

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 7

WCC No. 2004-0991

BILLIE JO SEARER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER HOLDING MOTION FOR SUMMARY JUDGMENT IN ABEYANCE AND
PERMITTING FILING OF AFFIDAVIT SUPPORTING REQUEST FOR DEPOSITION

Summary: Respondent insurer moves for summary judgment based on the lack of any medical evidence supporting the petitioner's allegation that she suffers from an occupational disease. In her response, the petitioner indicates her intent to muster such medical evidence through a future deposition of her treating physician.

Held: The petitioner is provided an opportunity to file an affidavit with supporting medical evidence or indicating why a deposition rather than an affidavit is necessary to provide such information. Meanwhile, the motion is held in abeyance.

Topics:

Summary Judgment: Discovery. For good cause, ruling on motion for summary judgment will be deferred until relevant discovery is completed, including the taking of depositions. ARM 24.5.329(8). Good cause must be shown through a supporting affidavit demonstrating that the facts necessary to oppose the motion for summary judgment cannot be properly presented through affidavits.

Summary Judgment: Affidavits. For good cause, ruling on motion for summary judgment will be deferred until relevant discovery is completed, including the taking of depositions. ARM 24.5.329(8). Good cause must be shown through a supporting affidavit demonstrating that the facts necessary

to oppose the motion for summary judgment cannot be properly presented through affidavits.

Summary Judgment: Discovery. Where the brief opposing summary judgment requests that a ruling on the motion be deferred until the opposing party has taken a critical deposition and such deposition can be taken within the time allowed for depositions, and the information set out in the opposing brief indicates possible grounds for allowing the deposition but such information is not verified by affidavit, the Court will provide the opposing party with an opportunity to file an affidavit with the information required by ARM 24.5.329(8).

Summary Judgment: Affidavits. Where the brief opposing summary judgment requests that a ruling on the motion be deferred until the opposing party has taken a critical deposition and such deposition can be taken within the time allowed for depositions, and the information set out in the opposing brief indicates possible grounds for allowing the deposition but such information is not verified by affidavit, the Court will provide the opposing party with an opportunity to file an affidavit with the information required by ARM 24.5.329(8).

¶1 The petitioner, Billie Jo Searer (claimant), herein filed a claim for occupational disease benefits. The Montana State Fund (State Fund) denied the claim and the matter was referred to an occupational disease panel, whose examining physician concluded that the claimant is not suffering from an occupational disease. The present petition ensued.

¶2 The State Fund now moves for summary judgment on the ground that the claimant has failed to marshal any medical evidence to support her claim that she is suffering from an occupational disease. In her opposing brief, the claimant concedes that she does not presently have sworn evidence or medical records indicating that her condition is occupationally related, however, she says that her treating physician, Dr. Fred G. McMurry, has informed her orally that she suffers from an occupational disease. She further states that she plans to depose Dr. McMurry prior to trial and asks that a ruling on the summary judgment be postponed until his testimony can be taken. Under the present scheduling order, the deadline for depositions has not expired.

¶3 The present situation is governed by Rule 24.5.329(8), which provides:

(8) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application

for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The facts outlined in the claimant's brief in opposition to the motion incline the Court to postpone ruling on the motion until Dr. McMurry's deposition has been taken. However, the claimant has failed to comply with the rule, which requires both an affidavit and an explanation as to why Dr. McMurry's opinions could not be presented, at least initially, by way of affidavit or by way of a medical report which is authenticated. Recognizing that the failure is a technical one and that a trial on the merits is preferred, I am granting the claimant additional time to provide an affidavit complying with the rule. Upon receipt of such affidavit, I will then consider whether to continue to postpone ruling on the motion until after the deposition is taken and submitted.

ORDER

¶4 If the claimant wishes to continue her opposition to the motion for summary judgment, she shall file either an affidavit providing medical support for her claim or an affidavit indicating why such affidavit cannot be obtained and why a deposition is necessary to enable her to oppose the motion. Such affidavit shall be filed on or before **February 14, 2005**. Failure to file a satisfactory affidavit will result in the Court granting the motion for summary judgment.

DATED in Helena, Montana, this 3rd day of February, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. Daniel B. McGregor
Submitted: January 27, 2005