IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 33

WCC No. 2000-0226

JOY EDGAR

Petitioner

vs.

LEGION INSURANCE COMPANY

Respondent/Insurer for

ROCKY MOUNTAIN CARE CENTER

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: Claimant injured her back in 1993 while working as a personal care attendant and returned to that line of work in 1994 even though restricted to light-duty positions. She reinjured her back in 1999 but in August of that year she was found at MMI and released to return to work with the same restrictions as in 1994. Temporary total disability benefits were thereafter terminated. Claimant seeks reinstatement.

Held: (1) The conditions for termination of TTD benefits - maximum medical healing and a release to return to some sort of work, § 39-71-701, MCA (1997) - were satisfied. (2) The *Coles'* requirements were inapplicable at the time of claimant's injury and the termination of her benefits, although the requirements have been legislatively adopted effective July 1, 2001. (3) Even if the *Coles'* requirements applied, claimant's treating physician approved her for the same sort of work he found appropriate in 1994. In 1994 he approved four jobs for her and as to at least three of those jobs, common experience indicates that there is no reason the passage of five years time should render the claimant unqualified for those jobs. (4) No attorney fees or penalty since the insurer did not unreasonably terminate benefits.

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. Specific jobs need not be approved.

Benefits: Termination of 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, the insurer may immediately terminate temporary total disability benefits. Specific jobs need not be approved.

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.

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 with the identical restrictions she had five years previous following a prior injury, and where specific jobs were vocationally and medically approved with respect to the prior injury, at least where common experience indicates that the passage of five years would not render claimant unqualified for those positions, and (4) a copy of the physician's report is furnished to claimant.

Statutes: 39-71-609. 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, the insurer may immediately terminate temporary total disability benefits. Specific jobs need not be approved.

Benefits: Termination of Benefits. Functional Capacity Evaluation is not a prerequisite to termination of temporary total disability benefits where physician merely recommended such evaluation to "appease" claimant and testified that the evaluation was unnecessary for his opinions.

Benefits: Termination of Benefits: Release to Return to Work. 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, the insurer may immediately terminate temporary total disability benefits. Specific jobs need not be approved.

¶1 The trial in this matter was held on February 20, 2001, in Helena, Montana. Petitioner, Joy Edgar (claimant), was present and represented by Mr. John C. Doubek. Respondent, Legion Insurance Company (Legion), was represented by Mr. Steven S. Carey.

¶2 Exhibits: Exhibits 1 through 11, and 14 through 30 were admitted without objection. Exhibits 12 and 13 were admitted over objections.

¶3 Witnesses and Depositions: The parties agreed that depositions of claimant and Allen M. Weinert, Jr., M.D. can be considered part of the record. Claimant and Brad Jarvis testified.

¶4 Issues Presented:

¶4A Whether Petitioner should be reinstated on full temporary total disability benefits, retroactive to the time they were terminated by the Respondent.

¶4B Whether Petitioner should be awarded attorney fees, costs and a penalty.

(Pretrial Order at 2.)

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

FINDINGS OF FACT

¶6 Claimant is 58 years old. She has a GED and has also been certified as a Certified Nurse Assistant (CNA). Over the years she has worked as a business manager for a contractor (1968-1980), a claims clerk for Montana Physician's Service (1975-1977), a bookkeeper for a plumbing and heating firm (1977-79), a claims clerk for Division of Workers' Compensation (1979-80), a day-care operator (1980-1992), and a personal care attendant (1993 and after). (Ex. 1-1.) Her resume also indicates she has experience managing rental property, has worked as a cashier/checker, and has done some freelance medical transcription. (*Id*.)

¶7 In 1993 she went to work as a personal care attendant for West Mont, a job requiring heavy lifting. (Ex. 25-1.)

¶8 On January 16, 1994, while working for West Mont, claimant injured her back, arms, and leg. (Ex. 15-1.) Only the back injury is relevant to the current claim.

¶9 At the time of the injury, the State Compensation Insurance Fund (State Fund) insured West Mont. It accepted liability for the injury.

¶10 Following her 1994 injury, claimant initially treated with Dr. Earl E. Book, but was then referred to Dr. Allen M. Weinert, a specialist in physical and rehabilitation medicine. Following his first examination of claimant, Dr. Weinert's diagnostic impression was "[p]ostraumatic generalized fibromyalgia" and "[e]xacerbation of preexistent L3-4 degenerative disc disease . . . ." (Ex. 16-23.) His impression remained virtually the same throughout his care of claimant in 1994, although his ultimate terminology was somewhat modified. As set forth in his May 2, 1994 office note, his ultimate impression was as follows:

1. Post traumatic myofascial pain, cervical, paraspinal, scapular groups, resolved.

2. L3-4 degenerative disc disease, stable.

(Ex. 16-1.)

¶11 Dr. Weinert found claimant at maximum medical improvement (MMI) as of May 2, 1994. (*Id*.) While he found no impairment, he medically precluded her from returning to her job with West Mont and released her to return to work only "at the light physical demand level." (*Id*.) He reviewed and approved job analyses for a cashier II (Ex. 20), cashier (Ex. 21), playground aide (Ex. 23-1), and bookkeeper (Ex. 24-1). A vocational consultant for the State Fund developed the job descriptions after determining the jobs were appropriate for claimant in light of her education and experience. (Ex. 18.)

