

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2019 MTWCC 18

WCC No. 2019-4762

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WILLIAM L. LORANGER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

**Summary:** Respondent moves for summary judgment, asserting that Petitioner's claim for PTD benefits — which is based on the combined sequelae of three industrial injuries — is premature because Petitioner has not yet returned to MMI for his right knee injury following right knee surgery and, based on Petitioner's attorney's assertions, is not at MMI for his cervical spine injury. Petitioner has not presented evidence that he is currently at MMI for his right knee injury nor that he is still at MMI for his cervical spine injury, but asserts that this Court can still determine that he is entitled to PTD benefits. In the alternative, Petitioner asserts that this Court should hold a trial to determine whether he is entitled to TTD benefits.

**Held:** Respondent is entitled to summary judgment because Petitioner's claim for PTD benefits is premature. This Court has previously ruled that when a claim for PTD benefits is based on the sequelae from multiple injuries, the claimant must be at MMI for each injury before he is eligible for PTD benefits. Petitioner has not presented sufficient evidence from which this Court could find that he is currently at MMI for either his right knee injury or his cervical spine injury. This Court cannot hold a trial to determine Petitioner's entitlement to TTD benefits because the parties have not mediated that issue; therefore, this Court does not currently have jurisdiction over that dispute.

¶ 1 Respondent Montana State Fund (State Fund) moves for summary judgment, asserting that Petitioner William L. Loranger's claim for permanent total disability (PTD)

benefits is premature because Loranger is no longer at maximum medical improvement (MMI) for his right knee injury.

¶ 2 Loranger asserts that, even assuming he is not currently at MMI for his right knee injury, he remains eligible for PTD benefits. In the alternative, Loranger argues that this Court should hold a trial to determine whether he is entitled to temporary total disability (TTD) benefits.

¶ 3 This Court held a hearing on December 10, 2019.

¶ 4 For the foregoing reasons, this Court grants State Fund's Motion for Summary Judgment.

### FACTS

¶ 5 On August 29, 1987, Loranger suffered a left knee injury while working for Pintler Outfitters. State Fund accepted liability for this claim. In 1990, Loranger reached MMI for his left knee injury.

¶ 6 On December 4, 1993, Loranger suffered a right knee injury while working for Montana Developmental Center. State Fund accepted liability for this claim. In 1996, Loranger reached MMI for his right knee injury.

¶ 7 On February 5, 2008, Loranger suffered a cervical spine injury while working for Montana State Prison. State Fund accepted liability for this claim. On June 9, 2008, Michael T. Gallagher, MD, determined that Loranger was at MMI for his cervical spine injury.

¶ 8 Loranger retired from his job at the Montana State Prison on October 30, 2018.

¶ 9 Loranger asserts that the pain from his injuries forced him to retire, and that, at the time of his retirement, he required additional treatment for his right knee injury and his cervical spine injury, including surgeries. On October 30, 2018, Loranger's attorney sent a demand letter stating, in relevant part:

Mr. Loranger has been forced to leave his employment with Montana State Prison as he can no longer endure the pain in which to work. As you know, Mr. Loranger has been battling severe neck pain for many years. His pain has finally gotten to the point where he cannot tolerate his pain to work. He has been on sick leave because of the pain for approximately the last two weeks (and continues to be on sick leave) and his last day of work is today.

Dr. Blavatsky has requested authorization to perform knee surgery. Please approve that authorization. He will also likely require neck surgery in the near future. Please classify Mr. Loranger as permanently totally disabled

for both conditions and commence payment of total disability benefits based on his February 5<sup>th</sup>, 2008 injury date. If you refuse to authorize his right knee surgery or payment of total disability benefits, please set forth your reasons in writing.

¶ 10 State Fund asserts that Loranger is not currently entitled to any wage-loss benefits on the grounds that he voluntarily retired for reasons unrelated to his injuries, noting that he did not mention suffering from pain in the letter he sent to the Montana State Prison notifying it of his decision to retire. State Fund also notes that Loranger continues to be self-employed at his business.

¶ 11 For Loranger's right knee, Nicholas Blavatsky, MD, diagnosed, "Osteoarthritis . . . end-stage and severe." Thus, on March 28, 2019, Loranger underwent a total knee replacement. Dr. Blavatsky noted that he proceeded to total knee replacement because conservative treatments had not improved Loranger's condition:

A 59-year-old male admitted to the surgical service at St. James on 03/28/2019 for definitive and elective total knee arthroplasty on the right. The patient failed conservative measures including anti-inflammatory preparation, intraarticular injection, activity modifications. X-rays had demonstrated complete ablation of the medial cartilage space with significant adaptive changes of the patellar articulation.

