

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 11

WCC No. 2008-2103

TINA MALCOMSON

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION

Summary: Respondent moves for reconsideration of this Court's prior Order Granting Petitioner's Motion for Summary Judgment for the reason that the Court did not grant Respondent's timely request for a hearing on Petitioner's motion for summary judgment prior to entering its Order.

Held: The motion for reconsideration is granted. ARM 24.5.329(5) provides that when a party timely requests a hearing on a summary judgment motion, "[t]he court will thereupon set a time and place for hearing." The rule is not discretionary. The prior Order is vacated. Counsel shall confer and contact the Court to schedule a hearing.

Topics:

Summary Judgment: Right to Hearing. The Court granted Respondent's motion for reconsideration where it found that it failed to grant Respondent's timely request for a hearing on Petitioner's summary judgment motion. ARM 24.5.329(5) expressly provides that a timely request for a hearing on a summary judgment motion will be granted; Respondent is entitled to a hearing.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329. The Court granted Respondent's motion for reconsideration where it found that it failed to grant Respondent's timely request for a hearing on Petitioner's summary judgment motion. ARM 24.5.329(5) expressly provides that a timely request for a hearing on a

summary judgment motion will be granted; Respondent is entitled to a hearing.

¶ 1 On February 25, 2011, I entered an Order Granting Petitioner's Motion for Summary Judgment.¹ The Order holds that, as applied to the facts of Petitioner Tina Malcomson's claim, §§ 39-71-604(3) and 50-16-527(5), MCA, are unconstitutional under Article II, Section 10, of the Montana Constitution and that Petitioner is not entitled to her attorney fees and costs under the private attorney general doctrine. Respondent Liberty Northwest (Liberty) moved for reconsideration of the Court's Order, arguing *inter alia* that it had timely requested a hearing which the Court did not allow.²

¶ 2 Liberty has cited Montana Supreme Court case law regarding the requirement that a hearing on a summary judgment motion be granted when requested. Malcomson has cited Montana Supreme Court case law arguing that the Court has some discretion as to whether to grant a requested hearing on a summary judgment motion. All of the case law cited relies on Rule 56, Mont. R. Civ P. Although this case law is instructive, it is not dispositive of the issue raised in Liberty's motion for reconsideration.

¶ 3 ARM 24.5.352 provides that if no express provision is made in the WCC's rules regarding a matter of procedure, the court will be guided by considerations and procedures set forth in the Montana Rules of Civil Procedure. Regarding a party's right to a hearing on a summary judgment motion, the rules of this Court contain an express provision. ARM 24.5.329(5), provides:

If either party desires a hearing on the motion, a request must be made in writing no later than the time specified for the filing of the last brief. The court will thereupon set a time and place for hearing. If no request for hearing is made, any right to hearing afforded by these rules will be deemed waived. The court may order a hearing on its own motion.

¶ 4 There is no dispute that Liberty timely requested a hearing on Malcomson's motion for summary judgment. Having done so, ARM 24.5.329(5) expressly provides that the Court "will set a time and place for hearing." The rule is not discretionary. Liberty is entitled to a hearing on Malcomson's motion for summary judgment.

¹ 2011 MTWCC 6.

² Although Liberty raised other issues in its motion, since I am granting reconsideration and vacating the Order based on the denial of a hearing, this order does not address Liberty's other issues.

ORDER

¶ 5 Respondent's Motion for Reconsideration is **GRANTED**.

¶ 6 The parties shall confer and contact the Court to schedule a hearing.

¶ 7 Pending the hearing of this matter, the Court's Order Granting Petitioner's Motion for Summary Judgment is vacated.

DATED in Helena, Montana, this 22nd day of April, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Stacy Tempel-St. John
Larry W. Jones
Submitted: April 13, 2011