

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 24

WCC No. 2013-3151

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**MARLENE TORGERSON, as Personal Representative of the  
Estate of Richard Torgerson**

**Petitioner**

**vs.**

**TRANSPORTATION INS. CO.**

**Respondent/Insurer.**

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ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND  
GRANTING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

**Summary:** Respondent moved for summary judgment, arguing that it is not liable for payment of an impairment award to a claimant who died from unrelated causes after reaching MMI but prior to a physician issuing an impairment rating for his occupational disease. Petitioner filed a cross-motion for summary judgment, arguing that the claimant's right to this benefit accrued at the time he reached MMI and that it is therefore payable to his estate.

**Held:** Under the applicable case law, a claimant's right to an impairment award accrues at the time the claimant reaches MMI, even though a physician must subsequently issue an impairment rating in order to determine the precise value of the entitlement. In the present case, the claimant's right to an impairment award accrued when he reached MMI, even though the claimant died prior to the issuance of an impairment rating. Therefore, his estate is entitled to receive payment of the impairment award from Respondent.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-726.** Although § 39-71-726, MCA, cuts off entitlement to any benefits not accrued prior to a claimant's death, the entitlement to an impairment award accrues at the time of a claimant's maximum healing, even though the impairment rating itself may occur later. Where

a claimant reaches maximum healing prior to his death, his right to an impairment award also accrued prior to his death, even if the impairment rating itself occurs later. In such instance, the claimant's estate would be entitled to payment of the impairment award.

**Benefits: Impairment Awards: Accrual.** Although § 39-71-726, MCA, cuts off entitlement to any benefits not accrued prior to a claimant's death, the entitlement to an impairment award accrues at the time of a claimant's maximum healing, even though the impairment rating itself may occur later. Where a claimant reaches maximum healing prior to his death, his right to an impairment award also accrued prior to his death, even if the impairment rating itself occurs later. In such instance, the claimant's estate would be entitled to payment of the impairment award.

¶ 1 Respondent Transportation Ins. Co. (Transportation) moves this Court for summary judgment in its favor with respect to Petitioner Marlene Torgerson's claim for payment of a 45% impairment award to the Estate of Richard Torgerson.<sup>1</sup> Transportation argues that Torgerson's estate is not entitled to payment of this impairment award because the award had not accrued at the time of Torgerson's death.<sup>2</sup> Torgerson objects to Respondent's motion and has filed a cross-motion for summary judgment on this issue, arguing that Torgerson's entitlement to this impairment award had accrued at the time of his death.<sup>3</sup>

¶ 2 On August 19, 2013, Transportation filed an affidavit from Dr. Dana Headapohl.<sup>4</sup> On August 20, 2013, the parties presented oral argument to the Court on their respective motions.<sup>5</sup>

#### Undisputed Facts<sup>6</sup>

¶ 3 Torgerson allegedly sustained an asbestos-related disease while employed by Burns International Security Services Corp. (Burns).<sup>7</sup>

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<sup>1</sup> Respondent's Motion for Summary Judgment, Docket Item No. 14.

<sup>2</sup> Respondent's Brief in Support of Motion for Summary Judgment (Opening Brief), Docket Item No. 15.

<sup>3</sup> Petitioner's Response to Respondent's Motion for Summary Judgment and Cross-Motion for Summary Judgment (Petitioner's Response and Cross-Motion), Docket Item No. 18.

<sup>4</sup> Docket Item No. 30.

<sup>5</sup> See Minute Book Hearing No. 4488, Docket Item No. 31.

<sup>6</sup> Neither party objected to the other's proffered facts.

