IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 22

WCC No. 2002-0614

MARCIA KAPOR

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE CORPORATION

Respondent/Insurer.

PARTIAL SUMMARY JUDGMENT

Summary: On February 3, 1997, claimant suffered a work-related neck and upper-back injury when she was hit in the head and neck by boxes. She was declared at maximum medical improvement (MMI) by her treating physician on August 22, 1997, but rated with a zero percent (0%) impairment rating even though her physician restricted her physical activities. While initially allowing her to return to her time-of-injury job provided her restrictions were respected, the treating physician ultimately determined that claimant was unable to return to her time-of-injury job. Ultimately, on May 1, 2001, a medical panel designated by the insurer found that claimant had a five percent (5%) impairment. Its report suggested that the original MMI finding was erroneous.

Held: The claimant's request for rehabilitation benefits is not barred by the requirement of section 39-71-1006(5), MCA (1995), that the claimant commence a rehabilitation program within 78-weeks of reaching MMI. The limitations of section 39-71-1006(5), MCA, applies only upon a finding of MMI and determination that claimant has a rateable impairment. Since claimant did not have a rateable impairment, the limitations period did not begin running. It began running on May 1, 2001, when a medical panel found that she was not only at MMI but also had a rateable impairment. Her claim for rehabilitation benefits is therefore not time-barred. Moreover, there is a factual issue as to when claimant in fact reached MMI.

Topics:

Limitations Periods: Rehabilitation Benefits. Under 1995 law, claimant must begin a rehabilitation program within 78-weeks of reaching MMI. However, for the section to apply,

the claimant must be eligible for benefits. Where claimant is not eligible at the time of MMI the period begins to run when she becomes eligible. § 39-71-1006, MCA (1995).

Limitations Periods: Rehabilitation Benefits. Where the claimant is eligible for rehabilitation benefits but the insurer notifies claimant of her entitlement to permanent partial disability benefits, including wage-loss benefits, without mention of rehabilitation benefits, the notice implicitly represents that the claimant is not entitled to rehabilitation benefits since wage-loss benefits are expressly tied to claimant's completion of a rehabilitation program, § 39-71-703(8), MCA (1995). In light of that representation, claimant should be allowed to present evidence which may give rise to an estoppel from asserting the 78-week limitation period of section 39-71-1006(5), MCA.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-1006(5), MCA (1995). Under 1995 law, claimant must begin a rehabilitation program within 78-weeks of reaching MMI. However, for the section to apply, the claimant must be eligible for benefits. Where claimant is not eligible at the time of MMI the period begins to run when she becomes eligible. § 39-71-1006, MCA (1995).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-1006(5), MCA (1995). Where the claimant is eligible for rehabilitation benefits but the insurer notifies claimant of her entitlement to permanent partial disability benefits, including wage-loss benefits, without mention of rehabilitation benefits, the notice implicitly represents that the claimant is not entitled to rehabilitation benefits since wage-loss benefits are expressly tied to claimant's completion of a rehabilitation program, § 39-71-703(8), MCA (1995). In light of that representation, claimant should be allowed to present evidence which may give rise to an estoppel from asserting the 78-week limitation period of section 39-71-1006(5), MCA.

Impairment: Generally. "Impairment" is a term of art connected to impairment ratings and the American Medical Association Guides to the Evaluation of Impairment. §§ 39-71-703(1) and -711, MCA (1995). Where a claimant is rated with a zero (0%) impairment, the claimant does not have a "permanent impairment" within the meaning of section 39-71-1011(2), MCA (1995), and is not eligible for rehabilitation benefits.

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Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-703(1), MCA (1995). Impairment" is a term of art connected to impairment ratings and the

American Medical Association Guides to the Evaluation of Impairment. §§ 39-71-703(1) and -711, MCA (1995). Where a claimant is rated with a zero (0%) impairment, the claimant does not have a "permanent impairment" within the meaning of section 39-71-1011(2), MCA (1995), and is not eligible for rehabilitation benefits.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-711, MCA (1995). Impairment" is a term of art connected to impairment ratings and the American Medical Association Guides to the Evaluation of Impairment. §§ 39-71-703(1) and -711, MCA (1995). Where a claimant is rated with a zero (0%) impairment, the claimant does not have a "permanent impairment" within the meaning of section 39-71-1011(2), MCA (1995) and is not eligible for rehabilitation benefits.