¶12 Claimant did not heed Dr. Weinert's restrictions and went back to work as a home healthcare attendant. She initially worked for Cooney Convalescent Home in Helena, starting sometime in 1994 (Edgar Dep. at 31). She thereafter worked for other employers. (*See* Ex. 2-6).

¶13 On April 17, 1999, claimant was working as a home healthcare attendant for Rocky Mountain Care Center (Rocky Mountain) and twisted her back when attempting to lift a patient. (Ex. 5-1; Ex. 7-2.)

¶14 At the time of the April 17, 1999 incident, Rocky Mountain was insured by Legion Insurance Company (Legion). Claimant submitted a written claim with respect to the incident and Legion accepted liability for her claim.

¶15 Claimant was initially treated for the injury on April 28, 1999, by Dr. Jim Hoyne of Helena Urgent Care. (Ex. 7-2.) Her primary complaint at that time was pain in the upper back "between the shoulder blades in the center." (*Id*.) In his medical history, Dr. Hoyne noted that claimant had preexisting "degenerative joint disease in her C spine, T spine, and LS spine, as well as fibromyalgia." (*Id*.) He ordered an x-ray of the thoracic spine, but it revealed minimal degenerative changes and no compression fractures. (*Id*.) He diagnosed mid-thoracic strain, prescribed an analgesic (Naprosyn), a muscle relaxant (Flexeril), and ice packs. He took her off work. (*Id*.)

¶16 Claimant then treated with Dr. W.E. Schoderbek, an internist, from May 3 to May 21, 1999. During that time, claimant continued to complain of thoracic pain. Dr. Schoderbek reviewed claimant's x-rays and noted "some wedge-like compression fractures in the thoracic spine" (Ex. 8-5), something that Dr. Hoyne had not noted. Dr. Schoderbek was not certain whether the claimant's April 17, 1999 injury "was, in fact, a strain or whether this may have been a new vertebral compression fracture." (*Id*. at 3.) During the course of his treatment of claimant, he prescribed a non-steroidal anti-inflammatory (Relafen), an antidepressant (Prozac) for depression, and physical therapy. (Ex. 8.) On May 21, 1999, he noted that physical therapy had "limited benefit" and that claimant was still symptomatic; he referred her to Dr. Weinert. (*Id*. at 1.)

¶17 Dr. Weinert first saw claimant with respect to her 1999 injury on June 10, 1999, and has treated claimant since that time.

¶18 On June 10th, Dr. Weinert read x-rays taken April 28, 1999, as indicating "minimal wedging and associated degenerative change at approximately T5 and T8" but disagreed with Dr. Schoderbek's interpretation of the x-rays as showing compression fractures. (Ex. 6-27.) According to Dr. Weinert, "These appear to be more of a chronic condition than an acute fracture." (*Id*.) Nonetheless, he ordered a bone scan to further investigate the possibility that claimant suffered an acute compression fracture. (*Id*. at 28.) In any event, he found that claimant did suffer an injury in 1999. The bone scan was ultimately negative for compression fractures. (Ex. 6-24.)

¶19 Dr. Weinert's impression with respect to the 1999 injury was "pre-existent fibromyalgia with exacerbation of rhomboid region myofascial pain secondary to a lifting incident of 4/17/99." (*Id*.) He also noted that claimant suffered from "thoracic kyphosis," which is an "exaggerated backward curvature of the thoracic region of the spinal column" (1997 Merriam-Webster Medical Dictionary online at www.medscape.com), as well as other unrelated conditions. (*Id*. at 6-27, 6-28.)

¶20 After examining and evaluating claimant on June 10th, Dr. Weinert prescribed more anti-inflammatory medication and further physical therapy. (Ex. 6-28.) However, he also concluded she could work in a light-duty job consistent with his 1994 evaluation of her and that she should not have been working as a CNA. (*Id*.) His evaluation of her physical capabilities on that date reads as follows:

> PHYSICAL CAPABILITIES: Joy is capable of working in the light physical demand classification, restricting lifting to 20 pounds. This is in keeping with prior recommendations from her 1994 injury. I suspect that she should not have been performing the CNA work in the first place as she already had a 20 pound lift restriction.

(*Id*.)

¶21 On July 9, 1999, Dr. Weinert examined claimant and found that she should continue to be restricted to light-duty work. He further wrote, "I don't see that further functional capacity evaluation [FCE] is indicated." (Ex. 6-23.) Nonetheless, in a subsequent note of August 17, 1999, the doctor noted that claimant wanted an FCE and that "it would be reasonable" to obtain one. (*Id*. at 18.) In his recommendation, he further wrote, "Because of Joy's contention that she can not work, we will go ahead and proceed with the functional capacity evaluation to objectively determine her functional abilities." (*Id*. at 19.) Legion refused to pay for an FCE and none was ever performed.

¶22 Claimant argues that the FCE should have been done and that the failure to do so entitles her to reinstatement of TTD benefits, which, as noted below in paragraph 27, were cut off on August 15, 2000. However, Dr. Weinert testified in deposition that his recommendation for an FCE was made to "appease" claimant and that an FCE was

unnecessary to his medical opinions. (Weinert Dep. at 11, 38.) Claimant has failed to persuade me that an FCE was either required or warranted.

