IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 17

WCC No. 2013-3093

APRIL DAVIDSON

Petitioner

vs.

BENEFIS

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moved for summary judgment and Respondent filed a cross-motion for summary judgment on the issue of whether Petitioner is entitled to payment of a 3% impairment rating which was rendered for the condition of her ankle after an industrial injury. However, the parties agree that the post-MMI condition of Petitioner's ankle is due to a preexisting condition and not to the industrial injury.

Held: The Court denied the motion and cross-motion for summary judgment. Petitioner would be entitled to payment of the impairment award under § 39-71-703(1), MCA, if she suffered an actual wage loss as a result of her industrial injury. Petitioner would not be entitled to payment of the impairment award if she did not suffer an actual wage loss as a result of her industrial injury since her claim would then fall under § 39-71-703(2), MCA, which provides that a worker is eligible for an impairment award only if the impairment rating is the result of a compensable injury. Since the question of whether Petitioner suffered an actual wage loss in the present case is a fact in dispute, the Court cannot render summary judgment for either party as this disputed fact is material to the resolution of this issue.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-703. Sections 39-71-703(1), and 39-71-703(2), MCA, address two separate situations. Section 39-71-703(1)(a), MCA, states

that it applies to situations in which the claimant has an actual wage loss. Section 39-71-703(2), MCA, applies to situations in which a claimant does not experience an actual wage loss. In the present motion for summary judgment, it remains a question of fact whether Petitioner suffered an actual wage loss as a result of her injury. Therefore, the Court could not determine whether her claim for an impairment rating falls under subsection (1) or (2) of the statute.

Wages: Wage Loss. Sections 39-71-703(1), and 39-71-703(2), MCA, address two separate situations. Section 39-71-703(1)(a), MCA, states that it applies to situations in which the claimant has an actual wage loss. Section 39-71-703(2), MCA, applies to situations in which a claimant does not experience an actual wage loss. In the present motion for summary judgment, it remains a question of fact whether Petitioner suffered an actual wage loss as a result of her injury. Therefore, the Court could not determine whether her claim for an impairment rating falls under subsection (1) or (2) of the statute.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-703. Section 39-71-703(2), MCA, has a causation element relative to the impairment rating while § 39-71-703(1), MCA, does not. This Court cannot insert a causation element into § 39-71-703(1), MCA, pertaining to the impairment rating. Rather, the causation element which brings a claim under § 39-71-703(1), MCA, pertains to actual wage loss.

Statutes and Statutory Interpretation: Inserting or Removing Items. Section 39-71-703(2), MCA, has a causation element relative to the impairment rating while § 39-71-703(1), MCA, does not. This Court cannot insert a causation element into § 39-71-703(1), MCA, pertaining to the impairment rating. Rather, the causation element which brings a claim under § 39-71-703(1), MCA, pertains to actual wage loss.

Wages: Wage Loss. Section 39-71-703(2), MCA, has a causation element relative to the impairment rating while § 39-71-703(1), MCA, does not. This Court cannot insert a causation element into § 39-71-703(1), MCA, pertaining to the impairment rating. Rather, the causation element which brings a claim under § 39-71-703(1), MCA, pertains to actual wage loss.

¶ 1 Petitioner April Davidson moves for summary judgment in her favor in this matter, arguing that she is entitled to receive payment of a 3% impairment award and payment of permanent partial disability (PPD) benefits for an industrial injury she suffered on January 5, 2011.[1] Respondent Benefis opposes Davidson's motion, arguing that material facts remain in dispute which preclude the judgment Davidson seeks.[2] However, Benefis argues that no material facts remain in dispute which would preclude summary judgment in its favor in this matter and it has therefore filed a cross-motion to that effect.[3]

¶ 2 On September 23, 2013, the Court heard oral argument from the parties regarding the parties' respective motions.[4] At that time, I orally ruled on both motions and denied them. This Order sets forth the reasoning for my decision.

Undisputed Facts[5]

¶ 3 Starting on or about October 2, 2009, Benefis employed Davidson as a Certified Nursing Assistant (CNA).

¶ 4 X-rays of Davidson's right foot and ankle taken December 13, 2009, were negative and found "no fracture" or "acute osseous injury."

