

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 114

WCC No. 9202-6375

JOSEPH McCracken

Petitioner

vs.

CITY OF GREAT FALLS

Respondent/Employer

DEPARTMENT OF LABOR & INDUSTRY

Intervenor.

ORDER DISMISSING PETITION WITHOUT PREJUDICE

Summary: Petition presented jurisdictional question whether dispute about relationship of cervical condition to injury could be resolved in proceeding arising through invocation of statutory impairment rating procedures.

Held: A dispute concerning the relatedness of claimant's cervical condition to his injury is not subject to the procedures of section 39-71-711, MCA (1987), and is subject to statutory mediation requirements. Where mediation has not yet taken place, the Workers' Compensation Court does not yet have jurisdiction over the cervical dispute.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-711, MCA (1987). A dispute concerning the relatedness of claimant's cervical condition to his injury is not subject to the procedures of section 39-71-711, MCA (1987), and is subject to statutory mediation requirements. Where mediation has not yet taken place, the Workers' Compensation Court does not yet have jurisdiction over the cervical dispute.

Jurisdiction: Mediation. A dispute concerning the relatedness of claimant's cervical condition to his injury is not subject to the procedures of section 39-71-711, MCA (1987), and is subject to statutory mediation requirements. Where mediation has not yet taken place, the Workers' Compensation Court does not yet have jurisdiction over the cervical dispute.

From the Court's perspective, this case has a long and interesting history. The Petition for Hearing was filed February 7, 1992. The case was one of the first cases heard by the current judge. That hearing was held on September 9, 1993. Since the time of hearing there have been additional developments. As a result of those developments, three of five issues identified in an April 6, 1994 Order Regarding Briefing have been rendered moot. One of the two remaining issues was whether the Court presently has jurisdiction over the fifth and final issue. Having concluded that it does not, the Court now dismisses the petition without prejudice.

Factual and Procedural Background

The petitioner, who is also the claimant, is Joseph McCracken (McCracken). McCracken is a fireman for the City of Great Falls.

On October 31, 1987, McCracken was hurt while fighting a motel fire. He fell, landing on his back. He felt immediate pain in his right shoulder. He was thereafter treated by Dr. Robert Chambers, an orthopedic surgeon. Dr. Chambers testified at trial.

At the time of the injury, the City of Great Falls (City) was self-insured. It accepted liability for the injury.

In 1990 the City requested Dr. Chambers to provide an impairment rating with respect to McCracken's injuries. (Tr. at 100.) Dr. Chambers refused, stating that he believed that an impairment rating should be provided by an impartial physician rather than the treating physician. (*Id.*, Ex. 36 at 19.)

Subsequently, one or both parties invoked the impairment rating procedures of section 39-71-711, MCA (1987). Pursuant to those procedures, claimant was examined by three different physicians designated by the Department of Labor and Industry. The first physician rated claimant's impairment at ten (10%) percent, the second at sixteen (16%) percent. The third rated claimant at thirteen (13%) percent, but apportioned four (4%) percent to non-job related factors, arriving at an ultimate nine (9%) percent rating. All three physicians rated claimant with respect to both his shoulder injury and a cervical neck injury. The breakdown between the two was as follows:

<u>Neck</u>	<u>Shoulder</u>	<u>Apportionment</u>	<u>Total Impairment</u>
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First Physician	5%	5%		10%
Second Physician	8%	8%		16%
Third Physician	6%	7%	-4%	9%

Subsection (3)(b)(iii) of 39-71-711, MCA, provides that unless the insurer or claimant petitions the Workers' Compensation Court within fifteen (15) days after the third impairment rating, the insurer shall pay an impairment award based on the third rating. In this case, claimant filed a petition on February 7, 1992, contesting the impairment rating. At trial the parties stipulated that the petition was timely.

Initially, numerous issues were presented to the Court. Those issues were reduced to five questions phrased by the Court after a conference with counsel.¹ The ultimate focus of the dispute, however, was twofold: first, whether the rating of the shoulder was adequate (raised by claimant) and, second, whether the claimant's cervical condition is related to his industrial accident (raised by the City).

