IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 29

WCC No. 2011-2775

CHRISTIAN CORNELIUS

Petitioner

vs.

LUMBERMEN'S UNDERWRITING ALLIANCE

Respondent

and

EMPLOYERS INSURANCE COMPANY

Respondent.

ORDER DENYING RESPONDENT EMPLOYERS INSURANCE COMPANY'S MOTIONS FOR A NEW TRIAL, AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND FOR RECONSIDERATION

Summary: Respondent moved for a new trial, amendment to this Court's findings of fact and conclusions of law, and reconsideration of this Court's decision, arguing that the Court erred in finding it liable for Petitioner's occupational disease claim and for awarding Petitioner TTD and medical benefits, plus her attorney fees and a penalty.

Held: Respondent has not proven that it is entitled to any of the relief sought in its motions. Its motions for a new trial, amendment to the findings of fact and conclusions of law, and reconsideration are denied.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.344.** Where the only mention of Respondent's request for amendment is in the caption of its petition, Respondent has not adequately set forth specifically and in full detail the relief requested by its motion to amend and its motion is therefore denied.

Procedure: Post-Trial Proceedings: Amendment to Findings. Where the only mention of Respondent's request for amendment is in the caption of its petition, Respondent has not adequately set forth specifically and in full detail the relief requested by its motion to amend and its motion is therefore denied.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 25-11-102. Where Respondent moved for a new trial but did not set forth any specific allegations of abuse of discretion, irregularities, accident, or surprise, and where its "newly discovered evidence" relates to events which occurred months after trial concluded, Respondent has not set forth grounds upon which the Court will grant a new trial under § 25-11-102, MCA.

Procedure: Post-Trial Proceedings: New Trial: Generally. Where Respondent moved for a new trial but did not set forth any specific allegations of abuse of discretion, irregularities, accident, or surprise, and where its "newly discovered evidence" relates to events which occurred months after trial concluded, Respondent has not set forth grounds upon which the Court will grant a new trial under § 25-11-102, MCA.

Procedure: Post-Trial Proceedings: New Trial: Generally. Where Respondent requested a new trial because of events which occurred months after trial concluded, the Court, relying on previous decisions, held that it cannot retry a case because of subsequent developments except that a change in a claimant's condition and disability could be grounds for a new petition under § 39-71-2909, MCA. Since Respondent's "newly discovered evidence" consists only of allegations that Petitioner was briefly employed months after trial, the Court concluded a new trial was not warranted.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.337. Where Respondent set forth a list of alleged "facts [which] deserve some more attention," but offered no insight into what it expected the Court to do or how the list of items should cause the Court to reconsider its decision, the Court concluded that Respondent had not set forth grounds entitling it to reconsideration of the Court's decision.

Procedure: Reconsideration. Where Respondent set forth a list of alleged "facts [which] deserve some more attention," but offered no insight into what it expected the Court to do or how the list of items should cause the Court to reconsider its decision, the Court concluded that Respondent had not set forth grounds entitling it to reconsideration of the Court's decision.

Medical Evidence: Objective Medical Findings. Where an e-mail sent by one medical provider did not contain objective medical findings, but where the records of two other medical providers contained objective medical findings specifically noted by the Court, the Court concluded that the medical evidence, taken together with Petitioner's testimony, demonstrated that she suffered from an occupational disease.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. Although Respondent argued that Petitioner could not be eligible for TTD benefits because the facts of her case did not satisfy § 39-71-701(1)(a), MCA, the Court held that Petitioner was eligible for TTD benefits because the facts of her case clearly satisfied § 39-71-701(1)(b), MCA.

Wages: Wages Defined. Where Respondent raised no argument that Petitioner's "service-for-service agreement" in which she exchanged work for veterinary services, the fact that Petitioner, subsequent to trial, did receive wages for post-trial work she performed for the veterinary clinic does not change her eligibility for TTD benefits. However, if the parties cannot agree on which post-trial weeks Petitioner received wages which would obviate Respondent's liability for TTD benefits for specific weeks, the parties may raise this matter in a new petition before this Court.

