IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 4

WCC No. 2017-4131

SCOTT SELLEY

Petitioner

vs.

ACUITY INSURANCE COMPANY; VICTORY INSURANCE CO. INC.; and DOES 1-5, inclusive

Respondents/Insurers.

ORDER DECLINING TO CONSIDER PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moves for partial summary judgment on his penalty claim against the second insurer, arguing that its refusal to authorize an MRI is unreasonable under the *Belton* rule, which provides that when two insurers deny liability for a claim, and assert that the other is liable, the second insurer has a duty to pay benefits under a reservation of rights until the claim is resolved. The parties have submitted nearly 300 pages of exhibits, the majority of which are medical records, in support of their positions.

Held: Although insurers have a duty to investigate claims, which includes obtaining diagnostic tests, this Court declines to consider Petitioner's partial summary judgment motion under ARM 24.5.329(1)(b), because judicial economy will be not served by deciding the penalty claim against the second insurer before trial.

¶ 1 Petitioner Scott Selley has worked for a beer distributorship since 2008. It is heavy labor. Selley has three claims at issue in this case.

¶ 2 First, Selley has an injury claim from June 22, 2012, for injuries that occurred when he fell, and kegs fell on top of him. Selley underwent a total right hip replacement. He also suffered an injury to his lumbar spine, which caused pain into his right leg. Respondent Victory Insurance Co. Inc. (Victory) accepted liability for this claim. Selley

reached maximum medical improvement (MMI) on April 22, 2014. His physician released him to return to work in his time-of-injury position.

¶ 3 Second, Selley has an injury claim from August 12, 2016, for a crush injury, which occurred when a keg fell on his right foot. He developed numbness and dysesthesia in his right foot. Respondent Acuity Insurance Company (Acuity) accepted liability for this claim.

¶ 4 Third, on June 7, 2017, Selley filed an occupational disease (OD) claim, based on conditions diagnosed via an EMG and a nerve conduction study, alleging that he has an OD of his lumbar spine, including peripheral motor neuropathy; intervertebral disk degeneration, lumbosacral region; and lumbar radiculopathy. Selley's podiatrist, Gina Painter, DPM, has opined that, absent any additional diagnostic testing, these conditions are "related to work injury." Dr. Painter has recommended an MRI of Selley's lumbar spine for diagnostic and treatment purposes.

¶ 5 Victory and Acuity denied liability for Selley's lumbar conditions. Victory denied liability under his 2012 injury claim on the grounds that Selley reached MMI for his 2012 injury and that his current condition is not a natural progression of that injury. Victory also asserted it is not liable under § 39-71-704(1)(f), MCA (2011), which states that medical benefits terminate 60 months from date of injury, subject to exceptions that are currently inapplicable. Victory further asserted that if Selley's lumbar conditions are ODs, it is not liable under § 39-71-407(14), MCA (2011 and 2015), because it was not the insurer at risk when Selley was first diagnosed, nor when he knew or should have known that these conditions were the result of an OD. Acuity denied liability for Selley's lumbar conditions under his 2016 injury claim on the grounds that his 2016 injury did not cause Selley's lumbar spine conditions and that they are a natural progression of his 2012 injury claim. Acuity also asserted that Selley does not have a compensable OD because of a lack of objective medical findings, and that if Selley has a compensable OD, Victory is liable because it was the insurer at risk when Selley's lumbar radiculopathy was first diagnosed. Based on their denials of liability, neither insurer will authorize the MRI.

¶ 6 In his Petition for Trial, Selley asserts that either Victory or Acuity is liable for his lumbar conditions, and seeks a penalty under § 39-71-2907, MCA. Selley has moved for partial summary judgment, arguing that Acuity has unreasonably refused to authorize his MRI under a reservation of rights pursuant to *Belton v. Carlson Transport*, in which the Montana Supreme Court held that when two insurers deny liability for a claim, and assert that the other is liable, the second insurer has a duty to pay benefits under a reservation of rights until the claim is resolved.[1]

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[1] 202 Mont. 384, 392, 658 P.2d 405, 409-10 (1983), *superseded by statute on other grounds as recognized in In Re Abfalder*, 2003 MT 180, ¶ 14, 316 Mont. 415, 75 P.3d 1246.; *see also* § 39-71-407(8), MCA ("If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed

¶ 7 Relying upon *Ballard v. Stillwater Mining Co*. — in which this Court ruled that the *Belton* rule does not apply when one or both insurers denies liability altogether[2] — Acuity argues that because it denied liability for Selley's alleged OD on the grounds that Selley does not have a compensable OD, it has no duty to authorize the MRI.