Summary Judgment: Disputed Facts. Where claimant had previously been found to be at MMI but a medical panel thereafter recommends changes in claimant's medications and exercise program and says with those changes she will have reached MMI, questions concerning what the physicians meant by reaching MMI and whether claimant had regressed or ever reached MMI, require an opportunity for an evidentiary hearing.

¶1 Claimant is seeking rehabilitation benefits. Liberty Mutual Fire Insurance Corporation (Liberty) has denied her request based on section 39-71-1006(5), MCA (1995), which provides:

(5) To be eligible for [rehabilitation] benefits under this section, a worker is required to begin the rehabilitation plan within 78 weeks of reaching maximum medical healing.

Liberty argues that claimant's present request is time-barred under the section because she reached MMI on August 22, 1997, and the 78-week period has expired. Claimant moves for a partial summary judgment determining that the 78-week limitation does not apply in light of the facts of this case.

¶2 The facts set out below are limited to those which are material to disposition of the claimant's motion and which are undisputed by the parties. Many are taken from an exhibit notebook submitted by claimant in support of her motion. Those exhibits are not challenged by Liberty and the Court has looked to them in setting out the facts below. Liberty has also submitted exhibits in connection with its brief and claimant has not objected to them. The Court has therefore relied on them as well in preparing a final statement of facts.

Facts

¶3 On February 3, 1997, Marcia Kapor suffered an industrial injury arising out of and in the course of employment with United Parcel Service (UPS) in Yellowstone County, Montana. She injured her neck and upper back when she was unloading boxes off a shelf and several boxes fell striking her in the head and posterior neck.

¶4 Ms. Kapors employer, UPS, was enrolled under Compensation Plan 2 of the Workers Compensation Act and its insurer is Liberty.

¶5 At the time of her injury, Ms. Kapor held two jobs, the first was at UPS as a delivery person, the second was at CarQuest as a delivery person. The UPS job required that she lift up to seventy pounds.

¶6 Ms. Kapor was initially treated at St. Vincent Emergency Room and thereafter by Dr. Bill S. Rosen, a physiatrist at St. Vincent Rehabilitation Center. Dr. Rosen diagnosed "inner scapular thoracic strain with probably [sic] associated cervical strain. (Ex. 2 at 85-86.) On August 22, 1997, he declared her at MMI with a 0% impairment rating. (*Id*. at 86.) He released her to light-duty employment without other restrictions. (*Id*. at 85-87.)

¶7 Upon Dr. Rosen's recommendation, claimant went through a functional capacity evaluation (FCE) on October 13, 1997 (*id*. at 46-59), which found she was able to work in a medium-heavy capacity. (*Id*. at 60.) Based on the FCE, Dr. Rosen raised her restrictions to a level consistent with the FCE. (*Id*. at 43-44.) He approved her return to work at UPS with the proviso that UPS accommodate physical restrictions set out in the FCE. (Ex. 2 at 43.) However, he was pessimistic she would be able to actually preform her UPS job, writing: "Overall, I am not optimistic that Marcia [claimant] will be able to return to successful employment at UPS . . . ." (*Id*.)

¶8 In November 1997, Liberty designated a rehabilitation provider for claimant. (Ex. 3 at 13.)

¶9 Thereafter, on January 24, 1998, Dr. Rosen reviewed a job description for claimant's time-of-injury job and disapproved it. (*Id*. at 20-22.)

¶10 Liberty agrees claimant suffered an actual wage loss under section 39-71-703, MCA (1995). (Liberty's Reply Brief in Opposition to Motion for Partial Summary Judgment at 2.) On February 7, 1998, it notified claimant that it was paying her a 25% permanent partial disability (PPD) award, 20% for wage loss and 5% for a reduction in labor capacity from heavy to light. (Ex. B to Liberty's Reply Brief.)

