

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 13

WCC No. 2017-4009

DEBBRA SMITH

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

**APPEALED TO MONTANA SUPREME COURT – 10/10/17
DISMISSED 12/01/17**

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves for summary judgment, arguing: (1) that Petitioner's claim for TTD or PTD benefits is time-barred; (2) that, in the alternative, she does not have sufficient evidence to prove that she is totally disabled as a result of her claim-related injuries; and (3) that her medical benefits are closed because Petitioner did not use them for 60 consecutive months. Petitioner opposes the motion on the grounds: (1) that she filed her Petition for Hearing within the statute of limitations; (2) that her head and neck problems are a result of claim-related injuries and have deteriorated to the point that she is now unable to work; and (3) that her medical benefits remain open because Petitioner received treatment during the relevant 60-month period.

Held: Respondent's motion for summary judgment is granted because Petitioner's claim for TTD or PTD benefits is time-barred under the two-year statute of limitations set forth in § 39-71-2905(2), MCA. Because the issue of Petitioner's entitlement to TTD or PTD benefits is disposed of on statute of limitations grounds, this Court does not reach whether there is an issue of material fact as to her substantive entitlement to those benefits. Further, because Petitioner has neither asserted a claim for medical benefits in her Petition for Hearing, nor mediated that issue, this Court currently lacks jurisdiction to consider whether her medical benefits are closed.

¶ 1 Respondent Montana State Fund (State Fund) moves for summary judgment, arguing: that Petitioner Debra Smith's claim for temporary total disability (TTD) or permanent total disability (PTD) benefits is time-barred; that, in the alternative, she does not have sufficient evidence to prove she is totally disabled due to her industrial injury; and that her medical benefits are closed because she did not use them for 60 consecutive months.

¶ 2 Smith opposes the motion on the grounds: that she filed her Petition for Hearing within the statute of limitations; that her head and neck problems are a result of claim-related injuries and have deteriorated to the point that she is now unable to work; and that her medical benefits remain open because she received treatment during the relevant 60-month period.

FACTS

¶ 3 Smith fell on December 10, 2009, and suffered injuries at work, including her left shoulder.

¶ 4 On January 5, 2010, State Fund accepted liability for her left shoulder injury.

¶ 5 On December 18, 2010, Smith's treating physician, Larry Stayner, MD, determined Smith was at maximum medical improvement (MMI) and had no restrictions. He released her to return to work at her time-of-injury job.

¶ 6 On February 9, 2011, Smith resigned via an e-mail to her supervisor stating: "I hereby give my 2-week resignation, in that I can no longer perform my job duties sustained from injuries, caused by the State of Montana on 10 Dec 09."

¶ 7 On August 24, 2011, Smith sent an e-mail to State Fund stating,

What is State Fund prepared to do for me since the State of Montana's Department of Administration is responsible for my injuries sustained from a very bad fall on the raised floor of the ITSD's data center at the Mitchell Bldg., December 10, 2009?

I am not, and have not, been able to physically work since February 9, 2011.

¶ 8 On August 25, 2011, State Fund responded, and first indicated that medical benefits remained open. However, as to Smith's request for benefits for her alleged inability to work, State Fund denied liability:

As far as disability benefits, prior to your voluntary resignation, your employer committed to providing accommodations. Presently, your file reflects that your time-of-injury job has been approved by your treating

physician, therefore you are not currently entitled to additional compensation benefits.

State Fund also notified Smith that if she disagreed with its decision, she could notify it in writing and, thereafter, petition the Department of Labor & Industry (DLI) for a mediation conference.

¶ 9 On October 24, 2011, State Fund had Smith undergo an independent medical evaluation (IME) with David J. Hewitt, MD, MPH. Concerning Smith's fall, Dr. Hewitt's diagnosis was a rib fracture and left shoulder SLAP (Superior Labrum Anterior Posterior) lesion. He concluded that Smith was at MMI, and back to her pre-injury status, with no loss of function and 0% impairment.

¶ 10 On January 4, 2012, Smith's attorney requested that State Fund forward a complete copy of her file, as well as a statement of all benefits it had paid on her claim to date.

¶ 11 On April 13, 2013, State Fund sent a letter to Smith and her attorney stating it was placing her claim on "inactive status" because it was not paying any medical or wage-loss benefits.

¶ 12 On May 19, 2016, Smith's attorney sent a letter to State Fund demanding that Smith be placed back on total disability benefits retroactive to February 9, 2011.

