

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 20

WCC No. 9710-7842

KEITH WARREN SMITH

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

Respondent/Insurer for

BOISE CASCADE CORPORATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The insurer accepted liability for injuries sustained by claimant and paid benefits. Believing he may have thoracic outlet syndrome, claimant asked his treating physician whom he might visit for that problem. The treating physician, who himself had no reason to believe claimant in fact had thoracic outlet syndrome, mentioned to local physicians expert in that problem. Not satisfied with those names, the claimant asked for another name. He and the physician then discussed a doctor in Seattle whom claimant had seen for other problems. After learning claimant desired to travel to Seattle to see this physician for this problem, the insurer notified him it would not cover that visit. Claimant petitioned the Court to compel covering of expenses associated with the out-of-state evaluation he obtained.

Held: Petition denied. Claimant is not entitled to reimbursement for out of state assessment for thoracic outlet syndrome where no doctor had diagnosed claimant with the syndrome and his treating physician had only referred claimant to the Seattle physician to accommodate claimant's request that he be evaluated for the condition and only after claimant had rejected the doctor's recommendation that he consult one of two in-town physicians with expertise in the area.

Topics:

Benefits: Medical Benefits: Out-of-state Treatment. Claimant is not entitled to reimbursement for out of state assessment for thoracic outlet syndrome where no

doctor had diagnosed claimant with the syndrome and his treating physician had only referred claimant to the Seattle physician to accommodate claimant's request that he be evaluated for the condition and only after claimant had rejected the doctor's recommendation that he consult one of two in-town physicians with expertise in the area.

Estoppel and Waiver: Equitable Estoppel. Although insurer paid for claimant's prior out-of-state consultations with a particular physician, it was not estopped from refusing to cover claimant's desired return to the physician for a consultation on thoracic outlet syndrome where no physician had diagnosed him with that condition and his treating physician had recommended he consult with one of two local experts in the condition. Claimant had been promptly informed the insurer would not cover claimant's desired consultation.

¶1 The trial in this matter was held in Billings, Montana on February 2, 1998. The petitioner, Keith Warren Smith (claimant), was present and represented himself. The respondent, Old Republic Insurance Company (Old Republic), was represented by Mr. Robert E. Sheridan.

¶2 Witnesses: Keith Warren Smith and Gary Doerr were sworn and testified.

¶3 Exhibits: Exhibits 1 was admitted over objection. Exhibits 2 through 5, 18 and 19, 21 through 31 and 33 were admitted without objection. Exhibits 7 through 9, 11 through 15, 17 and 32 were withdrawn. Exhibit 10 was not admitted. There were no Exhibits 6, 16, or 20.

¶4 Depositions: The parties agreed that the deposition of Dr. Thomas R. Johnson can be considered part of the record.

¶5 Issues: The controversy in this case arises out of the refusal of Old Republic to pay for a July 25, 1997 medical examination of claimant by Dr. Frederick A. Matsen, III and for claimant's travel expenses to Seattle, Washington, where the examination was conducted. The issues, as phrased in the Pretrial Order, are as follows:

A. Whether authorization of the insurer is required before a claimant may consult with a medical specialist except in cases of medical emergencies or necessities.

B. Whether the Petitioner was entitled to consult with Frederick Matsen, III in Seattle without obtaining authorization from Respondent pursuant to the provisions of A.R.M. § 24.29.1403.

C. Whether Respondent is precluded by virtue of the application of laches or estoppel from asserting its right to require authorization before Petitioner may consult with a medical specialist.

(Pretrial Order at 2-3.)

¶16 At the close of trial, the Court questioned the phrasing of the issues in light of the evidence presented. The second issue is nothing more than a restatement of the first. If that issue is construed literally, the Court need only determine whether ARM 24.29.1403 (1991), which requires the insurer's prior approval of a consultation by a specialist, is applicable to this case and, if so, whether the doctrine of either estoppel or laches precludes Old Republic from invoking the regulation. Answers to those questions do not resolve the merits of the dispute. Old Republic is not automatically liable for Dr. Matsen's examination. It is responsible for the examination only if the referral to and examination by Dr. Matsen were medically reasonable. On the other hand, Old Republic is not automatically relieved of liability even if the prior approval requirement applies; its decision is reviewable on its merits by this Court, *Ingraham v. Champion International*, 243 Mont. 42, 793 P.2d 769 (1990).

