IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 22

WCC No. 9912-8384

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Petitioner

vs.

SCOTT GRINER

Claimant

SENTRY INSURANCE MUTUAL COMPANY

Respondent.

ORDER DENYING SUMMARY JUDGMENT

Case Summary: Claimant suffered a work-related back injury in 1995 and underwent surgery for a herniated disk at the L5-S1 level. He subsequently returned to work but thereafter developed leg pain indicative of a herniated disk. In 1998 it became acute and surgery ensued for a herniated disk at the L4-5 level. Sentry was on the hook for the 1995 injury. Liberty was the insurer at risk in 1998 and accepted liability for claimant's condition at that time subject to a reservation of rights allowing it to seek indemnification from Sentry. Both insurers, as well as claimant moved for summary judgment.

Held: The facts supporting the motions are from depositions and each party has cited portions of the depositions which appear to support their proffer of uncontested facts. However, other portions of the depositions are cited as contradicting essential facts, particularly regarding the nature of claimant's post-1995 injury job and, more importantly, the degree to which the claimant's post-1995 work contributed to his 1998 condition. The nature and degree of the post-1995 contribution is important in applying case law concerning subsequent aggravations. Since the depositions would have to be reviewed in their entirety and conclusions reached as to ultimate facts, summary judgment is inappropriate. The parties can agree to submit the case on the depositions and exhibits or go to trial.

Topics:

Summary Judgment: Disputed Facts. A party is entitled to summary judgment only if undisputed material facts entitle the party to judgment as a matter of law.

Summary Judgment: Disputed Facts. Even though the arguments of the parties largely involve legal issues, the Court must first determine whether the material facts to those issues are undisputed.

Summary Judgment: Disputed Facts. What facts are material are determined by looking at the substantive law which governs the claim.

¶1 This is a dispute between two insurers. Sentry Insurance Mutual Company (Sentry) was at risk on August 17, 1995, when the claimant injured his back. Claimant underwent surgery for a herniated disk at the L5-S1 level, following which his leg pain either resolved or diminished, and he returned to work. Subsequently, he experienced renewed leg pain and in 1998 had surgery for a herniated disk at the L4-5 level. Liberty Mutual Fire Insurance Company (Liberty), which insured claimant's employer in 1998, accepted liability for the condition under the Occupational Disease Act. However, it reserved the right to assert a claim for indemnification against Sentry on the basis that claimant's 1998 condition was the result of his 1995 injury, hence, Sentry should be liable for his condition.

¶2 Liberty moved for summary judgment seeking a determination that Sentry is responsible. Sentry and claimant tendered cross-motions for summary judgment asserting that Liberty is liable. The motions have been exhaustively briefed and are ripe for decision.

Discussion

¶3 While the dispute between the parties is largely a legal matter involving conflicting interpretations of case law concerning the subsequent injury/aggravation doctrine, their legal arguments have factual underpinnings, therefore, the Court must first determine whether there are disputed facts which affect its legal determinations. A party is entitled to summary judgment only if undisputed material facts entitle the party to judgment as a matter of law. Rule 24.5.329(2); *Schelske v. Creative Nail Design, Inc.,* 280 Mont. 476, 482, 933 P.2d 799, 802 (1997). What facts are material are determined by looking at the substantive law which governs the claim. *Spinler v. Allen*, 295 Mont. 139, 142, 983 P.2d 348, 351 (1999).

¶4 The parties do not agree on the facts. Sentry filed a Statement of Uncontested Facts (July 14, 2000). In its reply brief, Liberty set forth numerous objections to those facts, citing to depositions taken in the case. (Brief in Opposition to Petitioner's Summary Judgment Motion and in Support of Respondent's Cross-Motion for Summary Judgment (July 21, 2000) at 4-5).) It further set out 23 enumerated facts, with citations, which it believes are uncontested. (*Id.* at 6-8.) In its reply, Sentry disputed some of Liberty's facts, citing other evidence in the case. (Liberty Mutual's Reply Brief and Brief in Opposition to Claimant's and Respondent's Motion for Summary Judgment at 1-3.)

¶5 Sentry filed the final brief. In its brief, it noted:

> It is apparent that there is substantial dispute over the facts of this case. As a result, it is somewhat of a misnomer to call the facts "uncontested." Rather, the sections in each party's briefs entitled "Uncontested Facts" should probably at this point more properly be considered "Proposed Findings of Facts."

(Respondent's Reply Brief in Support of Cross-Motion for Summary Judgment at 3.) Sentry goes on to propose that the Court consider the case on the entire record, which consists primarily of deposition transcripts, and enter findings of fact and conclusions of law.

¶6 I agree with Sentry that the present state of the facts is insufficient to permit me to render summary judgment for any party. There are disputes as to whether claimant's job was more difficult following his first surgery, as to the nature of his symptoms following his first surgery, and, most importantly, as to the role of claimant's post-1995 work with respect to the development of the L4-5 herniated disk. The parties have selectively cited the depositions to support their positions, and it is clear to me that a careful reading and sifting of the depositions, especially those of Drs. Murphy and Dewey, will be required before I can reach an ultimate conclusion as to the role of post-1995 work in the development of claimant's 1998 condition. That determination in turn is essential to sorting out the parties' legal arguments and determining which cases are applicable to the facts.

¶7 I do not agree, however, that I can proceed to review the depositions and enter findings of fact, conclusions of law and a judgment at this time. While Sentry agrees to that procedure, the other two parties have not. It may well be that they wish to offer other evidence, or wish me to personally hear some or all of the witnesses rather than rely on the depositions. I must therefore deny the motion for summary judgment. If the parties agree to submit the case based upon depositions and exhibits, or upon an agreed statement of facts, or upon some combination of the foregoing, then I will consider the case on that basis. Otherwise, the case must be set for trial.

ORDER

¶8 The motion and cross-motions for summary judgment are **denied**.

¶9 Counsel are to notify the Court within 10 days of this Order whether they agree to submit the case based upon depositions and exhibits, or upon an agreed statement of facts, or upon some combination of the foregoing. Otherwise, the case will be set for trial.

DATED in Helena, Montana, this 16th day of May, 2001.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. William J. Mattix
Mr. Kelly M. Wills
Mr. Robert Whelan
Submitted: January 22, 2001