IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 31

WCC No. 2001-0295

RICHARD WIARD

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

DAW FOREST PRODUCTS

Employer.

PARTIAL SUMMARY JUDGMENT

APPEALED 8/15/01 - AFFIRMED 10/30/03

Factual Summary: Claimant suffered a neck injury in 1992 and had surgery. He was thereafter declared at maximum medical improvement (MMI). He saw a doctor in 1995 about his neck but the doctor's report indicated a new industrial injury and the insurer denied payment. Claimant thereafter did not see a doctor for his neck for over five years and now seeks medical benefits, as well as temporary total disability benefits.

Held: The claim for medical benefits is barred under section 39-71-704 (1991), which provides that medical benefits terminate if not used for 60 or more months. Claimant's due process and estoppel claims are rejected. The insurer merely refused payment of his 1995 claim. He is presumed to have known the law and could have petitioned the Court at that time if he disagreed with the insurer's action.

Topics:

> **Words and Phrases: Ignorance of the Law.** Ignorance of the laws governing benefits is no excuse and does not operate to create exceptions to the laws.
>
> **Benefits: Medical Benefits: 60 Month Limitation.** Under 1991 law - § 39-71-704 (1)(d) - an insurer's liability for further medical benefits terminates if medical benefits are not used for 60 or more months.

Constitutional Law: Due Process. Failure of the insurer to inform claimant of 60 month provision limiting medical benefits under 1991 law does not violate claimant's right to due process of law.

Estoppel and Waiver: Equitable Estoppel. Rejection of a single medical bill by the insurer does not amount to a misrepresentation of a 1991 law which provides for termination of liability for medical benefits if claimant fails to use medical benefits for 60 or more months. There was no representation at all with respect to the 60 month rule.

¶1 The claimant in this matter suffered an industrial injury of his neck on August 5, 1992, while employed by DAW Forest Products (DAW). At the time of his injury, DAW was insured by Liberty Northwest Insurance Corporation (Liberty). Following his injury, still in 1992, he underwent surgery. His surgeon declared him at MMI in 1993 and last saw him in 1995. In 2000 he underwent additional neck surgery. Through his petition he seeks payment of his medical and compensation benefits on account of the 2000 surgery.

¶2 Liberty moves for partial summary judgment with respect to medical benefits, arguing that such benefits are barred by section 39-71-704(1)(d), MCA (1991), which provides that medical benefits cease "when they are not used for a period of 60 consecutive months." Claimant has responded with his own motion for partial summary judgment urging that Liberty should be barred from using the section "as a defense in this matter." Motion for Partial Summary Judgment (docketed May 18, 2001).

Uncontested Facts

¶3 Liberty's statement of uncontested facts refers to seven exhibits, which it attaches to its brief and incorporates by reference. The exhibits are numbered A through G.

¶4 The facts, as set forth by Liberty and referenced to exhibits, are as follows:

¶4A Attached as Exhibit "A" is the claim for compensation regarding the claimant's 1992 injury. Liberty accepted liability and paid certain wage loss and medical benefits to the claimant.

¶4B Attached as Exhibit "B" is Dr. Dewey's letter of 4-22-93 in which Dr. Dewey, the surgeon who operated on the claimant for his 1992 injury, found the claimant at maximum medical improvement.

¶4C Attached as Exhibit "C" is Dr. Dewey's note of 4-25-95 referencing a new injury while the claimant was working for an employer that was not his 1992 employer.

¶4D Attached as Exhibit "D" is the computer entry of Cynthia Bean, who was then a Liberty Northwest adjustor, referencing her telephone conversation with the claimant on 6-2-95 to the effect that the claimant injured himself while working for

May & Company and it was this injury that prompted him to see Dr. Dewey in April 1995.

