IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 27

WCC No. 2011-2751

MARLON CLAPHAM

Petitioner

vs.

TWIN CITY FIRE INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PETITIONER

Summary: Petitioner moved for summary judgment, arguing that Respondent violated the provisions of § 39-71-608, MCA, when it agreed to pay his claim under a reservation of rights and then refused to pay medical expenses and failed to accept or deny his claim, or request authorization to continue paying his claim under the statute, after the 90-day time period had expired. Petitioner contends he is entitled to acceptance of his claim, attorney fees, and a penalty. Respondent admits it did not pay Petitioner's medical expenses and that it did not accept or deny his claim within 90 days as required by the statute. However, Respondent argues that it was not obligated to pay any benefits under § 39-71-608, MCA, and that the only consequence it may face for failing to comply with the 90-day deadline is attorney fees and a penalty if the claim is later adjudged compensable.

Held: Petitioner is not entitled to acceptance of his claim for Respondent's failure to obtain written consent to make compensation payments for more than 90 days under a reservation of rights. However, Petitioner is entitled to a penalty if his claim is found to be compensable. Respondent is obligated to pay certain medical expenses incurred during the time period it placed Petitioner's claim under § 39-71-608, MCA.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-608.** Section 39-71-606(5), MCA, which specifically limits the remedies available for noncompliance with the statute to attorney fees and a penalty, likewise applies to claims placed under § 39-

71-608, MCA. It would be absurd to hold an insurer who invokes § 39-71-608, MCA, potentially liable for automatic acceptance of the claim while an insurer who simply denies the claim would not face the possibility of this action.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-606. Section 39-71-606(5), MCA, which specifically limits the remedies available for noncompliance with the statute to attorney fees and a penalty, likewise applies to claims placed under § 39-71-608, MCA. It would be absurd to hold an insurer who invokes § 39-71-608, MCA, potentially liable for automatic acceptance of the claim while an insurer who simply denies the claim would not face the possibility of this action.

Claims: Acceptance. Section 39-71-606(5), MCA, which specifically limits the remedies available for noncompliance with the statute to attorney fees and a penalty, likewise applies to claims placed under § 39-71-608, MCA. It would be absurd to hold an insurer who invokes § 39-71-608, MCA, potentially liable for automatic acceptance of the claim while an insurer who simply denies the claim would not face the possibility of this action.

Remedies: Failure to Comply with 39-71-608. The remedy for failure to comply with § 39-71-608, MCA, is found within § 39-71-606(5), MCA: "[A]n insurer who fails to comply with 39-71-608 . . . may be assessed a penalty under 39-71-2907 if a claim is [found] compensable . . . ."

Penalties: Insurers. The remedy for failure to comply with § 39-71-608, MCA, is found within § 39-71-606(5), MCA: "[A]n insurer who fails to comply with 39-71-608 . . . may be assessed a penalty under 39-71-2907 if a claim is [found] compensable . . . ."

Insurers: Duties. Respondent's argument that placing a claim under § 39-71-608, MCA, does not obligate it to pay benefits but only permits it to do so if it feels like it is without merit. The use of "may" in a statute does not give an insurer discretion to decide to deny a claimant's request for benefits to which the claimant is otherwise entitled. The legislature may not delegate absolute discretion to insurers, and an insurer is obligated to pay benefits, including medical benefits, during the time period it placed the claim under § 39-71-608, MCA.

Legislative Power, Delegation of. The legislature may not delegate absolute discretion to insurers. Therefore, Respondent's argument that placing a claim under § 39-71-608, MCA, does not obligate it to pay benefits but only permits it to do so if it feels like it is without merit. The use of "may" in a statute does not give an insurer discretion to decide to deny a claimant's request for benefits to which the claimant is otherwise entitled.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-615. Section 39-71-615, MCA, is not a separate method by which insurers may choose to pay medical benefits under a reservation of rights except for non-wage-loss cases. It therefore is inapplicable to situations where the claimant incurs a wage loss.

Claims: Reservation of Rights. Section 39-71-615, MCA, is not a separate method by which insurers may choose to pay medical benefits under a reservation of rights except for non-wage-loss cases. It therefore is inapplicable to situations where the claimant incurs a wage loss.