Benefits: Temporary Total Disability Benefits. Where Respondent raised no argument that Petitioner's "service-for-service agreement" in which she exchanged work for veterinary services, the fact that Petitioner, subsequent to trial, did receive wages for post-trial work she performed for the veterinary clinic does not change her eligibility for TTD benefits. However, if the parties cannot agree on which post-trial weeks Petitioner received wages which would obviate Respondent's liability for TTD benefits for specific weeks, the parties may raise this matter in a new petition before this Court.

Procedure: Pretrial Order. Where the issue as presented in the Pretrial Order was "Which, if either" insurer was liable for Petitioner's claim, but no evidence or arguments were brought before the Court that suggested that neither insurer was liable for Petitioner's condition, the Court did not err in holding, "No one has argued that [the] condition is not work-related." Simply suggesting in the agreed-upon issue that the possibility that Petitioner's condition was not work-related is not the same as actually arguing so at trial.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. While Respondent believes it should escape its duty to pay benefits under § 39-71-407(5), MCA, by suggesting it is possible that an argument might be made that Petitioner's condition is not work-related and therefore neither insurer would be liable, Respondent cannot escape such a duty if it did not mount an effective defense as to why it did not pay Petitioner's benefits and then seek indemnification from the other insurer.

Attorney Fees: Reasonableness of Insurers. While Respondent argued that it was not unreasonable for it to refuse to pay Petitioner's benefits under § 39-71-407(5), MCA, Respondent cannot escape its duty to pay these benefits and seek indemnification from the other insurer by merely suggesting the possibility of raising an argument that Petitioner's condition is not work-related. The Court concluded that Respondent failed to escape its duty to pay benefits under the statute precisely because it raised no arguments to support its suggestion that Petitioner's condition might be unrelated to work.

Penalties: Insurers. While Respondent argued that it was not unreasonable for it to refuse to pay Petitioner's benefits under § 39-71-407(5), MCA, Respondent cannot escape its duty to pay these benefits and seek indemnification from the other insurer by merely suggesting the possibility of raising an argument that Petitioner's condition is not work-related. The Court concluded that Respondent failed to escape its duty to pay benefits under the statute precisely because it raised no arguments to support its suggestion that Petitioner's condition might be unrelated to work.

¶ 1 Respondent Employers Insurance Company (Employers) moves this Court to grant Employers a new trial, amend its Findings of Fact, Conclusions of Law and Judgment, and/or reconsider its Findings of Fact, Conclusions of Law and Judgment in

this matter.[1] Employers contends that the Court erred in holding it liable for Petitioner Christian Cornelius' occupational disease claim, awarding Cornelius temporary total disability (TTD) and medical benefits, and concluding that Employers is liable for Cornelius' attorney fees and a penalty.[2] Cornelius and Respondent Lumbermen's Underwriting Alliance (Lumbermen's) both oppose Employers' combined motions.[3]

¶ 2 Employers contends that it is entitled to relief from the Findings of Fact, Conclusions of Law and Judgment issued in this matter, either in the form of a new trial, amendment to the findings of fact and conclusions of law, or reconsideration. Employers relies on ARM 24.5.337 and 24.5.344 in seeking this relief.[4] Cornelius responds that the alleged errors Employers has set forth in its brief in support of its motions do not provide grounds for either reconsideration, amendment, or a new trial, but rather are matters more appropriately heard on appeal.[5] Lumbermen's contends that Employers has not offered valid reasons for its motions and has presented the same arguments it made, and which the Court rejected, at trial.[6]

Employers' Motions to Amend and for a New Trial

¶ 3 Under ARM 24.5.344, any party to a dispute may petition for a new trial or request amendment to the Court's findings of fact and conclusions of law within 20 days after the judgment is served. The party requesting the new trial or amendment shall set forth specifically and in full detail the relief requested. Lumbermen's contends that Employers has failed to satisfy the specificity requirement regarding its request for amendment.[7] Indeed, the only mention of Employers' request for amendment is in the caption of its petition. Therefore, for its motion to amend, I conclude Employers has failed to meet the requirements of ARM 24.5.344(2) in that it did not set forth specifically and in full detail the relief requested by the motion to amend.

