

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 43

WCC No. 2007-1920

TONYA HILBIG

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

WRS ARCHITECTURE & DESIGN, PC

Employer/Respondent.

ORDER DENYING THE UNINSURED EMPLOYERS' FUND'S MOTION TO FIND SUMMARY JUDGMENT INAPPROPRIATE AND GRANTING THE UEF'S MOTION FOR AN EXTENSION OF TIME TO RESPOND

Summary: Respondent UEF moved the Court to find summary judgment inappropriate pursuant to ARM 24.5.329(1)(c), or in the alternative to grant the UEF an extension of time to file a response brief. The UEF asserted that it had recently learned of medical evidence which would place a material fact in dispute and would thereby render summary judgment inappropriate in the case.

Held: Two days before trial, the parties agreed in a conference call with the Court that the only issue in dispute was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved. The UEF conceded during this conference that it had no medical evidence to support its contention that Petitioner was not injured to the extent claimed in the subject accident. Based upon these representations, the Court vacated the trial and directed Petitioner to file a motion for summary judgment to resolve the one legal issue that was in dispute. In light of the procedural history of this case and the representations of counsel which have contributed to this procedural history, it would be manifestly unjust if the Court were to now allow the UEF to interject medical evidence

through the back door which would have not been admitted had this matter proceeded to trial as scheduled. The UEF's motion to find summary judgment inappropriate is denied. The UEF has 10 days from the date of this Order in which to respond to Petitioner's summary judgment motion, and must confine its brief only to the evidence which was admitted by stipulation and which would have been relied upon had this matter proceeded to trial as scheduled.

¶ 1 Respondent Uninsured Employers' Fund (the "UEF") moves this Court to find summary judgment inappropriate in this matter pursuant to ARM 24.5.329(1)(c). Alternately, Respondent requests an extension of time to file its response brief to Petitioner's Motion for Summary Judgment.¹

¶ 2 In its brief in support of its motions, the UEF admits it is aware that Petitioner filed a motion for summary judgment after being directed to do so by this Court.² Petitioner filed her motion on August 4, 2008.³ The UEF has not filed a brief in opposition, arguing that it recently became aware of facts which, in its counsel's opinion, renders summary judgment inappropriate. The UEF asserts that on August 5, 2008, it contacted counsel which represents a third-party insurer against whom Petitioner is seeking compensation in a tort action filed in District Court. As a result of this contact, the UEF learned that a question of fact may exist regarding the cause of Petitioner's injury. The UEF attached an April 26, 2008, report of an Independent Chart Review conducted by Drs. Lennard S. Wilson and Henry Gary in support of its contention.

¶ 3 On April 21, 2008, the parties in this matter participated in a teleconference with the Court to discuss various pretrial issues. I noted that the proposed final Pretrial Order submitted by the parties contained only one uncontested fact:

On February 2, 2006, petitioner suffered an industrial injury arising out of and in the course of her employment with WRS Architecture & Design, PC, in Cascade County, Montana. Petitioner had multiple injuries that she received in an automobile accident while she was delivering items for her employer. At the time of the subject injury, petitioner's employer was uninsured, and the

¹ Motion to Find Summary Judgment Inappropriate (24.5.329(c)) or for an Extension of Time to Respond (24.5.316(3)). Docket Item No. 47.

² See Minute Book Hearing No. 3936.

³ Petitioner's Motion for Summary Judgment and supporting Brief. Docket Item No. 46.

Uninsured Employers' Fund ("UEF") refuses to provide coverage for the injury.⁴

¶ 4 In response to questioning by the Court, counsel for both Petitioner and the UEF conceded that the only dispute remaining in the matter was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved. The UEF admitted that although one of its contentions was that Petitioner was not injured to the extent claimed in the subject accident, the UEF had no evidence to support this contention. Counsel for the UEF admitted that no independent medical examination (IME) had been performed and that no other medical records existed which supported the UEF's theory. The UEF agreed that the only issue for the Court to determine was the legal issue of whether the UEF has to pay benefits prior to the resolution of Petitioner's third-party claim.

¶ 5 In light of the concessions made during the April 21, 2008, conference, I vacated the April 23, 2008, trial date and directed Petitioner to file a motion for summary judgment. I also admitted Exhibits 1 through 22 which were stipulated to by counsel and filed with the Court, and which I stated would be considered with Petitioner's summary judgment motion and which the parties could reference in their briefs.

¶ 6 At the time of the April 21, 2008, teleconference, where this case was set to proceed to trial in two days' time, the parties stipulated that the dispute concerned a purely legal issue, and the UEF conceded that it had no medical evidence to support its contention regarding the extent of Petitioner's injury. Furthermore, the trial exhibit binder had been prepared and it was admitted into the record. Had this matter proceeded to trial as scheduled, it would have been submitted on that one legal issue and on the exhibits to which the parties had stipulated. It was because the parties agreed that the only issue in dispute was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved and the UEF's concession that it had no evidence to support its contention that Petitioner was not injured to the extent claimed in the subject accident that I vacated the trial and directed Petitioner to file a motion for summary judgment. In light of the procedural history of this case and counsels' representations which have contributed to this procedural history, it would be manifestly unjust if I were to now let the UEF interject medical evidence through the back door that would have not been admitted – nor for that matter, even existed – had this matter proceeded to trial as scheduled.

¶ 7 ARM 24.5.329(1)(c) provides that a party against whom summary judgment is directed and who believes summary judgment may be inappropriate may notify the Court and ask the Court to determine whether further briefing and proceedings are appropriate.

⁴ (Proposed) Final Pretrial Order at 1. Docket Item No. 48.

The UEF's motion to find summary judgment inappropriate is denied and the parties are ordered to file responsive briefs in this matter in accordance with ARM 24.5.316. However, the time for Respondents to file briefs in response to Petitioner's Motion for Summary Judgment has passed while I considered the UEF's pending motion. Therefore, I conclude Respondents should have additional time to file their responses. Respondents will have 10 days from the date of this Order in which to file their response briefs, with Petitioner having 5 days thereafter to file a reply brief as set forth in ARM 24.5.316(3). The briefs will rely **only** on the evidence that has been admitted by stipulation and which would have been relied upon had this matter proceeded to trial as scheduled.

JUDGMENT

¶ 8 Respondent UEF's motion to find summary judgment inappropriate pursuant to ARM 24.5.329(1)(c) is **DENIED**.

¶ 9 Respondents have 10 days from the date of this Order to file their response briefs and Petitioner shall have 5 days thereafter to file a reply brief.

¶ 10 The only evidence which will be considered by this Court in ruling on Petitioner's motion for summary judgment are Exhibits 1 through 22 which have been admitted into the Court record by stipulation of the parties.

DATED in Helena, Montana, this 25th day of August, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas J. Murphy
Arthur M. Gorov
William R. Stuff