¶ 1 Petitioner Marlon Clapham moves this Court for summary judgment in his favor. Clapham contends that although Respondent Twin City Fire Insurance Company (Twin City) invoked § 39-71-608, MCA, regarding his occupational disease claim, it failed to abide by the statute's requirements: Specifically, Clapham contends Twin City failed to accept or deny his claim within the time allowed under the statute, and that it failed to pay medical benefits during the time it placed his claim under the purview of the statute. Clapham argues that as a result of Twin City's failure to comply with the provisions of § 39-71-608, MCA, he is entitled to acceptance of his claim and for reasonable attorney fees and a penalty, pursuant to §§ 39-71-611, -612, and -2907, MCA.[1]

¶ 2 Twin City opposes Clapham's motion. While it acknowledges that it failed to comply with the provisions of § 39-71-608, MCA, it argues that the remedy Clapham seeks – acceptance of his claim – is not an appropriate remedy and would lead to absurd results. Twin City further argues that it may invoke § 39-71-608, MCA, and not be obligated to pay any benefits demanded by a claimant during the time the claim is placed under the statute.[2]

---

[1] Petitioner's Motion for Summary Judgment and Brief in Support (Opening Brief), Docket Item No. 36. Although Clapham moved for summary judgment, this Order ultimately resolves only some of the issues Clapham and Twin City have presented for resolution at trial.

[2] Respondent's Response to Petitioner's Motion for Summary Judgment (Response Brief), Docket Item No. 45.

Undisputed Facts[3]

¶ 3 On or about November 29, 2010, Clapham filed a First Report of Injury or Occupational Disease relating to an occupational disease he claims to have sustained to his low back in his employment as a machinist with H-E Parts International, LLC/Crown Parts & Machine, Inc. (Crown Parts).

¶ 4 By letter dated January 7, 2011, Twin City indicated temporary total disability (TTD) benefits would be paid to Clapham under § 39-71-608, MCA, pending further investigation of the compensability of Clapham's claim. Twin City further stated it was requesting an additional 90 days under § 39-71-608, MCA, to investigate the claim.

¶ 5 Twin City continued to pay Clapham TTD benefits after the 90 days for investigation under § 39-71-608, MCA, had elapsed and paid some medical benefits.

¶ 6 Twin City denied authorization for certain treatment recommendations from Clapham's physicians and has delayed authorization for others. Twin City has also declined to pay certain medical expenses relating to Clapham's treatment for his low-back condition.

¶ 7 According to his treating physician, Clapham's low-back condition has worsened as a result of the delay in his receipt of medical treatment for that condition.

¶ 8 The 90-day review period Twin City was entitled to ended on or about April 7, 2011. Prior to and after that date, Clapham made repeated requests that his claim be accepted with payment of appropriate wage-loss and medical benefits.

¶ 9 Twin City has not obtained written consent from Clapham, or approval from the Department of Labor and Industry, to make compensation payments for more than 90 days under a reservation of rights as required under § 39-71-608, MCA.

¶ 10 Twin City has not formally accepted or denied Clapham's claim as of the date of this motion.

Analysis and Decision

¶ 11 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment

---

[3] Opening Brief at 2-3. Although Twin City alleges that "significant questions of fact warranting resolution at trial remain," (Response Brief at 9) it does not dispute any of the "Uncontroverted Facts" Clapham enumerates in his Opening Brief.

as a matter of law.[4] The material facts necessary for disposition of certain issues in this case are undisputed. Accordingly, this case is appropriate for partial summary disposition.

¶ 12 An employee's last day of work is the point in time from which an occupational disease claim must flow.[5] Clapham's last day of work with Crown Parts was on November 24, 2010.[6] Therefore the 2009 statutes apply.

¶ 13 Section 39-71-608, MCA, provides:

> (1) An insurer may, after written notice to the claimant and the department, make payment of compensation benefits within 30 days of receipt of a claim for compensation without the payments being construed as an admission of liability or a waiver of any right of defense.
>
> (2) An insurer may not make payments pursuant to this section for more than 90 days without:
>
> (a) written consent of the claimant; or
>
> (b) approval of the department.

