IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 10

WCC No. 8906-5395

HARRY A. NESS

Petitioner

vs.

ANACONDA MINERALS COMPANY,a division of

ATLANTIC RICHFIELD COMPANY, INCORPORATED

Respondent.

DECISION GRANTING PARTIAL SUMMARY JUDGMENT

Summary: On remand from the Supreme Court in *Ness v. Anaconda Minerals Co.*, 257 Mont. 335, 849 P.2d 1021 (1993) *(Ness I*), claimant moved for summary judgment determining he was entitled to total disability benefits from the date the insurer terminated those benefits until his 65th birthday.

Held: Based on the holding of *Ness I*, claimant is entitled only to extension of temporary total disability benefits through the date the insurer satisfied the fourth element of *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985), providing him notice of a physician's report determining his ability to work. Note: this decision was affirmed by the Montana Supreme Court in *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (*Ness II*).

Topics:

Benefits: Termination of Benefits: Coles. Based on the holding of *Ness v. Anaconda Minerals Co.*, 257 Mont. 335, 849 P.2d 1021 (1993) (*Ness I*), claimant is entitled only to extension of temporary total disability benefits through the date the insurer satisfied the fourth element of *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985), providing him notice of a physician's report determining his ability to work. [**Note:** this decision was affirmed by the Montana Supreme Court in *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (*Ness II*).]

Cases Discussed: *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985). Based on the holding of *Ness v. Anaconda Minerals Co.*, 257 Mont. 335, 849 P.2d

1021 (1993) (*Ness I*), claimant is entitled only to extension of temporary total disability benefits through the date the insurer satisfied the fourth element of *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985), providing him notice of a physician's report determining his ability to work. [**Note:** this decision was affirmed by the Montana Supreme Court in *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 929 P.2d 205 (1996) (*Ness II*).]

This case is before the Court pursuant to a remand by the Montana Supreme Court in *Ness v. Anaconda Minerals Company, 257 Mont. 335, 849 P.2d 1021 (1993)*. After remand the petitioner moved for partial summary judgment. The motion has been fully briefed and is now ready for decision.

Factual and Procedural Background

The essential facts in this case are set forth in the decision of the Supreme Court. We will briefly summarize them here.

Petitioner, Harry Ness (claimant), was injured on October 14, 1981, while working for Anaconda Minerals Company (Anaconda). He was working on the belly pan of a D-8 Caterpillar when it fell and crushed him. He suffered severe, permanent and disabling injuries.

Anaconda, which was self-insured, accepted liability for claimant's injuries and began paying total disability benefits. On October 19, 1982, claimant's treating physician, Dr. James P. Murphy, concluded that claimant had reached maximum healing and rated the extent of claimant's impairment at twenty-five (25%) percent. Based on Dr. Murphy's finding of maximum healing, but lacking any medical release approving claimant's return to work, Anaconda terminated claimant's temporary total disability benefits effective December 8, 1982. It then began paying permanent partial disability benefits, and continued those benefits until November 18, 1987, at which time it discontinued all benefits.

On June 29, 1989, claimant filed a petition with this Court. He sought reinstatement of total disability benefits retroactive to December 8, 1982. A trial was held on September 5, 1989. On August 23, 1990, the Court entered judgment for Anaconda, concluding that claimant was not totally disabled after December 8, 1982. Claimant appealed.

On March 24, 1993, the Montana Supreme Court reversed the decision of this Court. The majority held that Anaconda improperly terminated claimant's temporary total disability benefits because it failed to comply with the four-part test established in *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985). *Ness*, 257 Mont. at 339. That test requires:

(1) a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit;

(2) a physician's determination of the claimant's physical restrictions resulting from an industrial accident;

(3) a physician's determination, based on his knowledge of the claimant's former employment duties, that he can return to work, with or without restrictions, on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition;

(4) notice to the claimant of receipt of the report attached to a copy of the report.

Ness at 339-40 (italics omitted). The Court found that as of December 8, 1982, only the first element had been satisfied. However, the Court went on to determine that by August 30, 1989, the first three elements of that test had been satisfied. It then concluded that Anaconda's liability for temporary total disability would cease on the date the fourth element was satisfied:

We conclude, however, that there was substantial evidence that as of August 30, 1989, the first three elements of the *Coles* test had been satisfied. **When there is proof of the date on which the fourth element of the *Coles* test has been satisfied, there will be substantial evidence for the termination of claimant's total disability benefits, and the commencement of partial disability benefits.**

Id. at 340 (emphasis added).

