

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 22

WCC No. 2011-2833

MARK DAUENHAUER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Within the 60-consecutive month period under the statute of repose, § 39-71-704(1)(e), MCA, Petitioner's wife contacted Respondent for authorization for her husband to see his surgeon for a follow-up visit. Respondent's claims examiner denied authorization, believing the request was based solely on Petitioner's desire to keep his medical benefits open. Without Respondent's authorization to see a physician, Petitioner had difficulty setting a medical appointment. Petitioner's family physician eventually faxed a request to Respondent to have Petitioner seen by a neurosurgeon, two days after the statute of repose had run. Respondent continued to deny further medical care on the basis that Petitioner had failed to use his medical benefits for over 60 consecutive months.

Held: Seeking authorization for legitimate, reasonably necessary medical treatment causally related to an accepted injury claim within 60 consecutive months of the last treatment constitutes "use" under § 39-71-704(1)(e), MCA. Because Respondent's claims examiner believed the sole reason Petitioner was requesting authorization for treatment was to extend the 60-month deadline, Respondent acted reasonably in denying and maintaining the denial of medical benefits.

Topics:

Insurers: Adjusters. The claims examiner was informed that one of the reasons Petitioner needed to see a physician was because the statute of repose was about to run under § 39-71-704(1)(e), MCA. The claims examiner interpreted this as a desire to keep the 60-month time limit from

running without a need for medical care and denied the request. The denial was not unreasonable, even though Petitioner was primarily seeking follow-up care due to numbness in his extremities resulting from his neck injury.

Attorney fees: Reasonableness of Insurer. The claims examiner was informed that one of the reasons Petitioner needed to see a physician was because the statute of repose was about to run under § 39-71-704(1)(e), MCA. The claims examiner interpreted this as a desire to keep the 60-month time limit from running without a need for medical care and denied the request. The denial was not unreasonable, even though Petitioner was primarily seeking follow-up care due to numbness in his extremities resulting from his neck injury.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Seeking authorization for legitimate, reasonably necessary medical treatment causally related to an accepted injury claim within 60 consecutive months of the last treatment constitutes “use” under § 39-71-704(1)(e), MCA. Otherwise, if the insurer denies authorization and the claimant cannot afford the treatment, the insurer could evade payment of medical benefits until the 60 months had run and then simply close its file.

Benefits: Medical Benefits: Sixty (60) Month Limitation. Where a claimant requested authorization to see his physician well within 60 months of his previous treatment, but the claims adjuster denied authorization and later denied the claimant further medical benefits under the 60-month rule, the claimant’s request for authorization constituted “use” under § 39-71-704(1)(e), MCA, since the requested treatment was for legitimate, reasonably necessary medical care related to his industrial injury.

¶ 1 The trial in this matter was held on April 12, 2012, in the offices of Fisher Court Reporting, Billings, Montana. Petitioner Mark Dauenhauer was present and represented by Victor R. Halvorsen. Respondent Montana State Fund (State Fund) was represented by Daniel B. McGregor. State Fund claims examiner Bob Silberling was also present.

¶ 2 Exhibits: I admitted Exhibits 1 through 8 without objection.

¶ 3 Witnesses and Depositions: The parties agreed that the deposition of Petitioner Mark Dauenhauer could be considered part of the record. Mark Dauenhauer, Susan Dauenhauer, and Bob Silberling were sworn and testified.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:¹

Issue 1: Whether State Fund acted reasonably in denying Petitioner medical benefits under § 39-71-704, MCA.

Issue 2: Whether Petitioner “used” his medical benefits within a period of 60 consecutive months per § 39-71-704(1)(e), MCA.

Issue 3: Whether Petitioner is entitled to an award of fees, penalty, and costs.

¶ 5 At the close of trial I issued a bench ruling pursuant to ARM 24.5.335. The following findings of fact, conclusions of law, and judgment are in accordance with that ruling.