¶ 5 From December 21, 2009, through June 17, 2010, Davidson received treatment for her right ankle condition from Lyle J. Onstad, M.D., physical therapist M. Dirk Cappis, P.T., and podiatrist Ronald G. Ray, D.P.M., P.T.

¶ 6 Davidson suffered a work-related injury to her right ankle at Benefis when she struck her ankle on a bed frame in 2010, prior to seeking physical therapy from Cappis on April 28, 2010.[6]

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[1] Petitioner's Motion for Summary Judgment, Docket Item No. 23; Petitioner's Brief in Support of Motion for Summary Judgment (Davidson's Opening Brief), Docket Item No. 25.

[2] Respondent's Response to Petitioner's Motion for Summary Judgment and Brief in Support of Cross-Motion for Summary Judgment (Benefis' Opening Brief), Docket Item No. 27.

[3] Respondent's Cross Motion for Summary Judgment, Docket Item No. 28.

[4] Minute Book Hearing No. 4492, Docket Item No. 33.

[5] Unless otherwise noted, these are items set forth as undisputed facts in Davidson's Opening Brief at 1-5, and stipulated to in Benefis' Opening Brief at 8.

[6] Benefis' Opening Brief at 8. In support of its cross-motion for summary judgment, Benefis offered several "undisputed facts" in addition to those Davidson offered in her Opening Brief. Since Davidson has not disputed any

¶ 7 Davidson has not submitted a written claim for a December 13, 2009, or an early 2010 right-ankle work injury occurring at Benefis.[7]

¶ 8 On June 1, 2010, Davidson presented to Ronald G. Ray, D.P.M., P.T., for treatment. She complained of pain in the anterolateral and lateral aspect of her right ankle. Davidson told Dr. Ray that the condition had been present for approximately six months. Dr. Ray examined Davidson and measured her ankle joint dorsiflexion with knee flexed to be 9° on the right and 18° on the left. Dr. Ray attributed the issues to nine factors:

> (1) Probably attenuation of the peroneus brevis tendon on the right, most likely as a longitudinal tear, as well as some possible involvement of the peroneus longus;
>
> (2) Most likely having metatarsus adductus deformity that is not compensated at the midtarsal joint creating a supinated foot type overloading on the lateral side of the foot;
>
> (3) The dysfunctional peroneal tendons which were allowing her uncompensated metatarsus adductus to invert her foot more on the right versus the left;
>
> (4) Metatarsus adductus deformity uncompensated causing supinated alignment of the foot in relationship to the leg, bilaterally;
>
> (5) Obesity;
>
> (6) Anterolateral soft tissue impingement phenomenon on the right ankle due to poor functioning of the ankle joint secondary to supinated foot alignment;
>
> (7) Depression;
>
> (8) Hypothyroidism; and
>
> (9) Hypertension.

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of the additional facts offered by Benefis, they are accepted as undisputed and are also incorporated here, as noted.

[7] *Id.*

Dr. Ray ordered a cast boot for Davidson to remove the strain off her right ankle. He noted a possible repair of peroneal tendons and ordered an MRI to further assess the tendons.[8]

¶ 9 A June 9, 2010, MRI ordered by Dr. Ray showed "no evidence of fracture." The MRI impression includes "partial tear of the anterior tibiofibular ligament"; "tear of the anterior talofibular ligament"; "injury to the interosseous ligament"; and "small ankle effusion."

¶ 10 On January 5, 2011, Davidson injured her right ankle when she slipped on ice in the Benefis parking lot and struck her ankle on her car's door.

¶ 11 Davidson did not seek treatment for her right ankle with Dr. Ray after June 17, 2010, until after the industrial accident on January 5, 2011.

¶ 12 At the time of her January 5, 2011, industrial injury, Davidson had been continuously performing her job as a CNA since the fall of 2009.

¶ 13 On January 12, 2011, J. Eldon LaTray, PA-C, evaluated Davidson, placed her in a Zimmer Boot, and restricted her to sedentary duty. Benefis provided Davidson with modified duty.

¶ 14 On January 12, 2011, Davidson filed a First Report of Injury and Occupational Disease.

¶ 15 On January 27, 2011, Benefis began paying Davidson medical benefits pursuant to § 39-71-625, MCA.[9]

¶ 16 Davidson initially treated with LaTray and Chadley M. Runyan, M.D. On April 6, 2011, LaTray referred Davidson to Patrick J. Thomas, M.D. Davidson treated with Dr. Thomas thereafter.

