IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 13

WCC No. 2006-1699

JOHN PORTER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Summary: Respondent asks the Court to reconsider its decision in this matter. It alleges that only Petitioner's cervical condition was at issue in this case but the Court erroneously held Respondent liable for continuing medical and TTD benefits regarding Petitioner's low-back claim. Respondent notes that it previously accepted liability for that condition and therefore no dispute existed regarding the low-back claim. Petitioner responds that his low-back claim was encompassed in the issues litigated in this matter and that Respondent not only denied liability of his cervical condition but also unreasonably ceased paying wage-loss and medical benefits on the accepted low-back claim. Petitioner asserts that this Court correctly determined that Respondent remained liable for ongoing benefits concerning the low back, and further correctly determined that Respondent's adjusting of Petitioner's claim was unreasonable.

Held: Respondent's motion for reconsideration is denied. After accepting liability for Petitioner's low-back claim, Respondent ceased paying benefits based on a medical opinion given by Dr. Butler, who was unaware of Petitioner's subsequent diagnosis and treatment by other physicians and who then withdrew his opinion upon learning of Petitioner's subsequent diagnosis and treatment. Respondent's contention that Dr. Butler's withdrawal of his opinion was limited to Petitioner's cervical condition is unsupported by the evidence.

¶ 1 Respondent Liberty Northwest Insurance Corporation moves the Court to reconsider its October 19, 2007, Findings of Fact, Conclusions of Law and Judgment in this matter.[1] Respondent alleges that this Court confused the facts underlying Petitioner's low-back claim, for which Respondent accepted liability, with the facts underlying Petitioner's cervical condition, for which Respondent denied liability and which this Court concluded was not work-related. Petitioner responds that although this Court concluded that his cervical condition was not work-related, Respondent remains liable for continuing wage-loss and medical benefits for Petitioner's accepted low-back claim as well as Petitioner's inability to return to work because of the combined effects of his low-back and cervical conditions.

¶ 2 Respondent's motion hinges on its insistence that the only litigated issue in this matter was Petitioner's cervical condition and that, since this Court concluded that Respondent was not liable for the cervical condition, Respondent must therefore be liable for nothing. As Petitioner points out in his response to Respondent's motion for reconsideration the parties agreed on the issues to be determined by the Court as set forth in the Pretrial Order. Among the issues which the parties jointly set forth for this Court's determination were the following: "Whether Petitioner has achieved maximum medical improvement relative to his work-related injury;" and "Whether [P]etitioner is entitled to temporary total disability benefits, and if so, for what period of time is he entitled to those benefits."[2] Respondent now attempts to argue that the only litigated issue was whether Petitioner's cervical condition is compensable. The facts do not support Respondent's contention. As set forth in my decision in this matter, I determined that Petitioner had not achieved maximum medical improvement (MMI) for his low-back condition and that he was therefore entitled to continued temporary total disability (TTD) benefits.[3]

¶ 3 Respondent sets forth two main assertions as to why it believes the Court's reasoning was incorrect. First, Respondent asserts that after Petitioner ceased to treat with Dr. Butler, his subsequent medical providers did not treat his low-back condition. Respondent asserts that these medical providers treated Petitioner only for his cervical condition and, since this Court determined that Respondent was not liable for Petitioner's cervical condition, Respondent cannot be liable for Petitioner's continuing medical treatment. Second, Respondent asserts that, "Dr. Butler did not withdraw his conclusions about [Petitioner's] low back condition and instead he deferred to Drs. Coward and Mack

[1] *Porter v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 42.

[2] *Porter*, ¶¶ 4b and 4c, respectively.

[3] *Porter*, ¶¶ 41-42.

for the condition they evaluated which was the neck injury the Court found not compensable."[4]

¶ 4 Respondent asserts that this Court fell victim to a "fallacy of equivocation" in concluding that Dr. Butler withdrew his opinion regarding Petitioner's low-back condition. However, Respondent's assertion relies upon two false premises: (1) that none of Petitioner's subsequent medical providers examined or treated his low-back condition; and (2) that Dr. Butler did not withdraw his opinion that Petitioner was at MMI.

