IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 45

WCC No. 2000-0046

RANDY GOHL,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND/
LIBERTY NORTHWEST,

Respondents/Insurers for

DIVERSIFIED TRANSFER & STORAGE,

Employer.

ORDER PERMITTING FILING OF PETITIONER'S DEPOSITION

Summary of case: Petitioner objects to the filing of his deposition, arguing it should not be considered by the Court since he will testify and because it contains an unauthenticated telephone conversation.

Held: The objection is **overruled**. While the Workers' Compensation Court is bound by the Montana Rules of Evidence, § 39-71-2903, MCA, the deposition of a party opponent is admissible under Mont.R.Evid. 801(d)(2), regardless of whether the party testifies or is available to testify. Moreover, Rule 802 Mont.R.Evid. provides that a court may adopt rules permitting additional exceptions to the general rule that hearsay is inadmissible. The Workers' Compensation Court has adopted such a rule in ARM 24.5.322, which authorizes the admission of any deposition taken in a workers' compensation proceeding. Objections to inadmissible evidence in deposition must be made at the time of the deposition and briefed in the parties' proposed findings. Rule 24.5.322(5).

Topics:

> **Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.322(5)**. Objections to inadmissible evidence in deposition must be made at the time of the deposition **and** briefed in the parties' proposed findings or they are deemed waived.

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.322(9). Claimant's deposition was admissible at trial over his objection where Mont.R.Evid. 801(d)(2) allows admission of the deposition of a party opponent regardless of whether the party testifies or is available to testify and Rule 802 Mont.R.Evid. allows a court to adopt rules permitting additional exceptions to the hearsay rule, which the Workers' Compensation Court has accomplished through ARM 24.5.322, authorizing the admission of any deposition taken in a workers' compensation proceeding.

Discovery: Depositions: Objections. Under ARM 24.5.322(5), objections to inadmissible evidence in deposition must be made at the time of the deposition **and** briefed in the parties' proposed findings or they are deemed waived.

Evidence: Depositions. Claimant's deposition was admissible at trial over his objection where Mont.R.Evid. 801(d)(2) allows admission of the deposition of a party opponent regardless of whether the party testifies or is available to testify and Rule 802 Mont.R.Evid. provides that a court may adopt rules permitting additional exceptions to the hearsay rule, which the Workers' Compensation Court has accomplished through ARM 24.5.322, authorizing the admission of any deposition taken in a workers' compensation proceeding.

¶1 Petitioner objects to the filing of his deposition. The objection is **overruled**.

¶2 Section 39-71-2903, MCA, requires the Workers' Compensation Court to follow the Montana Rules of Evidence. The section provides in relevant part, "The workers' compensation judge is bound by common law and statutory rules of evidence."

¶3 Deposition testimony constitutes out-of-court statements. Those statements are ordinarily considered hearsay if offered for the truth of matters asserted. Hearsay is inadmissible unless within one of the hearsay exceptions. Rule 802 Mont.R.Evid., states, "Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state." Rule 804 Mont.R.Evid. contains a specific exception allowing the admission of a deposition where a witness is unavailable, but the exception is inapplicable here since the claimant is available and plans to testify. However, Rule 801(d)(2), Mont.R.Evid., provides that out-of-court statements of a party are not hearsay, thus no exception need be found. The rule provides:

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

. . . .

(2) Admission by Party-Opponent. **The statement is offered against a party and is (A) the party's own statement**, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its

> truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. [Emphasis added.]

Similarly, Rule 32 of the Montana Rules of Civil Procedure provides that the deposition of an adverse party may be used at trial for any purpose, providing in relevant part:

> **RULE 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS.**
>
> . . . .
>
> **(a) Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> . . . .
>
> (2) The deposition of a party . . . may be used by an adverse party for any purpose.

