IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 10

WCC No. 2017-3948

ALAN DAVIS

Petitioner

vs.

LIBERTY INSURANCE CORPORATION

Respondent/Insurer

EMPLOYMENT RELATIONS DIVISION, DEPARTMENT OF LABOR AND INDUSTRY

Intervenor.

ORDER DENYING RESPONDENT'S MOTION TO AMEND

Summary: Respondent moved to amend its Response to Petition for Hearing to assert affirmative defenses based on its contention that the compromise settlement of Petitioner's wage-loss benefits precludes him from asserting that he is permanently totally disabled. Respondent maintains that Petitioner's medical benefits terminated under the 60-month limitation of medical benefits in § 39-71-704(1)(f)(i), MCA (2011), and that Petitioner does not have the right to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA, (2011) which provides that the 60-month limitation "does not apply to a worker who is permanently totally disabled as a result of a compensable injury."

Held: This Court denied Respondent's Motion to Amend because its proffered affirmative defenses are not legally tenable defenses. As a matter of law, the issues settled via a compromise settlement remain "uncertain or undetermined." Thus, Petitioner may litigate the issue of whether he is permanently totally disabled under the definition at § 39-71-116(28), MCA (2011), for purposes of establishing his right to medical benefits under § 39-71-704(1)(f)(ii), MCA (2011), notwithstanding the compromise settlement of his asserted right to PTD benefits under § 39-71-702, MCA (2011). Moreover, Petitioner expressly reserved medical benefits "to the extent allowed under the Workers' Compensation Act," which includes the contractual right to maintain

that he is permanently totally disabled for purposes of medical benefits under § 39-71-704(1)(f)(ii), MCA (2011).

¶ 1 Respondent Liberty Insurance Corporation (Liberty) moves to amend its Response to Petition for Hearing. Petitioner Alan Davis argues that Liberty should not be permitted to amend because its proposed amendments do not set forth tenable defenses and are therefore futile. This Court agrees with Davis.

Facts and Procedural History

¶ 2 Davis was injured on October 7, 2011.[1] Liberty accepted liability for his claim.

¶ 3 In the early summer of 2016, Davis and Liberty entered into a compromise settlement of his wage-loss benefits. In relevant part, the Petition for Settlement states:

> Significant disputes exist concerning Claimant's entitlement to wage loss and/or rehabilitation benefits for his October 7, 2011 claim. Based on these and other disputes between the parties, and rather than face the uncertainty of litigation, the parties have agreed to resolve all disputes between them by way of compromise settlement. Pursuant to this agreement, the Insurer shall pay and the Claimant shall accept the sum of Seventy-Two Thousand Two Hundred Seventy-Three and 30/100 Dollars ($72,273.30). The settlement resolves any and all claims by Claimant for benefits arising out of his October 7, 2011 workers' compensation claim including, but not limited to, any claims for past or future temporary total disability benefits, permanent partial disability benefits, temporary partial disability benefits, permanent total disability benefits, death benefits, rehabilitation benefits, and any claim for costs or attorney's fees pursuant to the Workers' Compensation Act. Claimant is responsible for the payment of any attorney fee that is owed as a result of this settlement. **Medical benefits are expressly reserved by Claimant for any medical condition causally related to the October 7, 2011 workers' compensation claim to the extent such benefits are allowed under the Workers' Compensation Act, and the Insurer reserves any and all defenses at law or equity to any claims for medical benefits.**[2]

The Petition for Settlement and the Settlement Recap Sheet states: "This settlement is based on consideration of Claimant's permanent total disability benefit rate after that rate

[1] The parties agree that the 2011 version of the Workers' Compensation Act (WCA) govern this claim, as that was the law in effect on Davis's date of injury, and the following citations in this Order Denying Respondent's Motion to Amend are to the 2011 version of the WCA.

[2] Emphasis in original.

has been adjusted to reflect the offset the Insurer would be entitled to take against an award of social security benefits." The Settlement Recap Sheet also states:

> The [part-time job Davis worked for about four years] is no longer available to Claimant and the party's [sic] dispute claimant's disability status and whether he is entitled to additional wage loss and/or rehabilitation benefits for his October 7, 2011 claim. Based on these and other disputes between the parties, and rather than face the uncertainty of litigation, the parties have agreed to resolve all disputes between them by way of compromise settlement.