¶17 Much of the evidence presented at hearing concerned the merits of Old Republic's determination disapproving Dr. Matsen's examination. In response to the Court's questions concerning the phrasing of the issues, Old Republic moved to conform the issues to the evidence. The motion is granted. It is evident that the parties did not intend that the Court answer abstract questions of law, rather they intended that the Court decide whether the claimant is entitled to payment of Dr. Matsen's bill and for travel reimbursement. Therefore, the following issue is added:

D. Whether Old Republic is liable for Dr. Matsen's July 25, 1997, examination of claimant and for claimant's travel expenses in connection with that examination.

* * * * *

¶18 Having considered the Pretrial Order, the trial testimony, the demeanor and credibility of the witnesses, the exhibits, the deposition, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶19 Claimant resides in Roundup, Montana.

¶110 On June 14, 1990, the claimant injured his shoulder and low back while in the course and scope of his employment for Boise Cascade Corporation.

¶111 At the time of the industrial injury, Boise Cascade was insured by Old Republic. Old Republic accepted liability for claimant's injury and paid compensation and medical benefits.

¶112 On December 15, 1992, claimant and Old Republic entered into a written settlement agreement with respect to claimant's future entitlement to benefits. The agreement, which was approved by the Department of Labor and Industry, reserved future hospital and medical benefits to claimant.

¶13 Claimant's primary injury was to his left shoulder. He was initially treated by Dr. Willard J. Hull, who performed a rotator cuff repair in October 1990. Claimant thereafter sued Dr. Hull.

¶14 Claimant returned to work in March 1991 but continued to have shoulder pain. He discontinued work on June 17, 1991, and thereafter, on September 19, 1991 sought further medical advice from Dr. Thomas R. Johnson. (Ex. 4 at 15.) Dr. Johnson diagnosed a "recurrent tear of [the] rotator cuff." (*Id.*)

¶15 Since September 1991, Dr. Johnson has been claimant's primary treating physician with respect to his 1990 injury.

¶16 Dr. Timothy Browne, an orthopedic surgeon practicing in Missoula, conducted an independent medical examination (IME) on September 6, 1991, at the request of Old Republic's adjuster. He reached the same conclusion as Dr. Johnson, to wit: claimant was suffering a recurrent rotator cuff tear. (Ex. 3 at 2.)

¶17 Dr. Johnson recommended a further consultation with one of two "world authorities on shoulder problems." (Ex. 4 at 15.) One of the two was Dr. Frederick Matsen, III, who practices in Seattle, Washington. Old Republic approved the consultation, and claimant saw Dr. Matsen in Seattle on October 11, 1991. Old Republic paid Dr. Matsen's medical bill and for claimant's travel to Seattle.

¶18 Dr. Matsen confirmed a recurrent tear of the rotator cuff. He recommended an initial trial of physical therapy. If that was unsuccessful, he recommended further rotator cuff surgery. (Ex. 5 at 3.) He referred claimant back to Dr. Johnson, stating, "Dr. Johnson would be imminently qualified to do this [the additional] surgery if he felt so inclined." (*Id.* at 4.)

¶19 Physical therapy was unsuccessful and on February 4, 1992, Dr. Johnson performed additional surgery on claimant's left shoulder. (Ex. 4 at 24.)

¶20 The February 4, 1992 surgery did not resolve claimant's symptoms. Over the next five years, claimant continued to have shoulder pain and on February 20, 1997, Dr. Johnson noted that claimant was having "occasional sharp shooting-like pain about the left shoulder that radiates down to the base of the hand, the hypothenar area of the hand." On February 20, 1997, claimant reported that his symptoms were different than his prior shoulder complaints. Dr. Johnson's impression was that "he may be getting some intermittent irritation of one of the cervical nerve roots." However, the doctor did not feel the symptoms were sufficiently severe to warrant treatment. (Ex. 4 at 2.)

¶21 In a May 8, 1997 visit to Dr. Johnson, claimant broached the possibility that he might be suffering from thoracic outlet syndrome. Dr. Johnson suggested claimant might see one of two Billings doctors with expertise in thoracic outlet syndrome. The doctor's office note for that date reflects:

He also mentioned he is having some problems with some intermittent numbness and tingling down into his arm and asked about thoracic outlet syndrome problem. I told him that Dr. John Moseley and Dr. John Cook have probably the most expertise in this area of anyone in Billings and that Keith [claimant] might want to check with them.

