IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 2

WCC No. 2016-3787

CARL MURPHY

Petitioner

vs.

WESTROCK COMPANY

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – MARCH 21, 2017
REVERSED AND REMANDED FOR FURTHER PROCEEDINGS – MARCH 20, 2018

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENT'S MOTION FOR PROTECTIVE ORDER, RESPONDENT'S MOTION IN LIMINE, AND PETITIONER'S MOTION TO COMPEL AS MOOT

Summary: Respondent moves for summary judgment on Petitioner's PPD and rehabilitation claims on the following grounds: its independent medical examiner, a medical doctor, opined that Petitioner has no medically determined physical restrictions as a result of his injury; and Petitioner's chiropractor, although offering a contrary opinion, may not create an issue of material fact because, under the 1991 statute, a chiropractor can provide neither the required "medically determined" physical restriction nor "physician's" certification. Therefore, Respondent contends it is entitled to judgment as a matter of law on Petitioner's claims.

Held: Although Petitioner's chiropractor offered an opinion contrary to Respondent's medical doctor, he may not create an issue of material fact because, under the 1991 statute, a chiropractor can provide neither the required "medically determined" physical restriction nor "physician's" certification. Therefore, Respondent is entitled to judgment as a matter of law on Petitioner's claims for PPD and rehabilitation benefits.

¶ 1 Respondent WestRock Company (WestRock) moves for summary judgment[1] on Petitioner Carl Murphy's permanent partial disability (PPD) and rehabilitation claims on the following grounds: its independent medical examiner, a medical doctor, opined that Murphy has no medically determined physical restrictions as a result of his injury; and Murphy's chiropractor, although offering a contrary opinion, may not create an issue of material fact because, under the 1991 statute, a chiropractor can provide neither the required "medically determined" physical restriction nor "physician's" certification. Therefore, WestRock contends it is entitled to judgment as a matter of law on Murphy's claims.[2]

¶ 2 This Court held a hearing on October 11, 2016. Rex Palmer represented Murphy. Larry W. Jones represented WestRock.

FACTS

¶ 3 On December 18, 1991, Murphy suffered a back injury while working at the Stone Container mill in Frenchtown. Stone Container accepted liability for Murphy's claim, and WestRock is now liable, as it is Stone Container's successor-in-interest.

¶ 4 Murphy missed no work as a result of his injury, but has received continuous treatment.

¶ 5 On March 8, 1993, Douglas L. Woolley, MD, placed Murphy at maximum medical improvement (MMI) and assigned a whole person impairment rating of 7%.

¶ 6 Murphy began treating with Jim W. Helmer, DC, in 1998.

¶ 7 Murphy would have continued working at the mill, but it closed in 2010.

¶ 8 In April 2016, counsel for Murphy wrote to Dr. Helmer, asking a series of questions about his ongoing treatment of Murphy.

¶ 9 On May 2, 2016, Dr. Helmer responded by letter. He explained that the symptoms for which he was treating Murphy were "consistent these past 18 years" and "a direct result of his 1991 injury and its[] sequelae." As for a functional level of lifting at work, Dr. Helmer made recommendations as follows:

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[1] WestRock moves for summary judgment, or alternatively, to dismiss for failure to state a claim, or alternatively, to dismiss for lack of a justiciable issue. This Court decides the motion on summary judgment grounds.

[2] WestRock also argues that summary judgment is proper because Murphy failed to plead that he has satisfied the preconditions for an entitlement to rehabilitation benefits. However, since this Court has chosen to decide the motion on summary judgment grounds, and such argument is more properly addressed in the context of a motion to dismiss, this Court does not address it.

a. occasional lifting of 30 to 40 pounds maximum if done without help;

b. frequent lifting of 10 to 15 pounds maximum.

¶ 10 On May 31, 2016, Murphy filed a Petition for Hearing seeking an order stating that he is entitled to PPD benefits.

