediation unit receives about

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<sup>1</sup>This provision does not apply to disputes that do not concern benefits or disputes for which another provision of [chapter 71](#) gives the Department of Labor and Industry jurisdiction. Also, before petitioning for mediation, section [39-71-2401](#)(4) requires that a party first attempt to settle the case by providing to the other party, in writing, "a specific written demand that contains sufficient explanation and documentary evidence to enable the other party to thoroughly evaluate the demand." The party receiving the demand must respond within 15 days, and a denial must state the basis for the denial. Administrative Rule [24.28.105](#) addresses the mediator's role related to a failure to meet the settlement requirements.

<sup>2</sup>The fiscal year ends June 30, 2014.

1,200 to 1,300 petitions per year with an approximate cost of \$500 per mediation petition. The resolution rate "has consistently been around 80%" and the average completion time for a mediation petition is less than 40 days.<sup>3</sup>

#### Mediation Logistics

Administrative Rule [24.28.104](#) contains a timeline for scheduling the mediation conference. The mediator has 45 days from receipt of the mediation request to hold a mediation conference unless the parties mutually agree to extend the timeline. If the mediator does not hold a mediation conference within 45 days, the parties may proceed to the Workers' Compensation Court.

The mediator may "re-convene" a mediation conference "if necessary, or upon request" as provided in Administrative Rule [24.28.106](#). That rule also allows mediation conferences to be conducted by telephone. A party may request an in-person mediation conference, but all in-person mediation conferences must be held in Helena.<sup>4</sup>

Workers' compensation mediation proceedings are intended to be private, confidential, and informal as provided in section [39-71-2410](#). There is no verbatim record of the mediation, and the mediator may not be called to testify concerning issues discussed in the mediation proceeding.

#### Mediation Procedures

The role of the mediator is provided for in section [39-71-2409](#). The mediator assists the parties in negotiating a resolution and voluntarily resolving the dispute by facilitating the exchange of information, assuring that relevant information is brought forward during the mediation, suggesting possible solutions, and recommending a solution.

Section [39-71-2406](#) requires the parties to fully present their cases at the mediation level. Additional evidence may be presented at the Workers' Compensation Court but, if a new issue is raised there, this section requires the Court to remand the issue to the mediator for consideration.

The procedures for workers' compensation mediation are contained in section [39-71-2411](#). The mediator is required to review the department's case file and receive additional documentation or arguments submitted by the parties. The mediator requests that each party provide an argument summarizing the party's position and fully presenting the party's case.

If the parties do not reach consensus during the mediation, section [39-71-2411\(6\)](#) requires the mediator to recommend a solution within a time period provided for in rule. Administrative Rule [24.28.108](#) sets that time period at 10 working days after the mediation.<sup>5</sup> Each party then has 25 days

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<sup>3</sup>E-mail from Diana Ferriter, Administrator for Employment Relations Division of Department of Labor and Industry, June 23, 2014.

<sup>4</sup>The timeframe for holding the mediation conference is extended to 60 days if a party requests an in-person mediation conference.

<sup>5</sup>If the report is not prepared within 10 days, the parties can proceed to Workers' Compensation Court.

from the mailing of the mediator's report to notify the mediator whether the party accepts the report. If either party does not accept the mediator's recommendation, the party may petition the Workers' Compensation Court.

Section [39-71-2411](#)(8) allows a mediator to determine that a party failed to cooperate in the mediation. A mediator making such a determination prepares a report including the finding of a failure to cooperate, and the report is mailed to the parties and to the Workers' Compensation Court. The parties then repeat the mediation process but only once more. A mediator may determine that a party failed to cooperate only if the party failed to supply information or summarize the party's position as requested by the mediator, failed to attend the mediation without being excused by the mediator, or failed to listen to and review the position of the other party.<sup>6</sup>

#### Legal Representation

Administrative Rule [24.28.102](#) addresses the parties to a mediation and provides that a claimant may be self-represented, represented by an unpaid representative, or represented by an attorney licensed to practice law in Montana. An insurer may be represented by a designated representative.

The role of the mediator as it relates to legal representation is discussed in Administrative Rule [24.28.107](#). The workers' compensation mediation process is designed to "allow claimants who wish to proceed without an attorney to do so." The mediator expects that an attorney representing a claimant and that an insurer's agent (even if not a licensed attorney) work in the workers' compensation field and be familiar with the settlement requirements and workers' compensation laws and procedures. Claimants who represent themselves are not assumed to be knowledgeable about the workers' compensation system, and the mediator and department are required to "make efforts to assist unrepresented claimants in meeting information and settlement requirements." The mediator must still maintain neutrality regarding the issues.

#### Voluntary Mediation

Mediation is an option for disputes in the Water Court, for human rights complaints, and for family law issues. Mediation is not mandatory in these areas.