¶ 14 Clapham raises two distinct issues regarding § 39-71-608, MCA: whether he is entitled to acceptance of his claim, plus attorney fees and a penalty, for Twin City's failure to obtain written consent from Clapham or approval from the Department of Labor and Industry to make compensation payments for more than 90 days under a reservation of rights; and whether, during the 90-day review period, Twin City was obligated to pay certain medical benefits which it refused to pay.

Issue 1. Is Clapham entitled to acceptance of his claim, plus attorney fees and a penalty, for Twin City's failure to obtain written consent from Clapham, or approval from the Department of Labor and Industry, to make compensation payments for more than 90 days under a reservation of rights?

¶ 15 As set forth in the Undisputed Facts above, Twin City failed to accept or deny Clapham's claim within 90 days, and did not receive written permission to continue paying his benefits under § 39-71-608, MCA. Therefore, Clapham argues, Twin City is liable for his workers' compensation claim.[7] Clapham points to *Haag v. Montana*

---

[4] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[5] *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 27, 346 Mont. 141, 194 P.3d 77.

[6] Amended Petition for Hearing at 2, Docket Item No. 22.

[7] Opening Brief at 5-6.

Schools Group Ins. Auth., in which the Montana Supreme Court held that an insurer who failed to accept or deny a claim within 30 days as required by § 39-71-606, MCA, was therefore liable for the claim.[8] Clapham acknowledges that the legislature later amended § 39-71-606, MCA, to include § 39-71-606(5), MCA, which states: "Failure of an insurer to comply with the time limitations required in this section does not constitute an acceptance of a claim as a matter of law. However, an insurer who fails to comply with 39-71-608 or this section may be assessed a penalty under 39-71-2907 if a claim is determined to be compensable by the workers' compensation court." Clapham argues that the present situation is distinguishable because Twin City paid the claim under § 39-71-608, MCA, which does not have language similar to that found in § 39-71-606(5), MCA.[9]

¶ 16 Twin City argues that its failure to obtain the necessary extension to allow payments under § 39-71-608, MCA, beyond 90 days does not constitute acceptance of Clapham's claim as a matter of law.[10] Twin City argues that the legislature clearly intended the scope of § 39-71-606(5), MCA, to encompass the situation presently before the Court. Twin City points out that § 39-71-606(5), MCA, specifically references § 39-71-608, MCA, arguing, "By providing that a failure to comply with the extension requirements of § 39-71-608, MCA[,] could subject an insurer to a penalty, the legislature necessarily implied that such a failure was not to be deemed an acceptance of the claim as a matter of law."[11]

¶ 17 Statutory interpretation is a holistic endeavor that must consider the statute's text, language, structure, and object. When construing a statute, the Court must ascertain and give effect to the legislative intent. If the words of the statute are clear and plain, the Court will discern the legislative intent from the text of the statute.[12] The Court resorts to the legislative history only if legislative intent cannot be determined from the plain wording of the statute.[13] The Montana Supreme Court has further held that statutes must be construed to avoid absurd results.[14]

---

[8] *Haag*, 274 Mont. 109, 115, 906 P.2d 693, 697 (1995).

[9] Opening Brief at 6-7.

[10] Response Brief at 2.

[11] Response Brief at 3.

[12] *Fliehler v. Uninsured Employers' Fund*, 2002 MT 125, ¶ 13, 310 Mont. 99, 48 P.3d 746. (Citations omitted.)

[13] *In the Matter of David Clarke*, 271 Mont. 412, 416, 897 P.2d 1085, 1088 (1995). (Citation omitted.)

[14] *S.L.H. v State Compen. Mut. Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, 15 P.3d 948.

