

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 6

WCC No. 2007-1920

TONYA HILBIG

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner was injured in an automobile accident while within the course and scope of her employment. Her employer was uninsured, and Petitioner filed a claim against the Uninsured Employers' Fund and pursued a third-party action against the driver of the other vehicle. The UEF has refused to pay Petitioner's benefits until her third-party claim is resolved. Petitioner has moved for summary judgment, arguing that she is entitled to benefits from the UEF because she is statutorily permitted to pursue her remedies concurrently.

Held: Petitioner's motion for summary judgment is granted. The Workers' Compensation Act explicitly permits Petitioner to pursue her remedies concurrently, while the UEF has no legal authority for refusing to pay benefits for which it has admitted liability.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329. The Court may refuse to consider a motion for summary judgment when Petitioner does not comply with the briefing requirements of ARM 24.5.329, or may order Petitioner to correct the deficiencies of the brief.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.318. Under ARM 24.5.318(6), the pretrial order supercedes all other pleadings and will govern the trial proceedings.

Therefore, contentions raised for the first time in response to Petitioner's motion for summary judgment will not be considered by the Court as a "fact in dispute" which may preclude summary judgment.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-511. Under § 39-71-511, MCA, the UEF is entitled to a setoff against benefits paid if Petitioner recovers monetary compensation as a result of her third-party claim. However, this does not entitle the UEF to refuse to pay benefits until Petitioner's third-party claim is resolved.

Uninsured Employers' Fund: Setoffs. Under § 39-71-511, MCA, the UEF is entitled to a setoff against benefits paid if Petitioner recovers monetary compensation as a result of her third-party claim. However, this does not entitle the UEF to refuse to pay benefits until Petitioner's third-party claim is resolved.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-508. Section 39-71-508, MCA, explicitly grants an injured worker the right to pursue concurrent remedies. The Court finds no legal authority for the UEF's contention that it need not pay benefits to which the claimant is otherwise entitled until all of her other remedies are exhausted.

Remedies: Concurrent Remedies. Section 39-71-508, MCA, explicitly grants an injured worker the right to pursue concurrent remedies. The Court finds no legal authority for the UEF's contention that it need not pay benefits to which the claimant is otherwise entitled until all of her other remedies are exhausted.

¶ 1 Petitioner Tonya Hilbig moves this Court for summary judgment pursuant to ARM 24.5.329. Respondent Uninsured Employers' Fund ("UEF") and the employer, WRS Architecture & Design, PC ("WRS"), oppose Petitioner's motion, arguing that disputed material facts exist. The UEF further argues that, although it is liable for Petitioner's workers' compensation claim, it does not have to pay Petitioner's benefits until her claim against a third-party insurer is resolved.

¶ 2 Procedurally, this case has a somewhat unusual history. It was set to go to trial on April 23, 2008, when various pretrial issues arose which necessitated a last-minute pretrial teleconference. On April 21, 2008, the parties participated in a teleconference with the Court to discuss these pretrial issues. During this teleconference, I noted that the [Proposed] Final Pretrial Order ("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] 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, [P]etitioner's employer was uninsured, and the [UEF] refuses to provide coverage for the injury.¹

¶ 3 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 must pay benefits prior to the resolution of Petitioner's third-party claim.***

¶ 4 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. I stated these exhibits would be considered with Petitioner's summary judgment motion and the parties could reference them in their briefs.

¶ 5 Petitioner filed her motion for summary judgment on August 4, 2008.² The UEF then moved this Court to either find summary judgment inappropriate or to grant the UEF an extension of time to respond.³ On August 25, 2008, I entered an Order which denied the UEF's motion to find summary judgment inappropriate, but granted its motion for an extension of time to respond.⁴ The UEF subsequently filed its response brief, as did WRS.⁵ Petitioner did not file a reply brief, and the motion was deemed submitted.

¹ [Proposed] Final Pretrial Order at 1, Docket Item No. 48.

² Petitioner's Motion for Summary Judgment and Supporting Brief, Docket Item No. 46.

³ 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.

⁴ 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 (Order Denying and Granting UEF's Motions), 2008 MTWCC 43, Docket Item No. 49.

⁵ Response to Motion for Summary Judgment and Brief in Support, Docket Item No. 50; Employer/Respondent's Objection to Motion for Summary Judgment, Docket Item No. 53.

