

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 1

WCC No. 2002-0559

RONALD HANSEN, SR.

Petitioner

vs.

VALOR INSURANCE COMPANY, INCORPORATED

Respondent/Insurer.

PARTIAL SUMMARY JUDGMENT

Summary: On stipulated facts, including agreement to consideration of certain records, the parties submitted question of whether under section 39-71-703(7), MCA (1999), the insurer is entitled to a credit of \$30,000 against any permanent partial disability benefits to which claimant may be entitled following a November 10, 2000 back injury.

Held: For a credit under subsection (7) section 39-71-703(7), MCA (1999), the insurer must show (1) that amounts previously paid as permanent partial disability benefits were for injury "to the same part of the body" and (2) that those amounts would be duplicated by a further award. Where claimant received two prior disputed liability settlements based on causation disputes between the parties, the total of the prior settlements approximated the costs of back surgery, no impairment ratings were rendered for injuries associated with prior settlements, and claimant's present impairment rating and disability is attributed to his most recent injury, an award of permanent partial disability benefits with respect to the recent injury will not duplicate amounts received by claimant in the prior settlements. Thus, insurer is not entitled to credit under subsection (7).

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-703(7), MCA (1999). For a credit under section 39-71-703(7), MCA, the insurer must show (1) that amounts previously paid as permanent partial disability benefits were for injury "to the same part of the body" and (2) that those amounts would be duplicated by the claimed present award. Where claimant received two prior disputed liability settlements based on causation disputes between the parties, the total of the prior settlements approximated the costs of back surgery, no impairment ratings were rendered for injuries

associated with prior settlements, and claimant's present impairment rating and disability is attributed to his most recent injury, an award of permanent partial disability benefits with respect to the recent injury will not duplicate amounts received by claimant in the prior settlements. Thus, insurer is not entitled to credit under subsection (7).

Benefits: Impairment Awards. For a credit under section 39-71-703(7), MCA, the insurer must show (1) that amounts previously paid as permanent partial disability benefits were for injury "to the same part of the body" and (2) that those amounts would be duplicated by the claimed present award. Where claimant received two prior disputed liability settlements based on causation disputes between the parties, the total of the prior settlements approximated the costs of back surgery, no impairment ratings were rendered for injuries associated with prior settlements, and claimant's present impairment rating and disability is attributed to his most recent injury, an award of permanent partial disability benefits with respect to the recent injury will not duplicate amounts received by claimant in the prior settlements. Thus, insurer is not entitled to credit under subsection (7).

Benefits: Permanent Partial Benefits: Generally. For a credit under section 39-71-703(7), MCA, the insurer must show (1) that amounts previously paid as permanent partial disability benefits were for injury "to the same part of the body" and (2) that those amounts would be duplicated by the claimed present award. Where claimant received two prior disputed liability settlements based on causation disputes between the parties, the total of the prior settlements approximated the costs of back surgery, no impairment ratings were rendered for injuries associated with prior settlements, and claimant's present impairment rating and disability is attributed to his most recent injury, an award of permanent partial disability benefits with respect to the recent injury will not duplicate amounts received by claimant in the prior settlements. Thus, insurer is not entitled to credit under subsection (7).

¶1 Before the Court are cross motions for partial summary judgment. Both motions concern the application of subsection (7) of section 39-71-703, MCA (1999), which limits permanent partial disability (PPD) benefits where the claimant has previously received PPD benefits for an injury to the same part of the body. The following facts are phrased and stipulated by the parties. (See Statement of Stipulated Facts.)

Stipulated Facts

¶1a On May 2, 1992, Mr. Hansen injured his lower back while lifting a hydraulic cylinder at work. (Industrial Accident Questionnaire dated July 29, 1992, attached as Exhibit A).

¶1b In January 1993, Mr. Hansen injured his lower back a second time by slipping on ice while at work (Dr. Irwin's report 4/22/93, p. 1, attached as Exhibit B; Dr. Rotar's consultation report 4/26/93 p. 1, attached as Exhibit C).

¶11c In April 1993, Mr. Hansen injured his lower back a third time by throwing sacks of potatoes while at work (Dr. Irwin's report 4/22/93 p. 1, attached as Exhibit B; Dr. Rotar's consultation report 4/26/92 p. 1, attached as Exhibit C).