¶11 **Liberty's February 7, 1998 notice to claimant did not advise her of any entitlement to rehabilitation benefits**. (*Id*.)

¶12 Claimant continued to seek medical care both from Dr. Rosen and Dr. Echeverri (a neurologist), complaining of headaches, neck pain, and left arm numbness. (Ex. 2 at 35-39, 146-154.) By July 29, 1998, Dr. Rosen suspected claimant was suffering from thoracic outlet syndrome. (*Id*. at 35-36.)

¶13 On October 29, 1998, Dr. John I. Moseley, a neurosurgeon, diagnosed bilateral thoracic outlet syndrome. (*Id*. at 165.) On January 12, 1999, Dr. Rosen opined that the thoracic outlet syndrome was an occupational disease "which may have been aggravated by her

most recent injury." (*Id.* at 33.) Over the next two years she continued to see Dr. Rosen for her complaints. In 2000 he prescribed various medications and also administered trigger point injections. (*Id.* at 18-20, 23-24.)

¶14 In 2001, Liberty referred claimant to a medical panel for an independent medical evaluation (IME.) A panel, consisting of Drs. Henry H. Gary (neurosurgeon), Lennard S. Wilson (neurologist), and Michael A. Sousa (orthopedic surgeon), examined claimant on May 1, 2001. (*Id.* at 167-73.) The panel report contains a chronological summary of claimant's medical history. It's summary is more complete than the Court's summary here.

¶15 The claimant's complaints at the time of the panel exam were as follows:

At the present time, she complains of rather chronic persistent pain, which she states is underneath the shoulder blade and along the medial scapular border and across the superior scapular border and over the trapezius, greater on the left than on the right. It is always there, sometimes stabbing sharp increase in pain. All types of activity, cleaning the house, vacuuming, lifting laundry, walking, jumping will aggravate this pain. These activities also bring on increased lower back pain, especially when she is on her feet, and these activities also aggravate and bring on her headache. Her headache is described as just a spot in the left temporal area, quite severe, occasionally is on the right side. She did not describe pain radiating from the neck to the head. She does not note any increased pain with coughing, sneezing, strain. Her numbness is a rather numb feeling all the time, but she can feel, so she describes this as a subjective numbness. This is made worse by working with her hands above her shoulder level. All types of other activities make this feeling of numbness worse. The feeling of numbness is worse when her shoulder, interscapular and infrascapular pain and headache are worse as well. She has no problems with her legs, with the exception that after she sits for a period of time, she loses the feeling in her legs, which takes a few seconds to recover when she gets up.

(Ex. 2 at 170-71.)

¶16 The panel opined that claimant's thoracic outlet syndrome diagnosis was unsubstantiated and that she would not benefit from thoracic outlet syndrome surgery. It then reviewed claimant's history and treatment and made the following recommendations concerning her further treatment:

We feel that her heavy use of acetaminophen and ibuprofen may be causing a transfer migraine syndrome. Therefore, medicines such as Tylenol and ibuprofen should not be used, and she should be switched to other medications. An anti-depressant may be instituted, as she does appear to be having some depression. She might benefit from over-the-door traction used in a flexion attitude. She has tried over-the-door traction, but was facing away from the door, by her description, and most likely was doing traction in an extension-type position.

(Ex. 2 at 173.) Finally, it answered addressed MMI and impairment:

With the change in treatment recommendations described above, she is at MMI. At this time, she would be a DRE Category 2 cervicotharcic, giving her a 5% permanent partial impairment rating.

(*Id*.)

¶17 Following the panel report, claimant's attorney requested rehabilitation benefits for claimant. (Ex. 4 at 1.) According to claimant's brief, but unsupported by evidentiary citation, a rehabilitation provider was designated and began evaluating claimant. (Fact 9 of Petitioner's Statement of Uncontested Fact.) Whether or not that is true, on December 19, 2001, Liberty's claims adjuster wrote a letter to claimant's attorney in which he denied liability for rehabilitation benefits based upon the 78-week limitation in section 39-71-1006, MCA. (*Id.* at 3.)

