

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 13

WCC No. 2017-4144

TODD MELLINGER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment, asserting that Petitioner's medical benefits terminated under the 60-month rule at § 39-71-704(1)(f), MCA (2005), and that it is not liable for a surgery to remove a bone spur, because Petitioner put off the surgery for more than 60 months and did not otherwise use his medical benefits during that time. Petitioner argues that Respondent is liable for the surgery because it falls under the prosthesis exception to the 60-month rule. Petitioner also argues he used his medical benefits and satisfied the 60-month rule because Respondent authorized the surgery while his medical benefits were open. Finally, Petitioner argues that Respondent's authorization of his surgery constitutes an enforceable contract.

Held: This Court granted summary judgment for Respondent. First, the prosthesis exception does not apply because regardless of whether Petitioner's special shoes and boots, brace, and orthopedic screws are prostheses, the surgery to remove a bone spur is not a surgery to repair, replace, or monitor a prosthesis. Second, Petitioner's medical benefits terminated because he put off the surgery for more than 60 months and did not otherwise use his medical benefits. Finally, Respondent did not contractually agree that Petitioner could have the surgery beyond the 60-month limitation.

¶ 1 Respondent Montana State Fund (State Fund) moves for summary judgment, asserting that it is not liable for a surgery to remove a bone spur in Petitioner Todd Mellinger's ankle because his medical benefits terminated pursuant to § 39-71-704(1)(f),

MCA (2005). Mellinger maintains that his medical benefits remain open and that State Fund is liable for the surgery. This Court grants State Fund's summary judgment motion.

STATEMENT OF FACTS

¶ 2 Making all inferences in Mellinger's favor, the following are the facts for purposes of this ruling.

¶ 3 On November 2, 2006, Mellinger suffered a severe right-foot injury while working for Montana Merchandising, Inc.

¶ 4 State Fund accepted liability and paid medical and indemnity benefits. State Fund also sent Mellinger a letter, noting that "medical benefits terminate when they are not used for a period of sixty (60) months."

¶ 5 Mellinger underwent surgery with Patrick J. Thomas, MD, which included the placement of three orthopedic screws in his ankle.

¶ 6 Thereafter, State Fund paid for Mellinger to travel to Spokane to be fitted for specialized shoes and boots and paid for the shoes and boots. State Fund also paid for a custom ankle brace.

¶ 7 On June 21, 2007, Mellinger returned to Dr. Thomas, who noted:

Currently Todd is tolerating his injury reasonably well. He understands that the joints in the midfoot were severely destroyed by the injury and likely will require arthrodesis at some point in his life if pain becomes significant. Given his young age, I expect that this will likely occur in the next decade, and this would require arthrodesis of the talonavicular and calcaneocuboid joints. He is doing well at this time with his AFO and his special shoe. I have given him a prescription to have a boot fabricated to support his injured extremity. I believe he is at maximal improvement at this time

¶ 8 In 2008 and 2010, State Fund authorized Hanger Prosthetics & Orthotics to modify Mellinger's boot and shoe soles.

¶ 9 Mellinger saw Dr. Thomas on May 13, 2011, complaining of pain in his ankle and a catching sensation. A radiograph revealed a bone spur. Dr. Thomas recommended a "distal tibial ostectomy to remove the spur, improve range of motion, and pain." Mellinger told Dr. Thomas that he would have the surgery the following winter.

¶ 10 State Fund authorized the surgery. Mellinger "did not know that there was an expiration date for that surgery approval."

¶ 11 On February 7, 2012, the State Fund's claims examiner contacted Mellinger to determine the status of the surgery.¹ Mellinger stated that he had been unable to have the surgery yet due to his work schedule, but that it would likely happen in March. Mellinger informed the claims examiner that Dr. Thomas thought he would be off work for 6-8 weeks.

¶ 12 On May 2, 2012, State Fund contacted Mellinger, again inquiring on the surgery status. Mellinger stated a recent work promotion had caused him to delay the surgery.

¶ 13 On November 8, 2012, State Fund sent Mellinger a letter, conveying that his claim had been placed in "inactive status" because he was not receiving medical or wage loss benefits.

¶ 14 On May 9, 2017, Mellinger called State Fund and stated he wanted to proceed with the surgery. State Fund denied liability for the surgery on the grounds that Mellinger's medical benefits terminated under § 39-71-704(1)(f), MCA (2005), because Mellinger had not used them for 60 consecutive months.

