IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 1

WCC No. 2019-4705

ROBERT L. ALLUM

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

MONTANA SUPREME COURT APPEAL No. DA 20-0113 – 02/25/20
AFFIRMED 2020 MT 159N - 06/16/20

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: After Petitioner's treating physician determined that Petitioner had reached MMI, Petitioner failed to attend an impairment evaluation because he claimed that the letter from the impairment evaluator's office was illegal notice of the evaluation, because his treating physician did not select the evaluator, and because the evaluator would not allow him to videotape the evaluation. Upon receiving Petitioner's Class 2 impairment rating, which was based on a medical records review, and approved job analyses for jobs that paid more than Petitioner's time-of-injury job, Respondent terminated Petitioner's TTD benefits and paid him his impairment award. Petitioner asserts that he has not reached MMI and that Respondent failed to follow the express terms of the WCA and, therefore, that he is entitled to retroactive and ongoing TTD benefits, additional PPD benefits, and a penalty.

Held: Petitioner is not entitled to retroactive and ongoing TTD benefits, additional PPD benefits, nor a penalty. Petitioner had no legal grounds to skip his impairment evaluation. Because Petitioner reached MMI, was released to return to work, and had a Class 2 impairment but no actual wage loss, the only benefit to which he was entitled was an impairment award. Respondent's termination of Petitioner's TTD benefits and its denial of Petitioner's claim for additional PPD benefits was lawful and reasonable.

¶ 1 The trial in this matter was held on December 16 and 17, 2019, in Helena. Petitioner Robert L. Allum was present and represented himself. Respondent Montana State Fund (State Fund) was represented by Thomas E. Martello and Melissa Quale.

¶ 2 Exhibits:

¶ 2a This Court admitted Exhibits 1, 2, 3, 4, 5, 7, 10, 11, 12, 34, 36, 38, 39, and 42 without objection.

¶ 2b ARM 24.5.318(3)(b)(E) and (F), state that, before the pretrial conference, the parties are to make their objections to the other party's exhibits and set forth the grounds for their objections on the exhibit list. Allum did not set forth any objections to State Fund's exhibits before the pretrial conference. However, because Allum is a self-represented litigant, this Court allowed him to make objections at the pretrial conference. Allum objected to Exhibits 6, 8, 9, and 13 through 30 on two grounds. First, Allum asserted that the exhibits were inadmissible because they did not contain "live signatures." Second, Allum asserted that under § 2-4-612(5), MCA, the exhibits could not be admitted unless State Fund called the author to testify. This Court overruled Allum's objections, ruling that there is no requirement for a document to contain a "live signature" before it is admitted and ruling that § 2-4-612(5), MCA, does not state that a party offering the document must call the author; rather, it states that the opposing party has the right to cross examine the author, which it can exercise by calling the author to testify. Because Allum did not set forth any other objection to these exhibits, this Court admitted them. While Allum asserts in Petitioner's Trial Brief that this Court did not allow him to challenge the authenticity of the exhibits at trial, and that the exhibits were inadmissible hearsay, he did not make those objections at the pretrial conference, thereby waiving those objections.[1] Moreover, he did not call the authors to testify to challenge the authenticity.

¶ 2c This Court admitted Exhibits 35, 37, and 41 over State Fund's relevancy objections.

¶ 3 Witnesses: Kimberly Dwyer; Brandi L. Taylor, MS, CRC; and Allum were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:

¶ 4a Issue One: Whether Petitioner is entitled to further temporary total disability (TTD) benefits and if so for what time period.

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[1] *See, e.g., In re Bower*, 2010 MT 19, ¶ 20, 355 Mont. 108, 225 P.3d 784 (citations omitted) (explaining, "We repeatedly have held that the complaining party must make a timely objection or motion to strike and state the specific grounds for its objection in order to preserve an objection to the admission of evidence for purposes of appeal. A timely objection must be made as soon as the grounds for the objection are apparent. Failure to make a timely objection constitutes waiver of the right to claim error on appeal.").

¶ 4b Issue Two: Whether Petitioner is entitled to further permanent partial disability (PPD) benefits, including impairment benefits, and if so for what time period.

¶ 4c Issue Three: Whether Petitioner is entitled to a penalty pursuant to § 39-71-2907, MCA.

PRELIMINARY MATTER

¶ 5 Allum has asserted that this Court has violated his due process rights and his statutory rights under § 2-4-612(5), MCA, which states:

> A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.

¶ 6 Prior to trial, Allum relied on this statute to argue that State Fund could not lay the foundation of any document unless the author testified at trial. In this Court's Order Denying Petitioner's Motion in Limine,[2] this Court ruled that State Fund did not necessarily need to have the author of an exhibit to authenticate it because this Court follows the Montana Rules of Evidence and M.R.Evid. 803(6) allows records kept in the regular course of business to be authenticated by the custodian or other qualified witness. This Court also ruled that State Fund did not need the authors to authenticate medical records under ARM 24.5.317.

¶ 7 In Petitioner's Trial Brief and at the trial, Allum argued that this Court was violating his right to cross examine the authors of the documents under § 2-4-612(5), MCA, by not requiring State Fund to call the authors as witnesses and by denying his motion to compel Wilbert B. Pino, MD, to testify at trial, which he made at trial. However, Allum's argument is without merit. Section 2-4-612(5), MCA, does not state that the party offering a document has the duty to call the author; it merely states that the opposing party has the right to cross examine the author. With the sole exception of one of State Fund's attorneys,[3] Allum had the right to cross examine the author of every document admitted into evidence and could have exercised his right by calling the authors to testify at trial. If the authors of any of the documents would not voluntarily appear at trial, Allum could

[2] Order Denying Petitioner's Motion in Limine, Docket Item No. 70.

[3] *See* Order Granting Respondent's Motion in Limine, Docket Item No. 71 (ruling that State Fund's attorney was not a necessary witness to authenticate a letter she sent to Allum, which was admitted as Exhibit 26, and that Allum did not "set forth sufficient evidence for this Court to determine that this is the rare case in which a party can call the opposing party's attorney.").

have subpoenaed them.[4] Because Allum is a self-represented litigant, this Court told him before trial that he had the duty to call the authors to testify at trial. However, Allum did not call any of the authors to testify. In short, Allum did not exercise his right.

FINDINGS OF FACT

¶ 8 The following facts are established by a preponderance of the evidence.

¶ 9 On May 1, 2000, Allum began working for Tatata, Inc., which does business as "Blinds and More." Allum's wife operated this business. Allum sold, installed, repaired, and cleaned window blinds. The job required frequent lifting over 50 pounds.

¶ 10 On November 18, 2013, Allum injured his right knee while working. At the time, Allum was 63 years old and receiving social security retirement benefits.

¶ 11 State Fund accepted liability for Allum's injury.

¶ 12 For the four months before his injury, Allum made a salary of $690 per month. His hours varied, but he averaged 40 hours per week. Allum occasionally worked on a job for a governmental entity and was paid the prevailing wage.

¶ 13 On December 13, 2013, State Fund began paying temporary partial disability benefits and temporary total disability (TTD) benefits, depending on whether Allum was working.

¶ 14 Despite treatment from 2013 to 2015, including a surgery to repair his torn meniscus, Allum's right knee pain did not improve.

¶ 15 On June 4, 2015, Allum saw Martin K. Gelbke, MD, at Bridger Orthopedic and Sports Medicine (Bridger Orthopedic). Dr. Gelbke is an orthopedic surgeon who specializes in joint replacements. Other physicians had told Allum that a total knee replacement was an option and Allum wanted to proceed. But, at that time, Dr. Gelbke did not think Allum was a candidate for a total knee replacement.

