

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 18

WCC No. 2021-5712

BAYLIE WETCH

Appellant

vs.

MONTANA STATE FUND

Appellee.

ORDER GRANTING APPELLANT INTERIM BENEFITS UNDER § 39-71-610, MCA

Summary: Appellant seeks an order granting interim benefits under § 39-71-610, MCA. Appellee resists, arguing that wage-loss benefits were not paid for a significant length of time, termination of those benefits was not the cause of any financial hardship, and that Appellant's medical opinion is not credible and, thus, does not support a prima facie case.

Held: This Court ordered that Appellee pay Appellant interim benefits. Wage-loss benefits were previously paid. The length of time they were paid *can* be considered but is *not* dispositive. Appellant will suffer financial hardship if interim benefits are not ordered. She would have gone into default on her personal automobile loan if she had not borrowed money from her uncle. And Appellant has tendered a strong prima facie case. Whether the physician rendering Appellant's medical causation opinion is credible is not before this Court. The standard is whether Appellant has "tender[ed] substantial evidence which, if believed, would entitle [her] to the benefits," and she has.

¶ 1 This is an appeal from an October 18, 2021, Order of the Department of Labor & Industry (DLI), denying Appellant Baylie Wetch's request for interim benefits under § 39-71-610, MCA.

¶ 2 ARM 24.5.314 provides for informal resolution of disputes arising under § 39-71-610, MCA, unless one or both parties request a formal hearing.¹ A formal hearing involves the admission of new evidence and this Court considers the case *de novo*.² Here, neither Wetch nor the Appellee, Montana State Fund (State Fund), requested a formal hearing.

¶ 3 Therefore, this Court convened an informal hearing with counsel on October 28, 2021, via Zoom.

¶ 4 Prior to the informal hearing, Wetch provided this Court with a Prehearing Memorandum and nine attached exhibits.

FACTS

¶ 5 Prior to the incident giving rise to Wetch's substantive claim, she was treating with psychiatrist Andrea Mow, DO.

¶ 6 On January 19, 2021, Wetch suffered physical injury to her head in the course of her work, after which she experienced cognitive concussion-related difficulties.

¶ 7 State Fund accepted liability for acute left-head bruising and acute left-arm bruising.

¶ 8 Wetch was initially taken off work by the Emergency Room physician and her primary care physician. Accordingly, State Fund paid temporary total disability (TTD) benefits from January 19 – February 9, 2021.

¶ 9 Wetch's primary care physician then released her to a part-time, trial return to her time-of-injury job. Accordingly, State Fund paid temporary partial disability (TPD) benefits from February 10 – March 3, 2021.

¹ Rule 24.5.314 provides as follows:

ADJUDICATION OF INTERIM BENEFIT CLAIMS UNDER 39-71-610, MCA.

(1) Appeals of determinations by the Department of Labor and Industry regarding interim benefits under 39-71-610, MCA, may be presented to the court in letter form. The court initially addresses such appeals informally through telephone conference involving all parties.

(2) If any party objects to informal resolution of a dispute under 39-71-610, MCA, the court holds a formal evidentiary hearing on an expedited basis. Such hearing may be conducted through telephone conference if all parties agree. If requested by any party, the court promptly holds an in-person hearing in Helena or, at the court's discretion, in some other venue at a date and time set by the court.

² *Smith v. State Comp. Ins. Fund*, 2000 MTWCC 9, ¶ 22.

¶ 10 Although Wetch was a young adult trying to support herself and had bills to pay, she left her time-of-injury job on March 3, 2021, because she could no longer do the work.

¶ 11 In a letter dated March 12, 2021, State Fund terminated her wage-loss benefits pursuant to § 39-71-712(3)(c), MCA.³

¶ 12 After leaving her time-of-injury job, Wetch attempted to work in two other jobs but could not do the work.

¶ 13 On April 8 and 9, 2021, James English, PsyD, performed a neuropsychological evaluation of Wetch. He opined that any job responsibility that required working memory would be problematic for Wetch and that if she returned to her time-of-injury job, there was a risk of her “acquiring either an Adjustment Disorder with Anxiety (due to continued similar stress) or possible PTSD (if not already present).” He further noted that Wetch had not yet reached maximum medical improvement (MMI) for her work-related injury.

¶ 14 On July 7, 2021, Dr. Mow opined that while Wetch’s psychological conditions predated her January 19, 2021, injury, they were aggravated by the injury and that her symptoms had not returned to baseline. Dr. Mow recommended “ongoing medication management and psychotherapy, along with cognitive rehabilitation, including spee[ch] therapy, occupational therapy and biofeedback to assist in [Wetch’s] recovery.”