¶23 On August 2, 1999, Dr. Weinert determined that claimant was at maximum medical improvement (MMI) and rated her impairment at 5%. (Ex. 6-21.) He reiterated his earlier release of claimant to return to "work in the light physical demand classification restricting lifting to 20 pounds." (*Id*.) He was not presented with and did not consider any job analysis at that time. However, he had released claimant in 1994 with the identical restrictions and at that time had approved four job jobs for claimant. (¶ 11.) During his deposition on December 21, 2000, he testified that as of June 10, 1999, claimant was able to perform the same level of work as he approved in 1994 and could do so on a 40-hour a week basis with appropriate ergonomic accommodations. (Weinert Dep. at 37.) The accommodations were:

> ¶23A Claimant should be able to get up every 20 to 30 minutes, "which is something employers commonly will allow." (*Id*. at 35.)
>
> ¶23B A "human-friendly" workstation. (*Id.* at 36.)
>
> ¶23C "Appropriate seating accommodations." (*Id.* at 35.)

As noted by Dr. Weinert, these sorts of accommodations are typically available (Weinert Dep. at 35), indeed for employers subject to the Americans with Disabilities Act, they may be required.

¶24 Legion subsequently paid a 5% impairment award.

¶25 On June 30, 1999, Brad A. Jarvis (Jarvis), the adjuster for Legion, notified claimant=s attorney that claimant's TTD benefits were being terminated based on Dr. Weinert=s June 10, 1999 report that she could return to light-duty work. (Ex. 14-1.) A copy of Dr. Weinert's report was enclosed. Notwithstanding the notice, TTD benefits were not terminated at that time. Legion continued paying the benefits.

¶26 On August 15, 2000, which was a year after Dr. Weinert found claimant at MMI, Legion sent a second termination notice to claimant=s attorney. (Ex. 29.) The termination notice was based on Dr. Weinert=s August 1, 2000 report (Ex. 6-10), which was enclosed with the notice. (*Id*.) The report simply reconfirmed claimant had reached MMI and was released to light-duty work as of August 2, 1999. (Dr. Weinert's office note for August 1, 2000, refers to the prior release as given "8-2-00", but the 2000 date is an obvious typographical error.) This time TTD benefits were, in fact, discontinued.

¶27 Claimant's attorney responded to the cut off of benefits by writing a letter to the insurer on August 21, 2000, demanding that claimant's TTD benefits be continued. He stated that no job had been identified for claimant which she was able to perform. (Ex. 30.)

¶28 Claimant did not return to work following Dr. Weinert's 1999 release, rather she began attending Helena College of Technology the spring semester of 2000. Her schooling was approved by the Vocational Rehabilitation Services of the Montana Department of Public Health and Human Services, which is subsidizing her schooling. Claimant continues to attend college. She is enrolled in a program which will lead to an associate degree in accounting and bookkeeping. (Ex. 28 *passim* and 28-7.) At the time of trial she was taking 13 semester hours. She has taken as many as 17 semester hours of courses during a single semester.

¶29 According to claimant, the classes are necessary to improve her computing skills and are necessary for her to return to bookkeeping. However, she has provided no expert testimony to show that she is not qualified for employment as a bookkeeper lacking the further education. Nonetheless, given the passage of time since she last worked as a bookkeeper and the introduction of computers as a major bookkeeping tool since that time, it is plainly possible that even though the bookkeeper position was appropriate in 1994, it is no longer appropriate unless she receives further education. However, the same is not true as to the cashier and playground aide positions. Those positions, which were vocationally approved in 1994, are the sort of positions with which the fact-finder, and public in general, are familiar. There is nothing about these positions of which the Court can conceive that has so significantly changed since 1994 that would render claimant unqualified to perform them in August 2000.

¶30 In conjunction with her schooling, claimant began working in a work-study position in January 2001. She works 8 to 9 hours a week and is paid for her work.

¶31 Claimant has alleged that the termination of her TTD benefits was unreasonable and that she is therefore entitled to attorney fees and a penalty. Even if I am wrong in concluding that the insurer properly terminated her benefits, I find that its termination of benefits was **not** unreasonable.

CONCLUSIONS OF LAW

¶32 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).

¶33 The dispute in this case is whether Legion improperly terminated claimant's TTD benefits on August 15, 2000, and therefore whether her TTD benefits should be reinstated. Section 39-71-701, MCA (1997), governs TTD benefits. 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[.]

Subsection (a) applies to this case. It provides that the worker is eligible for TTD benefits only until she reaches "maximum healing." Maximum healing is the same thing as maximum medical improvement. § 39-71-116(18), MCA (1997). A preponderance of the evidence in this case establishes that claimant reached MMI more than a year prior to the date her TTD benefits were terminated.

¶34 Termination of benefits is further governed by Section 39-71-609, MCA (1997),[(1)] which 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.

Under this section, 14 days' notice must be provided unless one of the exceptions applies. The notice provided by Legion on August 15, 2000, provided for immediate termination. Claimant had not returned to work at that time, therefore, the first issue presented in this case is whether the exception in subparagraph (2) applies.

¶35 Dr. Weinert's release of claimant to return to work in a light-duty capacity satisfied the subsection (2) requirement that claimant was "released to return to work in some capacity." On its face, the release was to "return to work." Even though the work was limited to "light duty," that sort or work is nonetheless "work in some capacity."

¶36 Claimant argues, however, that the release was deficient since Dr. Weinert did not approve any job analyses at the time he released her and because the insurer did not comply with the *Coles'* requirements. Her arguments are unpersuasive for several reasons.

¶37 First, section 39-71-609(2), MCA, does not require approval for specific jobs. It 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 conclude that termination of claimant's benefits in August of 2000, was consistent with section 39-71-609, MCA (1997).