#### Water Court Mediation

Section [85-2-233](#)(5)(b) provides that a water judge may require parties to participate in settlement conferences or may assign the matter to a mediator. Rule 16 of the Water Right Adjudication Rules<sup>7</sup> further provides that if the Water Court assigns an outside mediator, the parties share the expense of the mediator as directed by the Water Court. The parties may wish to participate in mediation or settle disputes informally even if not ordered to do so by the Water Court. Ninety percent of Water Court

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<sup>6</sup>Section [39-71-2411](#)(8)(c) provides a process for disputing a mediator's determination that the party failed to cooperate in the mediation process. In short, the party may petition the Workers' Compensation Court, which then holds an oral discussion and determines whether the determination of failure to cooperate is supportable. If the mediator's determination is considered supportable, the Court may order the parties to attempt mediation for a second time.

<sup>7</sup>"Water Right Adjudication Rules Amended by the Montana Supreme Court," available from [http://courts.mt.gov/content/water/rules/water\\_right\\_adjudication\\_rules.pdf](http://courts.mt.gov/content/water/rules/water_right_adjudication_rules.pdf), accessed June 18, 2014, p. 113.

objections are settled without a hearing.<sup>8</sup>

### Status Conference

After objections are filed and the objections have been consolidated into cases, a status conference is held for each case. At the status conference, the Water Master meets with the objector and the claimant together in person or on a conference call. The meeting is informal, and there is no recording. Witnesses are not sworn in, and there is no evidence taken. The purpose of the status conference is to discuss the case informally and determine what needs to be done to resolve the objection. The status conference may result in an agreement to perform some activity such as finding more information, meeting with the Department of Natural Resources and Conservation (DNRC), participating in a field investigation, providing an affidavit, consulting with an attorney, or conducting discovery. Many cases are resolved at the first status conference.<sup>9</sup>

### Stipulation and Mediation

After the status conference, options for settlement without a hearing include stipulation and mediation. Stipulation occurs when the parties meet on their own and agree to a solution. The parties then notify the Water Master of the settlement agreement in writing. The stipulation usually includes statements of fact that the parties agree to and changes that may need to be made to the claim. The Water Master reviews the stipulation to make sure it covers the objections and complies with the law. The Court must accept the stipulation for the objection to be considered resolved.<sup>10</sup>

Mediation is an option for those who wish to try to settle the objection but do not want to manage negotiations themselves. Parties wishing to mediate submit a form to the Water Court, which appoints a mediator. The mediators are not employed by the Water Court but are trained in Water Court procedures. Mediation fees are negotiated with the mediator and paid by the parties. The mediator facilitates the exchange of information and settlement alternatives but does not make a decision or provide an evaluation of the case. If the parties agree to a settlement, the mediator helps the parties develop a stipulation to be submitted to the Water Court. Mediation proceedings are confidential and cannot be used in a hearing if the mediation is not successful.<sup>11</sup>

### Human Rights Mediation

Section [49-2-504](#)(2) allows the parties to a human rights complaint to voluntarily agree to mediation. If the parties enter into mediation, the timeline for resolving the complaint is extended to allow time for mediation.

The Human Rights Bureau has a voluntary resolution specialist who contacts the parties to all complaints and offers mediation services. A mediation is held only if both parties agree. From January

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<sup>8</sup>"Step-by-Step Guide Book," available from <http://courts.mt.gov/water/default.mcpX>, accessed June 18, 2014, p. 24.

<sup>9</sup>"Step-by-Step Guide Book," p. 20-21.

<sup>10</sup>"Step-by-Step Guide Book," p. 24-25.

<sup>11</sup>"Step-by-Step Guide Book," p. 25-26.

1, 2013, to June 27, 2014, about 17 percent of the total complaints were resolved through these voluntary resolution agreements.<sup>12</sup>

#### Family Law Mediation

[Title 40, chapter 4](#), is entitled "Termination of Marriage, Child Custody, Support." Section [40-4-301](#) allows the District Court to "at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation."<sup>13</sup> The section of law addressing amendment of parenting plans, section [40-4-219](#), also provides that the Court can order the parties to participate in a dispute resolution process and that mediation is a dispute resolution process.

Section [40-4-302](#) states that the "purpose of a mediation proceeding is to reduce the acrimony that may exist between the parties and to develop an agreement that is supportive of the best interests of a child involved in the proceeding."

The 56 District Courts are structured into 22 judicial districts for administrative purposes. Some of these judicial districts may have local rules related to mediation of family law issues. Generally, family law mediation costs are paid by the parties. There are no readily available statistics about how often mediation is used in family law cases in Montana or the success of family law mediation.

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<sup>12</sup>There were 171 voluntary resolution agreements out of a total of 1,027 complaints. Phone call with Kim Cobos, Data Manager for Human Rights Bureau, June 27, 2014.

<sup>13</sup> The Court may not order mediation without written, informed consent if the Court has reason to suspect one of the parties or a child of the party has been physically, sexually, or emotionally abused by the other party.