¶ 15 After learning of Dr. Mow’s opinions, State Fund authorized treatment for these conditions under a “reservation of rights” while it obtained her preinjury medical records.⁴

¶ 16 On August 5, 2021, Dr. Mow opined that Wetch “does not have the ability” to perform her time-of-injury job, even on a half-time basis, and that she has not had the ability to perform that work since her January 19, 2021, injury.

¶ 17 On October 4, 2021, Wetch ¶ submitted a request to the DLI for an order of interim benefits under § 39-71-610, MCA.

¶ 18 On October 18, 2021, the DLI denied Wetch’s request, because it determined that two of the four factors for awarding such benefits had not been met, i.e., benefits had not been paid for a substantial time period, and Wetch had not shown that she had financial hardship.

¶ 19 On October 20, 2021, Wetch appealed from the DLI’s order pursuant to ARM 24.5.314.

³ Section 39-71-712(3)(c), MCA, provides, in pertinent part, that “a worker is not eligible for temporary partial disability benefits or temporary total disability benefits if . . . the worker refuses to accept the modified or alternative position.”

⁴ This Court construes this as paying medical benefits under § 39-71-615, MCA, as that is the only provision in the Montana Workers’ Compensation Act under which an insurer can pay medical benefits without accepting the claim.

¶ 20 At present, Wetch is working part-time at a daycare for substantially less pay than she earned working full-time at her time-of-injury job, she is temporarily living at her father's house due to financial hardship, and she would have gone into default on her personal automobile loan if she had not borrowed money from her uncle.

¶ 21 Wetch has yet to reach MMI.

¶ 22 State Fund recently provided Dr. English with Wetch's preinjury medical records and asked him to opine whether her January 19, 2021, work injury caused an exacerbation or aggravation of her pre-existing conditions. As of the informal hearing in this Court, Dr. English's opinion on that question had not yet been received.

DISCUSSION

¶ 23 Wetch argues that, based on the language this Court used in setting forth the second factor to be considered in awarding interim benefits under § 39-71-610, MCA, which is "were benefits paid, *especially for a significant time period*,"⁵ the length of time benefits were paid can be considered but is not dispositive. Moreover, she explains that the reason wage-loss benefits were paid for such a short time period is because she attempted, albeit ultimately unsuccessfully, to return to work. Wetch argues that the more important question is, "once benefits have been paid and relied on, what impact did denial of those benefits have on the claimant." And Wetch contends that the impact here was to "eliminate [her] ability to pay her own bills, live independently, and successfully continue working while recovering from a traumatic injury," which caused "financial distress [to] pile[] onto [her] other psychological issues, and very likely has hampered [Wetch's] ability to recover from her injury."

¶ 24 Wetch also contends that she has very clearly demonstrated financial hardship, as she would have gone into default on her personal automobile loan if she had not borrowed money from her uncle. Wetch argues that this is sufficient evidence of financial hardship under *New Hampshire Ins. Co. v. Matejovsky*.⁶ Moreover, she contends that having to move back in with her father is additional evidence demonstrating her financial hardship.

¶ 25 Notwithstanding, Wetch argues that the most compelling reason to grant her interim benefits is her demonstration of a strong prima facie case. Wetch points out that State Fund has no qualified medical opinion to counter Dr. Mow's opinion that she has not been able to work at her time-of-injury job since her January 19, 2021, injury. Moreover, although Dr. English has yet to offer a causation opinion, the other opinions he has offered to date are in agreement with Dr. Mow's, i.e., that Wetch cannot return to her time-of-injury job and that she has yet to reach MMI.

⁵ *N.H. Ins. Co. v. Matejovsky*, 2015 MTWCC 15, ¶17 (emphasis added) (citations omitted).

⁶ *Matejovsky*, ¶ 19.

¶ 26 Finally, Wetch argues that if State Fund wanted additional time to investigate whether the cause of her inability to return to her time-of-injury job was the January 19, 2021, injury, the proper course would have been to start paying her wage-loss benefits under § 39-71-608, MCA. Wetch asserts that, since State Fund did not do so, interim benefits would be appropriately granted under § 39-71-610, MCA.

¶ 27 State Fund argues that interim benefits should not be awarded to Wetch because wage-loss benefits were not paid for a significant time period, only about six weeks, and not a lot of benefits were paid in total.

¶ 28 State Fund also asserts that interim benefits should not be awarded to Wetch because Wetch never relied on those wage-loss benefits that were paid; it claims, without any direct evidence, that she had already been thinking about leaving her job before her injury, and, after doing so, she got other paid work. Therefore, State Fund contends that termination of those benefits was not the cause of any financial hardship for Wetch.

