

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 55

WCC No. 9504-7281

FRANK DeGREGORY

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

ORDER DENYING SUMMARY JUDGMENT

Summary: In opposition to motion for summary judgment filed by respondent, petitioner submitted exhibits and factual assertions not verified by affidavit, discovery, or other evidence.

Held: Motion denied because trial is approaching and materials submitted by claimant may raise material issues of fact. Though petitioner's submission in opposition lacked the verification necessary for opposing a motion with factual assertions, that flaw is not fatal in this instance. **Note:** this case was decided prior to the Court's adoption of a rule on Summary Judgment Motions (see ARM 24.5.329.)

Topics:

Summary Judgment: Disputed Facts. Failure to verify factual assertions made in opposition to motion for summary judgment with affidavits, or back with discovery or other verified evidence, may be fatal to opposition. **Note:** this case was decided prior to the Court's adoption of a rule on Summary Judgment Motions (see ARM 24.5.329.)

Summary Judgment: Affidavits. Failure to verify factual assertions made in opposition to motion for summary judgment with affidavits, or back with discovery or other verified evidence, may be fatal to opposition. **Note:** this case was decided prior to the Court's adoption of a rule on Summary Judgment Motions (see ARM 24.5.329.)

Respondent has filed a Motion for Summary Judgment supported by an Affidavit of Bill Hanson. In his response to the motion, the petitioner recites numerous facts and attaches several exhibits, none of which are verified by affidavit, deposition, written discovery, or the equivalent.

While this Court has not adopted a specific rule governing summary judgment practice, it has on previous occasions stated that, where appropriate, it will borrow from Rule 56, Mont.R.Civ.P. See e.g., *State Compensation Ins. Fund. v. Frank C. Richter*, WCC No. 9308-6867, Order Denying Motion for Summary Judgment (March 4, 1994). In *Richter* the Court adopted the Rule 56 requirement that motions for summary judgment, and any opposition to those motions, must be based on sworn, admissible evidence, which is usually presented by way of affidavit, deposition and answers to written discovery. The Court cannot consider representations of the parties which are not founded on sworn evidence. *B.M. by Berger v. State*, 215 Mont. 175, 179, 698 P.2d 399 (1985); *Prairie State Bank v. IRS of Treasury Dept.*, 745 P.2d 966 (Ariz. 1990).

However, the Court has not formally adopted Rule 56 and has modified its application to conform to the nature of the proceedings in this Court. In *ANR Freight Systems, Inc. v. Farmers Ins. Group*, WCC No. 9411-7182, Order Denying Motion for Summary Judgment (January 26, 1995) at page 2, this Court said:

While the Workers' Compensation Court has generally applied the summary judgment procedures specified by the Montana Rules of Civil Procedure, application of those procedures may in some cases be inappropriate. One of the primary purposes of summary judgment motions is to "encourage judicial economy through the elimination of any unnecessary trial." *Payne Realty v. First Security Bank*, 256 Mont. 19, 24, 844 P.2d 90 (1993). Cases in the Workers' Compensation Court are heard on an expedited basis. Discovery is conducted on an expedited basis. Ordinarily, trials are held within seventy-five days of the filing deadline and are completed in less than a day. Motions for summary judgment may delay trial without any corresponding economies. The time and effort involved in preparing briefs and resolving motions for summary judgment may be as great or greater than that expended in resolving the issues by trial. Therefore, the Court may decline to consider individual summary judgment motions where the issues may be resolved just as expeditiously by trial as by motion.

In *Industrial Indemnity Ins. Co. v. Roberta C. Ryan*, WCC No. 9305-6795, Order Denying All Outstanding Motions (January 4, 1994) at page 3, the Court considered an insurer's motion that the Court enter summary judgment finding that claimant suffered a subsequent

work-related injury to the same part of her body, thereby cutting off the insurer's liability. Characterizing the evidentiary basis for the motion as "skimpy", this Court went on to say:

Motions for summary judgment are especially disfavored in the Workers' Compensation Court. In a case such as this, unless the Court is satisfied that a sufficiently complete factual basis has been established, and it reaches a firm conviction that further factual inquiry would be unproductive, it will not grant a motion for summary judgment. No medical depositions have been offered in this case. The only medical records submitted by Industrial are four short letters from Dr. Ellis. The Court is not convinced that the medical information is adequate to render a summary decision.

(*Id.* at 4.)

That summary judgment may be inappropriate in some cases does not relieve the responding party from complying with Rule 56 when replying to a motion for summary judgment. On the other hand, the Court does not intend its selective application of Rule 56 to become a trap for the unwary, especially since the Court has not adopted its own rule with regard to summary judgment. Therefore, where the response to a motion for summary judgment sets forth facts, and it is not apparent that counsel for the responding party is familiar with the requirement that the facts be verified, the Court may grant the responding party an opportunity to file affidavits and discovery materials to cure the oversight.

In this case, the facts and documents identified in the responsive brief **may** raise material issues of fact. I have reached, and express, **no** opinion as to whether or not they in fact do so, only that the petitioner should be given an opportunity to verify them in compliance with Rule 56.

This case is set for trial in Missoula during the week of July 11, 1995. The motion was not submitted for decision until today, July 3, 1995. The reply brief, which was filed on July 3rd, contains a request for oral argument. Thus, even without granting petitioner an opportunity to submit verification of his factual allegations, there is insufficient time to consider and rule on the motion prior to trial. Based on the considerations I expressed in *Ryan* and *ANR*, I conclude that the motion for summary judgment should be **denied** and this case should proceed to trial as scheduled.

Dated in Helena, Montana, this 3rd day of July, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Steve Fletcher
Mr. Charles G. Adams