IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 54

WCC No. 2002-0636

GERRY SMITH

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent.

ORDER DENYING SUMMARY JUDGMENT

Summary: Insurer moves for summary judgment with respect to its liability for a shoulder condition, urging that claimant's current condition (Parsonage Turner Syndrome) is not one for which it accepted liability (shoulder strain or tendinitis) and is unrelated to his employment, or, alternatively, that its acceptance of liability for claimant's shoulder complaints was based on a mutual mistake of fact. The claimant resists the motion arguing, among other things, that the deposition of claimant's treating physician, which is scheduled to take place a week after the motion was submitted for decision, will establish that claimant's employment aggravated, worsened, or lit up his current condition.

Held: Even though claimant has not submitted any affidavit raising an issue of fact concerning his aggravation claim, it is appropriate under Rule 24.5.329(8) to postpone consideration of the motion until claimant can take the doctor's deposition. Since the submission of the motion and the doctor's deposition are so close to trial, the Court not only postpones consideration of the motion but denies it without prejudice since it will be just as expeditious to proceed with trial before addressing the issues raised by the motion.

Topics:

> **Summary Judgment: Affidavits.** Even though the opposing party does not support its medical contentions with affidavits or other sworn evidence raising a material issue of fact, where summary judgment motion raises medical issues and medical testimony which might raise an issue of fact is scheduled to take place only days after a motion for summary judgment is submitted for decision, the Court will defer ruling on motion for summary judgment and consider the medical testimony in determining whether a genuine issue of fact is raised. *See* ARM 24.5.329(8). This

approach is in recognition of the expedited pretrial schedule in workers' compensation proceedings and the difficulty in scheduling doctors' testimony.

Summary Judgment: Disputed Facts. Even though the opposing party does not support its medical contentions with affidavits or other sworn evidence raising a material issue of fact, where summary judgment motion raises medical issues and medical testimony which might raise an issue of fact is scheduled to take place only days after a motion for summary judgment is submitted for decision, the Court will defer ruling on motion for summary judgment and consider the medical testimony in determining whether a genuine issue of fact is raised. *See* ARM 24.5.329(8). This approach is in recognition of the expedited pretrial schedule in workers' compensation proceedings and the difficulty in scheduling doctors' testimony.

Constitutions, Statutes, Regulations and Rules: Montana Workers' Compensation Court Rules: 24.5.329(8). Even though the opposing party does not support its medical contentions with affidavits or other sworn evidence raising a material issue of fact, where summary judgment motion raises medical issues and medical testimony which might raise an issue of fact is scheduled to take place only days after a motion for summary judgment is submitted for decision, the Court will defer ruling on motion for summary judgment and consider the medical testimony in determining whether a genuine issue of fact is raised. *See* ARM 24.5.329(8). This approach is in recognition of the expedited pretrial schedule in workers' compensation proceedings and the difficulty in scheduling doctors' testimony.

Motion for Summary Judgment: Consideration of. Where a deposition necessary to consideration of summary judgment motion is to be taken less than a week before the scheduled trial, it is just as expeditious for the Court to proceed with the trial. Therefore, the motion will be denied without prejudice. ARM 24.5.329(1)(b).

Constitutions, Statutes, Regulations and Rules: Montana Workers' Compensation Court Rules: 24.5.329(1)(b). Where a deposition necessary to consideration of summary judgment motion is to be taken less than a week before the scheduled trial, it is just as expeditious for the Court to proceed with the trial. Therefore, the motion will be denied without prejudice. ARM 24.5.329(1)(b).

¶1 This is an accepted liability case, however, the respondent/insurer now denies liability on the ground that both parties were mistaken about the nature and cause of the claimant's shoulder condition. His condition was initially thought to be a strain or tendinitis of the shoulder, but both parties now agree claimant suffers from Parsonage Turner Syndrome, a condition which the claimant's treating physician, as well as an IME physician, opined is unrelated to his employment. Respondent now moves for summary judgment urging that it accepted liability only for the tendinitis and is not responsible for his

continuing condition. In the alternative it urges mutual mistake of fact as grounds for relieving it from its initial acceptance.

¶2 Respondent argues, among other things, that even assuming respondent's legal grounds are sound, there is nonetheless a dispute of material fact as to whether claimant's "condition was aggravated, accelerated, or lit-up by his employment." (Petitioner's Response to Respondent's Motion for Summary Judgment at 2.) He says that aggravation "will be addressed in the deposition of Bret Lindsay, M.D., on November 6, 2002." (*Id.*)

¶3 Respondent is correct in its assertion in its Reply Brief that unsupported statements by counsel do not create genuine issues of fact, *Heibert v. Cascade* County, 2002 MT 233, ¶ 21. However, Rule 24.5.329 allows the Court to refuse or postpone summary judgment where a party is unable to timely provide a sworn affidavit raising genuine issues of fact. Subsection (8) states:

> (8) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

An affidavit of claimant's counsel states that he has scheduled Dr. Lindsay's deposition for November 6, 2002. (Seaman Affidavit, ¶ 9.) While it does not technically comply with the rule in that it does not state why he could not present an affidavit by Dr. Lindsay which supports his aggravation claim, the Court also recognizes that workers' compensation cases are tried on an expedited basis and that it is often difficult to obtain evidence from and schedule depositions of doctors. There is no claim by respondent that claimant has unduly delayed scheduling Dr. Lindsay's deposition. Had the deposition been obtained prior to submission of the motion for decision, any testimony the doctor gave would be considered. I therefore find good cause to allow the deposition to proceed and to postpone consideration of the motion until the doctor's testimony can be submitted.

¶4 Moreover, since the motion is submitted for decision rather late in the pretrial process - a mere 13 days before trial, I find it appropriate to invoke subsection (1)(b) of Rule 24.5.329, which provides:

> (b) Because cases in the workers' compensation court are heard on an expedited basis, a motion for summary judgment may delay trial without any corresponding economies. The time and effort involved in preparing briefs and resolving the motion may be as great or greater than that expended in resolving the disputed issues by trial. For these reasons, summary judgment motions typically will be disfavored. The court may decline to consider individual summary judgment motions where it concludes that the issues may be resolved as expeditiously by trial as by motion.

Trial shall therefore proceed as scheduled if the parties have anything more to offer the Court by way of evidence in addition to that offered through the affidavits and Dr. Lindsay's deposition.

¶5 Accordingly, the motion for summary judgment is **denied** for procedural reasons and without addressing the merits of the matters raised therein.

DATED in Helena, Montana, this 31st day of October, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Garry D. Seaman
Ms. Carrie L. Garber
Submitted: October 29, 2002