

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 85

DORIS OSTER,

Petitioner,

WCC No. 9509-7394

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

SPORTSMAN' LOUNGE/RESTAURANT,

Employer.

ORDER DENYING MOTION TO DISMISS

Summary: Insurer moved to dismiss petition seeking permanent total disability benefits arguing that no physician had rendered an opinion on claimant's disability status, no determination has been made that claimant has reached maximum medical healing, and no rehabilitation provider has determined whether claimant is employable.

Held: Motion to dismiss denied. For purposes of ruling on a motion to dismiss, all well-pleaded facts are deemed admitted and the Court looks to whether claimant has stated a claim on which relief can be granted. Where Montana requires only notice pleading, and petitioner alleges she is permanently totally disabled, inherent in those allegations are allegations that she has reached MMI and is unable to work, along with other factual predicates to PTD status. The Court will not convert the motion to one for summary judgment where no sworn and admissible evidence has been presented.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Rules of Civil Procedure: Rule 12(b). For purposes of ruling on a motion to dismiss, all well-pleaded facts are deemed admitted and the Court looks to whether claimant has stated a claim on which relief can be granted. Where Montana requires only notice pleading, and petitioner alleges she is permanently totally disabled, inherent in those allegations are allegations that she has reached MMI and is unable to work, along with other factual predicates to PTD status.

Pleading: Statement of a Claim. For purposes of ruling on a motion to dismiss, all well-pleaded facts are deemed admitted and the Court looks to whether claimant has stated a claim on which relief can be granted. Where Montana requires only notice pleading, and petitioner alleges she is permanently totally disabled, inherent in those allegations are allegations that she has reached MMI and is unable to work, along with other factual predicates to PTD status.

Procedure: Motion to Dismiss. For purposes of ruling on a motion to dismiss, all well-pleaded facts are deemed admitted and the Court looks to whether claimant has stated a claim on which relief can be granted. Where Montana requires only notice pleading, and petitioner alleges she is permanently totally disabled, inherent in those allegations are allegations that she has reached MMI and is unable to work, along with other factual predicates to PTD status.

Procedure: Motion to Dismiss. The Court will not convert respondent's motion to dismiss into one for summary judgment where no sworn and admissible evidence has been presented.

Summary Judgment: Generally. The Court will not convert respondent's motion to dismiss into one for summary judgment where no sworn and admissible evidence has been presented.

Petitioner in this case seeks permanent total disability benefits. Respondent has moved to dismiss, setting forth the following reasons as the basis for its motion:

1. No physician has given an opinion as to whether Petitioner is permanently partially disabled or permanently totally disabled;
2. No specific determination was made as to whether Petitioner is at maximum medical improvement; and
3. There has been no determination from the rehabilitation provider whether Petitioner is employable.

(MOTION TO DISMISS at 1, filed October 6, 1995.) No supporting brief was submitted with the motion; however, petitioner has filed a RESPONSE TO MOTION TO DISMISS. The motion is deemed submitted.

Rule 12(b), MONT.R.CIV.P., sets out the grounds for motions to dismiss. They are "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person,¹ (4) insufficiency of

¹There is no ground (3) in the rule.

process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19." The only ground implicated by the motion is (6) -- failure to state a claim.

For purposes of a motion to dismiss for failure to state a claim, all well pleaded facts are deemed admitted. *Farris v. Hutchinson*, 254 Mont. 334, 335, 838 P.2d 374, 375 (1992). The petition in this case is sufficient to state a claim upon which relief can be granted. The MONTANA RULES OF CIVIL PROCEDURE require only notice pleading. *Kinion v. Design Systems, Inc.*, 197 Mont. 177, 179, 641 P.2d 472, 474 (1982). Petitioner alleges that claimant is permanently totally disabled and entitled to total disability benefits. Inherent in those allegations are allegations that she has reached maximum medical improvement and is unable to work, and all other factual predicates necessary to an award of permanent total disability benefits. On its face the petition is sufficient.

Whether the respondent intended to present matters outside of the petition, it has failed to do so. Bald assertions do not constitute sworn and admissible evidence. Therefore, we cannot convert the motion to one for summary judgment. *See* Rule 12(b), MONT.R.CIV.P.²

IT IS HEREBY ORDERED THAT the MOTION TO DISMISS is **denied**.

Dated in Helena, Montana, this 31st day of October, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Torger S. Oaas

Mr. Daniel J. Whyte

Submitted Date: October 26, 1995

²Rule 12(b), MONT.R.CIV.P., provides in relevant part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Rule 56 motions must be supported by admissible evidence. Rule 56(c), MONT.R.CIV.P.