¶ 11 Murphy also seeks an order stating that "Petitioner's physical limitations[] established by his doctor satisfy the statutory criteria for vocational rehabilitation benefits."

¶ 12 On June 29, 2016, Emily E. Heid, MD, conducted an independent medical examination (IME) of Murphy. In her report, she opined that Murphy did not have a medically determined restriction as of March 8, 1993, that there were no jobs in which his ability to work in some capacity was impaired, and that as of the date of the IME, Murphy did not have any physical restrictions as a result of his injury.

LAW AND ANALYSIS

¶ 13 This Court renders summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[3] After 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 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.[4]

¶ 14 The 1991 Workers' Compensation Act (WCA) defines "physician" to include " 'surgeon' and in either case means one authorized by law to practice his profession in this state."[5] A chiropractor is not a "physician" under this definition.[6]

¶ 15 The 1991 WCA defines "permanent partial disability" as follows:

> "Permanent partial disability" means a condition, after a worker has reached maximum healing, in which a worker:
>
> (a) has a ***medically determined*** physical restriction as a result of an injury as defined in 39-71-119; and
>
> (b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.[7]

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[3] ARM 24.5.329(2).

[4] *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71 (citation omitted).

[5] § 39-71-116(16), MCA (1991, *Temporary*).

[6] *Murphy v. Cigna Cos.*, 1998 MTWCC 73, ¶ 17 (applying the definition in the 1979 WCA, which is identical in all pertinent respects to the definition in the 1991 WCA).

[7] § 39-71-116(14), MCA (1991, *Temporary*) (emphasis added).

A claimant who does not meet this definition is ineligible for PPD benefits under § 39-71-703, MCA (1991).[8]

¶ 16 Under the 1991 WCA, a claimant is eligible for rehabilitation benefits if, *inter alia*:

> (a) the injury results in ***permanent partial disability*** or permanent total disability as defined in 39-71-116;
>
> (b) a ***physician*** certifies that the injured worker is physically unable to work at the job the worker held at the time of the injury . . . .[9]

¶ 17 WestRock concedes that since 1993, chiropractors have been included in the definition of "treating physician" and have been able to offer testimony as to a claimant's physical restrictions and physical ability to work in particular jobs.[10] However, WestRock argues that under the 1991 WCA, chiropractors are not included in the definition of "physician," and, under *Weis v. Division of Workers' Compensation*,[11] may not make "medical determinations." WestRock therefore argues that Dr. Helmer's opinions as to Murphy's physical restrictions and ability to work are inadmissible. Thus, WestRock argues that Dr. Heid's opinion is uncontroverted and that Murphy cannot prove that he is permanently partially disabled or that he is unable to work.

¶ 18 Murphy argues that the issue of who may make a medical determination of his physical restrictions and testify as to his ability to return to work is "procedural," and cites *EBI/Orion Group v. Blythe* for the proposition that when the issue is procedural, the law in effect at the time of trial controls.[12] In *Blythe*, the Montana Supreme Court held that the law as to who is qualified to conduct an IME was procedural and, therefore, that "the law in effect as to IMEs as of the date of trial is controlling."[13] Thus, although Blythe was injured when the 1987 WCA was in effect, the court held that the 1993 WCA applied to determine whether a psychologist could conduct an IME.[14] Since the current WCA provides that a chiropractor is a "treating physician,"[15] Murphy argues that Dr. Helmer may make a medical determination of his physical restrictions and testify as to his ability to work. Thus, Murphy argues that Dr. Helmer's opinions that contradict Dr. Heid's create material issues of fact.

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[8] *Williams v. Plum Creek Timber*, 1994 MTWCC 59 (ruling, "to be eligible for the permanent partial disability benefits prescribed in section 39-71-703, MCA, claimant must first meet the two prong test set out in 39-71-116(14), MCA (1991)"), *aff'd*, 270 Mont. 209, 891 P.2d 502 (1995).

