IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2023 MTWCC 1

WCC Nos. 2023-6351 and 2023-00007

PHYLLIS RUSSELL

Petitioner

vs.

VICTORY INSURANCE CO., INC.

Respondent/Insurer.

ORDER GRANTING PETITIONER PARTIAL SUMMARY JUDGMENT AND ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: The parties cross moved for summary judgment on the issue of whether Respondent had grounds to terminate Petitioner's benefits for refusing to attend an appointment with her treating physician. Respondent asserts that Petitioner did not attend an appointment with the occupational medicine physician that it had designated as her treating physician under § 39-71-1101(2), MCA, which states, in relevant part, "Any time after acceptance of liability by an insurer, the insurer may designate or approve a treating physician who agrees to assume the responsibilities of the treating physician." Thus, Respondent argues that it had grounds to terminate Petitioner's benefits under § 39-71-1106(1), MCA, which states that an insurer may terminate benefits if an injured worker unreasonably refuses to cooperate with her treating physician. *Inter alia*, Petitioner argues that the occupational medicine physician did not become her treating physician under § 39-71-1101(2), MCA, because Respondent had not accepted liability for her claim at the time it attempted to designate him as her treating physician. Thus, Petitioner argues that she was not legally obligated to attend the appointment with the occupational medicine physician and, therefore, that Respondent did not have grounds under § 39-71-1106(1), MCA, to terminate her benefits for refusing to attend the appointment.

Held: Petitioner is entitled to partial summary judgment because Respondent did not have grounds to terminate her benefits under § 39-71-1106(1), MCA. Respondent had not accepted liability at the time it attempted to designate the occupational medicine physician as Petitioner's treating physician, nor at the time of the appointment Petitioner refused to attend. At that time, Respondent was paying benefits under a "reservation of rights," which it asserted allowed it to indefinitely pay benefits without accepting liability. Thus, when Respondent attempted to designate the occupational medicine physician as Petitioner's treating physician, it did not have the right to do so under the plain language of § 39-71-1101(2), MCA, and, therefore, the occupational medicine physician did not become her treating physician. Because the occupational medicine physician was not Petitioner's treating physician, she was under no obligation to attend the appointment Respondent scheduled for her. Therefore, Respondent did not have grounds under § 39-71-1106(1), MCA, to terminate her benefits for refusing to attend the appointment.

¶ 1 Respondent Victory Insurance Co., Inc. (Victory) moves for summary judgment, asserting that it had grounds to terminate Petitioner Phyllis Russell's benefits under § 39-71-1106(1), MCA, because she refused to attend an appointment with the occupational medicine physician it had designated as her treating physician under § 39-71-1101(2), MCA.

¶ 2 Russell cross moves for summary judgment, asserting, *inter alia*, that Victory did not have the right to designate a new treating physician under § 39-71-1101(2), MCA, when it claims to have done so because it had not yet accepted liability for her claim. Thus, she argues that the occupational medicine physician was not her treating physician at that time, that she was not legally obligated to attend the appointment that Victory scheduled for her, and, therefore, that Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA, for refusing to attend the appointment.

¶ 3 For the following reasons, this Court denies Victory's Motion for Summary Judgment and grants Russell partial summary judgment on her claim that Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA. Russell's claims for the amount of benefits that Victory owes, if that is still in dispute after Victory pays her past-due benefits; for ongoing benefits; for a penalty under § 39-71-2907, MCA; and for her attorney fees and costs under § 39-71-611, MCA, remain for trial.

FACTS

¶ 4 On February 20, 2022, Russell injured her back, left shoulder, and left hip in the course and scope of her employment.

¶ 5 On February 25, 2022, Russel saw Kellie A. Depuydt, NP, who released Russell to return to work.

¶ 6 On February 27, 2022, Russell injured her back, neck, head, left shoulder, and left hip in the course and scope of her employment.

¶ 7 Russell filed a claim with Victory for these injuries, which insured Russell's employer.

¶ 8 Russell's symptoms included neck pain, with pain radiating into her shoulders and left arm and fingers, and headaches.

¶ 9 On March 1, 2022, Russell returned to Depuydt, who referred Russell for a head CT scan, a spine CT scan, and 12 sessions of physical therapy.

¶ 10 On April 1, 2022, Victory authorized the CT scans and the course of physical therapy.

