IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 1

WCC No. 2013-3248

LAURIE NELSON

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer.

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves for summary judgment on two issues: (1) With respect to Respondent's denial of medical bills and travel expenses associated with treatment Petitioner received in 2011, Respondent contends that Petitioner failed to timely file her petition pursuant to § 39-71-2905, MCA. (2) With respect to Petitioner's claim for TPD benefits, Respondent contends that Petitioner is not entitled to these benefits because she has not suffered a wage loss.

Held: With respect to Respondent's denial of medical bills and travel expenses associated with the treatment Petitioner received in 2011, Respondent's motion is denied. The statute of limitations for Petitioner's claim commenced when Respondent denied her claim for benefits and Petitioner filed her petition within two years of Respondent's denial in accordance with § 39-71-2905, MCA. With respect to Petitioner's claim for TPD benefits, Respondent's motion is granted. Petitioner has not suffered a wage loss as a result of her injury and is therefore not entitled to TPD benefits pursuant to § 39-71-712, MCA.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905. The Court concluded that a Petition for Hearing was timely filed after rejecting Respondent's argument that its denial of Petitioner's request to change treating physicians triggered the statute of

limitations to run. Denying a request to change treating physicians is not a categorical denial of benefits which would trigger the statute of limitations.

Limitation Periods: Petition Filing. The Court concluded that a Petition for Hearing was timely filed after rejecting Respondent's argument that its denial of Petitioner's request to change treating physicians triggered the statute of limitations to run. Denying a request to change treating physicians is not a categorical denial of benefits which would trigger the statute of limitations.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-712. Where Petitioner's post-injury wages are greater than the aggregate of her wages at the time of her industrial injury, she is not entitled to TPD benefits, even though she discontinued one of the two positions she held with her employer.

Benefits: Temporary Partial Disability Benefits. Where Petitioner's post-injury wages are greater than the aggregate of her wages at the time of her industrial injury, she is not entitled to TPD benefits, even though she discontinued one of the two positions she held with her employer.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-123. Although Petitioner held two job positions with the same employer, governed by two separate employment contracts, § 39-71-123(1), MCA, defines wages as "all remuneration paid for services performed by an employee for an employer." Section 39-71-123(4)(c), MCA, provides that compensation for concurrent employments is based on the aggregate of average actual wages. Therefore, whether Petitioner's two positions are considered one employment or two concurrent employments, the average weekly wage calculation remains the same.

Wages: Average Weekly Wage. Although Petitioner held two job positions with the same employer, governed by two separate employment contracts, § 39-71-123(1), MCA, defines wages as "all remuneration paid for services performed by an employee for an employer." Section 39-71-123(4)(c), MCA, provides that compensation for concurrent employments is based on the aggregate of average actual wages. Therefore, whether Petitioner's two positions are considered one employment or two

concurrent employments, the average weekly wage calculation remains the same.

¶ 1 Respondent Montana Schools Group Insurance Authority (MSGIA) moves this Court for summary judgment on two issues. First, MSGIA contends that Petitioner Laurie Nelson failed to timely file her Petition for Hearing in this Court relative to her request for payment of medical and travel expenses associated with her treatment by Dr. William Bugbee, and her claim is therefore time-barred pursuant to § 39-71-2905, MCA. Second, MSGIA contends that Nelson is not entitled to temporary partial disability (TPD) benefits pursuant to § 39-71-712, MCA, because Nelson's current wage is higher than her time-of-injury wage.[1]

¶ 2 Nelson opposes MSGIA's motion on both issues. Regarding her treatment with Dr. Bugbee, Nelson contends that her petition was timely filed. Regarding her claim for TPD benefits, Nelson contends that facts in dispute preclude summary judgment.[2]

¶ 3 For the reasons discussed below, MSGIA's motion as it pertains to Nelson's treatment with Dr. Bugbee is denied. MSGIA's motion as it pertains to Nelson's claim for TPD benefits is granted.

Uncontroverted Material Facts[3]

¶ 4 On August 17, 2005, Nelson, who was both a teacher and the volleyball coach, fell off the side of a box while coaching and dislocated her left ankle.

¶ 5 MSGIA accepted Nelson's claim.

¶ 6 At the time of the injury, Nelson was making $32,135 per year.

¶ 7 In addition, for the 2005-2006 school year, Nelson received a $3,612 stipend for being the softball coach, a $2,070 stipend for being the assistant volleyball coach, and a $310 stipend for being a class sponsor.