¶38 Second, as held in *Sears v. Travelers Insurance,* 1998 MTWCC 12, the enactment of subsection (2) of section 39-71-609, MCA, by the 1995 legislature nullified the *Coles'* requirement.[(2)] A copy of my *Sears* decision is attached hereto. It outlines and discusses *Coles'* criteria and my determination that they are no longer applicable. My reasoning in paragraph 37 supplements my reasoning in *the Sears* decision. (The 2001 Legislature reenacted the *Coles*' requirements effective July 1, 2001. 2001 Montana Laws, Ch. 174, §§ 1 and 2.)

¶39 Third, even if the *Coles'* criteria apply, they were satisfied in the present case. The criteria were 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.

¶40 In this case, all four criteria were satisfied. The first two and the fourth criteria warrant little discussion. As to criteria (1), Dr. Weinert determined that claimant was at MMI.

Claimant has not presented any persuasive evidence to the contrary. As to criteria (2), Dr. Weinert limited claimant to light-duty work and lifting of 20 pounds or less. As to criteria (4), the claimant was provided with Dr. Weinert's June 1999 and August 2000 reports.

¶41 The third criteria requires further consideration. Dr. Weinert did not release claimant to her time-of-injury job, therefore, the question presented is whether he released her to "another job for which [s]he is fitted by age, education, work experience, and physical condition." Claimant argues that the criteria was not met in this case because Dr. Weinert did not consider specific job analyses when he released her to return to work in 1999 and 2000. If the Court ignored claimant's 1994 injury, her 1994 vocational work up, and Dr. Weinert's approval of several job analysis prepared in 1994, then her argument might be persuasive. But I cannot ignore those facts. I noted in my initial decision in *Sears* (Order Denying Summary Judgment at 7), that the "purpose of the *Coles* criteria" was "to protect the claimant from arbitrary termination of [temporary total disability] benefits." In the present case, Dr. Weinert determined that claimant could work in a light-duty job consistent with his 1994 evaluation of her. (¶ 20; Ex. 6-28.) In 1994 he reviewed and approved a number of jobs which had been determined to be vocationally appropriate for claimant. The jobs he approved in 1994 were determined to be suitable for claimant by a vocational consultant. At least three of the jobs - the two cashier positions and playground attendant - are the sort of jobs that common experience indicates would not become unsuitable due to the passage of five years after 1994. Common sense must be applied. To require another entire vocational work up in 1999 as a prelude to termination of benefits does not make sense in light of the nature of the positions approved.

¶42 Finally, I note that even if the *Coles'* criteria apply and were not met, claimant's entitlement to further TTD benefits would have ceased in January 2001, when she began working part time. At that point, she no longer had a "total wage loss."

¶43 In light of the previous findings of fact and conclusions of law, I also determine that claimant is not entitled to attorney fees, a penalty, or costs. To be entitled to any of those things, she must first prevail on the merits of her claim; she has not. Moreover, she must prove that the insurer's denial of benefits was unreasonable. §§ 39-71-611, -2907, MCA (1997). The insurer's termination of benefits, even if wrong, was not unreasonable.

¶44 I make no determination as to claimant's entitlement, if any, to rehabilitation or permanent disability benefits, or as to the insurer's conduct with respect to those benefits.

JUDGMENT

¶45 The claimant is not entitled to further TTD benefits. Her petition is **dismissed**.

¶46 Claimant is not entitled to attorney fees or costs.

¶47 This decision is otherwise certified as final for purposes of appeal. ARM 24.5.348.

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

DATED in Helena, Montana, this 19th day of June, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. John C. Doubek
Mr. Steven S. Carey
Submitted: March 1, 2001

Attached: *Sears v. Travelers Insurance,* 1998 MTWCC 12
Sears v. Travelers Insurance, Order Denying Summary Judgment

1. Section 39-71-609 has not been amended since the claimant's injury. Therefore, the same statute was effective at the time of the termination of benefits as at the time of her injury.

2. However, I also suggested insurers should continue to comply with *Coles*. I did so because *Coles* provides good guidance for determining when it is proper to terminate benefits and because the Supreme Court might ultimately disagree with my conclusion that the *Coles'* criteria are no longer applicable.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9608-7594

STEPHEN A. SEARS

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

COULTER CORPORATION

Employer.

ORDER DENYING SUMMARY JUDGMENT

Introduction

Petitioner, Stephen A. Sears (claimant), injured his back on October 27, 1994, in a work-related accident. His employer's insurer, Travelers Insurance (Travelers), accepted liability for his injury and paid temporary total disability benefits from November 7, 1994 through December 15, 1994, when claimant returned to work. (Letter of Jason G. Dykstra (March 12, 1997); Letter of James G. Hunt (March 14, 1997).)[(1)] Travelers reinitiated temporary total disability benefits on February 8, 1995, but terminated them once again on August 29, 1995, pursuant to a fourteen-day notice of termination. (*Id.*)

Motion for Summary Judgment

The claimant seeks reinstatement of temporary total disability retroactive to August 29, 1995, and continuing through June 3, 1996. (Petition for Hearing; Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgement (Petitioner's Reply) at 4.) He moves for summary judgment on the grounds that the insurer (1) failed to comply with the *Coles* criteria when terminating benefits in August 1995, and (2) failed to notify the Department of Labor and Industry (Department) of the termination as required by section 39-71-609(1), MCA. The motion has been briefed and is ready for decision.

