

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 1

WCC No. 9511-7432

MARY C. STORMONT

Petitioner

vs.

NATIONAL UNION FIRE OF PITTSBURGH

Respondent/Insurer for

HILLHAVEN CORPORATION

Employer.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND JOINDER

Summary: Petitioner moved for summary judgment on ground that insurer failed to accept or deny claim within thirty days, but failed to comply with WCC rules requiring motions for summary judgment to be based on evidence authenticated by affidavit, deposition, interrogatories, or other means. In a separate motion, insurer sought to join another insurer which it alleged may have liability based on an earlier injury of claimant.

Held: Both motions denied. While lack of supporting affidavits and discovery may not always be fatal to a motion for summary judgment (for example, where the briefs reveal agreement to facts necessary to resolve the motion), summary judgment will be denied where the moving party does not comply with rules requiring authenticated evidence or sworn discovery to support the motion. Motion to join denied where it was based on assertion that treating chiropractor “may suggest” that claimant’s present condition is attributable to an earlier injury, not affirmative opinion of physician on that point. Conjecture about what a medical provider may or may not say is not sufficient basis for the Court to hail an additional party into Court.

Topics:

Procedure: Motions: Generally. While lack of supporting affidavits and discovery may not always be fatal to a motion for summary judgment (for example, where the briefs reveal agreement to facts necessary to resolve the motion), summary

judgment will be denied where the moving party does not comply with rules requiring authenticated evidence or sworn discovery to support the motion.

Summary Judgment: Affidavits. While lack of supporting affidavits and discovery may not always be fatal to a motion for summary judgment (for example, where the briefs reveal agreement to facts necessary to resolve the motion), summary judgment will be denied where the moving party does not comply with rules requiring authenticated evidence or sworn discovery to support the motion.

Summary Judgment: Motion for Summary Judgment. While lack of supporting affidavits and discovery may not always be fatal to a motion for summary judgment (for example, where the briefs reveal agreement to facts necessary to resolve the motion), summary judgment will be denied where the moving party does not comply with rules requiring authenticated evidence or sworn discovery to support the motion.

Summary Judgment: Criteria. While lack of supporting affidavits and discovery may not always be fatal to a motion for summary judgment (for example, where the briefs reveal agreement to facts necessary to resolve the motion), summary judgment will be denied where the moving party does not comply with rules requiring authenticated evidence or sworn discovery to support the motion.

Procedure: Joining Third Parties. Motion to join denied where it was based on assertion that treating chiropractor “may suggest” that claimant’s present condition is attributable to an earlier injury, not affirmative opinion. Conjecture about what a medical provider may or may not say is not sufficient basis to hail an additional party into Court.

Petitioner filed this action seeking a determination that she suffered a work-related industrial accident on October 14, 1993, and asks that the Court fix the amount of benefits due her. She also seeks attorney fees, costs and a penalty. She now moves for summary judgment.

Respondent, National Union Fire of Pittsburgh, resists the motion. In addition, it has moved to join the State Compensation Insurance Fund as a third-party defendant.

Both motions are **denied**.

1. SUMMARY JUDGMENT MOTION

Claimant's summary judgment motion alleges that respondent/insurer failed to deny the petitioner's claim for compensation within 30 days as required by section 39-71-606, MCA. Citing the Montana Supreme Court's recent decision in *Haag v. Great Falls School District*, Montana Supreme Court No. 94-590 (November 12, 1995), she argues that her claim must be deemed accepted.

Attached to claimant's brief in support of her motion are *unauthenticated* copies of a claim for compensation dated November 8, 1993, a June 27, 1994 letter from a claims adjuster to claimant's then attorney, and a June 30, 1994 demand letter from claimant's attorney back to the claims examiner. The motion is not supported by affidavits or discovery, and the respondent's response to the petition denies the essential allegations made by petitioner.

When addressing motions to dismiss on previous occasions, this Court has consistently warned parties that their motions must comply with the requirements of Rule 56 of the Montana Rules of Civil Procedure, including the requirement that they be based on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ..." Rule 56(c), Mont.R.Civ.P. Affidavits must be based on personal knowledge and set forth admissible evidence. Rule 56(e), Mont.R.Civ.P. Unsworn statements, unauthenticated documents, and representations made in briefs do not provide an evidentiary basis for granting summary judgment.

The lack of supporting affidavits and discovery may not always be fatal. It may appear from the parties collective briefs that they agree to the authenticity of documents and the truth of particular facts. In essence, their briefs may contain an agreed statement of facts although not expressly designated as such. In this case, however, it does not appear that all facts essential for resolution of the dispute are uncontested. The date on which the claim was received by National Union is disputed. In her reply brief the petitioner has supplemented her factual statement with additional unauthenticated documents which are intended to resolve the dispute. However, the Court would have to provide respondent with an opportunity to reply to those documents and the facts which petitioner alleges they prove. I decline to prolong the summary judgment process. It will be just as economical for the parties to muster their evidence at trial as for them to now secure affidavits and discovery and engage in yet another round of briefing.

Moreover, summary judgment is clearly unwarranted in this case. The claimant seeks a determination of the amount of benefits due her, yet she has provided no evidence upon which the Court can make such determination.

2. MOTION TO JOIN ADDITIONAL PARTY

National Union moves to join the State Fund. According to its brief, the State Fund was the insurer with respect to two prior industrial injuries suffered by the petitioner. National Union argues that even if claimant suffered a new injury, the new injury may have caused only a temporary aggravation of her preexisting condition. Thus, it reasons, the State Fund may be liable for the claimant's current condition and should be joined as a party to this action.

National Union offers no factual support for its contention that claimant suffered only a temporary aggravation of her condition. It says that claimant's treating chiropractor, Dr.

David Thiry, "**may** suggest" that her present condition is attributable to a prior industrial injury, and indicates that Dr. Thiry's opinion has been requested. However, it offers no affirmative opinion of any physician which would support its *suggestion*. It also does not explain why it has not previously sought such an opinion. Copies of correspondence attached to its brief indicate that it has previously obtained Dr. Thiry's opinions regarding other issues.

Conjecture about what a physician may or may not say is an insufficient basis for the Court to hail an additional party into Court.

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THEREFORE, IT IS ORDERED that the petitioner's motion for summary judgment and the respondent's motion to join an additional party are **denied**.

IT IS FURTHER ORDERED that the trial setting and the pretrial deadlines are **reaffirmed**.

Dated in Helena, Montana, this 3rd day of January, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Steve M. Fletcher - FAXED and mailed

Ms. Sara R. Sexe - FAXED and mailed

Ms. Nancy Butler - Courtesy Copy

Submitted Date: December 29, 1995