

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 24

WCC No. 9512-7457

CLINTON LOSS

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY

Respondent/Insurer for

NABISCO BRANDS, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Insurer accepted claim for carpal tunnel syndrome and paid medical expenses and some TTD. Claimant seeks additional TTD and a \$10,000 award under section 39-72-405, MCA

Held: Section 39-72-701, MCA (1991) does not authorize the Court to award TTD benefits after claimant has reached maximum medical healing. The Court declines to extend the requirements of Coles v. Seven Eleven Stores, 217 Mont. 343, 704 P.2d 1048 (1985), adopted by the Supreme Court in Wood v. Consolidated Freightways, Inc., 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), to mandate continuing benefits on the argument a doctor's release to return to work without restrictions was allegedly erroneous. The Coles requirements are procedural, not substantive, except for the maximum medical healing determination. Where the MMI determination is not contested, the Court will not retrospectively reexamine the correctness of the physician's opinions upon which the termination of TTD was based. However, claimant is entitled to the maximum award of \$10,000 under section 39-72-405, MCA (1991) where his wage loss amounts to from \$2.73 to \$3.20 an hour. Working a 40 hour week, he will lose \$10,000 within 79 to 92 weeks, or less than 2 years.

Topics:

Benefits: Temporary Total Benefits. Section 39-72-701, MCA (1991) of the OD Act does not authorize the Court to award TTD benefits after claimant has reached maximum medical healing.

Cases Discussed: Workers' Compensation Court Cases: Coles v. Seven Eleven Stores. The Court declines to extend the requirements of Coles v. Seven Eleven Stores, 217 Mont. 343, 704 P.2d 1048 (1985), adopted by the Supreme Court in Wood v. Consolidated Freightways, Inc., 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), to mandate continuing benefits on the argument a doctor's release to return to work without restrictions was allegedly erroneous. The Coles requirements are procedural, not substantive, except for the maximum medical healing determination. Where the MMI determination is not contested, the Court will not retrospectively reexamine the correctness of the physician's opinions upon which the termination of TTD was based.

Benefits: Termination of Benefits: Coles. The Court declines to extend the requirements of Coles v. Seven Eleven Stores, WCC No. 2000, adopted by the Supreme Court in Wood v. Consolidated Freightways, Inc., 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), to mandate continuing benefits on the argument a doctor's release to return to work without restrictions was allegedly erroneous. The Coles requirements are procedural, not substantive, except for the maximum medical healing determination. Where the MMI determination is not contested, the Court will not retrospectively reexamine the correctness of the physician's opinions upon which the termination of TTD was based.

Occupational Disease: Indemnity (39-72-405) Awards. Claimant is entitled to the maximum award of \$10,000 under section 39-72-405, MCA (1991) where his wage loss amounts to from \$2.73 to \$3.20 an hour. Working a 40 hour week, he will lose \$10,000 within 79 to 92 weeks, or less than 2 years.

Occupational Disease: Medical Panels. Insurer did not raise until filing proposed findings and conclusions of law the argument that no award could be made under section 39-72-405, MCA (1991), because no medical panel had determined it was inadvisable for claimant to continue in the same employment. Where the rules of the WCC require both parties to set out their contentions in pleadings and the pretrial order, the Court would not allow the insurer to raise this argument at trial. While the requirements concerning the medical panel has procedural and evidentiary significance, it is not jurisdictional and may be waived.

Pain. Pain is a factor which must be considered in determining disability. Metzger v. Chemetron Corporation, 212 Mont. 351, 354, 687 P.2d 1033, 1035 (1984). It is a

subjective phenomena and is not objectively measurable. It is not entirely within the realm of expert testimony.

The trial in this matter came on February 29, 1996, in Helena, Montana. The petitioner, Clinton Loss (claimant), was present and represented by Mr. Norman H. Grosfield. The respondent, Lumbermens Mutual Casualty Company (Lumbermens), was represented by Mr. Thomas A. Marra.

Evidence: Claimant, his wife and Brenda Williams, C.R.C. testified at trial. In addition, the depositions of claimant, Dr. William S. Shaw and Brenda Williams, C.R.C. were submitted for the Court's consideration. Exhibits 1 through 9 were admitted without objection.

Issues presented: This is an occupational disease case involving carpal tunnel syndrome. The insurer has admitted liability and paid medical expenses and temporary total disability benefits for a period of time. Through his petition, the claimant seeks additional temporary total disability benefits and a \$10,000 award pursuant to section 39-72-405, MCA.

At the commencement of trial claimant also requested the Court to award rehabilitation benefits. That request was not set forth in either the petition for hearing or Pretrial Order. It is therefore outside the scope of issues presented for trial, and the Court so ruled.