(Ex. 4 at 1.)

¶22 Until the time of Dr. Johnson's examination of claimant on May 8, 1997, Dr. Johnson had not entertained the possibility of thoracic outlet syndrome. Concerning the possibility, Dr. Johnson testified as follows:

Q. Had that [thoracic outlet syndrome] been anything you had considered during the course of your evaluation and treatment of him?

A. Not really. I felt that - I was more concerned maybe that he was having a problem from his neck, a pinched nerve in the neck, rather than from the thoracic outlet, but that certainly is in a differential diagnosis with someone who has numbness and tingling in their arm. Perhaps he had read something about it.

(Johnson Dep. at 11.)

¶23 Thereafter, at the request of claimant, Dr. Johnson wrote a letter referring claimant back to Dr. Matsen for reevaluation. The letter, dated July 2, 1997, read as follows:

My receptionist told me that you needed a new letter to see Dr. Matsen. Let this letter then serve as a letter of referral to see Dr. Rick Matsen, III, Professor and Chairman of the Department of Orthopedics at the University of Washington School of Medicine in Seattle, Washington, and a world authority on problems of the shoulder. This is for you to see Dr. Matsen in followup and reevaluation of your shoulder problem.

(Ex. 31.)

¶24 Dr. Johnson did not believe there was any emergency for claimant to see Dr. Matsen. He also did not believe that claimant's complaints required a referral to a physician outside of Billings. He identified Dr. Moseley and Dr. Cook, who both practice in Billings, as capable of determining whether claimant suffered from thoracic outlet syndrome. (Johnson Dep. at 15.) Indeed, he wrote the July 2, 1997 letter referring claimant to Dr. Matsen simply because claimant expressed a desire to see Dr. Matsen. (*Id.*)

¶25 With Dr. Johnson's July 2, 1997 letter in hand, claimant requested Old Republic to authorize an examination by Dr. Matsen and pay his travel expenses to Seattle for the examination.

¶26 Gary F. Doerr (Doerr), the claims adjuster in charge of claimant's case, requested further information from Dr. Johnson. On July 21, 1997, Doerr received a call from Dr. Johnson's office advising him that the visit to Dr. Matsen did not constitute a medical emergency.

¶27 Based on the call, Doerr wrote a letter to claimant advising him that he was **not** authorizing a visit to Dr. Matsen and telling him, "I cannot authorize out of state medical referrals unless they are medically necessary." (Ex. 25.)

¶28 On July 31, 1997, Doerr received a follow-up letter from Dr. Johnson. (Ex. 27.) In the letter, Dr. Johnson specifically replied to questions Doerr had posed in a July 21, 1997 letter to the doctor. (Ex. 24.) Dr. Johnson's letter shows that his referral of July 2, 1997, of claimant to Dr. Matsen was **solely** in deference to claimant's request for the referral. The paragraphs numbered 3 and 4 in the letter, which is set out in full below, are the critical paragraphs:

I am writing concerning your letter regarding Keith Smith, Claim 9000001. In your letter you pose four questions and I would answer them as follows:

1. The intermittent numbness and tingling is involving Keith's left arm and that is the same side that he has had the shoulder problems.
2. It is possible that Mr. Smith is suffering from an element of a thoracic outlet syndrome on the left side. However, I don't think at this time it is sufficiently severe to warrant any surgical treatment but he might benefit from an exercise program.
3. Your question was the medical necessity for Mr. Smith to revisit with Dr. Matsen. I believe Keith wants to see Dr. Matsen for evaluation of the possibility of a thoracic outlet problem. He has seen him in the past for this problem and feels comfortable with his opinion and I think it is for that reason that he would like to see him for the thoracic outlet problem. If he were to see someone in the Billings area for a thoracic outlet problem, I would suggest Dr. John Moseley or Dr. John Cook as being knowledgeable in this area.
4. I don't have any other recommendations regarding any additional treatment for Keith's left shoulder. I would suggest that you call Mr. Smith directly as far as his specific reasons for wanting to see Dr. Matsen at this time. I certainly do not have any objection for him seeing Dr. Matsen. I always welcome Dr. Matsen's opinion and recommendations.

(Ex. 27.)