¶ 17 On September 26, 2011, Dr. Thomas injected Davidson's right subtalar joint, stating, "[W]e will see if she gets improvement." Dr. Thomas continued Davidson's work restrictions, found she was at maximum medical improvement (MMI), and recommended a functional capacity evaluation (FCE) and impairment evaluation. Dr. Thomas did not recommend surgical treatment.

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[8] Benefis' Opening Brief at 8-9.

[9] The parties stipulated to this fact; however, there is no § 39-71-625, MCA.

¶ 18 On December 20, 2011, Davidson underwent an FCE. The FCE results limited her to light duty and indicated that her physical capabilities did not match the job requirements for her time-of-injury position as a CNA.

¶ 19 On December 23, 2011, Mark T. Stoebe, D.C., D.A.B.C.O., performed an impairment rating of Davidson. He found that Davidson, "is not capable of returning to her time of injury job." He evaluated her impairment as follows:

> **IMPAIRMENT** is best described by using the range of motion model, the tables 16-20 and 16-22 on page 549 of the AMA Guides, Sixth Edition. The only impairing motion is limited dorsiflexion of the right [ankle] (limited to 10°), Dr. Ray indicated that her right ankle dorsiflexion was limited to 9° in June of 2010, prior to the injury in January of 2011. Therefore there is no evidence of significant, structural damage from her most recent injury, impairment is **0% WHOLE PERSON**.

On May 14, 2012, Dr. Ray responded in the affirmative to an inquiry from Davidson's counsel asking Dr. Ray to agree if his limited range of motion findings as of June 1, 2010, were consistent with a 3% whole person impairment rating under the 6th edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.[10]

¶ 20 In correspondence dated June 14, 2012, Davidson requested payment of PPD benefits based on a 3% impairment rating and Dr. Stoebe's opinion that she is unable to return to her time-of-injury job.

¶ 21 In correspondence dated August 3, 2012, Benefis denied payment of the impairment award and PPD benefits, contending if "Dr. Stoebe's evaluation findings are valid, then Ms. Davidson has no ratable impairment *for the aggravation sustained in this claim*," and § 39-71-703, MCA, requires a "permanent impairment" to result in a "compensable wage loss for PPD purposes."

¶ 22 On August 31, 2012, having read Dr. Ray's May 14, 2012, letter, Dr. Stoebe explained the manner and process of his interpretation of the 6th Edition Guides with respect to Davidson's right ankle and again confirmed his opinion of a 0% whole person impairment rating as related to the January 5, 2011, injury at issue in the present case.[11]

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[10] Benefis' Opening Brief at 9; R. Rondinelli, M.D., Ph.D., *et al*. (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th ed., AMA Press, 2008 (6th Edition Guides).

[11] Benefis' Opening Brief at 9.

¶ 23 On June 27, 2013, Dr. Stoebe testified at deposition as follows:

> Q All right. And, now, I want to understand your opinion, Doctor. And that is Mr. Adamek referred to your opinion as being an opinion that she has no additional impairment as a result of this injury; is that right?
>
> A Correct.
>
> Q So do I understand that she has an impairment because of this dorsiflexion, limitation on her dorsiflexion range of motion?
>
> A Yes.
>
> Q Okay. But that it was your opinion that she had returned to baseline, so that the impairment which you observed was not attributable to this injury?
>
> A Correct.
>
> Q What I would like to know is what is her impairment or was her impairment before the injury based on range of motion?
>
> A It would be seven percent lower extremity, which should be about three percent, which is three percent whole person, according to Table 16-10 on Page 530.
>
> Q So essentially you agree, when Dr. Ray wrote back to us in response to our questions, he commented that based upon the limitation of motion that he observed in her dorsiflexion, that she had a seven percent lower extremity impairment for her right ankle that translated to a three percent whole person impairment at the time that he was evaluating her?
>
> A Correct.
>
> Q All right. Thank you. So apparently it's your opinion that she does, in fact, have a whole person impairment, but it just was not caused by this injury?
>
> A Correct.

> Q I take it you would agree then that the impairment which you observed, there were actual objective medical findings which would support that impairment. Obviously the limitation on her range of motion, correct, is one of them?
>
> A Yes.