[9] § 39-71-2001(1)(a)–(b), MCA (1991) (emphasis added).

[10] *See, e.g.*, § 39-71-116(41)(b), MCA (2015).

[11] 232 Mont. 218, 220, 755 P.2d 1385, 1386 (1988).

[12] 281 Mont. 50, 54, 931 P.2d 38, 40 (1997).

[13] *Id*.

[14] *Blythe*, 281 Mont. at 54, 931 P.2d at 40.

[15] § 39-71-116(41)(b), MCA (2015).

¶ 19 In its reply brief, WestRock counters that in *Fleming v. International Paper Co.*, the Supreme Court impliedly overruled *Blythe*, holding that the statutes in effect on the date of the accident or injury control in workers' compensation cases, regardless of whether the issue is substantive or procedural.[16] WestRock thus argues that the 1991 statutes control.

¶ 20 At the hearing, Murphy offered three reasons why *Fleming* should not apply. First, Murphy points out that the *Fleming* court was mistaken when it stated that it had not made an exception for procedural statutes, as it had done so in *Blythe*, and argues that *Fleming* was wrongly decided. Next, he argues that the statement that procedural statutes in effect at the time of injury control is dicta because a statute of limitation is substantive. Finally, he argues that having to apply old procedures, including this Court's procedural rules, which apply "to all cases regardless of the date of injury," is not practical because some workers' compensation claims remain open for decades. He urges this Court to follow *Blythe*.

¶ 21 *Blythe* and *Fleming* cannot be reconciled, but this Court is bound to follow *Fleming* because it is the Supreme Court's most recent case discussing the issue of which law to apply. There is no ambiguity in its holding. The court stated, "For almost 75 years, this Court has held that the statutes in effect on the date of the accident or injury control in workers' compensation cases."[17] After citing fifteen cases, the court stated, "We made no exception in these cases for statutes of limitation or other procedural statutes, and we decline to do so now."[18]

¶ 22 To Murphy's points, this Court agrees that the Supreme Court was mistaken when it stated in *Fleming* that it has not made an exception for statutes of limitation or other procedural statutes, as the court had made that exception in *Blythe* and in *State Compensation Ins. Fund v. Sky Country, Inc.*[19] Notwithstanding, the "other procedural statutes" portion of that statement is not dicta because *Fleming* involved a statute of limitation issue; the court clearly considered statutes of limitation as one type of procedural statute, among others. Finally, this Court points out that following *Fleming* is not as impractical as Murphy argues; that case concerns only the issue of which ***statutes*** control, and does not preclude this Court's practice of applying its current rules of procedure regardless of the date of injury.

¶ 23 WestRock is correct that under the 1991 WCA, a chiropractor is not a "physician" and may not make a medical determination of a claimant's physical restrictions or ability

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[16] 2008 MT 327, ¶¶ 26, 28, 29, 346 Mont. 141, 194 P.3d 77.

[17] *Fleming*, ¶ 26.

[18] *Fleming*, ¶¶ 26, 27, 28.

[19] 239 Mont. 376, 378, 780 P.2d 1135, 1136 (1989) (applying law, which provides procedure in the Department of Labor and Industry for resolving disputes regarding independent contractor status, even though the controversy arose before the effective date of the statute).

to work. In *Weis*, the Supreme Court considered whether the legislature intended to restrict the making of an impairment rating to licensed medical physicians in the 1985 WCA by characterizing an impairment rating as a "purely medical determination."[20] To decide, the court set about interpreting the word "medical."[21] The court found that, by its plain meaning, "medical" means "of, relating to, or concerned with physicians or the practice of medicine."[22] Next, the court examined the statute that addresses the rights and limitations governing the practice of chiropractic, which states that chiropractors "shall not in any way imply that they are regular physicians or surgeons. They shall not . . . practice medicine or surgery or osteopathy . . . ."[23] Finally, the court observed that in 1987, the Montana Chiropractor Association had suggested amendments to a bill concerning workers' benefits that would allow other health care professionals, not just medical doctors, to make impairment ratings.[24] Nevertheless, the legislators chose not to incorporate the suggested changes.[25] Writing for a unanimous court, Justice William E. Hunt Sr. explained that the legislature intended to restrict the rendering of an impairment rating to licensed medical physicians because it is a "medical determination."[26]