¶ 4 Torgerson last worked for Burns on October 6, 1989.<sup>8</sup>

¶ 5 Torgerson was diagnosed with asbestos-related disease on March 8, 2001.<sup>9</sup>

¶ 6 On August 16, 2012, Torgerson died from cancer unrelated to his asbestos-related disease.<sup>10</sup>

¶ 7 On November 8, 2012, Alan C. Whitehouse, M.D., gave Torgerson a 45% impairment rating.<sup>11</sup>

¶ 8 On May 28, 2013, Torgerson's estate filed the present claim, seeking payment of permanent partial disability (PPD) benefits in the form of a 45% impairment award.<sup>12</sup>

### Analysis and Decision

¶ 9 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.<sup>13</sup> The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 10 This case is governed by the 1989 version of the Montana Workers' Compensation and Occupational Disease Acts since they were the laws in effect on Torgerson's last day of work for his time-of-injury employer.<sup>14</sup>

¶ 11 At issue is whether Torgerson's estate is entitled to payment of Torgerson's impairment award. Transportation argues that Torgerson's estate is not entitled to the impairment award because § 39-71-726, MCA, cuts off liability for all benefits which are

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<sup>7</sup> Opening Brief at 1.

<sup>8</sup> See Docket Item No. 23.

<sup>9</sup> Neither party included Torgerson's date of diagnosis in their respective statement of facts. However, both parties stated in their respective arguments that March 8, 2001, was the date of Torgerson's diagnosis. Therefore, I include it here as an undisputed fact.

<sup>10</sup> Opening Brief at 1.

<sup>11</sup> Opening Brief at 1.

<sup>12</sup> Opening Brief at 1.

<sup>13</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

<sup>14</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986); *Montana State Fund v. Grande*, 2012 MT 67, ¶ 23, 364 Mont. 333, 274 P.3d 728 (citing *Hardgrove v. Transportation Ins. Co.*, 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999).

not accrued at the time of a worker's death.<sup>15</sup> Transportation argues that Torgerson's right to payment for an impairment award would not have accrued until after a physician issued an impairment rating, and since this did not occur until after Torgerson's death, his entitlement ended under § 39-71-726, MCA.<sup>16</sup>

¶ 12 Torgerson's estate argues, however, that Torgerson's entitlement to his impairment award accrued at the time that he reached maximum medical improvement (MMI).<sup>17</sup> Torgerson's estate notes that a worker diagnosed with asbestos disease is considered to be at MMI on the date of diagnosis,<sup>18</sup> and therefore Torgerson was at MMI for his asbestos-related disease on March 8, 2001.

¶ 13 In making their respective arguments, the parties rely upon *Hendricks v. Anaconda Company*<sup>19</sup> and *Monroy v. Cenex*.<sup>20</sup> Transportation notes that the parties agree that *Monroy* controls this case; the parties simply disagree as to its application.<sup>21</sup>

¶ 14 In *Hendricks*, the claimant suffered an industrial injury in October 1971. He received temporary total disability (TTD) benefits until November 1973, when he died of unrelated causes. Prior to the claimant's death, two physicians had examined him and estimated his "percentage of disability." However, neither physician opined that the claimant had reached MMI.<sup>22</sup> The claimant's widow demanded a lump sum disability benefit.<sup>23</sup> On appeal, the Montana Supreme Court held that the claimant's widow was not entitled to the lump sum for two reasons: (1) the claimant had not made an election prior to his death which would have determined his entitlement to a lump sum indemnity benefit; and (2) prior to the claimant's death, no physician had ever determined that he had reached MMI.<sup>24</sup> In reaching its determination, the court, in interpreting the

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<sup>15</sup> Opening Brief at 2.

<sup>16</sup> Respondent's Combined Reply Brief in Support of Motion for Summary Judgment and in Opposition to Petitioner's Cross-Motion for Summary Judgment (Transportation's Reply Brief), Docket Item No. 20, at 2.

<sup>17</sup> Petitioner's Response and Cross-Motion at 2-3.

<sup>18</sup> See *Fellenberg v. Transp. Ins. Co.*, 2004 MTWCC 29, ¶ 43 (*aff'd* 2005 MT 90, 326 Mont. 467, 110 P.3d 464).

<sup>19</sup> *Hendricks*, 173 Mont. 59, 566 P.2d 70 (1977).