¶ 13 On June 6, 2016, State Fund responded, stating, "Smith's claim has been closed since 2013 with no new information since that time. I am unable to comply with your request to place Ms. Smith back on disability retroactively and at her full TTD rate."

¶ 14 Smith petitioned for mediation on July 20, 2016,¹ and a mediation conference was held on August 19, 2016. The issue mediated was Smith's "entitlement to reinstatement of her Temporary Total Disability (TTD) benefits and/or payment of her Permanent Total Disability (PTD) impairment benefits."

¶ 15 The mediator issued her Report and Recommendation on October 11, 2016.

¶ 16 Smith filed her Petition for Hearing on May 1, 2017, requesting that this Court order Respondent to pay her "TTD benefits and/or PTD benefits, both retroactively when she was cut off and ongoing." She did not seek medical benefits.

¶ 17 The last time State Fund paid a medical benefit was for treatment Smith received on May 2, 2011.

¹ The parties agreed to allow Court staff to ask the DLI for the date Smith petitioned for mediation. This Court takes judicial notice of the date pursuant to M.R.Evid. 201.

LAW AND ANALYSIS

¶ 18 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Smith's industrial accident.²

¶ 19 This Court renders summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.³ After the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment.⁴

Issue 1: Is Smith barred from receiving TTD or PTD benefits for failing to file her Petition for Hearing within the statute of limitations pursuant to § 39-71-2905(2), MCA?

¶ 20 State Fund argues that Smith's claim for TTD or PTD benefits is time-barred because she failed to file her Petition for Hearing within two years of its denial of these benefits as required by § 39-71-2905(2), MCA. Smith argues that her Petition for Hearing is timely.

¶ 21 Section 39-71-2905(2), MCA, provides:

A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied.

¶ 22 State Fund is correct that Smith's current claim for TTD or PTD benefits is time-barred. Smith sent an e-mail to State Fund on August 24, 2011, in which she notified State Fund that it was her position that as of February 9, 2011, she was unable to work as a result of injuries sustained in her industrial accident. On August 25, 2011, State Fund informed Smith that her treating physician had released her to return to work and denied liability for "additional compensation benefits," which would include TTD and PTD benefits since they are the only types of wage-loss benefits for which a claimant who is totally unable to work is eligible. State Fund's email "firmly established a denial of benefits and the existence of a 'dispute over liability,' thus triggering the 2-year statute of limitations contained in § 39-71-2905(2), MCA."⁵ Thus, the statute of limitations started

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

³ ARM 24.5.329(2).

⁴ *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71 (citation omitted).

⁵ *Johnson v. Montana State Fund*, 2011 MTWCC 22, ¶ 21 (citation omitted).

running on these benefits on August 26, 2011, and ran on August 26, 2013.⁶ Notwithstanding, Smith filed her Petition for Hearing on May 1, 2017, over three years beyond the limitations period. Her claim for TTD and PTD benefits is time-barred.

¶ 23 Smith makes three arguments in support of her position. However, none have merit.

¶ 24 First, Smith argues that her claim is timely because she filed her Petition for Hearing within two years of the mediation process. However, under the plain language of § 39-71-2905(2), MCA, a Petition for Hearing must be filed within two years after benefits are denied, not within two years of the mediation. The dates of the mediation process are relevant only to the issue of tolling the statute of limitations, which is irrelevant here because Smith petitioned for mediation after the statute of limitations already ran.⁷

¶ 25 Second, Smith asserts that the statute of limitations did not start running because State Fund did not have sufficient grounds to deny her request for benefits in 2011. Smith argues that State Fund denied her request for additional benefits “for incorrect reasons and an incorrect reliance upon bits and pieces of the medical records.” Smith maintains that in addition to injuring her left shoulder, she also injured her cervical spine and low back. She also maintains she suffered a flare in her headaches after her fall. Smith maintains that her physicians treated her for these injuries and sequela in 2010 and 2011, but did not determine whether she was at MMI for these alleged injuries or consider them when releasing her to return to work. She also claims these conditions have worsened and now render her permanently disabled. Thus, she argues State Fund did not have sufficient grounds to deny her demand for additional compensation benefits.