¶ 8 In his reply brief, Selley argues that Acuity did not have sufficient evidence at the time Dr. Painter requested the MRI to support its position that he does not have a compensable OD.

¶ 9 Victory agrees with Selley that Acuity has a duty to pay for the MRI but does not agree that Selley is entitled to a penalty.

¶ 10 The trial in this case is set for the week of April 30, 2018.

¶ 11 ARM 24.5.329(1)(b), states:

> Because the court hears cases in the Workers' Compensation Court on an expedited basis, a motion for summary judgment may delay the trial without any corresponding economies. The time and effort involved in preparing briefs and resolving the motion may be as great or greater than that expended in resolving the disputed issues by trial. For these reasons, the court typically disfavors summary judgment motions. The court may decline to consider individual summary judgment motions where it concludes that the issues may be resolved as expeditiously by trial as by motion.

¶ 12 This Court does not approve of a situation in which neither insurer will agree to pay medical benefits, either outright or under a reservation of rights, since the insurers have an affirmative duty to investigate Selley's claims "in light of relevant statutes."[3] The duty to investigate includes the duty to obtain diagnostic tests,[4] and arises before the claimant's burden of proof, which does not arise, if at all, until litigation.[5] However, this

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claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible."); *Cornelius v. Lumbermen's Underwriting Alliance*, 2012 MTWCC 13, ¶¶ 56-57 (ruling that since liability dispute was between two insurers, the second insurer acted unreasonably by refusing to pay benefits).

[2] 1999 MTWCC 84, ¶ 7.

[3] *Marcott v. La. Pac. Corp*., 275 Mont. 197, 210, 911 P.2d 1129, 1137 (alteration in original) (citations omitted) (holding that insurers have a duty to investigate claims in light of relevant statutes and, "Absent such [an] investigation, denial of a claim for benefits is unreasonable.").

[4] *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶¶ 75-76, 303 Mont. 364, 15 P.3d 948 (affirming this Court's determination that insurer was unreasonable for refusing to pay for two diagnostic tests requested by claimant's treating physician because insurer second guessed the treating physician without having any "medical backup" for its position).

[5] *See, e.g.*, *Mont. State Fund v. Zurich Am. Ins. Co.*, 2009 MTWCC 3, ¶ 85 (emphasis omitted) (citation omitted) (ruling, "Where a worker suffers two sequential industrial injuries affecting the same part of the body, the insurer for the second injury is initially liable for benefits and bears the burden of proof when seeking to shift liability back to the prior insurer. When a subsequent injury has arguably aggravated a preexisting condition, the second

Court declines to rule upon Selley's summary judgment motion, which is in actuality a motion for partial summary judgment, for reasons of judicial economy. To determine whether Acuity's refusal to pay for the MRI under a reservation of rights at the time Dr. Painter requested it was reasonable — i.e., whether Acuity had a reasonable basis, based on an adequate investigation, for its position that Selley's lumbar condition is a natural progression of his 2012 claim and its alternative position that Selley does not have a compensable OD — this Court would have to review nearly 300 pages of exhibits, the majority of which are medical records. This Court will have to review those same medical records at trial to decide the merits of this case, thereby duplicating its efforts. To be sure, at trial, this Court will make findings as to whether Acuity's refusal to authorize the MRI was reasonable at the time Dr. Painter requested it because, as Victory correctly points out, "whether an insurer can meet its burden of proof has to be examined at the time the request was made for the MRI. Otherwise, an insurer could refuse to pay, stall, and hope it wins at trial. Such tactics would defeat the reason for the *Belton* decision."

¶ 13 This Court concludes that there will be no economy in ruling on a partial summary judgment motion; therefore, this Court declines to rule upon Selley's summary judgment motion pursuant to ARM 24.5.329(1)(b); instead, this Court will rule upon Selley's penalty claim when deciding the merits of this case. Accordingly,

¶ 14 This Court declines to consider Selley's partial summary judgment motion pursuant to ARM 24.5.329(1)(b).

DATED this 27th day of February, 2018.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Ben A. Snipes
Jon T. Dyre
Michael P. Heringer/Davina Attar

Submitted: February 1, 2018

insurer avoids liability for that condition only upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury or that the second injury did not in fact permanently aggravate the underlying condition for which the prior insurer was liable.").