

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 14

WCC No. 9611-7657

ESTATE OF JAMES JACQUES, Deceased,
by and through ANN JACQUES

Petitioner

vs.

BORDEN, INCORPORATED

Respondent/Insurer/Employer.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Summary: Motion for summary judgment presented two issues: (1) whether claimant was entitled to a psychological impairment rating under the 1989 WCA; and (2) whether a psychologist, not licensed to practice medicine in the State of Montana, can render an impairment rating valid under the WCA?

Held: Where neither section 39-71-703, MCA (1989), nor section 39-71-711, MCA (1989) distinguish between awards for physical impairments and awards for psychological impairments, the Court will not read such a distinction into the statutes. While the statutes do not restrict impairment awards to physical impairments, they do preclude a psychological impairment award, and any other permanent partial disability award, where the claimant does not have some physical restriction due to his industrial injury. During argument, petitioner conceded that section 39-71-711, MCA (1989) limits impairment evaluations to medical doctors and chiropractors, thereby precluding valid impairment ratings by a psychologist.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-703, MCA (1989). The 1989 WCA allows an impairment award based on a psychological condition where the claimant also suffers a concomitant physical restriction.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-711, MCA (1989). The 1989 WCA allows an impairment award based on a psychological condition where the claimant also suffers a concomitant physical restriction.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-711, MCA (1989). Section 39-71-711, MCA (1989) limits impairment evaluations to medical doctors and chiropractors, thereby precluding valid impairment ratings by a psychologist.

Benefits: Impairment Awards: Mental Impairment. The 1989 WCA allows an impairment award based on a psychological condition where the claimant also suffers a concomitant physical restriction.

Impairment: Impairment Ratings. Section 39-71-711, MCA (1989) limits impairment evaluations to medical doctors and chiropractors, thereby precluding valid impairment ratings by a psychologist.

Impairment: Mental Impairments. The 1989 WCA allows an impairment award based on a psychological condition where the claimant also suffers a concomitant physical restriction.

Physicians: Impairment Ratings. Section 39-71-711, MCA (1989) limits impairment evaluations to medical doctors and chiropractors, thereby precluding valid impairment ratings by a psychologist.

Statutes and Statutory Interpretation: Inserting or Removing Items. The Court can neither omit provisions set out in a statute nor write in new requirements. *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93, 874 P.2d 1217, 1219 (1994).

Statutes and Statutory Interpretation: Legislative History. Where modifying language used in Senate Committee discussions was not incorporated into final statute, that legislative history cannot lead the Court to insert a modification into the statute not present in the plain, unambiguous language as adopted.

Statutes and Statutory Interpretation: Plain Meaning. Where the words of a statute are plain, the statute must be applied as written; the Court cannot look to legislative history for intent or meaning contrary to unambiguous language. *See Lodge v. Grass High School Dist. No. 2 v. Hamilton*, 264 Mont. 290, 293, 871 P.2d 890, 892 (1994).

The petitioner in this case is the personal representative of the estate of James Jacques. Mr. Jacques was injured in an industrial accident on June 22, 1990. He died on December 15, 1993, of a condition unrelated to his industrial injury. His estate now seeks payment of an impairment award for a psychological impairment which was allegedly attributable to or aggravated by Mr. Jacques injury.

On December 11, 1996, the respondent moved for summary judgment on the ground that the Workers' Compensation Act does not provide for permanent partial disability benefits based upon a psychological impairment. (Motion for Summary Judgment Pursuant to Rule 24.5.329 of the Procedural Rules of the Workers' Compensation Court (Motion for

Summary Judgment) at 2; Respondent's Brief in Support of Motion for Summary Judgment Pursuant to Rule 24.5.329 of the Procedural Rules of the Workers' Compensation Court (Respondent's Brief.) Secondary, respondent urged that if such impairment award is payable then it cannot be based on an impairment rating rendered by a Ph.D. psychologist. (Respondent's Brief at 6.) Respondent specifically challenges an impairment rating rendered by James V. English, Ph.D., who is a clinical psychologist. (*Id.*)

On December 13, 1996, petitioner's counsel invoked Court rule 24.5.329(1)(c), which provides:

(c) If upon the filing of a motion for summary judgment, the party against whom the motion is directed believes that summary judgment is inappropriate for the reasons set forth in (1)(b) above, that party shall immediately notify the court and arrange for a telephone conference between the court and counsel. The court will determine after the conference whether further briefing and proceedings are appropriate.

