

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 114A

WCC No. 9508-7362

JAN GATES

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANY

Respondent/Insurer for

DARBY LUMBER

Employer.

ORDER CLARIFYING DECISION

Summary: Insurer requested clarification of decision (12/29/95) regarding (1) geographical labor market, (2) entitlement to eight weeks of benefits where she medically able to return to time-of-injury job but job is no longer available, (3) triggering event for rehab benefits, and (4) timing of rehab benefits.

Held: (1) WCC refused to adopt bright-line rule that geographical area within 50 miles constituted any claimant's labor market. Each case must be decided on its own facts. (2) Prior WCC conclusion that worker unable to return to time-of-injury job was entitled to at least 8 weeks of rehabilitation benefits applied only to worker who is unable to return to the job on account of his injury. (3) Designation of a vocational rehabilitation provider under section 39-71-2001, MCA (1993) does not necessarily mean particular benefits will flow to claimant, but is the first step necessary if there is "a dispute as to whether an injured worker can return to the job the worker held at the time of injury." (4) Payment of rehabilitation benefits commences after filing of the rehabilitation plan with the DOL.

Topics:

Constitutions, Statutes, Regulations and Rules: Section 39-71-2001, MCA (1993). Designation of a vocational rehabilitation provider under section 39-71-2001, MCA (1993) does not necessarily mean particular benefits will flow to claimant, but is the first step necessary if there is "a dispute as to whether an injured worker can return to the job the worker held at the time of injury." Payment of rehabilitation benefits commences after filing of the rehabilitation plan with the DOL.

Benefits: Rehabilitation Benefits: Generally. Prior WCC conclusion that worker *unable* to return to time-of-injury job was entitled to at least 8 weeks of rehabilitation benefits applied only to worker who is unable to return to the job on account of his injury.

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Vocational -- Return to Work Matters: Labor Market. WCC refused to adopt bright-line rule that geographical area within 50 miles constituted any claimant's labor market. Each case must be decided on its own facts. Here, applying section 39-71-703, MCA (1993), Missoula was outside labor market of claimant residing south of Connor, Montana, approximately 80 miles south of Missoula. See *also* order of 12/29/95 in same case.

Wages: Wage Loss. The WCC will not adopt a bright line rule defining a claimant's geographical labor market for assessing permanent partial disability benefit entitlement. While the Court found Missoula, which is eighty miles from claimant's home, to be outside this particular claimant's geographical labor, each case must turn on its own facts, including consideration not only of distance in miles, but possibly also such matters as ease of travel in winter and claimant's available transportation.

Benefits: Rehabilitation Benefits: Retraining. Section 39-71-2001(3), MCA (1993), which requires that a worker unable to return to his time-of-injury job be provided eight weeks of rehabilitation benefits at a minimum, applies only when the worker cannot perform the job, not to situations where the worker is able to perform the job but it has been eliminated or filled by someone else.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Section 39-71-2001(3), MCA (1993), which requires that a worker unable to return to his time-of-injury job be provided eight weeks of rehabilitation benefits at a minimum, applies only when the worker cannot perform the job, not to situations where the worker is able to perform the job but it has been eliminated or filled by someone else.

Benefits: Rehabilitation Benefits: Rehabilitation Providers. While section 39-71-2001, MCA (1993), requires that a rehabilitation provider be designated if there is a dispute over whether the injured worker can return to the time-of-injury job, the designation of a provider does not answer the question whether other rehabilitation benefits are due.

Benefits: Rehabilitation Benefits: Generally. Under section 39-71-2001(2), MCA (1993), entitlement to rehabilitation benefits commences after a rehabilitation plan is filed with the department.

On December 29, 1995, this Court entered its Findings of Fact, Conclusions of Law and Judgment in this case. Respondent, Liberty Northwest Insurance Group, thereafter submitted a timely Petition for New Trial or Alternatively Request for Amendment of Findings of Fact and Conclusions of Law, wherein it asks the Court to clarify four areas of its original decision.

Discussion

The matters Liberty wishes clarified are: (1) the geographical labor market for purposes of determining permanent partial disability benefits; (2) a claimant's entitlement, if any, to eight weeks of benefits where he or she is able to return to the time-of-injury job but the job has been eliminated or filled by someone else; (3) the triggering event for purposes of rehabilitation benefits; and (4) the timing of rehabilitation benefits. Petitioner, Jan Gates, does not object to the Court addressing the last three of Liberty's concerns.

Petitioner contends that the requested geographical clarification is beyond the scope of issues raised by the facts of this particular case, and that the Court's adoption of Liberty's proposed rule would amount to an advisory opinion. Advisory opinions are, of course, verboten. *State ex rel. Fletcher v. District Court*, 260 Mont. 410, 419, 859 P.2d 992, 997 (1993). On the other hand, this case involves a concrete controversy and the Court is obliged, to the extent practicable and within the confines of the issues of the case, to speak in a clear and precise manner that will avert uncertainty concerning the legal principles annunciated. To the extent I did not do so in the original decision, I find clarification appropriate.

