IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 95

WCC No. 9406-7066

EDWIN TAYLOR

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

MONTANA DEPARTMENT OF HIGHWAYS

Employer.

ORDER DENYING MOTION FOR SUMMARY RULING

The matter before the Court is the Petitioner's Motion for Summary Ruling. The motion requests the Court to enter summary judgment determining that petitioner suffered an industrial injury on March 4, 1991.

Procedural Background

The Petition for Hearing in this matter was filed on June 2, 1994. It alleges that the petitioner, Edwin Taylor, was injured in an industrial accident on March 4, 1991, while he was working for the Montana Department of Highways. It further alleges that the Department's insurer, the State Compensation Insurance Fund (State Fund), accepted liability for the accident and thereafter paid petitioner temporary total disability benefits. Finally, apropos to the present matter, the petition alleges that in April 1994, the State Fund notified petitioner that it was terminating benefits because "the State of Montana is of the opinion that Mr. Taylor did not suffer a disabling injury." (Petition ¶ VIII.) The State Fund admits that it initially accepted liability but affirmatively alleges that the claim was fraudulent. (Response at 1-3.)

The Petitioner's Motion for Summary Ruling and a supporting brief were filed on July 14, 1994. Respondent submitted a brief opposing summary judgment. Both parties have submitted numerous exhibits in support of their arguments and the State Fund has submitted several affidavits. The parties filed a number of depositions with the Court.

The Court held a hearing on the petitioner's motion on September 22, 1994. Following argument by counsel, the parties requested and were given time to submit additional briefs. The Court received those briefs and the motion is ready for decision.

Discussion

While the rules of the Workers' Compensation Court provide that the time for filing a motion "for summary ruling" shall be fixed by a scheduling order, the Court has adopted no other rules applicable to motions for summary judgment. However, in recent decisions it has applied Rule 56, Mont.R.Civ.P., to summary judgment motions. E*.g.,* ***Steve Wood v. Montana School Groups Ins. Authority,*** *WCC 9401-6986, Order Granting Partial Summary Judgment (August 12, 1994);* ***State Compensation Ins. Fund v. Frank Richter****, WCC. No. 9308-6367, Order Denying Summary Judgment (March 4, 1994).* It will continue to do so.[(1)]

Rule 56 (c), Mont.R.Civ.P., provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, 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." See also ***First Security Bank v. Vander Pas****, 250 Mont. 148, 152, 818 P.2d 384 (1991).* When appropriate, summary judgment encourages judicial economy by eliminating unnecessary trial, delay and expense. ***Wagner v. Glasgow Livestock Sale Co.,*** *22 Mont. 385, 389, 722 P.2d 1165, 1168 (1986).* However, there truly must be a complete absence of any genuine issue of fact. ***Kober v. Stewart,*** *148 Mont. 117, 122, 417 P.2d 476 (1966).* Summary judgment is not "a substitute for trial if a factual controversy exists." ***Reaves v. Reinbold,*** *189 Mont. 284, 288, 615 P.2d 896, 898 (1980).* If there is any doubt as to the propriety of summary judgment, the motion must be denied. ***Rogers v. Swingly,*** *206 Mont. 306, 310, 670 P.2d 1386 (1983).*

Initially, the moving party bears the burden of showing an absence of material fact; the burden then shifts to the opposing party to present evidence of a material and substantial nature raising a genuine issue of fact. ***Cole v. Flathead County,*** *236 Mont. 412, 416, 771 P.2d 97, 100 (1989).* The evidence, both in support and in opposition to the motion, must be sworn evidence in the form of affidavits, depositions, and answers to interrogatories, and is limited to "such facts as would be admissible in evidence." Rule 56 (e), Mont.R.Civ.P. Thus, inadmissible evidence cannot be considered.

Petitioner's motion was initially supported only by the documents attached to his motion. One of the documents is the claim form which is routinely admitted. The other documents, with one exception, are copies of medical records which are routinely admissible unless the opposing party specifically objects to the records. Respondent has not objected to the attachments to petitioner's motion, and has also attached copies of medical records to its own response. The claim form and the medical records will therefore be considered. The Social Security disability determination, attached to petitioner's motion, is inadmissible and will not be considered.

According to his Petition, petitioner suffered an industrial injury while he was picking up traffic cones in Bozeman:

EDWIN TAYLOR was injured in the course and scope of his employment as a truck driver for the State of Montana, Department of Highways, Bozeman Division on March 4, 1991. On that date he was picking up traffic cones on Main Street in Bozeman, Montana. He had tar and gravel stuck to the bottom of his boots, he stumbled because

of the build-up on his boots while carrying five (5) safety cones. He fell into the fender on the air compressor hitting his head, neck and shoulder then fell to the pavement landing on his hips and back.