¶ 16 In the fall of 2015, Allum was unable to return to his time-of-injury job. On October 2, 2015, State Fund began paying Allum TTD benefits.

¶ 17 Allum returned to Bridger Orthopedic on June 30, 2016. Dr. Gelbke advised Allum of the potential problems with a total knee replacement:

> He is really wanting to proceed with a knee replacement. I am very skeptical still about proceeding with a knee replacement as he clearly is not bone-on-

[4] *See* ARM 24.5.331 and M.R.Civ.P. 45. *See also Knight v. Johnson*, 237 Mont. 230, 233, 773 P.2d 293, 294 (1989) (holding that a plaintiff in personal injury suit had duty to subpoena his treating physician and that physician had no duty to appear at trial without a subpoena).

> bone arthritic. I am worried that if we were to move forward with a knee replacement that he will end up with a knee replacement that he is not happy with. We talked about this exhaustively.

¶ 18 On September 29, 2016, Allum returned to Dr. Gelbke and again requested a total knee replacement. Dr. Gelbke again informed Allum that there was a 15% to 20% patient dissatisfaction rate with total knee replacements. Nevertheless, Allum decided to proceed.

¶ 19 In October 2016, Allum suffered a stroke.

¶ 20 Allum returned to Dr. Gelbke on February 8, 2017. Allum had been cleared by neurology for a total knee replacement and wanted to proceed. Dr. Gelbke again warned Allum that he could be dissatisfied with a total knee replacement. Dr. Gelbke's record states, in relevant part:

> Again, we reviewed the fact that in the orthopedic literature, there is a 15% to 20% patient dissatisfaction rate regarding total knee replacement. Furthermore, if not totally bone on bone [t]here is a higher chance he will be dissatisfied with a knee replacement. His MRI demonstrated lateral wear. [D]espite many, many conversations with Mr. Allum, he still wants to move forward with his knee replacement. Informed consent has previously been obtained. We will reschedule him, but I will require repeat clearance.

¶ 21 Dr. Gelbke performed the total knee replacement surgery on April 25, 2017. Royce Pyette, MD, assisted Dr. Gelbke.

¶ 22 Dr. Gelbke anticipated that Allum would be at maximum medical improvement (MMI) between 12 and 18 months after the surgery.

¶ 23 In December 2017, Allum fell on his right knee, which caused pain and swelling. He returned to Dr. Gelbke on January 4, 2018. Based on his physical examination, which was normal other than "trace effusion," and his review of recent x-rays, which showed "a well-positioned right total knee arthroplasty," Dr. Gelbke determined that Allum "did not disrupt anything."

¶ 24 On May 4, 2018, Dr. Gelbke replied to a letter from State Fund. Dr. Gelbke stated that Allum had reached MMI and that the only treatment Allum required was a "routine follow up every 2-5 years." In response to a question asking whether Allum had a whole person impairment under the AMA *Guides to the Evaluation of Permanent Impairment*, 6th Ed. (AMA *Guides* 6th Ed.), Dr. Gelbke wrote, "Schedule Impairment Rating with Dr. Pyette."

¶ 25 On June 27, 2018, Allum returned to Bridger Orthopedic, complaining of pain, swelling, instability, and weakness. Jarred Pinnick, PA (PA Pinnick), saw "moderate joint

effusion." On physical examination, PA Pinnick found normal range of motion, "good strength in the quad," and that Allum's "right lower extremity remain[ed] neurovascularly intact." PA Pinnick reviewed x-rays taken that day, which showed "a stable and intact right total knee arthroplasty." PA Pinnick aspirated Allum's knee to determine if Allum had an infection.

¶ 26 To determine Allum's physical capabilities and restrictions, Dr. Gelbke requested a Functional Capacity Evaluation (FCE). Thus, on June 28, 2018, Bridger Orthopedic requested authorization from State Fund to conduct a FCE. State Fund authorized the FCE. In response to an inquiry regarding the delay in the scheduling of the FCE, Bridger Orthopedic sent State Fund a fax on July 10, 2018, which explained, "We were waiting for some lab work to determine if he had an infection. He does not. Next step is his FCE. That is scheduled for 8-7-18."

¶ 27 Allum returned to Bridger Orthopedic on July 11, 2018, and reported that his pain and swelling had improved. PA Pinnick noted that Allum's knee was not infected. PA Pinnick did not see anything unusual on physical examination. PA Pinnick told Allum that he could "increase his activity level as tolerated." Because Allum subjectively felt that his right quadriceps were weak, PA Pinnick prescribed a 6-week course of physical therapy. PA Pinnick recommended that Allum return to see Dr. Gelbke in the spring of 2019 for an annual follow up. On a Medical Status Form, PA Pinnick stated, "Robert has an FCE scheduled for 8/7/18 to determine whether or not he can return to work full time unrestricted."

¶ 28 On July 20, 2018, Allum met with Brandi L. Taylor, MS, CRC, who State Fund had designated as Allum's rehabilitation provider. Taylor obtained Allum's educational history, which included a high school diploma and several years of college courses. Taylor also obtained Allum's employment history, which included working in the mortgage industry.

¶ 29 Allum underwent a comprehensive FCE on August 7, 2018, at Bridger Orthopedic with Angie Kolar, PT (PT Kolar). PT Kolar noted that Dr. Gelbke was the referring physician. Due to Allum's right knee, PT Kolar recommended specific lifting restrictions for floor to waist, waist to shoulder, and overhead. PT Kolar also recommended that Allum avoid squatting, kneeling, crawling, climbing, use of ladders, and that he not work at heights. PT Kolar noted that Allum demonstrated the ability to walk on an occasional basis but recommended that Allum limit his use of stairs to only as needed to access his work. Using the definitions from the Dictionary of Occupational Titles, PT Kolar determined that Allum could not return to his time-of-injury job because it was in the heavy physical demand category. PT Kolar determined that Allum could return to work in jobs in the medium physical demand category.

¶ 30 State Fund provided Taylor with the report from Allum's FCE. Relying upon the definitions of labor activity in § 39-71-703(10), MCA,[5] Taylor determined that Allum could not return to his time-of-injury job. Instead, Taylor determined that he could return to work in light- and sedentary-activity jobs. Taylor prepared five alternative job analyses (JAs) for light- and sedentary-activity jobs in the Bozeman area for which she thought Allum was qualified and competitive, including a JA for the parking lot attendant position for Republic Parking at the Bozeman Yellowstone International Airport in Belgrade, a light-labor activity job which paid $9.57 per hour.

¶ 31 On August 16, 2018, State Fund sent Allum a letter informing him that it had scheduled him for an impairment evaluation with Dr. Pyette on September 6, 2018.

¶ 32 On August 27, 2018, Allum returned to Bridger Orthopedic, complaining of pain and swelling. Allum saw Jaspur Kolar, PA (PA Kolar), for the first time, who summarized the appointment as follows:

> Bob is a patient of Dr. Gelbke here at Bridger Orthopedic. He underwent right knee total arthroplasty. In addition, he recently had a FCE performed on 08/07/2018.
>
> [U]nfortunately, Bob continues to have pain and swelling in the right knee. He states that he is still in formal physical therapy program. He states he has not yet been released by Physical therapy and discharged to a home exercise program. Patient states that he remains unable to perform the vast majority of his prior work duties due to the pain and limitations following surgery.
>
> . . . .
>
> Inspection of patient's right knee reveals no warmth or redness. Patient's surgical incision is well-healed. Patient does have noticeable right-sided knee swelling compared to that of the left. The patient does have good ability to flex and extend the knee. Patient does have some slight weakness against resisted knee flexion and extension on the right compared to the left. Good plantar flexion dorsiflexion of foot and ankle and good sensation

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[5] Section 39-71-703(10), MCA, states:

As used in this section:
(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;
(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;
(c) "light labor activity" means the ability to lift up to 20 pounds occasionally or up to 10 pounds frequently; and
(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

> distally into his toes. Patient is unable to perform weight-bearing deep knee bend squat.

