

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 28

WCC No. 9702-7698

STEVE CHURCH

Petitioner

vs.

TRAVELERS INDEMNITY COMPANY OF ILLINOIS

Respondent/Insurer for

FOOD SERVICES OF AMERICA

Employer.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: Claimant moved for summary judgment establishing his entitlement to 20% permanent partial disability benefits for loss of lifting capacity.

Held: Claimant's interpretation of section 39-71-703, MCA (1993) is correct. The statute does not authorize an insurer to split the difference between 15% PPD benefits due if claimant moves from heavy to medium lifting, and 20% due if he moves from heavy to light. Although there is no statutory basis for the 17.5% paid by the insurer, WCC declines to award summary judgment where factual issues remain regarding other arguments raised by insurer and the possibility exists that the insurer has paid more than was due.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-703, MCA (1993). Section 39-71-703, MCA (1993) does not authorize an insurer to split the difference between 15% PPD benefits due if claimant moves from heavy to medium lifting, and 20% due if he moves from heavy to light. Although there is no statutory basis for the 17.5% paid by the insurer, WCC declines to award summary judgment where factual issues remain regarding other arguments raised by insurer and the possibility exists that the insurer has paid more than was due.

Benefits: Permanent Partial Disability: Labor Capacity. Section 39-71-703, MCA (1993) does not authorize an insurer to split the difference between 15% PPD benefits due if claimant moves from heavy to medium lifting, and 20% due if he

moves from heavy to light. Although there is no statutory basis for the 17.5% paid by the insurer, WCC declines to award summary judgment where factual issues remain regarding other arguments raised by insurer and the possibility exists that the insurer has paid more than was due.

The controversy in this matter relates to the amount due claimant pursuant to section 39-71-703, MCA (1993), for physical restrictions resulting from an industrial injury he suffered on January 17, 1995. Petitioner has moved for summary judgment, arguing that the sole issue in this case involves a matter of statutory interpretation. Petitioner alleges that he was performing heavy labor prior to his injury and can now perform only light labor, therefore entitling him to 20% permanent partial disability benefits. § 39-71-703(3)(d), MCA (1993). If claimant could perform medium labor, then he would be entitled to 15% under the statute. *Id.* The insurer has split the difference and paid claimant 17.5%.

If the only issue in this case were a matter of interpreting section 39-71-703(3)(d), MCA (1993), then summary judgment would be appropriate. The section provides:

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

. . . .

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

Suffice it to say that the statute is clear on its face. It does not provide for 17.5%. Unless claimant meets the minimal criteria of medium labor, as defined in the section, then he is entitled to benefits based on light labor. There is no half-measure and the medical evidence proffered by respondent fails to provide even a prima facie case that claimant can lift up to 50 pounds occasionally or 25 pounds frequently.

However, according to the respondent, there is a factual dispute concerning claimant's job before and after the accident. A February 14, 1996 letter from the employer (Ex. 9 to Respondent's Response to Petitioner's Motion for Summary Judgment) states that claimant was performing the same job after his injury as before his injury and that the job is heavy labor requiring him to lift up to 100 pounds. (*Id.*; Ex. 8.) The entitlement to benefits because

of a reduction in labor activity is based on the difference between the type of labor the claimant was "performing" prior to his injury and what he is able to perform after his injury. § 39-71-603(d), MCA. Thus, the types of labor claimant was performing both before and after his injury are facts of consequence which appear to be in controversy.

Petitioner maintains that since respondent has paid 17.5% it should not be allowed to contest the additional amount claimed. However, the fact that the 17.5% has been paid does not bar the insurer from asserting that it owes no more than what it has already paid. The petitioner has neither established the basis for any estoppel nor pointed out where the respondent in this proceeding has stipulated or agreed that petitioner was doing heavy labor before his injury and can now only perform light labor. However, the Court takes note that the 17.5% has in fact been paid, whereas respondent is now arguing in effect that nothing is due impairment wise because claimant is performing the same labor as before. Its argument appears to fly in the face of its payment and raises a serious question as to the reasons for and reasonableness of its present contention.

Since petitioner has not established his entitlement to additional benefits by way of summary judgment, it is premature for the Court to consider his request for attorney fees and a penalty. However, with regard to the 17.5% statutory interpretation issue, the insurer's interpretation is not reasonable. The statute is plain on its face and is not reasonably debatable. I must still determine whether the respondent's other argument concerning his duties pre- and post-injury is reasonable and that determination involves factual matters.

The motion for summary judgment is **denied**.

SO ORDERED.

DATED in Helena, Montana, this 28th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston - FAXED and mailed

Mr. Dylan E. Jackson - FAXED and mailed

Submitted: April 25, 1997