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[1] *Cornelius v. Lumbermen's Underwriting Alliance*, 2012 MTWCC 13.

[2] [Employers] Combined Petition for New Trial and/or a Request for Amendment to Findings of Fact and Conclusions of Law and Motion for Reconsideration (Petition), Docket Item No. 20.

[3] Petitioner's Response to Respondent Employers Insurance Co's Petition and Motion for New Trial and/or Reconsideration (Cornelius' Response), Docket Item No. 22, and Respondent Lumbermen's Underwriting Alliance's Response Brief in Opposition to Respondent, Employers Insurance's Combined Petition for New Trial and/or Reconsideration (Lumbermen's Response), Docket Item No. 23, respectively.

[4] Petition at 1.

[5] Cornelius' Response at 1-2.

[6] Lumbermen's Response at 7.

[7] Lumbermen's Response at 3.

¶ 4 As for Employers' motion for a new trial, this Court has held that the applicable grounds for a new trial are found within § 25-11-102, MCA,[8] as limited by § 25-11-103, MCA, which provides that only subsections (1), (3), and (4), apply to cases tried by a court without a jury. The applicable provisions of § 25-11-102, MCA, state:

> The former verdict or other decision may be vacated and a new trial granted on the application of the party aggrieved for any of the following causes materially affecting the substantial rights of the party:
>
> (1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
>
> . . .
>
> (3) accident or surprise that ordinary prudence could not have guarded against;
>
> (4) newly discovered evidence material for the party making the application that the party could not, with reasonable diligence, have discovered and produced at the trial . . . .

¶ 5 Employers does not specify which specific grounds under § 25-11-102, MCA, should entitle it to a new trial. The only argument Employers sets out specific to its motion for a new trial is, "Specifically, it would appear that the evidence of the Petitioner's work history mandates that the award of Temporary Total Disability Benefits be subject to a new trial at the very least."[9] Cornelius points out that Employers has not alleged any specific abuse of discretion nor has it set forth any alleged irregularities in this Court's proceedings. Cornelius further notes that Employers has set forth no allegations of accident or surprise. Cornelius contends that the only remaining evidence Employers may be relying upon is the arguable "newly discovered evidence" that she was briefly employed during the spring of 2012 – months after the trial concluded.[10] Both Cornelius and Lumbermen's point to *Burglund v. Liberty Mut. Fire Ins. Co.*, in which the Montana Supreme Court held that it was within this Court's discretion to deny a motion for a new trial from an injured worker who argued his industrial injury allegedly forced him to stop working 17 months after his trial.[11] In its underlying decision, this Court stated that it cannot retry a case because of subsequent developments, but that a change in a claimant's condition and disability could be grounds for a new petition under

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[8] *See, e.g.*, *Romans v. Liberty Mut. Fire Ins. Co.*, 2000 MTWCC 32A (*aff'd,* 2001 MT 64N).

[9] [Employers] Memorandum in Support of Petition and Motion for New Trial and/or Reconsideration (Opening Brief), Docket Item No. 21 at 6.

[10] Cornelius' Response at 2.

[11] *Burglund*, 279 Mont. 298, 305, 927 P.2d 1006, 1010 (1996).

§ 39-71-2909, MCA.[12] Likewise in the present case, Employers asks this Court to revisit its decision based on developments which occurred post-trial. Employers has not set forth grounds which convince me a new trial is warranted in this instance, and therefore its motion for a new trial is denied.

