IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 37

WCC No. 2000-0077

MARSHA DAULTON

Petitioner

vs.

MHA WORKERS' COMPENSATION TRUST

Respondent/Insurer for

ST. PETER'S HOSPITAL

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Claimant, a registered nurse, suffers from an occupational disease involving both of her shoulders and cannot return to her time-of-injury job. However, she was determined to be at maximum medical improvement and released to work for a job identified by a vocational consultant as appropriate for her. Nonetheless, she claims she cannot return to work and is entitled to temporary total disability benefits.

Held: Claimant is no longer entitled to temporary total disability benefits since she has reached MMI. 39-71-701 (1997). The insurer complied with the notice requirements of section 39-7-609 (1997-1999) and, even though not applicable, with the *Coles* requirements. No determination is made as to whether claimant is permanently totally or permanently partially disabled since those issues were not raised. Attorney fees are denied since claimant did not prevail and the insurer's termination of benefits was reasonable.

Topics:

> **Benefits: Temporary Total Benefits.** Under 1997 and 1999 law, §§ 39-71-701 and -609, MCA, once claimant has been found to be at MMI and has been released to return to any sort of employment, she is no longer entitled to temporary total disability benefits.
>
> **Benefits: Termination of Benefits.** Under 1997 and 1999 law, § 39-71-701 and -609, MCA, once claimant has been found to be at MMI the insurer may terminate claimant's temporary total disability benefits upon 14 days notice. If the claimant

has also been released to return to any sort of employment, the insurer may immediately terminate temporary total disability benefits.

Benefits: Termination of Benefits: *Coles*. The *Coles'* requirements are inapplicable under 1997 and 1999 law, although the legislature has re-adopted them effective July 1, 2001. [**Editor's Note**: The effective date of the 2001 *Coles*' amendment is March 30, 2001, not July 1, 2001.]

Benefits: Termination of Benefits: *Coles*. Even if the *Coles'* requirements are applicable under 1997 and 1999 law, they are satisfied where the physician (1) finds claimant at MMI, (2) determines her physical restrictions, (3) releases her to return to work in a specific job which was found to be vocationally appropriate, and (4) a copy of the physician's report is furnished to claimant.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-609. Under 1997 and 1999 law, §§ 39-71-701 and -609, MCA, once claimant has been found to be at MMI the insurer may terminate claimant's temporary total disability benefits upon 14 days notice. If the claimant has also been released to return to any sort of employment, the insurer may immediately terminate temporary total disability benefits.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-701. Under 1997 and 1999 law, 39-71-701, once a claimant has been found to be at MMI she is no longer entitled to temporary total disability benefits provided she has been given notice in accordance with 39-71-609.

¶1 The trial in this matter was held on February 21, 2001, in Helena, Montana. Petitioner, Marsha Daulton (claimant), was present and represented by Mr. John C. Doubek. Respondent, MHA Workers' Compensation Trust (MHA), was represented by Mr. G. Andrew Adamek.

¶2 Exhibits: Exhibits 1 through 13 were admitted without objection.

¶3 Witnesses and Depositions: The parties submitted the depositions of claimant, Margot Hart, and Kenneth V. Carpenter, M.D. for the Court's consideration. Claimant, Margot Hart, Larry Daulton, Janice Edgar, and Gerry Blackman were sworn and testified. A trial transcript was not prepared.

¶4 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

1. Whether Petitioner is entitled to have her TTD benefits reinstated.

2. Whether Petitioner is entitled to attorney fees and costs from Insurer.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is 47 years old. She was licensed as a Practical Nurse (LPN) in 1986 and thereafter worked as an LPN on the surgical floor at St. Peter's Hospital (St. Peter's) for approximately ten years. (Daulton Dep. at 8-9, 14.) In 1995 she was licensed as an RN and was thereafter hired in a RN position as a "float nurse" at St. Peter's. As a float nurse she worked in different areas of the hospital, however, she worked mostly in surgery. (*Id*. at 19-20, 22.)

¶7 During her employment at St. Peter's, claimant began experiencing right shoulder pain. The parties agree that as of September 10, 1997, claimant was suffering from an occupational disease (OD) of her right shoulder. (Uncontested Fact No. 1.) MHA, which insured St. Peter's at the time, accepted liability for her disease. (Uncontested Fact No. 2.)

