IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 45

WCC No. 2002-0560

HEATHER APPLEGATE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

BITTERROOT VALLEY LIVING CENTER

Employer.

PARTIAL SUMMARY JUDGMENT

Summary: Claimant previously petitioned the Court for approval of rehabilitation benefits which the insurer had denied based on its view that she did not suffer a loss of wages. After trial, the Court found a wage loss and approved a plan that had previously been prepared by a vocational consultant. Claimant thereafter embarked upon the plan, commuting 84 miles daily to and from school. In her present action, she seeks auxiliary benefits under section 39-71-1025, MCA (1999), to pay for her travel.

Held: Claimant is entitled to travel reimbursement under section 39-71-1025(3), MCA (1999). Her claim for those benefits is not barred by her prior action since the matter was not litigated and was not inextricably related to the issues of that action. Similarly, the rehabilitation plan does not bar the benefits since it covered only benefits due under section 39-71-1006, MCA (1999), and made no provision barring other benefits. While the insurer "may" deny a request for auxiliary benefits, the Court may review that denial and order that the benefits be paid.

Topics:

Judgments: Res Judicata. Prior litigation seeking a determination that claimant suffered a wage loss and is therefore entitled to rehabilitation benefits does not bar a subsequent petition seeking auxiliary benefits to pay for travel which is necessary to implement a rehabilitation plan since the issue of auxiliary benefits was not raised or litigated in the

prior proceeding and was not inextricably connected to the issues actually litigated in the prior proceeding.

Benefits: Auxiliary. Commuting to and from school to fulfill a rehabilitation plan is "travel" required to "implement a rehabilitation plan." Under section 39-71-1025(3), MCA (1999), auxiliary benefits are available to reimburse a claimant for such travel.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-1025(3), MCA (1999). Commuting to and from school to fulfill a rehabilitation plan is "travel" required to "implement a rehabilitation plan." Under section 39-71-1025(3), MCA (1999), auxiliary benefits are available to reimburse a claimant for such travel.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-1025(3), MCA (1999). Where a statute (39-71-1025, MCA (1999)) broadly provides for reimbursement for travel which is necessary to "implement a rehabilitation plan," a court cannot insert an exclusion which would bar reimbursement for commuting 84 miles to and from school.

Statutes: Inserting or Removing Items. Where a statute (39-71-1025, MCA (1999)) broadly provides for reimbursement for travel which is necessary to "implement a rehabilitation plan," a court cannot insert an exclusion which would bar reimbursement for commuting 84 miles to and from school.

Benefits: Auxiliary. While an insurer may refuse auxiliary benefits, such refusal may be disputed by the claimant, in which case the dispute may be mediated and thereafter resolved by the Workers' Compensation Court.

Jurisdiction: Dispute. While an insurer may refuse auxiliary benefits, such refusal may be disputed by the claimant, in which case the dispute may be mediated and thereafter resolved by the Workers' Compensation Court.

Contracts. A rehabilitation plan executed by the claimant and an insurer does not bar a claim for auxiliary benefits where it does not expressly do so and where the plan is adopted pursuant to section 39-71-1006, MCA (1999). Auxiliary benefits are expressly a separate and distinct benefit from rehabilitation benefits. 39-71-1025, MCA (1999).

1 In a prior case involving the present claimant, *Applegate v. Liberty Northwest Insurance Corp.,* WCC No. 2001-0468*,* this Court approved a rehabilitation plan which the claimant is now pursuing. Through her present petition she is now seeking auxiliary rehabilitation benefits to pay for her travel to and from the school she is attending. Both parties move for summary judgment.

Facts

2 The essential facts appear from the pleadings, the clamant's prior action in this Court, and claimant's affidavits filed herein.

3 Claimant was injured on July 22, 2000, and her claim for compensation was accepted by Liberty. She was unable to return to her time-of-injury job and was referred to a vocational consultant for evaluation. The vocational consultant prepared and proposed a rehabilitation plan providing for 33 weeks of computer classes and a concurrent 8 weeks of job placement assistance. Liberty, however, refused to approve the plan based on its view that claimant was ineligible for rehabilitation plans because she did not suffer a wage loss or a 15% impairment, 39-71-1006, -1011, MCA (1999).

4 Claimant then petitioned this Court for rehabilitation benefits. In response to questions put to her by the Court at trial, claimant indicated she wished to pursue the plan proposed by the vocational consultant. On its part, Liberty agreed that the plan was reasonable and should be approved if the Court found a wage loss. After listening to the evidence, I found that claimant suffered a wage loss and ordered that the proposed rehabilitation plan be implemented.

5 Claimant is attending Emma Dickinson Adult Learning School for computer training. The school is in Missoula. Claimant lives in Stevensville, 42 miles from the school. Thus, she commutes 84 miles to and from school each school day. Through her present petition, she seeks auxiliary rehabilitation benefits to pay for her daily travel.

Discussion

6 The parties do not disagree as to the material facts. Rather their dispute is premised on issues of law. Therefore, a discussion of applicable summary judgment principles is omitted and I turn to the merits of the dispute.