¶ 12 On September 17, 2019, Dr. Blavatsky noted that Loranger was satisfied with the results of the total knee replacement and that Loranger had "regained full extension and adequate and functional flexion." Dr. Blavatsky instructed Loranger to commence a home exercise program, to place weight on his knee "as tolerated," and to return in one year for a follow-up appointment. Dr. Blavatsky did not comment on whether Loranger had reached MMI.

¶ 13 In his Petition for Trial, Loranger contends that he "is permanently totally disabled as the result of his August 29<sup>th</sup>, 1987 left knee injury, his December 4<sup>th</sup>, 1993 right knee injury and February 5<sup>th</sup>, 2008 neck injury." He contends that he became permanently totally disabled on October 30, 2018.

### LAW AND ANALYSIS

¶ 14 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."<sup>1</sup> "[I]f the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the

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<sup>1</sup> *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment.”<sup>2</sup>

¶ 15 Relying upon *Rockett v. Travelers Ins. Co.*,<sup>3</sup> *Crawford v. Liberty Northwest Ins. Corp.*,<sup>4</sup> and *O’Mahoney v. Liberty Ins. Corp.*,<sup>5</sup> State Fund asserts that Loranger’s PTD claim is premature because he is not yet at MMI for his right knee injury, noting that he is still recovering from his total knee replacement.

¶ 16 The 1993 and 2007 Workers’ Compensation Acts, which are the laws applicable to Loranger’s right knee and cervical spine injuries, define “permanent total disability,” in relevant part, as a “condition resulting from injury as defined in this chapter, **after a worker reaches maximum medical healing**, in which a worker does not have a reasonable prospect of physically performing regular employment.”<sup>6</sup> The 1993 and 2007 Workers’ Compensation Acts define “medical stability,” “maximum healing,” or “maximum medical healing” as “a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.”<sup>7</sup>

¶ 17 In *Rockett*, this Court relied upon these definitions and ruled that Rockett’s claim for PTD benefits was premature because she was not at MMI. This Court reasoned: “In the present case, Dr. Galvas’ testimony establishes that further evaluation may lead to further treatment that will materially improve the claimant’s condition. Claimant has therefore not reached MMI or healing. Her request for PTD benefits is therefore premature.”<sup>8</sup>

¶ 18 In *Crawford*, this Court relied on this definition and held that a claimant could not pursue a claim for PTD benefits until he was at MMI for all his injuries. Crawford suffered serious injuries in a car accident, including a mental injury.<sup>9</sup> He had not reached MMI for his mental injury and continued to receive treatment.<sup>10</sup> Nevertheless, Crawford argued that he was entitled to PTD benefits because his physical injuries alone precluded him

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<sup>2</sup> *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted), *aff’d*, 2019 MT 160, 396 Mont. 325, 444 P.3d 1019.

<sup>3</sup> 2003 MTWCC 21.

<sup>4</sup> 2004 MTWCC 41.

<sup>5</sup> 2013 MTWCC 6, *appeal dismissed, and judgment vacated and withdrawn per stipulation*.

<sup>6</sup> § 39-71-116(19), MCA (1993); § 39-71-116(25), MCA (2007) (emphasis added).

<sup>7</sup> § 39-71-116(14), MCA (1993); and § 39-71-116(18), MCA (2007). This Court has long recognized that the “maximum medical improvement” and “MMI” are synonymous with “medical stability,” “maximum healing,” and “maximum medical healing.”

<sup>8</sup> *Rockett*, ¶ 34.

<sup>9</sup> *Crawford*, ¶¶ 3a, 3d.

<sup>10</sup> *Crawford*, ¶ 3e.

from regular employment.<sup>11</sup> However, this Court granted the insurer's summary judgment motion, reasoning that Crawford was not entitled to PTD benefits because he was not yet at MMI.<sup>12</sup> This Court explained:

The matter is one of statutory interpretation, specifically, whether if the MMI prerequisite for permanent total disability is satisfied if the claimant is at MMI with respect to only some of his injuries but those injuries themselves preclude any reasonable prospect of his returning to regular employment. However, the claimant has not provided any evidence demonstrating that he is in fact permanently unable to perform regular employment based on any of the injuries which are at MMI. Indeed, he has provided no affidavits, depositions, or other admissible evidence whatsoever. Thus, there is no factual basis for me to address his legal contentions. Rather, ***based on the uncontroverted evidence which has been presented, he is not at MMI, and is therefore ineligible for permanent total disability benefits.*** Accordingly, the motion for summary judgment must be granted.<sup>13</sup>