¶ 24 In this case, Murphy has not set forth admissible evidence from which this Court could conclude that he is permanently partially disabled under the 1991 WCA. As set forth in § 39-71-116(14)(a), MCA (1991, *Temporary*), to be permanently partially disabled, the claimant must have a "medically determined" physical restriction. As Dr. Helmer is not a "physician" under the 1991 WCA, he may not provide the "medically determined" physical restriction required for Murphy to be entitled to PPD benefits. Dr. Heid's opinion that Murphy has no physical restrictions as a result of his injury is therefore uncontroverted.

¶ 25 Moreover, Murphy has not set forth admissible evidence supporting his claim that he is eligible for rehabilitation benefits under the 1991 WCA. Section 39-71-2001(1)(a), MCA (1991), provides that a claimant is not eligible for rehabilitation benefits unless he is permanently partially disabled, which Murphy cannot prove with the evidence he currently has. And, § 39-71-2001(1)(b), MCA (1991), provides that a claimant is not eligible for rehabilitation benefits unless a "physician" certifies that he is physically unable to return

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[20] *Weis*, 232 Mont. at 220, 755 P.2d at 1386.

[21] *Weis*, 232 Mont. at 220, 221, 755 P.2d at 1386.

[22] *Weis*, 232 Mont. at 221, 755 P.2d at 1387 (citation omitted).

[23] *Id.* (internal quotation marks omitted) (citation omitted).

[24] *Weis*, 232 Mont. at 221, 755 P.2d at 1387.

[25] *Weis*, 232 Mont. at 222, 755 P.2d at 1387.

[26] *Weis*, 232 Mont. at 220, 755 P.2d at 1386. *See also Prillaman v. Mont. Hosps. Ass'n Workers' Comp. Trust*, No. 9210-6604, 1993 WL 281097, at *8 (Workers' Comp. Ct. May 7, 1993) (applying the 1991 statute and ruling that although the legislature amended § 39-71-711, MCA, in 1989, post-*Weis*, to enable chiropractors, who were certified as evaluators under Title 37, chapter 12, to render impairment ratings, those amendments did not open the door for chiropractors to make other types of medical determinations, such as causation), *rev'd on other grounds*, 264 Mont. 134, 870 P.2d 82, *superseded by statute*, Laws of Montana, 1995, ch. 243, § 8.

to work at his time-of-injury job. Since Dr. Helmer is not a "physician" under the 1991 WCA, he may not provide the "physician's" certification required for Murphy to be eligible for rehabilitation benefits. Dr. Heid's opinion that Murphy is able to perform his time-of-injury job is therefore uncontroverted.

¶ 26 Because Murphy failed to create a material issue of fact with admissible evidence and failed to make a showing sufficient to establish the existence of essential elements of his PPD and rehabilitation benefits claims, on which he would bear the burden of proof at trial, summary judgment in favor of WestRock is appropriate.[27]

ORDER

¶ 27 WestRock's Motion for Summary Judgment is **granted**.

¶ 28 WestRock's Motion for Protective Order and Motion in Limine, and Murphy's Motion to Compel are **denied as moot**.

¶ 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 22nd day of February, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Rex Palmer
Larry W. Jones

Submitted: October 11, 2016

[27] *See Alfson v. Allstate Prop. & Cas. Ins. Co.*, 2013 MT 326, ¶ 11, 372 Mont. 363, 313 P.3d 107 (citation omitted) ("A court need only consider admissible evidence in deciding whether summary judgment is an appropriate remedy."). *See also 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) ("Summary 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.").