

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 84

WCC No. 9906-8257

JOHN BALLARD

Petitioner

vs.

STILLWATER MINING COMPANY

Respondent/Insurer/Employer.

ORDER DENYING INTERIM BENEFITS

Summary: Claimant involved in dispute with Montana and Alaska insurers over which, if either, is liable for his present ankle condition requested interim benefits during pendency of proceeding. The WCC had previously ordered six weeks of interim benefits following delay in proceeding caused by insurer's filing of motion to join third party without properly serving third party.

Held: The authority for the previous order was ARM 24.5.308, which permits an order for benefits when a trial is vacated and good cause is shown for interim benefits. That section does not authorize further benefits at present. The only source of additional authority to order interim benefits is section 39-71-610, MCA, which allows no more than 49 days of interim benefits pending resolution of a workers' compensation dispute. Where claimant has already received 42 days of interim benefits under the prior order, the Court declines to order additional benefits, particularly where the issues suggest it is possible neither insurer could be liable to claimant, making any repayment possibility questionable.

Topics:

Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.308. Claimant involved in dispute with Montana and Alaska insurers over which, if either, is liable for his present ankle condition requested interim benefits during pendency of proceeding. Under ARM 24.5.308, the WCC had previously ordered six weeks of interim benefits following delay in proceeding caused by insurer's filing of motion to join third party without properly serving third party. WCC held that ARM 24.5.308 did not apply at present, meaning the only source of additional authority to order interim benefits is section 39-71-610, MCA, which allows no more than 49 days of interim benefits pending

resolution of a workers' compensation dispute. Where claimant has already received 42 days of interim benefits under the prior order, the Court declines to order additional benefits, particularly where the issues suggest it is possible neither insurer could be liable to claimant, making any repayment possibility questionable.

Benefits: Interim (39-71-610) Benefits. Claimant involved in dispute with Montana and Alaska insurers over which, if either, is liable for his present ankle condition requested interim benefits during pendency of proceeding. Under ARM 24.5.308, the WCC had previously ordered six weeks of interim benefits following delay in proceeding caused by insurer's filing of motion to join third party without properly serving third party. WCC held that ARM 24.5.308 did not apply at present, meaning the only source of additional authority to order interim benefits is section 39-71-610, MCA, which allows no more than 49 days of interim benefits pending resolution of a workers' compensation dispute. Where claimant has already received 42 days of interim benefits under the prior order, the Court declines to order additional benefits, particularly where the issues suggest it is possible neither insurer could be liable to claimant, making any repayment possibility questionable.

¶1 Claimant has a bad ankle. He injured it in 1994 in a work-related accident in Alaska. At the time, his employer was insured by Alaska National Insurance Company, which accepted liability for his claim and subsequently paid both indemnity and medical benefits. In this action, claimant alleges that on January 20, 1998, he suffered a subsequent injury to his ankle while working for Stillwater Mining Company, which is self-insured.

¶2 On September 23, 1999, this Court ordered Stillwater Mining Company, a self-insured employer, to pay six weeks of interim temporary total disability benefits. The Order was made in conjunction with Stillwater's request for a continuance and its pending motion to join Alaska National as a party to this action. In large part, the Order was made because Stillwater failed to comply with Court rules regarding service of its motion for joinder, thus delaying action on the motion and contributing to the need for a continuance.

¶3 The six weeks of benefits have been paid out and the claimant now asks the Court to order further interim benefits.

Discussion

¶4 Initially, the Court must find legal authority for any further order. Its initial order was pursuant to Rule 24.5.308, which permits such order where an additional party is joined. Subsection (3) provides in relevant part:

(3) If the joinder of a third party results in the trial being vacated and good cause is shown, the court may order the insurance company alleged to be at risk at the time of the accident to pay benefits pending the trial. Such insurer has a right to seek indemnity from the responsible insurer if it is later determined that it was not responsible.

Since Stillwater had delayed the joinder issue by failing to serve Alaska National with its motion, as required by subsection (2) of the Rule, I found good cause to invoke the rule.

¶15 The question now presented is whether the Court has legal authority to order Stillwater to pay further interim benefits and, if so, whether there is good cause to enter such order.