¶ 11 That same day, Victory's adjuster, Ashley Burch, sent Russell a letter stating that Victory was not accepting liability for her claim but would pay benefits under a "reservation of rights." Burch explained: "This will allow me to pay benefits while I continue my investigation without accepting liability or waiving my right of defending this case in the future should there be a need to do so."

¶ 12 For the next seven and a half months, Victory paid Russell's benefits without accepting liability under its asserted "reservation of rights."[1]

¶ 13 On April 20, 2022, Depuydt, who was Russell's treating physician, referred Russell for a cervical spine MRI.

¶ 14 On April 27, 2022, Victory authorized the MRI.

¶ 15 On May 18, 2022, Victory began paying Russell wage-loss benefits based upon the restrictions noted in the Medical Status Forms that Depuydt filled out at the conclusion of Russell's appointments.

¶ 16 On June 7, 2022, Depuydt referred Russell to neurology for evaluation of Russell's headaches and for a Botox consult.

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[1] This Court notes that there is no provision in the Workers' Compensation Act that allows for an insurer to indefinitely pay benefits under a "reservation of rights." For those claims in which the insurer cannot accept or deny a claim within 30 days, as required by § 39-71-606, MCA, it can proceed under § 39-71-608, MCA, which states:

> **Payments within 30 days by insurer without admission of liability or waiver of defense authorized -- notice -- limitations on payments over 90 days.** (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.

¶ 17 On July 13, 2022, Russell saw Robert M. Lynagh, DO, a neurologist. Dr. Lynagh diagnosed cervicogenic headaches and cervical stenosis with radiculopathy. Dr. Lynagh recommended Botox injections to treat her headaches and requested authorization for a cervical epidural steroid injection and a bone density study.

¶ 18 Russell returned to Dr. Lynagh on August 10, 2022, who again requested authorization for an epidural steroid injection and a bone density scan.

¶ 19 On August 17, 2022, Victory authorized the epidural steroid injection but denied the bone density scan on the grounds that it was not related to Russell's injuries.

¶ 20 On September 27, 2022, Russell saw Trenay Hart, PA-C, for her headaches. Hart prescribed medications for Russell's headaches. Hart scheduled a follow-up appointment but wrote: "At this point I do not really want to take over her occupational injury therefore I will make referral to occupational medicine so they can manage that."

¶ 21 On October 14, 2022, Russell returned to Depuydt, and reported that her headaches were improving, and that the epidural steroid injection was helpful. At the conclusion of the appointment, Depuydt filled out a Medical Status Form in which she released Russell to work three days per week.

¶ 22 On October 19, 2022, Victory authorized Hart's referral to occupational medicine.

¶ 23 On October 31, 2022, Victory demanded that Russell schedule an appointment with Michael Fitch, DO, an occupational medicine physician, and informed her that a nurse case manager would attend the appointment with her.

¶ 24 That afternoon, Russell's attorney, Megan L. Miller, sent Burch and Victory's attorney, Joe C. Maynard, an email in which she stated that Russell objected to the presence of a nurse case manager in the examination room. Miller also asked for a copy of Hart's referral to occupational medicine.

¶ 25 Maynard responded with an email which stated that Hart referred Russell to occupational medicine in her September 27, 2022, record. Maynard also stated that the nurse case manager would not attend the examination but would talk to Dr. Fitch after the appointment.

¶ 26 Later that afternoon, Maynard sent an email to Burch stating, "Ash – Call and make an appointment for [Russell]."

¶ 27 Burch followed Maynard's directive, and scheduled Russell for an appointment with Dr. Fitch for November 15, 2022. At this time, Victory still had not accepted liability for Russell's claim.

¶ 28 On November 2, 2022, Miller sent Hart a letter which summarized Russell's treatment to date. Miller asked Hart, "In light of the fact that Depuydt, NP is the treating physician for Ms. Russell's claim, do you still believe it necessary for Ms. Russell to see an occupational health provider? If so, for what purpose?" Hart responded, "No."

¶ 29 On November 7, 2022, Russell's attorney sent Depuydt a letter which summarized Russell's treatment to date. Russell's attorney asked Depuydt, "In light of the fact that you are the treating physician for Ms. Russell's claim, do you believe it necessary for Ms. Russell to see an occupational health provider? If so, for what purpose?" Depuydt responded, "No," and explained, "I don't think it would help."