¶ 5 As Petitioner notes in his response brief, and as supported by the record in this matter, Drs. Coward and Marks, and Jason Miller, PT, all examined and treated Petitioner for the accepted low-back condition after Dr. Butler's cessation of treatment. Petitioner further points out that Dr. Butler acknowledged during his deposition that an MRI ordered subsequent to Petitioner's treatment with Dr. Butler revealed a disk protrusion displacing the left L3 nerve root.[5]

¶ 6 Respondent attempts to support its assertion that no doctors subsequent to Dr. Butler examined or treated Petitioner's low-back condition by referring to the second page of a two-page progress report by Dr. Coward. Respondent notes that on that page of the progress report, Dr. Coward orders x-rays of Petitioner's shoulders but makes no reference to Petitioner's low back. Respondent fails to note, however, that on the first page of the **same progress report**, Dr. Coward notes Petitioner's ongoing low-back pain, conducts an examination of Petitioner's low back, and makes findings concerning the condition of Petitioner's low back.[6] When viewing the **complete** record, Respondent's assertion that no doctors subsequent to Dr. Butler treated Petitioner's low back as part of his ongoing medical treatment is simply unsupported. As Petitioner points out in his response brief, Respondent cites only to portions of the record which favor the conclusion it desires, while disregarding those parts which favor Petitioner's claim. I find Respondent's salad bar approach to the record in this matter unpersuasive, to say the least.

¶ 7 Respondent further asserts that this Court erroneously characterized Dr. Butler's deposition testimony as a withdrawal of his medical opinions. During the line of questioning at issue, Dr. Butler testified:

> Q. And obviously, if you had known there had been a follow-up with a medical doctor, a series of radiographs, a neurosurgical consult where

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[4] Motion for Reconsideration and Supporting Brief at 2.

[5] *Porter*, ¶ 25.

[6] Ex. 1 at 3-4.

there were narcotic medications provided and a follow-up MRI, you would have deferred the answers presented to you in the May 25, 2005 letter from Gary Holt to the other physicians who had seen him more recently?

A. Absolutely.

Q. And based on the understanding which you've just obtained, that there indeed was a workup done by other physicians, would you withdraw these conclusions until you had an opportunity to review those records and/or simply defer to the other physicians?

A. Yes, I would defer to the other physicians.[7]

¶ 8 While Respondent would have the Court read Dr. Butler's deferral as referring only to Petitioner's cervical condition, nothing in the record supports Respondent's contention that Dr. Butler intended to qualify his deferment in this manner. After learning that subsequent diagnosis and treatment of Petitioner included a lumbar MRI, Dr. Butler unequivocally deferred to the other physicians. As Petitioner points out, and as Gary Holt conceded in his deposition, without the opinion of Dr. Butler, Respondent has no opinion from a physician that Petitioner is at MMI for his work-related injury and does not have an opinion from a physician that Petitioner is released to return to work in any capacity. Therefore, as I concluded, Petitioner is not at MMI and he is entitled to TTD benefits from the date of termination until such time as he has reached MMI or is released to return to his time-of-injury employment or an employment with similar physical restrictions.[8]

¶ 9 Respondent further argues that this Court did not sufficiently support its determination that Respondent acted unreasonably in its adjusting of this claim. Respondent asserts that the statutory authority for the imposition of attorney fees and a penalty is inadequate and that the burden of proof is more fully set forth in case law which this Court did not cite in its decision. Specifically, Respondent asserts that under *Marcott v. Louisiana Pac. Corp.*[9] and *Holton v. F.H. Stoltze Land and Lumber Co.,*[10] in order to find an insurer's actions unreasonable, the Court must find that no genuine doubt about compensability exists from a medical or legal standpoint. Respondent then insists that since Petitioner's cervical condition was not adjudged compensable, a genuine doubt as

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[7] Butler Dep. 49:6-20.

[8] *Porter*, ¶¶ 41-42.

[9] *Marcott*, 275 Mont. 197, 911 P.2d 1129 (1996).

[10] *Holton*, 195 Mont. 263, 637 P.2d 10 (1981).

to the compensability of his claim existed. Once again, Respondent ignores facts which it finds inconvenient – specifically, that Petitioner's low-back condition **is** compensable as evidenced by the fact that Respondent accepted liability for it. Respondent appears to argue that once it has accepted liability for a condition, it can then capriciously cease paying benefits on that condition without consequence. It was on this basis that I found Respondent's adjustment of this claim unreasonable and accordingly concluded that Petitioner was entitled to a penalty and attorney fees. Respondent has presented no persuasive evidence or arguments to the contrary.

ORDER

¶ 10 Respondent's motion for reconsideration is **DENIED**.

DATED in Helena, Montana, this 6TH day of March, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Steven S. Carey
Larry W. Jones
Submitted: November 26, 2007