¶ 4 The Employment Relations Division of the Department of Labor and Industry approved the settlement on July 8, 2016.

¶ 5 On October 17, 2016, Liberty denied liability for Davis's ongoing medical benefits pursuant to § 39-71-704(1)(f), MCA. That statute provides:

> (i) The benefits provided for in this section terminate 60 months from the date of injury or diagnosis of an occupational disease. A worker may request reopening of medical benefits that were terminated under this subsection (1)(f) as provided in 39-71-717.
>
> (ii) Subsection (1)(f)(i) does not apply to a worker who is permanently totally disabled as a result of a compensable injury or occupational disease or for the repair or replacement of a prosthesis furnished as a direct result of a compensable injury or occupational disease.

¶ 6 In his Petition for Hearing, Davis alleges that he is permanently totally disabled and, therefore, that his medical benefits remain open pursuant to § 39-71-704(1)(f)(ii), MCA. In the alternative, Davis challenges the 60-month limitation on equal protection and due process grounds.

¶ 7 In its Response to Petition for Hearing, Liberty counters that Davis is not permanently totally disabled. Liberty also asserts that § 39-71-704(1)(f)(i), MCA, is constitutional.

¶ 8 Liberty timely moves to amend its Response to Petition for Hearing to add affirmative defenses based on its position that Davis has settled the issue of whether he is permanently totally disabled.

Law and Analysis

¶ 9 ARM 24.5.302(1)(a) requires a respondent to file a response to a Petition for Hearing that sets forth "a short, plain statement of the respondent's contentions." This Court has explained, "While the Workers' Compensation Court has its own rules of procedure, its rules require a respondent to set out its contentions in its response, ARM 24.5.302(1)(a), hence the Court will not consider [an affirmative] defense if not listed in the contentions."[3]

¶ 10 This ruling comports with M.R.Civ.P. 8(c)(1), which provides that a party must affirmatively state any affirmative defense. If a defendant does not set forth an affirmative defense in its responsive pleading, it is deemed waived.[4] However, the Montana Supreme Court has held, "Rule 8(c) is not absolute . . . as the court retains discretion to allow a defendant to amend pursuant to the terms of M.R.Civ.P. 15 . . . ."[5]

¶ 11 This Court follows M.R.Civ.P. 15(a) in determining whether to permit parties to amend pleadings.[6] M.R.Civ.P. 15(a)(2) provides that if 21 days has elapsed since a pleading was served, the party "may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

¶ 12 The Montana Supreme Court has explained that M.R.Civ.P. 15(a) "favors allowing amendments."[7] Indeed, it has "interpreted the Rule liberally, allowing amendment of pleadings as the general rule and denying leave to amend as the exception."[8] "The proposed amendment should be permitted, in keeping with the policy that leave to amend 'shall be freely given when justice so requires,' unless: (1) the 'motion causes undue delay, is made in bad faith, is based upon a dilatory motive on the part of the movant, or

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[3] *Kelly v. Hartford Accident & Indem. Co*., 2000 MTWCC 50, ¶ 27, n.1.

[4] *Meadow Lake Estates Homeowners Ass'n v. Shoemaker,* 2008 MT 41, ¶ 31, 341 Mont. 345, 178 P.3d 81 (citation omitted). *See also Kratovil v. Liberty Northwest Ins. Corp*., 2007 MTWCC 38, ¶ 3 (citing *Kelly*, 2000 MTWCC 50).

[5] *Bitterroot Int'l Sys., Ltd. v. W. Star Trucks, Inc*., 2007 MT 48, ¶ 49, 336 Mont. 145, 153 P.3d 627 (citation omitted).

[6] *See, e.g.*, *Murphy v. Montana State Fund*, 2010 MTWCC 39, ¶ 2 (citation omitted).

[7] *Seamster v. Musselshell Cnty. Sheriff's Office*, 2014 MT 84, ¶ 14, 374 Mont. 358, 321 P.3d 829 (internal quotation marks omitted) (citation omitted).

