

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 2

WCC Nos. 2009-2352 and 2009-2396

JEFF DRAKE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer

and

LORI HILBERT

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER DENYING PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT AND
GRANTING RESPONDENT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

Summary: Petitioners suffered industrial injuries while the 5th Edition of the AMA Guides was in effect but reached MMI after the 6th Edition came into effect. They challenge Respondent's decision to award them impairment ratings as determined under the 6th Edition. Petitioners argue that impairment ratings should be calculated under the Guides in effect on the date of their industrial injury. Respondent argues that impairment ratings should be calculated under the Guides in effect on the date an injured worker reaches MMI.

Held: Section 39-71-703, MCA, provides that an injured worker's impairment rating is to be determined by the "latest" edition of the Guides. Section 39-71-711, MCA, provides that an impairment rating is a purely medical determination which must be determined

by an impairment evaluator after a claimant has reached maximum healing and must be based on the “current” edition of the Guides. The “latest or “current” edition of the Guides is the most recent edition in existence on the date an injured worker reaches MMI. In Petitioners’ cases, the 6th Edition existed on the date they each reached MMI. Petitioners’ motions for summary judgment are denied and Respondent’s cross-motions for summary judgment are granted.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-703. Since an impairment rating occurs after an injured worker reaches MMI, the Court interpreted the reference to the “latest edition . . . of the Guides” found within § 39-71-703(1), MCA, to be the latest edition in existence at the time the worker reaches MMI.

Statutes and Statutory Interpretation: Definitions. Since an impairment rating occurs after an injured worker reaches MMI, the Court interpreted the reference to the “latest edition . . . of the Guides” found within § 39-71-703(1), MCA, to be the latest edition in existence at the time the worker reaches MMI.

Impairment: Impairment Ratings. The impairment rating is not itself a benefit. Rather, as defined by the Legislature, it is a purely medical determination which occurs after an injured worker reaches MMI.

Benefits: Impairment Awards. The impairment rating is not itself a benefit. Rather, as defined by the Legislature, it is a purely medical determination which occurs after an injured worker reaches MMI.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-711. Under § 39-71-711, MCA, an injured worker is evaluated and an impairment rating is calculated after the injured worker reaches MMI. At that moment, the evaluator uses the “current edition” of the Guides to calculate the impairment rating. The most reasonable interpretation is that the “current edition” of the Guides are those in effect at the time the worker reaches MMI.

Statutes and Statutory Interpretation: Definitions. The Court interpreted the reference to the “current edition” of the Guides found within § 39-71-711, MCA, to mean the Guides in effect at the time an injured

worker reaches MMI since the Court found this to be the most reasonable interpretation of the term “current edition.”

Impairment: Impairment Ratings. The correct edition of the Guides to use in calculating impairment ratings is the current or latest edition in existence at the time an injured worker reaches MMI.

¶ 1 In separate actions, Petitioners Jeff Drake and Lori Hilbert each moved for summary judgment against Respondent Montana State Fund (State Fund), arguing that State Fund incorrectly calculated their respective impairment ratings according to the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th Edition. Drake and Hilbert argue that State Fund should have calculated their impairment ratings according to the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th Edition,¹ because their injuries occurred while the 5th Edition was in effect.² State Fund opposed Drake’s and Hilbert’s respective motions and filed cross-motions for summary judgment in each case, arguing that it correctly applied the Guides in use on the day a medical provider declared each claimant to be at maximum medical improvement (MMI).³

¶ 2 Since Drake and Hilbert presented the same legal issue in their respective motions for summary judgment, I consolidated the cases for purposes of resolving the legal issue presented.⁴

¹ L. Cocchiarella, *et al.* (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed., AMA Press, 2005 (5th Edition), and R. Rondinelli, *et al.* (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th ed., AMA Press, 2008 (6th Edition), respectively. Collectively referred to as “Guides.”

