

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 61

WCC No. 9604-7536

THEDA BEA BOULDIN

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BIG SKY CARVERS

Employer.

PARTIAL SUMMARY JUDGMENT AND DECISION

Summary: Insurer accepted occupational disease claim filed by 25-year old woman whose job involved painting detail on decoy ducks. The initial diagnosis involved "fibromyositis with secondary headaches," which her physician believed was "aggravated by her work." Issues addressed in partial summary judgment involved whether the insurer's initial acceptance of the claim barred it from later asserting fibromyalgia condition was not work related and whether WCC had original jurisdiction to adjudicate claim for occupational disease.

Held: Although neither party questioned the WCC's jurisdiction to decide the case, jurisdiction is an issue which may be raised at any time and may be raised sue sponte. When liability for an alleged occupational disease is disputed under the 1995 version of the Occupational Disease Act (ODA), the procedures set forth at section 39-72-602, MCA (1995), are mandatory. These procedures include examination by a panel of physicians appointed by the Department of Labor, preparation of a report, issuance of an order by the DOL, hearing procedures in the DOL, and appeal to the WCC. Because this is a denied liability case, the DOL, not the WCC, has original jurisdiction to conduct a de novo hearing into whether claimant has an occupational disease. However, the WCC has jurisdiction to determine whether the insurer's initial acceptance of the claim bars subsequent denial. Where the insurer concedes claimant's present condition is the same condition for which she filed the initial claim, the insurer is barred from later denial.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-72-602, MCA (1995). Although neither party questioned the WCC's jurisdiction to decide the case, jurisdiction is an issue which may be raised at any time and may be raised *sue sponte*. When liability for an alleged occupational disease is disputed under the 1995 version of the Occupational Disease Act (ODA), the procedures set forth at section 39-72-602, MCA (1995), are mandatory. These procedures include examination by a panel of physicians appointed by the Department of Labor, preparation of a report, issuance of an order by the DOL, hearing procedures in the DOL, and appeal to the WCC. Because this is a denied liability case, the DOL, not the WCC, has original jurisdiction to conduct a *de novo* hearing into whether claimant has an occupational disease. However, the WCC has jurisdiction to determine whether the insurer's initial acceptance of the claim bars subsequent denial.

Claims: Acceptance. Under the 1995 version of the Occupational Disease Act, in a denied liability case, the DOL, not the WCC, has original jurisdiction to conduct a *de novo* hearing into whether claimant has an occupational disease. However, the WCC has jurisdiction to determine whether the insurer's initial acceptance of the claim bars subsequent denial. Where the insurer concedes claimant's present condition is the same condition for which she filed the initial claim, the insurer is barred from later denial.

Jurisdiction: Original Jurisdiction. Although neither party questioned the WCC's jurisdiction to decide the case, jurisdiction is an issue which may be raised at any time and may be raised *sue sponte*. When liability for an alleged occupational disease is disputed under the 1995 version of the Occupational Disease Act (ODA), the procedures set forth at section 39-72-602, MCA (1995), are mandatory. These procedures include examination by a panel of physicians appointed by the Department of Labor, preparation of a report, issuance of an order by the DOL, hearing procedures in the DOL, and appeal to the WCC. Because this is a denied liability case, the DOL, not the WCC, has original jurisdiction to conduct a *de novo* hearing into whether claimant has an occupational disease. However, the WCC has jurisdiction to determine whether the insurer's initial acceptance of the claim bars subsequent denial.

The petitioner in this case, Theda Bea Bouldin (Theda), who appears *pro sé*, seeks occupational disease benefits on account of a fibromyalgia condition. Her case was scheduled for trial on Tuesday, September 3, 1996. However, after reviewing the Pretrial Order and the exhibits, the Court identified two significant issues of law which may be dispositive of the Petition for Hearing. Those issues, as phrased by the Court are:

1. Does the insurer's initial acceptance of Theda's occupational disease claim bar it from now asserting that her fibromyalgia is not work related?
2. If the insurer's initial acceptance of Theda's claim does not preclude it from litigating the relatedness of her fibromyalgia to her work, does the Workers' Compensation Court have original jurisdiction to adjudicate her claim that she suffers from an occupational disease?

The second issue raised yet another jurisdictional issue:

3. If the Court lacks original jurisdiction to determine whether claimant suffers from an occupational disease, does it have original jurisdiction to determine whether the insurer is precluded from contesting her claim?

Since answers to these questions could be dispositive, I vacated the trial setting and invited the parties to address the issues at a hearing. A hearing was held on September 3, 1996. At that time the Court received a legal memorandum from Liberty and heard oral argument. The matter was then deemed submitted for decision.

Facts

The facts relevant to the issues under consideration are set forth in the pretrial order and stipulated exhibits. They are undisputed.