Claimant also seeks a penalty. That issue was bifurcated at the time of the pretrial conference in light of a discovery dispute over certain documents in the insurer's claim file.

* * * * *

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, the parties' proposed findings of fact and conclusions of law, and the arguments presented at the trial, the Court makes the following:

FINDINGS OF FACT

1. Both claimant and his wife were credible witnesses. In the findings that follow, the Court adopts their testimony as true.
2. Claimant is 39 years old, married, and lives near Helena, Montana. He is a high school graduate and has completed approximately two years of college courses in business administration at Montana State University.
3. His work history includes building maintenance, appliance sales and delivery, crew work for the forest service, and ranch work.
4. From March 1980 until August 9, 1994, claimant worked for Nabisco, Incorporated as a delivery driver. He delivered Nabisco products to retailers throughout Montana and parts of

Idaho and Wyoming. He often worked 10 to 15 hours per day and drove for extended periods of time to reach distant locations.

5. Many stores required that claimant deliver the products at specific times, thus creating pressure for him to meet retailers' schedules. Delivery times of all Nabisco drivers were also compared. Each driver was expected to maintain a speedy, efficient delivery schedule.

6. The claimant's duties were year-round. Winter driving conditions added to delivery pressures.

7. At times claimant was also required to load trucks at Nabisco's warehouse. He took boxes off a conveyor belt and stacked them in the trucks. He was required to load the trucks as quickly as possible. When loading, he carried several small boxes at a time, squeezing them together between his hands. He loaded each truck from floor to ceiling, front to back.

8. Nabisco products were packaged in boxes varying in weight from 5 to 16 pounds. Claimant delivered boxes a stack at a time, using a hand-truck. Loaded, the hand-truck weighed as much as 250 pounds.

9. Delivery accommodations at retail stores varied. Some had docks with ramps which could be extended to the truck. If no dock ramp was available, claimant used a ramp from his truck. The ramps weighed over 100 pounds.

10. Claimant had little if any time for rest breaks. Claimant's job, for lack of a better description, was a "go-go" job.

11. In 1991 claimant experienced pain and numbness in both arms and hands. He was referred to Dr. Allen Weinert, a Helena physiatrist, for evaluation. (Ex. 2 at 1.) Dr. Weinert's history, taken November 13, 1991, reflects the following symptomatology:

Over the last several months he [claimant] has noted bilateral upper extremity pain that initially started on the left side but shortly thereafter began on the right side as well. The pain is diffuse in nature and variable in location affecting shoulder, forearms, hands. There is associated numbness in the hands bilaterally and no specific finger distribution. The pain and numbness are aggravated at night and also when he is using his upper extremities such as when holding the steering wheel while driving. He has noted some tendency to drop things because of decreased sensation in the hands. There are no definite alleviating maneuvers that he can do other than he says he gets some relief by elevating his arms at his sides. . . .

(Ex. 2 at 1.) Dr. Weinert performed a nerve conduction study on November 13, 1991. The study was positive in that it revealed a "prolonged, left median motor distal latency with borderline reduced left median sensory response amplitude." (*Id.* at 2.) Otherwise, it was within normal limits. (*Id.*) Dr. Weinert's impression was:

[a]lthough EMG findings demonstrate a unilateral median neuropathy at the wrist, **my suspicion is that he is suffering bilateral carpal tunnel syndrome.** There is no evidence on physical examination of a central process to account for his current symptoms.

(*Id.* at 3, emphasis added.) Dr Weinert pursued a conservative course of treatment requiring claimant to wear a splint.

12. Following Dr. Weinert's examination, on November 20, 1991, claimant filed a claim for occupational disease benefits.

13. Dr. Weinert did a follow-up exam on December 16, 1991. At that time the claimant reported he had been using the splints which the doctor had prescribed and that his symptoms had improved. (Ex. 2 at 5.) However, he reported increasing pain in his right shoulder. (*Id.*) At the time of the examination, Dr. Weinert attributed the right shoulder pain to "right shoulder rotator cuff tendinitis secondary to extensive overhead lifting." (*Id.*) He made the following recommendations:

1. Regarding the right shoulder pain, I think this is purely a manifestation of his work related overhead lifting. I discussed with him the possibility of limiting this, but at this point, he does not feel he could carry on his warehouse activities without lifting overhead. . . .

2. Regarding his carpal tunnel syndrome, the splints do seem to help although he has already broken one over the counter [sic] splint and is currently wearing out a second one. I recommend that he go to using the custom splint for daytime use as well as this might prove more durable. I will plan to follow-up with him in six weeks to assess progress in the above stated plan. If the numbness and tingling in his upper extremities [sic] continues to persist or get worse, his options are:

1. To look for a less physically demanding job activity although this may not guarantee improvement in his carpal tunnel syndromes.