¶ 30 On November 8, 2022, Miller sent Maynard and Burch an email with Hart's and Depuydt's opinions regarding the referral to occupational medicine. Miller explained that based on Hart's and Depuydt's opinions, Russell would not attend the appointment with Dr. Fitch. Miller wrote:

> The insurer scheduled Ms. Russell to see Dr. Fitch, an occupational health provider, based on Hart PA-C's 9/27/22 medical note indicating she "did not want to take over her occupational injury therefore I will make a referral to occupational medicine so they can manage that." As this was the first (the only time) Ms. Russell saw Trenay Hart, Trenay Hart was apparently unaware of the medical providers already treating Ms. Russell. Kellie Depuydt has treated Ms. Russell from the onset of her injury. Kellie Depuydt has made referrals for care and overseen Ms. Russell's treatment regimen including providing work restrictions.
>
> Ms. Russell was referred to Dr. Lynagh by Kellie Depuydt for neurosurgical consult. He indicated Ms. Russell is likely surgical but cannot undergo the surgery until her bone density is increased. Ms. Russell is undergoing this treatment (which the insurer likely should be paying for). Dr. Lynagh asked Trenay Hart PA-C to evaluate Ms. Russell with regard to her intractable headaches. Ms. Russell is also seen by Dr. Schabacker for pain management-some of which is related to this claim. Given this, adding an additional medical provider is unnecessary and Ms. Russell does not want to see yet another medical provider. Her current regimen, is at least for now, is giving her some relief and she has returned to work.
>
> Given Trenay Hart's determination that the referral to occupational health is not necessary and Kelly Depuydt's opinion that occupational medicine will not offer additional assistance, [p]lease cancel the appointment with Dr. Fitch. Ms. Russell will not be attending.

¶ 31 On November 12, 2022, Maynard responded with an email stating, "Please consider this email a 14[-]day notice of termination of benefits."

¶ 32 Russell did not attend the appointment with Dr. Fitch that Victory had scheduled for her on November 15, 2022.

¶ 33 On November 17, 2022, Russell returned to Depuydt with worsening symptoms. Depuydt completed a Medical Status Form in which she noted that Russell was not released to work.

¶ 34 Also on November 17, 2022, Burch sent Russell a letter stating that Victory was accepting liability for her claim. However, Burch also notified Russell that Victory was going to terminate her benefits for failing to attend the appointment with Dr. Fitch on November 15, 2022. Burch's letter states:

> I have been informed that you did not attend your appointment with Dr. Michael Fitch on 11/15/2022. A new appointment with Dr. Fitch has been scheduled for 12/01/2022 at 9:00 a.m.
>
> Please be advised that I am no longer authorizing any continued treatment with Kellie Depuydt, NP.
>
> I am hereby giving you written notice that your benefits will be terminated 14 days from the date of this letter due to non-compliance with attendance to the appointment with Dr. Fitch.

¶ 35 Victory terminated Russell's benefits.

¶ 36 In December 2022 and January 2023, Russel saw Dr. Lynagh and Hart, both of whom have recommended additional treatment. Dr. Lynagh opined that Russell is not released to work.

¶ 37 In her Petition for Emergency Trial, Russell seeks: a ruling that Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA; an award of her benefits retroactive to the date Victory terminated them; an award of her ongoing benefits; a penalty under § 39-71-2907, MCA; and an award of her attorney fees and costs under § 39-71-611, MCA.

LAW AND ANALYSIS

¶ 38 This case is governed by the 2021 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Russell's industrial injuries.[2]

¶ 39 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

[2] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

judgment as a matter of law."[3] "[If] 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]

¶ 40 Here, the parties do not identify any issues of material fact and this Court has reviewed the evidence submitted and determined that there are no issues of material fact.

¶ 41 The parties dispute whether Victory had grounds to terminate Russell's benefits under § 39-71-1106(1), MCA, which provides, in relevant part, as follows:

> An insurer that provides 14 days' notice to the worker and the department may terminate any compensation benefits that the worker is receiving until the worker cooperates, if the insurer believes that the worker is unreasonably refusing:
>
> (1) to cooperate with a managed care organization, a preferred provider organization, or the treating physician[.]