Theda is 25 years old. She worked at Big Sky Carvers (BSC) painting detail on duck decoys from June 1, 1992 until March 14, 1996. Her job required her to sit in a chair at a table eight hours per day, five days per week.

On March 6, 1995, Theda filed a workers' compensation claim. A copy of the claim is in evidence as Exhibit 35. It describes what occurred, as follows:

No accident. Employee was suffering from headaches & sought medical treatment 1/30/95. Diagnosis subsequently was "Fibromyositis Syndrome" - an inflamed muscle in her neck & upper back. Doctor suggests pain is due to constant neck flexion.

At the time she submitted her claim, Theda was being treated by Dr. Leonard Ramsey. He examined Theda on February 2, 13 and 21, again on March 3, 1995, and thereafter. (Ex. 1 at 1-2.) His office notes for those dates indicate that she was suffering pain and tenderness in the muscles of both her neck (paracervical muscles) and upper back (trapezius muscle), along with headaches. (*Id.*) Dr. Ramsey's diagnosis was fibromyositis. That diagnosis was later recast as fibromyalgia. (March 23, 1995 office note of Dr. Ramsey, Ex. 1 at 5 and see May 30, 1995 note of Dr. Duane Mohr, Ex. 3.) Both terms describe chronic muscle pain, tenderness, and stiffness.⁽¹⁾

Liberty insured Theda's employer. On March 24, 1995, a claims adjuster for Liberty wrote to claimant accepting her claim under the Occupational Disease Act of Montana (ODA). (Ex. 8.) The letter said in relevant part:

We have received your recent claim for benefits. Based on the description of the events and medical information received to date, your claim is being accepted under the Occupational Disease Statutes of Montana.

(*Id.*) With the letter, Liberty commenced paying wage-loss benefits. (*Id.*)

The letter's reference to "medical information" was apparently to a March 16, 1995 letter of Dr. Ramsey to Liberty. (Ex. 1 at 4.) In his letter, Dr. Ramsey affirmed his previous diagnosis of fibromyositis and linked the condition to Theda's work. Dr. Ramsey wrote in relevant part:

Theda Bouldin has been under my care for severe headaches since 1/30/95. Her diagnosis is fibromyositis with secondary headaches. . . . Her condition is aggravated by her work, although it is impossible to say that it is exclusively brought on by her work.

(*Id.*) In an earlier office note of March 3, 1995, Dr. Ramsey had written, " . . . I think it is very honest and safe to say that greater than 50% of the reason for her fibromyositis is related to work." (Ex. 1 at 2.)

Dr. James R. Burton and Dr. Hubert E. Prussack thereafter examined Theda. Dr. Burton is an orthopedic surgeon in Missoula and Dr. Prussack is a neurologist in Bozeman. Based on the reports of their examinations, Liberty had a change of heart. On July 19, 1995, Liberty's claims adjuster wrote Theda that it was denying her claim. (Ex. 9.) The letter stated in relevant part:

In reviewing the reports from Dr. Burton and Dr. Prussack, they can not relate your injury to Big Sky Carvers. Based upon these objective medical findings we have received to date, we are unable to substantiate a relationship between your condition and your employment with Big Sky Carvers. **For this reason, we must advise you that we are denying your claim for compensation at this time.**
[Emphasis added.]

(*Id.*)

Liberty then had yet another change of heart. On July 26, 1995, it wrote Theda:

On July 19, 1995, you received a letter from Liberty Northwest denying your claim for compensation. At this time we are revoking our denial pending further investigation.

(Ex. 10.)

Liberty thereafter sent Theda to Dr. Robert E. Chambers, an orthopedist in Great Falls. He conducted an independent medical examination on November 7, 1995. (Chambers Dep. Ex. 1.) Based on his report and the reports of other physicians, Liberty once more denied liability. On November 15, 1995, it wrote Theda, telling her in relevant part:

At this time we are denying liability for your claim filed with Big Sky Carvers on March 5, 1995 based on the preponderance of medical evidence from Dr. Burton, Dr. McElhinny, Dr. Chambers and Dr. Prussack as a condition not related to your work environment.

(Ex. 11.)

Liberty has stood by this last denial and asserts in this case that Theda's work at Big Sky Carvers "is not the cause of her alleged disability." (Response to Petition for Hearing at 1.) During oral argument Liberty's counsel conceded that claimant's condition has not changed since she filed her claim, rather Liberty now believes, and asserts herein, that her condition was not caused by her work. Thus, the principal issue raised by Liberty is one of causation.

Discussion

Prior to considering Liberty's contention concerning causation, I must first address what, if any, jurisdiction the Workers' Compensation Court has over this occupational disease claim. Next a determination of whether I have jurisdiction to at least address the legal effect of Liberty's initial acceptance of Theda's claim must be made.

