

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 11

WCC No. 2008-2066

SHARON STEWART

Petitioner

vs.

LIBERTY NORTHWEST INS. CORP.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
APPEALED TO MONTANA SUPREME COURT - 04/30/12
CROSS APPEALED TO MONTANA SUPREME COURT - 05/14/12
AFFIRMED – 04/23/13

Summary: Petitioner suffers from ongoing pain in her right knee since her industrial accident and two arthroscopic surgeries. This Court ruled in an earlier decision that Petitioner was not entitled to an increase in her impairment rating for her chronic pain. Following the earlier ruling, the Respondent denied further liability for Petitioner's pain medication. Petitioner contends that Respondent unreasonably denied her medication, and she is entitled to the pain medication, penalty, attorney fees, and costs.

Held: Petitioner has demonstrated that her original injury and resulting surgeries are causally related to her need for ongoing pain medication. She is entitled to continued payment of her medication without a reservation of rights by Respondent. As Respondent acted reasonably in reliance on this Court's earlier ruling that Petitioner was not entitled to an increased impairment rating for her chronic pain, Petitioner is not entitled to a penalty or attorney fees.

Topics:

Defenses: Collateral Estoppel. Petitioner failed to meet her burden of proof in her first claim before this Court when her treating physician could not explain a causal relationship between her knee injury or surgery and her continuing pain so as to merit a higher impairment rating. A medical expert testified in the current proceeding that the fibrosis present in

Petitioner's knee six weeks following her initial surgery was evidence of damage to the saphenous nerve more probably than not resulting either from her injury or surgery, satisfying her burden of proof that she is entitled to continuing medication for her pain. These are two different claims under different statutes of the WCA and do not satisfy the identical issue element of collateral estoppel.

Defenses: *Res Judicata*. The doctrine of *res judicata* prevents a party from relitigating a subject matter that the party has already had an opportunity to litigate. There has to have been full opportunity to present an issue in a prior proceeding, and the prior decision must be accorded finality as to all issues raised or which *could* have been raised. Here, the insurer had accepted liability and was paying for Petitioner's pain patches on an ongoing basis. It was only after the insurer denied liability for the patches following the previous litigation that the issue arose to a justiciable controversy. *Res judicata* is inapplicable under these facts.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Although Petitioner's treating physician could not opine on a more-probable-than-not basis that Petitioner's knee injury or resulting surgeries were causally related to the chronic pain condition, a physician who performed an independent medical review of the case did so. The Court concluded that the testimony of the two doctors, taken together, was sufficient to prove a causal connection between Petitioner's industrial accident and her chronic pain condition.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-2907. An insurer's reliance on an earlier ruling of this Court forms a reasonable basis to deny liability. The insurer had a reasonable defense to liability after this Court concluded that Petitioner failed to prove a causal connection between her injury and her pain; however, the insurer continued to pay for the disputed medication under a reservation of rights. The insurer's actions were reasonable, and a penalty under these facts is inappropriate.

Penalties: Insurers. An insurer's reliance on an earlier ruling of this Court forms a reasonable basis to deny liability. The insurer had a reasonable defense to liability after this Court concluded that Petitioner failed to prove a causal connection between her injury and her pain; however, the insurer continued to pay for the disputed medication under a

reservation of rights. The insurer's actions were reasonable, and a penalty under these facts is inappropriate.

¶ 1 The parties submitted this matter on a stipulated record and briefs in accordance with this Court's Minute Entry Orders of June 9 and July 14, 2011,¹ the Order Setting Briefing Schedule² dated July 26, 2011, and the Stipulated Record and Separate Statement of Disputed Record³ of July 21, 2011. Michael J. San Souci represents Petitioner Sharon Stewart. Larry W. Jones represents Respondent Liberty Northwest Ins. Corp.

¶ 2 Exhibits: The parties stipulated to the inclusion of the following Docket Items from WCC No. 2008-2066: Docket Item Nos. 1, 8-9, 11-14, 17-18, 21-25, 27, 29, 31, 36, 38, 44, 47, 49, 51, 54-58, 60, and 63. Additionally, the parties stipulated to Docket Item No. 18, Findings of Fact, Conclusions of Law and Judgment in WCC No. 2006-1592 (2007 MTWCC 41). Liberty objects to Stewart's offer of the following items from WCC No. 2006-1592 on the grounds of relevancy and *res judicata*: Docket Item No. 1, Petition for Hearing on Disputed Impairment Rating; Docket Item No. 5, Deposition upon Oral Examination of Lowell Anderson, M.D.; Docket Item No. 10, Pretrial Order; and Docket Item No. 15, Minute Book Hearing No. 3733.⁴ Since Clifford Wheeless, M.D., considered Dr. Anderson's deposition in formulating the medical opinions voiced in his affidavit and in his videoconference perpetuation trial testimony (also referred to herein as deposition testimony), Stewart laid sufficient foundation for Dr. Anderson's deposition and it is therefore admitted.⁵ The remaining records from the earlier case involving a claim for a higher impairment rating are irrelevant to this proceeding involving a claim for medical benefits and are therefore excluded.