PA Kolar was unaware that Dr. Gelbke had already determined that Allum was at MMI and, thus, stated that Allum was "not yet at MMI." PA Kolar advised Allum to complete his physical therapy program and return to Bridger Orthopedic in four weeks to reassess whether he was at MMI and whether he could attend an impairment evaluation. PA Kolar filled out a Medical Status Form, releasing Allum to modified duty until September 27, 2018. PA Kolar restricted Allum from climbing, from lifting more than 26 pounds, and to only occasionally lifting up to 25 pounds.

¶ 33 After his appointment, Allum called State Fund and spoke to Anna Pudelka — who was the claims examiner adjusting his claim — and informed her that PA Kolar recommended cancelling his impairment evaluation because of his knee pain. Allum also informed Pudelka that he was scheduled to return to Bridger Orthopedic in four weeks. Pudelka cancelled the impairment evaluation.

¶ 34 On September 20, 2018, Allum returned to Bridger Orthopedic, first seeing PA Pinnick, who then brought in Dr. Gelbke. Allum complained of pain and swelling in his knee and difficulty kneeling. During the appointment, Allum told Dr. Gelbke that he disagreed with the results of his FCE. Dr. Gelbke replied that he would look into Allum's concerns. During his physical examination, PA Pinnick saw swelling but no other problems. Neither Dr. Gelbke nor PA Pinnick recommended any additional treatment and both determined that Allum was at MMI. The medical record from that day states:

> Evaluation [of] the right knee reveals mild to moderate effusion. He has generalized tenderness [on] palpation. His incision is well healed. There is no erythema. He has no varus valgus instability. He has 5/5 quad strength. Range of motion of the right knee is measured at 0 to 130°. His patella is tracking centrally.
>
> . . . .
>
> Unfortunately, I cannot give a clear reason for the patient's continued swelling. Some patients after total knee replacement have persistent swelling. He may be 1 of these patients. There is no evidence of infection. He has good range of motion. He has good strength. He has good stability. His patella is tracking centrally. I discussed his care with Dr. Gelbke. I do not see any reason to re-aspirate his knee. Dr. Gelbke is going to call his work comp adjuster to discuss the patient. ***From our standpoint he is at MMI at this time.*** I will have the patient follow up in approximately 1 year

> for repeat x-rays and further evaluation. He may follow up sooner as needed.[6]

¶ 35 Dr. Gelbke did not request a second FCE.

¶ 36 On October 10, 2018, Pudelka called Treasure State Occupational Health (TSOH) to reschedule Allum's impairment evaluation. TSOH is a separate business from Bridger Orthopedic. However, TSOH's physicians sometimes evaluate patients at Bridger Orthopedic's office in Bozeman.

¶ 37 On October 11, 2018, Allum called Pudelka to request a second FCE and to inform her that he was going to videotape the impairment evaluation. Pudelka accurately explained the claims process to Allum, including the reason she requested an impairment evaluation. Her claim note documents their conversation as follows:

> P/c from IE re: FCE and the Impairment rating. I explained that the processes are independent and the FCE is reviewed w/ regard to the TOI JA and the Alternative JAs that (sic) as to whether or not he will be able to work in those types of jobs. I stated that the IR is based on the 6th edition of the AMA guide to permanent impairments and that is completed by Dr. Pyette or [Dr.] Pino because they have expertise in the AMA guides and Dr. Gelbke doesn't render those. IE wants to see if he can get another FCE. I stated that if Dr. Gelbke thinks an additional FCE is indicated, he will order it, but if he doesn't, the IE can seek that on his own with his own health insurance. I stated that likely, his TOI JA will be disapproved since his TOI job is Heavy duty and he is only released to Medium/light duty. I stated that the FCE has to do with capacity to return to work at what level of duty. The IE would like to do a video recording of the IR and I stated that he will need to confirm w/ the provider whether or not he will allow it. I stated regardless, of whether or not they allow it, he will need an impairment rating since he's at MMI. He will f/u w/ Dr. Gelbke to see about the FCE. He didn't voice any other concerns.

¶ 38 On October 22, 2018, Allum sent State Fund a letter, with a copy to Dr. Gelbke, to voice his displeasure with "Bridger Orthopedic personnel." Allum was displeased for three reasons. First, Allum was displeased because, in Allum's words, Dr. Gelbke "has not approved or disapproved, in writing, any actions, reports, treatment plan or physical condition of me since May, 2018." Second, Allum was displeased because Dr. Gelbke had not ordered a second FCE. Allum asserted that the first FCE was invalid because he did not think he was at MMI at that time. Allum reasoned that because he was in a course of physical therapy at that time and because PA Kolar stated he was "not yet at MMI" on August 27, 2018, he could not have been at MMI at the time of the FCE. Allum

[6] (Emphasis added).

complained that he discussed his disagreements with the results of the FCE with Dr. Gelbke and that "Dr. Gelbke agreed to discuss [his] concerns with Jaspur Kolar." However, Allum explained that the reason for his letter was, "I spoke with several female administrative gatekeepers at Bridger Ortho, in an attempt to resolve the FCE issue amicably, but I have waited for over a week with no response." Third, Allum was displeased because he did not think that PA Pinnick accurately set forth what occurred during his September 20, 2018, appointment in the medical record and had minimized the effects of his knee pain and swelling on his life. Allum concluded his letter by stating that he intended to videotape any independent medical examination (IME).

¶ 39 On October 24, 2018, State Fund sent Allum a letter informing him that his impairment evaluation was scheduled for November 9, 2018, with Dr. Pyette.

¶ 40 On October 31, 2018, Allum sent an email to TSOH with a copy of his October 22, 2018, letter to State Fund to put TSOH on notice that he was going to videotape the impairment evaluation.

¶ 41 On November 1, 2018, State Fund responded to Allum's letter of October 22, 2018. In response to Allum's complaints about the timing of the FCE, State Fund stated that it could not direct Dr. Gelbke's care and that, "Dr. Gelbke's/Mr. Kolar's request of a FCE and scheduling of the FCE was based upon their medical expertise." In response to Allum's objection to the impairment evaluation, State Fund informed Allum that it had scheduled the impairment evaluation because Dr. Gelbke and PA Pinnick had determined that he was at MMI. In response to Allum's demand to videotape the impairment evaluation, State Fund told Allum to contact TSOH to see if Dr. Pyette would allow him to videotape it. State Fund stated, "Please bear in mind, this is not an independent medical evaluation, it is an impairment rating visit."

¶ 42 Dr. Pyette reviewed Allum's medical records and read Allum's October 22, 2018, letter to State Fund. Because of Allum's dissatisfaction with Bridger Orthopedic and Allum's statement that he was going to videotape the impairment evaluation, Dr. Pyette declined to be Allum's impairment evaluator. Thus, on November 5, 2018, Lynne Sinnema – the Director of Operations of TSOH – sent an email to Pudelka, in which she stated, "[b]ased on a review of the medical record and correspondence, Treasure State Occupational Health will not be able to schedule an appointment for Robert Allum . . . for an impairment rating with Dr. Pyette." The email further stated, "We may be able to get him in with Dr. Pino on Saturday, the 10th in Bozeman but we do not allow videotaping as requested by the claimant in the letter dated October 22, 2018."