A telephone conference was held with counsel on December 16, 1996. The conference culminated in a determination that petitioner should be allowed further discovery before responding to the summary judgment motion. The trial setting was vacated and petitioner was granted 60 days in which to complete discovery and file an answer brief to the motion. (Order Extending Time for Answering Discovery and Motion for Summary Judgment, December 23, 1996.)

On January 23, 1997, the respondent filed Respondent's Supplemental and Amended Brief in Support of Motion for Summary Judgment Pursuant to Rule 24.5.329 of the Procedural Rules of the Workers' Compensation Court along with a Motion for Telephone Conference for Clarification of Court Order of December 23, 1996. The Court initiated a second conference call to discuss the motion. During that conference the Court and counsel agreed that two issues raised in this case are appropriately resolved by way of partial summary judgment. The Court phrased those issues as follows:

1. Assuming that a claimant meet the definition of permanent partial disability, § 39-71-116(13), MCA (1989), and assuming that claimant suffers from a psychological condition which is (1) related to his industrial accident and (2) ratable under the Guides To evaluation Of Permanent Impairment published by the American Medical Association, is that claimant entitled to an impairment award based only on his physical impairment or may the impairment award be based on both his physical and psychological impairments?
2. Assuming that an impairment award may include an impairment rating for a psychological condition, may the Court make an impairment award based on an impairment rating rendered by a psychologist?

(Court File Memo, January 24, 1997 at 1.) The Court provided counsel with an opportunity to review the issues and submit alternative phraseology.

On February 3, 1997, the respondent filed a Response to Honorable Mike McCarter's Workers' Compensation Court Memorandum Regarding Summary Judgment Issue (Respondent's Response). In that response, the respondent urged that the issues be reframed as follows:

1. Whether the Claimant is entitled to a psychological impairment rating under the Workers' Compensation Act in effect on the date of his injury?
2. Whether a psychologist, not licensed to practice medicine in the State of Montana, can render an impairment rating and whether that rating is valid under the Workers' Compensation Act?

(Respondent's Response at 2.) Respondent then argued the issues as stated. (*Id.*)

On February 5, 1997, the Court received Petitioner's Reply Regarding Summary Judgment Issues. Therein, the petitioner accepted the Court's statement of the issues and objected to the respondent's restatement of the issues as "overly broad and general." I then determined that the differences in the phraseology of the issues were unimportant. My staff contacted petitioner's attorney and asked him to file a brief respecting the merits of the issues. On March 13, 1997, petitioner's attorney filed Petitioner's Brief in Support of Motion for Partial Summary Judgment. With the filing of that brief, the Court deemed the motion for summary judgment submitted and ready for decision.⁽¹⁾

Summary Judgment Standard

Court rule 24.5.329 governs motions for summary judgment. Subsection (2) of the rule provides:

(2) Subject to the other provisions of this rule, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Factual Context of Motion

The issues raised by summary judgment are purely legal ones involving statutory interpretation. Two alleged facts, however, provide a background for the legal discussion. Those facts are:

1. The claimant received a 5% physical impairment rating as a result of his industrial injury.
2. The claimant also received a psychological impairment rating from James V. English, who is a Ph.D. psychologist.

These facts appear from the briefs of the parties and are not provided to the Court in the format required by Rule 24.5.329(3).⁽²⁾ Therefore, the two facts are assumed true for purposes of discussion only and are not adopted by the Court as undisputed. Insofar as those facts are relevant to the ultimate issues in this case, they will have to be established at trial.

Discussion

The respondent, Borden, Incorporated (Borden), argues that as a matter of law it is not liable for an impairment award based on a psychological impairment rating. It further argues that if an impairment award may be based on a psychological impairment, then the Court cannot consider any impairment rating rendered by a Ph.D. psychologist.

I.

Mr. Jacques was injured on June 22, 1990. (Petition para. 1; Response para.1.) Thus, the 1989 version of the Workers' Compensation Act (WCA) governs the benefits payable with respect to his injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

Under the 1989 WCA, impairment awards were governed by sections 39-71-703(1) and -711, MCA (1989). Section 39-71-703(1), MCA (1989), provided in pertinent part:

39-71-703. Compensation for permanent partial disability -- impairment awards and wage supplements. (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:

(a) The following procedure must be followed for an impairment award:

(i) Each percentage point of impairment is compensated in an amount equal to 5 weeks times 66 2/3% of the wages received at the time of the injury, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.

(ii) When a worker reaches maximum healing, an impairment rating is rendered by one or more physicians as provided for in 39-71-711. Impairment benefits are payable beginning the date of maximum healing.