¶ 6 When I reviewed the briefs after Petitioner's motion was submitted for consideration, I determined that Petitioner's brief contained alleged facts which had not been admitted by stipulation, and that Petitioner's brief further failed to comply with the briefing requirements of ARM 24.5.329. I ordered Petitioner to present to the Court a statement of uncontested facts derived solely from the stipulated trial exhibits, which cited to those exhibits and which complied with ARM 24.5.329. I further stated that if Respondent believed that something in the stipulated record contradicted the facts cited by Petitioner, thereby creating a genuine issue of material fact precluding summary judgment, it should respond accordingly.⁶

¶ 7 During the April 21, 2008, teleconference, I questioned UEF's counsel about its contentions. Although counsel asserted that some dispute existed regarding Petitioner's medical claims, Petitioner's counsel stated that neither the UEF nor WRS presented any evidence to support their contention that Petitioner was not injured to the extent claimed. Petitioner's counsel pointed out that the trial exhibits had already been prepared and submitted to the Court, as had the witness list, and the UEF had no evidence to support this contention. I asked UEF's counsel what evidence the UEF had in support of its contention that Petitioner was not injured to the extent claimed, and counsel responded, "Right now, nothing." UEF's counsel stated that, while he would like to get an IME of Petitioner, it would be untimely, and he conceded that the only issue was the legal issue of whether the UEF has to pay benefits prior to the resolution of Petitioner's third-party claim. Therefore, I concluded that no genuine issue of material fact existed as to the UEF's unsupported contention regarding Petitioner's medical condition.

¶ 8 In spite of a clear directive to the parties regarding the narrow issue before the Court, both Petitioner and the UEF have continued to attempt to manufacture a dispute regarding Petitioner's medical condition in their respective summary judgment briefs – both in the statement of facts Petitioner filed in response to my Order, and in the UEF's response to that statement of facts. It therefore bears reiterating yet again what was agreed to by all parties during the teleconference of April 21, 2008, and which was expressly noted in my Order of August 25, 2008,⁷ and in my Order of December 16, 2008:⁸
The only issue for the Court to determine is the legal issue of whether the UEF has to pay benefits prior to the resolution of Petitioner's third-party claim.

⁶ Order Requiring Petitioner to Submit Uncontested Facts as Required by ARM 24.5.329 (Order Requiring Uncontested Facts), Docket Item No. 54.

⁷ Order Denying and Granting UEF's Motions, 2008 MTWCC 43, ¶ 6.

⁸ Order Requiring Uncontested Facts, ¶ 2.

¶ 9 Relevant to this issue, Petitioner has offered two facts which the UEF agrees are uncontested:

¶ 9a On February 2, 2006, [Petitioner] suffered an industrial injury arising out of and in the course of her employment with [WRS]. [Petitioner] received multiple injuries in the automobile accident while she was delivering items for her employer.

¶ 9b [WRS] was uninsured at the time of the accident . . . [T]he [UEF] refuses to provide workers' compensation coverage for the injury.⁹

¶ 10 I further note that, in its objection to Petitioner's summary judgment motion, WRS sets forth several allegations which it believes are material facts in dispute, such as the reason for Petitioner's termination from her employment with WRS. In the Pretrial Order, WRS's **only** contentions were:

¶ 10a Employer was unknowingly uninsured at the time of the workers compensation injury.

¶ 10b Employer incorporates by this reference the contentions of the UEF.¹⁰

¶ 11 Under ARM 24.5.318(6), upon approval by the Court, the pretrial order will supercede all other pleadings and will govern the trial proceedings. Nowhere in the Pretrial Order does WRS offer these contentions and they will not be entertained now. As I noted in this Court's Order denying the UEF's motion to find summary judgment inappropriate, at the time of the April 21, 2008, teleconference, this case was set to proceed to trial in two days' time and the parties had stipulated that the dispute concerned a purely legal issue. The UEF had conceded it had no medical evidence to support its contention regarding the extent of Petitioner's injury, and the trial exhibit binder had been prepared and was admitted into the record. I explained:

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

⁹ Petitioner's Statement of Uncontroverted Facts at 2 (citations omitted), Docket Item No. 55.

¹⁰ [Proposed] Final Pretrial Order at 2.

to file a motion for summary judgment. . . . [I]t 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 . . . had this matter proceeded to trial as scheduled.¹¹

Similarly, WRS cannot now interject new “facts” through the back door that would not have been admitted had this matter proceeded to trial as scheduled. I therefore reject WRS’s argument that certain material facts are in dispute in the present case.

¶ 12 Petitioner argues that, since she was injured within the course and scope of her employment and that her employer was uninsured, the UEF is obligated to accept liability and pay workers’ compensation benefits. The UEF agrees that it is liable for Petitioner’s workers’ compensation claim; however, it argues that it is not required to pay Petitioner’s workers’ compensation benefits until resolution of Petitioner’s third-party claim against the insurer of the other driver who was involved in Petitioner’s work-related automobile accident.

¶ 13 The UEF further argues that Petitioner is not entitled to temporary total disability (TTD) benefits because WRS offered and she accepted modified employment. In that regard, it bears noting that the UEF’s contentions in the Pretrial Order are as follows:

¶ 13a That the Petitioner has received payment or reimbursement of her medical expenses from the insurance carrier for the other driver involved in the accident at issue.

¶ 13b That the Petitioner has a claim pending with the insurance carrier for the other driver involved in the accident at issue.

¶ 13c That no lawsuit has yet been filed as a result of the aforementioned claim.

¶ 13d That Petitioner is not entitled to benefits under the Workers’ Compensation Act until she has resolved the claim pending against the insurance carrier for the other driver involved in the accident at issue.

¶ 13e Employer was not covered by any workers’ compensation insurance on the date of the subject injury.

