IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 68

WCC No. 2004-1002

ANNA SWAN

Petitioner

vs.

PACIFIC EMPLOYERS INSURANCE COMPANY

Respondent/Insurer.

DECISION AND JUDGMENT

Summary: The claimant suffered a nonwork-related low-back injury in 1998 and had surgery at her L3-L5 disk levels. She recovered from the surgery and returned to work as a nurse's aide, then suffered an additional injury to her low back. As a result of her work injury, she underwent additional surgery at the L3-S1 levels of her back. Following that surgery, her surgeon gave her a 16% whole person impairment rating. However, he also opined that she suffered an 8% impairment as a result of her 1998, non-industrial accident. Based on the latter opinion, the insurer paid only an 8% impairment award. The claimant brought the present petition for the difference between the 8% award and her 16% impairment.

Held: Where a claimant suffers an industrial injury to the same part of the body which has previously been injured, and the impairment rating for her industrial injury is a singular rating based on the part of the body rated, she is entitled to the full amount of the award without deduction for an estimate of her prior, pre-industrial injury impairment.

Topics:

> **Benefits: Impairment Awards.** The rule that an employer "takes his employee subject to the employee's physical condition at the time of the employment" applies to impairment awards. *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 103, 894 P.2d 327, 300 (1995). Thus, where an industrial injury aggravates a preexisting condition of the same body part, the insurer is liable for the full impairment rating without deduction for any impairment it alleges preexisted the industrial accident unless the claimant has previously received an impairment award for an industrial accident to the same part of the body, which award must be deducted. § 39-71-703, MCA (1997-2001).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-703, MCA (1997-2001). The rule that an employer "takes his employee subject to the employee's physical condition at the time of the employment," *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 103, 894 P.2d 327, 300 (1995), applies to impairment awards. Thus, where an industrial injury aggravates a preexisting condition of the same body part, the insurer is liable for the full impairment rating without deduction for any impairment it alleges preexisted the industrial accident unless the claimant has previously received an impairment award for an industrial accident to the same part of the body, which award must be deducted. § 39-71-703, MCA (1997-2001).

¶1 This matter came on for trial in Kalispell, Montana, on August 24, 2004. Petitioner, Anna Swan (claimant), was present and represented by Mr. Kenneth S. Thomas. Respondent, Pacific Employers Insurance Company (Pacific), was represented by Mr. Charles G. Adams.

¶2 The sole issue in this case involves calculation of an impairment award. After discussion with counsel, I determined that the issue is one of statutory interpretation and that no evidence other than the deposition of Dr. Howard C. Chandler and the exhibits submitted by the parties was necessary. The only witness who would have testified was the claimant, and I deemed her testimony unnecessary. She therefore did not testify.

¶3 The claimant sustained an injury to the lumbar region of her back in 1998 in a non-industrial automobile accident. Her back injury caused pain into her legs and on September 10, 1999, Dr. Howard C. Chandler, a neurosurgeon, performed back surgery at the L3 to L5 levels. (Ex. 9 at 313-14.) The surgery consisted of an L3-L5 laminectomy and microdiscectomies at the L3-L4 and L4-L5 levels. (*Id*.)

¶4 The claimant recovered from her surgery and returned to work as a nurse's aide. Thereafter, on August 23, 2002, the claimant injured her back while working as a nursing assistant. (Ex. 1 at 1.) The injury again involved the lumbar portion of her back.

¶5 At the time of her 2002 industrial injury, the claimant's employer was insured by Pacific. (Ex. 3 at 1.) Pacific accepted liability for her accident.

¶6 As a result of the claimant's 2002 industrial injury, Dr. Chandler performed additional surgery on the claimant's lumbar spine. This time, he performed an L3-S1 decompression and posterior fusion. (Ex. 9 at 345-48.) The new surgery thus involved the original levels (L3-L5) of the claimant's 1999 surgery and one additional level (L5-S1).

¶7 Following the claimant's reaching maximum medical improvement (MMI) from her industrial injury and the L3-S1 surgery, Dr. Chandler rated the claimant's lumbar impairment at 16% of the whole person. (Ex. 9 at 358; Chandler Dep. at 19-20.)

¶8 Dr. Chandler did not initially render an impairment rating for the claimant's 1998 lumbar injury since her injury was not work related. However, following the claimant's 2002

industrial injury, Pacific asked him to provide an "estimate" of her impairment attributable to her 1998 injury. (Ex. 9 at 338.) He responded with an estimate of 8%.[(1)] (*Id*.)

¶9 Upon the claimant's reaching MMI for her 2002 industrial injury, Pacific subtracted Dr. Chandler's 8% estimate of impairment for her 1998 automobile accident from the 16% impairment rating he rendered post-industrial accident. It then paid her an 8% impairment award. The claimant then petitioned this Court for the full 16% impairment rating.

¶10 Dr. Chandler testified by deposition. He testified that the claimant's 2002 industrial injury not only involved an additional level of the claimant's lumbar spine (L5-S1) but also aggravated her preexisting condition at the levels above (L3-L5), thus leading to the 2002 surgery involving all three levels. (Chandler Dep. at 22-23, 27.) He further testified that the impairment rating following the 2002 surgery involved all three levels and that he could not apportion that impairment rating as between the 1998 accident and 2002 industrial injury since the post-2002 rating was an overall rating for all three levels. (*Id*. at 22-23.) In other words, the impairment rating attributable to the 2002 industrial injury could not be rated separately from the 1998 rating. Rather, the 2002 rating was based on all levels affected by the claimant's industrial injury and was not simply the difference between the 16% and the 8%.