¶16 Subsection (3) reflects the rule laid down in *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983), that in a subsequent injury case involving two insurers "[i]t is the duty of the insurance company on risk to pay the benefits until it proves, or until another insurance company agrees, that it should pay the benefits." *Id.* at 392, 658 P.2d at 410. Ordinarily, the insurer for the subsequent injury is "on risk" and is therefore liable for benefits until it either proves the first insurer should be liable or the first insurer accepts liability. *Intermountain Insurance Co. v. Church Mutual Insurance Co.*, 228 Mont. 32, 35, 740 P.2d 682, 684 (1987); *Richter v. Simmons Drilling, Inc.*, 241 Mont. 518, 522, 788 P.2d 308, 310 (1990). In such cases, one or the other insurer is liable for the benefits at issue, it is simply a question of which one, and the Court needs no statutory authority to make an order for interim benefits since one or the other insurer will ultimately pay. If the wrong insurer is ordered to pay interim benefits it will be entitled to indemnification from the insurer determined to be liable.

¶17 *Belton* and its progeny have a narrow and limited application with respect to interim benefits. The cases have considered only situations where there is no dispute that one or the other of two insurers is liable for the benefits requested. The rule has not been extended to cases in which one or both insurers denies liability altogether. Thus, it does not cover cases in which the second insurer denies that a second industrial accident occurred or raises defenses such as the claimant's failure to timely notify his employer of the accident, § 39-71-603, MCA, or file a written claim, § 39-71-601, MCA. The rule also does not cover a case in which neither insurer may be liable for further benefits. Finally, the *Belton* rule does not require payment of a class of benefits which is disputed, e.g., it does not require payment of interim total disability benefits where the insurer denies that claimant is totally disabled.

¶18 In this case, Stillwater Mining has denied liability with respect to the claim against it. It points out that after the alleged subsequent accident the claimant sought and obtained benefits from Alaska National, an act which is inconsistent with his present contention that Stillwater Mining is liable to him. On its part, Alaska National informs the Court that under Alaska law it may have defenses other than the subsequent injury question. Specifically, it may defend against any further claim based on a "failure to mitigate damages" theory arising out of the claimant's return to heavy labor despite medical restrictions limiting him to light duty. Of course, this Court cannot adjudicate Alaska National's liability, however, the information it has provided raises the possibility that neither insurer herein may be liable to claimant. Under these circumstances, the *Belton* rule is inapplicable.

¶9 Therefore, the Court must determine if it has statutory authority to order Stillwater Mining to pay interim benefits. I find it does not. The only authority to order interim benefits is set out in section 39-71-610, MCA, which provided at the time of the claimant's alleged injury at Stillwater Mining:

39-71-610. Termination of benefits by insurer -- department order to pay disputed benefits prior to hearing -- limitation on order -- right of reimbursement. If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing, but in no event may the biweekly compensation benefits be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of a hearing. If after a hearing it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for such payments by the claimant.

As amended in 1999, the section now provides for an initial Department Order and a hearing before the Court, thus the Court has the final authority to order benefits. 1999 Mont. Laws, ch. 377, § 13.

¶10 Section 39-71-610, MCA, provides authority for 49 days of interim benefits while a claimant seeks an adjudication of his or her entitlement to benefits. I have already ordered 48 days of benefits, thus at best the section would authorize an additional one day of benefits.

ORDER

¶11 Claimant's request for further interim benefits is **denied**.

DATED in Helena, Montana, this 23rd day of December, 1999.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Mr. Joe C. Maynard

Mr. Robert J. McLaughlin

Mr. Michael P. Heringer

Date Submitted: December 8, 1999

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vs.

STILLWATER MINING COMPANY

Respondent/Insurer/Employer.

AMENDMENT TO ORDER DENYING INTERIM BENEFITS

¶1 *Sua sponte*, the Court amends paragraph 10 of its December 23, 1999 Order Denying Interim Benefits. The amendment corrects the Court's faulty mathematical calculation (6 times 7 equals 42, not 48), and inserts a sentence which was erroneously omitted from the final Order. THEREFORE,

PARAGRAPH 10 IS AMENDED to read as follows:

10. Section 39-71-610 provides authority for 49 days of interim benefits while a claimant seeks an adjudication of his or her entitlement to benefits. However, on its face, it applies only where the insurer has paid and then terminated benefits. Moreover, I have already ordered 42 days of benefits, thus at best the section would authorize an additional one week of benefits.

DATED in Helena, Montana, this 28th day of December, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston

Mr. Joe C. Maynard

Mr. Robert J. McLaughlin

Mr. Michael P. Heringer