FINDINGS OF FACT

¶ 6 On April 29, 1994, Petitioner Mark Dauenhauer suffered an industrial injury which occurred in the course and scope of his employment. At the time of his injury, Dauenhauer was employed by Holm Sutherland Company Inc., in Yellowstone County, Montana. Dauenhauer injured his head and neck.²

¶ 7 The State Fund accepted liability for the claim, and paid medical and wage-loss benefits.³

¶ 8 Dauenhauer testified at trial. I found Dauenhauer to be a credible witness. He was working as a heavy equipment operator, running a sheepsfoot roller in a trench on April 29, 1994, when it lunged up the side of the trench, flipping over on top of him and breaking his jaw. Eventually, he required cervical surgery for the removal of two discs, fusion of three vertebrae, and the installation of a z-type plate to stabilize his spine. The plate is still in his neck.⁴

¶ 9 Dauenhauer’s surgeon, Lashman W. Soriya, M.D., recommended that he stop working as a heavy equipment operator and seek a different line of work. Dauenhauer attended college courses and earned an associate’s degree in computer aided drafting.

¹ Pretrial Order at 2, Docket Item No. 21.

² Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 1.

³ Pretrial Order, Statement of Uncontested Facts, at 2, ¶ 3.

⁴ Trial Test.

He now owns his own company, designing refrigeration equipment for retail grocery stores.⁵

¶ 10 After his surgery, Dauenhauer continued to see Dr. Soriya post-surgery for follow-up visits, although his visits became fewer as time went on. Dauenhauer stated that Dr. Soriya told him to never let his medical insurance lapse and to never settle his medical claim because of the severity of his injury. He testified that Dr. Soriya told him that, because of the fusion, there would be more pressure on the adjacent disks, and that his quality of health may suffer later in his life.⁶

¶ 11 Dauenhauer last saw Dr. Soriya on July 17, 2006, complaining of “tightness in his shoulders and left axillary pain and numbness in the left hand and sometimes numbness in the right.”⁷ The doctor’s report on that date notes the findings on x-rays as: “fusion from C4 to C6 with anterior cervical instrumentation, and at C3-C4 he has significant disk degeneration. At C6-C7 there is modest disk degeneration.”⁸ Dauenhauer recalls the doctor telling him about the disk degeneration in his neck “just like he had predicted,” and Dauenhauer was very concerned about what the x-rays revealed.⁹

¶ 12 Dauenhauer attempted to see Dr. Soriya for a post-surgery check-up before his medical benefits ran out because he continued to have numbness in his fingers and toes and he wanted to see if the disk degeneration had progressed. When his wife attempted to get authorization for that office visit from State Fund, the claims examiner denied authorization.¹⁰

¶ 13 Dauenhauer went to see his family doctor, R. James Nichols, M.D., on July 1, 2011, taking all of his medical records with him for the doctor to review. Dauenhauer knew by then that Dr. Soriya had retired, and requested that Dr. Nichols refer him to a “neurospecialist” in Dr. Soriya’s old office. After reviewing Dauenhauer’s medical records, the doctor told him that he needed to see a specialist to find out how the degeneration in his cervical disks had progressed. Dr. Nichols recommended that Dauenhauer see Michael Copeland, M.D., with the Northern Rockies Neurosurgeons clinic. Dr. Nichols told Dauenhauer that he would contact workers’ compensation to get

⁵ Trial Test.

⁶ Trial Test.

⁷ Trial Test.; Ex. 6 at 7.

⁸ Ex. 6 at 8.

⁹ Trial Test.

¹⁰ Trial Test.

this straightened out, and get the approval so he could set an appointment for him with Dr. Copeland's office.¹¹

¶ 14 Susan Dauenhauer (Susan) testified at trial. I found Susan to be a credible witness. Following her husband's injury, Susan handled all of his medical appointments. If Dauenhauer needed to see a doctor, Susan called the State Fund claims examiner to get authorization. Since 1994, Susan talked with at least four different claims examiners assigned to her husband's claim. After the surgery, all of Dauenhauer's medical appointments were with his surgeon, Dr. Soriya, and Susan accompanied him to each of his medical appointments, except for his last one with Dr. Nichols.¹²

¶ 15 In November 2010 Susan called State Fund in an attempt to get authorization for a follow-up medical exam. Susan left a message for the claims examiner, and when she received no call back, she called State Fund again in January 2011 and left another message. When she again received no return call, she called State Fund in February 2011 and finally reached the claims examiner, Bob Silberling. Susan was upset by that time because she had never had a problem before reaching and talking with a claims examiner. Susan explained to Silberling that she knew the 60 months were about to run out and she needed authorization for Dauenhauer to see his doctor to check on the degeneration of his disks. Silberling told Susan that he would review Dauenhauer's file and get back to her.¹³

