IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 54

WCC No. 2004-1024

NATHAN M. BLAYLOCK

Petitioner

vs.

MONTANA STATE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The petitioner seeks an order compelling his treating physician to provide further documentation regarding his impairment rating, an order sanctioning or penalizing his employer for its alleged failure to provide him with copies of his release to return to work, and a $48,000 settlement.

Held: Except for discovery abuses, which are not present in this case, the Court has no jurisdiction to order a treating physician to provide a claimant with additional documentation or to impose sanctions or penalties on an employer for failure to provide a claimant a copy of a release to return to work. The petitioner's first two requests are therefore denied. As to the petitioner's request for a settlement, he is not entitled to damages for pain and suffering and is limited to those benefits for which the Workers' Compensation Act expressly provides. The only potential benefits he has identified are permanent partial disability benefits and an impairment award. § 39-71-703, MCA (2003). He is not entitled to PPD benefits because he admittedly does not have a wage loss. He has also failed to prove any impairment, however, he is entitled to an opportunity to obtain an independent impairment rating before the Court makes any determination as to his entitlement to an impairment award.

Topics:

Benefits: Generally. Injured workers are not entitled to damages for pain and suffering and are limited to those benefits for which the Workers' Compensation Act expressly provides.

Benefits: Permanent Partial Disability Benefits. Under the 2003 law, a claimant is not entitled to permanent partial disability benefits where he or she suffers no wage

loss, however, the claimant may be entitled to an impairment award based on the percentage of impairment assessed.

Benefits: Impairment Awards. Where the claimant's treating physician renders a zero percent (0%) impairment rating, the claimant is entitled to obtain an independent impairment rating at his or her own cost. Where that opportunity has been denied or the claimant has been misled as to the right to receive a second opinion, the Court will defer decision on an impairment dispute to allow the claimant to obtain an independent rating.

Sanctions. The Workers' Compensation Court has no jurisdiction to sanction or penalize an employer for failure to provide a claimant with documents he requests except where the documents are sought in discovery and the employer violates discovery orders or rules governing discovery.

Jurisdiction: Physicians. Except in connection with discovery, the Workers' Compensation Court does not have jurisdiction to order a treating physician to provide additional documentation to a claimant.

¶1 The trial in this matter was held in Billings, Montana, on June 28, 2004. The petitioner (hereinafter claimant) was present and represented himself. The respondent was represented by Mr. Daniel B. McGregor.

¶2 Exhibits: Exhibits 1 through 12 were provided to the Court and there were no objections to them. However, in light of the colloquy with the claimant, the Court resolved the dispute; it was unnecessary to consider the exhibits.

¶3 Witnesses and Depositions: No formal testimony was taken after it became clear from the Court's colloquy with the claimant that there were no material issues of fact and that the issues involved simple matters of law. The Court notes that there was a pending motion for summary judgment, however, resolution of the case was based on the claimant's statements and representations, as well as the stipulated facts in the Pretrial Order.

¶4 Issues Presented: The issues, as set out in the Pretrial Order, are as follows:

> ¶4a Blaylock [claimant] seeks documentation from Dr. Sukin on his impairment rating.
>
> ¶4b Blaylock seeks to have Peter Yeagen, Jr., Inc. and the State Fund settle with him (probably in accordance with his demand for a $48,000.00 "settlement award"); and
>
> ¶4c Blaylock seeks some unidentified sanction and/or remedy for the alleged refusal of his employee, Gerald Unruh, to show him the documentation releasing him back to work.

(Pretrial Order at 3.)

¶5 Having considered the Pretrial Order, and the representations and the statements of the claimant at trial, the Court makes the following:

FINDINGS OF FACT

¶6 All of the following facts are from the Uncontested Facts stipulated by the parties in the Pretrial Order.

> ¶6a Petitioner filed a signed first report of injury dated August 31, 2003 with a represented injury date of August 26, 2003. Petitioner reported an injury to his right index finger stating that a Russian olive thorn had lodged in his knuckle.
>
> ¶6b The site where the thorn had lodged became infected and the petitioner then sought medical attention at Saint Vincent's Hospital in Billings, Montana. Dr. Dean Sukin treated the petitioner and determined that he suffered from a septic tenosynovitis secondary to foreign body.
>
> ¶6c On August 27, 2003 Dr. Sukin performed an irrigation and debridement of the right MP joint and extensor tendon sheath. Radiology reports demonstrated that there was an old fracture of the tuft of the right index finger.
>
> ¶6d MSF accepted the claim for injury to the right index finger on September 16, 2003.
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> ¶6e On November 19, 2003, Dr. Sukin orally informed petitioner that he was released back to his time of injury job without restrictions or impairment.
>
> ¶6f On November 19, 2003, the State Fund sent the petitioner a letter confirming his release to return to work and that the wage loss benefits would terminate 14 days from the date of the letter.
>
> ¶6g Dr. Sukin affirmed his oral representations of November 19, 2003, in his letter of December 10, 2003.
>
> ¶6h On January 21, 2004, the petitioner requested that the State Fund pay for a second independent evaluation to be performed by Dr. Rosen.
>
> ¶6i The State Fund refused to do so, but did authorize a follow up visit with Dr. Sukin.
>
> ¶6j Petitioner declined to return to Dr. Sukin and instead reiterated his demand that he be seen by Dr. Rosen for a second opinion.
>
> ¶6k The State Fund has also refused to pay petitioner the additional $48,000 he claims is his entitlement for a "settlement award."

