IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 61

WCC No. 2002-0694

MONTANA HEALTH NETWORK

Petitioner

vs.

DANNETTE GRAHAM

Claimant.

ORDER FOR SECTION 39-71-610, MCA, BENEFITS

Summary: Claimant seeks interim temporary total disability benefits under section 39-71-610, MCA (2001). The insurer resists based on statements of three witnesses indicating claimant was not injured at work and an IME indicating claimant's current knee problems are unrelated to her alleged industrial accident.

Held: Interim benefits ordered in light of claimant's assertion that her injury occurred at work and her treating physician's opinion indicating that her current condition is work-related and disabling. Claimant does not have to prove the merits of her claim for TTD benefits, only that she has a strong prima facie case.

Topics:

Benefits: Interim (Section 39-71-610, MCA) Benefits, Procedure. Unless formal hearing is requested the Workers' Compensation Court will resolve requests for interim benefits under section 39-71-610, MCA, benefits on an expedited, informal basis, typically by telephone conference with counsel. ARM 24.5.314.

Benefits: Interim (Section 39-71-610, MCA) Benefits, Criteria for Awarding. In determining whether interim benefits under section 39-71-610, MCA, are appropriate, the Court will consider four factors. First, was liability for the claim accepted? Second, were benefits paid, especially for a significant time period? Third, has the claimant demonstrated she will suffer significant financial hardship if section 39-71-610, MCA, interim benefits are not ordered? Fourth, has the claimant tendered a strong prima facie case for reinstatement of the benefits she is seeking?

Benefits: Interim (Section 39-71-610, MCA) Benefits. In an accepted claim case in which the insurer has paid temporary total disability benefits and the claimant is suffering severe financial hardship, the Court will order interim benefits under section 39-71-610, MCA, where claimant tenders her own testimony that she suffered a work related injury and her treating physician's opinion that her current condition is work related and disabling.

Benefits: Interim (Section 39-71-610, MCA) Benefits. Claimant's own expected testimony that she suffered a work related injury plus the opinion of her physician that her current condition is work-related and currently disabling constitutes a strong prima facie case for benefits despite the insurer's proffer of statements from other witnesses indicating she was not injured at work and IME opinions indicating her condition is not work related. The treating physician's opinion is entitled to some deference, especially in a proceeding for interim benefits and conflicts in testimony raise credibility issues which can only be resolved after a full trial on the merits of the claim for benefits.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-610, MCA (2001), Procedure. Unless formal hearing is requested the Workers' Compensation Court will resolve requests for interim benefits under section 39-71-610, MCA, benefits on an expedited, informal basis, typically by telephone conference with counsel

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-610, MCA (2001), Criteria for Awarding. In determining whether interim benefits under section 39-71-610, MCA, are appropriate, the Court will consider four factors. First, was liability for the claim accepted? Second, were benefits paid, especially for a significant time period? Third, has the claimant demonstrated she will suffer significant financial hardship if section 39-71-610, MCA, interim benefits are not ordered? Fourth, has the claimant tendered a strong prima facie case for reinstatement of the benefits she is seeking?

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-610, MCA (2001). In an accepted claim case in which the insurer has paid temporary total disability benefits and the claimant is suffering severe financial hardship, the Court will order interim benefits under section 39-71-610, MCA, where claimant tenders her own testimony that she suffered a work-related injury and her treating physician's opinion that her current condition is work related and disabling.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-610, MCA (2001). Claimant's own expected testimony that she suffered a work-related injury plus the opinion of her physician that her current condition is work related and currently disabling constitutes a strong prima facie

case for benefits despite the insurer's proffer of statements from other witnesses indicating she was not injured at work and IME opinions indicating her condition is not work related. The treating physician's opinion is entitled to some deference, especially in a proceeding for interim benefits and conflicts in testimony raise credibility issues which can only be resolved after a full trial on the merits of the claim for benefits.

Constitutions, Statutes, Rules, and Regulations: Workers' Compensation Court Rules: ARM 24.5.314. Unless formal hearing is requested the Workers' Compensation Court will resolve requests for interim benefits under section 39-71-610, MCA, benefits on an expedited, informal basis, typically by telephone conference with counsel. ARM 24.5.314.

¶1 This is an appeal from an Order of the Department of Labor and Industry directing the Montana Health Network Workers' Compensation Trust to reinstate claimant's temporary total disability (TTD) benefits for 49 days. While section 39-71-610, MCA,[(1)] characterizes this proceeding as an "appeal", it also provides for a hearing, thus the matter is heard *de novo*. *Smith v. State Compensation Ins. Fund,* 2000 MTWCC 9, ¶ 22.[(2)]

¶2 Rule 24.5.314 of this Court provides for informal resolution of disputes arising under section 39-71-610, MCA, unless one or both parties request a formal hearing.[(3)] Neither party in this case requested a formal hearing, therefore, on November 26, 2002, the Court convened a telephone conference with counsel. Prior to the conference, both parties provided the Court with written argument, along with various documents.

