IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 46

WCC No. 2007-1843

STEVEN SCHOENEMAN

Petitioner

vs.

LIBERTY INSURANCE CORPORATION

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Summary: Respondent asks the Court to reconsider its decision in this matter. It alleges that the Court impliedly overruled cases without expressly doing so, wrongly relied on dicta in reaching its decision, considered irrelevant statutory provisions, and that the Court's holding was both unclear and unsupported. Petitioner responds that Respondent's motion is merely a restatement of its previous arguments which have been addressed and ruled upon by the Court.

Held: Respondent's motion for reconsideration is denied.

¶ 1 Respondent Liberty Insurance Corporation moves the Court to reconsider its Order Granting Petitioner's Motion for Summary Judgment ("Order") entered July 11, 2007, in this matter.[1] Petitioner Steven Schoeneman responds, arguing that the Court should not disturb its July 11, 2007, decision.

¶ 2 Respondent alleges that the Court impliedly overruled cases without expressly doing so, wrongly relied on dicta in reaching its decision, considered irrelevant statutory provisions, and that the Court's holding was both unclear and unsupported.

¶ 3 Petitioner responds that Respondent's motion for reconsideration is merely a restatement of its summary judgment arguments, and that this Court has already

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[1] *Schoeneman v. Liberty Ins. Corp.*, 2007 MTWCC 28.

addressed these arguments and ruled in Petitioner's favor. Petitioner further asserts that Respondent misinterprets this Court's discussion of the *Sears* and *Edgar* cases,[2] in that this Court found these cases factually distinguishable from the present situation and did not overrule them.

¶ 4 Respondent first argues that this Court has held that the first sentence of § 39-71-609(2), MCA, contravenes the public policy of the Workers' Compensation Act (WCA) and that the Court's reasoning in doing so was incorrect. Respondent misapprehends the Court's holding. I did not hold that the sentence in question contravenes the WCA's declared public policy. Rather, I held that Respondent's interpretation of § 39-71-609(2), MCA, was incorrect to the extent that Respondent sought to excise a single sentence from the statute and interpret it in such a way that, as Respondent acknowledged, it created a "black hole" into which pre-MMI claimants could fall, with the result being that an injured worker would be unable to obtain benefits while still unable to return to work. It was in this regard that I found Respondent's interpretation contravened the public policy of the WCA.[3] "To avoid an absurd result and to give effect to a statute's purpose, we read and construe the statute as a whole."[4]

¶ 5 Respondent next asserts that this Court's decision overruled *Edgar* in substance without expressly so holding. Respondent then asks the Court to either expressly overrule *Edgar* or reconsider its decision and find in Respondent's favor. Respondent's belief that *Edgar* has been overruled is incorrect. As was clearly discussed in the Order, I found the facts of *Edgar* to be distinguishable from the facts of the present case.[5] Respondent's proffered choice of either overruling *Edgar* or finding in Respondent's favor presents a false dilemma which I decline to entertain.

¶ 6 Respondent next asserts that the Court has not only overruled *Edgar*, but *Sears* as well, and again requests that the Court either expressly overrule *Sears* or reconsider its decision and find in Respondent's favor. Again, I found the facts of both *Edgar*–as

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[2] *Sears v. Travelers Ins.*, 1997 MTWCC 18, and *Edgar v. Legion Ins. Co.*, 2001 MTWCC 33, respectively.

[3] *See* Order Granting Petitioner's Motion for Summary Judgment ("Order") at ¶ 44.

[4] *S.L.H. v. State Compensation Mutual Ins. Fund*, 2000 MT 362, ¶ 17, 303 Mont. 364, 15 P.3d 948. (*Citing*, *Skinner Enterprises, Inc. v. Lewis and Clark County Board of Health*, 286 Mont. 256, 274, 950 P.2d 733, 744 (1997).

[5] *See, e.g.*, Order, ¶ 42, in which I stated, "Unlike the present case, however, the claimant in *Edgar* was at MMI and released to work in light-duty positions for which job analyses had been previously approved by her treating physician," and ¶ 41, in which I stated, "Read in their entirety, it is clear in both *Edgar* and *Sears* that this Court did not contemplate a situation such as the one at hand . . . ."

explained above–and *Sears* to be factually distinguishable from the present case.[6] And once again, I find Respondent's proffered choices of either finding in its favor or overruling a decision which was factually distinguishable from the present case unwarranted.

¶ 7 Respondent further objects to this Court's favorable reference to language from the *Edgar* and *Sears* decisions which Respondent alleges is merely dicta. Quoting C.J.S., Respondent points out, "Dictum, as a general rule, is not binding as authority or precedent."[7] I agree. Rather, a court's purpose in including dicta in its decisions is often to serve as persuasive guidance to future courts in considering similar issues. It is within that context that I considered the *Edgar* and *Sears* decisions in their entirety and found guidance in the ***reasoning*** behind those rulings notwithstanding the factual distinctions. Respondent's request that I reconsider my decision based on these grounds is therefore denied.