¶8 Claimant was referred by St. Peter's to Dr. Allen Weinert, a physiatrist, for treatment. He initially saw her on September 22, 1997. At that time, her primary complaints were of constant pain in the right shoulder and intermittent numbness into the right arm. (Ex. 4 at 109.) Dr. Weinert diagnosed mild right rotator cuff tendinitis, right cervical and scapular region myofascial pain, and mild right thoracic outlet syndrome. (*Id*. at 111.) He prescribed physical therapy and approved claimant to work on the obstetrical floor at St. Peter's, however, he disapproved her working in surgery. (*Id*.)

¶9 Claimant continued to have shoulder pain and on October 30, 1997, she saw Dr. Carpenter, an orthopedic surgeon. (Daulton Dep. at 28; Carpenter Dep. at 5.) Her pain continued and on November 20, 1997, an MRI was done. It showed "impingement on the supraspinatus muscular tendon complex by the acromion process," and "a partial tear at the junction of the of the supraspinatus muscular rendon complex." (Ex. 5 at 124.) On January 7, 1998, Dr. Carpenter performed rotator cuff surgery on claimant's right shoulder. (Carpenter Dep. at 10; Ex. 5 at 125-26.)

¶10 Claimant returned to work at St. Peter's in March or April, 1998, in a part-time, non-nursing position. She was assigned to assist St. Peter's in developing a database of latex-free products. (Daulton Dep. at 29, 56.) She called manufacturers and distributors of latex-free products and entered data regarding the products into a computer. (Daulton Dep. at 29, 34.) She worked approximately two hours a day, four days a week. (Ex. 9 at 291.) Although claimant had minimal computer skills, she was able to do her assigned job. (*Id*.)

¶11 By the end of March, however, claimant was experiencing weakness when elevating her right arm. (Carpenter Dep. at 13; Ex. 1 at 8.) On April 22, 1998, Dr. Carpenter noted that her range of motion was decreasing. (*Id*.) Meanwhile, claimant's left arm began hurting.

¶12 Claimant quit working altogether on July 17, 1998, and has not worked since that time.

¶13 On July 27, 1998, Dr. Carpenter examined claimant's left shoulder. (Ex. 1 at 18.) X-rays showed a narrowing of the acromioclavicular (AC) joint, i.e. the shoulder joint. (Ex. 1 at 18.) Dr. Carpenter diagnosed a strain of the left rotator cuff with exacerbation of AC joint arthritis. (*Id.*)

¶14 On September 14, 1998, Dr. Carpenter noted that claimant was still having pain in both of her shoulders and suggested she continue physical therapy. (Ex. 1 at 20; Ex. 8 at 224.) He disapproved her return to work as a floor nurse and opined that she might never be able to return to that kind of work. (Carpenter Dep. at 17; Ex. 1 at 20.)

¶15 On January 19, 1999, claimant underwent a functional capacities evaluation (FCE). (Ex. 2 at 30-42.) Due to claimant's pain during the examination, the physical therapist was unable to assess her work capacity. (Ex. 2 at 31.)

¶16 On February 17, 1999, Dr. Carpenter found claimant to be at maximum medical improvement (MMI) with respect to her right shoulder and assigned her an 8% whole person impairment rating. (Carpenter Dep. at 19 and Dep. Ex. at 5.)

¶17 On April 14, 1999, Dr. Carpenter found claimant at MMI with respect to her left shoulder and rated her left shoulder impairment at 4% of the whole person. (Carpenter Dep. Ex. at 3.)

¶18 On May 9, 1999, Dr. Weinert examined claimant at the request of MHA. (Ex. 4 at 118.) It was his opinion that:

> claimant is employable in the sedentary physical demand classification. She should restrict lifting to ten pounds. She should avoid any reaching above shoulder height and avoid prolonged forward flexed posture of the arms. She should avoid repetitive movement in the arms such as assembly line work, etc. I do think she could perform computer activities with an ergonomically correct work station which may include an ergonomic chair with arm supports, etc., and appropriately positioned keyboard tray and mouse tray. Vocational rehabilitation is recommended.

(*Id*. at 119.) He reviewed several job analyses submitted to him by Cheryl Holmes, a vocational consultant hired by the insurer. He disapproved jobs as a home health nurse and office nurse. (Ex. 4 at 120, 122; Ex. 8 at 279-286.) However, he approved her to work as a RN Diabetes Coordinator. (Ex. 4 at 121; Ex. 8 at 271-74.) He also conditionally approved her working as a nurse case manager, noting that she could work that job only if she did not have to reach or lift above the shoulder level. (Ex. 4 at 123; Ex. 8 at 275-78.)