1. Jurisdiction.

Neither party has questioned the Court's jurisdiction in this case. However, jurisdiction is an issue which may be raised at any time; it may be raised by the Court sua sponte (on its own motion). *Estate of Stoian*, 138 Mont. 384, 394-95, 357 P.2d 41, 47 (1960); *In re Marriage of Miller*, 259 Mont. 424, 426-27, 856 P.2d 1378, 1380 (1993).

When an insurer disputes liability in an occupational disease case, the ODA provides that the claimant must be examined by a panel of physicians appointed by the Department of Labor and Industry. § 39-72-602(2), MCA. Based on the panel report, the Department of Labor must then issue an order determining whether the claimant suffers from an occupational disease. *Id.* If the claimant or the insurer is dissatisfied with that final determination, then either may request a hearing before the Department. §39-72-611 and -612(1), MCA. The Department may also order a hearing on its own motion. *Id.* After hearing, the Department must issue its final decision. §39-72-612(1), MCA. That final decision is then appealable to the Workers' Compensation Court, which may judicially review the decision. § 39-72-612, MCA.

The foregoing procedure is mandatory when liability is disputed under the ODA.

Section 39-72-602, MCA, provides in relevant part:

39-72-602. Insurer may accept liability -- procedure for medical examination when insurer has not accepted liability. (1) An insurer may accept liability for a claim under this chapter based on information submitted to it by a claimant.

(2) In order to determine the compensability of claims under this chapter when an insurer has not accepted liability, the following procedure **must** be followed:
[Emphasis added.]

The procedure described thereafter is the medical panel procedure summarized in the preceding paragraph, culminating in the Department's order of determination. Sections 39-72-611 and -612, MCA, then prescribe the hearing and appeal procedures which must be followed after the Department issues that order. Thus, the ODA unequivocally vests the Department, not the Court, with original jurisdiction in disputed liability cases under the ODA.

The medical panel and hearing procedures prescribed in the ODA do not extend to a case in which the insurer has accepted liability for the claim. *Gomez v. Montana Municipal Ins. Authority*, WCC No. 9411-7177, Order Granting in Part/denying in Part the Motion to Dismiss (January 27, 1995). Rather the Court has jurisdiction over an accepted liability case. *Id.*

In the present case Liberty initially accepted liability. Several months later it rescinded its acceptance and denied the claim. It is upon that later denial that Liberty presses its case. If its original acceptance does not bar the subsequent denial, then this case must be treated as a denied liability case and must be pursued before the Department. An insurer cannot claim that it can rescind an acceptance and at the same time insist that for purposes of section 39-72-602, MCA, the claim was accepted. It either has accepted liability for the claim, in which case it must pay benefits, or it has denied liability. The Department, not the Court, has jurisdiction over any factual issues raised by a denial. Thus, the Workers' Compensation Court lacks jurisdiction to conduct a *de novo* hearing to determine whether claimant's fibromyalgia condition was caused or aggravated by her occupation.

Although the Court lacks jurisdiction to conduct a factual hearing, I nonetheless conclude that the Court has jurisdiction to determine whether Liberty's initial acceptance of Theda's claim, as a matter of law, bars it from now denying her claim. If the original acceptance cannot be rescinded then the acceptance is still operative and the Department procedures do not apply. Thus, the Court has jurisdiction to determine the legal affect of the original acceptance.

2. The effect of Liberty's denial.

The issue raised by Liberty in its defense concerns causation. In *Chaney v. United States Fidelity and Guar.*, 917 P.2d 912 (Mont. 1996), the Supreme Court held that causation

issues are irrelevant where the insurer fails to timely accept a claim. That holding was based on the Supreme Court's determination that an insurer's failure to accept a claim within 30 days, as required by section 39-71-606(1), MCA, "is deemed an acceptance of the claim." 917 P.2d at 915 (citing *Haag v. Montana Schools Group Ins. Auth.*, 274 Mont. 109, 906 P.2d 693, 697 (1995)). Thus, the Supreme Court equated a failure to timely accept a claim with an actual acceptance. Its further holding concerning causation issues therefore extends to claims which have been expressly accepted by the insurer.

In this case, Liberty accepted Theda's claim, and thereby admitted that her fibromyalgia condition was caused or aggravated by her work. Its acceptance was unconditional; it did not merely pay benefits under a reservation of rights, see § 39-71-608, MCA.

Counsel for Liberty conceded during oral argument that Theda's current condition is the same condition for which it initially accepted liability. It is not alleging that she is now suffering from some different, unrelated condition. Thus, this case is distinguishable from *Grenz v. Fire and Casualty of Connecticut*, 250 Mont. 373, 820 P.2d 742 (1991), wherein the insurer successfully contested the relatedness of degenerative arthritis to a right elbow injury claimant suffered at work in 1984. *Grenz* does not support Liberty's contention that it can dispute liability for the condition for which it accepted liability. The insurer in *Grenz* did not contest liability for the wrist injury, rather it contended that the condition for which claimant was seeking benefits was an independent condition unrelated to that original injury.