Employers' Motion for Reconsideration

¶ 6 Employers further moves this Court for reconsideration of its decision. Under ARM 24.5.337, any party may move for reconsideration of a decision of this Court within 20 days after the decision is served.

¶ 7 In its brief, Employers sets forth fourteen items which it calls "facts [which] deserve some more attention."[13] Employers does not allege that the Court overlooked any of these items, and I interpret Employers' request for "attention" to mean that Employers believes this Court did not give enough weight to these fourteen items. However, Employers does not offer any direction as to what exactly it expects the Court to make of these items or how this list should cause the Court to reconsider its decision in this case. In its brief, Lumbermen's asserts that Employers set forth these items to attack Cornelius' credibility, and argues that reconsideration is unwarranted because the Court specifically found Cornelius to be credible.[14]

¶ 8 Employers has not asked the Court to reconsider its credibility finding regarding Cornelius and therefore, I do not see the relevancy of many of the items Employers set forth for "more attention." However, Employers has set forth three arguments on which it alleges it is entitled to reconsideration which incorporate some of these items. Employers contends that: the Court's conclusion that it is liable for Cornelius' occupational disease claim is erroneous because the conclusion was not based on objective medical findings; the Court erred in concluding that Cornelius is entitled to TTD benefits because she was involuntarily terminated and continued to work; and the Court erred in awarding Cornelius attorney fees and a penalty.

I. Employers' Liability for Cornelius' Occupational Disease Claim

¶ 9 Employers contends that the Court's determination that Cornelius suffered from an occupational disease is in error because the Court relied upon an e-mail sent by K. Allan Ward, M.D., which does not contain objective medical findings. Employers acknowledges that the Court specifically noted objective medical findings from the

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[12] *Burglund v. Liberty Mutual Northwest Ins. Co.*, 1995 MTWCC 31.

[13] Opening Brief at 2.

[14] Lumbermen's Response at 4. *See Cornelius*, ¶ 5.

medical records of John G. VanGilder, M.D., and physical therapist Jeff Swift, R.P.T. However, Employers argues that without Dr. Ward also setting forth objective medical findings, the Court cannot rely on his opinion.[15] Employers cites to no statute, rule, or case law which requires all the elements for a claim to be found within a single medical record. As Lumbermen's notes, the medical evidence and Cornelius' testimony, taken together, demonstrates that she suffered an occupational disease from her employment with Employers' insured.[16] I therefore conclude Employers is not entitled to reconsideration on this issue.

II. Cornelius' Receipt of TTD Benefits

¶ 10 Employers next argues that the Court erred in awarding Cornelius TTD benefits for two reasons: she was terminated from her employment with Employers' insured, and she has worked for another employer subsequent to her termination from her time-of-injury employment. Employers relies on *Carey v. American Home Assurance Co.*, in which I determined that an injured worker whose job position was eliminated was not entitled to TTD benefits.[17] Employers argues that in *Carey*, this Court determined that the claimant was not entitled to TTD benefits because her industrial injury did not cause her wage loss, and that the Court erred in not making a similar determination in the present case.[18]

¶ 11 In *Carey*, the claimant's job position was eliminated as part of a nationwide corporate restructuring of Sam's Club stores.[19] She was working in her time-of-injury position without restrictions when her job was eliminated on May 2, 2007. On May 8, 2007, her treating physician found her to be at maximum medical improvement (MMI) and released her to return to work without restriction.[20] In *Carey*, I concluded that the claimant was not entitled to TTD benefits because she was never statutorily eligible to receive them: although Carey argued that she "requalified" for TTD benefits under § 39-71-701(4), MCA, I held that she could not "requalify" for a benefit she had never qualified for in the first place.[21]

¶ 12 Under § 39-71-701(1), MCA:

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[15] Opening Brief at 3.

[16] Lumbermen's Response at 6.

[17] *Carey*, 2010 MTWCC 3.

[18] Opening Brief at 4.

[19] *Carey*, ¶ 10.