¶ 42 Victory argues that it had grounds to terminate Russell's benefits under this statute because she did not attend the November 15, 2022, appointment with Dr. Fitch. Victory asserts it had the unfettered right to change Russell's treating physician from Depuydt to Dr. Fitch under § 39-71-1101, MCA, which provides, in relevant part, as follows:

> (1) Prior to the insurer's designation or approval of a treating physician as provided in subsection (2) or a referral to a managed care organization or preferred provider organization as provided in subsection (8), a worker may choose a person who is listed in 39-71-116(42) for initial treatment. Subject to subsection (2), if the person listed under 39-71-116(42) chosen by the worker agrees to comply with the requirements of subsection (2), that person is the treating physician.
>
> (2) Any time after acceptance of liability by an insurer, the insurer may designate or approve a treating physician who agrees to assume the responsibilities of the treating physician. The designated or approved treating physician:
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> (a) is responsible for coordinating the worker's receipt of medical services as provided in 39-71-704;
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> (b) shall provide timely determinations required under this chapter, including but not limited to maximum medical healing, physical restrictions, return to work, and approval of job analyses, and shall provide documentation;

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[3] *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citation omitted).

[4] *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.

(c) shall provide or arrange for treatment within the utilization and treatment guidelines or obtain prior approval for other treatment; and

(d) shall conduct or arrange for timely impairment ratings.

Victory argues that it designated Dr. Fitch as Russell's treating physician and that she thereafter refused to attend the appointment it scheduled for her on November 15, 2022. Thus, it argues that by failing to attend the appointment, Russell did not cooperate with her treating physician and that it therefore had grounds to terminate her benefits under § 39-71-1106(1), MCA.

¶ 43 Russell makes three independent arguments in support of her claim that Victory did not have grounds to terminate her benefits for refusing to attend her November 15, 2022, appointment with Dr. Fitch. First, Russell points out that on October 31, 2022, when Victory scheduled her appointment with Dr. Fitch, and on November 15, 2022, the date of the appointment it had scheduled for her, it had not accepted liability for her claim. At that time, Victory was paying her benefits under a "reservation of rights." Thus, she argues that Victory did not then have the right to designate Dr. Fitch as her treating physician under the plain language of § 39-71-1101(2), MCA, which unequivocally states that an insurer can designate a treating physician only after it has accepted liability. Because Victory had not accepted liability for her claim when it attempted to designate Dr. Fitch as her treating physician, Russell argues that he did not become her treating physician and that she was not legally obligated to attend the November 15, 2022, appointment with him. Thus, she argues that Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA, for failing to cooperate with her treating physician.

¶ 44 Second, Russell argues that Victory does not correctly interpret § 39-71-1101, MCA. Russel points out that the plain language of the last phrase of subsection (1) states that if a claimant's chosen treating physician agrees to comply with the requirements in subsections (2)(a)-(d), then that medical provider "***is*** the treating physician."[5] While acknowledging the language in subsection (2) giving insurers the right to designate the treating physician after accepting liability, Russell argues that the correct way to interpret § 39-71-1101(1) and (2), MCA, is as saying that an insurer can designate the treating physician under subsection (2) only if the claimant fails to select a treating physician or if the claimant's chosen treating physician refuses to comply with the requirements in subsections (2)(a)-(d). Russell asserts that her statutory interpretation is supported by the legislative history of § 39-71-1101, MCA.[6] Russell points out that she selected

[5] Emphasis added.

[6] *See, e.g.*, Mont. Sen., *Floor Session on H. Bill 334*, 62nd Legis., Reg. Sess. (March 26, 2011) (comments of Senator Blewett stating, in response to a question asking if the insurer can designate a treating physician only if the claimant fails to select one or if the claimant's chosen treating physician does not comply with the requirements of a treating physician, "Yes, that is correct. The first section allows the worker to select the medical provider that will be the treating physician and if a worker does not select a qualified medical provider or treating physician or the treating

Depuydt as her treating physician and that Depuydt complied with the requirements in subsections (2)(a)-(d). Thus, Russell argues that Victory did not have the right to select Dr. Fitch as her treating physician under § 39-71-1101, MCA, even after it accepted liability for her claim, and that it did not have grounds to terminate her benefits under § 39-71-1106(1), MCA, for refusing to attend the appointment with him.