Undisputed Facts

Claimant's opening brief sets out a list of the facts claimant believes to be uncontested and which, he argues, entitle him to judgment. (Claimant's Brief in Support of Motion for Summary Judgment (Claimant's Brief) at 1-2.) Accompanying his brief is an affidavit of his attorney with numerous documents attached.

In its answer brief, Travelers does not dispute the claimant's facts or the authenticity of the documents; it does not even address them. Under the Court's rules regarding summary judgment motions, "Any party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party." ARM 24.5.329(3). The rule requires the opposing party to identify any of the facts recited by the moving party which the opposing party disputes. Since Travelers does not deny the facts and documents set out in claimant's brief, and since its own statement of facts does not contradict any of claimant's facts, the claimant's statement of facts is deemed uncontroverted.

Travelers sets out additional facts it believes are uncontroverted and attaches several supporting documents. (Respondent's Response to Petitioner's Motion for Summary Judgment at 2-4 (Respondent's Brief).) Addressing the additional facts, claimant says, "For the purposes of this motion, Sears [claimant] will not dispute any of the facts recited by Respondent and they [sic] court may assume each is true." (Petitioner's Reply at 1.) Travelers' facts should therefore be deemed uncontroverted, as well.

Through correspondence filed with the Court, the parties have also agreed to the specific dates on which compensation was paid to claimant.[(2)]

Despite the numerous facts conceded by the parties, I nonetheless concluded that the factual underpinnings of the motion should be clarified. Not all of the facts set out in the parties' briefs are relevant to the present motion and not all the relevant facts are set out in the form required by Court rules. To avoid any doubt concerning the facts, I prepared a revised statement of undisputed facts and sent it to counsel asking that they confirm the truth of the facts recited therein or advise me of which facts are in dispute.

As a result of the responses received from counsel, the paragraph concerning claimant's termination of employment has been revised. Further, at respondent's request, a paragraph concerning Dr. Maxwell's discharge of claimant and the insurance adjuster's reliance on that discharge has been added. Deeming the fact irrelevant, claimant agreed that the Court may accept the additional fact as true for purposes of the motion.[(3)]

The undisputed facts, as restated are as follows:

> 1. Claimant injured his low back on October 27, 1994, while working for Coulter Corporation.
>
> 2. Coulter was insured by Travelers, which accepted liability for the injury.
>
> 3. Travelers instituted payment of temporary total disability benefits on November 7, 1994.
>
> 4. Travelers terminated temporary total disability benefits as of December 15, 1994, since claimant returned to work for Coulter on December 17, 1994.
>
> 5. Claimant was terminated by Coulter on February 3, 1995.
>
> 6. On February 8, 1995, claimant returned to his treating physician complaining of low-back pain. His physician took claimant off work.
>
> 7. Travelers reinstated temporary total disability benefits effective February 8, 1995.
>
> 8. On July 20, 1995, claimant underwent an independent medical examination by Dr. Terry E. McLean. On August 4, 1995, Dr. McLean sent Travelers his final report, which stated in relevant part:
>
> Thus, it would appear the patient is indeed stationary from his industrial injury without impairment. After reviewing his job description, I feel the patient is capable of returning to this line of work.
>
> (Attachment to Affidavit of Jim Hunt.)

9. On August 11, 1995, Travelers gave claimant, through his attorney, 14-days written notice that it was terminating his temporary total disability benefits . The notice stated in full:

Enclosed is a copy of Doctor McLean's final evaluation. He has also confirmed that Mr [sic] Sears is at maximum medical improvement and has suffered no permanent impairment.

This letter is fourteen (14) day notice for termination of temporary total benefits. By copy of this letter I am also advising Mr [sic] Sears.

(Attachment to Affidavit of Jim Hunt.)

10. Temporary total disability benefits were terminated on August 30, 1995.

11. The job descriptions reviewed by Dr. McLean were for Customer Service Specialist III and Customer Service Specialist I. (Attachment to Affidavit of Jim Hunt.) The description for the Specialist III is dated as prepared on May 7, 1991, and is signed and dated by the claimant on November 30, 1992. (*Id.)*

12. According to an Affidavit of Lawrence L. Rowan, M.sc., Crc, which is attached to Petitioner's Brief, the

two position descriptions from COULTER are inadequate to determine the physical employment duties of either position. For example, neither position description addresses sitting demands, standing demands, postural changes, carrying, or other nonexertional and exertional demands as found in acceptable job analyses used to determine whether an injured worker can perform a particular job.

(Affidavit of Lawrence L. Rowan, M.sc., Crc. at 1-2.)

13. Mr. Rowan is a certified rehabilitation counselor. (*Id*. at 1) His opinion, as set forth in the previous paragraph, is not challenged by Travelers.

14. On June 16, 1995, Dr. Maxwell (claimant's treating physician) determined that claimant was at maximum medical improvement, discharged him from care, and approved his return to work without restrictions. Dr. Maxwell assigned a zero percent impairment rating.

15. Diane Nelson, who was adjusting the claim for Travelers, relied upon both Dr. Maxwell's release and the IME report of Dr. McLean in terminating claimant's temporary total disability benefits on August 30, 1995.

16. Claimant returned to work on June 3, 1996.

Discussion

In ruling on claimant's summary judgment motion, the Court must determine whether the facts, as recited above, entitle claimant to judgment as a matter of law. ARM 24.5.329(2).

I.