In reversing the judgment of this Court, the Supreme Court remanded the case with specific instructions, as follows:

The judgment of the Workers' Compensation Court is, therefore, reversed, and this case is remanded to that court with instructions to reinstate claimant's total disability benefits retroactive to December 8, 1982, **and continuing until the date on which claimant or his attorney were provided with notice of the report completed by Dr. James P. Murphy on August 30, 1989. At that point, claimant's disability status may be changed from total disability to partial disability**.

Id. (emphasis added). The Supreme Court also determined that claimant is entitled to attorney fees and instructed this Court to determine the amount of fees due. ***Id.*** *at 341*.

The Motion for Partial Summary Judgment

Following remand the claimant filed his Motion for Partial Summary Judgment. The motion requests entry of partial summary judgment determining that claimant is entitled to total disability benefits from December 8, 1982 through February 21, 1994, the latter date being claimant's sixty-fifth birthday. The motion further asks for a determination that claimant is entitled to an attorney fee amounting to forty (40%) percent of the benefits awarded in this action.

Additional Facts

In addition to the record created prior to the appeal, the parties have filed a new Final Pretrial Order containing a statement of nine (9) uncontested facts. A copy of the order was initially received by the Court on November 29, 1993. However, that copy bore only the signature of respondent's counsel. The Final Pretrial Order, signed by both counsel, was received and filed on January 6, 1995.

Of the nine uncontested facts contained in the Final Pretrial Order, two are critical to the present motion. The two are numbered as 3 and 9. They state:

3. That on September 11, 1989, claimant received notice of the report completed by Dr. James P. Murphy.

. . .

9. The claimant's attorney fees may be computed in accordance with the contingent fee agreement as opposed to computed on an hourly basis.

Standard of Review

While the rules of the Workers' Compensation Court do not specifically provide for motions for summary judgment, in recent decisions the Court has applied Rule 56 of the Montana Rules Civil Procedure to such motions. E.g. *Edwin Taylor v. State Compensation Insurance Fund,* WCC No. 9406-7066 (October 21, 1994 Order Denying Motion for Summary Ruling at 2.) It will continue to do so in cases where summary judgment motions are appropriate.[(1)]

Rule 56(c), Mont.R.Civ.P., provides that "[summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, 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." Entry of summary judgment in favor of the non-moving party is also permitted in appropriate cases:

Generally, no formal cross-motion is necessary at the district court level for the court to enter judgment for the non-moving party if the law so entitles it. However, the court must be careful that the original movant had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact and the other party is entitled to judgment as a matter of law.

Payne Realty & Housing v. First Security Bank, 247 Mont. 374, 378, 807 P.2d 177 (1991).

DISCUSSION

Temporary Total Disability Benefits

In His Motion for Partial Summary Judgment, claimant contends that Anaconda cannot reduce his benefits from total disability to partial disability until it provides him with

another, new fourteen (14) day notice stating that it is terminating his temporary total disability benefits. According to claimant, the 1982 notice was ineffective and he is entitled to temporary total benefits until such time as an effective notice is given. However, claimant acknowledges that his entitlement to temporary total benefits end when he turns sixty-five. Since he reached the age of sixty-five on February 21, 1994, he asks that temporary total benefits be awarded until that date.

The claimant's contentions must be examined in light of the Supreme Court decision and its instructions on remand. The Supreme Court determined that three of the four criteria for termination of temporary total disability benefits were met "as of August 30, 1989." It held that claimant's entitlement to temporary total disability benefits terminated as of the date that the fourth criteria was satisfied. I am bound by that holding. *Doting v. Trunk*, 259 Mont. 343, 347-48, 856 P.2d 536 (1993). I cannot ignore the Supreme Court's instructions nor deviate from them. *Carey v. Wallner,* 229 Mont. 57, 60, 744 P.2d 881 (1987) ("Once we order a particular judgment, the lower court has no discretion to alter it.").

The decision of the Supreme Court states that "[w]hen there is proof of the date on which the fourth element of the *Coles* test has been satisfied, there will be substantial evidence for the termination of claimant's total disability benefits, and the commencement of partial disability benefits." *Ness at 340.* The fourth element has two parts: (1) notice to claimant of the insurer's receipt of a physician's report stating that claimant can return to work and (2) the forwarding of the physician's report to the claimant.

