

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 4

WCC No. 9305-6795

INDUSTRIAL INDEMNITY INSURANCE COMPANY

Petitioner

vs.

ROBERTA C. RYAN

Respondent.

ORDER DENYING ALL OUTSTANDING MOTIONS

The Court presently has under consideration a **Motion For Summary Judgment** filed by petitioner and numerous motions filed by the respondent. After reviewing each of the motions, the Court has determined that they should all be denied and that this case should be scheduled for trial.

Background

The petitioner, Industrial Indemnity Insurance Company (Industrial), is the insurer for respondent's former employer, Valley View Estates (Valley View). On August 25, 1986, the respondent, Roberta C. Ryan, suffered a work-related injury while working for Valley View. Industrial alleges that on April 3, 1987, respondent suffered a second, permanently disabling work-related injury. At that time, Valley View was insured by a different company, which ultimately settled with respondent. Industrial's petition seeks a determination that it is not responsible for any further medical or disability benefits. It alleges that respondent's disability and current medical condition are attributable to the second injury. Respondent, however, at various places denies any second injury and has demanded benefits from Industrial. She is now seeking an emergency lump sum advance.

This case already has a long and convoluted procedural history. Respondent is appearing without an attorney. Her husband initially attempted to represent her but was properly barred from doing so by Court Order on August 6, 1993. On September 7, 1993, the undersigned replaced the Honorable Timothy W. Reardon as Judge of the Workers' Compensation Court. On November 3, 1993, it entered an Order disposing of various pro sé requests filed by respondent. At the same time, it issued an **Order to Show Cause Why The Petition Should Not Be Dismissed**. The Order took note of respondent's initial

objection to Industrial's commencement of this proceeding, and requested the parties to address the appropriateness of the insurer initiating litigation requesting a factual determination that it is not liable for disability or medical benefits. Meanwhile, Industrial had filed a motion for summary judgment asking the Court to summarily absolve it of further liability to respondent.

Respondent's response to the **Order To Show Cause** created uncertainty as to whether she still desired dismissal of this case, especially in light of her own requests for affirmative relief. Because of that uncertainty, on December 7, 1993, the Court issued an **Order Directing Respondent To Clarify Position**. Respondent's response, which was received on December 13, 1993, indicated her desire to pursue affirmative relief against Industrial, including a request for an emergency lump sum advance. She agreed that her requests for relief could be treated as a counter-petition. In light of the respondent's desire to go forward, on December 14, 1993, the Court then entered an **Order Regarding Submission of Pending Motions**. The Order directed the completion of briefing of the outstanding motions by December 29, 1993. The Court received an additional memorandum from respondent today, January 6, 1994. The motions are now ready for decision.

1. Request For Emergency Lump Sum Advance

On December 3, 1993, the respondent filed a request for an "emergency lump sum advance" and *Holton* award in excess of \$18,000. She further requested that an emergency telephone hearing be held to consider her request.

A *Holton* award is based on an impairment rating. **See *Holton v. F.H. Stoltze Land & Lumber Co.*, 195 Mont. 263, 637 P.2d 10 (1981)**. There is no indication in the materials provided the Court that any impairment rating has been rendered with respect to the August 25, 1986 injury, and Dr. Ellis' letter of March 18, 1987, states "there will be no impairment rating of any significant disability from this condition." Presently there is no basis for directing Industrial to pay an impairment award.

A lump sum is not available to respondent unless she prevails on the merits and establishes that she is due further disability benefits. The amount of any lump sum would also depend on the extent of liability for such benefits. Therefore, Industrial's liability, if any, must be determined first. The issues in this case are not susceptible to a telephone hearing. Moreover, it is doubtful that a trial on the merits could be held on an expedited basis. Respondent has not yet focused on the relevant issues in this case. The Court file is already thick with irrelevant argument and materials, as well as unfounded allegations. Sorting through respondent's myriad of allegations is difficult enough. To do so on an emergency basis would compound the Court's task. Respondent's request for an emergency hearing and for an emergency lump sum advance must therefore be denied.

2. Respondent's Request For Sanctions And Attorney Fees

In her response brief filed December 3, 1993, the respondent requests the Court to order sanctions and attorney fees against Industrial. The Court fails to find any substantial basis for such an award. Respondent has attempted to inject issues and facts which are not relevant to the issues properly before this Court. It is clear that she does not understand the legal process. This Court has previously urged her to retain an attorney to represent her, and it does so once more. Respondent's request for sanctions and attorney fees is denied.

3. Summary Judgment Motion

Industrial's motion for summary judgment is based on a subsequent injury. While respondent denies the second injury, documents furnished to the Court show that she filed a claim for an injury occurring on April 3, 1987, and she settled that claim for the sum of \$54,430.60. Respondent's affidavit supporting the settlement states: "It has been agreed that my claim will be settled on the basis of permanent total disability."

