IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 69

WCC No. 9709-7825

FRANK R. JONES

Petitioner

vs.

RELIANCE NATIONAL INDEMNITY COMPANY

Respondent/Insurer for

RHONE-POULENC, aka STAUFFER CHEMICAL

Employer.

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary: Citing Mogus v. Reliance National Indemnity Ins. Co., WCC No. 9705-7749, in which this Court ruled that a permanently totally disabled claimant is not entitled to permanent partial disability benefits, the insurer moved for summary judgment. Claimant argued that he is not in fact permanently totally disabled and that the insurer merely decided to categorize him as permanently totally disabled. He wishes to pursue permanent partial disability benefits.

Held: Where the only undisputed evidence before the Court on permanent total disability status is the fact that claimant has been so characterized by the insurer, the summary judgment motion must be denied. The insurer is not precluded, however, from attempting to prove at trial that claimant is permanently totally disabled, in order to argue that Mogus applies.

Topics:

Benefits: Permanent Partial Benefits: Generally. Citing Mogus v. Reliance National Indemnity Ins. Co., WCC No. 9705-7749, in which this Court ruled that a permanently totally disabled claimant is not entitled to permanent partial disability benefits, the insurer moved for summary judgment. Claimant argued he is not in fact permanently totally disabled. Where the only undisputed evidence before the Court on permanent total disability status is the fact that claimant has been so characterized by the insurer, the summary judgment motion must be denied. The insurer is not precluded, however, from

attempting to prove at trial that claimant is in fact permanently totally disabled, in order to argue that Mogus applies.

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Petitioner in this matter seeks permanent partial disability benefits with respect to several injuries, the latest of which occurred on August 24, 1991. Respondent moves for partial summary judgment with respect to the 1991 claim.

Legal Predicate for Motion

The motion is predicated on this Court's recent ruling that a permanently totally disabled claimant is not entitled to permanent partial disability benefits. *Mogus v. Reliance National Indemnity Ins. Co.,* WCC No. 9705-7749 (October 24, 1997). That holding was based on the 1991 version of the Workers' Compensation Act, which is the same version applicable in this case.

Under the 1991 Act, eligibility for permanent partial disability benefits requires proof that the "injured worker suffers a permanent partial disability," § 39-71-703(1), MCA (1991).[(1)] Permanent partial disability is defined as a condition which results in a medically determined physical restriction as a result of the injury but which does not preclude the worker from returning "to work in some capacity." § 39-71-116(15), MCA (1991).[(2)] The claimant in *Mogus* alleged, and respondent admitted, that he was permanently *totally* disabled. He sought permanent partial disability benefits only after he reached age 65 and his permanent total benefits were discontinued. Since claimant admitted he was permanently totally disabled, I found that he was not "able to return to work in some capacity." Therefore, he did not meet the definition of permanent partial disability and was not entitled to permanent partial disability benefits.[(3)]

Factual Background and Arguments

In this case, it is the respondent who alleges that the claimant is permanently totally disabled. The petition does not allege that claimant is in fact permanently partially disabled, it alleges only that the claimant was "receiving" permanent partial disability benefits prior to reaching age 65. Petition for Hearing ¶ VII.

Pursuant to this Court's rule regarding submission of summary judgment motions, ARM 24.5.329(3), respondent set out the following facts as uncontroverted.

1. On August 21, 1991, Petitioner was injured and permanently aggravated any back condition he previously may have had. (See Uncontested Fact No. 3 of the Response to Petition.)

2. Respondent paid permanent total disability benefits to Petitioner until he reached the age of 65 and pays permanent partial benefits under the August 24, 1991 industrial accident. (Petition for Hearing, p. 2 at No. 7.)

3. The permanent partial benefits being paid consist of biweekly payments of the full permanent impairment award based upon an impairment rating of 26% whole man by Gary D. Cooney on July 9, 1993. (See Affidavit of Diane Nelson.)

4. From 1993 until 1996, Petitioner received permanent total disability benefits as a result of the August 1991 injury. As of October 11, 1996, Petitioner began receiving permanent partial disability benefits. *(Id.)*

5. Petitioner claims that he is entitled to additional permanent partial disability benefits after age 65, over and above the impairment award. (See Petition for Hearing at No. 8 and Affidavit of Diane Nelson.)

6. To date, Petitioner has not challenged the amount of the impairment rating made by Dr. Cooney. (See Affidavit of Diane Nelson.)

(Brief in Support of Motion for Partial Summary Judgment at 2.)