¹ Minute Book Hearing No. 4278, Docket Item No. 60; Minute Book Hearing No. 4292, Docket Item No. 63.

² Docket Item No. 65.

³ (Stipulated Record), Docket Item No. 64.

⁴ Stipulated Record at 2-4. Subsequent to the filing of the Stipulated Record, Petitioner filed Petitioner's Motion for Order Rectifying Clerical Error in Record (Docket Item No. 70). Petitioner objected to the non discoverable items in Docket Item No. 36 and Docket Item No. 39 in its entirety on the grounds they were ruled non discoverable by the Court in its Orders of December 1 and 7, 2010 (Docket Item Nos. 42 and 46). By e-mail dated November 17, 2011 (Docket Item No. 71), Respondent's counsel indicated to the Court that he had no objection to Petitioner's motion. Consequently, the non discoverable items in Docket Item No. 36 and Docket Item No. 39 in its entirety have been omitted from the record.

⁵ Counsel for both parties further stipulated that those exhibits presented during Dr. Wheeless' testimony would be lodged with the Court as trial exhibits (Minute Book Hearing No. 4226, Docket Item No. 47), and these included Dr. Anderson's deposition (Wheeless Dep., Ex. D).

¶ 3 Witnesses and Depositions: The transcripts of the depositions of Petitioner Sharon Stewart, Liberty's case manager, Sandy Scholl, Dr. Anderson, and Dr. Wheelless⁶ are considered part of the record.

¶ 4 Issues Presented: The Order of Agreed Issues and Order Setting Briefing Schedule, sets forth the following issues:

Issue No. 1: Whether Petitioner Sharon Stewart is entitled to continued payment of the pain patches for which Respondent Liberty Northwest Ins. Corp. is paying under a reservation of rights.

Issue No. 2: Whether Petitioner Sharon Stewart is entitled to a penalty pursuant to § 39-71-2907, MCA.

Issue No. 3: Whether Petitioner Sharon Stewart is entitled to attorney fees and costs.⁷

FINDINGS OF FACT

¶ 5 As shown in the Findings of Fact, Conclusions of Law and Judgment in 2007 MTWCC 41, Stewart was injured on August 26, 2002, while working for Liberty's insured, Gallatin Laundry Company, Incorporated. Liberty accepted liability for the claim and paid certain wage-loss and medical benefits.⁸

¶ 6 Stewart underwent two surgical procedures to her right knee as a result of her industrial accident, both performed by John Campbell, M.D. Dr. Campbell's preoperative diagnosis for the second surgery performed on November 26, 2002, included: "POSTOPERATIVE COMPLICATION OF COMPLEX REGIONAL PAIN SYNDROME."⁹

¶ 7 Stewart filed a petition with this Court for an increase in her impairment rating award based on her chronic pain condition and the determination by her treating physician, Dr. Anderson, that her physical findings most closely resembled reflex sympathetic dystrophy.¹⁰

⁶ The videoconference deposition of Dr. Wheelless was taken before this Court on December 8, 2010, to preserve his trial testimony.

⁷ Order of Agreed Issues and Order Setting Briefing Schedule (Order of Agreed Issues) at 1, Docket Item No. 55.

⁸ *Stewart v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 41, ¶¶ 8a-8c.

⁹ *Stewart*, 2007 MTWCC 41, ¶¶ 9, 11.

¹⁰ *Stewart*, 2007 MTWCC 41, ¶¶ 4a, 22, 30.

¶ 8 In the earlier case, this Court determined that Stewart failed to carry her burden of proof in demonstrating that a causal connection existed between her industrial injury or subsequent surgeries and her chronic pain condition.¹¹ Dr. Anderson believed that a causal relationship existed between Stewart's surgeries and subsequent pain, but was unable to express how the two were related other than to note that Stewart did not exhibit the same pain symptoms prior to her surgery.¹² As a result, this Court denied Stewart's request for an increased impairment rating, and Stewart did not appeal the Court's Findings of Fact, Conclusions of Law and Judgment of September 14, 2007.

