IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 30

WCC No. 2001-0334

BRYAN BERGMAN

Petitioner

vs.

VALOR INSURANCE COMPANY, INCORPORATED

Respondent/Insurer for

GOOD OLD BOYS INCORPORATED

d/b/a ROOTERS

Employer.

DECISION AND JUDGMENT

Summary: Claimant suffered a back injury in 1998. His resulting impairment was 15% and he settled his claim for further benefits. Subsequently, on March 21, 2000, he suffered an aggravation of his condition. However, that aggravation did not increase his impairment and did not result in any wage loss or additional physical restrictions. Nonetheless, he seeks a 15% impairment award with respect to the subsequent injury.

Held: Claimant is not entitled to an impairment award. He failed to prove that he suffered any additional impairment or disability on account of the second injury, which appears to have been only a temporary aggravation of his preexisting condition. Moreover, he settled his first claim. That settlement encompassed any claim for an impairment award and since his impairment was 15% as a result of the 1st injury that 15% must be deducted from any claim arising with respect to the second injury. § 39-71-703(7), MCA (1999). Since the impairment following the second injury was 15%, he would be entitled to nothing in any event.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-703(7), MCA (1999).** A subsequent insurer liable for an injury to the same body part which was previously injured is entitled to an offset for the impairment suffered as a result of the prior injury or injuries even though the

claimant settled the prior claim or claims and the settlement did not expressly allocate or consider the impairment.

Injury and Accident: Aggravation: Temporary Aggravation. Where a subsequent injury does not increase the claimant's preexisting impairment or his disability, he is not entitled to an impairment award.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-703(1-2), MCA (1999). Where a subsequent injury does not increase the claimant's preexisting impairment or his disability, he is not entitled to an impairment award.

Benefits: Impairment Awards. Where a subsequent injury does not increase the claimant's preexisting impairment or his disability, he is not entitled to an impairment award.

¶1 This matter is submitted to the Court for decision based upon Stipulated Facts and Issues to Be Determined by the Court filed January 11, 2002.

¶2 The case involves Bryan Bergman (claimant), who suffered back injuries in 1998 and 2000. The insurer for the first injury was Reliance National. The insurer for the second injury was Valor Insurance Company, Incorporated (Valor). Following the first injury, claimant's impairment rating was 15%. Following the second injury, it was the same.[(1)] Reliance National settled claimant's first injury for an amount barely greater than the 15% impairment, however, claimant alleges that the impairment rating was unknown at the time of the settlement and therefore not encompassed in the settlement. He now seeks the full 15% impairment rating from Valor.

¶3 As set forth in the parties' stipulation, the following issues are presented for decision:

1. Whether Petitioner was compensated for the 15% whole-person impairment rating assigned by Dr. Catherine Capps on October 14, 1999, by the insurer responsible for adjusting Petitioner's October 1, 1998 injury claim;

2. Whether Petitioner sustained an additional ratable impairment under the JAMA Guidelines to Permanent Impairment, 5th Edition, as a result of the March 21, 2000 industrial accident; and

3. Whether Petitioner is entitled to be compensated by Respondent/Insurer for the Petitioner's March 21, 2000 industrial accident for the value of the 15% whole-person impairment rating that Petitioner has been assigned.

(Stipulated Facts and Issues to be Determined by the Court at 5.)

¶4 In light of the parties' stipulation, I have relied solely upon their stipulated facts. I have neither reviewed nor independently appraised the exhibits and depositions they filed. The

stipulated facts are set forth below. However, I have reordered, rearranged and consolidated them, changed the paragraph numbering, deleted repetitive facts, and in a very few instances restated facts for purposes of readability, all of this without changing the facts themselves. Some stipulated findings which are wholly irrelevant to the issues of the case are omitted, e.g., Stipulated Finding 22 (concerning claimant's "needle phobia"). The source of each fact is cited as "SF" (Stipulated Fact), followed by the original paragraph number of the fact.

Stipulated Facts

¶5 Claimant was employed as a laborer for Bitterroot Stock Farm Club, on or about October 1, 1998. (SF 24.)

¶6 On October 1, 1998, claimant stepped into a hole while raking and sustained injury to his lumbar spine. (SF 25.)

¶7 The insurer for the injury claim of October 1, 1998, was Reliance National. (SF 23 and 14.)

¶8 Claimant timely filed a claim regarding the October 1, 1998 accident and liability was accepted by Baumgardner-Lind adjusting firm.[(2)] (SF 26.)

¶9 The symptomatology following the stock farm injury never completely went away. More particularly, the pain in the buttocks which radiated down the leg never went away. Nor did the numbness and trouble bending. The constant numbness from the Reliance National injury never went away. (SF 15, 16.)

¶10 Claimant was examined by independent medical evaluator Catherine C. Capps, M.D., who diagnosed a probable herniated nucleus pulposus, L5 spine with left radicular leg pain. This diagnosis was laid out in Dr. Capps' letter of March 17, 1999. (SF 27.)

