

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 53

WCC No. 9307-6858

JAMES P. SMITH

Petitioner

vs.

NATIONAL UNION FIRE INSURANCE COMPANY

Respondent/Insurer for

RSA-USA, INC.,/IDC SERVICES, INCORPORATED

Employer.

ORDER DENYING MOTION FOR DEFAULT

Respondent, National Union Fire Insurance Company (National), has filed a Motion for Default and for an award of attorney fees and costs incurred as a result of the petitioner's failure to appear at his scheduled deposition. Petitioner has responded, accepting responsibility for attorney fees and costs but asking that the request for default be denied. The response is accompanied by petitioner's affidavit explaining the circumstances of this failure to appear. According to the affidavit, claimant had planned on attending the deposition but a co-worker quit his employment the night before and petitioner's employer then indicated that petitioner could not have the time off.

National relies of the Rules 37 (d) and 37 (b)(2)C), Mont.R.Civ.P. as authority for its request that the Court dismiss the petition with prejudice. Where this Court's rules are silent, we have often looked to the Rules of Civil Procedure for guidance. ***Moen v. Decker Coal Co.***, 201 Mont. 425, 655 P.2d 482 (1982). Sanctions for discovery abuses, however, are specifically governed by ARM 24.5.326 of the procedural rules of this Court. The rule provides in relevant part:

24.5.326 FAILURE TO MAKE DISCOVERY--SANCTIONS (1) If a party fails to respond to discovery pursuant to these rules, or makes evasive or incomplete responses to discovery, or objects to discovery, the party seeking discovery may move for an order compelling responses. . . . With respect to a motion to compel discovery, the court may impose such sanctions as it deems appropriate, including, but not limited to, awarding the prevailing party attorney fees and reasonable expenses

incurred in obtaining the order or in opposing the motion. If the party shall fail to make discovery following issuance of an order compelling responses, the court may order such sanctions as it deems required and just under the circumstances.

While the rule broadly authorizes such sanctions as the Court "deems appropriate," dismissal is an extreme sanction, and is not **required** even under Rule 37, Mont.R.Civ.P. Rule 37 (d) provides only that a court may "make such orders . . . as are just," including the orders authorized in subsection (b)(2). Dismissal is only one of several potential orders listed in the subsection; in any event the language of the rule does not limit the Court to the enumerated orders.

In seeking dismissal, National argues that throughout this proceeding the petitioner has been less than diligent in pursuing his claim. However, a brief review of the Court file indicates that a great deal of discovery has been done by both parties. A review of the Court file also indicates that the insurer has denied liability in this case and is not paying benefits, so it is not prejudiced by any delay that may result from petitioner's failure to appear. The trial in this matter has also been rescheduled for the week of June 27, 1994, so respondent should have sufficient time to reschedule the deposition.

While the Court does not condone the failure of the claimant to appear for his deposition, dismissing his claim with prejudice is too harsh. An award of attorney fees and costs, and an opportunity for respondent to seek additional time for discovery, are adequate under the circumstances. The petitioner is cautioned, however, that failure to appear a second time may well result in the dismissal of his claim.

THEREFORE, IT IS HEREBY ORDERED that petitioner, James P. Smith, shall pay attorney fees and costs incurred by respondent's counsel in the amount of \$145.00 and shall hereafter appear for his deposition at the time and place duly noticed by the respondent.

IT IS FURTHER ORDERED that the motion to default and dismiss the petition with prejudice is **denied**.

Finally, should the respondent need more time for discovery because of petitioner's failure to appear, it shall notify the Court of the time it needs. If warranted, the trial of this matter will be set over to another term.

This Order issued by me pursuant to a standing order of the Court and at the Court's direction.

DATED in Helena, Montana, this 3rd day of June, 1994.

(SEAL)

/s/ CLARICE V. BECK
Hearing Examiner

c: Mr. Randall O. Skorheim
Ms. Sara R. Sexe