Medical information developed after trial apparently has convinced the claimant and the City, as well as Intervenor (Department of Labor and Industry), that the prior ratings of the shoulder no longer accurately reflect the extent of claimant's shoulder impairment. Thus, they have agreed to withdraw the dispute over the shoulder impairment rating. The issues remaining are:

¹Issues listed in the Order Regarding Briefing issued April 6, 1994:

1. Whether the words "*current* edition of the Guides to Evaluation of Permanent Impairment," as set forth in section 39-71-711(b), MCA (1987), mean *current* as of the injury or *current* as of the time of the impairment evaluation.
2. If *current* means as of the time of the impairment evaluation, whether the requirement that the evaluator use the *current* edition is unconstitutional.
3. Whether the impairment evaluation method required by section 39-71-711, MCA (1987), is unconstitutional either on its face or as applied in this case.
4. Whether the relatedness of the claimant's neck condition to his industrial accident is an issue which may be properly decided in this proceeding.
5. If the relatedness of the claimant's neck condition is an issue to be decided in this proceeding, whether the claimant's neck condition is in fact related to his industrial accident.

4. Whether the relatedness of the claimant's neck condition to his industrial accident is an issue which may be properly decided in this proceeding.

5. If the relatedness of the claimant's neck condition is an issue to be decided in this proceeding, whether the claimant's neck condition is in fact related to his industrial accident.

Order Regarding Briefing (April 6, 1994).

Discussion

In 1987 the Montana Legislature adopted a specific procedure to resolve disputes over impairment ratings. Section 39-71-711, MCA (1987),² provided that in cases where the insurer and claimant could not agree on an impairment rating, the Division of Workers' Compensation could appoint an independent evaluator to do the rating. If both parties accepted the evaluator's rating, then an impairment rating was paid on that basis. If they still did not agree, then the statute provided for designation of second and third evaluators. The third evaluator was required to review the ratings by the first two evaluators and, if he chose, examine the claimant. He was then to issue a final, definitive rating.

The final rating was binding unless the insurer and/or claimant petitioned the Workers' Compensation Court for review. Such petition had to be filed within fifteen (15) days of mailing of the final evaluation. Subsection (6) provided:

(6) A party may dispute a final impairment rating rendered under subsection (3)(b)(ii) by filing a petition with the workers' compensation court within 15 days of the evaluator's mailing of the report. **Disputes over impairment ratings are not subject to 39-71-605 or to mandatory mediation.** [Emphasis added.]

Subsection (7) created a presumption of correctness of the final rating, albeit a rebuttable one, providing:

(7) An impairment rating rendered under subsection (3) is presumed correct. This presumption is rebuttable.

²The full text of the statute is set out at the end of this Order.

The procedure was repealed in 1991. 1991 Mont. Laws, ch. 558, §7. However, it is applicable to this case because the injury occurred while the procedure was effective.

The first and dispositive question which must be answered in this case is whether the controversy over claimant's cervical condition is subject to the procedures prescribed in section 39-71-711, MCA (1987). The Court concludes that it is not. The section prescribes procedures for resolving disputes over impairment ratings. Subsection (1)(a) specifically states an impairment rating is "a purely medical determination." The uniquely medical nature of the rating is reflected in the statutory scheme and the presumption it affords the final rating. While determinations concerning causation or relatedness often involve medical issues, they may also involve non-medical ones, such as determining what occurred. There is no language in section 39-71-711, MCA, that empowers the evaluators to resolve disputes regarding *causation or relatedness*. The language stating that an impairment rating is a "purely medical determination" indicates that the legislature did not intend the statutory procedure to extend to issues of causation and relatedness. The evaluators' sole function is to calculate an impairment rating. And, the review provided under subsection (6) pertains only to that rating.

Therefore, the dispute concerning the relatedness of claimant's cervical condition is not subject to the procedures of section 39-71-711, MCA, and the Court cannot acquire jurisdiction of the dispute under subsection (6). Since subsection (6) does not apply, the mediation exemption provided thereunder is inapplicable to the present dispute. Conversely, since the exemption does not apply, the controversy over the cervical condition must be mediated before the matter can be litigated in this Court. §§ 39-71-2401 and -2905, MCA (1987).