¶ 19 Likewise, in *O'Mahoney*, O'Mahoney asserted that she was entitled to PTD benefits because she could not perform regular employment due to the pain from her injury.<sup>14</sup> However, this Court ruled that she was not yet eligible for PTD benefits because she was not at MMI: "While O'Mahoney undergoes evaluation and treatment for her pain, O'Mahoney is not at maximum healing for her work-related injury and her claim for permanent total disability is premature."<sup>15</sup>

¶ 20 For the same reason, Loranger's claim for PTD benefits is premature. Loranger alleges that he is PTD because of the pain he is suffering from his three industrial injuries, including his right knee injury. However, he underwent a total knee replacement in the spring of 2019 and has not presented sufficient evidence from which this Court could find that he has returned to MMI. In his record from Loranger's last appointment, Dr. Blavatsky did not state that Loranger had returned to MMI and Dr. Blavatsky's statement that Loranger was to place weight on his knee "as tolerated" is an indication that Loranger was still healing and had not reached the point where his right knee pain had stabilized. While Loranger asserts that there is no direct evidence that Dr. Blavatsky thought that Loranger's right knee was no longer at MMI before surgery, it is evident that the reason Dr. Blavatsky performed a total knee replacement was to improve Loranger's right knee

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<sup>11</sup> *Crawford*, ¶ 5.

<sup>12</sup> *Crawford*, ¶ 6.

<sup>13</sup> *Crawford*, ¶ 6 (underline in original) (other emphasis added).

<sup>14</sup> *O'Mahoney*, ¶ 34.

<sup>15</sup> *O'Mahoney*, ¶ 51.

condition; thus, it is evident that Dr. Blavatsky thought Loranger was no longer at MMI.<sup>16</sup> Because Loranger has not set forth evidence indicating that he has returned to MMI for his right knee injury, his PTD claim is premature and State Fund is entitled to summary judgment under *Rockett*, *Crawford*, and *O'Mahoney*.

¶ 21 Loranger advances four arguments in support of his position that State Fund is not entitled to summary judgment. However, none have merit.

¶ 22 First, Loranger argues that State Fund did not meet its summary judgment burden because it has not produced direct evidence that he is not currently at MMI for his right knee; i.e., he argues that State Fund did not meet its burden because it did not obtain a statement from Dr. Blavatsky stating that Loranger has not returned to MMI. However, “[s]ummary judgment is proper when a non-moving party fails to make a showing sufficient to establish the existence of an essential element of its case on which it bears the burden of proof at trial.”<sup>17</sup> Under this law, State Fund did not have the burden of disproving Loranger’s case by presenting direct evidence that he has not returned to MMI; it was sufficient for State Fund to point out that there is insufficient evidence to prove that Loranger has returned to MMI. At trial, Loranger will have the burden of proving his entitlement to PTD benefits, which includes his burden of proving that he is at MMI.<sup>18</sup> Thus, the summary judgment burden shifted to Loranger to present evidence from which this Court could find that he is at MMI for his right knee injury. Loranger did not meet his burden.

¶ 23 Second, Loranger argues that he is currently eligible for PTD benefits because he was at MMI for his right knee injury in 1996. He asserts that once a claimant reaches MMI, he is thereafter continuously eligible for PTD benefits, even if he is receiving treatment to improve his condition. However, as State Fund points out, this Court rejected this same argument in *Hale v. Liberty Mutual Middle Market*.<sup>19</sup> Although Hale had been declared to be at MMI in 2006, this Court ruled he was no longer at MMI at the trial in 2010 because his physicians then opined that his condition could improve with additional treatment.<sup>20</sup> This Court explained, “an injured worker may reach MMI and may [thereafter] no longer be at MMI if the injured worker’s condition deteriorates such that additional

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<sup>16</sup> See, e.g., *Rockett*, ¶ 34 (explaining that claimant is not at MMI where physician thinks that additional treatment will improve claimant’s condition).

<sup>17</sup> *Blacktail Mountain Ranch, Co. v. State, Dep’t of Natural Res. & Conservation*, 2009 MT 345, ¶ 7, 353 Mont. 149, 220 P.3d 388 (citation omitted).