¶ 15 Mellinger currently wears a Kenetrek EverStep Orthopedic Boot, which incorporates an ankle brace and has a rocker bottom sole.

¶ 16 In his Petition for Hearing, Mellinger seeks a general order that his medical benefits remain open and a specific order that State Fund is liable for the surgery to remove the bone spur.

¶ 17 In its Response to Petition for Hearing, State Fund asserts that Mellinger's medical benefits terminated under § 39-71-704(1)(f), MCA (2005), which provides that with an exception to repair or replace a prosthesis, medical benefits terminate if not used for a period of 60 consecutive months. State Fund asserts that Mellinger does not have a prosthesis.

LAW AND ANALYSIS

¶ 18 This case is governed by the 2005 version of the Montana Workers' Compensation Act (WCA) because that was the law in effect at the time of Mellinger's right-foot injury.²

¹ Neither party set forth the date on which State Fund authorized the surgery. However, it is clear from the record that State Fund's approval occurred between May 13, 2011, when Dr. Thomas recommended the surgery, and February 7, 2012, when State Fund's claims examiner called Mellinger to inquire as to the status of the surgery.

² *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

¶ 19 Summary judgment is only appropriate when the moving party establishes no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law.³

¶ 20 Section 39-71-704, MCA (2005), is the statute under which insurers are liable for medical benefits following a compensable injury. But, it provides in relevant part:

(f) Except for the repair or replacement of a prosthesis furnished as a result of an industrial injury, the benefits provided for in this section terminate when they are not used for a period of 60 consecutive months.

(g) Notwithstanding subsection (1)(a), the insurer may not be required to furnish, after the worker has achieved medical stability, palliative or maintenance care except:

. . .

(ii) when necessary to monitor the status of a prosthetic device;

Prosthesis Exception

¶ 21 Mellinger first argues that regardless of whether his medical benefits are terminated under the 60-month rule, State Fund is liable for his bone-spur removal surgery under the exception for the repair or replacement of a prosthesis. He cites a definition providing that a “prosthesis” is “an artificial device that replaces a missing or injured part of the body,” and argues that his boots, ankle brace, and orthopedic screws are prostheses. Mellinger acknowledges that the proposed surgery is not to repair or replace any of these devices but argues that prostheses and their functions cannot be viewed in isolation but must instead be analyzed with the condition of the adjacent human tissue. Thus, in Mellinger’s words, “the ‘repair’ of a [prosthesis] may actually involve a surgery on the human tissue with which the [prosthesis] corresponds.”

¶ 22 State Fund relies upon *Wiard v. Liberty Northwest Ins. Corp.* — in which this Court defined “prosthesis” as “an artificial substitute for a missing body part”⁴ — and argues that neither Mellinger’s boot, brace, nor orthopedic screws are a prosthesis because Mellinger is not missing any body part and they do not substitute for a missing body part. Moreover, State Fund argues that the proposed surgery is not to repair, replace, or monitor any of these devices. Thus, State Fund contends that the prosthesis exception does not apply.

¶ 23 The Legislature has not defined “prosthesis” or “prosthetic device” in the WCA and there is no universally accepted definition in the medical field. There are narrow definitions, under which only devices that replace a missing body part, such as artificial

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

⁴ 2001 MTWCC 31A, ¶ 12 (citing Dorland’s Medical Dictionary, 24th Ed. (1982)).

limbs and joints, qualify.⁵ And there are broad definitions, under which devices that “replace or augment a missing or impaired part of the body” qualify, including devices such as hearing aids.⁶ While this Court adopted a narrow definition in *Wiard*, and while the Department of Labor & Industry has also adopted a narrow definition of “prosthesis,”⁷ the WCA provides that an “injury” includes “damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids,”⁸ thereby indicating that the Legislature intended a broader definition in the WCA.

¶ 24 Notwithstanding, for purposes of Mellinger’s request for a ruling that State Fund is liable for the surgery to remove his bone spur, this Court need not decide at this time whether Mellinger’s boot, brace or orthopedic screws are prostheses because the surgery Mellinger seeks is not for the repair or replacement of any of these devices, nor a procedure to monitor the status of these devices. In Dr. Thomas’s record dated May 13, 2011, he states that during the surgery, he will remove the bone spur. Dr. Thomas does not say that he will repair or replace Mellinger’s boots, brace, or orthopedic screws, nor that he will monitor the status of these devices. Although Mellinger is correct that the repair or replacement of a prosthesis *may* involve surgery on human tissue — e.g., when an artificial joint is replaced — the issue in this case is whether Dr. Thomas will actually repair or replace a prosthesis, or whether he will monitor the status of a prosthesis. In short, the prosthesis exception does not apply merely because the procedure is on or near the same part of the body at which there is a prosthesis.