---

[1] Respondent Montana Schools Group Insurance Authority Motion for Summary Judgment, Docket Item No. 11.

[2] Petitioner's Response to Respondent's Motion for Summary Judgment (Nelson's Response Brief), Docket Item No. 16.

[3] Except as otherwise noted, the uncontroverted facts are taken from MSGIA's "Statement of Uncontroverted Facts," Montana Schools Group Insurance Authority's Brief in Support of Motion for Summary Judgment (MSGIA's Opening Brief), Docket Item No. 12, at 2-4.

¶ 8 Nelson also earned stipends in the 2004-2005 school year. She received $645 for the assistant volleyball coach position, $3,491 for the softball coach position, and $284 for being a class advisor.

¶ 9 Nelson initially treated with Gregory M. Behm, M.D., and eventually began seeing Michael R. Yorgason, M.D.

¶ 10 Nelson continued to have persistent ankle pain and swelling, and on November 28, 2006, Dr. Yorgason referred Nelson to William D. Bugbee, M.D.

¶ 11 Nelson began treating with Dr. Bugbee with an initial evaluation on January 12, 2007.

¶ 12 Nelson underwent a left medial hamitalus osteochondral allograft, placement, and removal of external fixation device and lateral ankle reconstruction with Dr. Bugbee and Michael J. Botte, M.D.

¶ 13 Nelson had a post-operative evaluation with Dr. Bugbee on January 17, 2008.

¶ 14 Nelson underwent a left ankle bipolar osteochondral allograft, placement, and removal of external fixation device, lateral ligament reconstruction, and tenolysis of the posterior tibial tendon on July 2, 2009.

¶ 15 Nelson saw Dr. Bugbee on two more occasions. MSGIA specifically pre-authorized all of the evaluations and surgeries with Dr. Bugbee.

¶ 16 During the time period that Nelson saw Dr. Bugbee, she continued to follow up with her authorized treating physicians in Montana. Nelson treated with Dr. Yorgason through 2009, who eventually referred her to Michael H. Schabacker, M.D., a pain management specialist at Northern Rockies Regional Pain Center.

¶ 17 Dr. Schabacker was designated as Nelson's treating physician in November 2009.[4] On August 11, 2010, in response to Nelson's attempt to arrange for ketamine infusions, MSGIA's claims examiner, Katy Howell, advised Nelson that Dr. Schabacker, in his capacity as Nelson's treating physician, must review the treatment recommendations and indicate whether he agrees. Howell further advised Nelson that if she proceeded with the ketamine infusions without following this procedure, MSGIA would not authorize the treatment under her claim.[5] On August 23, 2010, Howell again

[4] MSGIA's Opening Brief, Ex. 14.

[5] MSGIA's Opening Brief, Ex. 20.

advised Nelson that Dr. Schabacker was her treating physician, that all prescriptions and referrals must come from him, and that Nelson needed to follow the correct pre-authorization procedure for any future injections, infusions, or other treatment for her ankle.[6]

¶ 18 By letter dated October 27, 2010, Howell advised Nelson that Dr. Schabacker, as Nelson's treating physician, had ordered a neuropsychological evaluation prior to considering Nelson's request for additional ketamine treatment. Howell's letter also stated that MSGIA would not consider authorization for additional evaluations or medical opinions until after Nelson had completed the recommended neuropsychological evaluation and Dr. Schabacker had provided his treatment recommendations based on the results of the neuropsychological evaluation.[7]

¶ 19 In a letter to Howell dated December 3, 2010, Nelson's attorney, Patrick R. Sheehy, asserted that Dr. Schabacker was no longer one of Nelson's treating physicians. Sheehy's letter further stated that Nelson would seek treatment with other previously-authorized treating physicians, or physicians who agreed to be supervised by previously-authorized treating physicians, involved with her ketamine infusion treatment.[8]

¶ 20 By letter dated December 16, 2010, Howell responded to Sheehy's letter. Howell stated that since November 2009, Dr. Schabacker had been primarily responsible for coordinating Nelson's medical treatment. Howell noted that MSGIA had never authorized another change in treating physicians since authorizing treatment with Dr. Schabacker. Howell referenced § 39-71-1101, MCA, ARM 24.29.1510, and ARM 24.29.1517, and noted that the statute and regulations did not allow Nelson to repeatedly change treating physicians. Howell advised, "Dr. Schabacker is currently Ms. Nelson's only authorized treating physician," and noted that neither Dr. Bugbee nor Dr. Lubenow qualified as treating physicians under Nelson's claim since neither doctor was licensed in Montana nor had admitting privileges to a Montana hospital.[9]

---

[6] *Id.*

[7] MSGIA's Opening Brief, Ex. 12.