¶ 18 In this instance, it is clear that the language of § 39-71-606(5), MCA, which specifically limits the remedies available for noncompliance with the statute to attorney fees and a penalty, likewise applies to claims placed under § 39-71-608, MCA. As Twin City points out in its brief, it would be absurd to hold an insurer who invokes § 39-71-608, MCA, potentially liable for automatic acceptance of the claim while an insurer who simply denies the claim would not face the possibility of this adverse action.[15]

¶ 19 Moreover, in *Haag*, the Montana Supreme Court recognized the interrelatedness of §§ 39-71-606 and -608, MCA, in its holding.[16] The court further recognized that §§ 39-71-606 and -608, MCA, contain "the same thirty-day period for the insurer's action . . . ."[17] The court noted that § 39-71-608, MCA, does not merely provide an alternative for an insurer, but, read together with § 39-71-606(1), MCA, reemphasizes the legislature's intent to require an insurer to take action within 30 days.[18]

¶ 20 The remedy for failure to comply with § 39-71-608, MCA, is found within § 39-71-606(5), MCA: "[A]n insurer who fails to comply with 39-71-608 . . . may be assessed a penalty under 39-71-2907 if a claim is determined to be compensable by the workers' compensation court." Therefore, I conclude that, if I determine that Clapham's claim is compensable, Twin City shall be assessed a penalty under § 39-71-2907, MCA, for its failure to comply with the terms of § 39-71-608, MCA.

Issue 2. Is Twin City obligated to pay certain medical expenses incurred during the time period it placed Clapham's claim under § 39-71-608, MCA?

¶ 21 As set forth in the facts above, once Twin City placed Clapham's claim under § 39-71-608, MCA, it began paying Clapham TTD benefits. However, it did not pay Clapham's medical expenses. Clapham argues that Twin City became obligated to pay medical benefits when it placed his claim under § 39-71-608, MCA. Clapham points out that § 39-71-608(1), MCA, says, in part, "An insurer may . . . make payment of compensation benefits . . . ." Clapham argues that "compensation benefits" includes medical benefits under the Workers' Compensation Act, and that when Twin City placed his claim under § 39-71-608, MCA, it became obligated to pay reasonable and related

[15] Response Brief at 4-5.

[16] "[W]e hold that when an insurer fails to act on a claim for compensation within thirty days, either by accepting or denying liability pursuant to § 39-71-606(1), MCA, or by beginning payments with a reservation of rights under § 39-71-608, MCA, the claim is deemed accepted as a matter of law." 274 Mont. at 115, 906 P.2d at 697.

[17] *Haag*, 274 Mont. at 114, 906 P.2d at 696-97.

[18] *Id.*

medical expenses on his claim.[19] Clapham further notes that ARM 24.29.601(5) defines "compensation benefits" as "wage loss, legal, medical, rehabilitation and all other benefits that are payable under the Montana Workers' Compensation and Occupational Disease Acts, including assessments or financial obligations."[20]

¶ 22 Twin City contends that § 39-71-608, MCA, does not obligate it to pay ***any*** benefits, but only permits it to do so if it feels like it.[21] Twin City argues that under the statute, "[a]n insurer ***may*** . . . make payment[s] . . ." but the statute does not require it to do so.[22] Twin City's argument is without merit. In several contexts, this Court has previously held that the use of "may" in a statute does not give an insurer discretion to decide to deny a claimant's request for benefits to which the claimant is otherwise entitled.[23] Underlying these decisions is *Ingraham v. Champion Int'l*, in which the Montana Supreme Court held that the legislature may not delegate absolute discretion to insurers.[24]

¶ 23 Twin City contends that although the Montana Supreme Court has consistently held that, specifically in the context of § 39-71-2907, MCA, the term "compensation benefits" encompasses medical benefits, in the "ordinary administration of a claim," the term "medical benefits" is distinct from "compensation benefits."[25] Twin City argues that § 39-71-704(1), MCA, indicates that medical benefits are in addition to, and separate from, "compensation benefits," and therefore it was not obligated to pay medical benefits when it placed Clapham's claim under § 39-71-608, MCA. Twin City also contends that payment of medical benefits under a reservation of rights is separately found under § 39-71-615, MCA.

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

---

[19] Opening Brief at 3-4.

[20] Petitioner's Notice of Additional Authority, Docket Item No. 61.

[21] Response Brief at 6.