(iii) An impairment award may be paid biweekly or in a lump sum, at the discretion of the worker. Lump sums paid for impairments are not subject to the requirements set forth in 39-71-741, except that lump-sum conversions for benefits not accrued may be reduced to present value at the rate set forth by the department in 39-71-741(5).

(iv) If a worker becomes eligible for permanent total disability benefits, the insurer may recover any lump-sum advance paid to a claimant for impairment, as set forth in 39-71-741(5). Such right of recovery does not apply to lump-sum benefits paid for the period prior to claimant's eligibility for permanent total disability benefits.

(v) If a worker suffers additional injury, an impairment award payable for the additional injury must be reduced by the amount of a previous award paid for impairment to the same site on the body.

Section 39-71-711, MCA (1989), provided:

39-71-711. Impairment evaluation -- ratings. (1) An impairment rating:

(a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association; and

(c) must be expressed as a percentage of the whole person.

(2) A claimant or insurer, or both, may obtain an impairment rating from a medical doctor or from a chiropractor if the claimant's treating physician is a chiropractor. If the claimant and insurer cannot agree upon the rating, the procedure in subsection (3) must be followed.

(3) (a) Upon request of the claimant or insurer, the department shall direct the claimant to an evaluator for a rating. The evaluator shall:

(i) evaluate the claimant to determine the degree of impairment, if any, that exists due to the injury; and

(ii) submit a report to the department, the claimant, and the insurer;

(b) Unless the following procedure is followed, the insurer shall begin paying the impairment award, if any, within 30 days of the evaluator's mailing of the report:

(i) Either the claimant or the insurer, within 15 days after the date of mailing of the report by the first evaluator, may request that the claimant be evaluated by a second evaluator. If a second evaluation is requested, the department shall direct the claimant to a second evaluator, who shall determine the degree of impairment, if any, that exists due to the injury.

(ii) The reports of both examinations must be submitted to a third evaluator, who may also examine the claimant or seek other consultation. The three evaluators shall consult with one another, and then the third evaluator shall submit a final report to the department, the

claimant, and the insurer. The final report must state the degree of impairment, if any, that exists due to the injury.

(iii) Unless either party disputes the rating in the final report as provided in subsection (6), the insurer shall begin paying the impairment award, if any, within 45 days of the date of mailing of the report by the third evaluator.

(4) The department shall appoint impairment evaluators to render ratings under subsection (1). The department shall adopt rules that set forth the qualifications of evaluators and the locations of examinations. 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. The department may seek nominations from the board of medical examiners for evaluators licensed under Title 37, chapter 3, and from the board of chiropractors for evaluators licensed under Title 37, chapter 12.

(5) The cost of impairment evaluations is assessed to the insurer, except that the cost of an evaluation under subsection (3)(b)(i) or (3)(b)(ii) is assessed to the requesting party.

(6) A party may dispute a final impairment rating rendered under subsection (3)(b)(ii) by filing a petition with the workers' compensation court within 15 days of the evaluator's mailing of the report. Disputes over impairment ratings are not subject to 39-71-605 or to mandatory mediation. (7) An impairment rating rendered under subsection (3) is presumed correct. This presumption is rebuttable.

Initially, the Court recognizes that section 39-71-711, MCA, provides a procedure for rendering an impairment rating. However, procedure is governed by the law in effect at the time of the adjudication. *Blythe v. Radiometer Am.*, 262 Mont. 464, 866 P.2d 218 (1993). The rule concerning the "law in effect at the time of the injury" only applies to statutes governing substantive entitlement to benefits. The Court need not concern itself with the provisions of subsections (3) through (7) governing the appointment of impairment evaluators since those provisions have been repealed. 1991 Montana Laws, ch. 558, § 7. However, the procedural provision governing who can render an impairment rating, § 39-71-711(2), MCA (1989), has been retained and therefore applies in this case.

Section 39-71-711(1), MCA (1989), also sets forth substantive criteria for impairment ratings. The 1995 legislature added an additional criteria for such ratings, requiring that the rating "must be established by objective medical findings," § 39-71-711(1)(d), MCA (1995); 1995 Mont. Laws, ch. 243, § 15; otherwise the criteria remain the same.

II.

The initial issue in this case is whether an impairment award can be based on a psychological impairment rating. Neither section 39-71-703, MCA, nor 39-71-711, MCA,

distinguish between awards for physical impairments and awards for psychological impairments. Respondent argues, however, that impairment awards are limited to physical impairments because the WCA does not expressly mention awards for psychological impairments and because the definition of permanent partial disability, § 39-71-116(14), MCA, includes a requirement that the claimant suffer a physical restriction as a result of his industrial accident. Neither argument is persuasive.