(Petition, ¶ I.) Petitioner was the only person present when the alleged accident occurred. He argues that the lack of witnesses, the employer's failure to question the claim when it was first presented, and the medical evidence conclusively show that an accident in fact occurred. He points out that he was hospitalized for several days following the accident and has been repeatedly diagnosed as suffering from back problems.

Initially, the fact that the alleged accident was not witnessed by others is not conclusive evidence. Neither is the fact that the employer did not initially question petitioner's report of the accident. Fraud may be proved by other evidence, including circumstantial evidence and the admissions of the party accused of the fraud.

Similarly, the medical records are not conclusive or unrebuttable. The fact that petitioner may suffer from a genuine medical condition does not conclusively prove that the medical condition arose from an industrial accident. The records in this case do not identify conclusive, objective manifestations of an injury occurring on March 4, 1991. While petitioner sought treatment at the emergency room, his complaints were primarily subjective ones. There is little evidence in the records to indicate that he had any significant contusions, cuts, bruises, or other objective signs of a fall or injury.

Petitioner asserts that the records reflect a contusion on his head when he was first examined on March 4. That contusion is described in a February 3, 1994 letter from the examining physician, Dr. Thomas G. Hildner, as follows:

My diagnosis was that the patient did have, in fact, a contusion to the left side of the head. This is manifested by *history and tenderness* in the left occipital area. There are varying types of contusions, some of them result in obvious scalp hematoma, some of them occur over a larger diffuse area and no hematoma response is elicited. I *did not see any significant abrasion or bruising, but again, that would merely be a skin manifestation and is not always present in response to a contusion.* The contusion may have been mild, therefore causing no obvious signs of injury. . . .

(Respondent's Reply Brief in Opposition to Petitioner's Motion for Summary Judgment, Ex. 14; italics added.) The contusion described by Dr. Hildner relies heavily on claimant's subjective report. It does not amount to overwhelming, conclusive or unrebuttable evidence that an accident in fact occurred.

However, in light of the evidence and arguments advanced by petitioner, the State Fund cannot rest its opposition on unsupported assertions or speculation. ***Lewis v. Department of Revenue,*** *207 Mont. 361, 373, 675 P.2d 107 (1984)*. It must come forward with admissible evidence which raises a material issue of fact.

The State Fund rests its opposition to the motion on four things. First, it suggests that the motion should be denied because a district court has found probable cause in a parallel criminal proceeding involving the same issue of fraud. Second, it argues that the

medical records are far from conclusive and that they do not disclose objective evidence of an accident or injury. (This argument has already been discussed in the context of petitioner's assertion that the medical records are conclusive.) Third, it has provided affidavits and deposition testimony which, if believed, tend to show that petitioner made statements to others indicating that he fabricated not only the March 4, 1991 accident, but two prior accidents, as well. Finally, it has offered evidence of petitioner's motive to fabricate.

The district court finding of probable cause is not entitled to preclusive effect. Probable cause may be established through hearsay evidence. The evidentiary basis for a motion for summary judgment is stricter. What might suffice for purposes of establishing probable cause may not suffice in the face of a motion for summary judgment. Thus, this Court must make its own, independent determination concerning petitioner's motion. The district court's probable cause finding is disregarded.

In this case the principal witness against petitioner is Elizabeth Stephens Larain (Larain), who was deposed on August 17, 1994. That deposition was suspended by order of the Court after Larain made allegations of misconduct against the petitioner's attorney. It was clear that the hostile environment engendered by those allegations precluded completion of the deposition at that time.

Prior to suspension of the deposition, Larain testified that petitioner initially told her he fell into a "pot hole" in March 1991. (Larain Dep. at 16.) She went on to testify that later the petitioner told her that the accident had never occurred and that he had faked the accident. (*Id.* at 17-18.) He further told her that he was scamming the system and that he was "going to take the system for all it was worth." (*Id.* at 19.) Her story is consistent with what she previously told Bryan Costigan, a criminal investigator for the State of Montana. (See Costigan Affidavit: Respondent's Brief in Opposition, ex. 9.)