¶11 Section 39-71-703, MCA (1997-2001), entitles the claimant to an impairment award **resulting** from her industrial injury. Section 39-71-703, MCA, provides in relevant part:

> **Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
> (a) has an actual wage loss as a result of the injury; and
> (b) **has a permanent impairment rating** . . .
> . . . .
> (2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.
> . . . .
> (4) A permanent partial disability award granted an injured worker may not exceed a permanent partial disability rating of 100%.
> (5) The percentage to be used in subsection (4) must be determined by adding all of the following applicable percentages **to the impairment rating** . . . .

(Emphasis added.) The section, however, does not directly address whether any preexisting impairment must be deducted in determining the ultimate impairment award.[(2)]

¶12 Pacific argues that the claimant's impairment from her prior auto accident must be deducted from her impairment award because the prior impairment is not causally connected to the claimant's industrial accident. However, it has long been the rule in Montana that an employer "takes his employee subject to the employee's physical condition at the time of the employment . . . ." *Larson v. Cigna Ins. Co.*, 271 Mont. 98, 103, 894 P.2d 327, 300 (1995). That rule is the basis for holding employers and their insurers liable for aggravations of preexisting conditions. As the Supreme Court stated in *Strandberg v. Reber Co.,* 179 Mont. 173, 175, 587 P.2d 18, 19 (1978):

> We have long recognized the doctrine in Montana that an employee suffering from a preexisting condition is not denied compensation if the disability was aggravated or accelerated by an industrial injury. The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury. [Citations omitted.]

¶13 In effect, Pacific is requesting the Court to write in a new set-off or apportionment provision. Section 39-71-703, MCA (1997-2001), does contain a set-off provision. That provision is found in subsection (7), which provides:

> (7) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

Thus, if a worker has already received an impairment award for the same part of the body, that award must be deducted. Significantly, there is no corresponding offset for any impairment caused by a preexisting condition for which a claimant has not received an impairment award.

¶14 Moreover, as evident from occupational disease provisions, specifically section 39-72-706(1), MCA (1989-2003), the legislature knows how to apportion liability.[(3)] The fact that it did not do so is further evidence of its intent that no deduction be allowed for preexisting impairment except where an impairment award has been previously paid for the same part of the body or is to a different, separately rateable part of the body.

¶15 Courts are prohibited from inserting new provisions into a statute. Section 1-2-101, MCA (2003), commands, "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 must therefore decline Pacific's invitation to insert a set-off or apportionment provision.

¶16 Finally, I note that in most cases it is impossible or impractical to determine the percentage of the preexisting impairment. This case is unusual because the same physician who treated the claimant for her industrial injury had treated the claimant for her prior accident, which was relatively recent. He was able and willing to provide an

impairment rating for the prior accident. In other cases, the preexisting impairment may be long standing and the treating physician for the prior condition may either be unavailable or unwilling to render a retrospective rating. Thus, interpreting impairment provisions as allowing apportionment would result in either wild guesses as to prior ratings or to applying apportionment only in unusual cases such as the present one.

¶17 I therefore conclude and hold that where an industrial injury is to the same part of the body, and the impairment rating is for that part of the body, the insurer is liable for the full impairment rating even though the claimant may have had a preexisting impairment for that part of the body. In the event the claimant has received a prior workers' compensation impairment award for the same body part, then the amount of that prior award may be deducted from the new award; otherwise, the full amount shall be paid.

JUDGMENT

¶18 The respondent is liable for the full 16% impairment rating for the claimant's lumbar spine injury. It has paid 8%, therefore, it is liable for and shall pay the claimant an additional 8% impairment award.

¶19 This JUDGMENT is certified as final for purposes of appeal.

¶20 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 28th day of September, 2004.

(SEAL)

/s/Mike McCarter
JUDGE

c: Mr. Kenneth S. Thomas
Mr. Charles G. Adams
Submitted: August 24, 2004

1. During his deposition, Dr. Chandler revised his opinion concerning the claimant's impairment following the 1998 auto accident upward to 9%. However, the additional percentage does not affect the discussion and determination in this case. (Chandler Dep. at 24.)

2. Section 39-71-711, MCA (1995-2003), makes further provisions regarding impairment ratings, providing:

> 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;
(c) must be expressed as a percentage of the whole person; and
(d) must be established by objective medical findings.
(2) A claimant or insurer, or both, may obtain an impairment rating from an evaluator who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice. If the claimant and insurer cannot agree upon the rating, the mediation procedure in part 24 of this chapter must be followed.
(3) 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.
(4) Disputes over impairment ratings are not subject to 39-71-605.

As evident from reading the section, nothing in it addresses the issue in the present case.

3. The fact that the apportionment provision has been declared unconstitutional, Schmill v. Liberty Northwest Ins. Corp., 2003 MT 80, 315 Mont. 51, 67 P.3d 290, does not affect the statement made here.