[22] *Id.*

[23] *See, e.g., Applegate v. Liberty Northwest Ins. Corp.*, 2002 MTWCC 45, ¶ 15. ("Respondent next argues that since section 39-71-1025, MCA, states that auxiliary benefits 'may be paid by the insurer' it has 'discretion' to deny claimant's request. The argument is without merit."); *Tinker v. Montana State Fund*, 2008 MTWCC 33, ¶ 25 ("Section 39-71-601(2), MCA, provides that the insurer may waive the time requirement for up to an additional 24 months . . . . Notwithstanding the language in the statute which appears to vest the insurer with the sole discretion to waive the time requirement . . . [waiver] . . . is not discretionary if the claimant would otherwise qualify for waiver under the statute.") (Internal citations omitted.)

[24] *Ingraham*, 243 Mont. 42, 48, 793 P.2d 769, 772 (1990).

[25] Response Brief at 5-6.

> (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:
>
> (a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires. . . .

¶ 25 Section 39-71-615, MCA, states:

> (1) An insurer may pay a medical claim that is based upon the report of a nonwage loss injury or occupational disease without the payments being construed as an acceptance of liability for the claim.
>
> (2) An insurer shall, within 10 days of making payment under subsection (1), notify the worker of the payment of the medical claim without acceptance of liability.
>
> (3) Upon written request by a worker for the payment of indemnity benefits or for a determination of liability, the insurer shall investigate the claim to determine liability for the injury or occupational disease under 39-71-606 or 39-71-608.

¶ 26 On its face, it is clear that § 39-71-615, MCA, applies only to a specific subset of cases which do not include Clapham's: cases which report a ***non-wage-loss injury or occupational disease***. Clapham's claim would not fall under § 39-71-615, MCA, under the circumstances because he did suffer a wage loss – as evidenced by Twin City's payment of TTD benefits while simultaneously and inexplicably refusing to pay medical benefits. Section 39-71-615, MCA, is not a separate method by which insurers may choose to pay medical benefits under a reservation of rights ***except for*** non-wage-loss cases. It is inapposite to the present case.

¶ 27 Essentially, what is left of Twin City's argument is this: medical benefits are a class of benefits separate from "compensation benefits," and an insurer may agree to pay "compensation benefits" via § 39-71-608, MCA, under a reservation of rights, but unless and until it accepts liability, it may only pay medical benefits on non-wage-loss claims via § 39-71-615, MCA. Therefore, if a claimant suffers a wage loss as a result of an alleged industrial injury or occupational disease, the insurer cannot pay medical benefits under a reservation of rights. As noted earlier in this Order, statutes must be construed to avoid absurd results.[26] The interpretation Twin City urges would lead to the absurd result of permitting insurers to pay a claimant's medical expenses without

---

[26] *S.L.H. v State Compen. Mut. Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, 15 P.3d 948.

admitting liability if the claimant had no wage loss, but would not allow insurers to pay medical expenses under a reservation of rights if the claimant had a wage loss.

¶ 28 Finally, Twin City contends that if the Court concludes that an insurer is compelled to make medical payments if it places a claim under § 39-71-608, MCA, Clapham is still obligated to establish a causal connection between the medical benefits he seeks and the conditions he claims are work-related. This argument is not pertinent given the stipulated facts in this case. As set forth above, Twin City declined to pay for treatment for Clapham's low-back condition – the condition which Clapham contends is related to an occupational disease. This argument addresses a hypothetical situation not before the Court and I therefore will not consider it.

¶ 29 For the reasons set forth above, I hold that when Twin City chose to place Clapham's claim under § 39-71-608, MCA, it became obligated to pay the medical expenses relating to Clapham's treatment for his low-back condition.

ORDER

¶ 30 Clapham is not entitled to acceptance of his claim for Twin City's failure to obtain written consent from Clapham, or approval from the Department of Labor and Industry, to make compensation payments for more than 90 days under a reservation of rights.

¶ 31 Clapham is entitled to a penalty for Twin City's failure to obtain written consent from Clapham, or approval from the Department of Labor and Industry, to make compensation payments for more than 90 days under a reservation of rights, if his claim is ultimately found to be compensable.

¶ 32 Twin City is obligated to pay certain medical expenses incurred during the time period it placed Clapham's claim under § 39-71-608, MCA.

DATED in Helena, Montana, this 1st day of August, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David T. Lighthall
Joe C. Maynard
Submitted: December 19, 2011