¶11 Per Nurse Practitioner Alexis Wagner's (Wagner) May 6, 1999 note, claimant continued to suffer left leg numbness that went from the mid-back down to the mid-knee on the side of the thigh. In addition, he had constant dull back pain with aggravation of pain with sitting or walking for long periods. Finally, he had trouble sleeping more than three hours at a time and had problems with left leg weakness. (SF 28.)

¶12 Claimant was found to be maximally improved by primary care provider Wagner, effective July 28, 1999, but Wagner was unable to perform an impairment rating. (SF 29.)

¶13 In the summer of 1999, claimant, who was represented by counsel,[(3)] was aware that the parties were attempting to obtain a determination of impairment, restrictions, and maximum medical improvement (MMI) so that his case could be settled. He was further aware that the failure to obtain an impairment rating was holding up his ability to settle the case. (SF 30.)

¶14 An offer of settlement on a disputed basis was made to claimant's attorney, Mr. Kenneth S. Thomas, and that offer was rejected by letter dated September 28, 1999. (SF 31.) In counsel's letter of September 28, 1999, it was suggested that an independent medical evaluation (IME) with Dr. Capps be conducted for the purpose of determining an impairment rating or, in the alternative, continuing to negotiate a settlement on a disputed basis. (SF 32.)

¶15 In response [to the September 28, 1999 letter of claimant's counsel], Baumgardner-Lind Adjusting firm's adjuster Elaine Olsen (Olsen) wrote to Dr. Capps on October 5, 1999, requesting an impairment rating. (SF 33.)

¶16 Dr. Capps responded to Olsen by letter dated October 14, 1999, and assigned a 15% whole-person impairment rating under the 4th Edition of the JAMA Guides to Permanent Impairment. (SF 34.) However, Dr. Capps' October 14, 1999 letter assigning impairment was received in Olsen's office on October 29, 1999. (SF 38, 44.) Olsen did not provide a copy of the impairment letter to claimant or his attorney, nor did she communicate that rating by any other means. The impairment letter was made known to claimant's attorney only after claimant's March 21, 2000 claim. (SF 46, 47.)

¶17 Meanwhile, the parties proceeded to settle the October 1, 1998 claim for $9,500. Claimant was anxious to resolve the claim as quickly as possible because of a family emergency in the state of California that necessitated his presence. Insurer and claimant did not wait to receive the impairment rating, but rather negotiated settlement in the total amount of $9,500. Olsen initially testified there was an agreement to resolve all issues in dispute in reference to wage loss resulting from the injury. However, Olsen later testified that there were multiple factors in reaching a disputed liability settlement of the October 1, 1998 injury while Reliance National was at risk. In particular, she indicated the factors included the failure to follow through with recommended medical care, claimant was leaving the state, additional medical care was not anticipated, and the question remained of a possible overpayment. (SF 36, 38, 39.) At the time of settlement, Olsen was aware that as a matter of law an impairment but no wage loss limited permanent partial disability benefits to the impairment. (SF 35.) She did not recall whether an impairment was discussed or factored into the settlement. (SF 36.)

¶18 A 15% impairment at claimant's 1998 rate was $9,100.35. Twenty percent for wage loss at claimant's rate is $12,203.80.[(4)]

¶19 A petition and settlement recap sheet were signed by the claimant on October 15, 1999. A settlement petition and recap sheet were received by Olsen on October 20, 1999. On or about October 21, 1999, Olsen signed the settlement petition. The settlement was approved and a settlement Order signed by Barbara Gullickson of the Employment Relations Division on October 29, 1999. The approved settlement between Reliance

National and claimant was received by Baumgardner-Lind on November 1, 1999. (SF 41-43, 45.)

¶20 On March 21, 2000, claimant was employed by Good Old Boys, Incorporated, d/b/a Rooters, as a cook. (SF 2.) On that date claimant was walking to the dish room with a pan of potatoes and slipped on grease, causing him to fall directly on his buttocks with his feet in front of him. (SF 5.) Claimant injured his lower back as a result of the incident of March 21, 2000. (SF 6.) The injury was to the same area of his back as injured on October 1, 1998. (SF 14.)

¶21 At the time of his injury, claimant was wearing a TENS unit on account of his prior, 1998 injury. (SF 7.)

¶22 At the time of the accident, Valor Insurance Company (Valor) insured Good Old Boys. (SF 4.) Valor accepted liability for the accident and paid medical benefits. (SF 8-9.)

¶23 Claimant was treated for the injury by Dr. James H. Chandler. (SF 10.) In a letter of April 28, 2000, Dr. Chandler set out his diagnostic impression of claimant's injury was that of lumbosacral discogenic injury with left-sided radiculopathy.[(5)] (SF 12.)

¶24 Claimant thereafter received physical therapy from three different providers, as well as a short course of treatment from a chiropractic physician. (SF 17.)