2. To repeat the neurodiagnostic studies to see if there has been a worsening and if so, consider possible surgical referral.

(Ex. 2 at 5-6.)

14. Claimant's carpal tunnel symptoms waxed and waned over the next four months.

15. On February 12, 1992, claimant returned to Dr. Weinert. At that time claimant complained of "some sensation of thenar weakness and some mild tingling in digits 1 through 3." (Thenar weakness is weakness in the mound on the palm at the base of the thumb.) He also complained of "increased symptoms in the right hand of numbness and tingling," especially at night, and "some pain and tenderness with handgrip activities." (*Id.*

at 10.) Dr. Weinert performed additional nerve conduction studies, which he interpreted as showing "left median neuropathy of the wrist (carpal tunnel syndrome) as well as electrophysically less severe right median neuropathy at the wrist." (*Id.* at 11.) In other words, the results were consistent with carpal tunnel on both the left and right, more severe on the left.

16. At the time of the February 12, 1992 examination, Dr. Weinert advised claimant that surgical intervention depended more on his symptomatology than on the EMG results. (*Id.* at 11.) He recommended continued use of the splints and advised claimant to contact him if he wished to pursue a surgical consultation. (*Id.*)

17. Claimant returned to Dr. Weinert on May 12, 1992, complaining of an increase in symptomatology:

[H]e states that symptoms have been worse over the last several weeks. He continues to complain of a numb feeling in digits 1-3, more marked in the left than the right. In addition he complains of wrist pain and pain over wrist and digit extensors on the left. He also recently had pain in the olecranon region at the insertion of the triceps. He has gone back to using the left wrist splint full time with only minimal relief. He's not taking any anti-inflammatory medications as his stomach did not tolerate these well. He continues to work without restriction.

(*Id.* at 16.) Claimant agreed to a surgical consultation with Dr. Kenneth Carpenter, a Helena orthopedic surgeon.

18. Claimant did not see Dr. Carpenter until January 15, 1993. (Ex. 1 at 1.) Dr. Carpenter confirmed Dr. Weinert's diagnosis of bilateral carpal tunnel and recommended surgery. At the time of the examination, claimant and his wife were building a new home and doing some of the construction work. (Ex. 2 at 20; Loss Dep. at 30; trial testimony.) The construction and their move into the new home caused him to delay his surgery. (*Id.*)

19. Claimant underwent bilateral carpal tunnel releases on June 29, 1993. (Ex. 1 at 1, 3.) The surgery confirmed the carpal tunnel syndrome diagnosis. In his operative note, Dr. Carpenter observed that the left "median nerve was narrowed approximately 50% under the mid portion of the transverse carpal ligament." (*Id.* at 3.) In his note regarding the right wrist, he said, "The same procedure with the same findings was performed on the opposite side." (*Id.*)

20. Claimant initially experienced a positive outcome. He was off work for approximately four months. Dr. Carpenter released him for work without restriction on October 25, 1993. (*Id.* at 7.)

21. However, on December 17, 1993, he reported to Dr. Carpenter that he had "re-developed a numbness and tingling of the index [finger] and thumb on both sides." (*Id.*)

Claimant testified at trial that while his symptoms initially improved following his surgery, they thereafter returned to the same level as before the operation.

22. Claimant continued to complain of symptoms in his arms, wrists, and hands. Dr. Carpenter examined him on February 7, April 20, and June 29, 1994, noting little change in his condition. (*Id.* at 9.)

23. Dr. Carpenter was unable to identify the cause of claimant's continuing symptoms through objective testing. Dr. Weinert performed another nerve conduction study on July 26, 1994, but the test results were normal. (Ex. 2 at 21-22.)

24. Dr. Carpenter prescribed physical therapy on August 15, 1994. (Ex. 1 at 10.) Claimant was evaluated by a physical therapist, who recommended stretching exercises, splints at night, pacing of activities, and biofeedback. (Loss Dep. Ex. at 89.)

25. Kim Garrison, RN, MN, provided biofeedback therapy from August 31, 1994 through October 4, 1994. She instructed claimant in relaxation techniques, pacing his activities, and self management. (Loss Dep. Ex. at 88-89.)

26. Claimant stopped working for Nabisco on August 9, 1994. By that time he was having difficulty holding on to the hand-truck, driving, and keeping up with the required work-pace. He has not worked since that time and has not seriously sought other employment. (Loss Dep. at 36.)

27. On August 24, 1994, Dr. Carpenter prescribed a Medrol Dose Pac to help control claimant's pain. Claimant experienced some relief for two days. (Ex. 1 at 10.)

