IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 31A

WCC No. 2001-0295

RICHARD WIARD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

DAW FOREST PRODUCTS

Employer.

ORDER DENYING MOTION FOR RECONSIDERATION

APPEALED 8/15/01 - AFFIRMED 10/30/03

Summary: The Court previously granted partial summary judgment to the insurer, finding that claimant's failure to use medical benefits for 60 continuous months precludes a claim for further medical benefits even if the benefits are for care related to the injury, § 39-71-704(1)(d) (1991). Claimant moved for reconsideration, alleging that the Court failed to follow its own policy regarding summary judgment. He also asserted that (1) the adjuster was aware that claimant was ignorant of the 60-month rule and the insurer should therefore be estopped from invoking the rule; (2) he is entitled to benefits despite MMI; and (3) the surgery for which he seeks benefits was a prosthesis and is therefore exempted from the 60-month rule.

Held: (1) The Court did not misapply its summary judgment policy. (2) There was no duty to inform claimant of the 60-month rule. (3) MMI is immaterial to the 60-month rule and the statute in any event is explicit and governs. (4) The claimant failed to raise the prosthesis argument, moreover, the surgery was not prosthetic surgery and in any event did not involve replacement or repair of a prosthesis.

Topics:

> **Summary Judgment: Criteria.** Court policies and rules do not preclude the grant of summary judgment. Where a party did not object to consideration of the motion, he cannot complain that the Court reached the merits of the motion.

Summary Judgment: Disputed Facts. In response to a motion for summary judgment, a party cannot hold back evidence and then seek reconsideration based on evidence and facts not tendered in response to the motion.

Procedure: Reconsideration. In response to a motion for summary judgment, a party cannot hold back evidence and then seek reconsideration based on evidence and facts not tendered in response to the motion.

Estoppel: Equitable Estoppel. Failure of insurer or adjuster to tell claimant that failure to use medical benefits for 60 months would result in termination of medical benefits was not a representation. There was no duty by the insurer to advise claimant of the 60-month limitation and no reliance on such omission. The 60-month limitation does not preclude claimant from seeking medical care during that time. The only purpose of requiring notice of requirement would be to allow a claimant to seek unnecessary care merely to toll the period, which would be tantamount to fraud.

Benefits: Medical Benefits: Sixty (60) Month Limitation. Failure of insurer or adjuster to tell claimant that failure to use medical benefits for 60 months would result in termination of medical benefits was not a representation. There was no duty by the insurer to advise claimant of the 60-month limitation and no reliance on such omission. The 60-month limitation does not preclude claimant from seeking medical care during that time. Only purpose of requiring notice of requirement would be to allow a claimant to seek unnecessary care merely to toll the period, which would be tantamount to fraud.

Benefits: Medical Benefits: Sixty (60) Month Limitation. Prosthetic exception to the rule providing that medical benefits terminate if not used for 60 continuous months applies only to the replacement or repair of a preexisting prosthesis.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-704 (1)(d), MCA (1991). Prosthetic exception to the rule providing that medical benefits terminate if not used for 60 continuous months applies only to the replacement or repair of a preexisting prosthesis.

Benefits: Medical Benefits: Sixty (60) Month Limitation. Bony fusion of cervical vertebrae does not constitute a prosthesis under section 39-71-704(1)(d), MCA (1991).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-704 (1)(d), MCA (1991). Bony fusion of cervical vertebrae does not constitute a prosthesis under section 39-71-704(1)(d), MCA (1991).

Benefits: Medical Benefits: Sixty (60) Month Limitation. Maximum medical healing is immaterial to the rule providing for termination of medical benefits if not used for 60 continuous months.

¶1 Petitioner requests the Court to reconsider its grant of partial summary judgment. His argument is in four parts. I will address each of them.

I. Procedural Arguments

¶2 Initially, claimant urges that the partial summary judgment was defective because it was issued 10 days before trial and before filing of the depositions of the claims adjusters. The argument is without merit. There is nothing to preclude issuance of partial summary judgment within 10 days of a pretrial. As to the depositions, claimant did not cite them in his response to the motion and did not request the Court to wait for them. The facts he offered in response to the motion were fully considered by the Court. He cannot hold back facts or evidence and then tender them after the motion was decided.

¶3 Claimant also urges that the summary judgment "was contrary to the Court's normal policy against summary judgment." He does not say why, and there is nothing in the rules that preclude summary judgment. There is provision for allowing a party to object to consideration of such a motion if trial of the matter would be more efficient. Rule 24.5.329(1)(c). However, claimant never objected to the Court's consideration of the motion. It is disingenuous of him to do so now.