¶4E Attached as Exhibit "E" is a copy of the Petitioner's Response to Respondent's First Discovery Requests wherein he makes the following admission:

> REQUEST FOR ADMISSION NO. 1: Do you admit that after your April 25, 1995 visit with Dr. Dewey there was a period of 60 consecutive months or more during which you did not receive testing, treatment and/or evaluation by a health care provided for your 1992 injury?
>
> ANSWER: Admit, to the extent that Liberty Northwest refused payment for the April 25, 1995 visit. But for Liberty's 1995 refusal, I would have had at least a yearly checkup.

¶4F Attached as Exhibit "F" is 9-5-00 St. Patrick Hospital Emergency Room report of Dr. Donovan.

¶4G Attached as Exhibit "G" is the Affidavit of Jaimie Kern showing the above documents were received in the normal course of business and constitute part of the file in this case and that the claimant did not seek medical treatment for his neck for more than 60 months.

(Liberty's Motion for Partial Summary Judgment and Supporting Brief at 2-3.)

¶5 Claimant does not dispute the authenticity of the exhibits proffered by Liberty. He accepts many of the facts tendered through the exhibits but in some cases does so with qualifications. Specifically, he responds:

> Mr. Wiard agrees that the factual allegations contained in paragraphs 1, 5, and 6 of Liberty's Brief are undisputed. In regards to paragraph 2, Mr. Wiard would agree that Exhibit B is a copy of Dr. Dewey's 4/22/93 letter; however, Mr. Wiard would submit that whether or not he reached maximum medical improvement is a determination to be made by this Court. In regards to paragraph 3, Mr. Wiard agrees that Exhibit C is a correct copy of Dr. Dewey's office note of 4/25/95; however, Mr. Wiard disagrees that this event constituted a new injury. In regards to paragraph 4, Mr. Wiard makes the same objections as noted for paragraph 3. Mr. Wiard has not had the opportunity to examine Miss Kern, and on that basis disputes the facts in paragraph 7.

(Brief in Opposition to Respondent's Motion for Partial Summary Judgment and in Support of Petitioner's Motion for Partial Summary Judgment at 2-3.)

¶6 Even with the qualifications posed by claimant, there is no dispute as to the following facts:

¶6A Claimant suffered an industrial injury to his neck on August 5, 1992. (Petition for Trial, paragraph 1, which is not denied, and Ex. A.)

¶6B Claimant underwent surgery on September 16, 1992. (Ex. B.)

¶6C On April 22, 1993, Dr. Richard Dewey, who performed the surgery, found claimant at MMI. (Ex. B.) While claimant asserts that "maximum medical improvement is a determination to be made by this Court" (Brief at 2), he has cited no evidence to contradict the MMI determination. The matter must therefore be taken as admitted. *Stutzman v. Safeco Ins. Co. of America,* 284 Mont. 372, 376, 945 P.2d 32, 34 (1997) (party opposing summary judgment cannot simply deny the facts proffered by the moving party). Therefore, for purposes of the motion for summary judgment, claimant is deemed to have been at MMI on April 22, 1993.

¶6D On April 25, 1995, claimant returned to Dr. Dewey complaining of a new neck injury five to six weeks previous. (Ex. C.) Dr. Dewey described the new accident as follows:

> Five to six weeks ago while working with the job service building cabinets on 10-hour shifts, a cabinet fell, he reached to grab it, strained his neck, intrascapular pain, tingling in the right arm.

(*Id*.) Dr. Dewey went on to note that he claimant had an excellent recovery and could return to work:

> Apparently he was off work for two to three weeks as a result of his latest injury. I have no confirmation of this and his condition now is excellent. He certainly can return to the work field in whatever occupation he so desires. He is skiing, playing golf, etc. He may return to his old job. If he pays attention to stretching, his problem should not recur. He is exceptionally strong. Strength is symmetric. Reflexes in the upper extremities symmetric. No loss of sensation in the digits.