¶ 43 On November 8, 2018, Sinnema called Allum's house and informed Allum's wife that the impairment evaluation had been cancelled. Later that day, Allum, who did not understand that Dr. Pyette had declined to be his impairment evaluator, called TSOH to reschedule the impairment evaluation. Allum again informed Sinnema of his intention to videotape the impairment evaluation. Sinnema told Allum that TSOH would not allow him to videotape the evaluation. Allum responded that he would object to an impairment

evaluation unless he was allowed to videotape it and directed Sinnema to contact State Fund to see what its position was on videotaping.

¶ 44 On November 9, 2019, Pudelka sent Sinnema an email asking if Sinnema had spoken to Allum. Sinnema responded:

> Hi Anna,
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> I did speak with him and let him know that we do not allow videotaping of the exam. He told me that he would object to an appointment without videotaping.
>
> I told him I would let you know and that you would proceed appropriately.
>
> Let me know if you would like us to proceed with reschedule with Dr. Pino.
>
> Lynne

¶ 45 On November 9, 2018, Pudelka sent Allum a letter informing him that State Fund was terminating his TTD benefits in 14 days under § 39-71-1106, MCA.[7] Because Allum had insisted upon videotaping the impairment evaluation, Pudelka placed the blame for the cancelled impairment evaluation on Allum. She explained that State Fund was terminating Allum's TTD benefits because he "failed to comply with the following recommended medical treatment: Failure to attend impairment rating requested by Dr. Gelbke."

¶ 46 On November 16, 2018, Allum called Pudelka to dispute the termination of his TTD benefits on the grounds that Dr. Pyette cancelled the appointment and to assert his right to videotape the evaluation, which he asserted was based on case law from the Montana Supreme Court. Pudelka explained that State Fund had grounds to terminate his TTD benefits because the reason Dr. Pyette cancelled the impairment evaluation was that Allum insisted upon videotaping it and that Allum did not have the right to videotape the impairment evaluation, which was different than an IME. Allum told her that he would attend an impairment evaluation if the evaluator put in writing that he would not allow videotaping.

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[7] Section 39-71-1106, MCA states:

> **Compliance with medical treatment required — termination of compensation benefits for noncompliance**. An insurer that provides 14 days' notice to the worker and the department may terminate any compensation benefits that the worker is receiving until the worker cooperates, if the insurer believes that the worker is unreasonably refusing:
>
> (1) to cooperate with a managed care organization, a preferred provider organization, or the treating physician;
>
> (2) to submit to medical treatment recommended by the treating physician, except for invasive procedures; or
>
> (3) to provide access to health care information to health care providers, the insurer, or an agent of the insurer.

¶ 47 After this conversation, Pudelka called Sinnema, telling her that Allum said he would attend an impairment evaluation, but that he wanted TSOH to put in writing that it does not allow videotaping. Sinnema informed Pudelka that she could schedule Allum for an impairment evaluation with Dr. Pino on December 8, 2018.

¶ 48 On November 20, 2018, TSOH sent Allum a letter informing him that he was scheduled for an impairment evaluation with Dr. Pino on December 8, 2018. The letter also states, "Please note that TSOH does not allow videotaping or audiotaping of exams."

¶ 49 On November 21, 2018, Allum faxed an angry, rambling letter to Pudelka. *Inter alia*, Allum asserted that: he was not at MMI because he still had pain and swelling, which he asserted was proof that his total knee replacement was a "failure (not successful)"; that the FCE was invalid; and that State Fund could not terminate his TTD benefits because Dr. Pyette cancelled the impairment evaluation. Allum also made several unsubstantiated allegations of wrongdoing, generally alleging that State Fund, Bridger Orthopedic, and TSOH were colluding to deprive him of benefits. He alleged that because State Fund was paying Bridger Orthopedic for his medical care, State Fund was the "master" and directing the providers at Bridger Orthopedic to work to his detriment. Based upon information he found on the internet, Allum also questioned Dr. Pyette's qualifications to determine his impairment rating and whether he was unbiased. Allum explained that he had the right to videotape the impairment evaluation because "an in depth analysis of the financial and personal relationships between Bridger Orthopedic[], Treasure State and Dr. Pyette is warranted."

¶ 50 On November 26, 2018, Allum sent a letter to State Fund in which he objected to the impairment evaluation with Dr. Pino. Allum cited § 39-71-605(1)(a), MCA — which states, in relevant part, that a claimant shall attend an examination "upon the written request of the insurer" — and asserted that because TSOH is not an insurer, its letter was not legal notice of the impairment evaluation. Allum also asserted that TSOH's refusal to allow him to videotape the impairment evaluation violated his due process rights and his rights under § 39-71-605, MCA. He asserted that State Fund had an affirmative duty to find an examiner who would allow him to videotape the examination. Allum also claimed that he was not at MMI because he still had pain and swelling, which he again asserted showed that his knee replacement was a "failure (unsuccessful)." Allum also asserted that the FCE was invalid, incorrectly claiming that neither Dr. Gelbke nor PA Kolar ordered it. He also claimed that the FCE results were "nonspecific" and "contradictory," which he claimed made it necessary for him to videotape "all future examinations." Allum also asserted that it was unlawful and improper to use the AMA *Guides* 6th Ed. to determine his impairment rating.

¶ 51 On December 7, 2018, Melissa Quale, an attorney at State Fund, sent Allum a letter to explain the claims process and State Fund's position on his claim. Quale truthfully informed Allum that in September 2018, Dr. Gelbke had determined that he was at MMI. She accurately stated that upon reaching MMI, "the law provides for a change in benefits

status." She explained that State Fund scheduled an impairment evaluation to determine whether he was entitled to additional benefits, including an impairment award. Quale also explained that an impairment evaluation under § 39-71-711, MCA, is different than an IME under § 39-71-605, MCA. Quale also explained to Allum that his reliance on this Court's decision in *New Hampshire Ins. Co. v. Matejovsky*[8] in support of his claim that he had an absolute right to videotape his impairment evaluation was misplaced, because this Court did not rule that a claimant had an absolute right to videotape an examination under § 39-71-605, MCA. Quale accurately explained this Court ruled that "before this Court requires a protective measure at an IME, the claimant must identify a problem or issue and propose a protective measure that will remedy or alleviate that specific problem or issue."[9] Quale explained that it was State Fund's position that there was no good reason to videotape the impairment evaluation and that, "Treasure State Occupational Health's denial of your request to videotape your Impairment Evaluation is in accordance with Montana law."

¶ 52 Allum did not attend his scheduled impairment evaluation with Dr. Pino.

¶ 53 On December 10, 2018, Pudelka sent Allum a letter stating that State Fund was terminating his TTD benefits under § 39-71-1106, MCA, because of his failure to attend his impairment evaluation with Dr. Pino, which she again stated was a "recommended medical treatment."

¶ 54 Pudelka knew that Allum had an impairment. Thus, she asked TSOH to have Dr. Pino determine Allum's impairment rating based on the information in his medical records. Thereafter, Pudelka sent the five JAs that Taylor had prepared to TSOH and asked TSOH to have Dr. Pino either approve or disprove the JAs.

¶ 55 On December 18, 2018, Dr. Pino reviewed Allum's medical records to determine Allum's impairment rating. Dr. Pino determined that Allum's whole person impairment rating under the AMA *Guides* 6th Ed. is 10%, setting forth that he relied upon Table 16-3 and Table 16-10. In addition, Dr. Pino unconditionally approved the five alternative JAs, including the JA for parking lot attendant.

¶ 56 On December 19, 2018, Pudelka sent Allum two letters to inform him that State Fund was terminating his TTD benefits and paying him an impairment award. In one letter, Pudelka informed Allum that State Fund was reinstating his TTD benefits, retroactive to its last TTD benefit payment. However, she stated: "State Fund continues to maintain its position that failure to comply with your physician's recommended treatment is a basis for termination of benefits pursuant to section Montana Code Annotated 39-71-1106," and notified Allum that his TTD would be terminated 14 days

[8] 2016 MTWCC 8.