1. Geographical Labor Market

In finding of fact 33, I determined that Missoula is outside claimant's local job market and that it is unreasonable to expect him to commute to a job in or beyond Missoula. This finding applies the 1993 version of section 39-71-703, MCA, and was made in the context of permanent partial disability *only*.

Liberty now asks the Court to adopt a bright-line geographical criteria concerning local job markets. Citing *Dunn v. Champion International, Corp.*, 22 Mont. 142, 720 P.2d 1186 (1986), it urges a 50 mile radius.

Dunn does not support Liberty's request. In *Dunn* the only mention of a 50 mile radius was in the Court's recitation of facts. While the majority opinion summarized testimony of a labor relations manager for Champion International to the effect that numerous mill jobs were available within a 50 mile radius of Missoula, the majority did **not** adopt a 50 mile radius test or even address a geographical issue.

Moreover, while a fixed-mile, bright-line rule might lead to certainty for the insurer, there are countervailing considerations. What if the city or town where jobs are available is within the radius but is on the other side of a mountain pass which is often impassible in winter? What if the claimant cannot afford reliable transportation? In this case I have found that Missoula is too far. That finding is a factual one and is sufficient for purposes of this case.

2. Entitlement to Benefits

At page 11 of the original decision I found, "Under subsection (3) at a minimum a worker who is unable to return to his time-of-injury job is entitled to eight weeks of rehabilitation benefits and vocational assistance in job placement." Liberty asks the Court to state whether this entitlement holds true where the worker is physically able to return to his time-of-injury job but the job has been eliminated or filled by the employer.

The holding is applicable only to a worker "who is *unable* to return to his time-of-injury job" *on account of his injury*. It refers to the worker's ability to perform the job, not to the availability of the job.

3. Triggering Event

Also at page 11 of the decision, I said: "In this case, a vocational rehabilitation counselor was designated for the express purpose of determining claimant's ability to return to work, thus triggering the provisions of section 39-71-2001, MCA." Liberty reads this as holding that "benefits" are triggered and urges that additional criteria must be met.

The sentence should not be construed as automatically entitling a claimant to benefits upon designation of a rehabilitation provider. The first sentence of section 39-71-2001(4), MCA (1993), provides, "If there is a **dispute** as to whether an injured worker can return to the job the worker held at the time of injury, the insurer **shall** designate a rehabilitation provider. . . ." But the next sentence further states that a worker is "entitled to rehabilitation benefits and services as provided in subsection (2)" **only** "[i]f it is determined that the worker **cannot return to the job held at the time of injury**." (Emphasis added.) Thus, while appointment of a rehabilitation provider and a rehabilitation evaluation are required when there is a dispute, the designation of a provider does not, without more, trigger benefits.

Liberty also points out that rehabilitation benefits are conditioned upon compliance with subsections (1) and (2) of 39-71-2001, MCA. Liberty is correct. Nothing that was said in the original decision is in derogation of those requirements. I held only that the minimum benefit payable to a disabled worker unable to return to the time-of-injury job is eight weeks. I specifically held, "The parties must comply with section 39-71-2001, MCA." (Findings of Fact, Conclusions of Law and Judgment at 12.) By that statement I meant they must comply with **all** requirements of the section.

In this case the parties agreed that the petitioner is permanently partially disabled and unable to return to his time-of-injury job. Their agreement gives rise to the minimum entitlement. It also satisfies the first two elements of subsection (1) that there be a determination that the claimant be permanently partially or permanently totally disabled and that a physician certify that the claimant is unable to return to the time-of-injury job. However, a rehabilitation plan has not been prepared or filed, as it must be under paragraphs (c) and (d) of subsection (1). Those steps must still be completed in this case. The parties are free to agree on a rehabilitation plan different from an immediate return to work. If they cannot agree on a rehabilitation plan, then they may petition the Court for a resolution of that dispute.

4. Timing of Payment

Finally, Liberty requests the Court to find that claimant is not entitled to payment of rehabilitation benefits until a plan has been filed with the Department.

The statute is plain. Section 39-71-2001(2), MCA (1993), provides in relevant part: **"After filing the rehabilitation plan** with the department, the injured worker is entitled to receive rehabilitation benefits at the injured worker's temporary total disability rate." (Emphasis added.) Thus, payment of rehabilitation benefits commences upon the filing of the plan. The plan also fixes the duration of the benefits. *Id.*

Liberty also discusses the *Coles* criteria for termination of temporary total disability benefits. Those criteria were adopted by the Workers' Compensation Court in *Coles v. Seven Eleven Stores*, WCC No. 2000, decided November 20, 1984, aff'd 217 Mont. 343, 704 P.2d 1048 (1985). The Supreme Court's decision in the appeal of *Coles* did not specifically address the criteria. However, in a later decision, *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), the Supreme Court embraced the criteria. *Accord Ness v. Anaconda Minerals Co.*, 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993).