<sup>18</sup> See, e.g., *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 34, 365 Mont. 405, 282 P.3d 687 (citing *Simms v. State Comp. Ins. Fund*, 2005 MT 175, ¶ 13, 327 Mont. 511, 116 P.3d 773) (explaining that a claimant “bears the burden of proving by a preponderance of the evidence that he is entitled to the workers’ compensation benefits sought”).

<sup>19</sup> 2010 MTWCC 28.

<sup>20</sup> *Hale*, ¶ 36.

medical treatment may improve the injured worker's condition."<sup>21</sup> Because Hale was not at MMI at the time of trial, Judge Shea explained, "I cannot conclude he is permanently totally disabled."<sup>22</sup> As in *Hale*, the evidence in this case shows that Loranger's right knee condition deteriorated and that he is no longer at MMI; thus, this Court could not conclude that he is entitled to PTD benefits.

¶ 24 Third, Loranger argues that this Court can determine whether he is entitled to PTD benefits by considering only the pain from his left knee injury and his cervical spine injury. However, even if Loranger abandons his position that his right knee is contributing to his disability, his claim for PTD benefits is premature because there is an absence of evidence indicating that he is still at MMI for his neck injury. Loranger asserts that his neck pain worsened over the years, to the point that he could no longer work at Montana State Prison, and his attorney's demand letter dated October 30, 2018, states that Loranger would likely need neck surgery "in the near future." If a surgery is necessary to improve his cervical spine condition, then he is no longer at MMI for that injury.<sup>23</sup> However, at the hearing, Loranger's attorney did not retract his statement that Loranger needs a cervical spine surgery. Moreover, Loranger did not introduce any evidence from which this Court could find that the physician treating Loranger's cervical spine injury thinks he is still at MMI. In these circumstances, Loranger has not met his burden of producing evidence from which this Court could find that he is still at MMI for his cervical spine injury. Again, his claim for PTD benefits is premature under *Rockett*, *Crawford*, and *O'Mahoney*.

¶ 25 Finally, relying on *O'Mahoney*, Loranger argues that instead of granting State Fund summary judgment, this Court should hold a trial and determine whether he is entitled to TTD benefits. However, *O'Mahoney* does not support Loranger's position. After determining that O'Mahoney's PTD claim was premature, this Court explained that because she was receiving TTD benefits at the time of the trial, "She is entitled to continuation of her temporary total disability benefits until such time as she completes the pain treatment recommended by her physician and is no longer temporarily totally disabled."<sup>24</sup>

¶ 26 The circumstances of this case are different. Loranger is not currently receiving TTD benefits and State Fund disputes that he is entitled to TTD benefits. At the hearing, Loranger's attorney acknowledged that Loranger and State Fund have not mediated the dispute over whether Loranger is entitled to TTD benefits. Thus, this Court does not

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<sup>21</sup> *Hale*, ¶ 33 (citing *Burtell v. State Comp. Ins. Fund*, 2002 MTWCC 18). See also *Hiett v. Missoula Cnty. Pub. Sch.*, 2003 MT 213, ¶ 27, 317 Mont. 95, 75 P.3d 341 ("The WCC fully realized that not all claimants who reach medical stability remain there, and that some actually deteriorate and require further treatment to again reach stability.").

<sup>22</sup> *Hale*, ¶ 36.

<sup>23</sup> See, e.g., *Rockett*, ¶ 34 (explaining that claimant is not at MMI where physician thinks that additional treatment will improve claimant's condition).

<sup>24</sup> *O'Mahoney*, ¶ 54.

currently have jurisdiction over Loranger's claim for TTD benefits under § 39-71-2408, MCA, which provides that an "insurer and claimant shall mediate any issue concerning benefits and the mediator shall issue a report following the mediation process recommending a solution to the dispute before either party may file a petition in the workers' compensation court."<sup>25</sup>

¶ 27 Accordingly, this Court enters the following:

ORDER

¶ 28 State Fund's Motion for Summary Judgment is **granted** on the grounds that Loranger's claim for PTD benefits is premature.

¶ 29 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 this 18<sup>th</sup> day of December, 2019.

(SEAL)

/s/ David S. Sandler  
JUDGE

c: J. Ben Everett  
Charles G Adams

Submitted: December 10, 2019

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<sup>25</sup> See, e.g., *Preston v. Transp. Ins. Co.*, 2004 MT 339, ¶ 36, 324 Mont. 225, 102 P.3d 527 (holding that under § 39-71-2408(1), MCA, this Court does not have jurisdiction over a dispute over benefits until the parties have completed the mandatory mediation process).