

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 43.5

WCC No. 2000-0101

DALE AABY

Petitioner

vs.

ASARCO

Respondent/Insurer/Employer.

ORDER DENYING MOTION FOR SUMMARY RULING

Summary of Case: Petitioner, who suffers from an occupational disease, seeks \$10,000 under section 39-72-405, MCA (1997), which provides for a benefit up to that amount where a claimant suffers a wage loss on account of his disease. The respondent moved for summary judgment based upon claimant's statements and testimony to the effect that he retired and did not intend to go back to any sort of employment. However, other evidence proffered by petitioner indicates he retired on account of his occupational disease.

Held: Respondent has not provided facts which entitle it to judgment as a matter of law. Section 39-72-405, MCA, only requires that the claimant cease his employment on account of the occupational disease and suffers a wage loss as a result. It does not require petitioner to seek and obtain other employment, but it does require his wage loss be measured by what he could earn if he sought employment. Motion for summary judgment **denied**.

Topic:

Occupational Disease: Indemnity (39-72-405) Awards. Insurer not entitled to summary judgment based upon claimant's statements that he retired and did not intend to go back to any work where other evidence suggested he retired because of his occupational disease (feet problems). Section 39-72-405, MCA, only requires that claimant cease employment because of the occupational disease and suffer a resulting wage loss, which is measured by what he could earn if he sought employment.

¶1 The petitioner herein seeks occupational disease benefits pursuant to section 39-72-405, MCA (1997), which provides for payment of up to \$10,000 when, *inter alia*, an employee suffering from an occupational disease "ceases employment and it is in fact, as

determined by the medical panel inadvisable for the employee on account of a nondisabling occupational disease to continue in employment" and thereby suffers a wage loss. Respondent moves for summary judgment, arguing that the petitioner voluntarily retired and is therefore not entitled to benefits. It cites statements by petitioner that he retired and had no interest in returning to the labor market because "[a]fter around 50-some years [of working], I think I've had enough." (motion for summary ruling and memorandum in support at 3, bolded in original.)

Discussion

¶12 Summary judgment is appropriate only where undisputed facts entitle the moving party to judgment as a matter of law. ARM 24.5.329(2). "Summary judgment is an extreme remedy which should never be substituted for a trial if a material factual controversy exists." *Montana Metal Bldgs., Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997).

¶13 In this case, the petitioner counters with evidence raising a material issue as to the reasons he retired. A statement taken from him by respondent's then counsel suggests that he may have taken himself out of the labor market on account of his occupational disease. As quoted in his response to motion for summary ruling at page 2, he said:

My feet would get so sore I couldn't walk on them, I couldn't stand on them. At night I'd have to go home and get off my feet and that's when the thunder and lightening started and it still does that. I mean, I don't have it quite so bad now as I did then because I'm not on my feet all the time.

Petitioner argues that he retired because

he could not continue to work in the heavy-type laboring activity in which he was involved at ASARCO, being on his feet; and if he were [to] obtain other employment at this time, such employment would pay well below his salary at ASARCO.

(Id.)

¶14 The fact that petitioner does not intend to go back to work is not incompatible with a finding that he ceased work on account of his occupational disease and thereby suffered a wage loss. If his retirement from ASARCO was caused by his occupational disease, he has suffered a wage loss since he is now unemployed. There is no requirement that petitioner seek and find actual employment. While his failure to find employment means his wage loss is greater than it might otherwise be, the measure of his wage loss under section 39-72-405, MCA, is what he could earn if he sought employment. The motion for summary ruling is **denied**.

DATED in Helena, Montana, this 17th day of July, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Todd A. Hammer
Submitted: July 12, 2000