¶11d On April 22, 1993, due to lower back pain caused by the accidents in January and April 1993, Mr. Hansen was examined by Dr. R. Stephen Irwin who noted intervertebral tenderness in the L3-L4 and L4-L5 disc spaces and diagnosed the condition as acute disc syndrome (Dr. Irwin's report 4/22/93, p. 2, attached as Exhibit B).

¶11e On April 29, 1993, Mr. Hansen was examined by Dr. Ingham who diagnosed a herniated disc at L5-S1 and recommended surgery to excise the herniated portion of the disc (History and Physical report 4/29/93, attached as Exhibit D).

¶11f On May 26, 1993, Mr. Hansen underwent a laminectomy during which a large herniated nucleus pulposus and several smaller disc fragments were removed from the L5-S1 disc space area (Operative Report 5/26/93, p. 1, attached as Exhibit E).

¶11g Mr. Hansen resolved his claim for lower back injuries occasioned by his May 1992 and January 1993 workers' compensation claims with Liberty Northwest Insurance Company in the total amount of \$15,000 (Petition for Compromise and Release Settlement 11/23/93, attached as Exhibit F). The settlement was approved by the Employment Relations Division on January 3, 1994 (Order Approving Compromise and Release Settlement, attached as Exhibit G).

¶11h Mr. Hanson [sic] resolved his April 1993 back injury claim with the State Compensation Insurance Fund on a disputed basis in exchange for \$15,000 (Petition for Compromise and Release Settlement 11/30/93, attached as Exhibit H). The Employment Relations Division approved the settlement on December 23, 1993 (Order Approving Compromise and Release Settlement, attached as Exhibit I).

¶11i On November 20, 1995, Mr. Hansen injured his back a fourth time while reacting to a fellow worker who gave him an unexpected "horse bite." (Dr. Ingham's report 11/30/95, attached as Exhibit J).

¶11j On May 4, 1998, Mr. Hansen injured his lower back for a fifth time as a result of twisting and turning while lifting pallets at work (Physical Therapy Progress Notes 5/6/98, attached as Exhibit K; Dr. Stepanski's report 5/6/98, attached as Exhibit L).

¶11k On November 10, 2000, Mr. Hansen suffered the lower back injury at issue in the instant case while lifting a box of drill bits at work (Claim Form, attached as Exhibit M; Dr. Stepanski's report 11/21/00, attached as Exhibit N).

¶11l On November 29, 2000, the MRI ordered by Dr. Stepanski revealed central disc bulging at L4-5; degenerative narrowing of the L5-S1 disc space with moderate bulge of the disc towards the left; and a mild bulging of discs, without associated cord compression or nerve

root impingement, at T7-T8 and T9-T10 (Dr. Schumpert's report 12/6/01, p. 2, attached as Exhibit O).

¶1m On December 6, 2001, Dr. John C. Schumpert conducted an independent medical evaluation to determine if Mr. Hansen's back pain was related to his injury of November 10, 2000, whether he had achieved maximum medical improvement and, if so, to assign an impairment rating (Report of Independent Medical Evaluation 12/6/01, p. 1, attached as Exhibit O). Dr. Schumpert determined that Mr. Hansen's back pain was related to his injury of November 10, 2000 and that Mr. Hansen had achieved maximum medical improvement (Report of Independent Medical Evaluation, 12/6/01, p. 6, attached as Exhibit O). Based on his findings and review of all available medical records, Dr. Schumpert assigned a whole person impairment rating of nine percent (Report of Independent Medical Evaluation 12/6/01, p. 6, attached as Exhibit O). Dr. Schumpert declined to apportion an impairment due to specific vertebrae or disc injuries but rather apportioned the entire impairment rating to lumbar and sacral injury and dysfunction with no portion of the impairment rating due to thoracic disc injury or dysfunction (Report of Independent Medical Evaluation 12/6/02 [sic], p. 5, attached as Exhibit O).

¶1n Mr. Hansen had never received an impairment rating for his back prior to December 6, 2001, at which time Dr. John C. Schumpert assigned a whole person impairment rating to Mr. Hansen's back (Affidavit of Ron Hansen, attached as Exhibit P).

¶1o Mr. Hansen's May 26, 1993 laminectomy, described in Stipulated Fact No. 6 above was not paid for by any workers' compensation or private insurance (Affidavit of Ron Hansen, attached as Exhibit P).

¶1p The workers' compensation settlements referred to in Stipulated Fact Nos. 7 and 8 above specifically closed Mr. Hansen's entitlement to medical benefits (Affidavit of Ron Hansen, attached as Exhibit P).