Temporary total disability ends when a claimant has reached maximum medical healing or returns to work. Section 39-71-116(28), MCA (1993), provides:

"Temporary total disability" means a condition resulting from an injury as defined in this chapter that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

Section 39-71-701, MCA (1993), which governs the payment of temporary total disability benefits, provides that such benefits cease upon the claimant's reaching a status of maximum healing or his release to return to work in the same position or in a modified or alternative position with an equivalent wage:

> **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 when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing.
>
> (2) The determination of temporary total disability must be supported by a preponderance of medical evidence.
>
> (3) Weekly compensation benefits for injury producing temporary total disability are 66 % of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury. Temporary total disability benefits must be paid for the duration of the worker's temporary disability. The weekly benefit amount may not be adjusted for cost of living as provided in 39-71-702(5).
>
> (4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.
>
> . . .

Ordinarily, the claimant bears the burden of proving his entitlement to benefits. *Ricks v. Teslow Consolidated***,** 162 Mont. 469, 512 P.2d 1304 (1973)*; Dumont v. Wicken Bros.*

Construction Co., 183 Mont. 190, 598 P.2d 1099 (1979). To satisfy that burden he must establish that during the time for which he seeks benefits he suffered a total loss of wages on account of his industrial injury, that he had not reached maximum medical improvement, and that he had not been released to return to his old job or an equivalent job with equal pay. § 39-71-116 (28) and -701, MCA (1993).

Under the plain terms of section 39-71-701(1), MCA, an injured worker is not entitled to temporary total disability benefits after he or she has reached maximum medical healing or has been released to return to his or her time-of-injury job. However, despite the rule prohibiting Courts from inserting additional requirements into a statute, § 1-2-101, MCA; *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994), more than a decade ago this Court adopted technical criteria governing termination of temporary total disability benefits. Those criteria have the effect, in some cases, of requiring continued payment of temporary total disability benefits beyond maximum healing or a release to return to work.

The criteria were adopted in *Coles v. Seven Eleven Stores,* WCC No.2000, decided November 20, 1984, affirmed 217 Mont. 343, 704 P.2d 1048 (1985), and formally embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.***,** 248 Mont. 26, 30, 808 P.2d 502, 505 (1991); *accord Ness v. Anaconda Minerals***,** 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993). There are four criteria, all of which must be met prior to termination of temporary total disability benefits. They 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."

Wood at 30, 808 P.2d at 505 (italics in original).

Claimant argues that the *Coles* criteria were not satisfied in his case because the job description upon which Dr. McLean based his determination that claimant could return to his time-of-injury job was flawed. In support of his argument he provides an affidavit of a vocational consultant swearing that the description was inadequate.

Claimant's argument would require the adoption of a new requirement that a technically accurate job description be provided to the physician releasing claimant to work. I decline

the invitation to do so. The *Coles* criteria are intended to assure that benefits to injured workers are not arbitrarily cut off or reduced. A detailed and technically accurate job description, which would undoubtedly have to be prepared by a vocational consultant hired by the insurer, and which would then be subject to attack by a vocational consultant hired by claimant, is not required by section 39-71-701, MCA (1993), or the language of *Coles*. The third *Coles* criteria requires that the physician base his determination on "his knowledge" of the position. It does not specify how he is to acquire that knowledge, nor does it require employment of a vocational consultant. Moreover, the purpose of the *Coles* criteria -- to protect the claimant from an arbitrary termination of benefits -- can be satisfied without imposing upon the insurer the heavy burden urged by claimant. Here, the physician was supplied with a job description prepared by the employer for the claimant's position. It was an existing description, not one prepared solely for purposes of determining claimant's entitlement to benefits. That procedure provided sufficient assurance that benefits would not be arbitrarily terminated.

Claimant's first argument is unpersuasive.

II.

As his second ground for summary judgment, claimant argues that the insurer's failure to provide a 14-day notice of termination of benefits to the Department rendered its notice ineffective.

The notice at issue was sent on August 11, 1995. At that time, section 39-71-609, MCA, as amended by the 1995 legislature, provided as follows:

> **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 for emphasis.]

On its face the amended section permits termination of temporary total disability benefits upon the claimant's release to return to work **without** any prior written notice to either the claimant or the Department.

Claimant argues that the 1993 version of section 39-71-609, MCA, should be applied in this case. That version did not contain the exception set out in subsection (2) of the amended statute.

As a general rule, the law in effect at the time of the injury determines a claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). However, that rule applies only to substantive provisions, not to provisions governing procedure. *Wolfe v. Webb*, 251 Mont. 217, 227, 824 P.2d 240, 246 (1992) (citing *State Comp. Mut. Ins. Fund v. Sky Country, Inc.,* 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989); *Weiss v. State*, 219 Mont. 447, 449, 712 P.2d 1315, 1316 (1986).) Section 39-71-609, MCA, is procedural. The 1995 version of the section therefore applies. The claimant is not entitled to further benefits based on the insurer's failure to notify the Department of the termination of temporary total disability benefits.

* * * *

The motion for summary judgment is **denied**.

DATED in Helena, Montana, this 8th day of April, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Hunt
Mr. Jason G. Dykstra
Submitted: February 20, 1997

1. Mr. Dykstra's letter provides the dates temporary total disability benefits were paid and Mr. Hunt's letter concurs with the dates. Thus, the dates are deemed by the Court to be agreed facts.

2. See paragraph 1 of this order and footnote 1.

3. The proposed fact has been reworded, broken into two paragraphs, and positioned differently than suggested by respondent. The changes are a matter of style and do not change the substance of the paragraph.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 12

WCC No. 9608-7594

STEPHEN A. SEARS

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

COULTER CORPORATION

Employer.