<sup>20</sup> *Monroy*, 246 Mont. 365, 805 P.2d 1343 (1990).

<sup>21</sup> Transportation's Reply Brief at 1.

<sup>22</sup> *Hendricks*, 173 Mont. at 60, 566 P.2d at 71.

<sup>23</sup> *Id.*

<sup>24</sup> *Hendricks*, 173 Mont. at 63, 566 P.2d at 73.

predecessor of § 39-71-726, MCA, noted, “[W]e do not construe this statute as terminating liability for compensation accrued prior to death but unpaid at the time of death.”<sup>25</sup> The court further noted that if the claimant had accrued an entitlement to a lump sum indemnity payment prior to his death, his estate would have been entitled to receive the payment after the claimant’s death.<sup>26</sup>

¶ 15 The Montana Supreme Court relied on *Hendricks* in rendering its decision in *Monroy*. In *Monroy*, the claimant received an impairment rating of 37% on April 5, 1988. On July 21, 1988, the claimant died from causes unrelated to his industrial injury, and his estate subsequently demanded payment of the impairment award.<sup>27</sup> This Court concluded that the claimant’s estate was entitled to receive the award and the insurer appealed.<sup>28</sup> The Montana Supreme Court distinguished *Hendricks*, as well as the earlier case of *Breen v. Ind. Acc. Board*, upon which *Hendricks* also relied, “on the grounds that neither case shows that the liability of the insurer for permanent partial disability benefits had *accrued* prior to the date of death.”<sup>29</sup> The court held:

It appears clear that the Workers’ Compensation Court, the Workers’ Compensation insurance industry, and the legislature have accepted the implication in *Holton [v. F.H. Stoltze Land and Lumber Co.]*, 195 Mont. 263, 269, 637 P.2d 10, 14 (1981)], that an award of permanent partial disability benefits based on the doctor’s medical impairment rating establishes minimum liability, which is irreducible, except for present value of lump-sum advances . . . .<sup>30</sup>

¶ 16 The Court then held that Monroy’s estate had a right to receive payment of his impairment award “based upon his physical impairment rating [which] was an irreducible minimum of payments to which he was entitled and which accrued at the time of his maximum healing. Since the date of the accrual was before Monroy’s death, his right to the unpaid benefits are an asset in his estate.”<sup>31</sup>

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<sup>25</sup> *Hendricks*, 173 Mont. at 62, 566 P.2d at 72 (quoting *Breen v. Indus. Acc. Bd.*, 150 Mont. 463, 475, 436 P.2d 701, 707 (1968)).

<sup>26</sup> *Hendricks*, 173 Mont. at 64, 566 P.2d at 73.

<sup>27</sup> *Monroy*, 246 Mont. at 367, 805 P.2d at 1344.

<sup>28</sup> *Monroy*, 246 Mont. at 366, 805 P.2d at 1343.

<sup>29</sup> *Monroy*, 246 Mont. at 371, 805 P.2d at 1346-47. (Emphasis in original.)

<sup>30</sup> *Monroy*, 246 Mont. at 371, 805 P.2d at 1347.

<sup>31</sup> *Monroy*, 246 Mont. at 372, 805 P.2d at 1347.

¶ 17 The court further clarified:

[Section 39-71-726, MCA,] continues to be effective where no settlement has been reached, the impairment has been fully paid, when total or partial disability benefits continue because maximum healing has not occurred, or when death from an unrelated cause would terminate such benefits.<sup>32</sup>

¶ 18 Torgerson's estate focuses on the language in *Monroy*, quoted above, which holds that in that instance, the claimant's "physical impairment rating . . . accrued at the time of his maximum healing."<sup>33</sup> Torgerson's estate argues that Torgerson's entitlement to an impairment rating accrued when he reached MMI on March 8, 2001, and "It's the accrual of the benefit, not the assignment of the rating[,] which determines the entitlement."<sup>34</sup>

