

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 18

WCC No. 2013-3164

RAYMOND JOHNSON

Petitioner

vs.

LIBERTY NW INS. CORP.

Respondent/Insurer.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PETITIONER

Summary: Upon order of the Court, the parties simultaneously moved for summary judgment on the issue of whether the 5th or 6th Edition of the AMA Guides applies for purposes of calculating Petitioner's impairment rating.

Held: The 1999 version of the Workers' Compensation Act applies to Petitioner's claim because that was the version in effect on Petitioner's last day of work. Under the 1999 statutes, the correct edition of the AMA Guides to apply is that which was current on the date the injured worker reached MMI. Since Petitioner reached MMI on April 16, 2001, the 5th Edition applies for his impairment rating. Summary judgment on this issue is granted in favor of Petitioner.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-711. Petitioner's claim falls under the 1999 version of the WCA, where § 39-71-711(1)(b), MCA, mandates that the "current edition" of the Guides be used in calculating an impairment rating. The "current edition" would be the 5th edition since Petitioner reached MMI on April 16, 2001.

Impairment: Impairment Ratings. Petitioner's claim falls under the 1999 version of the WCA, where § 39-71-711(1)(b), MCA, mandates that the "current edition" of the Guides be used in calculating an impairment rating.

The “current edition’ would be the 5th edition since Petitioner reached MMI on April 16, 2001.

Statutes and Statutory Interpretation: Amendments to Statutes. Where it is undisputed that the 1999 version of the WCA applies to Petitioner’s claim, amendments, including a retroactivity provision, made to the 2011 version are inapplicable.

Statutes and Statutory Interpretation: Retroactivity. Where it is undisputed that the 1999 version of the WCA applies to Petitioner’s claim, amendments, including a retroactivity provision, made to the 2011 version are inapplicable.

Statutes and Statutory Interpretation: Applicable Law. Where it is undisputed that the 1999 version of the WCA applies to Petitioner’s claim, amendments, including a retroactivity provision, made to the 2011 version are inapplicable.

¶ 1 On July 19, 2013, Petitioner Raymond Johnson and Respondent Liberty NW Ins. Corp. (Liberty), filed simultaneous motions for summary judgment and briefs in support on the issue of whether the 5th or 6th edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment*¹ applies to a determination of Johnson’s impairment rating.²

Stipulated Facts³

¶ 2 On April 16, 2001, Johnson was diagnosed with asbestos-related disease (ARD).

¶ 3 Since a claimant diagnosed with ARD is considered to be at maximum medical improvement (MMI) on the date of diagnosis,⁴ Johnson achieved MMI on April 16, 2001.

¹ Fifth Edition: L. Cocchiarella, M.D., MSc, *et al.* (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th ed., AMA Press, 2005 (5th Edition); Sixth Edition: R. Rondonelli, M.D., Ph.D., *et al.* (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th ed., AMA Press, 2008 (6th Edition); collectively referred to as AMA Guides.

² Petitioner’s Motion for Summary Judgment (Johnson’s Opening Brief), Docket Item No. 18; Liberty Northwest Insurance Corporation’s Brief in Support of Motion for Summary Judgment (Liberty’s Opening Brief), Docket Item No. 19.

³ The Court ordered the parties to file a stipulated statement of material facts. (See Order Incorporating Minute Entry, Docket Item No. 17.) The parties both incorporated “Stipulated Facts” in their opening briefs. While the parties’ respective statements are similar, they are not identical. The Court is only citing to and considering those facts which appear in both briefs, see Johnson’s Opening Brief at 1-2; Liberty’s Opening Brief at 2, except as otherwise noted.

¶ 4 On August 31, 2001, Johnson ceased working for his time-of-injury employer.⁵

¶ 5 On December 15, 2003, Alan C. Whitehouse, M.D., issued a 25% impairment rating calculated using the 5th Edition.

¶ 6 On February 2, 2009, this Court found Liberty liable for Johnson's occupational disease.⁶

¶ 7 On August 21, 2009, Liberty paid Johnson a 25% impairment award.

¶ 8 Between December 5 and 11, 2012, Dr. Whitehouse issued a 50% impairment rating calculated using the 5th Edition. Liberty denied payment of this impairment award, relying on § 39-71-711, MCA (2011).

¶ 9 On June 13, 2013, Dr. Whitehouse conducted a new independent medical examination (IME) of Johnson.

¶ 10 On June 27, 2013, based on the results of the June 13, 2013, IME and new medical information, Dr. Whitehouse issued Johnson a 98% impairment rating using the 5th Edition.

Analysis and Decision

¶ 11 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.⁷ The material facts necessary for disposition of the issue that is the subject of this motion are undisputed. Accordingly, this case is appropriate for partial summary disposition.

¶ 12 This case is governed by the 1999 version of the Montana Workers' Compensation Act (WCA) because that was the law in effect on Johnson's last day of work for his time-of-injury employer.⁸

⁴ *Fellenberg v. Transportation Ins. Co.*, 2004 MTWCC 29, ¶ 43.

⁵ Petition for Hearing, Docket Item No. 1, at 1; *Johnson*, ¶ 6.