[9] *Matejovsky*, ¶ 31.

thereafter, due to his refusal to attend an impairment evaluation unless he was allowed to videotape it.

¶ 57 In the other letter, Pudelka notified Allum that the only benefit to which he was entitled at that time was an impairment award under § 39-71-703(2), MCA.[10] She based her decision on Dr. Gelbke's determination that Allum had reached MMI on September 20, 2018, and on Dr. Pino's determinations that he had a 10% whole person impairment rating and could return to work in jobs that paid more than his time-of-injury job, as evidenced by his approval of the JAs.

¶ 58 Also on December 19, 2018, Pudelka sent a letter to Dr. Gelbke with a copy of Dr. Pino's report. She asked Dr. Gelbke if he agreed with Dr. Pino's determinations that Allum was at MMI, that Allum had a 10% whole person impairment rating, and that Allum could return to work, as indicated by Dr. Pino's approval of the JAs.

¶ 59 On December 21, 2018, State Fund sent Allum $393.16 in TTD benefits, which brought it current. State Fund also sent Allum $1,376.18 for the first installment of his impairment award. From December 26, 2018, to June 24, 2019, State Fund sent Allum biweekly checks to fully pay his impairment award.

¶ 60 Because Dr. Gelbke did not respond to State Fund's letter dated December 19, 2018, State Fund sent a second request on January 16, 2019. However, Dr. Gelbke still did not respond.

¶ 61 State Fund paid Allum TTD benefits through January 24, 2019.

¶ 62 In the spring of 2019, Allum thought his medical benefits were going to terminate under § 39-71-704(1)(f)(i), which states that medical benefits terminate 60 months from the date of injury. Thus, pursuant to § 39-71-717, MCA, he petitioned the Department of Labor & Industry's medical review panel to reopen his medical benefits. State Fund did not oppose Allum's petition, noting that § 39-71-704(1)(f)(ii), MCA, states that medical benefits do not terminate "for the repair or replacement of a prothesis furnished as a direct result of a compensable injury . . . ."

¶ 63 On June 19, 2019, the Department of Labor & Industry's medical review panel decided that Allum's medical benefits should remain open, explaining its decision as follows:

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[10] Section 39-71-703(2), MCA, states:

> When a worker receives a Class 2 or greater class of impairment as converted to the whole person, as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition, and has no actual wage loss as a result of the compensable injury or occupational disease, the worker is eligible to receive payment for an impairment award only.

> [I]t is the consensus of the medical panel to "reopen" medical benefits. One reviewer opined "reopen" benefits, citing ongoing pain after knee replacement with functional benefit of physical therapy. Another reviewer opined "reopen" benefits, citing continuing pain after arthroplasty with ongoing need for physical therapy. Another reviewer opined "reopen" benefits.
>
> After arthroplasty, [IW] was deemed at MMI on 09/20/18. Based on the initial injury, subsequent surgeries, documented symptoms and examination findings, medical care will likely be required to support IW's return to work. Notably, in a letter dated 05/07/19, [M]s. Pudelka indicated that "the medical for Mr. Allum's right total knee prosthetic remains open."

¶ 64 On June 20, 2019, Allum saw Dr. Gelbke. Dr. Gelbke summarized his history with Allum, noting that Allum was not happy with his total knee replacement, as Dr. Gelbke had predicted was a possibility:

> This is a 68-year-old gentleman status post right total knee arthroplasty in April of 2017. [H]e is here today in follow-up. He overall is not happy with his knee replacement. He says he has a persistent feeling of weakness in his leg and that the knee gives out on him. He does have some low back pain as well. He has swelling on and off in the knee. We have worked him up for infection in the past and this [has] been negative. We have had multiple conversations about knee replacement. He had come to see me many times about his knee before surgery. He was not a bone-on-bone arthritic knee patient radiographically before surgery. I had many conversations with him about knee replacement and recommended against it. I sent him for another opinion. Nevertheless he was persistent with me and clearly understood all the information that I conveyed to him including that in the orthopedic literature the 15-20% patient dissatisfaction rate associated with knee replacement as well as the fact that performing a knee replacement prior to being bone-on-bone arthritic knee radiographically is more likely to end up with an un satisfying result and (sic) if there is bone-on-bone arthritis. He convinced me to move forward with a knee replacement and we did this. Technically I feel that the surgery went well. Unfortunately, he has had persistent problems with the knee. He was originally doing quite well but he had a fall on his knee and this demonstrated no fractures but he feels like it made it worse. Again he complains of swelling as well as instability.

Dr. Gelbke did not see any problems on Allum's x-rays from that day nor find any problems during his physical examination, except for swelling. Dr. Gelbke did not find any problems he could fix during his physical examination. Dr. Gelbke's record states, in relevant part:

> On physical exam the right lower extremity is neurovascularly intact. He is approximately 0-120 degree knee range of motion. I feel that the knee was balanced in flexion extension. He does have a palpable effusion today. The patella I feel is tracking appropriately. He has some mild tenderness to palpation around his patella. He ambulates with a limp.
>
> . . . .
>
> Assessment: This is a 68-year-old gentleman who has swelling in the knee on and off with activity and feels that the knee does not support him and feels subjectively that he has weakness in his leg. I told him that the most common reasons for an effusion are infection and instability. I do not feel that his knee is unstable on my exam. We have had a negative infection workup to date. I do not know exactly why he is having the symptoms. I am not confident that I could make this a better knee by revising it. I have recommended another opinion with Dr. Sukin who has been doing this 10 years longer than I have been. [He] may see something that I do not see. He is amenable to this. We will try to set up the referral for a 2nd opinion.

Dispositive Findings

¶ 65 Having considered the totality of the evidence presented, having resolved the conflicts in the evidence, and having made the findings of fact set forth above, this Court makes the following dispositive findings of fact.

MMI

¶ 66 This Court finds that Allum reached MMI on September 20, 2018 — at the latest — and that he remained at MMI through the date of trial under the definition at § 39-71-116(21), MCA, which states that MMI "means a point in the healing process when further material functional improvement would not be reasonably expected from primary medical services." Dr. Gelbke did not recommend any primary medical service on September 20, 2018, nor on June 20, 2019. Moreover, Allum did not present sufficient evidence from any other medical provider to convince this Court that there has been or currently is any primary medical service that would likely result in material functional improvement of his right knee.

¶ 67 Relying on the AMA *Guides* 6th Ed., Allum argues that Dr. Gelbke prematurely determined that he reached MMI. In its discussion of MMI, the AMA *Guides* 6th Ed. states, "Impairment ratings are to be performed when an individual is at a state of permanency."[11] The AMA *Guides* 6th Ed., also states:

[11] AMA *Guides* 6th Ed., p. 27.

> *Permanency* is the condition whereby impairment becomes static or well stabilized with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability. The term is usually synonymous with MMI, usually occurring when all reasonable medical treatment expected to improve the condition has been offered or provided.

Allum points out that Dr. Gelbke determined that he was at MMI on May 4, 2018, that PA Kolar stated that Allum was "not yet at MMI" on August 27, 2018, and that Dr. Gelbke again stated Allum was at MMI on September 20, 2018. He also points out that his medical benefits remain open and that he has medical appointments scheduled. Thus, he maintains that his right-knee condition has not yet reached "permanency."