(*Id*.) Claimant does not dispute the note but "disagrees" that the event described in the note "constituted a new injury." (Brief in Opposition to Respondent's Motion for Partial Summary Judgment and in Support of Petitioner's Motion for Partial Summary Judgment at 3.)

¶6E On June 2, 1995, claimant discussed Dr. Dewey's bill with Liberty's adjuster. The adjuster told him that Liberty was denying payment for the bill because of the new injury. (Ex. D and Affidavit of Richard Wiard, ¶ 8.)

¶6F Claimant thereafter did not seek medical care with respect to his neck until September 5, 2000. (Exs. E and F.)

> ¶6G Claimant concedes he did not seek further medical care for his neck for more than 60 months but urges that "[b]ut for Liberty's 1995 refusal [to pay Dr. Dewey's May 1995 bill], *I would have had at least a yearly checkup*." (Ex. E, emphasis added.)

¶7 In his own motion for partial summary judgment, the claimant adds the following facts, which are not disputed by Liberty:

> On or about February 24, 1994, claimant and Liberty entered into a Compromise and Release Settlement Agreement. The settlement was approved by the Department of Labor and Industry. The settlement agreement contained the following provision concerning future medical benefits: "Further medical and hospital benefits are expressly hereby reserved by the claimant."

(Ex. 1 to Affidavit of Richard Wiard.)

Discussion

¶8 The cross-motions for partial summary judgment address only claimant's entitlement to further medical benefits. The motions are based upon section 39-71-704, MCA (1991), which was governing law at the time of claimant's injury, *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). That section provides in relevant part:

> **39-71-704. Payment of medical, hospital, and related services -- fee schedules and hospital rates -- fee limitation.** (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:
>
> (a) After the happening of the injury and subject to the provisions of subsection (1)(d), the insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained, subject to the requirements of 39-71-727.
>
> (b) The insurer shall replace or repair prescription eyeglasses, prescription contact lenses, prescription hearing aids, and dentures that are damaged or lost as a result of an injury, as defined in 39-71-119, arising out of and in the course of employment.
>
> (c) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury pursuant to rules adopted by the department. Reimbursement must be at the rates allowed for reimbursement of travel by state employees.

(d) Except for the repair or replacement of a prosthesis furnished as a result of an industrial injury, **the benefits provided for in this section terminate when they are not used for a period of 60 consecutive months**. [Emphasis added.]

¶9 Summary judgment is appropriate only where undisputed facts entitle the moving party to judgment as a matter of law. ARM 24.5.329(2). "Summary judgment is an extreme remedy which should never be substituted for a trial if a material factual controversy exists." *Montana Metal Bldgs. Inc. v. Shapiro*, 283 Mont. 471, 474, 942 P.2d 694, 696 (1997).

¶10 In this case, there is no question that the claimant did not use his medical benefits for a period of greater than 60 consecutive months. Even if his visit to Dr. Dewey on May 25, 1995 is deemed a use of his medical benefits for his 1992 injury, his next use of benefits was on September 5, 2000, more than 60 months later. The plain, unambiguous terms of section 39-71-704(1)(d), MCA (1991), relieve Liberty of liability for the September 5, 2000 visit and any further medical care.

¶11 Claimant, however, argues that the bar should not apply. He advances three theories to support his argument. First, he urges that the 1994 settlement agreement expands his entitlement to benefits beyond the statutory period. Second, he argues that Liberty's failure to give him notice of the 60 month limitation denied him his right to due process of law. Third, he argues that Liberty is estopped from asserting the 60 month limitation.

I. Settlement Agreement

¶12 Claimant's argument concerning the effect of the 1994 settlement agreement warrants only brief discussion. As set forth in the agreement, "Further medical and hospital benefits are expressly hereby reserved by the claimant." Medical benefits are governed by section 39-71-704, MCA (1991). The agreement does nothing more nor less than reserve the claimant his entitlement under that section. It neither contracts nor expands his entitlement under the statute. His argument is without merit.