A review of the Final Pretrial Order and the record shows that both parts of the fourth element were satisfied on September 11, 1989, during Dr. Murphy's deposition. In the agreed facts of the Final Pretrial Order, claimant concedes that he received notice of Dr. Murphy's report on September 11, 1989. The "report" of Dr. Murphy consists of his written approval of two job analyses, one for a sewing machine operator and the other for parking lot attendant. Those analyses, signed by Dr. Murphy, were authenticated during the doctor's deposition and admitted without objection as exhibits B and C to the deposition. (Murphy Dep. at 16-17.) Claimant's attorney referred to the exhibits in his own examination of the doctor. (*Id.* at 22.) Thus, on September 11, 1989, claimant and his attorney were provided not only notice regarding the reports but an opportunity to review and copy the actual reports. Since the last of the four *Coles'* factors was satisfied on September 11, 1989, Anaconda Mineral's liability for temporary total disability benefits ceased on that date.

The facts essential to the fourth element are not susceptible to dispute. The parties have had an opportunity to fully argue their positions, and claimant can claim no surprise concerning Anaconda's position regarding a September 11, 1989 cut-off date. According to Anaconda's brief, and an attached schedule of payments, it has paid claimant retroactive temporary total benefits through September 11, 1989. (Defendant's Memorandum in

Opposition to Claimant's Motion for Summary Judgment.) Therefore, I find that entry of partial summary judgment in favor of Anaconda on this point is appropriate.

Attorney Fees

The parties have agreed that claimant's attorney fees should be computed according to the contingent fee agreement between claimant and his attorney. (Final Pretrial Order, Agreed Fact 9.) The fee agreement is attached to claimant's Brief in Support of Motion for Summary Judgment as Exhibit "D". Anaconda does not challenge the authenticity of the agreement.

The agreement was executed on October 24, 1985. From the face of the agreement it appears that it was approved by the Division of Workers' Compensation on October 29, 1985. The contingent fee arrangement is spelled out as follows:

TWENTY-FIVE PERCENT (25%) of the compensation payments the First Party receives due to the efforts of the Second Party unless the Workers' Compensation Judge orders compensation payments after a hearing before the Court, in which case the fee shall be 33% of the Court award. If the matter is appealed to the Montana Supreme Court and they should order compensation payments, the fee shall be 40% of that award.

Anaconda contends that fees should be limited to thirty-three (33%) percent despite claimant's successful appeal to the Supreme Court. It argues that the condition precedent for a forty (40%) percent award has not been met because the Supreme Court did not "order compensation payments." According to Anaconda, the Supreme Court merely ordered *this* Court to order compensation payments. The argument is patently frivolous. By directing this Court to reinstate claimant's temporary total disability benefits, the Supreme Court was ordering that compensation be paid. Claimant is entitled to attorney's fee of forty (40%) percent of all additional compensation received and to be received as a result to this action. The actual amount due will be determined in later proceedings.

PARTIAL JUDGMENT

Pursuant to the foregoing discussion and the instructions of the Supreme Court, this Court enters partial summary judgment as follows:

1. Claimant is entitled to temporary total disability benefits retroactive to December 8, 1982, through September 11, 1989. Anaconda is entitled to a credit for permanent partial disability benefits paid during that time and to any temporary total disability benefits it has already paid as a result of the Supreme Court decision.

2. Claimant is entitled to permanent partial disability benefits of $120.50 per week commencing September 12, 1989 and continuing for the duration of his partial disability, which shall not exceed 500 weeks. *Ness at 340-41*.

3. Claimant is entitled to attorney fees amounting to forty (40%) percent of all compensation received and to be received as a result of the Supreme Court decision in *Ness*. The actual amount due remains to be determined.

Dated in Helena, Montana, this 3rd day of February, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. R. Lewis Brown
Mr. Andrew J. Utick

1. In a recent decision, I noted that summary judgment practice may not always be appropriate in workers' compensation cases. ANR Freight Systems, Inc. v. Garrett Freight Lines/Farmers Insurance Group, WCC No. 9411-7182 (January 26, 1995 Order Denying Motion for Summary Judgment at 2.) The goal of summary judgment practice is judicial economy. In light of the expedited procedures of the Court, summary judgment practice in some cases may result in both delay and additional cost to the Court and parties. In such cases the Court may refuse to consider summary judgment motions.