ORDER DENYING MOTION FOR RECONSIDERATION

¶1 On April 8, 1997, this Court issued an Order Denying Summary Judgment. The summary judgment was sought by claimant based upon an alleged failure of the insurer to comply with (1) the *Coles* criteria applicable to the termination of temporary total disability benefits and (2) the requirement that the Department of Labor and Industry be notified of such termination. Claimant thereafter moved for reconsideration with respect to the first issue. Oral argument on the motion was held on October 31, 1997.

¶2 After extensive reflection on the matters raised by claimant during the oral argument, the motion for reconsideration is **denied**.

Discussion

¶3 As explained in the original Order, the *Coles* criteria were adopted in this Court's November 20, 1984 decision in *Coles v. Seven Eleven Stores, WCC No. 2000 (affirmed on unrelated grounds in* 217 Mont. 343, 704 P.2d 1048 (1985)). The criteria were ratified by the Supreme Court in *Wood v. Consolidated Freightways, Inc.,* 248 Mont. 26, 30, 808 P.2d 502, 505 (1991). As set forth in those decisions, the insurer must satisfy four criteria prior to terminating temporary total disability 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."

Wood, 248 Mont. at 30, 808 P.2d at 505 (italics in original).

¶4 In moving for reconsideration, claimant urges once more that the job description furnished to the doctor who released claimant to return to his time-of-injury job was insufficient; thus, he argues, the third criteria was not met.

¶5 In my original Order, I rejected the contention that "a technically accurate job description" must be provided to the physician releasing the claimant for work. (Order Denying Summary Judgment at 7.) I pointed out that the purpose of the *Coles* criteria is to insure that a claimant's benefits are not arbitrarily terminated and that such purpose is not served by a hyper-technical requirement concerning a job description. (*Id.*) I reiterate that view here.

¶6 Plainly, a detailed job description is not necessary in all cases. It serves no purpose whatsoever where the claimant has completely recovered and the physician imposes no restrictions on the claimant's vocational activities. Where the physician is the claimant's treating physician, it is reasonable to expect that the physician has claimant's best interests at heart and has discussed the nature of the claimant's job duties in sufficient detail for the physician to reach a conscientious and medically sound decision. Where the job requirements are common knowledge, such as for secretaries and keno callers, requiring a detailed job description is a waste of time and money unless there is something unusual about the particular position and, even then, such peculiarity can be ascertained in discussion between the physician and his or her patient.

¶7 In rearguing the motion, claimant points out that the job description which was furnished to the releasing physician in this case was woefully inadequate, and he has a point. The job description sets out the nature of the claimant's duties but not the physical demands other than a 50-pound lifting requirement. The nature of the work suggests that there could be a number of diverse physical requirements associated with the duties.

¶8 Had claimant been released without physical restrictions, the physical duties would be unimportant and there would be no reason to pursue the matter further. In fact, claimant's treating physician, Dr. James H. Maxwell, released claimant without restrictions. (Ex. 5 to Respondent's Response to Petitioner's Motion for Summary Judgment.) However, that release was not the articulated basis for the termination of benefits and will not be considered here.

¶9 The IME physician, whose determination was the basis for the termination of benefits, initially imposed restrictions on claimant's return to work. In his initial July 20, 1995 letter to the insurer's claims adjuster, Dr. McLean wrote in relevant part:

> At this point I would recommend the patient return to work with restriction of lifting 50 pounds or less, nor carrying more than 30 pounds. He may sit 30-60 minutes and stand less than 30 minutes at a time. He may work 8+ hours a day and 40+ hours a week.

(Exhibit to Claimant's Brief in Support of Motion for Summary Judgment at 4.) At the time he wrote the restrictions, Dr. McLean had ordered an EMG to "assess his [claimant's] left lower extremity." He reserved final opinion concerning claimant's ability to return to his time-of-injury job until he received the results of the EMG. In the same July 20, 1995 letter, he wrote:

> Upon receipt of the EMG, recommendations will be made as far as return to full work without impairment.

(Id.)

¶10 Dr. McLean thereafter received the EMG results and wrote a follow-up letter. In it he wrote that the EMG study disclosed some evidence of "nerve root irritation at L5-S1", which he said could be attributed to claimant's preexisting condition. (Exhibit to Claimant's Brief in Support of Motion for Summary Judgment at 8.) After discussion of the EMG and imaging studies, he released claimant to return to his time-of-injury job, saying:

> Thus, it would appear the patient is indeed stationary from his industrial injury without impairment. After reviewing his job description, I feel the patient is capable of returning to this line of work.

(Id.) However, the doctor did not address the prior restrictions he had placed on claimant. He did not remove the restrictions. He did not affirm the restrictions.

¶11 Thus, the Court is left to wonder whether Dr. McLean intended to continue his restrictions. If he did, then the job description upon which he based his decision to release the claimant to his time-of-injury job raises significant concerns. Dr. McLean's restrictions included restrictions on lifting, sitting and standing. The job description does not indicate what sitting and standing the claimant might be required to do. On its face, however, it raises the possibility that claimant might be required to exceed the restrictions. In particular, the first duty on the job description is as follows:

> Performs preventive maintenance and repair of company midrange and large products in assigned geographic area. Installs (or removes) semi-automated and moderately complex automated instruments as designated by management. Cleans, adjusts, and calibrates equip- ment and performs moderately complex hardware and software diagnostic testing.