28. Dr. Carpenter continued to treat claimant through the end of 1994 but with little effect.

29. In a letter dated November 17, 1994, Dr. Carpenter advised Steven Maasch, claims adjuster for Intermountain Claims, that the claimant could return to light-duty work not involving a lot of lifting or repetitive motion. (*Id.* 1 at 21.)

30. At the request of the insurer, on November 15, 1994, claimant was evaluated by Dr. Dale Peterson of the Billings Clinic. Dr. Peterson recorded that claimant had

pain across the dorsum of both wrists. It is a sharp pain that comes on more when he is using his hands such as holding a spray can, driving and the like. He maybe gets some mild tingling in all the fingers at times but this is a lesser problem. There is no symptom shooting up the forearms. . . .

(Ex. 6 at 1.) Peterson found no sign of nerve entrapment, nerve root irritation, or other neurologic disorder on examination and recommended no further diagnostic studies or treatment. While he could find no neurologic reason to restrict claimant's activities, he noted that he would defer to Dr. Carpenter in determining what restrictions were

appropriate due to claimant's mechanical pain in the wrists. (*Id.* at 2.) On the other hand, he also opined, "There would be no neurologic contraindication to his activities." (*Id.*)

31. At the further request of the insurer, claimant submitted to additional independent medical examinations by Dr. William Shaw, a board certified occupational medicine specialist, and Dr. Curtis Settergren, an orthopedic surgeon. Both physicians practice at the Billings Clinic. The examinations were done on January 24, 1995.

32. The history taken by Dr. Settergren reflected the following complaints on the date of the examination:

Now he states that with any activity, his wrists will ache and he'll have soreness up into the forearms occasionally with a burning pain in the mid palmar area. The wrist pain is not well localized. He just indicates the entire wrist, dorsal and volar, just kind of circumferential. Occasionally his thumb will get numb.

(Ex. 4 at 1.) Dr. Settergren also reviewed x-rays of claimant's wrists, along with Dr. Peterson's 1994 EMG study, and did a physical examination. Ultimately, he was unable to ascertain "any biomechanical reason" for claimant's complaints. (*Id.*) He suggested ruling out connective tissue disease and concluded that if an evaluation for that disease was negative, "I would see no indication for further intervention or reasons to limit what the patient can do." (*Id.*) However, Dr. Settergren observed, "A functional capacity evaluation could better delineate what he is capable of doing." (*Id.*) This latter comment suggests that even though Dr. Settergren could not identify the specific cause of claimant's symptoms he still considered the symptoms genuine and possibly debilitating.

33. Dr. Shaw was similarly unable to objectively identify the cause of claimant's complaints. In a letter to Steven Maasch, dated January 26, 1995, he reported that claimant had reached maximum medical improvement and that he could return to work. (Ex. 5 at 1.) Concerning a return to work, he said:

There are no objective findings upon which to base restrictions. Any limitations to activities would be based solely on the patient's own subjective perception of pain and his own ability to tolerate it. There are no objective conditions identified which would warrant imposition of restrictions or limitations to his activities. I suspect that he will be more comfortable performing less strenuous, repetitive, gripping or manipulations with his hands, but I do not believe that performances of such activities are likely to create a progressive or worsening condition. Therefore, I believe it is safe for him to function normally, both avocationally and in the workplace.

(*Id.* at 1-2.)

34. Dr. Shaw copied his medical report and letter to Dr. Carpenter. He also discussed claimant's case with both Drs. Settergren and Carpenter. Based on those conversations he felt the opinion he expressed was a consensus of all three physicians. (Shaw Dep. at 12.)

35. Dr. Carpenter did not testify in this matter. However, his office notes reflect his awareness of the IME opinions. They also show that claimant's condition was stable.

a. On November 23, 1994, he examined claimant and noted, "He is basically doing the same" and "[t]oday is unchanged." Under recommendations, he wrote:

I don't have any other recommendations to make at this time. He recently had an independent medical evaluation and no recommendations are forthcoming there either. I will plan on checking him in 4 months.

(Ex. 1 at 18.) The IME to which he referred was apparently the one by Dr. Peterson.

b. Dr. Carpenter again saw claimant on March 15, 1995. He noted that claimant's "symptoms continue unchanged." (*Id.* at 23.) His office note further reflects his awareness of Dr. Shaw's examination and recommendations:

He was evaluated by Dr. Shaw in Billings and essentially has been given a release to return to work. He has some concern about that in that he feels over a period of time that if he does a lot of repetitive activities over a period of weeks that his symptoms may recur. **Certainly that may be the case, and I've explained to him that if it is then what needs to happen is that modifications or changes will need to be made in what he does or how he does it.** I'll plan on checking him in six months.