II. Estoppel

¶4 Claimant urges that the deposition of Loren Hartman (Hartman), an adjuster for Liberty Northwest Insurance Corporation (Liberty), shows that claimant was never advised of the 60 month period and that Hartman knew claimant was unaware of the requirement. Based on this, he argues that Liberty is estopped from invoking the 60-month rule.

¶5 Initially claimant's tender of Hartman's deposition is untimely. He neither relied upon it nor requested the Court to consider it when responding to the summary judgment motion. A party cannot hold back evidence when responding to a summary judgment motion, and then seek reconsideration after an adverse ruling. Moreover, in this case, the proffered evidence would not change my ruling.

¶6 In his response to the motion for summary judgment, claimant asserted the failure to advise him of the 60 month period as one of the bases of his estoppel argument. I found that failure to advise does not amount to a representation, therefore element one of estoppel was lacking. In his motion to reconsider, claimant urges that there was a duty to inform claimant regarding the 60 month period since Liberty was aware of the limitation and more knowledgeable in workers' compensation matters. I am unpersuaded.

¶7 If claimant needed medical care during the 60-month period, then he could have sought care. Nothing that was said or not said by Liberty's adjuster deterred him from seeking medical care during the 60-month period had he needed it. (He did seek care on one occasion but the bill for that was rejected as unrelated to his injury, and he never pursued the matter further.) Underlying claimant's estoppel contention is an unspoken argument or assumption that had claimant known of the 60-month requirement he would have sought medical care within that period just to toll the running of the 60 months. It is only in that sense that failure to advise claimant of the period could constitute an omission upon which claimant could have relied. That sort of reliance is outside the contemplation of the 60-month statute. The right to medical benefits is the right to reasonably necessary care for the injury; care for the sole purpose of extending the 60-month period is not reasonably necessary medical care for which an insurer is liable. If a claimant does not need medical care during the 60-month period, securing care just for the purpose of extending the 60-month period is tantamount to fraud.

¶8 Thus, even if the claims adjuster was aware of claimant's ignorance of the 60-month limitation, that knowledge was immaterial. Moreover, claimant has misrepresented the testimony of the claims adjuster. Claimant asserts that the adjuster testified "that he knew that Mr. Wiard did not have knowledge of the sixty month rule." (Motion for Reconsideration and Brief in Support at 2.) That is untrue. Mr. Hartman merely "guessed" that claimant was not aware of the requirement:

> Q. And would it be your experience, then, that a pro se claimant would know of this [60 month] rule, independent of your telling him so?
>
> A. I would guess not. But I don't know it. It depends on the particular claimant.
>
> Q. What would your **guess** be as to this particular claimant, Mr. Wiard?
>
> A. I would **guess** not.

(Hartman Dep. at 14, emphasis added.)

III. Maximum Medical Improvement

¶9 Claimant argues that the fact that claimant reached maximum medical improvement (MMI) does not relieve an insurer of liability. He notes that the insurer continues to be responsible of benefits where there is no new intervening cause and that a claimant can revert to temporary total disability status even after reaching MMI. The argument misses the point of the partial summary judgment: Even though the principles are generally true, section 39-71-704(1)(d), MCA (1991), expressly cuts off further liability for medical benefits if the claimant does not use those benefits for 60 months. The cut off is irrespective of whether the claimant reached MMI.

IV. Prosthetic Exception

¶10 Finally, claimant urges that the surgery for which he seeks payment falls under the "prosthesis" exception to the 60-month rule. The exception is contained within the rule itself. Section 39-71-704(1)(d), MCA (1991), provides:

> (d) Except for the repair or replacement of a prosthesis furnished as a result of an industrial injury, the benefits provided for in this section terminate when they are not used for a period of 60 consecutive months.

¶11 Initially, this argument was never raised in claimant's response to the motion for partial summary judgment and it is too late to raise it now.

¶12 Moreover, the surgery in question was neither a "repair or replacement" of an existing prosthesis, nor is it a prosthesis at all. The surgery was an "[a]nterior cervical diskectomy and fusion at C6-7 with allograft interbody fusion and anterior instrumentation [i.e., plates and screws]." (Motion for Reconsideration and Brief in Support, Ex. C at 5.) Dorland's Medical Dictionary, 24th Ed. (1982), cited by claimant, defines prosthesis as "an artificial substitute for a missing body part." In this case, there was no replacement or repair of a device or prosthesis previously inserted into the cervical area. It was new surgery. Moreover, the procedure was a bony fusion of two adjacent vertebrae. The reference to an "allograft iliac crest wedge" is simply to the fact that bone from the claimant's iliac crest was used in the fusion.

ORDER

¶13 The motion for reconsideration is **denied**.

DATED in Helena, Montana, this 20th day of July, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Eric Rasmusson
Mr. Larry W. Jones
Submitted: July 5, 2001