¶ 16 The Dauenhauers received a letter from Silberling dated February 22, 2011, denying authorization to see a physician on the grounds it appeared the request was based on the 60-month rule and was for palliative or maintenance care rather than medically necessary care.¹⁴ Susan then contacted the Northern Rockies Neurosurgeons clinic where Dr. Soriya had practiced and was told he had retired. She tried to schedule Dauenhauer with a different physician at Dr. Soriya's clinic and was referred to a Dr. Christopher who practiced in the field of occupational health.¹⁵

¶ 17 After reviewing Dauenhauer's medical records, Dr. Christopher's office informed Susan he could not help her husband. Susan then attempted to schedule an appointment with the physician who took over Dr. Soriya's practice and was again refused an appointment. She then tried the Deaconess Billings Clinic where Dr. Soriya had also previously practiced and was told they could not help her. Dauenhauer had a

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Ex. 3 at 7.

¹⁵ Trial Test.

physical exam sometime in early 2011 with a Dr. Emory. Dauenhauer took his medical records with him to that appointment but Dr. Emory stated he could not treat him. Finally, on July 1, 2011, Susan secured an appointment for Dauenhauer with Dr. Nichols, their family physician.¹⁶

¶ 18 In Susan's multiple attempts to schedule Dauenhauer for a medical exam, she informed each of the medical offices that her husband's workers' compensation carrier had denied him authorization for further medical treatment.¹⁷

¶ 19 Following the office visit with Dr. Nichols on July 1, 2011, Dr. Nichols wrote to Dauenhauer and stated that he should see a spine specialist. Dr. Nichols recommended Dr. Copeland to rule out spinal stenosis and neural foraminal narrowing at the C6 level, both directly and indirectly related to his industrial accident.¹⁸

¶ 20 Susan contacted Dr. Copeland's office to set an appointment for Dauenhauer, but was told it was Dr. Nichol's responsibility to get the State Fund to approve the referral.¹⁹ On July 18, 2011, Dr. Nichol's office faxed a request to State Fund for Dauenhauer to see Dr. Copeland, and State Fund denied the request the same day.²⁰ On September 27, 2011, Dr. Copeland's clinic, Northern Rockies Neurosurgeons, wrote to Dauenhauer stating that his workers' compensation insurer considered his case closed and that the clinic could not see him until his case was "reactivated."²¹

¶ 21 After receiving Silberling's letter denying authorization for further medical attention, Dauenhauer contacted his attorney who wrote Silberling on February 28, 2011, attempting to get Silberling to authorize additional medical attention for Dauenhauer.²²

¶ 22 Bob Silberling testified at trial. I found Silberling to be a credible witness. Silberling is a State Fund claims examiner who was assigned to Dauenhauer's case. Silberling testified that State Fund moved into a new building in approximately June 2010, that the old phone numbers did not transfer, and that everyone at State Fund received new phone numbers. He did not recall receiving any phone message from

¹⁶ Trial Test.

¹⁷ Trial Test.

¹⁸ Ex. 7 at 1.

¹⁹ Trial Test.

²⁰ Trial Test.; Ex. 7 at 2.

²¹ Ex. 6 at 11.

²² Ex. 4 at 1.

Susan prior to his conversation with her on or about February 22, 2011, when she called to get authorization for Dauenhauer to see his doctor.²³

¶ 23 Silberling asked Susan why Dauenhauer was seeking further medical treatment. It was his impression from speaking with Susan that the only reason was to keep his medical benefits from lapsing under the 60-month rule. Silberling told Susan he would have to review the file to determine if State Fund would approve a follow-up doctor visit. After reviewing the file, Silberling determined that it had been over four years since Dauenhauer had last seen a doctor, and he had received no prescription medication since 1999.²⁴ Silberling then issued his letter of February 22, 2011, denying authorization for further medical treatment.²⁵

¶ 24 Silberling later received a written request from Dauenhauer's attorney to rescind the denial and authorize a follow-up medical exam.²⁶ There was no evidence presented as to whether Silberling ever responded to that request; however, he could not recall receiving any additional information provided with the letter documenting Dauenhauer's medical condition.²⁷