[20] *Carey*, ¶ 18.

[21] *Carey*, ¶¶ 39-41, 44.

> Subject to the limitation in . . . [39-71-701(4), MCA], 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; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

¶ 13 In *Carey*, the claimant had been released to return to the employment in which she was engaged at the time of her industrial injury. In fact, she was working in that employment at the time that her job position was eliminated, and it is undisputed that her treating physician had released her to return to that position or a position with similar physical requirements.[22] Unlike Carey, at the time of trial Cornelius had not been released to return to her time-of-injury employment or to employment with similar physical restrictions.[23] Cornelius argues that she is unable to seek work with similar physical requirements due to her lack of a work release from a medical provider, and Employers' refusal to accept liability has precluded her from receiving vocational rehabilitation benefits which could hasten her return to the workforce.[24]

¶ 14 Section 39-71-116(35), MCA, defines temporary total disability as "a physical condition resulting from an injury . . . that results in total loss of wages and exists until the injured worker reaches maximum medical healing." Employers argues that Cornelius is not eligible for TTD benefits because she cannot satisfy § 39-71-701(1)(a), MCA: specifically, that she cannot prove that her total wage loss was a result of an injury. Employers argues that Cornelius suffered a total loss of wages on November 2, 2009, when she was terminated from her employment, and since she was not taken off work until November 4, 2009, her doctor's work restriction did not cause her total wage loss.[25]

¶ 15 However, leaving aside the question of whether Cornelius can satisfy § 39-71-701(1)(a), MCA, the facts as found in this Court's ruling in this matter clearly indicate that Cornelius can satisfy § 39-71-701(1)(b), MCA, and in fact, the Court so held in the

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[22] *Carey*, ¶ 18.

[23] *Cornelius*, ¶¶ 27-28, 35.

[24] Cornelius' Response at 6.

[25] Opening Brief at 4.

underlying decision.[26] As set forth in the underlying decision, Cornelius is eligible for TTD benefits under § 39-71-701(1)(b), MCA.

¶ 16 As to Employers' argument that Cornelius is not entitled to TTD benefits because she worked for a subsequent employer, in *Dostal v. Uninsured Employers' Fund*, I held that an injured worker who had received wages on two occasions after the Uninsured Employers' Fund (UEF) incorrectly terminated her TTD benefits remained eligible for reinstatement of her TTD benefits except that the UEF was relieved of liability for TTD benefits for the weeks in which the claimant received wages.[27] The rule likewise applies here. At trial, Employers raised no argument that Cornelius' "service-for-service agreement" with a veterinary clinic constituted wages. However, Employers now argues that Cornelius subsequently received wages for work she did at the veterinary clinic subsequent to trial. Therefore, I make no determination on these issues, but if the parties cannot agree on which weeks post-trial Cornelius received wages which would obviate Employers' liability for TTD benefits for specific weeks, the parties may bring this matter to the Court on a new petition.

III. The Award of Attorney Fees and Penalty

¶ 17 Employers further argues that it is entitled to reconsideration of the Court's award of attorney fees and a penalty. Employers claims that this Court's imposition of attorney fees and a penalty deprived it of its ability to mount a defense to Cornelius' claim.[28] Employers argues that the Court based its decision on an incorrect premise and further argues that the Court incorrectly relied upon § 39-71-407(5), MCA, in determining that Employers should have paid benefits because this subsection applies only to industrial injuries and not to occupational diseases.[29]

¶ 18 Employers notes that in the underlying decision, this Court stated, "No one has argued that Cornelius' present condition is not work-related."[30] Employers argues that this is incorrect, because one of the issues set forth in the Pretrial Order specifically stated, "Which, ***if either***, of the Respondent insurers is liable for medical benefits payable . . . ."[31] While the issue may have included this language, Employers does not point out to the Court where any party at trial actually set forth any argument that neither

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[26] *Cornelius*, ¶ 52.

