IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 16

WCC No. 2019-4596

PEGGY BROWER

Petitioner

vs.

VALOR INSURANCE COMPANY, INC., in liquidation,
MONTANA INSURANCE GUARANTY ASSOCIATION

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moves for summary judgment, asserting that Respondent remains liable for her cervical problems because the insurer accepted liability for her "cervical condition" in the early 2000s and there is no evidence that she suffered a permanent aggravation. Petitioner also asserts that Respondent is estopped from denying liability and has waived its right to contest coverage through representations, which Petitioner understood to mean that the insurer had accepted liability for all of her cervical problems and that she would have coverage for all problems with her cervical spine.

Held: Petitioner is not entitled to summary judgment because there are issues of fact as to whether her current cervical problems — which are degenerative disk disease with radiculopathy and spondylosis — are the same condition for which the insurer accepted liability or a natural progression of that specific condition, which was arguably limited to a herniated disk at C5-6. Respondent is not estopped from contesting liability because neither it nor the insurer represented that the insurer had accepted liability for every problem in Petitioner's cervical spine or that Petitioner had coverage for every problem she would develop in her cervical spine.

¶ 1 Petitioner Peggy Brower moves for summary judgment, arguing that Valor Insurance Company, Inc. (Valor) accepted liability for her cervical spine condition in the early 2000s and that Respondent Montana Insurance Guaranty Association (MIGA) is

now attempting to deny liability for the cervical problems for which liability was accepted. Brower also argues that she is entitled to summary judgment because Valor and MIGA represented that her cervical condition would be covered.

¶ 2 MIGA urges this Court to deny Brower's motion because she has not carried her burden of proving that her current cervical problems are the same condition for which Valor accepted liability. MIGA also denies that there have been representations from which Brower could have reasonably believed that Valor accepted liability for every problem in her cervical spine or that she had coverage for every problem she could develop in her cervical spine.

¶ 3 Because there are issues of material fact, this Court denies Brower's summary judgment motion.

FACTS

¶ 4 In June 2002, Brower filed a First Report of Injury or Occupational Disease. She complained of right shoulder pain.

¶ 5 At that time, Valor insured Brower's employer, First Interstate Bank.

¶ 6 In 2003, Valor became insolvent and MIGA is now liable for Brower's claim.

¶ 7 Brower's treating physicians initially thought that she had a shoulder injury. However, a shoulder surgery did not provide any relief. Brower's treating physicians then thought she had thoracic outlet syndrome. However, thoracic outlet surgery did not improve her condition.

¶ 8 An MRI on September 2, 2003, showed, "Diffuse degenerative dis[k] disease in the cervical spine with the epicenter at C5-6 with some involvement at C6-7. There is an eccentric protruding dis[k] at 5-6, which causes a ventral impression upon the thecal sac and slight narrowing of the neural foramina at that point."[1]

¶ 9 On October 1, 2004, a panel of physicians generally diagnosed "cervical spine disease," and specifically diagnosed "right C6 radiculopathy associated with a herniated disk at C5-C6 to the right." The panel opined that the disk herniation at C5-6 was caused by her work. In response to a question asking what the work-related diagnoses were, the panel answered:

> Based upon the history obtained from the records, [Brower's] history and our examinations here at Deaconess Billings Clinic, we can conclude that [Brower] clearly has chronic right shoulder, arm and neck pain related to her work as a proof operator. Many of the characteristics of this pain suggest

[1] Alterations added.

> a prominent myofascial pain syndrome related to the prolonged maintenance of her arm in 90 degrees of forward flexion required by her work. In addition, it is possible that a significant portion of her pain has been due to cervical spine disease, particularly right C6 radiculopathy associated with a herniated disk at C5-C6 to the right. Exactly when the disk herniation occurred is uncertain since the first MRI of her neck was not obtained until November 2nd, 2003, at which time the herniated disk at C5-C6 was clearly visible. When all of this information is taken in the context of her persistent pain in her right shoulder, arm and neck, it is very possible that the herniated disk at C5-6 has been present from the beginning of her complaints, and therefore related to her work. We feel that it is quite possible that the cervical spine disease noted above has accounted for at least some of her painful symptoms in the right upper extremity since the beginning of her problem in 2002.[2]

The panel then distinguished the C5-6 herniated disk from Brower's degenerative process and opined that her herniated disk was caused by Brower's work:

> [I]t is quite possible that a significant portion of [Brower's] chronic right shoulder and arm pain are referred pain from her herniated disk at the C5-6 level with compression of the right C6 nerve root. In the absence of evidence to the contrary, it is also likely that the C5-C6 disk herniation is related to her work as a proof operator. Also, as discussed in #1, there appears to be a component of myofascial pain syndrome in her right shoulder, arm and neck. Additional workup is recommended to determine which of these two processes may be contributing to her pain . . . . The surgical procedures on her right shoulder and the surgery for her alleged right thoracic outlet syndrome have not benefitted her and have probably contributed to and/or aggravated her myofascial pain symptoms. Since the first MRI of cervical spine was not obtained until November 2nd, 2003, it is not possible to be definitive in concluding that the C5-C6 disk herniation occurred during her work. However, the character of her pain and the persistence of it and the finding of the C5-C6 disk persistently on not only the November 2nd, 2003, MRI scan, but the MRI scan done more recently on 9/21/04, are strongly suggestive that this C5-C6 disk herniation is causing some of her chronic pain. An alternative explanation for which there is no clear evidence is that the herniated disk at C5-C6 is unrelated to her work and simply associated with cervical degenerative processes. However, the panel feels that this is a less likely conclusion. Thus, on a more probable than not basis, the panel feels that the C5-C6 disk herniation

[2] Alterations added.

> is related to her work as a proof operator and is a likely cause of her persistent painful syndrome.[3]

¶ 10 In 2006, Brower and Valor settled the wage loss portion of her claim. In relevant part, the Petition for Full and Final Compromise Settlement and Release states:

> Disputes subsequently arose concerning ability to work, causation of disability, extent of disability, refusal of certain treatment recommendations, reasonableness and necessity of certain medical treatment, and entitlement to permanent partial versus permanent total disability benefits.
>
> . . . .
>
> Past, present, and future medical benefits are reserved, as limited herein.

In a cover letter to the Employment Relations Division (ERD) in which Valor's attorney recapped the claim history and Valor's position, the attorney stated, in relevant part, "In May 2004, Dr. Galvas noted a cervical dis[k] problem, which was probably the cause of the original shoulder and upper extremity pain. The cervical dis[k] condition has been treated conservatively, most recently by Dr. Bryan, and Insurer understands Petitioner is disinterested in pursuing a surgical remedy for this condition."[4]

¶ 11 At the time she settled, Brower thought that Valor "would provide future medical treatment for my neck injury, and I relied on that fact when I agreed to settle my claim with medical coverage for my neck open."

¶ 12 In 2012, MIGA sent a letter to a physician at the City-County Health Department in Great Falls, asking whether several prescriptions were medically necessary to treat Brower's industrial injury, which MIGA stated "affected her right shoulder, arm and neck."

¶ 13 On August 13, 2015, Brower underwent an examination under § 39-71-605, MCA, with John A. Vallin, MD. Dr. Vallin concluded, *inter alia*, that Brower had "right shoulder impingement syndrome related to repetitive occupational exposure as an encoder for First Interstate Bank on or around June 17, 2002." However, Dr. Vallin opined that Brower's herniated disk at C5-6 was not caused by her work, nor the cause of her right shoulder pain. Dr. Vallin also opined that Brower did not have "cervical radiculopathy" nor "symptomatic cervical degenerative dis[k] disease/spondylosis."[5]

¶ 14 On July 9, 2018, Brower saw John G. VanGilder, MD. Dr. VanGilder noted that Brower reported "neck pain that's been going on for years" and that an MRI from May 23,

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[3] Alterations added.

[4] Alterations added. Neither party has provided this Court with Dr. Galvas's record from May 2004.

[5] Alteration added.

2017 “shows degenerative dis[k] disease at C4-5, C5-6, C6-7”[6] and “bilateral foraminal stenosis at C4-5, C5-6, and left greater than right at C6-7.” Dr. VanGilder diagnosed cervical spondylosis and cervical degenerative disk disease with radiculopathy. Dr. VanGilder informed Brower of her options, which included an anterior cervical diskectomy and multilevel fusion. However, Dr. VanGilder did not offer any opinion as to the cause of Brower’s cervical spondylosis nor of her degenerative disk disease.

¶ 15 Brower decided to undergo the surgery. However, on July 13, 2018, MIGA denied authorization for the surgery on the grounds that the “work injury is to employee arm and shoulder.”

¶ 16 On May 16, 2019, Brower returned to Dr. VanGilder. Dr. VanGilder again informed Brower of her options, which included “leaving things alone and living with her symptoms, PT for the neck, steroid injections in the neck, and the option of a C4-5, C5-6, C6-7 ACDF with plate.” As before, Dr. VanGilder did not comment on the cause of Brower’s spondylosis nor of her degenerative disk disease.