7 Auxiliary rehabilitation benefits are governed by section 39-71-1025, MCA (1999). The section provides:

39-71-1025. Auxiliary rehabilitation benefits. In addition to benefits otherwise provided in this chapter, separate benefits not exceeding a total of $4,000 may be paid by the insurer for reasonable travel and relocation expenses used to:

(1) search for new employment;

(2) return to work but in a new location;

(3) implement a rehabilitation plan that has been filed with the department; and

(4) attend an on-the-job training program.

Subsection (3) is implicated in the present case.

8 Liberty urges that claimant is not entitled to auxiliary benefits for several reasons. First, it argues that the doctrine of *res judicata* bars claimant's current request because she requested and was denied auxiliary benefits in the prior proceeding. In the alternative, it urges that the doctrine applies even if she did not request auxiliary benefits in the prior proceeding since she could have done so. Second, it argues that payment of auxiliary benefits is in the discretion of the insurer and it has exercised that discretion adversely to the claimant. Third, it argues that the rehabilitation plan is a contract and precludes auxiliary benefits.

I. The *Res Judicata* Argument

9 The nature of the doctrine of *res judicata*, as well as the rules governing its application, are discussed in the case of *In re Ramond W. George Trust,* 1999 MT 223, 47, 296 Mont. 56, 986 P.2d 427 (1999):

47 "[R]es judicata is a final judgment which, when rendered on the merits, is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand." *Scott v. Scott* (1997), 283 Mont. 169, 175, 939 P.2d 998, 1001 (citing *Fiscus v. Beartooth Electric Cooperative, Inc.* (1979), 180 Mont. 434, 436, 591 P.2d 196, 197). The doctrine bars a party from re-litigating a matter that the party has already litigated **and from re-litigating a matter that the party had the opportunity to litigate in an prior case**. *City of Bozeman v. AIU Ins. Co.* (1995), 272 Mont. 349, 354, 900 P.2d 929, 932 (quoting *State ex rel. Harlem Irrigation District v. Montana Seventeenth Judicial District Court* (1995), 271 Mont. 129, 894 P.2d 943, 946). Res judicata is based on the policy that there must be some end to litigation. *Glickman v. Whitefish Credit Union Ass'n,* 1998 MT 8, 20, 287 Mont. 161, 20, 951 P.2d 1388, 20. A claim is res judicata if: (1) the parties or their privies are the same; (2) the subject matter of the claim is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and issues. *Glickman*, 20 (citing *Loney v. Milodragovich, Dale & Dye, P.C.* (1995), 273 Mont. 506, 510, 905 P.2d 158, 161). [Emphasis added.]

10 A review of the Petition For Emergency Trial, Pretrial Order, and transcribed excerpts from the trial in the prior case show that claimant did not request auxiliary travel benefits in the prior proceeding, thus those benefits were not at issue. While her petition broadly requested a "[d]etermination of the Petitioner's entitlement to benefits," (Petition for Emergency Trial, WCC No. 2001-0468, Prayer 2), the allegations of the Petition For Emergency Trial, as well as the Pretrial Order, concerned the wage-loss issue. As noted earlier, the issue framed at the beginning of trial was whether claimant suffered a wage loss, which in turn would entitle her to implement the rehabilitation plan. Auxiliary benefits were discussed at trial but only in the context of claimant's request for interim compensation benefits covering the period between the termination of her temporary total

disability benefits and the commencement of her rehabilitation program. Even then the discussion took place only in response to a request by the Court that claimant identify some statutory authority which would support her interim benefits request. (Tr. Excerpt at 6.) Thus, the issue raised in the present case was not litigated in the prior action.

11 The more difficult issue is whether the travel issue falls under the "could have been litigated rule." The "opportunity to litigate" rule is discussed in *Harlem Irrigation District,* 271 Mont. 129, 894 P.2d 943 (1995), which is quoted in the subsequent case of *City of Bozeman v. AIU Insurance Co.*, 272 Mont. 349, 354, 900 P.2d 929, 932 (1995):

[T]he doctrine of res judicata bars not only issues that were actually litigated, but also those that could have been litigated in a prior proceeding. *Mills v. Lincoln County,* (1993) 262 Mont. 283, 864 P.2d 1265, 1267. A party should not be able to litigate a matter that the party already had the opportunity to litigate; public policy dictates that there must be some end to litigation. [Citations omitted.] Once a party has had an opportunity to present a claim, the judgment in a previous case is final as to the issues that were raised, as well as those that could have been raised. See *Burgess v. Montana* (1989), 237 Mont. 364, 366, 772 P.2d 1272, 1273. This notion arises from public policy designed to prevent endless piecemeal attacks on previous judgments. *Wellman v. Wellman* (1982), 198 Mont. 42, 46, 643 P.2d 573, 575. We conclude that the theories of recovery alleged in this cause of action could have been litigated in the prior proceeding.

