IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 41

WCC No. 2004-0961

STEVEN CRAWFORD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER GRANTING SUMMARY JUDGMENT

Summary: The claimant seeks reclassification of his benefits from temporary total disability benefits to permanent total disability benefits even though he has not reached maximum medical healing with respect to mental conditions which were caused by his industrial injury. The insurer moved for summary judgment based on the fact that the claimant has not reached maximum medical improvement (MMI).

Held: The motion for summary judgment is granted. While the claimant raises an intriguing legal issue as to whether he should be reclassified as permanently totally disabled when only one of some of his injuries are at MMI but in themselves permanently totally disabling, he has provided no evidence showing he is in fact permanently disabled on account of injuries which are at MMI. Thus there is no basis for the Court to address his legal contentions. As it stands, he is not at MMI and is therefore ineligible for permanent total disability benefits.

Topics:

Summary Judgment: Generally. The Court will not consider legal theories where there is no factual predicate for doing so.

Benefits: Permanent Total Disability Benefits: Generally. A claimant who has not reached maximum medical improvement is not eligible for permanent total disability benefits. §§ 39-71-702, MCA (1995-2001) and 39-71-116(23), MCA (1995). Lacking a factual foundation to do so, the Court will not address a contention that the provisions for permanent total disability allow permanent total disability benefits to be paid where the claimant has not reached maximum medical improvement with respect to all of his injuries but some of the claimant's injuries

are at maximum medical improvement and are in themselves permanently totally disabling.

Benefits: Permanent Total Disability Benefits: Maximum Medical Improvement. A claimant who has not reached maximum medical improvement is not eligible for permanent total disability benefits. §§ 39-71-702, MCA (1995-2001) and 39-71-116(23), MCA (1995). Lacking a factual foundation to do so, the Court will not address a contention that the provisions for permanent total disability allow permanent total disability benefits to be paid where the claimant has not reached maximum medical improvement with respect to all of his injuries but some of the claimant's injuries are at maximum medical improvement and are in themselves permanently totally disabling.

Maximum Medical Improvement: When Reached. A claimant who has not reached maximum medical improvement is not eligible for permanent total disability benefits. §§ 39-71-702, MCA (1995-2001) and 39-71-116(23), MCA (1995). Lacking a factual foundation to do so, the Court will not address a contention that the provisions for permanent total disability allows permanent total disability benefits to be paid where the claimant has not reached maximum medical improvement with respect to all of his injuries but some of the claimant's injuries are at maximum medical improvement and are in themselves permanently totally disabling.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-702, MCA (1995-2001). A claimant who has not reached maximum medical improvement is not eligible for permanent total disability benefits. §§ 39-71-702, MCA (1995-2001) and 39-71-116(23), MCA (1995). Lacking a factual foundation to do so, the Court will not address a contention that the provisions for permanent total disability allow permanent total disability benefits to be paid where the claimant has not reached maximum medical improvement with respect to all of his injuries but some of claimant's injuries are at maximum medical improvement and are in themselves permanently totally disabling.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-116(23), MCA (1995). A claimant who has not reached maximum medical improvement is not eligible for permanent total disability benefits. §§ 39-71-702, MCA (1995-2001) and 39-71-116(23), MCA (1995). Lacking a factual foundation to do so, the Court will not address a contention that the provisions for permanent total disability allow permanent total disability benefits to be paid where the claimant has not reached maximum medical improvement with respect to all of his injuries but some of the claimant's injuries are at maximum medical improvement and are in themselves permanently totally disabling.

¶1 The claimant in this matter was injured on June 19, 1996, and is currently receiving temporary total disability benefits. Through his present petition, he is seeking reclassification of his benefits to permanent total disability benefits. The reclassification would entitle him to cost-of-living increases. Section 39-71-702, MCA (1995-2001), which governs permanent total disability benefits, provides in relevant part:

(5) A worker's benefit amount must be adjusted for a cost-of-living increase on the next July 1 after 104 weeks of permanent total disability benefits have been paid and on each succeeding July 1. A worker may not receive more than 10 adjustments. The adjustment must be the percentage increase, if any, in the state's average weekly wage as adopted by the department over the state's average weekly wage adopted for the previous year or 3%, whichever is less.

There is no corresponding cost-of-living provision for temporary total disability benefits. *See* § 39-71-701, MCA (1995).

¶2 Respondent, Liberty Northwest Insurance Corporation (Liberty), moves for summary judgment, urging that the claimant is not entitled to permanent total disability benefits because he has not reached maximum medical improvement (MMI) with respect to his industrial accident. The motion has been briefed and was telephonically argued on April 28, 2004.

Facts

¶3 In moving for summary judgment, Liberty relies on an affidavit of its claims adjuster and the pleadings. The essential facts material to the motion for summary judgment are uncontroverted by the petitioner. Those facts are as follows:

> ¶3a On June 19, 1996, the petitioner, Steven Crawford (claimant), suffered severe, multiple injuries in an automobile accident. At the time of the accident he was in the course and scope of his employment.
>
> ¶3b At the time of the accident, claimant's employer was insured by Liberty. Liberty has accepted liability for the claim.
>
> ¶3c Liberty is continuing to pay the claimant temporary total disability benefits.
>
> ¶3d Liberty has accepted liability for not only the claimant's physical injuries but also for mental conditions resulting from the accident and injuries.
>
> ¶3e The claimant has not reached MMI at least with respect to his mental conditions. Liberty continues to authorize treatment for the mental conditions.

Discussion

¶4 Section 39-71-703, MCA (1993-1995), governs the claimant's entitlement to permanent total disability benefits. It provides that such benefits are payable if the claimant "is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116 . . . ." Section 39-71-116(23), MCA (1995), is keyed to the time the claimant reaches *maximum medical improvement*, providing:

> (23) "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches **maximum medical healing**, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled. [Emphasis added.]

Temporary total disability is similarly keyed to maximum medical healing, providing:

> (33) "Temporary total disability" means a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists **until the injured worker reaches maximum medical healing.** [Emphasis added.]

"Maximum medical healing" is the same thing as "maximum medical improvement." I therefore use the terms interchangeably and use "MMI" as shorthand for both.

¶5 In the telephonic hearing, claimant's counsel conceded that the claimant has not reached MMI with respect to his mental conditions. However, he argued that the claimant has reached maximum medical healing with respect to his physical conditions and should be reclassified as permanently totally disabled on account of the physical conditions. The question he poses is whether a claimant is entitled to permanent total disability benefits when he has reached maximum medical healing with respect to only some of his injuries, but those injuries are in themselves permanently totally disabling.

¶6 The argument is intriguing and I do not dismiss it out of hand. The matter is one of statutory interpretation, specifically, whether if the MMI prerequisite for permanent total disability is satisfied if the claimant is at MMI with respect to only some of his injuries but those injuries themselves preclude any reasonable prospect of his returning to regular employment. However, the claimant has not provided any evidence demonstrating that he is in fact permanently unable to perform regular employment based on any of the injuries which are at MMI. Indeed, he has provided no affidavits, depositions, or other admissible evidence whatsoever. Thus, there is no factual basis for me to address his legal contentions. Rather, based on the uncontroverted evidence which has been presented, he is not at MMI, and is therefore ineligible for permanent total disability benefits. Accordingly, the motion for summary judgment must be granted.

ORDER AND JUDGMENT

¶7 The motion for summary judgment is **granted** and the petition is dismissed without prejudice.

¶8 This Order and Judgment is certified as final.

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

(SEAL)

MIKE McCARTER
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones
Submitted: April 28, 2004