¶ 25 Silberling received the faxed Provider Request for Authorization from Dr. Nichols on July 18, 2011, requesting authorization for Dauenhauer to be seen by Dr. Copeland at Northern Rockies Neurosurgeons.²⁸ He denied the request based on his letter of February 22, 2011, and because by that time, the file was closed. The request was not accompanied by medical notes indicating the reason for the referral, and it was generated by a physician (Dr. Nichols) who had not previously provided medical services on the claim.²⁹ On July 19, 2011, State Fund received a copy of Dr. Nichols' letter to Dauenhauer, stating the reasons why Dr. Nichols wanted him to be seen by a neurosurgeon.³⁰ State Fund never received a copy of Dr. Nichols' bill and was never asked to pay for the visit with Dr. Nichols.³¹

²³ Trial Test.

²⁴ Trial Test.

²⁵ Ex.3 at 7.

²⁶ Ex. 4 at 1.

²⁷ Trial Test.

²⁸ Ex. 3 at 9; Ex. 7 at 2.

²⁹ Trial Test.

³⁰ Ex. 4 at 4; Ex. 7 at 1.

³¹ Trial Test.

CONCLUSIONS OF LAW

¶ 26 This case is governed by the 1993 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Dauenhauer's industrial accident.³²

¶ 27 Dauenhauer bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.³³ Dauenhauer has met his burden.

ISSUE 1: Whether State Fund acted reasonably in denying Petitioner medical benefits under § 39-71-704, MCA.

¶ 28 Section 39-71-704(1)(e), MCA, states that medical, hospital, and related benefits terminate "when they are not used for a period of 60 consecutive months."

¶ 29 As this Court stated in its Order Denying Motion for Reconsideration in *Wiard v. Liberty Northwest Ins. Corp.*:³⁴

Underlying claimant's estoppel contention is an unspoken argument or assumption that had claimant known of the 60-month requirement he would have sought medical care within that period just to toll the running of the 60 months. . . . The right to medical benefits is the right to reasonably necessary care for the injury; care for the sole purpose of extending the 60-month period is not reasonably necessary medical care for which an insurer is liable. If a claimant does not need medical care during the 60-month period, securing care just for the purpose of extending the 60-month period is tantamount to fraud.

¶ 30 In the present proceeding, Susan testified that she told the State Fund claims examiner that one of the reasons her husband needed to see a physician after having not seen one for over four years, was because the 60 months were about to run. It was not the only reason, nor was it the primary reason. Although Dauenhauer was aware of the 60-month time limit, he was seeking follow-up care because he was concerned about the ongoing numbness in his extremities and wanted to find out about the extent of degeneration of the disks in his neck. Silberling denied the requested authorization because he perceived that Dauenhauer's sole reason for seeking follow-up care was to

³² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

³³ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

³⁴ *Wiard v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 31A, ¶ 7.

keep the 60-month time limit from running. Medical care for the sole purpose of extending the 60-month period is not reasonably necessary care.³⁵

¶ 31 As this Court has ruled previously, reliance by an insurer on an earlier ruling of this Court forms a reasonable basis for denial of liability.³⁶

¶ 32 When Silberling finally received medical information, it was a request from a physician who had not previously treated Dauenhauer for his industrial injury, it was not accompanied by any medical notes or other information documenting the need for additional care, and the request was faxed to State Fund two days beyond the 60-month period. The file was by that time closed, as permitted under § 39-71-704(1)(e), MCA.

¶ 33 For the foregoing reasons, I conclude State Fund acted reasonably in denying Dauenhauer medical benefits.

ISSUE 2: Whether Petitioner “used” his medical benefits within a period of 60 consecutive months per § 39-71-704(1)(e), MCA.

¶ 34 As I held in *Palmer v. Safeco*,³⁷ § 39-71-704(1)(e), MCA, is a statute of repose, as it “terminates the cause of action on a date certain and independent of the accrual of the cause of action.” It was undisputed in *Palmer* that the injured worker requested no medical benefits for over 60 consecutive months, and the statute of repose, unlike a statute of limitation, could not be tolled during the period he was unaware that the condition for which he sought treatment was related to his industrial injury. Similarly, in *Wiard v. Liberty Northwest Ins. Corp.*,³⁸ Both *Palmer* and *Wiard* are distinguishable from the facts of this case in which Dauenhauer sought both medical care and authorization for such care within the 60-month period.