The "opportunity to litigate" rule is tied to the specific issues raised in the prior litigation, *Rafanelli v. Dale,* 1998 MT 331, 12, 292 Mont. 277, 971 P.2d 371, and bars a party in subsequent litigation from raising a new legal theory or ground with respect to the specific claim raised or relief requested in the prior case. Consistent with that doctrine, I held in *Miller v. State Compensation Fund,* 2000 MTWCC 72, that where a claimant brought an action seeking to reopen a settlement agreement, the judgment rejecting his request barred a subsequent action again seeking to reopen the same settlement but on different grounds.

12 In this case, the issue raised is not tied to the issues of the prior case. The request for auxiliary benefits to pay for commuting is not a "theory of recovery" supporting the relief requested in the prior action, nor is it a "ground" for recovery of the benefits sought in the prior action. Auxiliary benefits are a separate and distinct benefit. They are separate and distinct from the benefits sought in the prior proceeding; they are separate and distinct from the rehabilitation benefits to which claimant was found entitled in the first proceeding. Section 39-71-1025, MCA (1999), expressly provides that the auxiliary benefits are "[i]n addition to benefits otherwise provided in this chapter," and are "separate benefits."

13 I also note here, as I noted in *Cheetham v. Liberty Northwestern Ins. Corp.,* 2001 MTWCC 65, that the "could have been litigated" rule must be applied in the context of

Workers' Compensation Court practice. The Workers' Compensation Act provides a variety of benefits. Not all benefits are available at the same time, thus litigation involving a claimant's entitlement to benefits may necessarily be piece meal. Moreover, establishment of entitlement to one sort of benefits may result in resolution of other issues without the need to specifically litigate them. This Court has never required a claimant to join every potential claim he might have for benefits in a single action.

14 I therefore conclude that the present claim for auxiliary benefits is not barred by the prior proceeding.

II. The Discretion Argument

15 Respondent next argues that since section 39-71-1025, MCA, states that auxiliary benefits "may be paid by the insurer" it has "discretion" to deny claimant's request. The argument is without merit. While the insurer may reject a request for auxiliary benefits, if the clamant disputes its decision then the matter is a dispute over which this Court has jurisdiction. Section 39-71-2401, MCA (1999), provides in relevant part:

(1) A dispute concerning benefits arising under this chapter or chapter 72, other than the disputes described in subsection (2), must be brought before a department mediator as provided in this part. If a dispute still exists after the parties satisfy the mediation requirements in this part, either party may petition the workers' compensation court for a resolution.

Section 39-71-2905, MCA, provides in relevant part:

(1) A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter. . . .

16 Moreover, any delegation of unreviewable discretion to an insurer would be unconstitutional. *Ingraham v. Champion Intern.,* 243 Mont. 42, 793 P.2d 769 (1990) (grant of absolute discretion to insurers to accept or deny lump-sum requests is an unconstitutional delegation of legislative power).

III. The Contract Argument

17 Liberty's contract argument fails for the same reason its *res judicata* argument fails: auxiliary benefits are separate and distinct from the rehabilitation benefits authorized by the claimant's rehabilitation plan. The plan approved in the prior proceeding was prepared under section 39-71-1006, MCA (1999), and covered only the benefits available under that section. The plan, a copy of which is attached to an Affidavit of Steve Fletcher, does not mention or cover auxiliary benefits. There is nothing in it which precludes auxilary benefits.

IV. The Merits

18 At the time the rehabilitation plan was prepared and approved, claimant lived 42 miles from school, and she still does. Section 39-71-1025, MCA (1999), provides for payment of reasonable travel expenses "used to . . . (3) implement a rehabilitation plan that has been filed with the department . . ." The provision is broad: it covers any travel necessary to implement a rehabilitation plan. It contains no exclusions which would permit the insurer or this Court to disregard daily commuting, and such an exclusion cannot be inserted. 1-2-101, MCA, ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). I therefore conclude that commuting 84 miles daily to and from school is "travel," that the travel is required to "implement a rehabilitation plan," and that claimant is entitled to reimbursement for that travel.

V. The Rate

19 The parties have not discussed the rate of reimbursement and have not had an opportunity to present evidence on the issue. If they cannot agree on the rate and compute the total amount due, a hearing will be scheduled to address the rate.

VI. Attorney Fees and Penalty

20 While I have resolved this case adversely to the insurer, its denial of auxilary benefits was not unreasonable. Its *res judicata* argument presented a legitimate legal issue of first impression. Since the insurer has not acted unreasonably, claimant is not entitled to attorney fees or a penalty.

ORDER

21 Partial summary judgment is hereby entered as follows:

22 Claimant is entitled to reimbursement for travel to and from school while pursuing her approved rehabilitation plan.

23 The parties shall confer in an attempt to agree on the rate to which she is entitled. They shall notify the Court no later than October 16, 2002, as to whether they have reached agreement. If they do not reach agreement, further proceedings will be scheduled to determine the rate.

24 Claimant is not entitled to attorney fees or a penalty. She is entitled to her costs.

DATED in Helena, Montana, this 9th day of October, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Steve Fletcher
Mr. Larry W. Jones
Submitted: August 1, 2002