¶ 68 However, the evidence shows that the condition of Allum's knee has been static since the spring of 2018. Objectively, Allum has had, and continues to have, a stable and intact right knee arthroplasty with intermittent swelling. Subjectively, Allum has had, and continues to have, pain and feelings of weakness and instability. Although PA Kolar stated that Allum had not "yet reached MMI" on August 27, 2018, because Allum was in a course of physical therapy, the physical therapy did not provide any functional improvement. Thus, when Allum returned to Bridger Orthopedic on September 20, 2018, to reassess his MMI status, Dr. Gelbke reaffirmed that he had reached MMI. It matters not that Allum's medical benefits remain open and that he has appointments scheduled because MMI does not mean that the condition will never change nor that the claimant will not need additional medical appointments.[12] Dr. Gelbke's opinion that Allum was at MMI on September 20, 2018, was not premature.

¶ 69 Allum also argues that the evidence shows that he did not reach MMI in 2018 because in the spring of 2019, two of the physicians on the Department of Labor & Industry's medical review panel recommended additional physical therapy, with one stating that physical therapy would provide "functional benefit." However, a claimant who receives treatments after reaching MMI is not necessarily no longer at MMI.[13] Moreover, this Court gives no weight to the opinion that physical therapy would provide "functional benefit" because this Court does not know what the physician relied upon to give this

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[12] *Hiett v. Missoula Cnty. Pub. Sch.*, 2003 MT 213, ¶ 27, 317 Mont. 95, 75 P.3d 341 (explaining, "not all claimants who reach medical stability remain there, and that some actually deteriorate and require further treatment to again reach stability"). *See also* AMA *Guides* 6th Ed., p. 26 (explaining that "MMI is not predicated on the elimination of symptoms and/or subjective complaints," that "MMI can be determined if recovery has reached the stage where symptoms can be expected to remain stable with the passage of time, or can be managed with palliative measures that do not alter the underlying impairment substantially, within medical probability," and that MMI "does not preclude the deterioration of a condition that is expected to occur with the passage of time or as a result of the normal aging process; nor does it preclude allowance for ongoing follow-up for optimal maintenance of the medical condition in question").

[13] *Hiett,* ¶ 35 (holding that after a claimant reaches MMI, he is "entitled to such 'primary medical services' as are necessary to permit him or her to *sustain* medical stability") (emphasis in original).

opinion,[14] including whether the physician knew that Allum undertook a course of physical therapy in the summer of 2018 that did not result in any functional improvement. Dr. Gelbke saw Allum the day after the medical panel issued its report and did not recommend additional physical therapy, nor any other treatment. Dr. Gelbke is Allum's treating physician and is a specialist in joint replacements; therefore, this Court gives significant weight to his opinion that Allum was at MMI on September 20, 2018. Based on the clear evidence, this Court is convinced that Allum reached MMI no later than September 20, 2018.

Impairment Rating

¶ 70 This Court finds that Allum's whole person impairment rating under the AMA *Guides* 6th Ed. is 10%. Allum did not introduce any evidence from which this Court could find that he has an impairment rating greater than 10%. Section 39-71-711(1)(a), MCA, states, in relevant part, that an impairment rating "is a purely medical determination and must be determined by an impairment evaluator." Allum did not present any evidence from an impairment evaluator; thus, he failed to meet his burden of proof.

¶ 71 Allum argues that this Court cannot give weight to Dr. Pino's determination of his impairment rating because Dr. Pino did not examine him, which is required under the AMA *Guides* 6th Ed. However, the only reason Dr. Pino did not examine Allum is that Allum failed to attend his impairment evaluation. As set forth below, Allum had no legal grounds to skip his impairment evaluation and he cannot take advantage of his own wrong.[15] Moreover, this Court is convinced that Dr. Pino had sufficient information from Allum's medical records to determine his impairment rating.

¶ 72 Allum also asserts that this Court should give no weight to Dr. Pino's impairment rating because the last paragraph of Dr. Pino's report states, in relevant part, "This evaluation is based upon the history given by the examinee, [and] the objective medical findings noted during the examination . . . ." Since Dr. Pino did not take a history nor examine him, Allum argues that these statements prove that Dr. Pino is untruthful. Nevertheless, while it is evident that Dr. Pino used a form and did not remove boilerplate, this Court gives weight to Dr. Pino's opinions because Dr. Pino made it clear at the beginning of his report that he based his opinions solely on a medical records review. This Court is convinced that Dr. Pino was merely careless and not attempting to deceive.

¶ 73 Finally, Allum asserts that this Court should give no weight to Dr. Pino's determination of his impairment rating because Dr. Pino did not say whether he used the first or second printing of the AMA *Guides* 6th Ed. However, Allum did not introduce any

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[14] *See, e.g.*, *Floyd v. Zurich Am. Ins. Co.,* 2017 MTWCC 4, ¶ 47 (citation omitted) (explaining that one of the factors on which this Court relies in weighing medical evidence is "the quality of evidence upon which the physicians based their respective opinions").

[15] § 1-3-208, MCA.

evidence from which this Court could find that his impairment rating would change depending on which printing was used. And, this Court has compared the first printing to the second printing and notes that the parts of the tables on which Dr. Pino relied in determining Allum's impairment rating are identical.[16]

FCE

¶ 74 This Court finds that the results of the FCE are valid and accurately set forth Allum's physical restrictions from his knee injury. The report is detailed and gives specific recommendations for Allum's restrictions. Allum did not produce any evidence from which this Court could find that his restrictions are other than as set forth in the FCE report. This Court is convinced that if Dr. Gelbke thought that the FCE was invalid or did not accurately set forth Allum's restrictions, then he would have ordered a second FCE.

Return to Work

¶ 75 This Court finds that Allum is physically capable of returning to work in jobs in the light- and sedentary-labor activity categories, as those categories are defined in § 39-71-703(10), MCA. Although Allum challenged four of the JAs on the grounds that he was not physically capable of performing one of these jobs, and that he was not qualified nor competitive for the other three jobs, this Court need not make findings on those jobs because Allum did not challenge the JA for the parking lot attendant job for Republic Parking on the grounds that he was not physically capable of performing this job nor dispute that he was capable and qualified for this job. This Court finds that Allum is physically capable of performing the parking lot attendant job for Republic Parking and that he is qualified and competitive for that job considering his age, education, and work experience.

Time-of-Injury Wage

¶ 76 This Court finds that Allum's time-of-injury wage under § 39-71-123(3)(a), MCA — which states, in relevant part, "for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages" — was $3.97 per hour, as set forth in the following calculations:

$690 salary per month ÷ 4.345 weeks in a month = $158.80 salary per week.

$158.80 salary per week ÷ 40 working hours per week = $3.97 per hour.

¶ 77 During his cross examination of Taylor, Allum implied that he worked less than 40 hours per week. However, this Court does not find this claim to be credible. When asked

[16] *Compare* AMA *Guides* 6th Ed., Table 16-3 and Table 16-10 (first printing), pp. 511 and 530 *with* AMA *Guides* 6th Ed., Table 16-3 and Table 16-10 (second printing), pp. 511 and 530.

what his normal work shift was at the beginning of his claim, Allum responded, in relevant part, "Try to keep 40, but can be more [and] sometimes less."

¶ 78 Allum also introduced evidence indicating that, at times, he made more than $690 per month because he was paid prevailing wages on jobs for governmental entities. Thus, Allum implicitly argues that the four pay periods before his injury do not accurately reflect his employment history and that his wage should be calculated under § 39-71-123(3)(b), MCA, which states:

> For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

To determine if good cause exists to use more than the last four pay periods, this Court looks to § 39-71-105(1), MCA,[17] which states, in relevant part, that "the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease."