¶1q The injuries occurring while Liberty Northwest, the State Fund, and Valor were at risk primarily related to the L4-5 and L5-S1 levels of the lumbar and sacral spine (See Exhibit O).

¶1r The parties stipulate and agree that each record attached to this stipulation is a true and correct copy of the original and may be considered undisputed by the Court for purposes of summary judgment.

(Statement of Stipulated Facts signed by both counsel.)

¶12 The affidavit of claimant, incorporated into the Statement of Stipulated Facts, provides in full:

¶12a That on or about November 23, 1993, I signed a petition to resolve a May 1992 back injury claim and a January 1993 back injury claim with Liberty Northwest Insurance

Company, in the amount of \$15,000.00. The petition for compromise and release settlement was based upon a dispute regarding causation of my back injuries, and there was no provision for continuing medical treatment.

¶12b That on or about November 30, 1993, I signed a petition to resolve an April 1993 back injury claim with the State Compensation Insurance Fund, in the amount of \$15,000.00. The petition for compromise and release settlement was based upon a dispute regarding causation of my back injury, and there was no provision for continuing medical treatment.

¶12c That the back surgery that was performed by Dr. Ingham on April 29, 1993, was not paid for by any workers' compensation insurer or other private insurer.

¶12d That most of the \$30,000.00 obtained for back injuries of May 1992, January 1993, and April 1993 was spent on my May 26, 1993 back surgery and other related medical expenses.

¶12e That, to the best of my knowledge, I have never been assigned a whole-person impairment rating for any of my back injuries, prior to December 6, 2001.

(Statement of Stipulated Facts, Ex. P.)

Conclusions of Law

¶13 Claimant's Petition for Hearing alleges he is entitled to PPD benefits as the result of a November 10, 2000 injury. The 1999 version of the Worker's Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶14 Permanent partial disability benefits are governed by section 39-71-703, MCA (1999). Under that section, claimant seeks an award of 1% for age, 9% for his impairment rating, 20% for wage loss, and 5% for his physical restrictions, which totals 35%. (Petition for Hearing, ¶ 3.) However, citing subsection (7) of section 39-71-703, MCA, respondent asserts that the requested benefits must be offset by the \$30,000 previously received by claimant in settlement of prior claims.

¶15 Section 39-71-703(7), MCA (1999), 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.

¶16 In *Bergman v. Valor Insurance Co., Inc.*, 2002 MTWCC 30, this Court addressed application of the 1997 version of the subsection, which is identical to the 1999 provision. In *Bergman* the claimant sought a 15% impairment award, but no other PPD benefits, with respect to a 2000 low-back injury. He had previously entered into a \$9,500 settlement with respect to a prior, 1998 low-back injury. Although a 15% whole person impairment rating

had been rendered prior to the time of settlement, that rating had not been communicated to claimant and his attorney. The circumstances of the settlement were as follows:

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 [the adjuster] 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 (citation omitted.) 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. (citation omitted). She did not recall whether an impairment was discussed or factored into the settlement.

Bergman ¶ 17.

¶17 In *Bergman*, the parties agreed that "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." *Bergman, supra*, ¶ 17-18. However, the stipulated facts did not show a wage loss with respect to the 1998 injury and claimant did not assert a wage loss with respect to the 2000 injury. *Bergman*, ¶ 33 and Endnote 4.

¶18 Following the 2000 injury, Bergman was placed at maximum medical improvement. However, claimant's treating physician opined that claimant had not received any permanent injury to his lower back in addition to that previously rated (15% whole person). *Bergman, supra*, ¶ 25.

¶19 In *Bergman*, I found the claimant was **not** entitled to additional PPD benefits. The basis for that decision, however, was that claimant failed to prove that he permanently aggravated his preexisting back condition. Thus, irrespective of subsection (7), he failed to satisfy the requirements for an award of PPD benefits. In the alternative, however, I found that even if claimant qualified for PPD benefits with respect to his 2000 injury, the insurer was entitled to a credit under section 39-71-703(7), MCA. I wrote:

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.

Bergman ¶ 37, emphasis in original.

¶10 In the present case, respondent insurer argues *Bergman* requires that the request for PPD benefits be rejected. *Bergman*, however, is inapposite.