II. Due Process --- Ignorance of the Law

¶13 Claimant cites no cases to support his argument that Liberty's failure to notify him of the 60 month rule denied him his right to due process of law. Whether or not the claimant was "intimately familiar with the laws and regulations which comprise Montana's Workers' Compensation Act" (Brief in Opposition to Respondent's Motion for Partial Summary Judgment and in Support of Petitioner's Motion for Partial Summary Judgment at 4), his ignorance of the law was no excuse. *Donovan v. Graff,* 248 Mont. 21, 25, 808 P.2d 491, 494 (1991); *Rieckhoff v. Woodhull*, 106 Mont. 22, 30, 75 P.2d 56, 58 (1937). If ignorance of the law were an excuse, laws would be applied willy-nilly depending upon the individual's legal knowledge; the result would be legal chaos and there would be no rule of law at all.

III. Estoppel

¶14 Claimant argues that because Liberty rejected Dr. Dewey's bill for his 1995 examination, it is estopped from asserting the 60 month limitation. He argues:

> In 1995 Liberty, without conducting a complete inquiry, rejected Mr. Wiard's attempt to exercise his right to medical benefits. Liberty denied payment of the medical bill based solely on the claims adjuster's opinion. (See Exhibit 3, p. 1.) There was no independent medical opinion supporting Liberty's denial. There was not even any follow-up with Dr. Dewey. Further, there is no evidence that Mr. Wiard was even advised of his right to contest Liberty's denial through mediation where his entitlement to medical benefits may have been clarified. But for Liberty's unsubstantiated rejection, Mr. Wiard would have had continuing health care to monitor his condition. (Affidavit of Richard Wiard, p. 2, #8). Mr. Wiard then attempted to avail himself of his medical benefits again in the year 2000, resulting in this action before the Court.

(Brief in Opposition to Respondent's Motion for Partial Summary Judgment and in Support of Petitioner's Motion for Partial Summary Judgment at 5.)

¶15 To estop Liberty from asserting the 60 month period as a bar, claimant must establish that all the elements required for estoppel. The elements of estoppel are set out and discussed in *Elk Park Ranch, Inc. v. Park County,* 282 Mont. 154, 165, 935 P.2d 1131, 1137 (1997):

> The doctrine of equitable estoppel is grounded both in statute and in case law. Section 26-1-601, MCA, provides:
>
> > The following presumptions are conclusive: (1) the truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever he has, by such declaration, act, or omission, intentionally led another to believe a particular thing true and to act upon such belief. . . .
>
> Section 26-1-601(1), MCA. In order to prove equitable estoppel, a party must show:
>
> > 1. the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a material fact;
> >
> > 2. these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;
> >
> > 3. the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him;

4. the conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under circumstances both natural and probable that it will be so acted upon;

5. the conduct must be relied upon by the other party and, thus relying, he must be led to act upon it; and

6. he must in fact act upon it in such a manner as to change his position for the worse.

282 Mont. at 165, 935 P.2d at 1137.

¶16 Claimant has not presented any affirmative evidence that Dr. Dewey's MMI opinion was wrong. Moreover, the acceptance of Dr. Dewey's opinion by the insurer does not constitute a representation or misrepresentation by the insurer. Element one is lacking as to claimant's MMI argument.

¶17 Element one is similarly lacking with respect to the 60-month limit. Liberty made no representation concerning the limit. It simply denied payment for Dr. Dewey's bill based on the report of a new injury. Moreover, claimant could have contested the denial and petitioned the Court for payment. The reliance element is therefore lacking.

ORDER

¶18 Finding good cause, Partial Summary Judgment is entered in favor of Liberty with respect to the claim for further medical benefits. Liberty is not liable for further medical benefits.

DATED in Helena, Montana, this 8th day of June, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Eric Rasmusson - U.S. Mail and FAX
Mr. Larry W. Jones - U.S. Mail and FAX
Submitted: June 6, 2001