¶19 Based upon Dr. Weinert's report, on May 25, 1999, MHA gave claimant 14 days' written notice terminating her temporary total disability benefits. (Ex. 10 at 306.) But, after correspondence with claimant's attorney, MHA reinstated her benefits.

¶20 Claimant continued to experience pain in both shoulders. Dr. Carpenter injected claimant's left shoulder with a steroid solution on June 28, 1999, but the treatment was ineffective. (Ex. 1 at 22.) He ordered another MRI. The MRI disclosed a partial intrasubstance tear of the supraspinatus tendon and degenerative changes of the AC joint. (Carpenter Dep. at 21.) Despite the MRI results, Dr. Carpenter did not recommend further surgery or other treatment. (*Id.*)

¶21 On November 9, 1999, Dr. Carpenter provided MHA's attorney with his assessment of claimant's condition and her ability to return to work:

> I have reviewed my records and also Dr. Weinert's evaluation of Marsha Daulton. I do not have any disagreement with Dr. Weinert's assessment and would feel it would be appropriate for Ms. Daulton to try the positions of diabetes coordinator or case manager with the restrictions and modifications that were outlined. It must be understood, however, that even with those restrictions and modifications she may continue to have symptoms when working at a computer that may make it impossible for her to do so.
>
> Though it is probably impossible to determine completely accurately, the problems that she has sustained in her left shoulder can be associated with placing more stress on that shoulder because of the limitations and pain incurred in her right shoulder.
>
> Finally, I do feel she is at maximum medical improvement with regards to the left shoulder and feel that the 4% impairment is accurate. Additionally, the impairment rating of 8% with regards to her right shoulder is also accurate.

(Ex. 1 at 3.)

¶22 Based on Dr. Carpenter's evaluation, on November 24, 1999, MHA gave claimant a 14-day written notice that her benefits were being terminated. (Ex. 10 at 311.) That letter stated in relevant part:

> I received a report from Dr. Carpenter dated November 9, 1999 confirming you have reached maximum medical improvement (MMI) from your bilateral shoulder occupational disease claim.
>
> Dr. Carpenter has approved the job descriptions of Nurse Case Manager, with no reaching/lifting above shoulder level; and Nurse Diabetes Coordinator. The starting wages for these jobs is up to $16.53/hour, which is more than the $13.96/hour you were making at the time of your occupational disease.
>
> Based on the above information, I am terminating your wage loss benefits fourteen (14) days from the date of this letter. A check for temporary total disability benefits from November 16 through December 8, 1999 is enclosed.

(*Id*.) The job descriptions referenced in the letter had previously been sent to claimant's attorney. (*Id*. at 310.) A copy of Dr. Carpenter's November 9, 1999 report was sent directly by Dr. Carpenter to claimant's attorney at the time it was made. (Ex. 1 at 3.) Dr. Weinert's report of May 7, 1999, indicating MMI and releasing claimant for the positions had been sent to claimant May 25, 1999. (Ex. 10 at 306.)

¶23 Claimant's benefits were terminated in accordance with the November 24, 1999 notice.

¶24 Claimant has continued treating with Dr. Carpenter, however, she is not receiving any ongoing treatment other than medications.

¶25 The only issues in this case are whether claimant is entitled to reinstatement of temporary total disability (TTD) benefits and, if so, to attorney fees and costs. I therefore limit my findings to the elements required for reinstatement of TTD benefits and the reasonableness of the insurer's conduct in refusing to reinstate the benefits.

¶26 As an initial matter, the evidence that claimant reached MMI prior to the cut-off of her TTD benefits is clear and unrebutted. Dr. Carpenter found her at MMI with respect to both of her shoulders prior to the termination of benefits. Even though claimant testified that her right shoulder condition has worsened since surgery (Daulton Dep. at 44), neither Dr. Carpenter nor Dr. Weinert has prescribed further treatment which might materially improve her condition, and she has presented no evidence that further treatment at this time would materially benefit her. I find that she had reached MMI at the time her TTD benefits were terminated and that she was still at MMI at the time of trial.