¹¹ Order Denying and Granting UEF’s Motions, 2008 MTWCC 43, ¶ 6.

¶ 13f Petitioner was not injured to the extent claimed in the subject accident.¹²

None of the UEF's contentions in the Pretrial Order in any way assert that Petitioner is not entitled to TTD benefits because of any modified employment arrangements. For the same reasons that I have concluded that WRS cannot manufacture a disputed fact regarding issues not pled in the Pretrial Order, neither can the UEF.

¶ 14 The UEF also attempts yet again to raise the issue regarding the extent of Petitioner's injuries and medical treatment. This is the same issue which I rejected at the April 21, 2008, teleconference and which I again rejected in the Order denying the UEF's motion to find summary judgment inappropriate. In the context of the present motion, the UEF argues that the reason why it should now be allowed to argue about the evidence regarding Petitioner's medical condition is because Petitioner alleged facts in her brief in support of her motion for summary judgment concerning her medical condition and treatment, and that Petitioner failed to provide affidavits in support of those assertions as required under ARM 24.5.329. Since Petitioner's allegations regarding her medical condition and treatment are completely irrelevant as to the **sole legal issue** before the Court, the UEF's argument concerning Petitioner's lack of validation of those allegations is similarly irrelevant.

¶ 15 The Pretrial Order governing the course of this trial was finalized and all exhibits which the Court would have considered at trial were stipulated to by the parties. As has been noted repeatedly, the **only** reason the trial was vacated was because the parties all agreed that there was a single legal issue for the Court to decide which was susceptible to summary disposition. Nevertheless, some parties apparently continue to operate with the misconception that my Order vacating the trial and directing the parties to resolve the sole remaining legal issue by summary judgment created some sort of judicially-approved mulligan – an opportunity to present evidence and raise issues that would not have been considered had the matter proceeded to trial as scheduled. To dispel this misconception as succinctly as possible: **It did not.** Accordingly, this Order will confine itself to the **sole legal issue** that would have been addressed at trial.

Sole Legal Issue: Whether the UEF can withhold payment of benefits until Petitioner's third-party action is resolved.

¹² [Proposed] Final Pretrial Order at 2-3.

¶ 16 The UEF directs the Court's attention to § 39-71-511, MCA,¹³ which states:

A claim for benefits from the uninsured employers' fund must be discharged, finally or periodically, to the extent that an employee or the employee's beneficiaries receive actual monetary compensation by judgment or settlement from the uninsured employer, a third party who shares liability as defined in 39-71-412, or a fellow employee who shares liability as defined in 39-71-413.

¶ 17 Section 39-71-412, MCA, as cross-referenced in § 39-71-511, MCA, states, in pertinent part:

The right to compensation and medical benefits as provided by this chapter is not affected by the fact that the injury, occupational disease, or death is caused by the negligence of a third party other than the employer or the servants or employees of the employer. Whenever such event occurs to an employee while performing the duties of his employment and such event is caused by the act or omission of some persons or corporations other than his employer or the servants or employees of his employer, the employee . . . shall, in addition to the right to receive compensation under this chapter, have a right to prosecute any cause of action he may have for damages against such persons or corporations.

¶ 18 The UEF argues that, until Petitioner's third-party claim is resolved, the UEF need not pay any benefits for which it would otherwise be liable because it is entitled to a set-aside under § 39-71-511, MCA. Petitioner argues that it is unjust that the UEF seeks to delay paying her benefits until her third-party claim is resolved, since resolution of that claim may take years and, in the interim, Petitioner is without benefits. Petitioner argues that she is statutorily entitled to pursue multiple remedies against both the UEF and the third-party insurer, and asserts that she has statutory support for so doing, while conversely, the UEF has no statutory support for its refusal to pay her benefits. Petitioner points to § 39-71-508, MCA, which states:

An employee who suffers an injury arising out of and in the course of employment while working for an uninsured employer . . . may pursue all remedies concurrently, including but not limited to:

- (1) a claim for benefits from the uninsured employers' fund;

¹³ Workers' compensation benefits are determined by the statutes in effect on the date of the claimant's injury. This case is governed by the 2005 version of the Workers' Compensation Act since that was the law in effect on the date of Petitioner's alleged industrial injury.

- (2) a damage action against the employer in accordance with 39-71-509;
- (3) an independent action against an employer as provided in 39-71-515; or
- (4) any other civil remedy provided by law.

¶ 19 Simply put, § 39-71-508, MCA, explicitly allows Petitioner to “pursue all remedies concurrently.” I can find no legal authority for the UEF’s contention that it gets to be the payor of last resort – who must pay benefits only when all of a claimant’s other remedies are exhausted. Therefore, I conclude that, since the UEF is liable for Petitioner’s claim, it must pay the benefits to which Petitioner is entitled and may not wait until Petitioner’s third-party claim is resolved to do so.

JUDGMENT

¶ 20 Petitioner’s motion for summary judgment is **GRANTED**.

¶ 21 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 20th day of February, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas J. Murphy
Arthur M. Gorov
Gary S. Deschenes (courtesy copy)
Submitted: January 14, 2009