² *Drake v. Montana State Fund*, WCC No. 2009-2352, Motion for Summary Judgment, Docket Item No. 5, and Brief in Support of Motion for Summary Judgment (“Drake’s Opening Brief”), Docket Item No. 6; *Hilbert v. Montana State Fund*, WCC No. 2009-2396, Petitioner’s Motion and Brief in Support of Motion for Summary Judgment (“Hilbert’s Opening Brief”), Docket Item No. 6.

³ *Drake*, Respondent’s Cross-Motion for Summary Judgment and Response to Petitioner’s [Motion] for Summary Judgment, Docket Item No. 9, and Respondent’s Brief in Support of Respondent’s Cross-Motion for Summary Judgment and Response to Petitioner[s] Motion for Summary Judgment (“State Fund’s Opening Brief in *Drake*”), Docket Item No. 10; *Hilbert*, Respondent’s Cross-Motion for Summary Judgment and Response to Petitioner’s [Motion] for Summary Judgment, Docket Item No. 9, and Respondent’s Brief in Support of Respondent’s Cross-Motion for Summary Judgment and Response to Petitioner’s Motion for Summary Judgment (“State Fund’s Opening Brief in *Hilbert*”), Docket Item No. 10.

⁴ Minute Book Hearing No. 4136.

STATEMENT OF FACTS

¶ 3 On December 29, 2006, Drake suffered an industrial injury to his lumbar spine while working for Northwest Installations, Inc., d/b/a Distinctive Countertops & Cabinetry. State Fund accepted liability for Drake's injury.⁵

¶ 4 On the date of Drake's injury, the 5th Edition was the current edition.⁶

¶ 5 On March 17, 2009, Drake was deemed to be at MMI.⁷

¶ 6 On the date Drake was deemed to be at MMI, the 6th Edition was the current edition.⁸

¶ 7 Using the 6th Edition, Bruce Belleville, M.D., assigned Drake a 13% whole person impairment rating. Using the 5th Edition, John C. Schumpert, M.D., assigned Drake a 20% impairment rating.⁹

¶ 8 State Fund has paid Drake a 13% whole person impairment rating, arguing that the 6th Edition is the correct edition to use for determining Drake's impairment rating.¹⁰

¶ 9 Drake's impairment award is \$6,825 less under the 6th Edition than under the 5th Edition.¹¹

¶ 10 On March 4, 2005, Hilbert suffered an industrial injury to her elbow and knee within the course and scope of her employment with Centron Services, Inc. State Fund accepted liability for Hilbert's injury.¹²

⁵ Drake's Opening Brief at 2.

⁶ Drake's Opening Brief at 2.

⁷ Drake's Opening Brief at 3.

⁸ Drake's Opening Brief at 3.

⁹ Drake's Opening Brief at 3.

¹⁰ Drake's Opening Brief at 2-3.

¹¹ Drake's Opening Brief at 7.

¹² Hilbert's Opening Brief at 2.

¶ 11 Hilbert also injured her low back in the industrial accident.¹³

¶ 12 On March 13, 2007, Hilbert reached MMI for her knee injury. David Heetderks, M.D., determined that Hilbert's knee condition gave her a 4% whole person impairment rating under the 5th Edition.¹⁴

¶ 13 On May 14, 2009, John A. Vallin, M.D., examined Hilbert and provided impairment ratings for her back based on both the 5th and 6th Editions of the Guides. Dr. Vallin determined that under the 5th Edition, Hilbert would be entitled to a 13% whole person impairment rating. Dr. Vallin determined that under the 6th Edition, Hilbert would be entitled to a 9% whole person impairment rating.¹⁵

¶ 14 State Fund has paid Hilbert a 9% whole person impairment rating under the 6th Edition.¹⁶

DISCUSSION

¶ 15 For summary judgment to be granted, 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.¹⁷ This matter is susceptible to summary disposition.