Petitioner challenges Larain's credibility. He cites an affidavit signed by Larain on July 25, 1994, in which she states that she does not know if petitioner injured his low back on March 4, 1991, and that petitioner did *not* tell her he did not fall on March 4, 1991. The affidavit also states that by the time of an October 1993 interview with Bryan Costigan her memory of what petitioner had told her was "very limited" because she had been taking "prescription drugs that erased my memory." (Larain Dep., Ex. 2 at 3.)

During the deposition Larain denied that the affidavit was true; denied that she had read the affidavit; and leveled the following accusations against petitioner's counsel:

Q Do you remember telling me that he -- that Mr. Taylor never told you he did not fall on March 4, 1991.

A I told you that's what I would say if you would get this so I wouldn't have to go to Court. That's what I told you.

. . .

A I told you that I would say that if you could get this thrown out of Court, - - - -

Q And I - - - -

A - - - - after you had kept me on the phone for three hours, after you had told me I was the only witness, I was going to get dragged through the Court, after you told me that all my medical history was going to be brought up, the fact that I was in treatment, after you told me that - - - -

Q And it is.

A - - - Ed Taylor had a seriously injured back, and that you were going to send me all his medical papers, after about three hours of this, I told you I'd tell you anything that you wanted to know. Yes, I did.

. . .

A I didn't read this affidavit until I read it to Mr. Goe and when I was going through it reading it to Mr. Goe, I said this isn't true.

Q Okay - - - -

A - - - you know - - and you know why I signed it. And I told you if I signed it that you would make sure that this - - you said if I signed this, you were pretty sure you could get this thrown right out of Court; and that would be the end of it. That's exactly what you said to me.

Q That is not what I said to you.

A And you know I don't want to go to Court.

Q Hey, you're going to go to Court, Liz, because you're lying through your teeth, and you're going to go to Court.

. . . .

(Larain Dep. at 50-53.) It was shortly after this that the Court was contacted and the deposition suspended.

Obviously, an issue has been raised concerning Larain's credibility. Counsel for petitioner has become a witness as to that issue. In light of Larain's accusations, his credibility is also at issue. The Court has suggested it would be appropriate for him to withdraw in light of that role but he has declined to do so. In any event, on a motion for summary judgment the Court cannot simply disregard deposition testimony or find a deponent incredible. Issues of credibility must be judged at trial and cannot be resolved on a motion for summary judgment.

Petitioner further argues that Larain's testimony must be disregarded because it is uncorroborated. However, he has been unable to cite to a single civil case which requires that a witness' testimony regarding the admissions of a party must be corroborated, and this Court is not aware of such a rule.

Moreover, Larain's evidence is not the only evidence offered by the State Fund. An affidavit of Carol McKean, petitioner's ex-wife, states that during the week of March 4, 1991, petitioner told her he had injured his back "while on the jackhammer" and that he had gone on to tell her:

[T]hat the reason he filed a workers' compensation claim was to try and buy time until he could file for bankruptcy. Mr. Taylor further stated that the reason he had filed for workers' compensation was because creditors could not touch such benefits.

(McKean Affidavit: Respondent's Reply Brief in Opposition to Petitioner's Motion for Summary Judgment, Ex. 8.)

Robert Beebe, who is a friend or at least acquaintance of petitioner, states in his affidavit[(2)] that in mid-April 1991, petitioner was performing heavy labor on his car while receiving total disability benefits with respect to the alleged March 1991 injury, and that petitioner had also told him in the past that he had back pain due to one leg being shorter than the other. (Beebe Affidavit.)

Petitioner's supervisor, Quentin Miller, has also provided the Court with an affidavit. In it he states that due to deficient job performance the petitioner's job was in jeopardy at the time of the alleged accident. He described the petitioner as appearing "preoccupied" on the day of the alleged accident.

I am satisfied that the evidence concerning this particular workers' compensation claim raises triable issues of fact. The motion for summary judgment is therefore **denied.**

DATED in Helena, Montana, this 21st day of October, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Bernard J. Everett
Mr. Oliver H. Goe

1. The possibility of expressly incorporating Rule 56, Mont.R.Civ.P., into the rules of this Court was discussed during the September 29, 1994 meeting of the Court's rules committee. Most of the members felt that the Court's prior decisions make it abundantly clear that it will borrow, where appropriate, from Rule 56 when considering summary judgment motions. The committee concluded that amendment of the Court rules was unnecessary.

2. The affidavit was filed after oral argument. However, the substance of Mr. Beebe's statements is contained in an affidavit of Bryan Costigan. Mr. Beebe is a long-haul trucker who is infrequently in Montana. Under these circumstances, the Court has permitted the late filing of Mr. Beebe's affidavit.