The petition and amended petition specifically cite subsection (6) of section 39-71-711, MCA, as the basis for the Court's jurisdiction in this case. Mediation did not take place. Since the mediation requirement was not satisfied, the Court is without jurisdiction to consider the parties' contentions regarding claimant's cervical condition.

The jurisdictional basis for resolving the dispute over the cervical condition is not inconsequential. Section 39-71-711, MCA (1987) creates a presumption of correctness regarding the final evaluation; no such presumption exists absent the section. Moreover, the scope and nature of the testimony allowable under the section upon petitioning the Worker's Compensation Court is not clear. While subsection (6) provides for a "petition" rather than an "appeal" to the Court, subsection (1)(a) states that an impairment rating "*must be determined by an impairment evaluator*" (emphasis and italics added), and subsection (7) creates the "presumption" of correctness. At the hearing the claimant argued that section 39-71-711, MCA, precludes the Court from considering the testimony of the treating physician and limited it to reviewing the evaluators' opinions. The Court need not address the scope of review under the section since hereafter the claimant may

bring a petition unfettered by any constraints which may be imposed by the section. In bringing a new petition, both parties are free to call witnesses and present testimony as in any other case within the Court's original jurisdiction.

Based on the forgoing discussion, IT IS HEREBY ORDERED that the petition in this matter is **dismissed without prejudice**.

Dated in Helena, Montana, this 14th day of December, 1994.

(SEAL)

/S/ Mike McCarter

JUDGE

c: Mr. Tom L. Lewis
Mr. Leo S. Ward
Mr. Robert J. Campbell

39-71-711. Impairment evaluation - ratings. (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;

(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American Medical Association; and

(c) must be expressed as a percentage of the whole person.

(2) A claimant or insurer, or both, may obtain an impairment rating from a physician of the party's choice. If the claimant and insurer cannot agree upon the rating, the procedure in subsection (3) must be followed.

(3) (a) Upon request of the claimant or insurer, the division shall direct the claimant to an evaluator for a rating. The evaluator shall:

(i) evaluate the claimant to determine the degree of impairment, if any, that exists due to the injury; and

(ii) submit a report to the division, the claimant, and the insurer.

(b) Unless the following procedure is followed, the insurer shall begin paying the impairment award, if any, within 30 days of the evaluator's mailing of the report:

(i) Either the claimant or the insurer, within 15 days after the date of mailing of the report by the first evaluator, may request that the claimant be evaluated by a second evaluator. If a second evaluation is requested, the division shall direct the claimant to a second evaluator, who shall determine the degree of impairment, if any, that exists due to the injury.

(ii) The reports of both examinations must be submitted to a third evaluator, who may also examine the claimant or seek other consultation. The three evaluators shall consult with one another, and then the third evaluator shall submit a final report to the division, the claimant, and the insurer. The final report must state the degree of impairment, if any, that exists due to the injury.

(iii) Unless either party disputes the rating in the final report as provided in subsection (6), the insurer shall begin paying the impairment award, if any, within 45 days of the date of mailing of the report by the third evaluator.

(4) The division shall appoint impairment evaluators to render ratings under subsection (1). The division shall adopt rules that set forth the qualifications of evaluators and the locations of examinations. An evaluator must be a physician licensed under Title 37, chapter 3. The division may seek nominations from the board of medical examiners.

(5) The cost of impairment evaluations is assessed to the insurer, except that the cost of an evaluation under subsection (3)(b)(i) or (3)(b)(ii) is assessed to the requesting party.

(6) A party may dispute a final impairment rating rendered under subsection (3)(b)(ii) by filing a petition with the workers' compensation court within 15 days of the evaluator's mailing of the report. Disputes over impairment ratings are not subject to 39-71-605 or to mandatory mediation.

(7) An impairment rating rendered under subsection (3) is presumed correct. This presumption is rebuttable.