¶ 79 Here, Allum did not meet his burden of proving that the four pay periods before his injury did not accurately reflect his employment history. Allum did not present evidence of his total earnings for the year prior to his injury, nor for any specific period in that year. The only evidence in the record as to the amount Allum earned while working on jobs for a governmental entity, and the period of time he worked on such a job, is in the notes a State Fund representative took as he spoke to Allum on December 6, 2013. Those notes state, in relevant part, "IE did indicate that when federal or state job is paid at prevailing wage, worked Dept. of Interior 4-6 months, paid at $35 or $37 as supervisor 1st part of this year." Nevertheless, these approximations are not sufficiently specific for this Court to make a calculation under § 39-71-123(3)(b), MCA.

Actual Wage Loss

¶ 80 This Court finds that from the time he reached MMI and thereafter, Allum has been capable of earning more than $3.97 per hour and that he does not have an actual wage loss under the definition in § 39-71-116(1), MCA, which states, " 'Actual wage loss' means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the

[17] *Peters v. Am. Zurich Ins. Co.*, 2013 MTWCC 16, ¶ 15. *See also Sturchio v. Wausau Underwriters Ins. Co.,* 2007 MTWCC 4, ¶ 23 (stating, "Section 39-71-123, MCA, sets forth the calculation methods by which one may achieve the reasonable relationship to actual wages lost as mandated by § 39-71-105(1), MCA.").

injury."[18] When Allum reached MMI, Montana's minimum wage was $8.30 per hour and the parking lot attendant position paid $9.27 per hour.

Reasonableness of State Fund's Termination of TTD benefits and Denial of Liability for additional PPD benefits

¶ 81 State Fund's termination of Allum's TTD benefits in January 2019, was reasonable.

¶ 82 State Fund's denial of Allum's claim for additional PPD benefits was reasonable.

CONCLUSIONS OF LAW

¶ 83 This case is governed by the 2013 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Allum's industrial injury.[19]

¶ 84 Under established Montana law, Allum, as claimant, "bears the burden of proving by a preponderance of the evidence that he is entitled to the workers' compensation benefits sought."[20]

¶ 85 Notwithstanding, Allum asserts that assigning him the burden of proof violates his due process rights. Allum maintains that State Fund took his property before the opportunity for a hearing and that due process requires that State Fund have the burden of proving that it had legal grounds to terminate his TTD benefits and pay him his impairment award. However, in *Grooms v. Ponderosa Inn*, the Montana Supreme Court rejected this argument, holding that while State Fund denied liability before the opportunity for a hearing, due process was satisfied because Grooms had a statutory right to have this Court decide her disputes over benefits, thereby giving her the opportunity to be heard.[21] Likewise, Allum, who was informed of the reasons State Fund terminated his TTD benefits and denied his demand for additional PPD benefits, had an opportunity to be heard.

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[18] *See also* § 39-71-703(5)(c), MCA (providing that "actual wage loss" is determined by comparing the claimant's hourly wage and stating, in relevant part, "Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.").

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

[20] *Ford*, ¶ 34 (citing *Simms v. State Comp. Ins. Fund*, 2005 MT 175, ¶ 13, 327 Mont. 511, 116 P.3d 773). *See also Hanks v. Liberty Nw. Ins. Corp.*, 2002 MT 334, ¶ 11, 313 Mont. 263, 62 P.3d 710 ("A claimant has the burden of proof that he or she is entitled to benefits under the Workers' Compensation Act."); *Larson v. CIGNA Ins. Co.*, 276 Mont. 283, 288, 915 P.2d 863, 866 (1996) (citing *DuMont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979) ("The claimant bears the burden of establishing a right to compensation."); *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973) (citations omitted) (citing case law from 1927, 1929, and 1935 in support of holding that claimant has burden of proof).

[21] 283 Mont. 459, 463-64, 942 P.2d 699, 701-02 (1997).

Issue One: Whether Petitioner is entitled to further temporary total disability (TTD) benefits and if so for what time period.

¶ 86 Section 39-71-116(39), MCA, states: " 'Temporary total disability' means a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing."

¶ 87 Section 39-71-701, MCA, states, in relevant part:

> **Compensation for temporary total disability — exception.** (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing . . . .

¶ 88 Section 39-71-609(2), MCA, states, in relevant part, "Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity."

¶ 89 Section 39-71-703(2), MCA, states:

> When a worker receives a Class 2 or greater class of impairment as converted to the whole person, as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition, and has no actual wage loss as a result of the compensable injury or occupational disease, the worker is eligible to receive payment for an impairment award only.

¶ 90 Under the plain language of these statutes, State Fund lawfully terminated Allum's TTD benefits in January 2019 because he was at MMI and had been released to return to work in jobs that paid more than his time-of-injury job. Allum reached MMI no later than September 20, 2018, at which time he was no longer temporarily totally disabled under §§ 39-71-116(39) and -701(1)(a), MCA. Upon receiving Dr. Pino's report that Allum had a 10% whole person impairment rating for his right knee, a Class 2 impairment, and Dr. Pino's approval of job analyses of jobs that paid more than his time-of-injury job, State Fund terminated Allum's TTD benefits under § 39-71-609(2), MCA, and began paying him his impairment award, the only benefit to which Allum was entitled under § 39-71-703(2), MCA. Allum is not entitled to any retroactive or ongoing TTD benefits.

¶ 91 Allum argues that State Fund illegally terminated his TTD benefits and paid him his impairment award on the grounds that State Fund did not follow the express terms of the WCA when it scheduled his impairment evaluation with Dr. Pino. For three reasons, Allum asserts that he had no legal duty to attend the impairment evaluation with Dr. Pino. Thus, he maintains that State Fund could not legally rely on Dr. Pino's opinions to

terminate his TTD benefits and pay his impairment award. However, none of his arguments are supported by the plain language of the WCA.

¶ 92 First, Allum asserts that the letter from TSOH was not legal notice of the impairment evaluation. He relies on § 39-71-605(1)(a), MCA, which states that "the employee shall, upon the written request of the insurer, submit from time to time to examination by a physician . . . ." However, State Fund was not obtaining an examination under § 39-71-605, MCA; rather, it was obtaining an impairment evaluation under § 39-71-711, MCA, which does not state that the insurer must provide written notice of the evaluation. Allum counters that § 39-71-605, MCA, applies because § 39-71-711(4), MCA, states: "Disputes over impairment ratings are subject to the provisions of 39-71-605." However, at the time, Allum and State Fund did not have a dispute over his impairment *rating*; i.e., they did not have a dispute over the percentage of his impairment. Rather, they had a dispute over whether Allum could videotape the impairment evaluation. Thus, the provisions of § 39-71-605, MCA, did not apply. The letter from TSOH was legal notice of the impairment evaluation under § 39-71-711, MCA.

¶ 93 Second, Allum asserts that State Fund could not obtain an impairment rating from Dr. Pino because Dr. Gelbke did not select Dr. Pino. He relies upon § 39-71-1101(2)(d), MCA, which states that treating physicians shall "conduct or arrange for timely impairment ratings." However, this statute does not state that the treating physician has the exclusive right to select the impairment evaluator. If the Legislature intended to give the treating physician the exclusive right to select the impairment evaluator, it would have directly said so, like it did in § 39-71-1101(1) and (2), MCA.[22] Moreover § 39-71-711(2), MCA, expressly gives an insurer the right to obtain an impairment rating from an impairment evaluator it chooses; it states: "A claimant or insurer, or both, may obtain an impairment rating from an evaluator if the injury falls within the scope of the evaluator's practice . . . ." Under this statute, after Dr. Pyette declined to be Allum's impairment evaluator, State Fund had the right to obtain an impairment rating from Dr. Pino.