(Exhibit to Claimant's Brief in Support of Motion for Summary Judgment at 11.) The duties described could conceivable require standing more than the "30 minutes at a time" or

sitting "more than 30-60 minutes" at a time, as limited by Dr. McLean. At least, it is not clear from the face of the job description that these activities are within the restrictions.

¶12 Had Dr. McLean been claimant's treating physician, the deficiency in the job description would be of less concern. It is reasonable to assume that the claimant would have freely and honestly discussed the physical requirements of his work with his treating physician. But here, the physician who released claimant to work was a physician hired by the insurer. That fact *may* have impeded full and free disclosure, although it did not necessarily do so.

¶13 But I have a more fundamental concern. That concern is with respect to the role of this Court in adding new requirements to the statutory ones.

¶14 The statutes governing temporary total disability benefits expressly provide that a claimant is entitled to temporary total disability benefits only until such time as the claimant reaches maximum medical healing. §§ 39-71-116(28) and -701, MCA (1993). Section 39-71-609, MCA (1995), sets out the requirements for terminating temporary total disability benefits. The section provides in relevant part:

> **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 for emphasis.]

¶15 Subsection (2) was effective July 1, 1995, and was not part of the law in effect at the time of the *Coles* and *Wood* decisions. It concerns only the **manner** in which benefits, to which a claimant is no longer entitled, may be terminated; thus it is procedural in nature as it does not affect the claimant's substantive right to benefits, *State Compensation Mut. Ins. Fund v. Sky Country, Inc.,* 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989) (citing *Weiss v. State,* 219 Mont. 447, 449, 712 P.2d 1315, 1316 (1986)). Since the termination of benefits in this case occurred in August 1995, which was after the effective date of the 1995 amendments to the Workers' Compensation Act, section 39-71-609, MCA, as amended in 1995, applies.

¶16 While subsection (1) generally requires 14-days written notice for termination of benefits, it is expressly *inapplicable* to the benefits described in subsection (2), providing in its introductory clause, "*Except as provided in subsection (2)*." The exception applies to the entire clause which follows. That clause contains two alternatives separated by the word "or." Thus, the exception applies to a termination of benefits after an acceptance of the claim. Subsection (2) does not require notice of termination of temporary total disability benefits. It expressly permits termination as of the date the claimant is released to return to work in some capacity. Moreover, since subsection (2) is the more specific provision with regard to termination of TTD, it is controlling over the more general provisions of subsection (1). *Montana Dept. of Revenue v. Kaiser Cement Corp.,* 245 Mont. 502, 507, 803 P.2d 1061, 1064 (1990).

¶17 *Coles* concerned the notice provision. There is no requirement of notice after June 30, 1995. Therefore, *Coles* is inapplicable to any termination of TTD after June 30, 1995.

¶18 Even if the *Coles* criteria are applicable to the termination of benefits in this case, I decline to expand them to include a requirement that the insurer furnish the releasing physician with a technically correct job description. I pointed out in my original order that the technical requirements adopted in *Coles* and *Wood* are not ones set forth in the statute governing termination of temporary total disability benefits, rather they are judicially created requirements. The statutes in effect at the time of *Coles* and at the time of the injury in this case, required the insurer to pay temporary total disability benefits only so long as the claimant had a total wage loss **and** had not reached maximum medical healing. §§ 39-71-116 and -701, MCA (1981-1993). Non-compliance with the *Coles* criteria extends temporary total disability benefits **irrespective** of whether the claimant continues to meet the criteria for payment of such benefits. *Ness v. Anaconda Minerals***,** 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993). *Coles* thus imposes a penalty of sorts on the insurer, but does so without the sort of statutory justification discerned in *Haag v. Montana School Group Ins. Auth.,* 274 Mont. 109, 906 P.2d 693 (1995). In *Haag* the Supreme Court held that the failure of an insurer to accept or reject a claim for compensation within the 30 days provided by statute constituted an acceptance of the claim, rendering the insurer liable for benefits. Liability under *Coles*, however, does not spring from any failure of the insurer to perform a statutorily mandated act. The acts mandated by *Coles* are extra-statutory.

¶19 If the claimant in this case continued to be temporary totally disabled in the face of the termination of his benefits, that would be one thing and I would unhesitatingly reinstate his benefits. But he contends that his temporary total disability status is irrelevant to his entitlement to benefits and that his TTD benefits should be continued merely because the insurer did not comply with the technical requirements of *Coles*. Both by statute and judicial precedent, courts are prohibited from inserting additional requirements into a statute. § 1-2-101, MCA; *Russette v. Chippewa Cree Hous. Auth.,* 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994). Therefore, even if the *Coles* requirement survives under the 1995

statutes, I decline claimant's invitation to add additional, technical requirements to those that have already been established.

¶20 Despite the result I reach in this case, insurers will be ill-advised to terminate TTD benefits without notice, without complying with *Coles,* and without providing the releasing physicians with technically accurate job descriptions. Providing a technically accurate job description to a releasing physician and complying with the other *Coles* criteria will eliminate any doubt as to the reasonableness of any decision to cut off benefits. It will provide fair notice to claimants. It will also eliminate uncertainty which will undoubtedly be engendered by the possibility of an appeal from this decision and the possibility that the Supreme Court, which can bring the collective wisdom of seven minds to bear on this issue, might reach a different result.

DATED in Helena, Montana, this 24th day of February, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Hunt
Mr. Jason G. Dykstra
Submitted: October 31, 1997