IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 33

WCC No. 9609-7612

JOSEPH I. SANDOVAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Insurer for

DONALD W. JACKLIN

Employer.

SUMMARY JUDGMENT

Summary: Donald W. Jacklin, who owns mules, contracted with claimant for the training and racing of his mules over a number of years. In a prior decision, the WCC found that contracts for training, which were accomplished in Montana, were separable from contracts for racing. After injury in Nevada during the racing season, claimant filed a workers' compensation claim in Montana. Jacklin moves for summary judgment, arguing no triable issue of fact on the question of whether he was required to have workers' compensation insurance in place covering Jacklin's racing work. As set out in the Court's prior order, under applicable law, for Montana workers' compensation requirements to apply, Jacklin must have either primarily controlled Sandoval's activities from Montana or Sandoval's duties must have been primarily carried out within Montana. The evidence is undisputed that Jacklin remained in Idaho. Jacklin submitted as "undisputed facts" a racing schedule for 1995, showing no races took place in Montana, meaning none of the summer 1995 work was to occur in Montana. Claimant responded by affidavit stating his "understanding" that some races would have occurred in Montana. Jacklin responded with an affidavit of the Executive Secretary for the Montana Board of Horse Racing stating that "no mule racing has occurred in Montana since 1994." Claimant did not dispute this affidavit.

Held: Summary judgment granted. Conclusory or speculative statements such as an "understanding" do not contradict facts stated in affidavits or sworn testimony. Uncontroverted facts establish that the 1995 summer work was not in Montana.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: Workers' Compensation Court Rules: ARM 24.5.329. Conclusory or speculative statements such as an "understanding" do not contradict facts stated in affidavits or sworn testimony such as to warrant denial of a motion for summary judgment.

Employment: Montana Employment. As set out in the Court's prior order in this case, for Montana workers' compensation requirements to apply, Jacklin must have either primarily controlled Sandoval's activities from Montana or Sandoval's duties must have been primarily carried out within Montana. The evidence is undisputed that mule owner, who hired claimant to race his mules, remained in Idaho. Owner submitted as "undisputed facts" a racing schedule for 1995, showing no races took place in Montana, meaning none of the summer 1995 work was to occur in Montana. Claimant responded by affidavit stating his "understanding" that some races would have occurred in Montana. Jacklin responded with an affidavit of the Executive Secretary for the Montana Board of Horse Racing stating that "no mule racing has occurred in Montana since 1994." Claimant did not dispute this affidavit. Summary judgment granted because conclusory or speculative statements such as an "understanding" do not contradict facts stated in affidavits or sworn testimony.

Jurisdiction: Montana Employment. As set out in the Court's prior order in this case, for Montana workers' compensation requirements to apply, Jacklin must have either primarily controlled Sandoval's activities from Montana or Sandoval's duties must have been primarily carried out within Montana. The evidence is undisputed that mule owner, who hired claimant to race his mules, remained in Idaho. Owner submitted as "undisputed facts" a racing schedule for 1995, showing no races took place in Montana, meaning none of the summer 1995 work was to occur in Montana. Claimant responded by affidavit stating his "understanding" that some races would have occurred in Montana. Jacklin responded with an affidavit of the Executive Secretary for the Montana Board of Horse Racing stating that "no mule racing has occurred in Montana since 1994." Claimant did not dispute this affidavit. Summary judgment granted because conclusory or speculative statements such as an "understanding" do not contradict facts stated in affidavits or sworn testimony.

¶1 For a second time, this case is presented on a motion for summary judgment. This time the Court grants Donald W. Jacklin's (Jacklin) motion for summary judgment and dismisses the petition.

Factual Background

¶2 Jacklin owns mules. Joseph I. Sandoval (Sandoval) is a mule trainer and jockey. In 1992, 1993, 1994, and 1995, Jacklin hired Sandoval to train and race his mules in various western

states. Jacklin, an Idaho resident, delivered the mules to Sandoval in Hamilton, Montana, in the winter of each year so Sandoval could condition and train the mules for the upcoming racing season. The conditioning and training took place in Hamilton.

¶3 Each spring Jacklin and Sandoval entered into a written agreement for the racing season. In my prior decision, I determined that the written contracts for the racing seasons, including the 1995 season, were severable and separate from the oral, winter training arrangements.

¶4 Sandoval was injured in Nevada on June 3, 1995, during the racing season. He did not work thereafter, however, Jacklin hired a new trainer and continued to race his mules. While a substantial portion of the 1992 through 1994 racing seasons were spent in Montana, the evidence presented to the Court at the time of the prior decision indicated that racing did not occur in Montana during 1995. I was unable to ascertain what amount of the racing season, if any, Sandoval would have spent in Montana during the 1995 summer season.

¶5 The fact that Sandoval was a Montana resident in 1995 did not automatically subject Jacklin, an Idaho resident, to Montana workers' compensation laws. As applicable to this case, Montana workers' compensation statutes required that "Jacklin must have either primarily controlled Sandoval's duties from Montana or Sandoval's duties must have been primarily carried out within Montana." (Order Denying Summary Judgment at 4.) Since Jacklin was in Idaho, that meant that "Sandoval's duties must have been primarily carried out within Montana." (*Id*.) Since the facts presented in connection with the earlier motions for summary judgment did not show whether Sandoval would have worked primarily in Montana during the 1995 summer racing season, the motions were denied and the matter was scheduled for trial.