¶27 I further find that prior to the termination of TTD benefits the claimant was released to "return to work in some capacity." § 39-71-609(2), MCA (1997). Dr. Weinert gave unqualified approval to her return to work as a RN Diabetes Coordinator, a position identified by a vocational consultant as appropriate for claimant. Dr. Carpenter seconded Dr. Weinert's release. While claimant and her husband provided testimony that may support a finding that she might not be able to perform the job on account of pain, and Dr. Carpenter acknowledged that possibility (see ¶ 14), that testimony goes to the merits of a claim for permanent partial or permanent total disability, issues which are not before the Court.

¶28 The insurer did not act unreasonably in terminating the claimant's TTD benefits.

CONCLUSIONS OF LAW

¶29 The 1997 version of the Workers' Compensation Act applies since that was the law in effect on the date of claimant's alleged injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶30 Section 39-71-701, MCA (1997), governs claimant's temporary total disability benefits. It provides that such benefits cease upon the claimant's reaching a status of maximum

medical healing **or** her release to return to work in the same position or a modified or alternative position at an equivalent or higher wages. The section provides in relevant part:

> **39-71-701. Compensation for temporary total disability-exception.**
>
> (1) Subject to the limitation in 39-71-736 and subsection (4) of this section,
>
> a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

As applied to the present case, claimant's entitlement to TTD benefits ceased when she reached MMI.

¶31 However, the section must also be read together with section 39-71-609, MCA (1997), which governs termination of claimant's temporary total disability benefits. § 1-2-101, MCA ("Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."); *Gibson v. State Compensation Mut. Ins. Fund,* 255 Mont. 393, 396, 842 P.2d 338, 340 (1992) ("When called upon to interpret several different provisions [of a statute] this Court will, if possible, construe the statutes so as to give effect to all of them.").

¶32 Section 39-71-609, MCA, provides:

> **39-71-609. Denial of claim after payments made or termination of all benefits or reduction to partial benefits by insurer -- fourteen days' notice required -- exception.** (1) Except as provided in subsection (2), if an insurer determines to deny a claim on which payments have been made under 39-71-608 during a time of further investigation or, after a claim has been accepted, terminates all biweekly compensation benefits, it may do so only after 14 days' written notice to the claimant, the claimant's authorized representative, if any, and the department.
>
> For injuries occurring prior to July 1, 1987, an insurer must give 14 days' written notice to the claimant before reducing benefits from total to partial. However, if an insurer has knowledge that a claimant has returned to work, compensation benefits may be terminated as of the time the claimant returned to work.
>
> (*2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity.* (Italics added.)

In this case, the prerequisites for cutting off TTD benefits were met. Claimant had reached MMI when her benefits were terminated, thus under section 39-71-701, MCA, she was no longer entitled to TTD benefits. The requirements of section 39-71-609, MCA, were also satisfied. The 14-day notice required in subsection (1) was given. Moreover, under subsection (2), no notice was required because claimant had "been released to return to work in some capacity."

¶33 Claimant urges that her benefits were improperly cut-off because the insurer failed to comply with the *Coles'* requirements. Those requirements were initially adopted by this Court in *Coles v. Seven Eleven Store,* WCC No. 2000, *aff'd* (on unrelated grounds), 217 Mont. 343, 704 P.2d 1048 (1985), and ratified by the Supreme Court in *Wood v. Consolidated Freightways, Ind.,* 248 Mont. 26, 30, 808 P.2d 502, 505 (1991). As set forth in *Wood*, an insurer must satisfy four criteria before terminating TTD benefits. The criteria are:

> (1) a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit;
>
> (2) a physician's determination of the claimant's physical restrictions resulting from an industrial accident;
>
> (3) a physician's determination, based on his knowledge of the claimant's former employment duties, that he can return to work, with or without restrictions, on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition;
>
> (4) notice to the claimant of receipt of the report attached to a copy of the report. . . .