LAW AND ANALYSIS

¶ 17 Generally, the law in effect when a claimant files her claim, or on her last day of work, whichever is earlier, governs an occupational disease claim.[7] This case is governed by the 2001 version of the Montana Workers’ Compensation Act (WCA) since that was the law in effect at the time of Brower’s occupational disease claim.[8]

¶ 18 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the “absence of a genuine issue of material fact and entitlement to judgment as a matter of law.”[9] “[If] the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment.”[10]

¶ 19 Brower first argues that MIGA should not be able to deny liability for her spondylosis and cervical degenerative disk disease with radiculopathy because Valor accepted liability for her “cervical condition.” As a general rule, “once an insurer accepts

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[6] Alteration added.

[7] *Hardgrove v. Transp. Ins. Co*., 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citation omitted); *Bouldin v. Liberty Nw. Ins. Corp.*, 1997 MTWCC 8. *But see Nelson v. Cenex, Inc*., 2008 MT 108, ¶¶ 30, 33, 342 Mont. 371, 181 P.3d 619 (worker’s later employment was irrelevant to his hazardous exposure and occupational disease, and the court therefore applied the Occupational Disease Act in effect on the date in which the period of employment which included his last injurious exposure ended).

[8] *See Bouldin*, 1997 MTWCC 8; *Fuss v. Ins. Co. of N. Am.*, 2004 MTWCC 34, ¶ 88 (citation omitted) (applying the versions of the WCA in effect at the time of claimant’s OD claims).

[9] *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

[10] *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted).

liability it may not thereafter argue that the injury or condition for which liability has been accepted was not caused by the industrial accident or disease."[11]

¶ 20 However, MIGA is correct that there are issues of fact as to whether Brower's current cervical problems are the same condition for which Valor accepted liability. Brower has not submitted any direct evidence of the condition for which Valor accepted liability. And, the circumstantial evidence suggests that the only cervical condition for which Valor accepted liability was Brower's herniated disk at C5-6. In 2004, the only cervical condition the medical panel attributed to Brower's employment was her disk herniation at C5-6. The panel did not attribute Brower's degenerative disk disease to her employment. At the summary judgment stage, this Court makes all reasonable inferences in favor of the party opposing summary judgment.[12] A reasonable inference can be drawn that the only cervical condition for which Valor accepted liability was the herniated disk at C5-6. In short, there is an issue of fact as to whether Valor accepted liability for Brower's degenerative disk disease, which was the only other condition diagnosed at that time.

¶ 21 Brower also argues that "MIGA cannot meet its burden to prove there was a new injury or exacerbation that would relieve it of liability." However, Brower puts the proverbial cart before the horse. In cases in which a claimant contends that her current condition is the natural progression of an earlier occupational disease, the claimant has the initial burden of proving that her initial occupational disease is the cause of the present disability.[13] If the claimant meets her burden, the burden shifts to the insurer to prove that a subsequent event or events aggravated claimant's initial occupational disease and is or are the actual cause of claimant's present disability.[14]

¶ 22 Here, Brower has not met her burden of establishing that there are no issues of fact on the issue of whether her current cervical problems are caused by a herniated disk at C5-6, nor that her current problems are the natural progression of her herniated disk at C5-6. Dr. VanGilder diagnosed cervical spondylosis and cervical degenerative disk disease with radiculopathy. However, Dr. VanGilder did not offer any opinion as to the

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[11] *Bouldin v. Liberty Nw. Ins. Corp.*, 1996 MTWCC 61.

[12] *Lunday v. Liberty Nw.*, 2017 MTWCC 20, ¶ 31.

[13] *See Burglund v. Liberty Mut. Fire Ins. Co.*, 286 Mont. 134, 136, 950 P.2d 1371, 1372 (1997) (holding that claimant met his initial burden with medical testimony "establishing a clear connection between his current condition and his 1984 injury."). *See also Lanes v. Mont. State Fund*, 2008 MT 306, ¶¶ 24-27, 346 Mont. 10, 192 P.3d 1145 (relying upon *Burglund* in holding that claimant met his burden by establishing that claimant's knee condition was caused by his initial occupational disease); *Gary v. Mont. State Fund*, 2012 MTWCC 38, ¶ 32 (explaining that claimant had the burden of proving a causal connection between his injury and his right to benefits and ruling that claimant did not meet his burden of proving that his herniated disk at L4-5, which occurred five years after his industrial injury, was caused by such injury).