This Court's decision in *Coles* held that it was unreasonable to terminate temporary total disability benefits based simply on the rendering of an impairment rating. *Coles* at 10. It further held that prior to converting temporary total disability benefits to permanent partial benefits the insurer must have:

- (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.

Coles at 11; *Wood* at 30, 248 P.2d. at 505; *Ness* at 339-40, 849 P.2d. at 1024. *Wood* adopted the criteria as appropriate in determining, once a claimant has presented evidence demonstrating no reasonable prospect of employment in his normal labor market, whether the insurer has satisfied its resulting burden of proving that "other suitable work is available" to the claimant. *Wood* at 30, 808 P.2d 505. *Ness* extended the application of the four criteria to the cut-off of temporary total benefits.

In discussing *Coles*, Liberty makes two comments. First, it states, "If an insurer complies with the criteria for TTD termination in *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985), then it will have, on termination, information showing a claimant's employability without the need for retraining." (Petition for new trial at 3.)

(As can be seen from the previous discussion, Liberty's citation to *Coles* is technically incorrect.) Second, it states, "If an insurer had to comply with the Coles criteria prior to termination of TTD benefits, then the delay in a claimant's receipt of rehabilitation benefits would be minimized." *Id.*

In answer to the first comment, the fact that a worker may be employable in some other job does not end the inquiry under section 39-71-2001, MCA (1993). Other factors must be considered **by the rehabilitation provider** in determining an appropriate rehabilitation plan; an immediate return to employment is only one possible rehabilitation option. *Pamela Sue Yarde v. Liberty Northwest Ins. Corp.*, WCC No. 9503-7264, decided September 7, 1995, at 8-9. Thus, unless a claimant is able to return to his or her time-of-injury job, a rehabilitation expert must be employed to work with claimant in arriving at a reasonable rehabilitation plan. That ultimate plan may or may not call for retraining.

Even if a physician determines that a claimant is able to return to work in his time-of-injury job, the rehabilitation provisions may nonetheless be invoked if the claimant disputes that determination. Section 39-71-2001(4), MCA (1993), expressly requires the insurer to designate a rehabilitation provider in the event "there is a **dispute** as to whether an injured worker can return to the" time-of-injury job. One of the important functions a rehabilitation provider can serve in such circumstance is to clearly delineate the physical requirements of the time-of-injury job so that the physician does not misapprehend those requirements.

With regard to Liberty's second comment, I am unable to discern what Liberty is urging. If it is urging the Court to hold that insurers must still comply with the *Coles* criteria prior to terminating benefits under the 1993 law, then that matter is beyond the scope of issues raised by the parties. I can state the obvious: *Coles*, *Wood*, and *Ness* have not been overruled and, although the criteria for payment of temporary total disability benefits have been reworded, the 1993 provisions at first blush appear to be substantively the same as the 1981 provisions. (The 1981 and 1993 criteria for temporary total disability benefits are set out in the addendum.) But I have not heard argument concerning the matter and "first blush" is a shaky basis for a legal holding.

ORDER

The findings of fact, conclusions of law and judgment shall be deemed **amended and clarified** in accordance with the foregoing discussion. The Petition for New Trial or Alternatively Request for Amendment of Findings of Fact and Conclusions of Law is otherwise **denied**.

Dated in Helena, Montana, this 13th day of February, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Larry W. Jones
Submitted: January 19, 1996

ADDENDUM

Section 39-71-116(19), MCA (1981).

(19) "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 is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence.

Section 39-71-701, MCA (1981).

39-71-701. Compensation for injuries producing temporary total disability. (1)

Weekly compensation benefits for injury producing total temporary disability shall be 66 2/3% of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed \$110 beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total temporary disability benefits shall be paid for the duration of the worker's temporary disability.

(2) In cases where it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for such week, which amount is to be calculated from the date of the disability social security entitlement.

Section 39-71-701, MCA (1993).

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.

(5) In cases where it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for such week, which amount is to be calculated from the date of the disability social security entitlement.

(6) If the claimant is awarded social security benefits, the insurer may, upon notification of the claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to recover any resulting overpayment of benefits. This subsection does not prevent a claimant and insurer from agreeing to a repayment plan.

(7) A worker may not receive both wages and temporary total disability benefits without the written consent of the insurer. A worker who receives both wages and temporary total disability benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.