[8] MSGIA's Opening Brief, Ex. 13.

[9] MSGIA's Opening Brief, Ex. 14.

¶ 21 On February 17, 2011, Nelson treated with Dr. Schabacker again, at which time he placed her at maximum medical improvement (MMI) and awarded her a 9% whole person impairment.[10]

¶ 22 By letter dated March 25, 2011, Howell advised Sheehy that since Nelson had reached MMI for her August 17, 2005, injury, all future treatment must be preauthorized.[11]

¶ 23 On July 25, 2011, Nelson treated with Dr. Bugbee again without obtaining prior authorization from MSGIA.

¶ 24 By letter dated September 20, 2011, MSGIA denied payment for Dr. Bugbee's July 25, 2011, service due to Nelson's failure to obtain prior authorization as required by ARM 24.29.1517(5)(d).[12]

¶ 25 Nelson quit her coaching job prior to the 2012-2013 school year. At the time, her salary was $56,189. In addition to her salary, Nelson received a stipend of $479 for being a class advisor.

¶ 26 On July 30, 2013, Nelson filed her Petition for Workers' Compensation Mediation Conference to address MSGIA's denial of payment of medical bills and travel for treatment rendered by Dr. Bugbee and her entitlement to TPD benefits.[13] The mediator's report and recommendation was issued on September 17, 2013.

¶ 27 On October 17, 2013, Nelson filed a Petition for Hearing in the Workers' Compensation Court.[14]

Analysis and Decision

¶ 28 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[15] Summary judgment is an extreme remedy which should not be a

---

[10] MSGIA's Opening Brief, Ex. 15.

[11] MSGIA's Opening Brief, Ex. 16.

[12] MSGIA's Opening Brief, Ex. 18. (Although MSGIA's letter referenced ARM 24.29.1517(5)(d), because Nelson's treatment was received after June 30, 2011, the applicable rule is ARM 24.29.1593(1)(b). The rule change is immaterial to the Court's disposition of MSGIA's motion.)

[13] MSGIA's Opening Brief, Ex. 19.

[14] Docket Item No. 1.

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

substitute for a trial on the merits if a material factual controversy exists. All reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the nonmoving party.[16] In this case, MSGIA's motion for summary judgment regarding Nelson's treatment with Dr. Bugbee is not susceptible to summary disposition. MSGIA's motion regarding Nelson's entitlement to TPD benefits, however, is susceptible to summary disposition.

¶ 29 This case is governed by the 2005 version of the Montana Workers' Compensation Act (WCA) because that was the law in effect at the time of Nelson's industrial accident.[17]

Issue One: Whether Nelson's Petition for Hearing as it pertains to her treatment with Dr. Bugbee was timely filed pursuant to § 39-71-2905, MCA.

¶ 30 Section 39-71-2905(2), MCA, provides: "A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied."

¶ 31 Essentially, MSGIA argues that the two-year statute of limitations relative to Nelson's 2011 claim for her treatment with Dr. Bugbee commenced in 2010 when MSGIA denied Nelson's demand to discontinue Dr. Schabacker as her treating physician and advised her that future treatment must be referred by Dr. Schabacker and pre-authorized by MSGIA. From these disputes, MSGIA concludes: "Further treatment with Dr. Bugbee was clearly denied."[18] I disagree.

¶ 32 The record before the Court reveals that the 2010 disputes between Nelson and MSGIA centered principally around Nelson's desire to continue with ketamine infusions as a means of dealing with her pain and her dissatisfaction with Dr. Schabacker as her designated treating physician. During the course of these disputes, I find only two specific references to Dr. Bugbee. The first reference is in Howell's October 27, 2010, letter to Nelson, which merely lists Dr. Bugbee among the doctors who had rendered treatment to Nelson since her injury.[19] The second reference to Dr. Bugbee appears in Howell's December 16, 2010, letter to Sheehy in which Howell refused Nelson's demand to change treating physicians. In this letter, Howell noted, *inter alia*, that § 39-71-1101, MCA, does not allow Nelson to repeatedly change treating physicians, and further noted that neither Dr. Bugbee nor Dr. Lubenow qualified as treating physicians

---

[16] *Delaware v. K-Decorators, Inc.,* 1999 MT 13, ¶ 55, 293 Mont. 97, 973 P.2d 818.