⁶ *Johnson v. Liberty Northwest Ins. Corp.*, 2009 MTWCC 20.

⁷ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

⁸ *Grenz v. Fire & Cas. of Conn.*, 278 Mont. 268, 271, 924 P.2d 264, 266 (1996).

¶ 13 At issue is whether the 5th Edition or the 6th Edition applies to the 50% impairment rating issued by Dr. Whitehouse in December 2012. Johnson argues that the 5th Edition applies,⁹ while Liberty maintains that the 6th Edition applies to the new impairment rating.¹⁰

¶ 14 Section 39-71-711(1)(b), MCA, sets forth the rule regarding the use of the AMA Guides in issuing impairment ratings.

¶ 15 Section 39-71-711(1)(b), MCA (1999), states that an impairment rating must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American medical association.

¶ 16 Although the legislature amended § 39-71-711, MCA, in other ways, § 39-71-711(1)(b), MCA, remained unchanged until 2011, when the legislature amended the provision to state that an impairment rating must be based on the 6th Edition.

¶ 17 In *Drake v. Montana State Fund* and *Hilbert v. Montana State Fund*, I was presented with the issue of determining what the pre-2011 version of § 39-71-711(1)(b), MCA, meant when it said “current edition.”¹¹ After considering the parties’ arguments, I held:

Pursuant to [the procedure for calculating an impairment rating as set forth in § 39-71-711, MCA], 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.¹²

¶ 18 In *Drake*, I interpreted the meaning of the language of § 39-71-711(1)(b), MCA, which was in use in the version of the statute which applies in the present case. Section 39-71-711(1)(b), MCA (1999), required the use of the “current edition” of the Guides. As set forth in *Drake*, the “current edition” of the Guides would be that version

⁹ Johnson’s Opening Brief at 6.

¹⁰ Liberty’s Opening Brief at 1.

¹¹ *Drake v. Montana State Fund* and *Hilbert v. Montana State Fund*, 2011 MTWCC 2. (Collectively referred to as “Drake” in this Order.)

¹² *Drake*, ¶ 38.

which is in effect at the time the injured worker reaches MMI.¹³ Similarly, I also held in *Drake* that the phrase “latest edition,” found in § 39-71-703(1), MCA, also meant the version in effect at the time the injured worker reaches MMI.¹⁴

¶ 19 In the present matter, Liberty asserts that this Court held in *Drake* that the version of the Guides in effect when the impairment rating is determined would be the “latest” or “current” version.¹⁵ This is not the holding of *Drake*. In *Drake*, Respondent Montana State Fund (State Fund) argued that the correct edition of the Guides to use would be the most current edition at the time the claimants reached MMI.¹⁶ I was persuaded by State Fund’s arguments and so held.¹⁷

¶ 20 Liberty argues that, pursuant to § 39-71-711(1)(b), MCA (2011), the 6th Edition should apply to Johnson’s case. Liberty urges, “[T]he Court should follow the law that currently exists in Montana and determine the 6th Edition . . . must be used”¹⁸ The difficulty with Liberty’s position is that “the law that currently exists” – that is, the 2011 version of the WCA – does not apply to Johnson’s case. Because Johnson’s last day of employment was August 31, 2001, his case falls under the 1999 version of the WCA. The 1999 version of § 39-71-711(1)(b), MCA, mandates that the “current edition” of the Guides shall be used to calculate an impairment. Pursuant to this Court’s holding in *Drake* and *Hilbert*, the “current edition” would be the 5th Edition since Johnson reached MMI on April 16, 2001.

¶ 21 Although Liberty correctly notes that § 39-71-711(1)(b), MCA (2011), is retroactive, the Supreme Court held in *Grenz* that in cases involving an occupational disease claim, an injured worker’s last day of employment determines which version of the WCA applies to the claim. There is no dispute in this case that the 1999 version of the WCA applies to Johnson’s claim. Since the 2011 version of § 39-71-711(1)(b), MCA, is inapplicable to Johnson’s claim, the retroactivity provision of the 2011 version of § 39-71-711(1)(b), MCA, is equally inapplicable to Johnson’s claim.

¹³ *Id.*

¹⁴ *Drake*, ¶ 26.

¹⁵ Liberty’s Opening Brief at 4.

¹⁶ *Drake*, ¶ 16.

¹⁷ See *Drake*, ¶ 26 (“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.”), ¶ 38 (“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.”), and ¶ 39 (“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.”)

¹⁸ Liberty’s Opening Brief at 1.

¶ 22 I therefore conclude that, consistent with my previous holdings in *Drake* and *Hilbert*, and the long-standing rule of *Grenz*, under the 1999 version of the WCA, the correct edition of the AMA Guides to apply to Johnson's impairment rating is the 5th Edition, as that was the "current edition" on the date Johnson reached MMI.

ORDER

¶ 23 Respondent's motion for summary judgment is **DENIED**.

¶ 24 Petitioner's motion for summary judgment is **GRANTED**.

¶ 25 Johnson's impairment rating shall be calculated pursuant to the 5th Edition of the AMA Guides.

DATED in Helena, Montana, this 5th day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Laurie Wallace/Jon Heberling/Ethan Welder
Leo S. Ward

Submitted: July 29, 2013