(*Id.*, emphasis added.) The note does not indicate any disagreement with Dr. Shaw's opinion concerning claimant's having reached maximum medical healing or with the release to return to work. It merely reflects the possibility that upon a return to work the claimant's symptoms may recur and that his job might then require modification.

36. Following receipt of Dr. Shaw's report, Lumbermens terminated claimant's temporary total disability benefits. The termination was effective March 20, 1995. (Ex. 8 at 1; Loss Dep. at 5-6, 9.) Claimant, by way of his petition, is seeking reinstatement of those benefits retroactive to that date and continuing until "[r]espondent's rehabilitation advisor submits a report stating that there are alternative employments that Petitioner is able to perform." (Ex. 8 at 1.)

37. In a letter dated June 19, 1995, claimant's counsel, Mr. Norman H. Grosfield, requested Dr. Carpenter give his opinion of whether claimant could return to his time-of-injury job. Mr. Grosfield prefaced his request with the following statement:

The workers' compensation insurance carrier for Nabisco sent Clint to the Billings Clinic. I have had a lot of experience in representing injured workers; and often insurance carriers send patients to the Billings Clinic, and especially to see Dr. William Shaw. It has also been my experience that Dr. Shaw tends to downplay any condition or finds no condition at all; and he has a well known reputation for this approach to claimants and workers' compensation matters. Of course, Dr. Shaw concluded that, in Clint's case, there were no objective findings that would preclude him from "functioning in a normal fashion".

Clint seems like a very candid person and conscientious worker; and he simply cannot continue the vigorous-type work activity required at Nabisco. . . .

(Shaw Dep. Ex. 3.⁽¹⁾) Grosfield then asked Dr. Carpenter to provide his opinion, as follows:

1. Your diagnosis and treatment of Clint;
2. Whether, based on the description of his work activity as referenced above, you believe Clint is capable of continuing in such employment without limitation.

(*Id.*)

38. Dr. Carpenter replied as follows:

As you are well aware, Mr. Loss has been treated for bilateral carpal-tunnel syndrome for the last several years. He had a bilateral carpal-tunnel release performed in June of 1993. As will occasionally occur in situations where people have surgery for carpal-tunnel syndrome even though the symptoms were relieved with the surgery, that return to the same activities without modification will cause a recurrence of the carpal-tunnel syndrome. This has been the case with Mr. Loss. After returning to his work as a delivery person, he began experiencing recurrent symptoms. He does fairly well if he does not do a lot of repetitive activities or drive for long distances but if he performs those activities, then the symptoms tend to return. We have tried a number of physical therapy modalities, exercise programs etc. to alleviate this problem but none of them have been successful in establishing his ability to perform repetitive activities.

It would be my opinion, therefore, that he is not capable of continuing in such employment without some types of modifications or limitations to alleviate his symptomatology.

(Ex. 1 at 22; Shaw Dep. Ex. 4.) The foregoing constitutes the entire text of Dr. Carpenter's letter.

39. Dr. Carpenter thereafter saw claimant on only one more occasion on September 25, 1995. His office note for that date indicates that claimant was "doing about the same." (Ex. 1 at 23.) It mentions another IME by Dr. Johnson in Missoula, and states that claimant "still

describes symptoms consisting of discomfort in his arms" (*Id.*) Under his recommendations, Dr. Carpenter wrote, "I don't feel any further work-up or treatment is indicated at this time. I did recommend that we recheck him periodically and will see him again in six months." (*Id.*) He did not address maximum medical healing or employment.

40. The IME to which Dr. Carpenter referred in his September 25 note was done by Dr. Stephen F. Johnson sometime in September 1995. Dr. Johnson concurred with Drs. Shaw and Settergren:

I do believe that Doctor Shaw and Doctor Settergren are correct that Mr. Loss' carpal tunnel and wrist situation has stabilized and that he does not warrant any impairment rating, restrictions, or limitations of activity **as far as his physical problems.**

(Ex. 3 at 1; emphasis added.) He went on to note that notwithstanding the lack of physical findings, "[T]his man perceives considerable pain." (*Id.*) Dr. Johnson arranged for claimant to take a Beck Depression Inventory. That test disclosed that claimant was depressed and the doctor commented that depression could be contributing claimant's pain. Finally, he concluded:

This type of situation is very difficult to treat. Even though I cannot identify a physical reason that he is not back to work, prognosis for any further medical or surgical treatment is very poor, especially if depression cannot be controlled, which is why I recommend considering some type of settlement.

(*Id.* at 2.)