¶ 16 In this case, both claimants suffered industrial injuries during the time in which the current version of the Guides was the 5th Edition. Both claimants were found to be at MMI after the publication of the 6th Edition. Both claimants would be entitled to higher impairment ratings under the 5th Edition than under the 6th Edition. Claimants argue that the 5th Edition is the correct edition to use in rendering their impairment ratings since the 5th Edition was in effect on the date of their respective industrial injuries. State Fund argues that the 6th Edition is the correct edition to use because it was the most current edition at the time these claimants reached MMI.

¶ 17 The parties have set forth various arguments as to why each believes one edition or the other is the correct edition to apply in these cases. At the core of the parties' disagreement lies the language of §§ 39-71-703, MCA, and 39-71-711, MCA.

¹³ State Fund's Opening Brief in *Hilbert* at 2.

¹⁴ State Fund's Opening Brief in *Hilbert* at 2.

¹⁵ Hilbert's Opening Brief at 2.

¹⁶ Hilbert's Opening Brief at 2.

¹⁷ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

Specifically, the parties' dispute centers around what constitutes the "latest" edition of the Guides in applying § 39-71-703, MCA, and what constitutes the "current" edition of the Guides in applying § 39-71-711, MCA.

¶ 18 The Montana Supreme Court set forth the rules of statutory construction in *S.L.H. v. State Compens. Mut Ins. Fund*:¹⁸

Statutory construction is a "holistic endeavor" and must account for the statute's text, language, structure, and object. Our purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will.

We discern the intent of the legislature from the text of the statute if the words are clear and plain. To avoid an absurd result and to give effect to a statute's purpose, we read and construe the statute as a whole.¹⁹

¶ 19 Section 1-2-101, MCA, states:

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. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

¶ 20 Although Drake and Hilbert have argued that State Fund's interpretation of the statutes may render the statutes constitutionally infirm,²⁰ neither Drake nor Hilbert has challenged the constitutionality of the statutes.²¹ For purposes of this analysis, the Court must interpret the statutes in question by applying the rules of statutory construction without regard to a hypothetical constitutional challenge that may or may not materialize. If the Court's interpretation of the statutes at issue draws a constitutional challenge, that will have to be a bridge to cross when such a challenge is made. This analysis will be confined to the question of statutory interpretation and will not address any hypothetical constitutional arguments.

¹⁸ *S.L.H.*, 2000 MT 362, 303 Mont. 364, 15 P.3d 948.

¹⁹ *S.L.H.*, ¶¶ 16-17. (Citations omitted.)

²⁰ See, e.g., Drake's Opening Brief at 6-8; Hilbert's Opening Brief at 4-6.

²¹ At oral argument, counsel for both Drake and Hilbert confirmed that they were not making a constitutional challenge to the statutes at issue in this case. Because Drake and Hilbert were not mounting a constitutional challenge to the statutes, they did not provide notice to the Attorney General pursuant to Rule 24(d), Mont. R. Civ. P.

¶ 21 Drake argues that the amount of benefits to which he is entitled is a substantive right and therefore, the law in effect on the date of his injury controls.²² Drake relies on *Trusty v. Consol. Freightways*,²³ in arguing that the Court cannot apply a later version of a statute if it impairs a vested right.²⁴ Hilbert likewise argues that the correct edition of the Guides to apply to an injured worker's impairment rating is the edition in effect on the date the worker suffers an industrial injury. Hilbert argues that under Montana law, an injured worker's benefit entitlement is determined by the law in effect at the time of the industrial injury, and this benefit entitlement includes the edition of the Guides under which the worker is to be evaluated. Relying on *Buckman v. Montana Deaconess Hospital*,²⁵ Hilbert argues that workers' compensation benefits are a contract between an injured worker and an employer, and the rights under the contract vest when the cause of action accrues, which is the date of injury.²⁶

¶ 22 Drake and Hilbert's reliance on *Trusty* and *Buckman* is misplaced. Although they are correct that the statutes in effect on the date of their respective injuries are the applicable law, the issue in this case is not whether the Court will apply a later version of the statute. Applying the statutes in effect on the date of the petitioners' respective injuries requires the use of the "latest" or "current" edition of the Guides. The issue to be resolved is what constitutes the "latest" or "current" edition of the Guides when calculating an impairment rating. The issue is not a question of which statutory year to apply; rather, it is a matter of statutory construction.