Where the words of a statute are plain, the statute must be applied as written; the Court cannot look to legislative history for intent or meaning contrary to unambiguous language. See *Lodge Grass High School Dist. No. 2 v. Hamilton*, 264 Mont. 290, 293, 871 P.2d 890, 892 (1994). The Court can neither omit provisions set out in the statute nor write in new requirements. *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93, 874 P.2d 1217, 1219 (1994).

Sections 39-71-703 and -711, MCA, refer to "impairment" awards and ratings. They do not refer to "physical impairment" ratings or awards. ⁽³⁾ Thus, the sections must be read as encompassing **all** impairment ratings, whether physical or psychological, *so long as all other requirements for rendering the rating and making the award are met*. For example, section 39-71-711, MCA, requires that the rating be based on the AMA impairment guides; thus claimant must prove that the psychological impairment rating was made pursuant to the guides.

Respondent's reliance on the definition of permanent partial disability is misplaced. Section 39-71-116(13), MCA (1989), provides:

(13) "Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) is able to return to work in the worker's job pool pursuant to one of the options set forth in 39-71-1012 but suffers impairment or partial wage loss, or both.

The section predicates any entitlement to permanent partial disability benefits upon proof that claimant suffers from a "medically determined physical restriction." It refers, as do sections 39-71-703 and -711, MCA, to "impairment," not to "physical impairment." The section does not restrict impairment awards to physical impairments, although it does preclude a psychological impairment award and any other permanent partial disability benefits where the claimant does not have some physical restriction due to his industrial accident.

I conclude that the 1989 WCA does not preclude an impairment award based on a psychological condition where the claimant also suffers a concomitant physical

restriction. In this case the respondent concedes that claimant has a 5% physical impairment rating and has not provided facts demonstrating that claimant did not suffer from a medically determined physical restriction. If petitioner proves that Mr. Jacques suffered a medically determined physical restriction on account of his industrial accident and that all other requirements for a further impairment award are satisfied, then she may recover for a psychological impairment.

III.

Petitioner concedes that under current law a psychologist may not render an impairment rating. The concession was inevitable since both the 1989 and 1995 versions of section 39-71-711, MCA, limit impairment evaluations to medical doctors and chiropractors. A psychologist is neither.

Petitioner has indicated her intent to obtain a psychological impairment rating from an M.D. psychiatrist and also notes that legislation pending before the 1997 Montana legislature, if adopted by the time of trial, may permit impairment ratings by psychologists. Thus, my ruling limiting impairment evaluations to medical doctors and chiropractors is not dispositive of the petition. Triable issues of fact remain.

IV.

During telephonic discussions with counsel, respondent's attorney has indicated that even if petitioner presents a psychiatrist's impairment rating there may still be evidentiary issues concerning the basis and validity of the rating. Those issues will be resolved at trial and counsel should be prepared to address them at that time.

ORDER AND PARTIAL SUMMARY JUDGMENT

1. The 1987 Workers' Compensation Act does not on its face preclude an impairment award based on a psychological impairment rating. However, the petitioner's decedent must satisfy the definition of permanent partial disability, § 39-71-116(13), MCA (1989), and the rating must otherwise satisfy the substantive criteria set out in section 39-71-711, MCA (1989).
2. Under the 1987 WCA, as well as the current WCA, a psychologist may not conduct an impairment evaluation rating. As a corollary, any impairment rating by a psychologist is inadmissible to prove an impairment rating.
3. Triable issues of fact remain, therefore, the case has been placed on the June trial calendar for Great Falls.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from this Order Granting Partial Summary Judgment.

DATED in Helena, Montana, this 20th day of March, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. J. David Slovak

Mr. Dylan E. Jackson

Submitted Date: March 13, 1997

1. The respondent has now submitted three briefs addressing the issues raised in its summary judgment motion. The Court deems a further, reply brief unnecessary.

2. ARM 245.329(3) provides:

(3) Any party filing a motion under this rule shall include in its brief a statement of uncontroverted facts, which shall set forth in full the specific facts on which the party relies in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific pleading, affidavit, or other document where the fact may be found. Any party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party.

The parties have not complied with the rule, however, as noted, the issues presented by the motion are legal ones that do not require any factual determinations.

3. Respondent refers to minutes of the 1987 Senate Committee on Labor and Industry which refer to "physical impairment." However, the "physical impairment" language quoted by respondent was not incorporated into final statute and the minutes cannot be used to contradict plain words in the final statute.