¶ 19 Transportation disagrees, arguing that under *Monroy*, Torgerson's "right to receive payment for an impairment award accrued only upon a physician actually issuing an impairment rating, irrespective of the date of MMI or the date of diagnosis."<sup>35</sup> Transportation argues that Torgerson's estate is not entitled to payment of Torgerson's impairment award because a physician did not issue the rating until after Torgerson's death.<sup>36</sup>

¶ 20 In support of this argument, Transportation relies on § 39-71-711(1)(a), MCA, which states that an impairment rating is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing.<sup>37</sup> Transportation argues that MMI merely defines the point at which a physician may issue an impairment rating, and that entitlement to the payment for an impairment award does not accrue until a physician issues an impairment rating.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Petitioner's Response and Cross-Motion at 3.

<sup>34</sup> *Id.*

<sup>35</sup> Transportation's Reply Brief at 1.

<sup>36</sup> Transportation's Reply Brief at 1-2.

<sup>37</sup> Opening Brief at 4.

<sup>38</sup> Transportation's Reply Brief at 2.

¶ 21 Transportation also disagrees with Torgerson’s interpretation of *Monroy*. Both parties base their arguments on the same passage in *Monroy*, but differ as to interpretation. The key language of *Monroy* states:

We therefore hold that the Workers’ Compensation Court was correct in determining that Monroy’s right to permanent partial disability benefits based upon his physical impairment rating was an irreducible minimum of payments to which he was entitled and which accrued at the time of his maximum healing. Since the date of the accrual was before Monroy’s death, his right to the unpaid benefits are an asset in his estate.<sup>39</sup>

¶ 22 Torgerson’s estate argues that *Monroy* means a claimant’s right to an impairment award accrues at the time of MMI.<sup>40</sup> Transportation argues that *Monroy* means a claimant’s right to the impairment award does not accrue until the physical impairment rating occurs.<sup>41</sup>

¶ 23 As both parties acknowledge, the key to this matter lies in determining when Torgerson’s entitlement to an impairment award **accrued**. In *Monroy*, the Court held that the claimant’s right to PPD benefits “accrued at the time of [the claimant’s] maximum healing,” therefore concluding that his estate was entitled to the unpaid benefits.<sup>42</sup> Following the Supreme Court’s holding in *Monroy*, I conclude that the entitlement to an impairment award accrues at the time of a claimant’s maximum healing, even if the impairment rating itself may come later. In other words, although the impairment rating sets the amount of the award and triggers the insurer’s ability to pay an amount certain, it is the claimant’s achievement of MMI that causes the entitlement to accrue.

¶ 24 This is consistent with the Montana Supreme Court’s earlier holding in *Hendricks*, in which the court held that one of the two reasons why the claimant’s estate was not entitled to receive a lump sum disability benefit was because the claimant had not reached MMI prior to his death.<sup>43</sup> Had the court understood that the accrual occurred not at MMI, but rather at the time a physician made a “percentage of disability” determination, it would have stated so.

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<sup>39</sup> *Monroy*, 246 Mont. at 372, 805 P.2d at 1347.

<sup>40</sup> Petitioner’s Response and Cross-Motion at 3.

<sup>41</sup> Transportation’s Reply Brief at 3.

<sup>42</sup> *Monroy*, 246 Mont. at 372, 805 P.2d at 1347.

<sup>43</sup> *Hendricks*, 173 Mont. at 63, 566 P.2d at 73.

¶ 25 Since Torgerson achieved MMI prior to his death, his right to an impairment award accrued prior to his death, even though the impairment rating itself occurred later. Therefore, I conclude that under *Monroy*, Torgerson's estate is entitled to payment of Torgerson's impairment award.

ORDER

¶ 26 Respondent's motion for summary judgment is **DENIED**.

¶ 27 Petitioner's cross-motion for summary judgment is **GRANTED**.

¶ 28 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 in Helena, Montana, this 26<sup>th</sup> day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Laurie Wallace/Jon Heberling/Ethan Welder  
Todd A. Hammer/Angela K. Jacobs

Submitted: August 20, 2013