¶ 25 Because there is no evidence in this case that the surgery will involve the repair, replacement, or monitoring of any prosthesis, State Fund is not liable for this surgery under the prosthesis exception.

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⁵ See, e.g., *Pillow v. United Parcel Serv. of Am.*, 2013 WL 141894 (Virginia Workers’ Compensation Commission) (holding that plates and screws in claimant’s ankle were not prostheses because a prosthesis is a “replacement device” whereas the plates and screws were “repair devices” and did not replace claimant’s ankle or ankle joint).

⁶ See, e.g., *Pillow* (Marshall, Commissioner; concurring in part and dissenting in part) (explaining that claimant’s internal plates and screws were prostheses under definitions in medical dictionaries that define “prosthesis” as a device that substitutes for, supplements, replaces, or augments a missing, defective, or impaired part of the body); see also *Cash v. Universal Rivet, Inc.*, 616 So.2d 446, 448 (Fla. 1993) (citations omitted) (holding that under the Florida Workers’ Compensation Act, a “prosthesis” is an “artificial substitute or replacement, whether external or implanted, for a missing or defective natural part of the body” which has a “relatively permanent functional or cosmetic purpose.”).

⁷ See ARM 24.29.1407(1) (“Claims for furnishing replacement or repair of prosthetic appliances shall be paid to orthotists or prosthetists, who have been certified by the American Board for Certification in Orthotics or Prosthetics, and whose services are performed in a certified facility.”).

⁸ § 39-71-119(1)(b), MCA.

Use of Medical Benefits

¶ 26 Relying upon *Schellinger v. St. Patrick Hospital and Health Sciences Center*⁹ and *Dauenhauer v. Montana State Fund*¹⁰, Mellinger argues that because his medical benefits were open when Dr. Thomas recommended the surgery and when State Fund authorized the surgery, he used his medical benefits and satisfied the 60-month rule.

¶ 27 State Fund argues that this case is distinguishable from *Schellinger* and *Dauenhauer* because Mellinger put off the surgery and did not use his medical benefits for more than five years. Thus, State Fund argues that while Mellinger's medical benefits were open when Dr. Thomas recommended the surgery, Mellinger's medical benefits thereafter terminated because he did not use them for 60 consecutive months.

¶ 28 In *Schellinger* and *Dauenhauer*, this Court addressed what constitutes use of medical benefits. In *Schellinger*, Schellinger sought treatment and then sent written demands for payment of medical bills within 60 months of the last time the insurer paid for medical treatment.¹¹ This Court ruled that Schellinger's demand letters constituted use of medical benefits, and that her medical benefits did not terminate for failing to use her medical benefits for 60 consecutive months.¹² Likewise, in *Dauenhauer*, this Court ruled that a request for authorization to see a physician is use of medical benefits and that Dauenhauer used his medical benefits within the 60-month period because to rule otherwise "would lead to an absurd result" because, "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."¹³

¶ 29 Here, State Fund is correct that Mellinger's medical benefits terminated because, unlike the facts of *Schellinger* and *Dauenhauer*, there was a period of 60 consecutive months in which Mellinger did not use his medical benefits. The Court has held the 60-month rule is a statute of repose, with the 60-month period triggered on a specific date: the last day of use.¹⁴ Mellinger last used his medical benefits when he saw Dr. Thomas on May 13, 2011 and obtained authorization for the surgery. Thus, the 60-month period began running. However, Mellinger did not use his medical benefits again until May 9, 2017, when he called State Fund and stated he wanted to proceed with the surgery, a period in excess of 60 months. His medical benefits therefore terminated, with the exception of procedures to repair, replace, or monitor any prosthesis.

⁹ 2012 MTWCC 10.

¹⁰ 2012 MTWCC 22.

¹¹ *Schellinger*, ¶¶ 8, 9, and 15.

¹² *Schellinger*, ¶¶ 15-18.

¹³ *Dauenhauer*, ¶ 37.

¹⁴ *Palmer v. Safeco*, 2006 MTWCC 44, ¶ 11.

