IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 16

WCC No. 2003-0761

LENNIE J. THOMPSON

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant challenges his treating physician's impairment rating and finding of maximum medical improvement. He also demands a second independent medical examination paid for by the insurer.

Held: Claimant is not entitled to a second IME, or even a first IME, paid for by the insurer. Since he has presented no medical opinions contrary to those of his treating physician, the treating physician's opinions are adopted as correct.

Topics:

Independent Medical Examination: Generally. A claimant does not have a right to an independent medical examination paid for by the insurer. Statutes governing IMEs give the insurer, not the claimant, the right to request such examinations. § 39-71-605, MCA (1999). However, a claimant is always free to obtain a second opinion, including a second impairment evaluation, at his or her own expense. § 39-71-711(2), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-605 (1999). A claimant does not have a right to an independent medical examination paid for by the insurer. Statutes governing IMEs give the insurer, not the claimant, the right to request such examinations. § 39-71-605, MCA (1999). However, a claimant is always free to obtain a second opinion, including a second impairment evaluation, at his or her own expense. § 39-71-711(2), MCA (1999).

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examination paid for by the insurer. Statutes governing IMEs give the insurer, not the claimant, the right to request such examinations. § 39-71-605, MCA (1999). However, a claimant is always free to obtain a second opinion, including a second impairment evaluation, at his or her own expense, § 39-71-711(2), MCA (1999).

Proof: Burden of Burden of Proof: Generally. A claimant who disputes the impairment rating and maximum medical improvement finding of his own treating physician bears the burden of persuading the Court that some other impairment rating and or MMI date are more accurate. Where claimant failed to present any medical opinions contrary to those of his treating physician, he failed to carry his burden and the Court must adopt the treating physician's findings.

Proof: Burden of Proof: Maximum Medical Improvement. A claimant who disputes the impairment rating and maximum medical improvement finding of his own treating physician bears the burden of persuading the Court that some other impairment rating and MMI date are more accurate. Where claimant failed to present any medical opinions contrary to those of his treating physician, he failed to carry his burden and the Court must adopt the treating physician's findings.

Proof: Burden of Proof: Impairment. A claimant who disputes the impairment rating and maximum medical improvement finding of his own treating physician bears the burden of persuading the Court that some other impairment rating and MMI date are more accurate. Where claimant failed to present any medical opinions contrary to those of his treating physician, he failed to carry his burden and the Court must adopt the treating physician's findings.

Proof: Burden of Proof: Conflicting Evidence: Medical. Where claimant requested and obtained an independent medical examination by a physician who, unbeknownst to him, was married to his treating physician, and then objects to her opinions, his objection is immaterial where the only other opinions are those of his treating physician.

Constitutional Law: Constitutional Challenges: Standing. A claimant has no standing to challenge the constitutionality of statutes which are not related to the non-constitutional issues he or she raises.

Constitutional Law: Constitutional Challenges: Sufficiency. A claimant has no standing to challenge the constitutionality of statutes which are not related to the non-constitutional issues he or she raises.

Constitutional Law: Constitutional Challenges: Sufficiency. A shotgun attack on the constitutionality of multiple provisions of the Workers' Compensation Act and which is not supported by specific case authority will not be considered by the Court.

¶1 The trial in this matter was held in Missoula, Montana, on October 8, 2003. Petitioner, Lennie J. Thompson (claimant), was present and represented himself. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Ms. Carrie L. Garber.

¶2 Exhibits: Exhibits 1 and 2 were admitted without objection. At trial I indicated that Exhibit 3 and attachments to claimant's motions will be considered but only insofar as they are relevant and helpful in resolving the legal issues in this case. After reviewing Exhibit 3 and the attachments, I find them unhelpful and irrelevant to the issues in this case.

¶3 Witnesses: Jamie Kern, Dr. Thomas A. Rickard, and claimant testified. No depositions were submitted.