There is no precedent allowing Liberty to rescind or withdraw its acceptance. As set forth above, the Supreme Court has held that once an insurer accepts liability it may not thereafter argue that the injury or condition for which liability has been accepted was not caused by the industrial accident or disease.

There is precedent relieving an insurer of accepted liability under some circumstances, but Liberty does not allege the existence of any of those circumstances. It does not allege that Theda suffered subsequent injury or aggravation. *Belton v. Hartford Accident & Indemnity Co.*, 202 Mont. 384, 387-89, 658 P.2d 405, 408-09 (1983); and see *Walker v. United Parcel Service*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993). It does not allege fraud. *Taylor v. State Compensation Ins. Fund*, 913 P.2d 1242 (Mont. 1995). It does not allege mutual mistake of fact. *Cf. Kienas v. Peterson*, 191 Mont. 325, 624 P.2d 1 (1980).⁽²⁾

In conclusion, Liberty's acceptance of Theda's claim precludes it from arguing or presenting evidence that her fibromyalgia was not caused by her work for Big Sky Carvers. Its receipt of contrary medical opinions after it had accepted liability do not provide any heretofore recognized legal ground which would relieve it of liability. Thus, it is liable for her condition irrespective of the evidence it may muster in support of its contention that her condition is not work related.

3. Unresolved issue.

One issue remains unresolved. That is "[w]hether the Petitioner is entitled to an order requiring Liberty Northwest to pay medical benefits without having the right to direct the Petitioner to health care providers or to refuse to pay health care providers." (Pretrial Order, Contested Issue of Fact 4 at 2.) Liberty did not address the issue in Respondent's Trial Memorandum, Respondent's Second Pretrial Memorandum, or at oral argument. Similarly, Theda has not addressed the issue.

ORDER AND PARTIAL JUDGMENT

1. This Court has jurisdiction over this matter.
2. Respondent's March 24, 1995 acceptance of petitioner's claim as compensable under the Montana Occupational Disease Act precludes it from now asserting that petitioner's fibromyalgia condition was not caused or aggravated by her job. Since that is the only argument raised by Liberty in its defense to petitioner's claim, Liberty is liable for medical and compensation benefits payable on account of her occupational disease. However, the Court is presently unable to determine the specific benefits which may be payable.
3. No determination is presently made concerning the fourth issue listed in the Pretrial Order. On or before October 22, 1996, the parties shall serve and file memoranda addressing the issue and advising the Court whether an evidentiary hearing regarding the issue is necessary. Their memoranda shall also advise the Court whether specific benefits payable as a result of this decision are in dispute and, if so, whether an evidentiary hearing is necessary for the Court to determine what is due.
4. Petitioner is entitled to costs pursuant to the Court's Rule 24.5.342.
5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
6. Any party to this dispute may have 20 days in which to request a rehearing from this Partial Summary Judgment and Decision.

DATED in Helena, Montana, this 8th day of October, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

Ms. Theda Bea Bouldin - Certified Mail

Mr. Larry W. Jones

Submitted Date: September 3, 1996.

1. Under the heading of **FIBROMYALGIA**, The Merck Manual (16th Ed.) at 1369, lists "Myofascial Pain Syndrome; Fibromyositis" as the subheading. It describes the conditions in the following general terms:

A group of common nonarticular rheumatic disorders characterized by achy pain, tenderness, and stiffness of muscles, areas of tendon insertions, and adjacent soft-tissue structures. These may be primary and generalized or concomitant with another associated or underlying condition, or localized and often related to overuse or micro trauma factors.

(*Id.*) The text goes on to distinguish myalgia from myositis, as follows:

The term **myalgia** indicates muscular pain. In contrast, **myositis** is due to inflammation of muscle tissues and is an inappropriate term for fibromyalgia, when such inflammation is absent. **Fibromyalgia** indicates pain in fibrous tissues, muscles, tendons, ligaments, and other "white" connective tissues. . . . [T]he absence of cellular inflammation justifies the preferred terminology of fibromyalgia rather than the older terms of fibrositis or fibromyositis. [Bold in original.]

(*Id.* at 1370.)

2. Respondent agrees that the medical evidence concerning causation is conflicting. In his deposition, Dr. Ramsey testified that claimant's work at BSC had "aggravated her fibromyalgia for sure, and flared it to the surface." (Ramsey Dep. at 11.) This conflicting testimony distinguishes this case from the example offered by respondent. In the example, the insurer accepts liability for a condition which both parties attribute to a work-related incident but which they thereafter discover is in fact attributable to cancer and not to the incident. The example thus involves a mutual mistake of fact.