¶ 35 This case is more similar to *Schellinger v. St. Patrick Hospital and Health Sciences Center*.³⁹ In *Schellinger*, the claimant repeatedly sought treatment for psychological issues despite the insurer’s continued denial of liability for her care. Following this Court’s ruling that Schellinger’s condition was compensable, she sent two demands for payment to the insurer’s counsel for all of her psychological care and treatment, all of which was completed prior to the expiration of the 60 months. I held

³⁵ *Id.*

³⁶ *Kilgore v. Transp. Ins. Co.*, 2008 MTWCC 51, ¶ 29.

³⁷ *Palmer v. Safeco*, 2006 MTWCC 44, ¶ 11.

³⁸ *Wiard v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 31.

³⁹ *Schellinger v. St. Patrick Hosp. and Health Sciences Cent.*, 2012 MTWCC 10.

that Schellinger had satisfied the 60-month time limit because she had received treatment and sought payment for the treatment within the time allotted.

¶ 36 It is undisputed that Dauenhauer wanted his physician to see him before his medical benefits lapsed. It is also undisputed by the medical evidence that he had a severe neck injury resulting from his 1994 industrial accident that required the removal of two disks and a cervical fusion. As a direct consequence of that surgery, he developed moderate to significant disk degeneration above and below the fused vertebrae. He testified to ongoing numbness and had legitimate medical concerns for seeking authorization for follow-up medical care in February 2011.

¶ 37 The request for authorization to be seen by a physician is a “use” under § 39-71-704(1)(e), MCA, since any other conclusion would lead to an absurd result. If an insurer denies authorization and a claimant cannot afford the treatment out of his or her own pocket, an insurer could evade the payment of medical benefits until the 60 months had run, and then simply close its file. Here, Dauenhauer’s wife followed the established protocol of requesting authorization from State Fund’s claims examiner before her husband saw his doctor for a follow-up visit. The request was made in February 2011, well within 60 months of Dauenhauer’s last visit with Dr. Soriya in July 2006. But for the denial, Dauenhauer would have been seen by a physician well within the 60-month time period.

¶ 38 Whether the claimant requests payment after seeing the physician as in *Schellinger*, or seeks authorization to see the physician ahead of time, as Dauenhauer did in this case, both would constitute “use” under § 39-71-704(1)(e), MCA, provided the sought-after treatment is for legitimate, reasonably necessary medical care related to the injury for which benefits are sought.

¶ 39 Dauenhauer had a legitimate reason for seeking reasonably necessary follow-up treatment for his neck surgery and advancing degenerative disk disease causally related to his accepted injury claim. His request for such treatment in February 2011 constituted use of his medical benefits within 60 consecutive months of his last treatment, satisfying the statute of repose.

ISSUE 3: Whether Petitioner is entitled to an award of fees, penalty, and costs.

¶ 40 Of the two attorney fee statutes, §§ 39-71-611 and -612, MCA, only § -611 is applicable here. Section 39-71-611(1), MCA, states that an insurer shall pay reasonable costs and attorney fees as established by the workers’ compensation court if:

- (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

¶ 41 Section 39-71-2907(1), MCA, states that the workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶ 42 As the attorney fee and penalty statutes require a determination that the insurer has been unreasonable, and I conclude under ¶ 33 above that the actions of the insurer under the facts in this case were not unreasonable, Dauenhauer is not entitled to attorney fees or a penalty.

¶ 43 As the prevailing party, Dauenhauer is entitled to his costs.

JUDGMENT

¶ 44 The State Fund acted reasonably in denying Petitioner's medical benefits under § 39-71-704, MCA.

¶ 45 Petitioner used his medical benefits within a period of 60 consecutive months per § 39-71-704(1)(e), MCA.

¶ 46 Petitioner is entitled to his costs.

¶ 47 Petitioner is not entitled to his attorney fees.

¶ 48 Petitioner is not entitled to a penalty.

¶ 49 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 3rd day of July, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Victor R. Halverson
Daniel B. McGregor
Submitted: April 12, 2012