¶29 Claimant received Doerr's July 21 denial letter (Ex. 25) prior to his departing for Seattle. Despite notice that Old Republic would not authorize the visit to Dr. Matsen and would not pay his travel expenses, claimant nonetheless went to Seattle and saw Dr. Matsen. He now

seeks an order directing Old Republic to reimburse him for his travel and pay Dr. Matsen's medical bill.

¶130 Dr. Matsen examined claimant on July 25, 1997. He reported his findings to Dr. Johnson in a letter of the same date. (Ex. 33.) The letter did not specifically address claimant's belief that he might be suffering from thoracic outlet syndrome. It merely set forth his symptoms and then stated:

We have reassured him that there is no need for additional surgical treatment of his current symptoms and that at this time we will continue with nonoperative management. . . .

(*Id.*)

¶131 Gary Doerr testified that irrespective of ARM 24.29.1403 (1989) he would have disapproved claimant's July 25, 1997 visit to Dr. Matsen because it was not medically necessary or reasonable. His testimony on this point was credible and persuasive.

¶132 Claimant has brought medical malpractice actions against a Billings hospital and at least two Billings physicians with respect to his medical care. He testified that, other than Dr. Johnson, he no longer trusts Billings physicians and hospitals. His lack of trust is one of the reasons he sought a further consultation by Dr. Matsen.

¶133 Claimant's blanket rejection of possible referrals to other Billings physicians and care at the other Billings' hospital is unreasonable. While he expressed his strong sentiment that he would not want to be treated at the other hospital, he gave no good reason for that opinion, and certainly provided no facts supporting his sentiment. He did not inquire as to Dr. Moseley's or Dr. Cook's qualifications or as to the hospital where they perform surgery.

CONCLUSIONS OF LAW

I. Applicable Law in General

¶134 As to substantive rights, the law in effect at the time of the claimant's injury governs his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Applicable Law Respecting Medical Benefits

¶135 Section 39-71-704(1), MCA (1989), governs claimant's entitlement to medical benefits. It provides in relevant part:

39-71-704. Payment of medical, hospital, and related services-fee schedules and hospital rates. (1) In addition to the compensation provided by this chapter and as an additional benefit separate and apart from compensation, the following must be furnished:

(a) After the happening of the injury, the insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained.

....

(c) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury pursuant to rules adopted by the department. Reimbursement must be at the rates allowed for reimbursement of travel by state employees.

The medical benefits provided under section 39-71-704, MCA (1989), are substantive and therefore apply. Later amendments to the section are therefore ignored.

III. ARM 24.29.1403 (1989)

¶136 In 1972, the Department of Labor and Industry (Department) adopted rules concerning the selection of a physician to treat an industrial injury. It adopted ARM 24.29.1403, which provides, as relevant to this case:

(3) Except in an emergency, approval of the insurer must be obtained before referral of a worker to a medical specialist for consultation. The report of the consultant shall be available to the insurer upon request. Insurers may request consultation and evaluation by a physician of their choice.

The foregoing regulation was invoked by Old Republic as the initial basis for its denial of Dr. Matsen's bill and claimant's travel expenses.

¶137 In 1993 the regulation was repealed and a new regulation -- ARM 24.29.1511 -- was adopted. 1993 MAR at 404. The new regulation provides in relevant part:

(3) Only the treating physician may refer an injured worker to another provider. The treating physician remains responsible for the overall medical management of the injured worker, despite the referral. If the treating physician transfers that responsibility to another physician, the physician loses the status of being the worker's "treating physician" and will not be able to make referrals. Prior authorization is required for change of treating physician.

As readily apparent, the new regulation does not require an emergency as a prerequisite to a referral.

IV. Applicability and Validity of the 1989 Regulation

¶138 Statutes and regulations which do not affect the rights of the parties, and which govern only the procedures for implementing those rights, may be applied with respect to past

injuries. *State Compensation Mut. Ins. Fund v. Sky Country, Inc.*, 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989).