¶6 Jacklin's latest motion for summary judgment provides additional facts concerning Sandoval's expected work in Montana during the summer of 1995. Initially, Jacklin has provided an affidavit showing that his mules did not race in Montana during 1995. He has supplied a schedule of the races in which his mules participated. Sandoval has not provided any evidence undercutting the information, thus the information is deemed uncontroverted.

¶7 The 1995 races took place in California, Nevada, Idaho and Arizona, as follows:

May 26, 27, and 28 Bishop, California

June 3 and 4 Winnemucca, Nevada

June 10 and 11 Boise, Idaho

June 15 Jerome, Idaho

June 26 Pleasanton, California

July 3 Pleasanton, California

July 8 Pleasanton, California

July 18 Stockton, California

August 6 Santa Rosa, California

August 11 Ferndale, California

August 19 Ferndale, California

August 23, 24, and 25 Sacramento, California

September 2 Sacramento, California

October 11 Fresno, California

October 15 Fresno, California

October 28 Yuma, Arizona

(Brief in Support of Donald W. Jacklin's Motion for Summary Judgment at 2.) Jacklin's affidavit also states that the mules would never have returned to Montana during the racing season. (Supplemental Affidavit of Donald W. Jacklin at 2.)

¶8 In my prior Order regarding the earlier cross-motions for summary judgment, I found, as an uncontested fact, that no mule racing occurred in Montana in 1995. (Order Denying Summary Judgment, Fact 8 at 2-3.) That fact is raised anew in the present motion. Jacklin's affidavit states that there was no mule racing in Montana in 1995, or for that matter in 1996, 1997, or 1998. (Jacklin Aff., ¶3 (12/14/98 execution - 1/13/99 filing). In a counter-affidavit, Sandoval asserts his "belief" that mule racing did take place in Montana in 1995. In paragraph 3 of his affidavit, filed February 5, 1999, he states:

> It was my understanding that in 1995, we would follow the same general routine as in past years. Mule racing took place with horse racing, and the 1995 horse racing dates were generally the same as 1992, 1993 and 1994. Don Jacklin and I attended a Board of Horse Racing meeting in February, 1995, to discuss speed indexes for the 1995 mule racing season. He and I discussed that the mules would race in Montana in 1995. Thus, I believe if I had not been injured, mule racing would have taken place in Montana in 1995 similar to the 1992, 1993 and 1994 race seasons because race dates were scheduled in Montana.

(Affidavit of Joseph I. Sandoval at 2.)

¶9 In reply to Sandoval's affidavit, on February 12, 1999, Jacklin supplied the Court with an affidavit of Sam Murfitt, Executive Secretary for the Montana Board of Horse Racing. In that affidavit, Murfitt confirms that "no mule racing has occurred in Montana since 1994."

(Affidavit of Sam Murfitt ¶ 3.) Sandoval has not sought permission of the Court to reply to that affidavit. He has not sought oral argument, as allowed by ARM 24.5.329 (5).

Discussion

¶10 This Court's rule governing consideration of a summary judgment motion mirrors Rule 56 of the Montana Rules of Civil Procedure, providing:

> (2) Subject to the other provisions of this rule, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

ARM 24.5.329(2). Where, as in this case, the moving party presents evidence of a fact, the opposing party may not simply deny the fact but must present admissible evidence to controvert it:

> The burden of proof rests with the party seeking summary judgment to provide the court with evidence which excludes any real doubt as to the existence of a genuine issue of material fact. *Berens v. Wilson* (1990), 246 Mont. 269, 271, 806 P.2d 14, 16. Only after the moving party has met this burden of proof does the burden shift to the nonmoving party to show that a genuine issue of material fact exists. *Morton v. N.W.M., Inc.* (1994), 263 Mont. 245, 249, 868 P.2d 576, 579. "When raising the allegations that disputed issues of fact exist, the nonmoving party has an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; **conclusory or speculative statements will not suffice**." *Koepplin v. Zortman Mining* (1994), 267 Mont. 53, 59, 881 P.2d 1306, 1309.

HKM Associates v. Northwest Pipe Fittings, Inc., 272 Mont. 187, 193, 900 P.2d 302, 306 (1995) (emphasis added). Sandoval has not satisfied his burden. His "belief" that there was mule racing in Montana in 1995 does not raise a question of fact where the affidavit of the Executive Secretary for the Montana Board of Horse Racing establishes that mule racing did not in fact take place in 1995.

¶11 Sandoval presents no other evidence raising a material issue of fact concerning the time he might have spent with the mules in Montana in 1995 absent his injury. He does not contradict the 1995 schedule of races for Jacklin's mules. While he has presented evidence of time spent in Montana in prior years, those were years in which Montana had mule races. None of the evidence he has mustered supports a finding that but for Sandoval's injury Jacklin's mules would have spent more time in Montana in 1995 than in any of the other states in which they were raced. Lacking such evidence, I conclude that Montana workers' compensation laws do not apply to the 1995 racing season agreement between Sandoval and Jacklin.

JUDGMENT

¶12 Based on the foregoing discussion, IT IS ORDERED AND ADJUDGED that:

¶13 1. The motion for summary judgment is **granted**.

¶14 2. The petition in this matter is **dismissed with prejudice**.

¶15 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶16 4. Any party to this dispute may have 20 days in which to request a rehearing from this Summary Judgment.

DATED in Helena, Montana, this 6th day of May, 1999.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Hunt
Mr. Robert J. Campbell
Mr. Leo S. Ward
Date Submitted: February 12, 1999