¶25 On February 20, 2001, Dr. Chandler determined that claimant was at MMI and concluded that he had suffered no additional injury. Dr. Chandler wrote on February 20, 2001, that "[i]t is my understanding that the patient received a 15% whole person impairment rating from Dr. Capps. **There is no indication in my opinion that this patient has sustained any additional injury that would add onto this already given permanent whole person impairment rating.** This patient will need ongoing Naprosyn anti-inflammatory medication into the indefinite future. This patient is capable of work activity. In my clinical experience patients with this type of problem are able to perform light-duty work that would hopefully provide for frequent changes in body position from sitting to standing to walking activities. He should avoid any repetitive lifting over 20 pounds in any position. He should avoid any repetitive bending or stooping." (SF 19, emphasis added.)

¶26 On March 30, 2001, Dr. Chandler approved the positions of cook and culinary art student as positions that were within the claimant's labor market. (SF 20.)

¶27 Dr. Capps indicated, on June 26, 2001, that claimant's 15% whole-person impairment rating would not increase under the 5th Edition of the JAMA Guidelines to Permanent Impairment, "unless [h]e had progression with significant instability - no evidence of this in records." (SF 21.)

¶28 At the time of claimant's March 21, 2000 injury, he was making $7.00 per hour. Claimant subsequently (currently) makes $8.15 per hour. (SF 3.)

¶29 The injury while Valor was at risk did not change claimant's ability to lift. The lifting restriction resulted from the injury while Reliance National was at risk. (SF 13.)

CONCLUSIONS OF LAW

¶30 Since the facts have been stipulated the only matter remaining for decision is an application of law to those facts.

¶31 In assessing the facts and determining how they fit with statutes and case law, the beginning point for analysis is the burden of proof. Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶32 The benefits at issue in this case fall under section 39-71-703, MCA (1999), which governs permanent partial disability benefits. The applicable part of the section 39-71-703, MCA (1999), provides:

> **39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
>
> (a) has an actual wage loss as a result of the injury; and
>
> (b) has a permanent impairment rating that:
>
> (i) is established by objective medical findings; and
>
> (ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.
>
> (2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.
>
> . . . .

¶33 The only benefit claimant is seeking is an impairment award. He does not contend that he suffered a wage loss. Moreover the stipulated facts indicate that he had no wage loss. (SF3)

¶34 Claimant's case rests upon his contention that he was never paid for the 15% impairment from the prior injury and that he is therefore entitled to the 15% award because he suffered a subsequent injury. His assertion is predicated upon section 39-71-703(7), MCA (1999), which provides:

> (7) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

The section was enacted after the Supreme Court decision in *Tiedeman v. Cooper Logging, Inc,* 218 Mont. 312, 708 P.2d 255 (1985). In *Tiedeman* the Supreme Court held that an insurer for a subsequent injury to the same body part is not entitled to a deduction for a prior insurer's payment on account of the prior injury to that body part.

¶35 Claimant's argument overlooks the question of causation. Neither *Tiedeman* nor section 39-71-703(7), MCA (1999), require a subsequent insurer to pay benefits where there is no permanent aggravation of the preexisting condition. Thus, where the subsequent injury causes no additional impairment or disability, section 39-71-703(7), MCA (1999), is inapplicable. The subsequent injury or aggravation, such as alleged in this case, must cause a permanent detriment in order to be compensable. *Kuntz v. Nationwide Mut. Fire Ins. Co.,* 287 Mont. 142, 952 P.2d 422 (1998). An injury causing only a temporary aggravation or flareup of a preexisting condition does not entitle a worker to permanent disability benefits. *Id.*

¶36 The claimant in this case bears the burden of proving that the March 21, 2000 injury permanently aggravated his preexisting back condition. He has not carried his burden. The stipulated facts show that the aggravation did not change his impairment rating, his wage loss, or ability to work. Irrespective of whether he was paid for the impairment resulting from his 1998 injury, he is not entitled to an impairment award on account of the March 21, 2000 injury.

¶37 Moreover, claimant's settlement with Reliance National must be credited against his present impairment claim. That settlement resolved all claims against Reliance National, **including any claim for an impairment award.** Even though claimant and the insurer may not have agreed on the impairment rating, the settlement encompassed the impairment. Therefore, the 15% impairment must be deducted under section 39-71-703 (7), MCA (1999). Since the claimant's post-2000 injury impairment is 15%, he would be entitled to nothing even if the section applied.

¶38 I therefore conclude as a matter of law that the claimant is not entitled to an impairment award in any amount from Valor.

JUDGMENT

¶39 Claimant is not entitled to an impairment award in any amount from Valor. Therefore, his petition should be and is **dismissed with prejudice.**

¶40 This JUDGMENT is certified as final for purposes of appeal.

¶41 Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 3rd day of June, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Kenneth S. Thomas
Mr. Joe C. Maynard
Submitted: January 11, 2002

1. There was no wage loss following the second injury.

2. Reliance employed Baumgartner-Lind as its adjuster.

3. Reference to representation by counsel is my addition based on other stipulated facts.

4. The stipulated facts do not show a wage loss with respect to the 1998 injury or even the basis for a dispute concerning wage loss.

5. Dr. Chandler's letter is dated April 28, 2000 on page 1, and April 27, 2000 on page 2.