[14] *Burglund*, 286 Mont. at 136, 950 P.2d at 1372 (citation omitted) ("The burden of proof then shifted to Liberty to establish that Burglund's degenerative low-back condition was accelerated by a subsequent occupational disease. More specifically, Liberty had to prove that Burglund's increased disability was not the result of a natural progression of the condition caused by the 1984 injury.").

cause of these specific diagnoses. While Brower asserts that Dr. VanGilder is treating the "same neck area that was covered for many years," she must prove more than that she has pain in the same area of the condition for which the insurer accepted liability. Until Brower meets her initial burden of establishing a causal relationship between her 2002 occupational disease and her current cervical spondylosis and cervical degenerative disk disease with radiculopathy, which must be done with medical expertise or opinion,[15] the burden does not shift to MIGA. This Court cannot grant summary judgment to Brower on the grounds that her current cervical problems are causally related to her occupational disease because she has not established that there are no issues of material fact.

¶ 23 Brower also asserts that MIGA is liable for "cervical coverage" under the doctrines of equitable estoppel, waiver, and judicial estoppel. However, Brower has not introduced evidence that Valor or MIGA ever represented that Valor accepted liability for every problem in her cervical spine or that she would have lifetime coverage for every problem she would develop in her cervical spine.

¶ 24 Brower first points to the letter Valor's attorney sent to the ERD and argues that it conclusively establishes that Valor accepted liability for her "cervical condition" and that she relied upon that representation in agreeing to settle with medicals open, as she would not have agreed to settle without coverage for every problem in her cervical spine. However, Brower takes more from this letter than is there. In his letter to the ERD, Valor's attorney did not represent that it was Valor's position that it had accepted liability for every problem in Brower's cervical spine nor promise lifetime medical care for every problem in Brower's cervical spine. Rather, he referred to a problem with one cervical disk; he stated, "In May 2004, Dr. Galvas noted ***a*** cervical disk problem, which was probably the cause of the original shoulder and upper extremity pain."[16] To the extent this statement sets forth the condition for which Valor accepted liability, a reasonable inference can be made that Valor's attorney was referring to Brower's herniated disk at C5-6. Thus, MIGA is not estopped from contesting liability on the basis of Valor's attorney's letter.

¶ 25 Moreover, it is established that when the parties settle a claim with medical benefits open, the agreement incorporates the workers' compensation laws.[17] As set forth above, under Montana workers' compensation law, MIGA is liable only for the specific condition caused by Brower's work and the natural progression of that condition. There is nothing in the settlement documents from which this Court could find that Valor promised Brower

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[15] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 44-48, 365 Mont. 405, 282 P.3d 687.

[16] Emphasis added.

[17] *Wiard v. Liberty Nw. Ins. Corp.,* 2003 MT 295, ¶ 24, 318 Mont. 132, 79 P.3d 281 (holding that when parties settled with medicals open, "the liability assumed by the insurer under the agreement was that imposed by the Act and nothing more").

coverage beyond the limits of Montana workers' compensation law;[18] i.e., there is nothing from which this Court could conclusively find that Valor promised coverage for all of Brower's cervical spine problems.

¶ 26 Brower also points to the letter the MIGA claims examiner sent on May 2, 2012. However, here again, Brower takes more from the letter than is there. MIGA did not represent that it accepted liability for every problem in Brower's cervical spine. Rather, the claims examiner merely asked if several prescriptions were related to Brower's "industrial injury which affected her right shoulder, arm, and neck." The claims examiner did not identify the cervical condition for which liability was accepted, nor state that MIGA would continue to provide coverage for every problem in Brower's cervical spine. Thus, MIGA is not estopped from contesting liability on the basis of this letter.

¶ 27 In sum, Brower did not meet her burden of establishing that there are no issues of material fact, nor that she is entitled to judgment as a matter of law. Accordingly, this Court enters the following:

ORDER

¶ 28 Petitioner's Motion for Summary Judgment is **denied**.

DATED this 25th day of October, 2019.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Sarah D. Simkins

Submitted: September 17, 2019

[18] *See Newlon v. Teck Am., Inc.*, 2015 MT 317, ¶ 18, 381 Mont. 378, 360 P.3d 1134 (holding that provision in WCA providing that medical benefits closed if the claimant did not access such benefits for 60 consecutive months did not apply because the settlement agreement stated that claimant had medical benefits for life).