¶ 24 Dr. Stoebe agreed with Dr. Ray that Davidson has a 3% whole person impairment rating since June 2010.[12]

¶ 25 On May 6, 2013, Davidson followed up with Dr. Thomas and requested another injection for her pain. Dr. Thomas again injected her right subtalar joint, but explained, "this is not a solution" and "if her pain recurs and I expect it will in approximately six to eight months, I recommend referral to Harborview Foot and Ankle Center for their expertise regarding the best treatment alternatives for this patient."

¶ 26 Davidson did not experience any additional or progressive range of motion loss to her right ankle resulting in whole body impairment caused by the January 5, 2011, industrial injury, in comparison to her June 2010 condition.[13]

¶ 27 Davidson has no whole body impairment attributable to her January 5, 2011, industrial accident.[14]

¶ 28 Davidson has never received payment of an impairment award, workers' compensation benefits, or other amounts for any previous injury to her right ankle.

Disputed Fact

¶ 29 Benefis disputed certain facts which Davidson contends are undisputed, including the following alleged fact which Davidson offered in her Opening Brief:

> [Benefis terminated Davidson] on December 14, 2011 as "unable to return to her time of injury position."[15]

¶ 30 Benefis explained it position regarding this allegedly undisputed fact as follows:

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[12] Benefis' Opening Brief at 10.

[13] Benefis' Opening Brief at 9.

[14] *Id.*

[15] Davidson's Opening Brief at 3.

> The circumstances of Petitioner's cessation of employment at Benefis in late December 2011 after being assessed at MMI for her January 5, 2011 injury are disputed. Petitioner asserts in her Affidavit that she was summarily terminated by Benefis because she could not return to work as a CNA in late 2011. Respondent has presented the Affidavit of Ms. Blackwell which indicates Petitioner resigned or elected to self-terminate before her permanent work restrictions were determined by FCE, and under circumstances where she would not consider other available positions because of other health conditions unrelated to her right ankle injury, would only commit to working certain days and shifts to avoid scheduling conflicts with her school classes, childcare needs, and her desire to care for her ailing mother.[16]

¶ 31 For reasons which will become readily apparent in my analysis below, at oral argument I ruled that the precise nature of the circumstances surrounding Davidson's termination was a disputed fact material to a determination of Davidson's motion for summary judgment. I therefore denied Davidson's motion for summary judgment because a material fact remained in dispute which precluded summary judgment in her favor.

Analysis and Decision

¶ 32 This case is governed by the 2009 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Davidson's industrial accident.[17]

¶ 33 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[18]

¶ 34 Davidson argues that under the applicable portions of § 39-71-703, MCA, and consistent with this Court's previous ruling in *Swan v. Pacific Employers Ins. Co.*,[19] the

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[16] Benefis' Opening Brief at 12.

[17] *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). (Citations omitted.)

[18] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285. (Citation omitted.)

[19] 2004 MTWCC 68.

fact that she may have had a preexisting ankle impairment is immaterial to her entitlement to the 3% impairment award in this case.[20]

¶ 35 In opposition to Davidson's motion and in support of its cross-motion, Benefis argues that Davidson is not entitled to payment of her impairment rating because the impairment preexisted her January 5, 2011, industrial accident.[21] Benefis argues that this case is more on-point with *McAdam v. National Union Fire Ins. Co. of Pittsburgh*[22] than with *Swan* and that Davidson cannot be entitled to payment of an impairment rating when the impairment was not caused by the industrial accident for which Benefis is liable.[23]

¶ 36 The pertinent subsections of § 39-71-703, MCA, provide:

> (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 that:
>
> (i) is not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and
>
> (iii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.
>
> (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.
>
> . . . .
>
> (8) 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.

¶ 37 In *Swan*, the claimant had a preexisting lumbar condition when she injured the lumbar portion of her back while working as a nursing assistant.[24] After she reached

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[20] Davidson's Opening Brief at 6-8.

[21] Benefis' Opening Brief at 11.

[22] 1998 MTWCC 28.

[23] Benefis' Opening Brief at 14-15.

[24] *Swan*, ¶¶ 3, 4.