Discussion

¶18 Claimant was injured on February 3, 1997. The law in effect on that date was the 1995 version of the Workers' Compensation Act, therefore it is that law that applies to her request for rehabilitation benefits. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶19 Rehabilitation benefits are governed by Title 39, ch. 71, part 10. Eligibility for benefits is governed initially by section 39-71-1006(1), MCA (1995), which provides:

39-71-1006. Rehabilitation benefits. (1) A disabled worker as defined in 39-71-1011 is eligible for rehabilitation benefits if:

(a) the worker has an actual wage loss as a result of the injury;

(b) a rehabilitation provider, as designated by the insurer, certifies that the injured worker has reasonable vocational goals and reemployment opportunity and will have a reasonable reduction in the worker's actual wage loss with rehabilitation; and

(c) a rehabilitation plan agreed upon by the injured worker and the insurer is filed with the department. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning and completion date. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of public health and human services to use the funds.

Subsection (a) requires a wage loss for a worker to be eligible for rehabilitation benefits. Liberty concedes claimant has a wage loss. Its concession was made shortly after Dr. Rosen's 1997 MMI finding through its adjuster's letter of February 5, 1998. (¶ 10.) If that

were the only criteria, rehabilitation benefits should have been offered to the claimant in 1997. The were **not** offered.

¶20 As set forth in the initial, introductory sentence of section 39-71-1006, MCA, to qualify for rehabilitation benefits the claimant must first demonstrate that she is a "disabled worker as defined in 39-71-1011." That section of the 1995 version provides in relevant part:

39-71-1011. Definitions. As used in this chapter, the following definitions apply:
. . . .

(2) "Disabled worker" means a worker who has a **permanent impairment**, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury. [Emphasis added]
. . . .

¶21 The above quoted provision ties into this case because Liberty argues that since Dr. Rosen medically restricted her physical activities at the time he found her at MMI on August 22, 1997, she had an impairment which made her eligible for rehabilitation benefits at that time. Liberty's argument, it seems to me, is initially disingenuous. When it issued its letter of February 7, 1998, Liberty conceded that claimant had a wage loss. If it believed claimant also had an impairment as required by section 39-71-1011(2), MCA (1995), then it had a duty to advise claimant of her entitlement to rehabilitation benefits. It did not do so.

¶22 Moreover, its argument is without merit.

¶23 Liberty says that all that is required under section 39-71-1011(2), MCA, is that the worker suffer a "permanent impairment." It says that the fact that the claimant had a **zero (0%)** impairment **rating** is irrelevant to whether she had an **impairment**. It argues that she had an impairment since she had physical restrictions.

¶24 Liberty ignores the fact that "impairment" is not separately defined in the 1995 Workers' Compensation Act: It is not among the defined terms in section 39-71-116, MCA (1995). In construing section 39-71-1011(2), MCA, the Court must look at the Workers' Compensation Act as a whole and give effect to all of its provisions and its purpose. *Skinner Enterprises, Inc. v. Lewis and Clark County Bd. of Health*, 286 Mont. 256, 272, 950 P.2d 733, 742 (1997) ("In construing a statute, this Court must read and construe each statute as a whole so as to avoid an absurd result 'and to give effect to the purpose of the statute.'"). The terms of section 39-71-1011(2), MCA, must be considered and read in "the context in which they were used by the legislature." *State v. Stanko*, 1998 MT 323, 53, 292 Mont. 214, 974 P.2d 1139.

¶25 Section 39-71-703(1), MCA (1995), refers to impairment in the context of an "impairment rating," limiting PPD benefits to claimants who have **both** a wage loss 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**. [Emphasis added.]

The tie of impairment ratings to the American Medical Association Guides to the Evaluation of Impairment is reiterated in section 39-71-711, MCA (1995), which provides in relevant part:

39-71-711. Impairment evaluation -- ratings. (1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association;

(c) must be expressed as a percentage of the whole person; and

(d) must be established by objective medical findings.

