IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 66

WCC No. 2000-0097

UNINSURED EMPLOYERS' FUND,

Petitioner,

vs.

SMF TRUCKING, LLC,

Respondent/Employer for

ED GRAY,

Employer/Claimant.

ORDER DENYING MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Summary: Respondent Employer moved to dismiss or for summary judgment in action brought by Uninsured Employers' Fund for indemnification.

Held: Motion to dismiss denied because a motion to dismiss has the effect of admitting the opposing parties allegations; if the UEF's allegations are admitted, dismissal is not appropriate. Motion for summary judgment denied because counsel failed to set out uncontested facts, supported by evidence, as required by Court Rule.

Topics:

> **Summary Judgment: Affidavits.** Motion for summary judgment denied where not supported by any discovery, affidavits or other admissible evidence and not in form required by ARM 24.5.329. Belated submission of affidavits and exhibits not considered by the Court.
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> **Summary Judgment: Motion for Summary Judgment.** Motion for summary judgment denied where not supported by any discovery, affidavits or other admissible evidence and not in form required by ARM 24.5.329. Belated submission of affidavits and exhibits not considered by the Court.

¶1 The matter before the Court is the SMF TRUCKING LLC'S MOTIONTO DISMISS/SUMMARY JUDGMENT.

Discussion

¶2 Through its petition in this matter, the Uninsured Employers' Fund (UEF) seeks indemnification for benefits it has paid Ed Gray (Gray) on account of a May 4, 1996 industrial injury. UEF alleges that Gray was injured while employed by SMF Trucking, LLC (SMF).

¶3 In its motion to dismiss or for summary judgment, SMF states that Gray was not employed by SMF but rather by David Fife, individually and doing business as REC Petes. The motion sets out SMF's supporting argument. Neither the motion nor the brief is supported by any discovery, affidavits, or other admissible evidence, nor do they comply with this Court's requirements for summary judgment motions as set forth in ARM 24.5.329.

¶4 A motion to dismiss "has the effect of admitting all well-pled allegations in the complaint," *Missoula City-County Air Pollution Control Bd. v. Board of Environmental Review,* 282 Mont. 255, 259, 937 P.2d 463, 466 (1997); thus the UEF's allegation that SMF employed Gray is admitted for purposes of the motion. A motion for summary judgment must set forth the uncontested facts in serial fashion, with citation to evidence supporting the fact, and it must be supported by affidavits, admissions in the pleadings, depositions, and other discovery. ARM 24.5.329. It would behoove counsel for SMF to review rules and case law governing motions to dismiss and motions for summary judgment.

¶5 The motion is not saved by SMF's belated attachment of an affidavit and exhibits to its reply brief. The evidence was submitted too late and does not give the UEF an opportunity to reply. I will not consider it.

ORDER

¶6 The motion is **denied**.

DATED in Helena, Montana, this 20th day of October, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Daniel B. McGregor
Mr. Paul Neal Cooley
Mr. Ed Gray - Certified Mail
Submitted: September 29, 2000