¶ 9 Subsequent to this Court's 2007 ruling, Liberty denied further liability for Stewart's pain medication and Stewart petitioned this Court for relief.¹³ The parties completed mediation, and Liberty then filed a Motion for Judgment on the Pleadings or Alternatively Rule 12(b)(6) Motion to Dismiss.¹⁴ After the parties briefed the matter, I heard oral argument on December 9, 2008, and orally denied Liberty's motions.¹⁵

¶ 10 Liberty then filed a Motion for Summary Judgment and Supporting Brief,¹⁶ and upon the parties fully briefing that matter, on June 4, 2010, I issued an Order denying Liberty's motion.¹⁷

¶ 11 The videoconference deposition of Clifford Wheelless, M.D., was taken on December 8, 2010, for the purpose of perpetuating his trial testimony.¹⁸ The Court and counsel for both parties attended the deposition. Counsel agreed at the conclusion of Dr. Wheelless' deposition that the exhibits presented during his testimony will be lodged with the Court as trial exhibits, with an index prepared by the clerk which will become a part of the exhibits.¹⁹

¶ 12 I find Dr. Wheelless to be a credible witness. Dr. Wheelless testified that he is a board certified orthopedic surgeon, licensed to practice medicine in North Carolina.²⁰

¹¹ *Stewart*, 2007 MTWCC 41, ¶ 29.

¹² *Stewart*, 2007 MTWCC 41, ¶ 30.

¹³ Petition for Emergency or Expedited Declaratory Relief to Reinstate Medical Benefits; for Attorney's Fees and Penalties (Petition), ¶ 11 and at Ex. 2, p. 2, Docket Item No. 1.

¹⁴ Docket Item No. 8.

¹⁵ Minute Book Hearing No. 4013, Docket Item No. 17.

¹⁶ Docket Item No. 18.

¹⁷ Order Denying Respondent's Motion for Summary Judgment, Docket Item No. 25.

¹⁸ Minute Book Hearing No. 4226, Docket Item No. 47.

¹⁹ *Id.*

²⁰ Wheelless Dep. 8:7-15.

Dr. Wheelless had with him during his testimony: his two-page affidavit;²¹ the depositions of Drs. Anderson and Headapohl, both with exhibits; and several other “basically interventional injection office notes from Dr. Vallin.”²²

¶ 13 Dr. Wheelless performed an independent medical review of Stewart’s case without physically examining her.²³ He testified that, from his review of the medical records, “obviously, some type of very obnoxious process was started after what should have been a very straightforward arthroscopic surgery” in Stewart’s right knee.²⁴ He stated that it was “fascinating,” “extraordinary,” and “extremely unusual” that Stewart would develop arthrofibrosis in her knee six weeks after her first surgery, necessitating a second surgery,²⁵ and that “obviously . . . some very unpleasant process unfolded and the pain and the arthrofibrosis were bound together.”²⁶ He further stated that, whether it was the puncture of Stewart’s knee for the purpose of scoping it, or whether it was the shaver used in the repair of the damaged meniscus, “[i]t would end up being the same difference. Something very obnoxious happened to cause that nerve to go into a very unusual pathophysiological situation which ended up causing a severe amount of fibrosis in the knee.”²⁷

¶ 14 Prior to his deposition, Dr. Wheelless provided an affidavit dated April 1, 2009, in which he states, in paragraph 2, that in the course of his practice he had become familiar with, as well as published, medical studies, findings, and reports dealing with injury to the infrapatellar branch of the saphenous nerve resulting from arthroscopic knee surgery. His affidavit further stated that “[r]esults of such medical studies have generally revealed nerve injury incidence rates of anywhere from 20 to 30%, or higher, in the area where the infrapatellar branch is distributed.”²⁸

¶ 15 It was Dr. Wheelless’ medical opinion that, more probably than not, either Stewart’s original knee injury or her resulting surgery were “absolutely” the cause of the chronic pain condition from which she now suffers.²⁹

²¹ Wheelless Dep. 15:21 - 16:15; Dep. Ex. A.

²² Wheelless Dep. 10:5-17.

²³ Wheelless Dep. 20:20-24; 21:17-19.

²⁴ Wheelless Dep. 31:25 - 32:3.

²⁵ Wheelless Dep. 45:14-22.

²⁶ Wheelless Dep. 45:23 - 46:1.

²⁷ Wheelless Dep. at 54:18-22.

²⁸ Wheelless Dep. Ex. A. at 2, ¶ 2.

²⁹ Wheelless Dep. 55:4-11; Dep., Ex. A. at 2-3, ¶ 3.