Section 39-71-703, MCA

¶ 23 Section 39-71-703, MCA, states in pertinent part:

(1) If an injured worker suffers a permanent partial disability . . . the worker is entitled to a permanent partial disability award if that worker . . .

. . . .

(b) has a permanent impairment rating that . . .

. . . .

²² *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). See also *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶¶ 26, 28, 346 Mont. 141, 194 P.3d 77.

²³ *Trusty*, 210 Mont. 148, 681 P.2d 1085 (1984).

²⁴ *Trusty*, 210 Mont. at 152, 681 P.2d at 1087-88.

²⁵ *Buckman*, *supra*.

²⁶ Hilbert's Opening Brief at 3-4.

(iii) is more than zero as determined by *the latest edition* of the American medical association Guides to the Evaluation of Permanent Impairment. (Emphasis added.)

¶ 24 State Fund argues that the language “the *latest* edition of the . . . Guides” is meant to ensure that injured workers are evaluated using the most current medical knowledge available and not using potentially outdated medical information. By way of analogy, State Fund notes that claimants are not denied access to medical services on the grounds that those services did not exist on the day of the claimant’s industrial injury. State Fund argues that it would be incongruous to base an impairment rating on an outdated edition of the Guides.

¶ 25 Drake agrees that an injured worker’s impairment rating is calculated after the worker reaches MMI. However, he argues that when § 39-71-703(1), MCA, refers to the “latest edition” of the Guides, the statute means the latest edition in effect at the time of the injured worker’s industrial injury. Drake argues State Fund’s interpretation of § 39-71-703(1), MCA, requires the insertion of language so that the statute reads “latest edition *as of the time of MMI*” in order to reach the result State Fund desires.²⁷

¶ 26 As Drake admits, the impairment rating calculation occurs after an injured worker reaches MMI. It is at that point in time that an evaluator, per the statute, takes the “latest edition . . . of the Guides” and renders an impairment rating. Drake’s interpretation would require the insertion of additional language to interpret the statute so that “latest edition” would mean the “latest edition” at a point in the past when the worker became injured rather than the “latest edition” as of the time an injured worker becomes eligible for an impairment rating. Under § 1-2-101, MCA, it is not the Court’s function to insert words which have been omitted. I conclude that under § 39-71-703(1), MCA, the “latest edition . . . of the Guides” is the latest edition in existence at the time the injured worker reaches MMI.

Section 39-71-711, MCA

¶ 27 Section 39-71-711, MCA, states in pertinent part:

(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;
[and]

²⁷ Oral argument.

(b) must be based on ***the current edition*** of the Guides to Evaluation of Permanent Impairment published by the American medical association. . . . (Emphasis added.)

¶ 28 State Fund asserts that it has always applied the edition of the Guides which were in effect on the day the injured worker reached MMI. Prior to the publication of the 6th Edition, State Fund's practice was never disputed. State Fund argued that its belief that the correct edition to use is that which is current on the date of MMI is based upon § 39-71-711(1)(a), MCA, which states that an impairment rating is a "purely medical determination." State Fund argues that the Legislature declared the impairment rating to be a "purely medical determination" regardless of whether that determination is used for treatment, evaluation, or another purpose.²⁸