In addition to the pleadings, the motion was supported by an Affidavit of Diane Nelson, the claims adjuster responsible for the claim. With one significant exception, her affidavit sets out the basic information contained in the respondent's statement of uncontroverted facts: Nelson's affidavit states that claimant received permanent total disability benefits from July 14, 1995 until October 10, 1996, whereas the respondent's statement states that claimant received such benefits from 1993 to 1996.

In his responsive brief, the claimant sets forth a list of what he believes are the uncontroverted facts. Petitioner's Brief & Response to the Respondents' Motion for Partial Summary Judgment. He does not dispute that he received permanent total disability benefits but dates them from July 31, 1995 until October 10, 1996, a two week difference from the time frame provided by Diane Nelson's affidavit. (*Id*. at 2.) He also states that he "never agreed or stipulated to permanent total designation of benefits in relation to the 1991 claim." (*Id*.) He also states that Dr. Gary Cooney determined that he was able to return to light or sedentary employment. (*Id*.) He attaches a copy of a July 9, 1993 letter of Dr. Cooney. The letter is not attached to any affidavit or response to discovery. Based on all of

this, he argues that respondent unilaterally converted his benefits from temporary to permanent total benefits and that he is only permanently partially disabled. (*Id*. at 4-5.)

In its reply brief the respondent argues that claimant's acceptance of the permanent total disability benefits conclusively establishes that he is permanently totally disabled. It further urges that permanent total disability is not solely a medical determination and attaches a letter of a vocational consultant which it characterizes as showing that claimant cannot work. That letter, like the one of Dr. Cooney is not part of any affidavit, response to discovery or deposition.

<u>Discussion</u>

Summary judgment motions are governed by this Court's Rule 24.5.329. As set forth in the rule:

[S]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, 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.

On its face, the rule requires that the facts upon which the motion is based be established by the pleadings and sworn evidence. Mere allegations and unsworn statements will not suffice. *Cf. Wright v. State*, 231 Mont. 324, 327, 752 P.2d 748, 750 (1988) (reported and transcribed negotiation session between parties was properly disregarded because it did not amount to sworn testimony). The moving party must

first support his contentions with an **appropriate evidentiary basis** before the opposing party must do more than simply rest upon the allegations contained in his pleadings. It is only when the moving party has properly supported its motion that the burden is shifted to the opposing party to provide counterproof rather than being permitted to rest solely on the allegation contained in its pleading.

Mathews v. Glacier General Assurance Co., 184 Mont. 368, 381, 603 P.2d 232, 239 (1979) (emphasis added). Even if no opposing evidence is submitted, summary judgment is not automatic. If the movant does not establish the absence of any genuine issue of material fact entitling the movant to summary judgment, the opposing party has no duty to present counterproof. *Id*. at 382, 603 P.2d at 239; *see also Minnie v. City of Roundup*, 257 Mont. 429, 849 P.2d 212 (1993) (where the moving party failed to support its summary judgment motion with appropriate evidentiary basis, the non-moving party was under no obligation to do more than simply rest upon the allegations in the pleadings).

Respondent's motion is premised on this Court's ruling in *Mogus,* which established that a claimant seeking permanent partial disability benefits (other than an impairment award) must have a physical restriction as a result of his/her industrial accident **and** be able to

return to work in some capacity. Respondent does not argue the first criteria, rather it rests its motion on the second. However, the only uncontroverted, admissible evidence it offers to prove that claimant cannot return to work is his receipt of permanent total disability benefits.[4] Claimant does not dispute that fact.

The fact that claimant received permanent total disability benefits does not conclusively establish that he is in fact unable to work in some capacity. As he points out, an insurer may unilaterally concede permanent total disability. While he has not presented admissible evidence which would establish such fact in this case, the mere possibility that an insurer might do so for its own convenience, especially where a claimant is a year or so short of retirement age, precludes the Court from conclusively inferring that claimant is in fact permanently totally disability.

As presented, the motion must therefore be, and is, **denied.** This ruling does not preclude respondent from attempting to prove, as a matter of fact, that claimant is permanently totally disabled or is otherwise ineligible for permanent partial disability benefits. It also does not preclude it from claiming a credit on account of the benefits respondent designated as permanent total benefits.

SO ORDERED.

DATED in Helena, Montana, this 17th day of December, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

Ms. Sara R. Sexe
Submitted: December 12, 1997

1. Section 39-71-703(1), MCA (1991), provides:

(1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.

2. Section 39-71-116(15), MCA (1991), provides:

"Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.

The requirements are in the conjunctive. Thus, to meet the definition the claimant must be "able to return to work in some capacity."

3. The impairment award authorized by section 39-71-703(2), MCA, had been paid and was not at issue.

4. Its reliance on the opinion of the vocational counselor must be disregarded since it is unsworn evidence.