248 Mont. at 30, 808 P.2d at 505.

¶34 I have previously held that the *Coles'* requirements are inapplicable to cases arising after July 1, 1995, the date on which amendments to the statutory notice requirements set forth in section 39-71-609, MCA, took effect. (The requirements, however, were reimposed by the 2001 legislature, 2001 Mont. Laws, Ch. 174, §§ 1 and 2.) As I noted in *Sears v. Travelers Insurance,* 1998 MTWCC 12, and *Edgar v. Legion Ins. Co.,* 2001 MTWCC 33, section 39-71-609(2), MCA, requires only that claimant be released to "work in some capacity." The term "work in some capacity" must be construed in accordance with its ordinary and generally understood meaning. "[S]tatutory language must be reasonably and logically interpreted and words given their usual and ordinary meaning". *In re R.L.S.,* 293 Mont. 288, 291, 977 P.2d 967, 968 (1999). On its face, the term "in some capacity" is broad, indicating a release to any sort of work is sufficient. Had the legislature intended a more careful job analysis, then it could have set forth additional criteria. The Court is prohibited from inserting additional requirements. § 1-2-101, MCA; *Russette v. Chippewa Cree Housing Authority,* 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994). I therefore concluded

that the *Sears'* criteria were inconsistent with the 1995 amendments and are inapplicable to post-July 1, 1995 cases.

¶35 Even if the Coles" requirements were applicable, they were satisfied.

¶36 The MMI determination of Dr. Carpenter satisfies the first requirement for "a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit."

¶37 In his May 9, 1999 report, Dr. Weinert placed specific physical restrictions upon claimant; Dr. Carpenter agreed with Dr. Weinert's analysis in his own report of November 9, 1999. Thus, the second *Coles'* requirement for "physician's determination of the claimant's physical restrictions resulting from an industrial accident" is met.

¶38 Both Dr. Weinert and Dr. Carpenter approved claimant's return to work as a RN Diabetes Coordinator, a job which a vocational consultant identified based upon claimant's education and vocational background. Thus, the third requirement for "a physician's determination . . . that [s]he can return to work, with or without restrictions, on . . . another job for which [s]he is fitted by age, education, work experience, and physical condition" is met. While the claimant in this case disputes the ability to physically do the work and her ability to compete for the position, her arguments go to the merits of a claim for permanent partial or permanent total disability. I do not read *Coles* as requiring the insurer to prove, in this Court, and as a matter of fact, that the claimant is neither permanently partially nor permanently totally disabled in order to justify its termination of TTD benefits. Nor do I read *Coles* as permitting claimant to continue receiving TTD benefits unless the insurer affirmatively proves in Court that claimant is neither permanently totally nor permanently totally partially disabled. Such a requirements would shift the burden of proof regarding claimant's entitlement to permanent disability benefits to the insurer and nullify provisions for permanent disability benefits. Such requirements would mean that a claimant is entitled to TTD benefits forever unless the insurer affirmatively proves that the claimant is neither permanently disabled nor permanently partially disabled. Such requirements are contrary to the benefits scheme set out in the Workers' Compensation Act, as summarized in *McDanold v. B.N. Transport, Inc.,* 208 Mont. 470, 475, 679 P.2d 1188, 1191 (1984):

> Our present statutory scheme considers a worker temporarily totally disabled until such time as the worker is as far restored as the permanent character of his injuries will permit. "When the claimant has reached this stage in his healing process temporary total disability ceases, and partial disability begins if there is permanent partial disability." McAlear v. McKee (1976), 171 Mont. 462, 466, 558 P.2d 1134, 1137.

The Coles' requirements were never intended as a substitute for proof of permanent partial or permanent total disability.

¶39 Finally, the last requirement of "notice to the claimant of receipt of the report attached to a copy of the report" is satisfied. Both Dr. Weinert's report and Dr. Carpenter's reports, as well as copies of the job descriptions, were sent to claimant or her attorney prior to the termination of her benefits.

¶40 Attorney fees in workers' compensation cases are recoverable under § 39-71-611, MCA (1997), only when an insurer unreasonably denies liability for a claim for compensation or terminates compensation benefits and the claim is later adjudged compensable by the Workers' Compensation Court or on appeal. The evidence shows that the insurer did not act unreasonably in terminating claimant's benefits. She is not entitled to attorney fees or costs.

¶41 Finally, I express no opinion concerning whether claimant is permanently partially or totally disabled since that issue was not raised in the case. I have therefore not addressed the vocational evidence or claimant's testimony that her pain precludes her from working.

JUDGMENT

¶42 Claimant is not entitled to further temporary total disability benefits as of the date of trial.

¶43 Claimant did not prevail, thus, she is not entitled to attorney fees or costs.

¶44 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶45 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 9th day of July, 2001.

(SEAL)

Mike McCarter
JUDGE

c: Mr. John C. Doubek.
Mr. G. Andrew Adamek
Date Submitted: February 21, 2001