IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 3

WCC No. 9903-8172

VALERY MEYER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

J.C. PENNEY COMPANY

Employer.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Case Summary: Motion for summary judgment brought by claimant based on letter from claims adjuster which claimant argues was an acceptance of the claim without a reservation of rights.

Held: Even if the letter constituted a binding acceptance which could not be altered by parol evidence or by a subsequent letter, other issues exist in case precluding summary judgment, i.e., whether claimant's present medical condition for which she sought benefits was related to claim which insurer allegedly "accepted," whether TTD benefits were properly terminated based on claimant working, whether claimant waived right to assert binding acceptance by not raising that argument for several years, among other issues.

Topic:

> **Summary Judgment: Criteria.** Even if the issue raised by claimant in her motion for summary judgment were resolved in her favor, other issues exist which require trial and prevent summary judgment in the case. Motion denied where Court cannot find no triable issue of fact in case.

¶1 Based on an alleged occupational disease arising June 1992, claimant Valery Meyer now seeks summary judgment awarding her temporary total disability benefits retroactive to early 1994 and continuing so long as she remains temporarily totally disabled. She also requests medical benefits for the alleged occupational disease.

¶2 Claimant contends undisputed facts demonstrate the insurer accepted the occupational disease claim without a reservation of rights. She then argues that Liberty Northwest Insurance Corporation (Liberty) cannot revoke its acceptance, hence she is entitled to benefits.

¶3 Claimant relies in large part upon the following September 20, 1993, letter to claimant from Claims Adjuster Erika Ayers:

> Dear Mrs. Meyer:
>
> Enclosed please find our check for $809.60 representing your lost time benefits from August 5, 1993 through September 17, 1993. Montana Workers' Compensation laws dictate a 6 day waiting period which is not paid. This period is from July 28, 1993 through August 4, 1993 which you will see indicated on your check stub. These monies were based on 2/3 of your average weekly wage of $193.25 and will be paid on a bi-weekly basis.
>
> As I indicated to you on the phone, it is important you remain under active treatment with Dr. Etter. I will be scheduling the independent exam in the near future and will let you know of the doctor, date and time.
>
> I am also enclosing a medical authorization form which I need you to sign. This will be sent to Dr. Etter so I may receive your medical records. Please return this to me right away.
>
> If you have any questions, please call.
>
> Sincerely,
>
> Erika Ayers
> Claims Adjuster

(Memorandum in Support of Claimant's Motion for Summary Judgment, ¶10; Affidavit of Erika Ayers Schulz, Ex. 2.)

¶4 Claimant also points to Compensation Reports submitted by the insurer to the Department of Labor and Industry during September 1993, which she contends used the transaction code for initial compensation payment, not the code for payment on a non-acceptance basis. (Memorandum in Support of Claimant's Motion for Summary Judgment, ¶7.)

¶5 Respondent does not dispute the content of the letter or the Compensation Reports, but submits an Affidavit of Erika Ayers Schultz, the adjuster, which states in pertinent part:

- Presently, I am a Case Manager with Liberty Northwest, working in Portland, Oregon. I have been employed by Liberty since February of 1991.

- I transferred to Montana for a six month period of time in 1993. It was during that time that I worked on the Valery Meyer claim.
- I was recently informed that this 1993 claim is being litigated and I was asked to review pertinent file materials regarding the adjustment of the file and my intentions regarding certain communications.
- My first contact with Ms. Meyer was on September 10, 1993. I phoned her to discuss the claim, but she indicated that she was not able to talk to me. She had my phone number and indicated that she would call me when she felt able to do so. (See Exhibit "1".)
- A week passed and I still had not heard from her. Consequently, I called her again on September 17, 1993. I awoke her from a nap and told her I only had 30 days to determine compensability and that I really needed to get information from her. She indicated she would return my call later that day. She did call back. (See Exhibit "1".)
- At that time, I did not have any medical records relating to her condition. **I communicated to her that I was going to begin paying time loss benefits, but that the investigation into her claim would go forward once we had been able to obtain information.**
- I have reviewed my letter of September 20, 1993. That letter sets out my intention to begin making time loss payments, to obtain her medical records, which we had not received, and to set an independent examination. (See Exhibit "2".)
- The purpose of that letter was simply to outline the benefits available and to get the medical authorization. I had no intention of accepting her claim and had communicated the same. There was simply no basis for accepting the claim because we had no documentation to support it.
- My intention was further reflected in indicating I would set an Independent Medical Examination. The purpose of the examination was to help determine compensability of her claimed condition. If I had accepted the claim, there would be no reason for an independent examination at that point.

(Affidavit of Erika Ayers Schulz, at 2-3; emphasis added.)

¶6 The insurer also points to an October 18, 1993 letter, from the adjuster to claimant, which provided in part:

As I previously explained, we have 30 days in which to make a compensability decision regarding your condition. Those 30 days have expired and I have not received any medical information relating your condition to your work exposure. Therefore, we are accepting your

condition pending further medical information. The timeloss benefits you continue to receive do not represent final acceptance of your claim.

(*Id.,* Ex. 5.)

¶7 Summary judgment may be granted where the uncontroverted, material facts require judgment as a matter of law. ARM 24.5.329; *Schelske v. Creative Nail Design, Inc.*, 280 Mont. 476, 482, 933 P.2d 799, 802 (1997).

¶8 In this case, even if I determine that the September 20, 1993 letter constituted a binding acceptance which cannot be contradicted by parole evidence or the subsequent, October 18, 1993 letter, the insurer has raised other issues which prevent summary judgment. As rephrased by the Court, these include the following:

> 1. Whether there is a causal connection between the claim for "difficulty breathing" which the insurer is alleged to have accepted and the alleged medical condition and disability spanning several years for which claimant seeks compensation. *See, LaPlant v. State Compensation Ins. Fund,* 1999 MTWCC 75, ¶15.
>
> 2. Whether temporary total disability benefits were properly terminated based on medical reports that claimant was capable of gainful employment.
>
> 3. Whether claimant waived her right to assert the insurer's acceptance of the claim by waiting several years, or is judicially or equitably estopped from asserting the claim at this time or in light of her pursuit of occupational disease benefits through a claim filed with the Department of Labor and Industry and now consolidated with this case.
>
> 4. Whether section 39-71-606(5), MCA, *Solheim v. Tom Davis Ranch,* 208 Mont. 265, 677 P.2d 1034 (1984), and this Court's decision in *Gunder v. CIGNA,* 1999 MTWCC 31, allows the insurer to contest the claim under the facts of this case.

¶9 Other than noting claimant's failure to persuade me she is entitled to summary judgment on these issues, I decline to rule more particularly on the issues raised by the motion. *See* ARM 24.5.329 (noting summary judgement in workers' compensation cases may delay trial without corresponding economies and allowing the Court to decline to consider individual summary judgment motions if it concludes the issues raised may be resolved as expeditiously by trial as by motion).

ORDER

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

¶11 SO ORDERED.

DATED in Helena, Montana, this 12th day of January, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Andrew J. Utick
Mr. Steven S. Carey
Date Submitted: October 22, 1999