. . . .

It is clear from the foregoing provisions that "impairment" is a medical finding and tied to the American Medical Association Guides to the Evaluation of Impairment.
A **zero** or **0%** impairment rating means that the worker has **NO medical impairment**.

¶26 Accordingly, Liberty's argument that claimant had an impairment making her eligible for rehabilitation benefits when declared at MMI by Dr. Rosen on August 22, 1997, is without merit. Moreover, Liberty's argument appears to be a new rationale which originated only in hindsight.

¶27 I therefore conclude that at the time Dr. Rosen found claimant at MMI she was not eligible for rehabilitation benefits. She became eligible for those benefits only upon the medical panel's determination on May 1, 2001, that she indeed had an impairment which it rated at 5%.

¶28 I turn to the question of whether the 78-week period commenced upon Dr. Rosen's 1997 MMI determination even though she was not eligible for rehabilitation benefits at that time. The question has two parts. First, in light of the claimant's ineligibility at the time of the MMI determination, did the limitations period begin to run at that time or did it begin running only after she was found to have an impairment? Second, if the limitations period

was triggered by Dr. Rosen's 1997 MMI finding, was it re-triggered by the medical panel's May 1, 2001 report? On question one I find for claimant. On question two, I find that there is a factual issue requiring further evidence.

¶29 In analyzing the first question, I again note that basic principles of statutory interpretation require that provisions of a statute must be interpreted in conjunction with each other to give effect to all provisions. (*See* ¶ 25.) Thus, the 78-week limitation period set out in section 39-71-1006(5), MCA (1995), must be read in conjunction with the eligibility requirements for rehabilitation benefits.

¶30 The 78-week limitation **implicitly assumes** that the claimant is eligible for rehabilitation benefits. **If the claimant is not eligible for the benefits, then it has no application.** I therefore conclude that the 78-week limitation commences running **only** when the claimant is determined to be at MMI **and** is determined to have a rateable impairment. Those twin requirements were not met until the medical panel issued its impairment rating on May 1, 2001. The claimant demanded rehabilitation benefits and Liberty denied those benefits within the 78 weeks. The denial of liability tolls the limitations period.

¶31 Moreover, if claimant was eligible for rehabilitation benefits on August 22, 1997, Liberty's failure to inform claimant of that fact in its PPD letter may give rise to an estoppel to now assert the limitations period. Subsection (8) of 39-71-703, MCA (1995), expressly ties rehabilitation benefits to PPD benefits, providing:

(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.

By notifying claimant on February 7, 1998, of her entitlement to PPD benefits, Liberty was clearly signaling claimant that she was ineligible for rehabilitation benefits. She should be allowed to show her reliance on that implicit representation for purposes of proving an estoppel.

¶32 Even if I am wrong with respect to my foregoing analysis, the claimant is still entitled to a trial regarding MMI. She alleges that Dr. Rosen's MMI determination was premature or that she reverted to non-MMI status after his determination. The panel report is ambiguous as to what the panel members believe constitute MMI, interpretation, thus preventing a determination as to when claimant in fact reached MMI, or whether she had reverted to non-MMI status. Moreover, there appears to be a factual dispute concerning thoracic outlet syndrome, a diagnosis offered by her physician after Dr. Rosen's MMI finding. This condition, or the symptoms associated with it, appear to have arisen, at least in part, after Dr. Rosen's MMI finding and led to additional treatment recommendations. I cannot say, based upon the medical records presented, that claimant did not revert to non-MMI after

Dr. Rosen's determination. This presents yet another factual issue. Claimant is therefore entitled to a trial on the MMI issue.

PARTIAL SUMMARY JUDGMENT

¶33 The claimant's request for rehabilitation benefits is not time-barred as a matter of law. If claimant wishes to develop a further factual record concerning the alternative grounds for this decision, the matter will be set for trial.

DATED in Helena, Montana, this 14th day of March, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. R. Russell Plath
Mr. Larry W. Jones
Submitted: December 12, 2002