¶ 16 Dr. Anderson, Stewart's treating physician, testified by deposition prior to Stewart's original workers' compensation case. He was unable to elevate his medical opinion to a more-probable-than-not basis that Stewart's knee injury or resulting surgeries were causally related to her chronic pain condition. He in fact acknowledged that, though he concluded there was a causal connection between her surgeries and chronic pain, he had no idea how the two were related.³⁰ This resulted in the Court's earlier determination that Stewart failed to meet her burden of proof in establishing that she was entitled to a higher impairment rating based on her chronic pain.

¶ 17 Now, with Dr. Wheelless' testimony, taken together with Dr. Anderson's deposition, Stewart has proven a causal connection between her industrial accident and chronic pain condition for which she requires continuing pain medication.

¶ 18 Liberty denied liability for Stewart's pain medication following the Judgment of this Court in 2007 MTWCC 41.³¹ Subsequent to that Judgment, Liberty made one payment for Stewart's Lidoderm pain medication, thereafter continuing to pay for it under a reservation of rights.³²

CONCLUSIONS OF LAW

¶ 19 This case is governed by the 2001 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Stewart's industrial accident.³³

ISSUE ONE: Whether Petitioner Sharon Stewart is entitled to continued payment of the pain patches for which Respondent Liberty Northwest Ins. Corp. is paying under a reservation of rights.

¶ 20 The injured worker bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.³⁴ Therefore, she must prove by a

³⁰ *Stewart*, 2007 MTWCC 41, ¶¶ 29, 31.

³¹ Petition, ¶ 13; Affidavit and Exhibits of Michael J. San Souci (Affidavit of San Souci), Ex. 2 at 2, Docket Item No. 12.

³² Affidavit of Terry Bilbrey, ¶¶ 3, 4, Docket Item No. 14; Order of Agreed Issues, ¶ 2.

³³ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

³⁴ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

preponderance of the evidence that the medical bills for which she seeks payment are causally related to her occupational injury.³⁵

¶ 21 Both Dr. Wheelless and Stewart's treating physician agree that there is a causal connection between Stewart's knee surgery and her continuing pain. However, where her treating physician could not definitely opine as to how that causal relationship existed in her previous case, Dr. Wheelless testified that the amount of fibrosis present in Stewart's knee some six weeks following her initial surgery was evidence of damage to the saphenous nerve more probably than not resulting either from her injury or surgery.

¶ 22 Section 39-71-704(1), MCA, states, in part:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

¶ 23 Stewart failed in her first claim before this Court in WCC No. 2006-1592 to demonstrate by a preponderance of the medical evidence that a causal relationship existed between her industrial injury and her chronic pain so as to merit a higher impairment rating. In the present proceeding, she is pursuing the continuing payment of medical benefits for her pain -- a different benefit claim under a different statute of the WCA. As this Court noted while denying Liberty's motion for summary judgment in the present case,³⁶ *Lund v. State Compensation Mut. Ins. Fund*³⁷ illustrates that these facts do not satisfy the identical issue element of collateral estoppel, precluding summary judgment.

¶ 24 Although raising the spectre of *res judicata* in its motion for summary judgment, Liberty only briefed the collateral estoppel issue, which was the basis for this Court's Order denying the motion.³⁸ Liberty again raises *res judicata* in its opening brief.³⁹ Although Liberty does not cite any authority for the premise that this Court's earlier ruling is not dispositive, I address briefly Liberty's *res judicata* argument here.

³⁵ *McCauley v. Liberty Northwest*, 2004 MTWCC 43, ¶ 47 (citing *Hash v. Montana Silversmith*, 256 Mont. 252, 257, 846 P.2d 981, 983 (1993)).

³⁶ Order Denying Respondent's Motion for Summary Judgment, Docket Item No. 25.

³⁷ *Lund*, 263 Mont. 346, 868 P.2d 611 (1994).

³⁸ Order Denying Respondent's Motion for Summary Judgment, ¶ 18.

³⁹ Liberty's Opening Brief, Docket Item No. 67.

¶ 25 The doctrine of *res judicata* prevents a party from relitigating a subject matter that the party has already had an opportunity to litigate.⁴⁰ “Once there has been full opportunity to present an issue for judicial decision in a given proceeding, the determination of the court in that proceeding must be accorded finality as to all issues raised *or which fairly could have been raised*”⁴¹

¶ 26 During the entire pendency of the prior proceeding, Liberty had accepted liability and paid for Stewart’s Lidoderm pain patches on an ongoing basis. It was only **after** Liberty denied liability for Stewart’s pain patches following the prior litigation that the issue arose to a justiciable controversy -- one that is “a real and substantial controversy, admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition.”⁴²

¶ 27 The issue of continued liability for Stewart’s pain medication certainly could have been raised by Liberty in the prior proceeding. But to Stewart, the issue was nonjusticiable **until** Liberty reversed its position and denied liability for further medicals. As such, the doctrine of *res judicata* is inapplicable under the facts before this Court.