41. In January 1996, Dr. Shaw was provided with a job analysis of claimant's job at Nabisco, as well as job analyses for video rental clerk, cashier, merchandise deliverer, circuit board assembler, and dump truck driver. (Shaw Dep. at 23 and Dep. Ex. 6.) He approved all six. (*Id.*)

42. In his deposition, Dr. Shaw confirmed the original diagnosis of carpal tunnel syndrome but also reiterated the findings he reported in his original IME report and his letter to Steven Maasch:

My impression was that Mr. Loss had had bilateral carpal tunnel syndrome, that that condition had had a period to stabilize and had been well treated with surgery. I felt that he had persistent wrist and shoulder complaints of a nonspecific nature without any clear abnormalities of anatomy or pathology to explain the complaints of pain.

(Shaw Dep. at 8-9.) He reiterated his previous opinion that claimant was not physically restricted by his condition or from returning to any sort of work. (*Id.* at 10.) He also affirmed

his approval of the six specific job descriptions he had previously signed off on. (*Id.* at 23-24.)

43. Dr. Carpenter's letter and office notes do not contradict Dr. Shaw's opinion that claimant had reached maximum medical healing as of January 26, 1995. His office note of March 15, 1995, shows that he was aware of Dr. Shaw's opinion and reflects no disagreement with it even though claimant expressed concern over a return to work. His later office note and reply to Mr. Grosfield do not offer any opposing opinion. Moreover, all of his office notes commencing November 23, 1994, reflect the stability of claimant's condition. I therefore find that claimant reached maximum healing as of January 26, 1995.

44. Similarly, Dr. Carpenter did not contradict the lack of objective findings reported by Drs. Peterson, Shaw, Settergren and Johnson. Thus, in fact, since his surgery there are no objective findings relating to claimant's symptoms.

45. Continuing in the same vein, Dr. Carpenter also did not contradict the other doctors' opinions that claimant has no physical restrictions and can safely return to his work, including to his time-of-injury job, without endangering himself.

46. That is not the end of the inquiry, however. On cross-examination, Dr. Shaw acknowledged that some people do have recurring symptoms in the hands following carpal tunnel surgery, including pain (*id.* at 26-28, 34-35), and that he "would not be surprised" if claimant experienced an onset of symptomatology and discomfort upon returning to his time-of-injury job. (*Id.* at 28-31.) The premise of his opinion that claimant could return to work was his determination that physically the claimant had the "capacity to perform the essential functions of a job **without direct threat to himself or others.**" (Shaw Dep. at 33; emphasis added.) The other doctors who approved claimant's return to work without restrictions based their opinions on similar criteria. None of them provided an opinion, one way or the other, as to whether claimant's pain precluded him from a return to his time-of-injury job, although Dr. Johnson felt that it was unlikely claimant would return to work unless his underlying depression is treated. (Ex. 3 at 2.) Dr. Settergren specifically recommended a functional capacity exam to determine claimant's capabilities (Ex. 4), and Dr. Peterson indicated that he would defer to Dr. Carpenter regarding what restrictions were appropriate due to mechanical **pain** in the wrists. (Ex. 6 at 2.)

47. Since his carpal tunnel surgery, claimant has been involved in a number of activities.

a. He has been a member of the Baxendale Volunteer Fire Department. The members meet once a month and practice fire fighting. Claimant acknowledged he does some physical activities in this work, the hardest being the handling of a fire hose. The longest he has handled a fire hose at one time is one-half hour. He received wages for a few days of fire fighting in the Libby area in 1994 but his duties were essentially non-physical ones.

b. Claimant has received E.M.T. training through the volunteer fire department. The training consisted mainly of classroom instruction not requiring physical exertion. He has been part of a response team on several calls involving recreational accidents. The most physically demanding task he has performed in this role is helping to lift a patient from the ground to a gurney.

c. Since the spring of 1992, claimant has done construction work on a house he and his wife are building. Claimant's work on the house has included sheet rocking, wiring, plumbing, cabinet building, and fence building. However, claimant has worked only a few hours a week on the house, has had assistance from his wife, friends, and subcontractors, and has frequently had to interrupt his work on account of wrist, hand, and arm pain.

48. As found in the first finding of fact, I found claimant and his wife to be entirely credible witnesses. I believe claimant testified truthfully and accurately. I also note that his work history shows an excellent work ethic and believe that he would return to his time-of-injury job if he truly felt he was able to do so.

49. I further find that claimant's pain does in fact preclude him from continuing with his time- of-injury job. Dr. Shaw acknowledged that claimant might well find the job uncomfortable. In fact claimant found it intolerable. I do not believe claimant is exaggerating his pain or its effect on his ability to perform his old job. The role of depression in his pain has not been fully explored and is unclear.

50. A major factor in claimant's inability to perform his job at Nabisco is the "go-go" nature of the job. The nature of the job precludes time-outs which might help alleviate some of claimant's symptoms. Although Dr. Carpenter mentioned the possibility of modifying his job, claimant's testimony persuades me that significant modification is unrealistic.

