

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 66A

WCC No. 9403-7015

MICHAEL E. HEISLER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HINES MOTOR COMPANY

Employer.

ORDER REGARDING CONSIDERATION OF DEPOSITIONS

Summary: The Supreme Court returned this case to the WCC to allow the parties to file certain depositions they told the Supreme Court had not been filed and considered by the lower court. The Supreme Court invited the WCC to amend its findings and conclusions in light of said depositions.

Held: The depositions were in fact filed prior to the Court's ruling on the motion for summary judgment. They were not included in the WCC's findings and conclusions because they were not relevant to the issues presented in the Pretrial Order. Matter returned to the Supreme Court.

Topics:

Appeals (To Supreme Court): Record on Appeal. Though Supreme Court returned case to WCC to allow filing and consideration of depositions parties stated on appeal had not been considered below, those depositions had in fact been filed prior to the WCC's ruling on motion for summary judgment and were deemed irrelevant to the issues stated in the Pretrial Order.

The Supreme Court returned this case to the Workers' Compensation Court for the purpose of allowing the parties to file certain depositions which they informed the Supreme Court had not been filed herein, and for this court "if it so desires, to amend its findings of fact, conclusions of law and decision taking into consideration the depositions."

A review of the docket of this case shows that the depositions at issue, being those of JoAnn Piehl, Charles Edquest and Mark Cadwallader, were in fact filed long prior to appeal and prior to this Court's rendering its Order Denying Summary Judgment and thereafter its judgment. Cadwallader's deposition was filed October 19, 1994. Edquest's and Piehl's depositions were filed on November 7, 1994. (See the "Filed" date stamps on the depositions and docket items 32, 33 and 34.)

This Court did not mention nor give consideration to the depositions because they were used in conjunction with arguments outside the issues stated in the Petition for Trial and Pre-trial Order. Petitioner argued in his briefs that the depositions proved that the rule requiring approval of a change of treating physician was arbitrary. (Reply Memorandum in Support of Petitioner's Motion for Summary Judgment.) In his Petition for Trial, petitioner challenged the rule on several bases but not on the basis that it is arbitrary. The issues set forth in the petition were:

- a. Whether the insurer acted reasonably in refusing to recognize Dr. Richard A. Nelson as the Petitioner's treating physician and/or to authorize the Petitioner's consultation with a neurologist of his choice for the neurological conditions from which he suffers;
- b. Whether the Claimant has a right of choice of his physician under the provisions of § 33-22-111 M.C.A. (1991).
- c. Whether the Insurer has a right to interfere with the Petitioner's full freedom of choice of physician pursuant to Article II Sections 3, 4 and 10 of the 1972 Montana Constitution and the 9th and 14th Amendments of the United States Constitution;
- d. Whether the Petitioner has a right of full freedom of choice of physicians pursuant to Article II Sections 3, 4 and 10 of the 1972 Montana Constitution and the 9th and 14th Amendments of the United States Constitution;
- e. Whether the Insurer's conduct is reasonable;

f. Whether the Insurer's conduct is unreasonable and entitles the Petitioner to recover penalties pursuant to the provisions of § 39-71-2907 M.C.A.;

g. Whether the Petitioner is entitled to recover his attorney's fees and costs incurred herein.

In the Pre-Trial Order, the parties stated the issues as follows:

1. Whether the Petitioner has a right to full freedom of choice pursuant to the provisions of § 33-22-111 M.C.A. (1991);

2. Whether the retroactive provisions of the amendments to § 33-22-111 M.C.A. (1993) are unconstitutional impairments of the obligations of contracts under the provisions of Article I Section 10 of the United States Constitution and Article II Section 31 of the Montana Constitution;

3. Whether the Defendant has violated the Petitioner's right to full freedom of choice pursuant to the provisions of § 33-22-111 M.C.A. (1991);

4. Whether the Division of Workers' Compensation rules requiring prior authorization by the Insurer before changing physicians unconstitutionally interfere with the Claimant's right to privacy as guaranteed by Article II Sections 3, 4, and 10 of the 1972 Montana Constitution and the provisions of the 9th and 14th Amendments to the United States Constitution;

5. Whether the Insurer's conduct is unreasonable and entitles the Petitioner to recover penalties pursuant to the provisions of § 39-71-2907 M.C.A.;

5[sic]. Whether the Petitioner is entitled to recover his attorney's fees and costs incurred herein.

The petitioner withdrew his allegations of unreasonable conduct on the part of the insurer. The remaining issues were specific: petitioner contended that he had a statutory and constitutional right to full freedom of choice of physician. The Court considered and rejected those contentions. The statutory and constitutional contentions did not allege arbitrariness of the rule as a basis for petitioner's challenges. This Court therefore did not consider that claim.

Finding no good cause to further consider petitioner's reliance on the depositions, this matter is returned to the Supreme Court for further proceedings on appeal.

SO ORDERED.

DATED in Helena, Montana, this 28th day of August, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Mr. C. Norman Peterson