¶ 28 Stewart has demonstrated by a preponderance of the evidence that her need for pain medication is causally related to her industrial injury and resulting knee surgery. She is therefore entitled to continued payment for her pain medication by Liberty.

ISSUE TWO: Whether Petitioner Sharon Stewart is entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 29 Stewart claims an entitlement to a penalty under § 39-71-2907(1), MCA, which states that the workers’ compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay when:

- (a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or
- (b) prior or subsequent to the issuance of an order by the workers’ compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

⁴⁰ *Greenwood v. Steve Nelson Trucking, Inc.*, 270 Mont 216, 219-20, 890 P.2d 765, 767 (1995).

⁴¹ *Slater v. Central Plumbing & Heating Co.*, 297 Mont. 7, 16, 993 P.2d 654, 660 (1999) (citation omitted) (emphasis added).

⁴² *Plan Helena, Inc. v. Helena Regional Airport Auth. Bd.*, 355 Mont. 142, 145, 226 P.3d 567, 569 (2010) (citation omitted).

¶ 30 In the present case, Liberty made one additional payment for Stewart's pain medication following this Court's judgment in 2007 MWCC 41,⁴³ until a review of the file and this Court's earlier decision by Liberty's case manager Scholl. In a letter to Stewart's attorney dated March 19, 2008,⁴⁴ Scholl explained that Liberty was denying further liability for Stewart's pain medication based on this Court's ruling that no evidence causally connected Stewart's injury and surgeries and her continuing pain. Nevertheless, Liberty continued paying for Stewart's pain medication under a reservation of rights.⁴⁵

¶ 31 Although I based my earlier ruling on Stewart's claim for an increased impairment rating, I do not believe it was unreasonable for Liberty to conclude it had no continuing liability for the payment of further pain medication since the basis for my denial of the increased impairment rating was my conclusion that Stewart had not established a causal connection between her injury and her continuing pain. Indeed, Stewart has prevailed in her claim for ongoing pain medication in this case due to the testimony of Dr. Wheelless -- testimony which was not present when Liberty denied liability for Stewart's pain patches.

¶ 32 As explained in *Marcott v. Louisiana Pacific Corp.*, the penalty statute "was never intended to eliminate the assertion of a legitimate defense to liability" and "the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments."⁴⁶ As this Court has ruled previously, reliance by an insurer on an earlier ruling of this Court forms a reasonable basis for denial of liability.⁴⁷

¶ 33 Here, Liberty had a legitimate defense to liability for Stewart's pain medication, based upon the earlier holding of this Court, but continued to pay the disputed medical benefits under a reservation of rights pending a resolution of the dispute. The insurer's actions in this case were reasonable, and the application of a penalty under these facts is inappropriate.

⁴³ Affidavit of Terry Bilbrey, ¶ 3.

⁴⁴ Affidavit of San Souci, Ex. 2 at 2.

⁴⁵ Affidavit of San Souci, Ex. 6; Affidavit of Terry Bilbrey, ¶ 4.

⁴⁶ *Marcott*, 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996) (citations omitted).

⁴⁷ *Kilgore v. Transportation Ins. Co.*, 2008 MTWCC 51, ¶ 29.

ISSUE THREE: Whether Petitioner Sharon Stewart is entitled to attorney fees and costs.

¶ 34 Of the two attorney fee statutes, §§ 39-71-611 and -612, MCA, only § -611 is applicable here. Section 39-71-611(1), MCA, states that an insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

¶ 35 This Court has concluded in ¶ 33 above that the actions of the insurer under the facts in this case were not unreasonable. Therefore, Stewart is not entitled to attorney fees.⁴⁸

¶ 36 As the prevailing party, Stewart is entitled to her costs.⁴⁹

JUDGMENT

¶ 37 Petitioner is entitled to continued payment of her pain patches, and other appropriate pain medication as prescribed by her treating physician, without further reservation of rights by Respondent.

¶ 38 Petitioner is entitled to her costs.

¶ 39 Petitioner is not entitled to a 20% penalty.

¶ 40 Petitioner is not entitled to her attorney fees.

¶ 41 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

⁴⁸ *Kilgore*, 2008 MTWCC 51, ¶ 31.

⁴⁹ *Kilgore*, 2008 MTWCC 51, ¶ 32, citing *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand* 1996 MTWCC 33).

DATED in Helena, Montana, this 11th day of April, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Michael J. San Souci
Larry W. Jones
Submitted: November 17, 2011