

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 4

WCC No. 9512-7464

JOSEPH DAVIS

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer/Employer.

ORDER DENYING MOTION TO DISMISS

Summary: Respondent moved to dismiss for failure to mediate. Uncontroverted facts established that petition was filed prior to receipt of mediator's recommendation, but recommendation was received and rejected by claimant prior to the filing deadline for the trial term on which the case was placed.

Held: Where the mediation process was complete before the filing deadline, the Court will not dismiss the petition. Except in cases of repeated abuse, the Court typically will not dismiss petitions for failure to mediate since dismissal would result in refiling and creation of additional paperwork for the Court. Where the mediation process is not completed prior to the filling deadline for a particular term, however, the Court will vacate the trial setting and reset trial for the next term.

Topics:

Mediation. Where petition was filed prior to completion of mediation process, but mediation process was complete (including issuance of mediation report and rejection by claimant) prior to filing deadline for particular WCC trial term, motion to dismiss petition for failure to mediate was denied. Except in cases of repeated abuse, the Court typically will not dismiss petitions for failure to mediate since dismissal would result in refiling and creation of additional paperwork for the Court. Where the mediation process is not completed prior to the filling deadline for a particular term, however, the Court will vacate the trial setting and reset trial for the next term.

Jurisdiction: Mediation. Where petition was filed prior to completion of mediation process, but mediation process was complete (including issuance of mediation

report and rejection by claimant) prior to filing deadline for particular WCC trial term, motion to dismiss petition for failure to mediate was denied. Except in cases of repeated abuse, the Court typically will not dismiss petitions for failure to mediate since dismissal would result in refiling and creation of additional paperwork for the Court. Where the mediation process is not completed prior to the filing deadline for a particular term, however, the Court will vacate the trial setting and reset trial for the next term.

Respondent moves to dismiss for petitioner's failure to complete the mediation process prior to filing his petition. The uncontroverted facts are established by the parties' briefs and Court file, as follows:

- 1) The petition in this case was filed December 20, 1995.
- 2) The mediator's written recommendation was not issued until December 28, 1995.
- 3) The mediator's recommendation was immediately rejected by the petitioner.
- 4) The deadline for filing petitions for Kalispell trials during the week March 18, 1996, was January 2, 1996.

While claimant "jumped the gun," it appears that the mediator's recommendation was received and rejected before the filing deadline. Thus, the mediation process was complete before the filing deadline. Had petitioner not jumped the gun, he still could have filed his petition in time for the March 18 Kalispell trial week.

Except in cases of repeated abuse, the Court has declined to dismiss petitions for failure to mediate since dismissal would only result in refiling of the petition, thus creating an additional Court file, and more ink and paper. In cases where the mediation requirements cannot be fulfilled in time to meet the deadline for the next immediate term, the Court has vacated the original trial setting and reset the case for the next term. In this case, mediation requirements were met prior to the deadline for the March 18 Kalispell term. As of December 29, 1995, the petition may properly be entertained by the Court, and the Court will permit the trial to remain on track as originally scheduled. However, the Court warns petitioner's counsel that any future petitions filed before receipt and rejection of the mediator's written recommendation **will** result in dismissal of the petition.

I trust that the discordant, accusatory tone of the parties' briefs will not carry over to the further proceedings in this case.

IT IS HEREBY ORDERED that the motion to dismiss is **denied** and that the respondent shall have **10 days in which to file its response**.

Dated in Helena, Montana, this 8th day of January, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Allan M. McGarvey

Mr. Todd A. Hammer

Submitted: January 8, 1996