¶3 The facts, briefly stated, are: (1) claimant suffered a right knee injury; (2) Montana Health Network accepted liability for the injury and thereafter paid TTD benefits for a time; (3) benefits were terminated earlier this year; (4) benefits were then reinstated for a time and then terminated again; and (5) the claimant is presently without income and has two children to support.

¶4 During the conference, counsel for Montana Health Network outlined the areas of dispute in candid and helpful terms similar to the outline furnished by claimant's counsel. Initially, there is a conflict in medical opinions. Claimant's treating physician opines that her current knee condition and disability are related to a work-related injury, whereas an independent medical examiner opines otherwise. Second, Montana Health Network has statements of three witnesses which indicate that claimant did not injure herself at work as she claims. If their testimony is more credible than claimant's is, then her treating physician's opinion is vitiated. However, as it now stands, claimant's case for benefits is supported by her own statement that she injured her knee at work and her treating physician's opinion that her knee condition is work related and still disabling.

¶5 This Court has previously articulated a standard for determining whether benefits should be temporarily reinstated under section 39-71-610, MCA, while a claimant pursues her claim on the merits.[(4)] As set out in discussion in *Smith, supra, ¶ 28,* four factors are considered. First, was liability for the claim accepted? Second, were benefits paid, especially for a significant time period? Third, has the claimant demonstrated she will suffer significant financial hardship if section 39-71-610, MCA, interim benefits are not ordered? Fourth, has the claimant tendered a strong prima facie case for reinstatement of the benefits she is seeking?

¶6 Factors one through three are patently satisfied. The significant question is number four and despite the statements of three witnesses, I find it is satisfied. Claimant need not prove her entitlement to TTD benefits in order to qualify for interim benefits under section 39-71-610, MCA. If that were the case, then the section would be unnecessary and meaningless. Rather, she need only tender substantial evidence which if believed would entitle her to the benefits. In this case, her treating physician's opinion is entitled to some deference. *See Kloepfer v. Lumbermen's Mut. Cas. Co.,* 276 Mont. 495, 498, 916 P.2d 1310, 1312 (1996).

¶7 As to the conflict in stories, without hearing the witnesses the Court is not in a position to judge credibility, thus it cannot disregard the claimant's assertions out of hand. Her claim was accepted by the respondent and it bears the burden of persuasion as to any allegation of fraud since fraud would constitute an affirmative defense. *See* Rule 8(c), Mont. R. Civ.P. and *Preston v. Transportation Ins. Co.*, 2002 Mont. 23, ¶ 30. I therefore find that claimant has met her burden under section 39-71-610, MCA, and that she is entitled to interim benefits for 49 days.

JUDGMENT

¶8 Montana Health Network shall reinstate and pay the claimant 49 days of TTD benefits.

¶9 In the event the claimant does not prevail on the merits of her claim for TTD benefits, or does not diligently pursue the merits, then she shall repay the benefits ordered herein.

¶10 The Court retains continuing jurisdiction to resolve any further disputes over the timing of the payments or any demand for repayment made pursuant to the previous paragraph.

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

DATED in Helena, Montana, this 5th day of December, 2002.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Joe C. Maynard
Mr. Marvin L. Howe
Submitted: November 26, 2002

1. Section 39-71-610, MCA (2001), provides:

> If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing before the workers' compensation court or prior to mediation, but the biweekly compensation benefits may not be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of the hearing or mediation. A party may appeal this order to the workers' compensation court. A proceeding in the workers' compensation court brought pursuant to this section is a new proceeding and is not subject to mediation. If after a hearing before the workers' compensation court it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for the payments by the claimant.

2. The discussion in *Smith* was as follows:

> ¶22 The 1999 revision still provides for a determination by the Department and an "appeal" to the Workers' Compensation Court, however, that language must be construed together and coordinated with the remaining language of the section. "In construing a statute, the statute must be read as a whole and its terms must not be isolated from the context in which the legislature has used them." *State v. Thomas,* 285 Mont. 112, 122, 946 P.2d 140, 146 (1997). The revision specifically provides for a hearing, not just judicial review, before the Workers' Compensation Court. Thus, even though not artfully drafted, the statute contemplates an initial order issued by an administrative officer of the Department, then, if a party disagrees with the order, a *de novo*

hearing before the Court. . . .

3. Rule 24.5.314 provides as follows:

> ADJUDICATION OF INTERIM BENEFIT CLAIMS UNDER 39-71-610, MCA.
>
> (1) Appeals of determinations by the department of labor and industry regarding interim benefits under 39-71-610, MCA, may be presented to the court in letter form. Such appeals shall be initially addressed informally by the court through telephone conference involving all parties.
>
> (2) If any party objects to informal resolution of a dispute under 39-71-610, MCA, a formal evidentiary hearing shall be held on an expedited basis. Such hearing may be

conducted through teleconference if all parties agree. If requested by any party, an in-person hearing will be promptly held in Helena or, at the court's discretion, in some other venue at a date and time set by the court.

4. Claimant has already filed a separate petition on the merits of her claim for benefits.