Agreement to Provide Medical Benefits

¶ 30 Mellinger relies on *Newlon v. Teck American, Inc.*,¹⁵ and argues that because State Fund authorized the surgery while his medical benefits were open, it is contractually obligated to pay for the surgery and cannot now rely upon the 60-month rule to deny liability.

¶ 31 State Fund argues that because it did not contractually agree to keep its authorization open indefinitely, *Newlon* is inapplicable. Rather, it argues that this case falls under *Wiard v. Liberty Northwest*¹⁶ and that its authorization included the 60-month rule.

¶ 32 In *Wiard*, Wiard and Liberty entered into a settlement agreement under which Wiard reserved his medical benefits.¹⁷ Because Wiard did not seek medical treatment between 1995 and 2000, Liberty asserted that, under the 60-month rule then codified at § 39-71-704(1)(d), MCA (1991), his medical benefits terminated.¹⁸ However, Wiard maintained that medical benefits remained open under the terms of the settlement agreement.¹⁹ The Montana Supreme Court agreed with Liberty, explaining that it “is well established that laws existing at the time a contract is formed become part of the contract” and that the “workers’ compensation statutes in effect when a worker is injured establish the contractual rights and debts of the parties.”²⁰ Therefore, the Supreme Court held that when the terms of a settlement agreement provide that medical benefits are reserved, the workers’ compensation laws that govern the claim are part of the settlement agreement, including the 60-month rule.²¹ Thus, the Supreme Court held that Wiard’s medical benefits terminated because he did not use them for 60 consecutive months,²² and that Wiard’s claim that he had no knowledge of the 60-month rule did “not alter the operation of the statute.”²³

¶ 33 In *Newlon*, the parties entered into a settlement agreement under which Teck agreed to provide, *inter alia*, “lifetime medical care” for his left knee.²⁴ Relying on *Wiard*, Teck argued that it was not liable for treatment of Newlon’s left knee because his medical

¹⁵ 2015 MT 317, ¶¶ 18, 19, 381 Mont. 378, 383, 360 P.3d 1134, 1138.

¹⁶ 2003 MT 295, 318 Mont. 132, 79 P.3d 281.

¹⁷ *Wiard*, ¶ 16.

¹⁸ *Wiard*, ¶¶ 11, 19.

¹⁹ *Wiard*, ¶ 17.

²⁰ *Wiard*, ¶¶ 20, 21 (citations omitted).

²¹ *Wiard*, ¶¶ 23 – 25.

²² *Wiard*, ¶¶ 15, 25, 45.

²³ *Wiard*, ¶ 32.

²⁴ *Newlon*, ¶ 4.

benefits terminated because Newlon did not use them for 60 consecutive months.²⁵ However, the Supreme Court distinguished *Wiard* because the settlement agreement in *Wiard* merely kept medicals open while the agreement between Teck and Newlon provided that Teck would provide “lifetime medical care” for his left knee.²⁶ The Supreme Court held Teck’s promise to provide “lifetime medical care” for Newlon’s left knee was enforceable because the “freedom to contract allows a party to a settlement agreement to make a promise that is durable even beyond the limits of the 60-month rule found in § 39-71-704(1)(d), MCA (1991).”²⁷

¶ 34 This case falls under *Wiard*, and not *Newlon*, because State Fund did not contractually agree to keep Mellinger’s benefits open indefinitely, or state that its authorization for the surgery was indefinite. State Fund and Mellinger did not enter into any contract under which State Fund was liable for benefits beyond the limits of the WCA. Thus, the 2005 WCA, which includes the 60-month rule, was part of, and governs, State Fund’s authorization. As set forth above, Mellinger’s medical benefits terminated because he did not use them for 60 consecutive months, with the exception of procedures to repair, replace, or monitor a prosthesis. And, as in *Wiard*, Mellinger’s lack of knowledge that State Fund’s authorization was not indefinite under the WCA does not change the outcome of this case.

¶ 35 Accordingly, this Court enters the following:

ORDER

¶ 36 State Fund’s Motion for Summary Judgment is **granted**.

¶ 37 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 this 8th day of August, 2018.

(SEAL)

/s/ DAVID SANDLER
JUDGE

c: Thomas J. Murphy
Melissa Quale

Submitted: February 7, 2018

²⁵ *Newlon*, ¶ 17

²⁶ *Newlon*, ¶¶ 4, 11, 17, 20.

²⁷ *Newlon*, ¶ 18.