¶ 8 Respondent further argues that the Court was unclear in its holding regarding whether "an insurer acting under the first sentence of MCA § 39-71-609(2) must give 14-days [sic] written notice."[8] In its summary judgment arguments, Respondent argued that the first sentence of § 39-71-609(2), MCA, is somehow extractable from the whole. This argument was rejected in this Court's Order. Therefore, the argument that Respondent now brings forth is based upon a false premise which cannot be reconciled with the Court's ultimate conclusion that § 39-71-609(2), MCA, is not divisible into separate definitions of "released to return to work in some capacity" for pre- and post-MMI claimants.[9]

¶ 9 Respondent asserts that this Court implied, but did not specifically hold, that 14 days' written notice was required to be given in light of the facts of this case. The ***sole*** issue in this case was whether Petitioner's benefits should be reinstated because Respondent failed to give 14 days' written notice. Since I ultimately ordered that Petitioner's benefits be reinstated, I had assumed–apparently incorrectly–that my ruling on this issue was evident. However, for clarity's sake, I reiterate here that I reinstated Petitioner's benefits because Respondent failed to give 14 days' written notice, and as Petitioner argued, such notice was statutorily required. Therefore, Respondent's motion for reconsideration on these grounds is denied.

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[6] *See, e.g.*, n.3 above, and Order, ¶ 40, in which I stated, "Respondent's reliance on *Sears* and *Edgar* . . . is misplaced," and ¶ 41, in which I pointed out that in *Sears*, unlike the present case, the claimant was given notice and his physician had approved a job description. *See also* ¶ 43, in which I stated, "Therefore, although Respondent argues that the present case is on-point with *Edgar*, *Sears*, and *Daulton*, I find these cases readily distinguishable . . . ."

[7] *See* Motion for Reconsideration and Supporting Brief at 3.

[8] Motion for Reconsideration and Supporting Brief at 3.

[9] Order, ¶ 39.

¶ 10 Respondent further takes issue with this Court's discussion of the interpretation of "released to return to work in some capacity," arguing that the interpretation of this phrase bears no relevancy to the issue at hand. Respondent then asserts that the *Coles*[10] factors were somehow nullified by the outcome of this case because § 39-71-609(2), MCA, does not require a physician's pre-MMI approval of a job analysis. Respondent overlooks that this Court did not conclude that a pre-MMI approval of a job analysis was required. In fact, I specifically stated, "I am hard-pressed to consider a claimant to have been released to return to work in some capacity when he is not at MMI, cannot return to his time-of-injury job, and there exists absolutely no evidence that ***any*** job exists that he may perform in his present physical and vocational condition."[11] As I further noted, the statutes at issue in this case "contemplate a claimant who is employable in the sense that a job exists which the claimant is physically and vocationally qualified to perform."[12] Like the courts in *Coles, Edgar*, and *Sears*, I did not hold that a complete, technical, and current job analysis is the ***only*** way to fulfill this requirement. Since in the present case, absolutely no evidence of any job existed, I did not need to reach the specifics of what kind of evidence would suffice. Such a discussion is more appropriately left for a future case when that issue is actually before the Court.

¶ 11 Finally, Respondent claims that this Court failed to address the fact that Petitioner was not at MMI when he was initially released to work without restrictions, although restrictions were later imposed. Although Respondent argues that the Court should have found in its favor outright, Respondent further argues that the Court should have segregated the time periods of Petitioner's initial release to return to work and the later imposition of restrictions and ruled on those time periods separately. In assessing this argument, I look back to the stipulated facts upon which Petitioner and Respondent agreed this issue may be decided. Specifically, the parties expressly stipulated that:

> Although Dr. Jimmerson wrote a letter on August 10, 2006, which purported to release Petitioner to return to work without restriction, Dr. Jimmerson asserted, and the parties agree, that this letter was written solely to assist Petitioner in obtaining employment, and that Petitioner intended to consult Dr. Jimmerson about any prospective jobs so they could determine if the job was appropriate for Petitioner's limitations.[13]

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[10] *Coles v. Seven Eleven Stores*, Docket No. 2000, File No. 583-138 (Nov. 1984) (*aff'd* 217 Mont. 343, 704 P.2d 1048).

[11] Order, ¶ 45. (Emphasis in original.)

[12] Order, ¶ 39.

[13] Order, ¶ 13.

Respondent agreed to the stipulated facts the Court relied upon in reaching its decision. Respondent cannot now argue that Petitioner was actually released to return to work without restriction, when it conceded that the purported work release was never intended to serve as an actual release, but merely to assist in facilitating Petitioner's job search. Therefore, I will not reconsider this issue.

ORDER

¶ 12 For the reasons set forth above, Respondent's motion for reconsideration is **DENIED**.

DATED in Helena, Montana, this 8th day of November, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Sara R. Sexe
Larry W. Jones
Submitted: August 7, 2007