51. Brenda Williams, who is a certified rehabilitation counselor, was hired by claimant's counsel to provide an employability assessment based on the assumption that claimant is unable to return to his time-of-injury job. (Williams Dep. at 9.) She identified nine occupations which are compatible with claimant's transferable skills and physical capabilities. Those jobs are sales representative, automobile sales person, real estate sales agent, insurance sales agent, retail manager or assistant manager, forklift operator, local truck driver, heavy equipment operator, and auto repair service estimator. She determined the following wages to be representative of the identified jobs: sales representative, \$7.90 to \$12.65 per hour; automobile sales person, \$5.15 to \$14.42 per hour; real estate sales agent, \$10.00 to \$13.65 per hour; insurance sales agent, \$9.19 to \$11.15 per hour; retail manager or assistant manager, \$7.87 to 12.40 per hour; forklift operator, \$7.39 to \$14.40 per hour; local truck driver, \$5.83 to 11.03 per hour; heavy equipment operator, \$10.20 to \$20.46 per hour, and auto repair service estimator, \$7.67 to

\$9.63 per hour. (*Id.* at 12-13.) For each position, the lower amount is the entry level wage, the higher amount is the *average* wage for experienced workers.

52. Ms. Williams testified that she was not sure whether claimant could perform the jobs of forklift operator, heavy equipment operator, or truck driver and that physician approval for those positions would be required. On the other hand, the remainder of the jobs are clearly light duty and within claimant's physical capabilities. (*Id.* at 14, 22.)

53. Ms. Williams testified that the claimant, if he were to begin working in one of the light-duty positions identified, would most likely earn an amount somewhere between the entry level and experienced level wages. She also indicated he should be able to obtain employment in one of the positions identified in three to six months.

54. Claimant did not deny that he could perform other jobs such as those identified by Ms. Williams, although he had concerns about the truck driving job, which he thought could "possibly" irritate his condition. However, he has not looked for work, in part because his wife, who is a meteorologist, has put in for a transfer to Alaska.

55. Claimant was earning \$12.59 per hour at the time he terminated his employment with Nabisco, Inc. Based upon the raises claimant received over the last three years, Ms. Williams estimated that, had claimant continued working for Nabisco, Inc., he would now be earning \$13.34 per hour.

56. It is unlikely that claimant can obtain employment paying as much as his Nabisco job. The average wage of experienced workers in most of the positions is less than what claimant was earning, and it is unlikely that claimant could find a position which has a starting wage as high as the average experienced worker's wage. He therefore has a significant loss of earning capacity. Assuming he could earn a wage which is the average of the entry level wage and the experienced worker's wage, and averaging the wages for all the light-duty jobs, claimant's prospective wage is \$10.14. It is \$10.61 for all jobs. This represents a loss of \$2.73 to \$3.20 per hour compared to his wage at Nabisco. Based on a 40-hour work week, he will lose \$10,000 within 79 to 92 weeks, or less than 2 years.

CONCLUSIONS OF LAW

1. The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *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).

2. Temporary total disability benefits under the Occupational Disease Act are governed by section 39-72-701, MCA (1991), which provides in relevant part:

39-72-701. Compensation for total disability or death due to occupational disease other than pneumoconiosis. (1) The compensation to which an employee temporarily totally disabled or permanently totally disabled by an occupational

disease caused by an occupational disease other than pneumoconiosis . . . **shall be the same payments which are payable to an injured employee . . . , and such payments shall be made for the same period of time as is provided in cases of temporary total disability**, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act. [Emphasis added.]

Thus, WCA provisions governing payment of temporary total disability benefits also govern temporary total disability benefits payable under the ODA.

3. Under the WCA, an injured worker is entitled to temporary total disability benefits if he or she meets the criteria set forth in section 39-71-701(1), MCA (1991), which provides:

(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**. [Emphasis added.]

The limitations noted in the section are inapplicable in the present case and therefore warrant no further discussion.

4. As the Supreme Court has emphatically instructed this Court, courts must construe statutes as they are written and may not insert terms or conditions omitted by the legislature. *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994). Where the terms of a statute are plain on their face, they must be applied as written. "If the plain meaning of the statute is clear from the language, we apply the law as written by the legislature and look no further to determine the legislature's intent." *Lodge Grass High School Dist. No. 2 v. Hamilton*, 264 Mont. 290, 293, 871 P.2d 890, 892 (1994). Under the plain terms of section 39-71-701(1), MCA, an injured worker or worker suffering an occupational disease is not entitled to temporary total disability benefits after he or she has reached maximum medical healing.