(Pretrial Order at 2, citations omitted.)

¶7 In addition to those facts, the following facts were ascertained in the colloquy between the Court and the claimant and respondent's counsel at the time of trial.

¶7a Dr. Sukin, who was the claimant's treating physician, rated the claimant's impairment from his industrial injury at zero percent (0 %).

¶7b The claimant contacted the office of Dr. Bill S. Rosen, a specialist in physical and rehabilitation medicine, to request him to render an independent impairment rating. Even though the claimant indicated he would pay for the evaluation himself, Dr. Rosen's office advised the claimant that the doctor would not do so unless workers' compensation authorized and paid for the visit.

¶7c Dr. Rosen is a member of the Managed Care Organization (MCO) with whom the respondent contracts to provide care for injured workers.

¶7d Following his release to return to work, the claimant returned to work for a different employer. Post-injury, he earns as much as he did at his time-of-injury job.

CONCLUSIONS OF LAW

¶8 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶9 The 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).

¶10 The Court cannot order Dr. Sukin to provide additional documentation to claimant regarding his impairment rating. The claimant has been provided with a copy of Dr. Sukin's finding of no impairment. Indeed the finding is one of the exhibits in this case, Exhibit 7 at page 34. The claimant could have deposed Dr. Sukin but did not do so. Moreover, in light of the lack of any contrary impairment rating, additional information as to how Dr. Sukin arrived at his impairment rating would not advance the claimant's case.

¶11 The State Fund is also not required to pay for a second opinion regarding impairment.

¶12 However, the claimant does have a right to obtain a second opinion regarding impairment and seek benefits based on that second opinion. In light of the fact that Dr. Rosen is part of the MCO with which the respondent contracts, it is vicariously responsible for Dr. Rosen's response regarding the claimant's request for an independent rating, a response which the claimant reasonably understood as precluding him from obtaining an independent evaluation. I therefore hold that under these circumstances, the claimant is

entitled to obtain an independent rating at his own expense and that the impairment issue is not ripe for decision until he has the opportunity to do so.

¶13 The impairment rating is important because a rating greater than zero will entitle the claimant to benefits pursuant to section 39-71-703, MCA (2003), which provides in relevant part:

> **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 not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and
>
> (iii) 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.
>
> (3) Beginning July 1, 2003, the permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 375 weeks.
>
> . . . .

¶14 The claimant is therefore provided an opportunity to obtain an independent impairment rating at his own expense. That rating shall be forwarded to the respondent. If the respondent disagrees with the rating, then the Court will hold a further hearing to resolve the impairment rating dispute. It expressly reserves jurisdiction to do so.

¶15 As set out in the quoted portion of section 39-71-703, MCA (2003), the claimant's entitlement to any benefits in addition to an impairment award depends on his demonstrating a wage loss. § 39-71-703(1)(a) and (2), MCA (2003). By his own admission, however, he is earning as much post-injury as he was at the time of his injury. He is therefore not entitled to permanent partial disability benefits.

¶16 As to the claimant's request for a settlement, the Court can award only those benefits provided by statute. Unlike the law governing negligence and other tort actions, workers' compensation laws do not provide for any awards for pain, suffering, inconvenience, and

the like. Rather, the claimant is limited to those benefits for which workers' compensation statutes expressly provide. Since he has returned to work, he is not permanently totally disabled. § 39-71-702, MCA (2003). He is also not entitled to further temporary total disability benefits. § 39-71-701, MCA (2003). His entitlement to further benefits therefore depends on his showing that he is permanently partially disabled, which in turn requires him to show that he has a wage loss. Since he admittedly does not have a wage loss, he is not entitled to further indemnity benefits with the possible exception of an impairment award.

¶17 Finally, the Court has no jurisdiction to sanction or penalize an employer for failure to provide the claimant with documentation releasing him back to work, at least where the employer has not violated any discovery orders of the Court. Since no discovery orders are at issue, the claimant's request must be denied.

JUDGMENT

¶18 The claimant is entitled to obtain an independent impairment rating at his own cost. Since he was not previously provided that opportunity, determination of his impairment rating and impairment award, if any, is premature.

¶19 The claimant shall make his own arrangements for an independent impairment rating. Upon receiving an independent impairment rating, he shall forward that rating to the respondent. If the rating is greater than zero and the respondent disputes the rating, then the parties shall so inform the Court and a hearing will be scheduled to resolve the dispute. In any event, the parties shall report back to the Court within six months concerning the impairment issue.

¶20 The claimant is not entitled to indemnity benefits with the possible exception of an impairment award and is not entitled to orders directing Dr. Sukin to provide additional documentation and penalizing or sanctioning his employer. Except for his request for an impairment award, his petition is **dismissed with prejudice**. The Court reserves jurisdiction over the impairment award dispute.

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

¶22 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 30th day of June, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Nathan M. Blaylock
Mr. Daniel B. McGregor
Submitted: June 28, 2004