¶139 If ARM 24.29.1403 is interpreted as a substantive provision, it must give way if in conflict with statutes governing medical benefits, specifically, section 39-71-704, MCA (1989). *Michels v. Department of Social and Rehabilitation Services*, 187 Mont. 173, 178, 609 P.2d 271, 273 (1980) ("Whatever force and effect the regulation has must derive from the statute under which it is enacted, and a regulation in conflict with that statute is without effect."). Section 39-71-704, MCA (1989), does not limit medical care to "emergency care," rather it authorizes "reasonable services." Insofar as ARM 24.29.1403(3) (1989) purports to limit speciality referrals to emergencies, and thereby deny claimant reasonable medical care by specialist physicians, it conflicts with the statute and is void.

¶140 Insofar as the regulation merely requires that the insurer review the proposed referral to determine if it is medically reasonable, ARM 24.29.1403(3) is consistent with the statute. However, construed in that vein, the regulation is procedural and does not apply to decisions made after its repeal on April 1, 1993.

¶141 I therefore conclude that ARM 24.29.1403(3) (1989) does not affect the claimant's entitlement to payment for Dr. Matsen's July 25, 1997 examination or claimant's travel to Seattle for that examination.

V. Medical Reasonableness

¶142 It is clear that in denying liability for the referral to Dr. Matsen, the claims adjuster was looking beyond the bare fact that no emergency existed. While he denied permission for the referral, at the same time he was seeking information as to whether a further medical consultation was medically necessary and, if so, whether such consultation could be reasonably provided by other physicians in Billings. (Ex. 24.)

¶143 Claimant has the burden of proving his entitlement to benefits with respect to his July 25, 1997 visit to Dr. Matsen. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 201, 598 P.2d 1099 (1979). Part of claimant's burden is to prove that the examination by Dr. Matsen, and the need to travel to Seattle for the examination, were medically reasonable. He has failed to sustain his burden.

¶144 Claimant's belief that he might be suffering from thoracic outlet syndrome was not supported by Dr. Johnson. Although Dr. Johnson conceded that thoracic outlet syndrome was one *possibility* in a differential diagnosis, there is no evidence that he ever seriously considered it. His medical notes and testimony demonstrate his opinion that claimant did not need surgery and that any medical work-up concerning possible thoracic outlet syndrome could be done by specialists in Billings. Dr. Johnson's correspondence and testimony reflect the fact that his referral of claimant back to Dr. Matsen was not based on

an opinion that such referral was necessary or reasonable, rather the referral was no more than an accommodation of claimant's wish to see Dr. Matsen. The referral has no better basis than the one which this Court rejected in *Mischelle Schelske v. Liberty Northwest Ins. Corp.*, WCC No. 9310-6925 (April 21, 1994), aff'd, 270 Mont. 527, 892 P.2d 572 (1995).

VI. Estoppel

¶45 Claimant contends that Old Republic's prior payment for his medical visits to Dr. Matsen estop Old Republic from denying payment for the July 25, 1997 visit. One of the essential elements of estoppel is reliance. *Kuzara v. State Compensation Ins. Fund*, 279 Mont. 223, 231, 928 P.2d 136, 141 (1996). That element is wholly lacking. Old Republic notified claimant, prior to his leaving for Seattle, that it would not authorize or pay for the visit. In light of the notification, any reliance on the prior payments was unreasonable. His estoppel argument fails.

VII. Laches

¶46 Claimant asserts that the doctrine of laches requires payment for his visit to Dr. Matsen. Laches is an equitable doctrine which bars an action as untimely where "the passage of time has prejudiced the party asserting it [the doctrine] or has rendered the enforcement of a right inequitable." *Helena Aerie No. 16, F.O.E. v. Montana Dept. of Revenue*, 251 Mont 77, 81, 822 P.2d 1057, 1059 (1991). The doctrine is an equitable statute of limitations and has no application here. The insurer gave clear, unequivocal notice that it was denying the benefits sought by claimant. Claimant's action was brought promptly and there is no delay to consider.

JUDGMENT

¶47 1. The subject matter of this action concerns claimant's alleged entitlement to medical benefits. The Court has jurisdiction. § 39-71-2905, MCA.

¶48 2. Claimant is not entitled to medical benefits with respect to his visit to Dr. Matsen on July 25, 1997.

¶49 3. Claimant is not entitled to travel expenses in connection with his visit to Dr. Matsen on July 25, 1997.

¶50 4. Claimant is not entitled to any other relief with respect to his present petition.

¶51 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶52 6. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 4th day of March, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Keith Warren Smith - Certified Mail

Mr. Robert E. Sheridan

Date Submitted: February 2, 1998