

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 24

WCC No. 2002-0588

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IN THE MATTER OF

TIM DICK, Guardian *Ad Litem* for

ALICIA M. BAARSON, BRITTANY E. BAARSON

and BRADLEY A. BAARSON

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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DECISION AND ORDER DENYING MOTION TO DISMISS

**Summary:** After the trial on the petition had been delayed and rescheduled two times, the petitioner moved to dismiss without prejudice or to continue the matter generally without a trial date. The reason for the request was the pendency of a separate civil action against the employer, which the petitioner wishes to have tried first.

**Held:** Both motions are denied. The insurer is entitled to a timely day in Court. See *Profitt v. Watts*, 140 Mont. 265, 370 P.2d 878 (1962).

**Topics:**

**Procedure: Continuance.** Further continuance denied where the matter has already been continued two times and the insurer objects to a further continuance.

**Procedure: Motion to Dismiss.** Once a petition has been filed the insurer is entitled to its day in Court and the Court will not dismiss the petition without prejudice over the insurer's objection. See *Profitt v. Watts*, 140 Mont. 265, 370 P.2d 878 (1962).

¶1 The petitioner herein brought the present petition for death benefits as guardian *ad litem* for and on behalf of the minor children of Kimberly Baarson (Baarson), who was shot and killed while working at Town Pump. The Montana State Fund insured Town Pump at the time of Baarson's death but denies that Baarson was killed in the scope and course of her employment.

¶12 The petition was filed on June 18, 2002, and set for trial during the week of October 28, 2002. At the parties' request, the matter was then rescheduled for trial during the week of February 17, 2003. In a February 5, 2003 telephone conference with the Court's hearing examiner, the parties indicated they had been working on a stipulation of facts to submit the matter to the Court but had encountered difficulty doing so. The matter was again postponed, this time until the week of May 5, 2003.

¶13 Then, on March 3, 2003, petitioner filed a motion to dismiss the petition without prejudice or to continue the matter without date. The motion was based on the fact that a separate third-party action is pending in district court against Town Pump and the petitioner wishes to have that action tried before the trial in the Workers' Compensation Act. State Fund objects to dismissal or further delays.

#### Discussion

¶14 In *Profitt v. Watts*, 140 Mont. 265, 370 P.2d 878 (1962), an identical request was presented to the old Industrial Accident Board, which at that time had jurisdiction to adjudicate worker's compensation disputes. The claimant therein had also brought a civil action against the employer and wanted to withdraw his claim before the Board. The Board dismissed the claim over the employer's objection but the Supreme Court reversed, holding that the employer was entitled to a hearing.

¶15 In the present case, the State Fund opposes dismissal or a continuance. Petitioner chose to pursue benefits and, like the employer in *Profitt*, the State Fund is entitled to a timely day in Court. Typically, cases are tried by this Court within 75 days of the filing of the petition. The case has already been rescheduled two different times, and the current trial date is eleven months out from the date the petition was filed. I decline to delay the case any further.

#### ORDER

¶16 The motion to dismiss is **denied**. The request for a continuance is **denied**. The matter will be tried during the week of May 5, 2003, as scheduled.

DATED in Helena, Montana, this 4<sup>th</sup> day of April, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Michael J. McKeon

Mr. Greg E. Overturf

Submitted: March 25, 2003