¶4 Issues Presented: The issues as set forth in the Pretrial Order are:

> Claimant's Statement of the Issues
>
> ¶4a Whether the Court was, is, and has been limited in what it awarded and can award injured workers by laws which were arbitrarily promulgated by the state legislature and are unconstitutional because they are against state/people's interest. Those laws also violate the fourteenth amendment to the U.S. Constitution by depriving persons of property without due process of law and equal protection of the laws. Those laws include but are not limited to: 39-71-105. Declaration of public policy; 39-71-605. Examination of employee by physician - effect of refusal to submit to examination - report and testimony of physician - cost; 39-71-701. Compensation for temporary total disability - exception (3); 39-71-703. Compensation for permanent partial disability benefits; 39-71-721. Compensation for injury causing death - limitation; 39-71-725. Payment of burial expense; 30-71-721. Compromise settlements and lump-sum payments; 39-71-808. Compensation for occupational deafness; 39-71-1014. Rehabilitation services - required and provided by insurers; 39-71-1025. Auxiliary rehabilitation benefit...
>
> ¶4b Whether it was a conflict of interest for Dr. Capps to give a second opinion about the plaintiff's disability when her husband, Dr. Richard [sic], was the original treating surgeon and disability rating physician for the plaintiff's impairment rating.
>
> ¶4c Whether a 1% impairment rating is a proper estimate given the plaintiff's inability to return to his previous line of employment.
>
> ¶4d Whether Liberty Northwest was unreasonable in denying payment for a third opinion about the plaintiff's impairment rating.
>
> ¶4e Whether MMI was prematurely given.
>
> Respondent's Statement of the Issues
>
> ¶4f Whether the Worker's Compensation Act is unconstitutional.

¶4g Whether the Court has jurisdiction to find an alleged conflict of interest between physicians and provides some remedy therefore.

(Pretrial Order at 2-3.)

¶5 Bench Rulings: At the close of trial the Court ruled that claimant failed to carry his burden of proving a higher impairment rating than determined by Dr. Rickard and paid by Liberty. I further ruled that, contrary to the claimant's arguments, medical doctors are not required to be certified to give impairment ratings. Finally, I ruled that Liberty is not required to pay for a third impairment rating.

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

FINDINGS OF FACT

¶7 This is the second in a series of cases brought by the claimant against Liberty with respect to a November 23, 1999 industrial injury. Some of the background facts are therefore taken from my prior decision in *Thompson v. Liberty Northwest Ins. Corp.,* 2002 MTWCC 34. That prior decision will be cited as *Thompson I*.

¶8 The November 23, 1999 injury occurred while claimant was working for Alpine Log Homes, which was insured by Liberty. (*Thompson I,* ¶ 8.) Claimant was knocked off a scaffolding and fell five feet, hitting various parts of his body, especially his right leg, right shoulder, and head. (*Id*.) Liberty accepted liability for his claim. (*Id.* ¶ 9; Pretrial Order, Uncontested Fact 3.)

¶9 One of the claimant's treating physicians was Dr. Rickard, an orthopedic surgeon who preformed ulnar nerve surgery on the claimant on June 4, 2002. (Ex. 1 at 4.) Dr. Rickard opined that claimant reached maximum medical improvement (MMI) within four to six weeks of his surgery and rendered a one percent whole person impairment rating with respect to the ulnar nerve condition. (Test. *and* Ex. 1 at 1.) He stood by those assessments in his trial testimony.

¶10 The claimant challenged both the impairment rating and the MMI determination. He contacted Jamie Kern (Kern), his claims adjuster, and requested an independent medical examination (IME). He specifically asked Kern for an examination by Dr. Catherine Capps, who unbeknownst to him is married to Dr. Rickard. Ms. Kern did not question his request and set up an IME with Dr. Capps.

¶11 Dr. Capps is also an orthopedic surgeon but maintains her practice separate from that of her husband. Dr. Capps agreed with the one percent impairment rating. Of significance, and contrary to the claimant's argument that he was denied an independent opinion because of Dr. Capps' marital relationship with Dr. Rickard, Dr. Capps disagreed with Dr.