[8] *Hobble-Diamond Cattle Co. v. Triangle Irrigation Co.,* 249 Mont. 322, 325, 815 P.2d 1153, 1155 (1991) (citation omitted). *See also Ins. Co. of State of Penn. v. State Comp. Ins. Fund,* 2000 MTWCC 26, ¶ 11 (*In re Berquist*) (citation omitted) ("Generally speaking, the authority to allow amendments is reposed in the sound discretion of the trial court. And it is the rule to allow, and the exception to deny, amendments.").

is futile,' or (2) 'the party opposing the amendment would incur substantial prejudice as a result of the amendment.' "[9]

¶ 13 In support of its Motion to Amend, Liberty points out that Davis settled the dispute over whether he has the right to permanent total disability (PTD) benefits. Liberty maintains that Davis's medical benefits terminated under the 60-month limitation of medical benefits in § 39-71-704(1)(f)(i), MCA, and, under the settlement, that Davis is not entitled to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA, which provides that the 60-month limitation "does not apply to a worker who is permanently totally disabled as a result of a compensable injury." Thus, Liberty argues it should be allowed to amend its Response to Petition for Hearing to add four affirmative defenses: (1) accord and satisfaction; (2) payment; (3) release; and (4) waiver.

¶ 14 Davis points out that he expressly reserved his right to medical benefits "to the extent allowed under the Workers' Compensation Act." Davis argues that this includes the right to argue he is permanently totally disabled under § 39-71-704(1)(f)(ii), MCA. Thus, citing *Berquist v. State Compensation Ins. Fund*, where this Court explained that a respondent's motion to amend "cannot be granted unless the proposed amendments raise legally tenable defenses,"[10] Davis urges this Court to deny Liberty's motion on the grounds that Liberty's proposed amendments are futile.

¶ 15 This Court agrees with Davis for two reasons:

¶ 16 First, Liberty conflates the issue of being permanently totally disabled under the definition in § 39-71-116(28), MCA, with the issue of being entitled to PTD benefits under § 39-71-702, MCA, which are separate and distinct issues when determining a claimant's right to medical benefits. Section 39-71-704, MCA, sets forth the statutory right to medical benefits, which is "an additional benefit separate and apart from" wage-loss benefits. Section 39-71-704(1)(f)(ii), MCA, does **not** say that a claimant is entitled to ongoing medical benefits if he is receiving PTD benefits under § 39-71-702, MCA; rather, this statute states that the claimant is entitled to ongoing medical benefits if he "is permanently totally disabled." In other words, under § 39-71-704(1)(f)(ii), MCA, the issue is whether the claimant is permanently totally disabled under the definition in § 39-71-116(28), MCA; the issue is not whether the claimant has the right to PTD benefits under § 39-71-702, MCA. Thus, although Davis settled the dispute over his claimed right to

[9] *Stevens v. Novartis Pharm. Corp.*, 2010 MT 282, ¶ 64, 358 Mont. 474, 247 P.3d 244 (citation omitted).

[10] 2000 MTWCC 26, ¶ 12 (citing *McGuire v. Nelson,* 162 Mont. 37, 42, 508 P.2d 558, 560 (1973) ("[A]lthough . . . leave to amend shall be freely granted, amendments should not be allowed where the theory presented by the amendment is totally inapplicable to the case . . . .")).

PTD benefits under § 39-71-702, MCA, this Court can determine if Davis "is permanently totally disabled" under the definition in § 39-71-116(28), MCA, which states:

> "Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

If Davis is permanently totally disabled under this definition, he will have the statutory right to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA.

¶ 17 Second, the compromise settlement of Davis's claimed right to PTD benefits does not preclude Davis from arguing that he is currently permanently totally disabled under § 39-71-116(28) and, therefore, has the right to medical benefits under § 39-71-704(1)(f)(ii), MCA. In *Johnson v. Liberty Northwest Ins. Corp*.,[11] this Court held that a disputed liability settlement does not bind a party to a position it took while negotiating the settlement. Johnson alleged that either International Paper "and/or" Liberty was liable for his occupational disease.[12] Johnson entered into a disputed liability settlement with International Paper, under which this Court dismissed International Paper from the case.[13] Liberty moved this Court for an order compelling Johnson to produce the settlement agreement, arguing that it could support a judicial estoppel defense, as Liberty argued that Johnson was taking an inconsistent position by settling with International Paper, but continuing to allege that Liberty was liable for his OD.[14] This Court noted that Montana law allows for alternative claims and, emphasizing that International Paper did not accept liability for Johnson's OD, and that Johnson and International Paper entered into a disputed liability settlement, ruled that Johnson was not taking an inconsistent position.[15] This Court explained:

> It is not inconsistent, as in the present case, for a petitioner to bring a claim in the alternative against two employers, settle with one on a disputed liability basis, and then proceed against the other. Having settled on a disputed liability basis, the settlement is, by definition, uncertain or

[11] 2007 MTWCC 7.