¶ 26 However, this Court does not consider the merits of a claim when determining whether the claimant timely filed it.⁸ Regardless of the reason for an insurer’s denial, the statute of limitations starts running on the day after the denial, and the claimant has two years to petition this Court to decide the merits of the dispute.⁹ Pursuant to § 39-71-2905(2), MCA, Smith had two years to petition this Court to adjudicate the dispute over

⁶ See M.R.Civ.P. 6(a) (2009) (to calculate a statute of limitations, “the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.”); *Fleming v. Int’l Paper Co.*, 2008 MT 327, ¶¶ 26, 28, 29, 346 Mont. 141, 194 P.3d 77 (declining to make an exception, for procedural statutes, to general rule that the statutes in effect on the date of the accident or injury control in workers’ compensation cases). See, e.g., *Bosch v. Town Pump, Inc.*, 2004 MT 330, ¶ 8, 324 Mont. 138, 102 P.3d 32 (not including the day on which Bosch’s injury occurred in calculating limitations period); *Grey v. Silver Bow Cnty.*, 149 Mont. 213, 218, 425 P.2d 819, 821-22 (1967) (extending the limitations period by one day where, otherwise, the last day of the period would have been a Sunday).

⁷ *Preston v. Transp. Ins. Co.*, 2004 MT 339, ¶ 37, 324 Mont. 225, 102 P.3d 527.

⁸ See, e.g., *Johnson*, ¶¶ 16-18 (holding that statute of limitations in § 39-71-2905(2), MCA, began running upon denial of claim notwithstanding claimant’s argument that insurer did not have legitimate grounds to deny his claim).

⁹ *Id.*

her entitlement to TTD or PTD, which includes the dispute as to whether State Fund was liable for TTD or PTD for the alleged injuries to her cervical spine and low back, and flare of her headaches.

¶ 27 Finally, Smith argues that the statute of limitations did not start running on her claim for TTD or PTD benefits on August 26, 2011, because she did not actually become totally unable to work until sometime in 2015. She explains that her medical records from 2015 and 2016, show “that the condition had deteriorated and that Petitioner was indeed incapable of returning to her time of injury employment or any other employment.” She further explains that, from these medical records, “It would appear that Petitioner’s condition worsened to the point that by 2015 she was indeed totally unable to work.”

¶ 28 However, as State Fund points out, her argument is belied by her own statements and allegations. In her resignation e-mail, dated February 9, 2011, Smith stated, “I can no longer perform my job duties sustained from injuries, caused by the State.” And in her e-mail to State Fund, dated August 24, 2011, she stated, “I am not, and have not, been able to physically work since February 9, 2011.” Smith’s attorney’s letter dated May 19, 2016, demanded total disability benefits retroactive to February 9, 2011. In her Petition for Hearing, Smith requests “TTD benefits and/or PTD benefits” retroactive to February 9, 2011. In short, Smith has consistently maintained that she has been unable to work since February 9, 2011, as a result of the injuries sustained in her fall. In these circumstances, the statute of limitations began running on August 26, 2011, the day after State Fund initially denied “additional compensation benefits” for her alleged inability to work as a result of her injuries, and did not “reset” to June 6, 2016, the date State Fund again denied liability for TTD and PTD benefits for her alleged inability to work starting in 2015.¹⁰

¶ 29 Smith did not file a Petition for Hearing with the Court within two years of the State Fund’s denial of liability for “additional compensation benefits.” Therefore, her claim for TTD or PTD benefits is time-barred and State Fund is entitled to summary judgment on this issue.

Issue 2: Does Smith have sufficient evidence to prove that she is totally unable to work as a result of her claim-related injuries?

¶ 30 Because the issue of Smith’s entitlement to wage-loss benefits is disposed of on statute of limitations grounds, this Court does not reach whether there is an issue of material fact as to her substantive entitlement to those benefits.

¹⁰ See *Johnson*, ¶¶ 19-21 (holding that second denial letter did not “reset” the statute of limitations).

Issue 3: Is Smith barred from seeking additional medical benefits for failing to use those benefits for a period of 60 consecutive months pursuant to § 39-71-704(1)(f), MCA?

¶ 31 Because Petitioner has neither asserted a claim for medical benefits in her Petition for Hearing, nor mediated that issue, this Court currently lacks jurisdiction to consider it pursuant to §§ 39-71-2408 and -2905, MCA.

ORDER

¶ 32 State Fund's motion for summary judgment is **granted**.

¶ 33 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 19th day of September, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: John C. Doubek
Thomas E. Martello

Submitted: September 5, 2017