Rickard concerning the relationship of the claimant's carpal tunnel syndrome to occupational factors. She opined that it was related, while Dr. Rickard opined it was not.

¶12 Liberty paid for Dr. Capps' examination and evaluations.

¶13 Dissatisfied with the one percent impairment rating, the claimant then asked Liberty to pay for a second IME by another physician. Liberty declined but advised him that he was free to obtain another impairment rating at his own expense. He never did so.

¶14 The claimant has offered no medical opinions contradicting the one percent impairment rating or Dr. Rickard's MMI determination.

CONCLUSIONS OF LAW

¶15 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶16 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to additional benefits and relief he seeks. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶17 The claimant has cited no statutory or case authority for the proposition that he is entitled to an IME at the insurer's expense, and I am aware of none. Rather, it is the insurer's right to request an IME. § 39-71-605, MCA (1999). While Liberty agreed to and paid for Dr. Capps' IME, it was not required to do so. And, it certainly was not required to pay for yet a second IME requested by the claimant. The claimant, however, was free to seek an additional impairment rating at his own expense. Section 39-71-711(2), MCA (1999), provides in relevant part: "(2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice."

¶18 The claimant asserts his rights were somehow violated by the fact that Dr. Capps is married to Dr. Rickard. He cites no authority, moreover, I fail to see any prejudice to his case. I again note that the claimant specifically requested that Dr. Capps do the IME and that Dr. Capps' independence is evidenced by her disagreement with Dr. Rickard over the relationship of the claimant's carpal tunnel syndrome to occupational factors. More importantly, if Dr. Capps' opinion concerning the claimant's impairment rating is ignored, the only opinion remaining is that of Dr. Rickard. Most importantly, the claimant was free to seek out an additional impairment evaluation at his own expense.

¶19 During trial the claimant also challenged Dr. Rickard's impairment rating based on his lack of any formal certification to perform impairment evaluations. Impairment evaluations, however, are part of the practice of medicine, and the Guides to Impairment

are established and published by the American Medical Association, which is an association of medical doctors. There is no statutory requirement for licensed M.D.s to be certified in rendering impairment ratings. Only chiropractors require certification. § 39-71-711(3), MCA (1999.)[(1)]

¶20 The claimant also challenges the MMI determination by Dr. Rickard as premature. However, the claimant offered no MMI opinion contrary to that of the doctor. Lacking a contrary medical opinion, Dr. Rickard's opinion is persuasive.

¶21 Finally, the claimant launches a shotgun attack on the constitutionality of Montana's workers' compensation laws. In an earlier Order Vacating Judgment Dismissing Impairment Award and Constitutional Claims, I required the claimant to specify his constitutional challenge or face dismissal of that challenge for vagueness. He has not heeded my admonition.

¶22 The non-constitutional issues raised in this case concern the impairment rating for the ulnar nerve, the MMI determination, and the claimant's right to a second IME. While the claimant has standing to raise constitutional issues that are related to those issues, he has no standing to question statutory provisions which do not apply to his case. *State v. Kirkland,* 184 Mont. 229, 234, 602 P.2d 586, 590 (1979). Unfortunately, the claimant's constitutional arguments are not focused on statutes governing impairment awards, MMI, or IMEs. Rather, as set forth in his first issue of the Pretrial Order, he attacks a host of Montana statutes having nothing to do with those issues. Moreover, he has failed to cite legal authority supporting his arguments. His constitutional challenges do not merit further consideration and are rejected.

JUDGMENT

¶23 The claimant is not entitled to any of the relief he has requested, therefore, his petition is **dismissed with prejudice**.

¶24 This JUDGMENT is certified as final for purposes of appeal.

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

DATED in Helena, Montana, this 25th day of February, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lennie J. Thompson
Ms. Carrie L. Garber
Submitted: October 8, 2003

1. Section 39-71-711(3), MCA (1999), provides:

> **39-71-711. Impairment evaluation -- ratings**.
> . . .
> (3) An evaluator must be a physician licensed under Title 37, chapter 3, except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12.