Industrial argues that the second injury cuts off all future liability for the August 25, 1986 injury. It cites ***Belton v. Carlson Transport***, 202 Mont. 384, 658 P.2d 405 (1983); ***Stangler v. Anderson Meyers Drilling Co.***, 229 Mont. 251, 746 P.2d 99 (1987) (summarizing the holding in ***Belton***); and ***Reever v. Sears Roebuck & Co.***, WCC No. 9208-6563 (June 7, 1993), as its principal authority.

The evidence mustered by Industrial in support of its motion is far too skimpy to support a summary ruling of the breadth sought.

Initially, it is not at all clear that the injury suffered on April 3, 1987 was to the same parts of the body as the August 25, 1986 injury. The August injury was reported on the claim form as to the "lower back." Dr. Ellis' office note of September 4, 1986, states that respondent "injured her low back area about a week ago." (Respondent's Ex. No. 4.) The settlement petition states that the April injury was to the neck and wrists, and that respondent had surgery for a protruding disc at the C5-6 level. ***Belton*** dealt with an ***aggravation*** of a preexisting work-related injury. Claimant in that case suffered a 1977 injury of his lower back, and a second injury in 1979, again to his lower back. In that context the Supreme Court held that where a respondent has reached maximum healing from the first injury, the insurer at risk at the time of a second injury is responsible for workers' compensation benefits. ***Stangler*** involved similar facts. The claimant in that case suffered two successive injuries to his lower back. The Court held that the insurer at risk for the second injury was responsible for further benefits because the claimant had reached maximum healing prior to the second injury. There is nothing in either of these cases which suggests that the insurer at risk for a subsequent injury to a different part of the body is liable for medical treatment for the earlier, unrelated injury or for compensation benefits proximately related to that earlier injury.

It is also inappropriate to grant a summary judgment ruling based on selected medical records, especially when the key records consist of correspondence rather than regularly kept office notes, consultative reports, and similar documents generated in the course of the patient's medical care. While Dr. Ellis expressed an opinion on March 18, 1987 that respondent had reached maximum healing, he could have changed his mind based on subsequent events. Respondent was also subsequently treated by other physicians who might disagree with Dr. Ellis. The party opposing motion for summary judgment is normally expected to identify any opposing evidence, the respondent in this matter is appearing pro sé. While respondent is expected to comply with Court rules, the Court has taken into consideration that she did not initiate this proceeding. Motions for summary judgment are especially disfavored in the Workers' Compensation Court. In a case such as this, unless the Court is satisfied that a sufficiently complete factual basis has been established, and it reaches a firm conviction that further factual inquiry would be unproductive, it will not grant a motion for summary judgment. No medical depositions have been offered in this case. The only medical records submitted by Industrial are four short letters from Dr. Ellis. The Court is not convinced that the medical information is adequate to render a summary decision.

Even if Industrial's factual contentions are adopted, the Court is not convinced that the decision in **Reeverts** entitles Industrial to a judgment exonerating it from all future liability for compensation benefits. The decision in **Reeverts** ordered the insurer to pay permanent partial benefits during the period between two injuries. While the period between the two injuries in this case is short, **Reeverts** does not as a matter of law preclude benefits during that interval. Moreover, in an **Order Amending Judgment; Order Denying Rehearing** issued on August 31, 1993, the Court specifically held that Ms. Reeverts' entitlement to partial benefits would resume upon her reaching age 65. (Not discussed in **Reeverts** is the possibility that a permanently totally disabled claimant's condition may improve sufficiently to permit a return to work.) **Reeverts** has been appealed, and the Montana Supreme Court will ultimately determine what permanent partial benefits are available in cases involving subsequent injuries which are permanently disabling. At this time, this Court is not persuaded that Industrial is entitled to judgment exonerating it from all possible future liability to respondent.

Finally, the Court notes that both parties have submitted documents for its consideration in connection with the summary judgment motion. The documents are not attached to either affidavits, deposition or discovery answers. The Court will not consider such documents in connection with a motion for summary judgment. Parties must comply with Rule 56, Mont. R. Civ. P. when seeking a summary judgment.

For the reasons set forth above,

IT IS HEREBY ORDERED THAT respondent's motions for an emergency lump sum advance, sanctions and attorney fees are **denied**.

IT IS FURTHER ORDERED that petitioner's motion for summary judgment is **denied**. This matter will be set for trial.

DATED in Helena, Montana, this 4th day of January, 1994.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Charles E. McNeil

Ms. Roberta C. Ryan - Certified Mail