¶11 Initially, the claimant in this case has established that he suffered additional impairment and disability as a result of the 2000 injury. Although he had a history of back problems, prior to November 2000, he had been working for five years as a warehouse coordinator, a job that evidently involved some lifting. (Statement of Stipulated Facts, Exs. K - O.) On November 21, 2000, he told a physician that following the November 10, 2000 incident he had a continuous dull ache, alternating with sharp stabbing pains and indicated "[t]his is at a different level and different pain from previously." As of December 6, 2001, claimant had not returned to work. (Ex. N.) On that date, Dr. Schumpert **disapproved** claimant's time of injury job and reduced his lifting restriction from the previous "70-pound lifting limit" to "25 pounds occasionally and 15 pounds frequently." (Ex. O at 4-5.)

¶12 Most importantly, Dr. Schumpert has opined that claimant now suffers from "chronic lumbosacral back pain, **related to injury on 10 November 2000.**" (*Id.* at 4, emphasis added.) He attributed claimant's current pain to his November 10, 2000 injury and rendered the 9% impairment rating with respect to **that** injury. (*Id.* at 6.) Thus, the undisputed record establishes that claimant's current condition is related to the November 10, 2000 injury and represents a new condition with a separate permanent impairment rating. Respondent has failed to demonstrate any overlap between Dr. Schumpert's impairment rating for the 2000 injury and any impairment claimant may have had with respect to his prior injuries.

¶13 Moreover, respondent has failed to demonstrate any overlap of the other PPD benefits claimant seeks. Of course, the prior settlements did not allocate the benefits paid claimant. Such lack of allocation was of no avail to the claimant in *Bergman* since the settlement agreement in that case expressly encompassed settlement of the claimant's entitlement to an impairment award, thus it encompassed the impairment award even though it was unknown at the time of the settlement. The situation in this case is different. In *Bergman* the impairment following the second injury was identical to the impairment following the first. That is not true in the present case since the impairment rating for claimant's 2000 injury is separate and distinct from any impairment suffered with respect to his prior injuries. *Bergman* is also distinguishable because the prior settlement was with respect to an accepted claim, whereas the settlements in this case were on a disputed basis, with medical benefits closed. Assuming the settlements encompassed claims for lost wages, physical restrictions, and education, there is no evidence to show that claimant

suffered the loss of wages and physical restrictions for which he now seeks compensation. The only factor which is possibly duplicated is the education factor. But more importantly, the claimant in this case has sworn "[t]hat most of the \$30,000 obtained for back injuries of May 1992, January 1993, and April 1993 was spent on my May 26, 1993 back surgery and other related medical expenses." (Affidavit of Petitioner Ron Hansen, Sr., ¶ 4.) The respondent does not dispute his statement. It is also noteworthy that in the prior cases, claimant settled on arguable entitlement to temporary total disability benefits, which he would have received at least during his surgery and recovery if he had proven causality. I am therefore unable to determine that any portion of the settlements can be attributed to non-medical/PPD factors or that any portion of the settlements overlap the PPD amounts sought in the present case.

¶14 Accordingly, respondent is not entitled to a credit under subsection (7) of section 39-71-703, MCA (1999).

¶15 The Court makes no determination of the amounts due claimant other than 9% for the impairment rating. The amounts due for education, wage loss, and physical restrictions are alleged, however, they were not stipulated. Similarly, I make no determination regarding claimant's entitlement to rehabilitation benefits or attorney fees and penalties.

PARTIAL SUMMARY JUDGMENT

¶16 Respondent /Insurer is **not** entitled to a credit for amounts previously paid in the two disputed liability settlements claimant entered into with other insurers.

¶17 Any party to this dispute may have twenty days in which to request a rehearing from this Partial Summary Judgment.

DATED in Helena, Montana, this 8th day of January, 2003.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Kenneth S. Thomas

Mr. Joe C. Maynard

Appendix

Submitted: December 4, 2002

Appendix

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.

(3) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (5) by 350 weeks.

(4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.

(5) The percentage to be used in subsection (3) must be determined by adding all of the following applicable percentages to the impairment rating:

(a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40 years of age at the time of injury, 1%;

(b) for a worker who has completed less than 12 years of education, 1%; for a worker who has completed 12 years or more of education or who has received a graduate equivalency diploma, 0%;

(c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%.

Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.

(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, 5%; 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, 3%; 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, 2%.

(6) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage.

The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(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.

(8) If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable under this section must be calculated based on the wages that the worker earns or would be qualified to earn following the completion of the rehabilitation plan.

(9) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 20 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.