¶ 29 State Fund argues that since the "purely medical determination" of an impairment rating can occur only after an injured worker has reached MMI, the Guides which are current on the date the worker reaches MMI are the correct Guides to use in determining the impairment rating.²⁹ State Fund argues that the Guides are periodically revised to incorporate current scientific clinical knowledge and judgment and impairment ratings should be conducted using up-to-date medical determinations.³⁰ State Fund argues that the promise of reasonable and necessary medical care found in § 39-71-704, MCA, contemplates that an injured worker receives the benefit of current medical knowledge, diagnoses, and treatment, and does not limit a worker to receive only that knowledge, diagnoses, and treatment which were available on the date of injury.³¹ State Fund contends that with multiple editions of the Guides in existence since the release of the first edition in 1971, the Legislature could not have intended this "purely medical determination" to be made based on potentially outdated information.³² Specific to Hilbert's case, State Fund notes that the 6th Edition had been in existence for a year and a half prior to the date when Hilbert reached MMI.³³

¶ 30 Hilbert contends that State Fund misconstrues the meaning of the statutory language which deems impairment ratings a "purely medical determination." Hilbert

²⁸ Oral argument.

²⁹ State Fund's Opening Brief in *Drake* at 8-10.

³⁰ State Fund's Opening Brief in *Drake* at 3-5.

³¹ State Fund's Opening Brief in *Drake* at 10-11.

³² State Fund's Opening Brief in *Hilbert* at 4-5.

³³ State Fund's Opening Brief in *Hilbert* at 5.

argues that the Guides exist to measure a loss that is then converted to a monetary award, and to use the edition in effect at the time of the claimant's industrial injury would not deprive the claimant of any advances in medical treatment or expose a claimant to an outdated standard of care.³⁴ Hilbert argues that State Fund confuses "the purpose of an impairment rating – to make a benefit determination – with that of medical care."³⁵

¶ 31 Drake argues that this is a case about benefits; the edition of the Guides which is used to determine Drake's impairment rating directly affects the amount of benefits he will receive. Drake points out that the impairment rating is not used to determine treatment; rather, its only function is to render a numerical value which is then directly translated into a dollar amount. Drake argues that although the Legislature has designated an impairment rating a "purely medical determination," it is not, in fact, akin to medical treatment.³⁶ Drake argues that an impairment rating is used solely to determine benefits and notes that in *Rausch v. State Compen. Ins. Fund*,³⁷ the Montana Supreme Court stated that an impairment rating's purpose is to calculate the impairment award benefit.³⁸

¶ 32 In *Rausch*, the Montana Supreme Court noted, "No section of the Workers' Compensation Act explicitly authorizes impairment awards per se. However, impairment awards are impliedly authorized to any injured worker classified in one of the four distinct classes of disability benefits. . . ." ³⁹ The Supreme Court further stated:

Impairment awards are based on a worker's impairment rating, which is a purely medical determination of the loss of physical function of the body caused by the injury. The impairment rating is the physical component on which the disability is based.⁴⁰

¶ 33 Although Drake argues that the impairment rating's sole purpose is to calculate an injured worker's disability benefit, the Supreme Court stated in *Rausch* that the

³⁴ Petitioner's Reply Brief in Support of Petitioner's Motion for Summary Judgment and Response to Respondent's Cross-Motion for Summary Judgment (Hilbert's Reply Brief) at 7-8, Docket Item No. 12.

³⁵ Hilbert's Reply Brief at 8.

³⁶ Oral argument.

³⁷ *Rausch*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

³⁸ Oral Argument.

³⁹ *Rausch*, ¶ 20.

⁴⁰ *Rausch*, ¶ 21.

impairment rating is “the physical component on which the disability is **based**.”⁴¹ The impairment **rating** is not itself a benefit. Rather, as defined by the Legislature, an impairment rating is a purely medical determination which occurs after an injured worker reaches MMI. The Legislature having specifically defined this term, it is not the province of this Court to either ignore the definition or redefine the term by judicial fiat.