[12] *Johnson*, ¶ 5.

[13] *Johnson*, ¶¶ 2, 6.

[14] *Johnson*, ¶ 7.

[15] *Johnson*, ¶ 6.

undetermined as it pertains to International Paper's liability for Petitioner's claimed injuries.[16]

¶ 18 Likewise, Davis's compromise settlement with Liberty left the issue as to whether he is permanently totally disabled, as defined in § 39-71-116(28), MCA, uncertain and undetermined. While Davis can no longer claim a right to PTD benefits under § 39-71-702, MCA, he may assert that he is permanently totally disabled under § 39-71-116(28), MCA, for purposes of obtaining medical benefits under § 39-71-704(1)(f)(ii), MCA.

¶ 19 In its reply brief, Liberty cites *Wiard v. Liberty Northwest Ins. Corp*,[17] and argues it supports its position. But *Wiard* actually supports Davis's position. In *Wiard*, the Montana Supreme Court held that, unless the parties agree otherwise, the WCA at the time of the injury are part of the settlement agreement.[18] Thus, the court held that although the terms of the settlement provided that Wiard's medical benefits remained open, the limitation in § 39-71-704(1)(d), MCA (1991) – which states that medical benefits "terminate when they are not used for a period of 60 consecutive months" – was part of the settlement agreement.[19] Since Wiard did not use his medical benefits for a period of 60 consecutive months, the court held that his medical benefits closed by operation of law.[20]

¶ 20 In the case at bar, Davis and Liberty expressly agreed that Davis's right to medical benefits remained open "to the extent such benefits are allowed under the Workers' Compensation Act." Davis is correct that this provision gives him a contractual right to medical benefits under § 39-71-704, MCA, which includes ongoing medical benefits if he is permanently totally disabled, per § 39-71-704(1)(f)(ii), MCA. Under *Wiard*, § 39-71-704(1)(f)(ii), MCA is part of his agreement with Liberty. In short, Davis and Liberty agreed to settle, on a compromise basis, the dispute as to whether he had the right to PTD benefits under § 39-71-702, MCA; they did not agree to settle the dispute if Davis was, or could become, permanently totally disabled under § 39-71-116(28), MCA, and thus did not have the right to medical benefits under § 39-71-704(1)(f)(ii), MCA. Under *Wiard* and the plain language of the Petition for Settlement, Davis has the right to argue that he is permanently totally disabled and therefore has the right to medical benefits under § 39-71-704(1)(f)(ii), MCA.

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[16] *Johnson*, ¶ 9.

[17] 2003 MT 295, 318 Mont. 132, 79 P.3d 281.

[18] *Wiard*, ¶¶ 20-23.

[19] *Wiard*, ¶ 23.

[20] *Wiard*, ¶ 23. *See also Newlon v. Teck American, Inc*., 2015 MT 317, 381 Mont. 378, 360 P.3d 1134 (reaffirming that the WCA at the time of injury is part of a settlement agreement, but distinguishing *Wiard* and because the parties specifically agreed that Newlon's medical benefits would remain open for life).

¶ 21 In sum, the compromise settlement which included a settlement of Davis's claimed right to PTD benefits does not preclude Davis from arguing he is permanently totally disabled under § 39-71-116(28), MCA, and, thus, that he has the right to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA. Therefore, Liberty's proffered affirmative defenses of accord and satisfaction, payment, release, and waiver are not legally tenable defenses. Accordingly,

¶ 22 Liberty's Motion to Amend is **denied**.

DATED this 25th day of July, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Larry W. Jones
Quinlan L. O'Connor

Submitted: July 7, 2017