[27] *Dostal*, 2012 MTWCC 5, ¶ 56.

[28] Opening Brief at 1.

[29] Opening Brief at 5.

[30] *See Cornelius*, ¶ 56.

[31] *Cornelius*, ¶ 4. (Emphasis added by Employers in Opening Brief at 5.)

insurer was liable for Cornelius' condition. Simply suggesting in the agreed-upon issue that the possibility exists that Cornelius' condition is not work-related is not the same thing as actually arguing so at trial. Since Employers has not drawn the Court's attention to any such argument, Employers has not proven that the Court's statement in the underlying decision is incorrect.

¶ 19 However, Employers further argues that the Court incorrectly relied upon § 39-71-407(5), MCA, which states in pertinent part, "If there is no dispute that an insurer is liable for an injury . . . ." Employers points out that in the present case, Cornelius did not suffer an injury but rather an occupational disease and Employers therefore argues § 39-71-407(5), MCA, is inapplicable. Employers argues that § 39-71-407, MCA, "does have separate provisions dealing with occupational diseases."[32]

¶ 20 Under § 39-71-407(10), MCA, when compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease. In the present case, this employer would be Employers' insured. While Employers emphasizes the use of the word "injury" in § 39-71-407(5), MCA, I note that elsewhere in the underlying decision at issue in this matter, I cited *In re Rusco*, where this Court held:

> Liability, as between insurers, has been the grist of a number of decisions over the past few years. The rules are straightforward. If a claimant has reached MMI with respect to a first industrial injury and he thereafter suffers a work-related, permanent, and material aggravation of his medical condition, then the insurer at risk at the time of the aggravation is liable for compensation and medical benefits attributable to the condition. If, on the other hand, the subsequent aggravation is temporary or immaterial, and the disabling condition results from a natural progression set in motion by the first injury, then the insurer for the original injury is liable for compensation and medical benefits for the condition.[33]

¶ 21 In discussing whether Employers acted unreasonably in adjusting Cornelius' claim, I cited to § 39-71-407(5), MCA, and also referenced *Rusco*, noting that *Rusco* was factually similar and that Employers, like the insurer in *Rusco*, had a duty to pay benefits unless and until it proved that Lumbermen's was liable for those benefits. In *Popenoe v. Liberty Northwest Ins. Corp.*, I found an insurer to have acted unreasonably in refusing to pay benefits in a case which was factually similar to a case in which the

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[32] Opening Brief at 5.

[33] *Montana Contractor Compen. Fund v. Liberty Northwest Ins. Corp. (In re Rusco)*, 2003 MTWCC 10, ¶ 35. (*Citing Burglund v. Liberty Mut. Fire Ins. Co.*, 286 Mont. 134, 950 P.2d 1371 (1997).)

Montana Supreme Court found liability.[34] In the present case, I fail to appreciate why this case should have been treated differently by the insurers in light of *Rusco*. While Employers believes it should escape its duty by suggesting that it is possible that an argument might be made that Cornelius' condition is not work-related and therefore neither insurer would be liable – and that for this Court to conclude otherwise would preclude Employers from mounting a defense – I concluded that Employers' conduct was unreasonable precisely because it did not mount an effective defense as to why it failed to pay Cornelius' claim and then seek indemnification from Lumbermen's. I therefore conclude Employers is not entitled to reconsideration of my decision regarding Cornelius' entitlement to her attorney fees and a penalty under the applicable statutes.

ORDER

¶ 22 Employers' motion to amend findings of fact and conclusions of law is **DENIED**.

¶ 23 Employers' motion for a new trial is **DENIED**.

¶ 24 Employers' motion for reconsideration is **DENIED**.

¶ 25 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 7th day of August, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jay P. Dufrechou/Margaret A. Dufrechou
Charles G. Adams
Kelly M. Wills
Submitted: May 29, 2012

[34] *Popenoe,* 2006 MTWCC 37, ¶ 21.