¶ 29 Finally, State Fund argues that interim benefits should not be awarded to Wetch because, although it does not have its own medical causation opinion, Dr. Mow's opinion is not credible and, therefore, does not support a prima facie case. State Fund contends that Dr. Mow's causation opinion is refuted by Wetch's preinjury medical records, because the reasons she cited for Wetch not being able to perform her time-of-injury job are the same problems she was dealing with before the January 19, 2021, injury, i.e., a diminished ability to focus, deal with stimuli, or multitask. Thus, State Fund argues that either Wetch's ability to perform her time-of-injury job is the same now as it was prior to her injury, i.e., if she could do it before, she can do it now, or, if she cannot do it now, it is due to her pre-existing psychological conditions, not her industrial injury.

¶ 30 As stated above, this Court's review of § 39-71-610, MCA, orders is *de novo*.⁷

¶ 31 This Court considers four factors to determine whether a claimant is entitled to interim benefits under § 39-71-610, MCA. Those factors are:

(1) Was liability for the claim accepted? (2) Were benefits paid, especially for a significant time period? (3) Has the claimant demonstrated [she] will suffer significant financial hardship if interim benefits under § 39-71-610, MCA, are not ordered? (4) Has the claimant tendered a strong prima facie case for reinstatement of the benefits [she] seeks? To meet the fourth factor, a claimant need not prove [her] entitlement to [wage-loss] benefits but need only tender substantial evidence which, if believed, would entitle [her] to the benefits.⁸

⁷ See ¶ 2 & n.2 above.

⁸ *Nat'l Union Fire Ins. of Pittsburg v. Rainey*, 2021 MTWCC 10, ¶ 44 (citation omitted).

¶ 32 There is an important distinction between an analysis based on “elements,” and an analysis based on “factors,” as is this one. According to Black’s Law Dictionary, an “element” is “A *constituent* part of a claim that *must* be proved for the claim to succeed,”⁹ whereas a “factor” is “An agent or cause that *contributes* to a particular result.”¹⁰ The distinction is that while elements are essential components, factors are merely to be considered and balanced based on the “facts and circumstances of the particular case.”¹¹

¶ 33 Here, that the first factor is met is not in dispute. State Fund accepted liability for acute left-head bruising and acute left-arm bruising. While investigating Wetch’s entitlement to medical benefits for her psychological conditions, State Fund started paying medical bills under § 39-71-615, MCA.

¶ 34 As for the second factor, benefits were paid, although not for a significant time period. However, this Court agrees with Wetch that the word “especially” before “for a significant time period,” signals that the length of time benefits were paid *can* be considered but is *not* dispositive. Contrary to State Fund’s contention, the amount of benefits paid is not part of the interim-benefits analysis. Since benefits were paid, this factor is satisfied.

¶ 35 The third factor is met, as well. Wetch is correct that the fact that she would have defaulted on her personal automobile loan if she had not borrowed money from her uncle clearly demonstrates that she will suffer significant financial hardship if interim benefits are not ordered.¹² Not only that, but the significant financial hardship she has already suffered — having to move in with her father — will continue until enough of her income is replaced for her to move back into her own place.

¶ 36 As for the fourth factor, Wetch has a strong prima facie case. Dr. Mow opined that Wetch has not been able to perform her time-of-injury job since her January 19, 2021, injury. Although State Fund argues that Dr. Mow’s opinion is not credible because Wetch’s symptoms predated her injury, symptoms can worsen. Given that Wetch was able to perform her time-of-injury job before her injury but cannot do so now, it logically follows that Dr. Mow is correct that her injury caused the worsening symptoms. Most importantly, State Fund has no medical opinion to counter Dr. Mow’s, and the standard for awarding interim benefits only requires “substantial evidence which, if believed, would

⁹ ELEMENT, Black’s Law Dictionary (11th ed. 2019) (emphases added).

¹⁰ FACTOR, Black’s Law Dictionary (11th ed. 2019) (emphasis added).

¹¹ See *Smith*, ¶ 28.

¹² See *Matejovsky*, ¶ 19 (“[T]here is no requirement that a claimant first go into default on loans or fall behind on her bills to show significant financial hardship; it is sufficient for a claimant to show that she will go into default or will fall behind without the benefits.”).

entitle [Wetch] to the benefits.”¹³ If Dr. Mow were believed, Wetch would be entitled to the benefits.

¶ 37 After considering each of the four factors and the facts and circumstances of this particular case, this Court concludes that Wetch is entitled to interim benefits. Accordingly, this Court enters the following:

ORDER

¶ 38 State Fund shall pay Wetch benefits under § 39-71-610, MCA.

¶ 39 Pursuant to ARM 24.5.348(2), this Order is certified as a final judgment for purposes of appeal.

DATED this 5th day of November, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Greg E. Overturf
Pamela Rabold

Submitted: October 28, 2021

¹³ *Rainey*, ¶ 44.