MMI for the work-related injury, her treating physician assigned her a 16% whole person impairment rating. However, at the request of the insurer, he then took her preexisting condition into account and opined that approximately half her impairment rating – or 8% – was due to her industrial injury.[25] The insurer then paid her an 8% impairment award.[26]

¶ 38 This Court held that the claimant was entitled to the full 16% impairment award. The Court noted that it has long been the rule in Montana that an employer takes the employee subject to the employee's physical condition at the time of the employment, and that employers are thereby liable for aggravations of preexisting conditions.[27] The Court noted that § 39-71-703, MCA, contains a set-off provision[28] which provides that if a worker suffers a subsequent compensable injury to the same part of the body, the award for the subsequent injury may not duplicate any amounts paid for a previous injury. The Court reasoned, "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."[29]

¶ 39 In *Swan*, the Court held:

> [W]here 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.[30]

¶ 40 In *McAdam*, a claimant with a history of chronic low-back pain suffered an industrial accident in which several body parts were injured.[31] The claimant later stated

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[25] *Swan*, ¶¶ 7-8.

[26] *Swan*, ¶ 9.

[27] *Swan*, ¶ 12. (Citations omitted.)

[28] In the 2009 version of the statute, applicable here, that provision is § 39-71-703(8), MCA.

[29] *Swan*, ¶ 13.

[30] *Swan*, ¶ 17.

[31] *McAdam*, ¶¶ 6, 9.

that he could not attribute his low-back pain to the industrial accident because he had had that pain for years.[32] After the claimant reached MMI, he was given a 0% impairment rating.[33] However, the same doctor apparently opined that the claimant had a 5% impairment rating for his low-back condition, but that the condition of the claimant's lower back entirely preexisted the industrial accident.[34] The claimant demanded PPD benefits, but the insurer denied the claim because of the 0% impairment rating.[35] This Court concluded that the claimant was not entitled to PPD benefits because he did not suffer an impairment as a result of his industrial accident, and that he was not entitled to any benefits as a result of his low-back condition because it was unrelated to his industrial accident.[36]

¶ 41 I do not find *Swan* or *McAdam* to be particularly enlightening of the present case because neither of them discussed a fact which is of primary importance in regards to Davidson's claim: specifically, whether the claimants suffered an actual wage loss as a result of their respective industrial injuries.

¶ 42 Sections 39-71-703(1) and 39-71-703(2), MCA, address two separate situations. Section 39-71-703(1), MCA – specifically in subsection (a) – states that it applies to situations in which the claimant has an actual wage loss. Section 39-71-703(2), MCA, applies to situations in which a claimant does not experience an actual wage loss.

¶ 43 In the case before me, it remains a question of fact to be determined if Davidson suffered an actual wage loss as a result of her injury. Thus, I cannot determine on the facts now before me whether Davidson's claim for an impairment rating falls under subsection (1) or (2) of the statute.

¶ 44 Under the statute, subsection (2) has a causation element relative to the impairment rating while subsection (1) does not. 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.[37] I cannot insert a causation element into § 39-71-703(1), MCA, as it pertains

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[32] *McAdam*, ¶ 11.

[33] *McAdam*, ¶ 12.

[34] *McAdam*, ¶ 15.

[35] *McAdam*, ¶ 13.

[36] *McAdam*, ¶¶ 22-23.

[37] § 1-2-101, MCA.

to the impairment rating. Rather, the causation element which brings a claim under § 39-71-703(1), MCA, pertains to the actual wage loss.

¶ 45 If Davidson suffered an actual wage loss as a result of her industrial injury, her claim would fall under § 39-71-703(1), MCA, and she would be entitled to payment of her 3% impairment rating. If, however, she did not suffer an actual wage loss as a result of her industrial injury, her claim would fall under § 39-71-703(2), MCA, and she would not be entitled to payment of the impairment rating because the impairment rating is not a result of a compensable injury. The factual determination as to whether Davidson suffered an actual wage loss as a result of her industrial injury is an issue for trial, and is not susceptible to summary disposition. Therefore, the parties' respective cross-motions for summary judgment are denied.

ORDER

¶ 46 Petitioner's motion for summary judgment is **DENIED**.

¶ 47 Respondent's cross-motion for summary judgment is **DENIED**.

DATED in Helena, Montana, this 30th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
G. Andrew Adamek

Submitted: September 23, 2013