[17] *Buckman v. Montana Deaconess Hosp*., 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[18] MSGIA's Opening Brief at 5.

[19] MSGIA's Opening Brief, Ex. 12.

since neither doctor was licensed in Montana nor had admitting privileges to a Montana hospital.[20]

¶ 33 Regarding Howell's December 16, 2010, letter, I note that Nelson had not specifically requested that Dr. Bugbee replace Dr. Schabacker as her treating physician. Rather, Nelson asserted through her attorney that Dr. Schabacker was no longer one of her treating physicians and she expressed her intention to seek treatment with other previously-authorized treating physicians, or physicians who agreed to be supervised by previously-authorized treating physicians, involved with her ketamine infusion treatment. More to the point, however, even if Nelson had specifically requested that Dr. Bugbee replace Dr. Schabacker as her treating physician, MSGIA's denial of that request is not a categorical denial of any "further treatment with Dr. Bugbee" for purposes of commencing the two-year statute of limitations.

¶ 34 Howell's statement regarding Dr. Bugbee's lack of qualifications as a treating physician is clearly a reference to § 39-71-116(37), MCA, which provides in pertinent part:

> "Treating physician" means a person who is primarily responsible for the treatment of a worker's compensable injury and is:
>
> (a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges to practice in one or more hospitals, if any, in the area where the physician is located[.]

¶ 35 That Dr. Bugbee does not qualify as a "treating physician" under § 39-71-116(37), MCA – i.e., the person primarily responsible for the treatment of Nelson's injury – is indisputable. The dispute presently before the Court, however, is not whether Dr. Bugbee either qualifies, or may be designated, as Nelson's treating physician under §§ 39-71-116(37) and 39-71-1101, MCA. Even without being designated the "treating physician" under the applicable statutes, Dr. Bugbee may nevertheless render treatment to Nelson provided the treatment is properly obtained within the parameters of the WCA. Therein lies the dispute that ***is*** presently before the Court: specifically, whether Nelson's 2011 treatment with Dr. Bugbee was properly obtained within the parameters of the WCA or whether MSGIA properly denied payment for the treatment because it was not pre-authorized. In order to find that the statute of limitations on MSGIA's 2011 denial of benefits began to run several months before the denial even occurred would require a conflation of two separate and distinct disputes.

---

[20] MSGIA's Opening Brief, Ex. 14.

¶ 36 MSGIA cites *Boyd v. Zurich Am. Ins. Co.*[21] in support of its contention that Nelson's claim is time-barred. In *Boyd*, the Montana Supreme Court affirmed this Court's decision in which I held the claimant's claim for benefits was time-barred under § 39-71-2905(2), MCA, and granted summary judgment in favor of the insurer. Other than involving a motion for summary judgment based upon the same statute, however, I find *Boyd* inapposite to the present case. In *Boyd*, the claimant brought a claim for a shoulder injury and the insurer "explicitly denied coverage for Boyd's shoulder injury claims."[22] Although Boyd raised several arguments as to why the insurer's explicit denial of benefits should not have triggered the statute of limitations, there was no dispute as to what the denial of benefits entailed. Had MSGIA made a similar explicit denial of any further treatment with Dr. Bugbee, its reliance on *Boyd* might be well taken. Given the circumstances of this particular case, however, MSGIA's reliance on *Boyd* is misplaced.

¶ 37 In *Ereth v. Cascade County*, the Montana Supreme Court noted:

> The policy underlying the bar imposed by statutes of limitations is, at its roots, one of basic fairness. As we have stated in the past, our system of jurisprudence is designed to achieve substantial justice through application of the law after the parties have had an opportunity to fully present both sides of a controversy.[23]

The controversy in this case is whether MSGIA properly denied Nelson's claim for benefits relative to her 2011 treatment with Dr. Bugbee because it was not pre-authorized. Pursuant to § 39-71-2905(2), MCA, the time limit for filing the petition in this Court commenced when MSGIA denied the claim. After factoring in the time when the statute of limitations was tolled because the claim was in mandatory mediation,[24] Nelson's petition was timely filed.