¶ 45 Third, Russell argues that if § 39-71-1101(2), MCA, is interpreted as giving workers' compensation insurers the unfettered right to choose a claimant's treating physician after accepting liability, then it violates the claimant's right to privacy under Art. II, § 10, Mont. Const., which states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Russell primarily relies upon *Armstrong v. State*, in which the Montana Supreme Court held that a statute prohibiting physician assistants-certified from performing abortions was unconstitutional because the right to privacy in Art. II, § 10 Mont. Const., which is a fundamental right, "guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference."[7] Applying strict scrutiny, Russell argues that a workers' compensation claimant has the fundamental right to make medical judgments in partnership with her chosen treating physician and that the State does not have a compelling interest in allowing a workers' compensation insurer to designate a claimant's treating physician. Thus, she asks this Court to rule that § 39-71-1101(2), MCA, is unconstitutional and that Victory did not have the right to designate Dr. Fitch as her treating physician even after it accepted liability for her claim, and that it did not have grounds to terminate her benefits under § 39-71-1106(1), MCA, for refusing to attend the appointment with him.

¶ 46 In response to Russell's first argument, Victory baldly asserts that it designated Dr. Fitch as Russell's treating physician after it accepted liability and that it terminated Russell's benefits for thereafter refusing to attend an appointment with him. In response to Russell's second argument, Victory argues that the plain language of § 39-71-1101(2), MCA, unambiguously allows workers' compensation insurers to designate the treating physician any time after accepting liability and that the legislative history is therefore irrelevant.[8] In response to Russell's constitutional argument, Victory argues that it is not properly before this Court. Although Russell filed a Notice of Constitutional Question to

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physician chosen by the worker does not comply with the requirements, then the insurer is allowed to designate one in the second paragraph of 39-71-1101.").

[7] 1999 MT 261, ¶ 14, 296 Mont. 361, 989 P.2d 364. *See also Weems v. State*, 2023 MT 82, ¶¶ 35, 36, 43-51, 412 Mont. 132, 529 P.3d 798 (holding that statute that made it a crime for qualified clinicians who are not physicians or physician assistants to perform abortions violated Art. II, § 10, Mont. Const., which "guarantees a woman a fundamental right of privacy to seek abortion care from a qualified health care provider of her choosing, absent a clear demonstration of a medically, acknowledged, bona fide health risk," because the State failed to present any evidence that allowing the qualified clinicians who are not physicians or physician assistants presented a bona fide health risk).

[8] *See Stand Up Montana v. Missoula Cnty. Pub. Sch*., 2022 MT 153, ¶ 25, 409 Mont. 330, 514 P.3d 1062 (stating, "When the plain language of the statute is clear, no other means of interpretation are necessary or proper. ... Only when the language of the statute is ambiguous do we resort to the statute's legislative history." (citation omitted)).

§ 39-71-1101, MCA, on the same day she filed her Petition for Emergency Trial, Victory asserts that it did not have sufficient notice of her constitutional challenge because she did not include it in her Petition for Emergency Trial. If Russell's constitutional challenge is properly before this Court, Victory argues that § 39-71-1101(2), MCA, does not implicate her right to privacy. Victory relies on *Powell v. State Compensation Ins. Fund*,[9] and argues that § 39-71-1101(2), MCA, involves Russell's entitlement to legislatively created benefits. Thus, Victory argues that § 39-71-1101(2), MCA, is constitutional because it is rationally related to the legitimate governmental interests of returning workers to work quickly, avoiding "doctor shopping," and cost containment.

¶ 47 On the summary judgment record, Russell is correct that Victory did not have grounds under § 39-71-1106(1), MCA, to terminate her benefits for refusing to attend the November 15, 2022, appointment with Dr. Fitch because he was not her treating physician. On October 31, 2022, when Victory scheduled the appointment with Dr. Fitch for November 15, 2022, it had not accepted liability for her claim. At that time, Victory was still paying benefits under a "reservation of rights" without accepting liability. Thus, under the plain language of § 39-71-1101(2), MCA, Victory did not then have the statutory right to designate Russell's treating physician and, therefore, Dr. Fitch did not become Russell's treating physician as a matter of law. Instead, Depuydt remained Russell's treating physician under § 39-71-1101(1), MCA. Because Dr. Fitch was not Russell's treating physician, Russell had no legal obligation to attend the appointment with him that Victory had scheduled for November 15, 2022, which was two days before Victory accepted liability for her claim. Thus, Russell did not refuse to attend an appointment with her treating physician and, therefore, Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA.

