IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 20

WCC No. 2000-0249

HARRY DARRAH

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer/Employer.

ORDER DENYING SUMMARY JUDGMENT

Case Summary: Citing section 39-71-710, MCA (1997), respondent moves for summary judgment with respect to claimant's request for permanent partial disability benefits, arguing that he is retired and therefore not entitled to the benefits.

Held: The Court will only consider those facts which are set out separately and serially in compliance with Rule 24.5.329(3). Those facts fail to show that claimant is retired within the meaning of the section. Motion **denied**.

Topics:

Summary Judgment: Disputed Facts. The Court will only consider facts which are properly set out separately and in serial fashion and will ignore other facts appearing in the body of the brief.

Summary Judgment: Disputed Facts. The Court will not consider facts which are not supported by reference to affidavits, depositions, or discovery answers.

Summary Judgment: Motion for Summary Judgment. The Court will not consider facts which are not supported by reference to affidavits, depositions, or discovery answers.

Summary Judgment: Motion for Summary Judgment. The Court will only consider facts which are properly set out separately and in serial fashion and will ignore other facts appearing in the body of the brief.

Benefits: Permanent Partial Benefits: Retirement. The undisputed facts in support of respondent's motion for summary judgment fail to show that claimant is

retired within the meaning of section 39-71-710, MCA (1997), therefore, summary judgment is **denied**.

¶1 The matter before the Court is respondent's renewed motion for summary judgment regarding claimant's request for permanent partial disability benefits. The original motion was denied as untimely since it was filed after the deadline fixed in the original scheduling order. Following that Order, the parties agreed to a continuance, hence a new scheduling order issued, and the time for filing of motions for summary judgment was extended. The renewed motion was filed within the deadlines fixed by the latest scheduling order. (Order Resetting Scheduling Order, filed February 1, 2001.)

Facts

¶2 The renewed motion references and incorporates respondent's prior briefs. The alleged undisputed facts as set forth by respondent are as follows, although not in the order presented:[(1)]

- Claimant was employed by ASARCO, from April 22, 1974 to March 6, 2000.
- On July 16, 1998, the claimant was injured while working at ASARCO.
- Claimant returned to work following his injury but retired on March 6, 2000.
- An impairment award of 25% was paid to claimant by ASARCO.
- ASARCO has denied claimant's request for permanent partial disability benefits based on his retirement.

Those are the only facts set out by ASARCO in compliance with Rule 24.5.329.[(2)] I do not consider other facts set out in narrative form in the body of ASARCO's brief since they do not comply with the rule.

¶3 On his part, claimant fails to set forth a "brief statement of genuine facts, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact . . . ." Rule 24.5.329(3). Claimant has also made representations concerning facts he will offer at trial.[(3)] Representations concerning prospective evidence are insufficient to raise an issue of material fact and are therefore disregarded. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 24.5.329(7) The Court therefore accepts as true, for purposes of the motion, the limited facts set forth above.

Discussion

¶4 ASARCO argues that the claim for permanent partial disability benefits is barred by section 39-71-710, MCA, which provides in relevant part:

> **39-71-710. Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.

The facts are insufficient to show that claimant is receiving "social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement." The Court need not consider whether some other sort of "retirement" satisfies the section. The fact that claimant "retired" from ASARCO may mean nothing more than claimant resigned his job, and leaves open the possibility that he did so because he was physically unable to continue working in the job.

ORDER

¶5 The motion for summary judgment is **denied**.

DATED in Helena, Montana, this 8th day of May, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Todd A. Hammer
Submitted: April 11, 2001

1. Respondent's Brief in Support of Its Motion For Summary Ruling.

2. Subsection (3) of the rule provides:

> (3) Any party filing a motion under this rule shall include in its brief a statement of uncontroverted facts, which shall set forth in full the specific facts on which the party relies in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific pleading, affidavit, or other document where the fact may be found. Any party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing

party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party.

The facts set forth in the text are the only ones which are set forth in serial fashion with evidentiary support.

3. Petitioner's Brief in Opposition to Respondent's Motion for Summary Judgment at 2.