Issue Two: Whether Nelson is entitled to temporary partial disability benefits pursuant to § 39-71-712, MCA.

¶ 38 Section 39-71-712, MCA, provides in pertinent part:

---

[21] *Boyd v. Zurich Am. Ins. Co.*, 2010 MT 52, 355 Mont. 336, 227 P.3d 1026 (*overruled on other grounds by Ford v. Sentry Cas. Co.*, 2012 MT 156, 365 Mont. 405, 282 P.3d 687).

[22] *Id.* ¶ 19.

[23] *Ereth v. Cascade County*, 2003 MT 328, ¶ 16, 318 Mont. 355, 81 P.3d 463.

[24] *See Fleming v. Int'l Paper Co.*, 2005 MTWCC 34, ¶ 21 (*citing Preston v. Transp. Ins. Co.*, 2004 MT 339, ¶¶ 36-37, 324 Mont. 225, 102 P.3d 527).

> (1) . . . [I]f prior to maximum healing an injured worker has a physical restriction and is approved to return to a modified or alternative employment that the worker is able and qualified to perform and the worker suffers an actual wage loss as a result of a temporary work restriction, the worker qualifies for temporary partial disability benefits.
>
> (2) An insurer's liability for temporary partial disability must be the difference between the injured worker's average weekly wage received at the time of the injury . . . and the actual weekly wages earned during the period that the claimant is temporarily partially disabled . . . .

¶ 39 MSGIA contends that Nelson is not entitled to TPD benefits because she did not suffer an actual wage loss as a result of her injury. Nelson does not dispute that she currently earns more than she earned at the time of her injury. However, Nelson contends that she has nevertheless suffered a wage loss because she can no longer coach due to her injury. Although Nelson's employment as both a teacher and coach was for the same employer, Nelson contends that because they were governed by separate employment contracts, the loss of her coaching position should be considered concurrent employment for purposes of determining whether she has suffered a wage loss.

¶ 40 I find no legal support for Nelson's argument that she has suffered a wage loss as a result of her injury. Section 39-71-123(1), MCA, defines "wages" as "***all*** remuneration paid for services performed by an employee for an employer." (Emphasis added.) Nelson does not dispute that the total remuneration paid for her services to her employer is greater now than it was at the time of her injury. The statute does not bifurcate an employee's wages based on whether the services performed by the employee are performed under separate contracts and it is not the prerogative of this Court to insert such a bifurcation provision. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."[25]

¶ 41 Even if I considered Nelson's teaching and coaching positions as concurrent employments, as Nelson urges, the result would be the same. Section 39-71-123(4)(c), MCA, provides that "compensation benefits for an employee working at two or more concurrent remunerated employments must be based on the ***aggregate*** of average actual wages of all employments." (Emphasis added.) Nelson does not dispute that her current wages are greater than the aggregate of her wages at the time of her injury.

[25] § 1-2-101, MCA.

Therefore, she has not suffered a wage loss due to the loss of her coaching position and is not entitled to TPD benefits under § 39-71-712, MCA.

¶ 42 Specific to MSGIA's motion for summary judgment on this issue, Nelson contends that I should deny the motion because "[t]here is a genuine issue of material fact regarding [Nelson's] coaching income, and the separate contracts which governed it. It should be considered to be concurrent employment income governed by a separate employment contract, totally unrelated to her teaching income."[26] As discussed above, however, even treating Nelson's teaching and coaching positions as concurrent employment does not result in a wage loss entitling her to TPD benefits under § 39-71-712, MCA. Therefore, assuming for the sake of argument that an issue of fact exists, it is not a material issue that precludes summary judgment.

ORDER

¶ 43 MSGIA's motion for summary judgment on the issue of whether Nelson's Petition for Hearing as it pertains to her treatment with Dr. Bugbee was timely filed pursuant to § 39-71-2905, MCA, is **DENIED**.

¶ 44 MSGIA's motion for summary judgment on the issue of whether Nelson is entitled to TPD benefits pursuant to § 39-71-712, MCA, is **GRANTED**.

DATED in Helena, Montana, this 9th day of January, 2014.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: (via email and U.S. mail)
Patrick R. Sheehy
Oliver H. Goe
Morgan M. Weber
Submitted: December 20, 2013

[26] Nelson's Response Brief at 5.