¶ 48 Victory's assertion that it designated Dr. Fitch as Russell's treating physician after it accepted liability and that it terminated her benefits under § 39-71-1106(1), MCA, because she thereafter refused to attend an appointment with him is unsupported by the evidence. The dates on which Victory attempted to designate Dr. Fitch as Russell's treating physician and the date on which it accepted liability come from its adjuster's letters and its attorney's emails. On April 1, 2022, Burch sent a letter to Russell in which she unequivocally stated that Victory was not accepting liability for her claim but would pay benefits under a "reservation of rights." On October 31, 2022 — more than two weeks before Victory accepted liability for Russell's claim — Maynard sent an email to Burch in which he directed her to schedule an appointment for Russell with Dr. Fitch. On November 12, 2022 — five days before Victory accepted liability for Russell's claim — Maynard sent an email to Miller in which he gave a 14-day notice that Victory was going to terminate Russell's benefits because Miller had informed him that Russell was not going to attend the November 15, 2022, appointment with Dr. Fitch. And, in Burch's letter

[9] 2000 MT 321, ¶ 21, 302 Mont. 518, 15 P.3d 877 (holding that the statutory cap on domiciliary care benefits was properly analyzed under the rational basis test, and not strict scrutiny, because, while the right to privacy and liberty are fundamental rights, the issue in the case was the claimant's entitlement to workers' compensation benefits, which is not a fundamental right).

to Russell dated November 17, 2022, Burch notified Russell that Victory was accepting liability for her claim but unequivocally informed her that Victory was going to terminate her benefits because she did not attend the appointment with Dr. Fitch that was scheduled for November 15, 2022. The evidence directly from Victory thus shows that it attempted to designate Dr. Fitch as Russell's treating physician under § 39-71-1101(2), MCA, before it had accepted liability for her claim. The evidence directly from Victory also shows that it terminated Russell's benefits under § 39-71-1106(1), MCA, for refusing to attend the appointment with Dr. Fitch that was scheduled for November 15, 2022, two days before it accepted liability for her claim, and when Dr. Fitch was not her treating physician as a matter of law. Victory cannot prevail on its summary judgement motion, nor defeat Russell's summary judgment motion, by contradicting its adjuster's letters and its attorney's emails.[10]

¶ 49 Because Russell is correct that Victory did not have grounds under § 39-71-1106(1), MCA, to terminate her benefits for refusing to attend the November 15, 2022, appointment with Dr. Fitch, this Court need not address her statutory interpretation argument nor her constitutional challenge.

¶ 50 Although Russell moved for summary judgment, this Court deems her motion to be one for partial summary judgment on the issue of whether Victory had grounds to terminate her benefits under § 39-71-1106(1), MCA, because she has made additional claims in this case, those being her claims for an award of past-due and ongoing benefits; for attorney fees and costs under § 39-71-611, MCA; and for a penalty under § 39-71-2907, MCA. Thus, this Court will grant her partial summary judgment on her claim that Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA, and issue a Scheduling Order scheduling the litigation deadlines and a trial on her remaining claims.

¶ 51 Based on the foregoing, this Court enters the following:

[10] *See, e.g., Stott v. Fox*, 246 Mont. 301, 309, 805 P.2d 1305, 1310 (1990) (holding that party cannot create issue of fact on summary judgment by contradicting its earlier testimony and that "a district court may grant summary [judgment] where a party's sudden and unexplained revision of testimony creates an issue of fact where none existed before. Otherwise, any party could head off a summary judgment motion by supplementing previous depositions ad hoc with a new affidavit, and no case would ever be appropriate for summary judgment.").

ORDER

¶ 52 IT IS ORDERED that Russell is **granted** partial summary judgment on her claim that Victory did not have grounds to terminate her benefits under § 39-71-1106(1), MCA.

¶ 53 IT IS FURTHER ORDERED that Victory's Motion for Summary Judgment is **denied**.

DATED this 22nd day of August, 2023.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Megan L. Miller
Joe C. Maynard

Submitted: April 21, 2023