¶ 94 Third, Allum argues that he did not have a legal duty to attend the impairment evaluation with Dr. Pino because TSOH would not allow him to videotape it. Allum equates an impairment evaluation to an IME and asserts that he had an absolute right to videotape the impairment evaluation. However, the Montana Supreme Court and this

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[22] § 39-71-1101(1) and (2), MCA, states, in relevant part:

> **Choice of health care provider by worker — insurer designation or approval of treating physician or referral to managed care or preferred provider organization — payment terms — definition.** (1) Prior to the insurer's designation or approval of a treating physician as provided in subsection (2) or a referral to a managed care organization or preferred provider organization as provided in subsection (8), a worker may choose a person who is listed in 39-71-116(41) for initial treatment. Subject to subsection (2), if the person listed under 39-71-116(41) chosen by the worker agrees to comply with the requirements of subsection (2), that person is the treating physician.
>
> (2) Any time after acceptance of liability by an insurer, the insurer may designate or approve a treating physician who agrees to assume the responsibilities of the treating physician.

Court have held that, unless a personal injury plaintiff or a claimant establishes a reason to require the recording with facts, he does not have the right to videotape an IME.[23] Here, Allum did not establish that he had a reason to videotape the impairment evaluation. He merely made unsubstantiated allegations that State Fund, Bridger Orthopedic, and TSOH were engaged in wrongdoing. However, Allum's unsubstantiated allegations, which remain unsubstantiated, did not give him reason to videotape the impairment evaluation.[24]

¶ 95 Because a claimant cannot unjustifiably refuse to attend an impairment evaluation and thereby remain indefinitely eligible for TTD benefits, State Fund had at least three options after Allum skipped his impairment evaluation. State Fund could have terminated Allum's TTD benefits under § 39-71-1106(1) and/or (3), MCA, and waited for Allum to cooperate with the claims process. Or, State Fund could have asked a physician to consider the JAs and, if the physician approved alternative employment, terminated Allum's TTD benefits under § 39-71-609(2) and (2)(c), MCA, and waited for Allum to pursue claims for a PPD award and an impairment award under § 39-71-703, MCA. Or, in addition to having the physician review the JAs, State Fund also had the option, though it was not required, to ask the physician to determine Allum's impairment rating based on a medical records review[25] and, thereafter, pay Allum a PPD award and/or an impairment award if he was entitled to such awards under § 39-71-703, MCA. This Court cannot fault State Fund for choosing the third option, which resulted in the prompt payment of Allum's impairment award. State Fund did not violate any of Allum's rights when it did so.

¶ 96 As a final point, this Court need not decide the dispute over Allum's assertion that State Fund illegally terminated his TTD benefits in January 2019 because it cited the wrong subsection of § 39-71-1106, MCA. Allum points out that one basis that State Fund gave for terminating his TTD benefits was that he refused to attend an impairment evaluation unless he could videotape it and that State Fund referred to an impairment

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[23] *Mohr v. Mont. Fourth Judicial Dist. Court,* 202 Mont. 423, 424, 660 P.2d 88, 88 (1983). *See also Hegwood v. Mont. Fourth Judicial Dist. Court*, 2003 MT 200, ¶ 13, 317 Mont. 30, 75 P.3d 308 (holding that trial courts have discretion to place protective measure upon the IME process, such as representation during the entire examination and videotaping, when warranted "based on the facts presented"); *Haman v. Wausau Ins. Co.,* 2007 MTWCC 49, ¶¶ 7, 11, 18, 20, 20a, 20b (ruling that claimant could videotape her second IME with the physician who conducted the first IME because such a protective measure was warranted given the "conflicting recollections" as to what was said and what occurred during the first IME); *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶ 31 (ruling that a claimant may obtain a protective measure for an IME, such as videotaping, when there is a legitimate problem or issue and the proposed protective measure will remedy or alleviate that specific problem or issue.); *Heffernan v. Safety Nat'l Cas. Corp*., 2017 MTWCC 18, ¶ 14 (ruling that claimant did not establish that protective measure of audiotaping the history portion of her IME was warranted).

[24] *See Hegwood,* ¶¶ 3, 10, 14 (holding that allegations that the examiner "no longer practices medicine and, instead, conducts IMEs for 'insurance companies and defense counsel full time' " and was an "examiner for hire" were insufficient to allow Hegwood's counsel to attend and record the entire IME).

[25] *See Estate of Hirth v. Mont. State Fund*, 2012 MTWCC 47, ¶¶ 4, 6 (ruling that two physicians' opinions of a decedent's impairment rating, which were based entirely upon medical records reviews, were admissible and that the fact that the physicians based their opinions on medical records reviews went to the weight, and not to the admissibility, of their opinions).

evaluation as "treatment." Thus, Allum asserts that State Fund must have been relying upon subsection (2) of § 39-71-1106, MCA, which provides that an insurer can terminate benefits if the claimant unreasonably refuses recommended treatment. Allum is correct that attending an impairment evaluation is not treatment, and this Court agrees that State Fund should have relied upon subsections (1) and/or (3), which provide that an insurer can terminate benefits when the claimant refuses to cooperate with the treating physician or when the claimant refuses to provide health care information. However, as set forth above, State Fund had other legal grounds to terminate Allum's TTD benefits in January 2019, specifically because he had reached MMI and had been released to return to work in jobs that paid more than his time-of-injury job. Thus, it is unnecessary for this Court to address whether a claimant is entitled to retroactive TTD benefits because the insurer cited the wrong subsection in its termination letter.

¶ 97 For the foregoing reasons, Allum is not entitled to additional TTD benefits.

Issue Two: Whether Petitioner is entitled to further permanent partial disability (PPD) benefits, including impairment benefits, and if so for what time period.

¶ 98 Section 39-71-116(27), MCA, states:

> (27) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum medical healing:
>
> (a) has a permanent impairment, as determined by the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, that is established by objective medical findings for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease and may not be based exclusively on complaints of pain.
>
> (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and
>
> (c) has an actual wage loss as a result of the injury.

¶ 99 Section 39-71-703, MCA, states, in relevant part:

> (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
>
> (a) has an actual wage loss as a result of the injury; and
>
> (b) has a permanent impairment rating as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease that:
>
> (i) is not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and

(iii) is more than zero.

(2) When a worker receives a Class 2 or greater class of impairment as converted to the whole person, as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition, and has no actual wage loss as a result of the compensable injury or occupational disease, the worker is eligible to receive payment for an impairment award only.

¶ 100 Here, while Allum is no longer entitled to TTD benefits, has an impairment that impairs his ability to work, and has an impairment rating under the AMA *Guides* 6th Ed., he did not suffer an actual wage loss as a result of his injury. Therefore, he does not have a "permanent partial disability" under the definition in § 39-71-116(27), MCA, and is not entitled to any PPD benefits under § 39-71-703(1)(a), MCA. Because Allum has a Class 2 impairment under the AMA *Guides* 6th Ed. and no actual wage loss, his claim falls under § 39-71-703(2), MCA, and the only benefit to which he was entitled was his impairment award, which State Fund has paid in full.

Issue Three: Whether Petitioner is entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 101 Section 39-71-2907, MCA, states:

(1) 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:

. . . .

(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.

¶ 102 Here, State Fund's termination of Allum's TTD benefits in January 2019 and its denial of his claim for additional PPD benefits were reasonable. Accordingly, Allum is not entitled to a penalty under § 39-71-2907, MCA.

JUDGMENT

¶ 103 Allum is not entitled to additional TTD benefits.

¶ 104 Allum is not entitled to additional PPD benefits.

¶ 105 Allum is not entitled to a penalty under § 39-71-2907, MCA.

¶ 106 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.

DATED this 28th day of January, 2020.

/s/ DAVID M. SANDLER
JUDGE

c: Robert L. Allum
Thomas E. Martello/Melissa Quale

Submitted: December 17, 2019