¶4 Numerous courts have admitted the deposition of a party, offered by an adverse party, under rules identical to Mont.R.Civ.P. §32(a) and Mont.R.Evid. §801(d)(2). For instance, in *Ouachita Mining and Exploration, Inc. v. Wigley*, 318 Ark. 750, 755, 887 S.W.2d 526, 529 (1994), the Arkansas Supreme Court stated:

> Jack Wigley was a party defendant to this lawsuit brought by Ouachita Mining. Ouachita Mining had taken his deposition and then sought to use it at trial. Rule 32(a)(2) of the Arkansas Rules of Civil Procedure reads: "The deposition of a party...may be used by an adverse party for any purpose." Moreover, our rules of evidence are clear that admissions by a party-opponent are not hearsay. Ark.R.Evid. 801(d)(2). Hence, Ouachita Mining was entitled to use the deposition of Jack Wigley as part of its case irrespective of the hearsay rule and irrespective of whether Wigley was available or unavailable at trial, and Ouachita Mining did so.

Similarly, in *Thunder Hawk v. Union Pacific Railroad Co.*, 891 P.2d 773, 782 (Wyo. 1995), the Wyoming Supreme Court explained:

W.R.C.P. 32(a)(1) allows any deposition to be used against any party for any purpose which is permitted by the Wyoming Rules of Evidence. The statements which Alex made in his deposition were admissible because they were admissions by a party-opponent. W.R.E. 801(d)(2)(A).

See also, Knight v. Georgetown University, 725 A.2d 472, 481 (D.C. App. 1999) ("Rule 32 does not require that the contents of the deposition be against the declarant's interest or that the declarant be unavailable, and neither do the rules of evidence regarding admissions of a party opponent."); *Collins v. Wayne Corporation*, 621 F.2d 777 (5th Cir. 1980) (district court erred in refusing to admit deposition of manufacturer's expert as an admission); *Coughlin v. Capitol Co.*, 571 F.2d 290, 308 (5th Cir. 1978) (Federal Rule 32(a)(2) "permits a party to introduce the deposition of an adversary as part of his substantive proof regardless of the adversary's availability to testify at trial."); 8A C. Wright and A. Miller, Federal Practice and Procedure, §§ 2145, 6722 (1994).

¶5 Moreover, this Court's Rule 24.5.322 (9) provides that all depositions are admissible notwithstanding their hearsay nature. The rule provides:

> Regardless of the availability of a witness or party to testify at trial, the circumstances of workers' compensation cases make it desirable, in the interest of justice, that a deposition or a witness or a party may be used by any party for any purpose unless the court restricts such usage upon a finding that the interests of justice would be served thereby.

While at first glance the rule may appear to be inconsistent with the Montana Rules of Evidence, in fact it is not. As quoted earlier in paragraph 3, Rule 802 Mont.R.Evid. states: "Hearsay is not admissible except as otherwise provided by statute, these rules, **or other rules applicable in the courts of this state.**" (Emphasis added.) On its face, the rule contemplates that courts may adopt hearsay exceptions in addition to those set out in the Rules of Evidence. This Court has done so in Rule 24.5.322 (9). Thus, depositions taken of any witness in a workers' compensation proceeding are properly admitted under the Rules of Evidence.

¶6 Admission of petitioner's deposition furthers the purposes underlying ARM 24.5.322(9). It is consistent with the expedited nature of worker's compensation proceedings, providing readily accessible background which need not be covered at trial. Moreover, insofar as the deposition contains inconsistent, contradictory or impeaching testimony, it will be available to the Court without prolonged inquiry.

¶7 Petitioner also objects to the admission of a telephone conversation played during his deposition. To pursue his objection he must comply with this Court's Rule 24.5.322(5), which provides:

> (5) Unless otherwise agreed, all objections must be made at the time of taking the deposition and be included within the transcript of the deposition. Evidence objected to shall be taken subject to the objections. Deposition objections must be briefed in the parties' proposed findings of fact and conclusions of law. Failure to do so will be deemed a withdrawal of the objections.

Provided he complies with the rule, his objection will be considered at trial.

SO ORDERED.

DATED in Helena, Montana, this 20th day of July, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Patrick R. Sheehy
Mr. Greg E. Overturf
Mr. Larry W. Jones
Submitted: July 11, 2000