¶ 34 Drake argues that the “current edition” referred to in § 39-71-711(1)(b), MCA, is the edition which was current on the day of his injury, and that State Fund’s interpretation would require the Court to insert language into the statute. Drake argues that if the Legislature had intended the “current edition” to be the one in use on the date of MMI, it would have expressly stated so in the statute.⁴²

¶ 35 State Fund responds that if the Legislature had intended the “current edition” to be the one in use on the date of injury, it would have expressly stated so in the statute. State Fund argues that Drake’s interpretation would require the insertion of language not present in the statute.

¶ 36 State Fund argues that § 39-71-711(1), MCA, contains four conjunctive subparts which must be read together. Noting that § 39-71-711(1)(a), MCA, specifies that the impairment evaluation must occur after the claimant has reached MMI, State Fund contends that the requirement under § 39-71-711(1)(b), MCA, that the impairment evaluation “must be based on the current edition of the Guides” can only mean the edition of the Guides which is current at the time the claimant has reached MMI.

¶ 37 Drake responds that in *S.L.H.*, the Montana Supreme Court held: “Subsections (a), (b) and (c) [of § 39-71-711(1), MCA,] are subordinate to and modify the words ‘[a]n impairment rating’ that precede them in section (1). None of the three subsections is subordinate to or modified by the other subsections, but rather each is independent of the others.”⁴³ Drake argues that, since § 39-71-711(1)(b), MCA, does not state that the current edition of the Guides is the edition current at the time of MMI, this Court cannot insert that language, nor can it read § 39-71-711(1)(b), MCA, in conjunction with § 39-71-711(1)(a), MCA, which states that the impairment evaluation is to be conducted after the claimant has reached maximum healing.

¶ 38 Regardless of whether the subsections of § 39-71-711(1), MCA, are read conjunctively or disjunctively, the Court has to assign an interpretation to what

⁴¹ *Rausch*, ¶ 21 (emphasis added).

⁴² Drake’s Opening Brief at 5.

⁴³ *S.L.H.*, ¶ 24.

constitutes the “current edition” of the Guides. The procedure for calculating an impairment rating set forth in the subsections of § 39-71-711, MCA, informs that interpretation. Pursuant to the statute, an injured worker is evaluated and an impairment rating is calculated **after** the injured worker reaches MMI. At that moment in time, the evaluator, following the procedure set forth in the statute, uses the “current edition” of the Guides to calculate the impairment rating. The most reasonable interpretation is that the “current edition” of the Guides are those which are in effect at the time the injured worker reaches MMI.

CONCLUSION

¶ 39 As noted above, this Court’s purpose in construing a statute is to ascertain the legislative intent and give effect to the legislative will. By the actual language of § 39-71-711(1)(a), MCA, the Legislature declared the impairment rating to be a purely medical determination. The statute requires the injured worker to be at MMI at the time the impairment rating is calculated. As State Fund pointed out, in § 39-71-703, MCA, the Legislature took care to specifically note when the calculations for compensating permanent partial disability were supposed to relate back to conditions in existence at the time of injury rather than at the time of MMI, and the Legislature did not do so in the case of impairment ratings. I therefore conclude that the correct edition of the Guides to use in calculating impairment ratings is the current or latest edition in existence at the time the injured worker reaches MMI. Summary judgment is therefore granted in favor of State Fund. Drake’s and Hilbert’s respective motions for summary judgment are denied.

ORDER

¶ 40 Petitioner Jeff Drake’s motion for summary judgment is **DENIED**.

¶ 41 Respondent Montana State Fund’s cross-motion for summary judgment of Jeff Drake’s claim is **GRANTED**.

¶ 42 Petitioner Lori Hilbert’s motion for summary judgment is **DENIED**.

¶ 43 Respondent Montana State Fund’s cross-motion for summary judgment of Lori Hilbert’s claim is **GRANTED**.

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

DATED in Helena, Montana, this 19th day of January, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David M. Sandler
William Dean Blackaby
Jay P. Dufrechou
Thomas E. Martello
Submitted: March 24, 2010