5. An exception to the maximum healing cutoff has nonetheless been inserted by judicial decision. In *Coles v. Seven Eleven Stores*, WCC No. 2000, decided November 20, 1984, affirmed 217 Mont. 343, 704 P.2d 1048 (1985), this Court adopted a four prong test which must be met prior to termination of temporary total disability benefits. That test requires:

"(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 v. Consolidated Freightways, Inc., 248 Mont. 26, 30, 808 P.2d 502, 505 (1991) (italics in original, emphasis added). The *Coles* criteria were formally embraced by the Supreme Court in *Wood*; accord *Ness v. Anaconda Minerals*, 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993).

The criteria are intended to assure that benefits to injured workers are not arbitrarily cut off or reduced. Even though a worker may have reached maximum healing, he or she may be permanently disabled from any sort of gainful employment, and thus entitled to permanent total disability benefits, or, while still capable of working, disabled from his or her time-of-injury job and therefore entitled to permanent partial disability benefits. Termination or reduction of benefits may be financially disastrous. The *Coles* criteria provide a litmus test for insurers' decisions to terminate or change benefits and thereby protect workers from unsubstantiated or ill-advised decisions.

Claimant did not offer evidence regarding the satisfaction of the four criteria at the time of the termination of his temporary total disability benefits. Rather, he has argued that Dr. Shaw's release to return to work was erroneous and that such error renders the termination of benefits defective under *Coles*.

The argument overlooks the nature of the criteria. The criteria are procedural ones. While the insurer must satisfy each criterion prior to terminating temporary total disability benefits, the criteria are not substantive ones and do substantively alter the plain terms of sections 39-72-701 and 39-71-701(1), MCA.

In this case the *Coles* criteria were met in January 1995 when Dr. Shaw determined claimant to be at maximum medical improvement and released him to return to work without restrictions. Dr. Carpenter was aware of the release and even discussed it with Dr. Shaw. He did not contradict Dr. Shaw's opinion. He merely suggested that should claimant continue to experience difficulty in performing his job, then modifications to the job should be considered. (Ex.1 at 23.)

Since *Coles* is a procedural, not a substantive requirement, except for the maximum medical healing determination, the Court will not retrospectively reexamine the correctness of the physician's opinions upon which the termination was based. The maximum medical healing requirement was unrefuted. The *Coles* criteria were satisfied and benefits properly terminated.

6. Claimant vigorously argues that Dr. Shaw's opinions should be rejected by the Court because he is biased against claimants. He provides the Court with a "sampling" of twelve

cases in which Dr. Shaw has testified adversely against claimants, and urges the Court to adopt the following finding:

Considering Dr. Shaw's past history with this Court and his utilization continuously by the insurance industry for independent medical examinations, as well as his propensity to often find against the position of the claimant and in favor of the insurer that retained him, this Court considers Dr. Shaw's opinions with great caution.

(Petitioner's Proposed Findings of Fact, Conclusions of Law, and Judgment at 7.)

The Court declines claimant's invitation. The claimant's citation of cases is no better than what it purports to be, to wit, a "sampling." At my instruction, my law clerk surveyed cases in which Dr. Shaw has testified. That survey demonstrates that Dr. Shaw has also presented medical opinions which favor claimants or which are neutral. A copy of a memorandum outlining the results of his research is attached.

Furthermore, the limited sampling fails to disclose how many cases involving Dr. Shaw failed to reach the Court because his opinions favored the claimant.

Moreover, the opinions of Dr. Shaw in this case are supported by **three** other physicians and are **unrefuted**. A careful reading of Dr. Shaw's reports and his testimony demonstrate that his opinions were based on physical findings and objective evidence. Dr. Shaw did not address claimant's pain-threshold or his ability to cope with his pain, only his physical limitations. Dr. Carpenter did not rebut Dr. Shaw's determination despite the invitation and encouragement to do so. Rather, he relied on claimant's report of pain and his inability to continue doing his time-of-injury job in reaching his opinion.

Finally, even though a physician, whether testifying on behalf of an insurer or claimant, may have biases does not mean his or her opinion is wrong. Each case must be considered on its individual merits. No flat rule of qualification or disqualification can or should be applied.

7. The claimant contends he is entitled to an award of \$10,000 pursuant to section 39-72-405(2), MCA (1991), on account of wage loss resulting from his occupational disease. Section 39-72-405(2), MCA, provides in relevant part:

(2) When any employee in employment on or after January 1, 1959, because he has an occupational disease incurred in and caused by such employment which is not yet disabling, is discharged or transferred from the employment in which he is engaged or when he ceases his employment and it is in fact, as **determined by the medical panel**, inadvisable for him on account of a nondisabling occupational disease to continue in employment and he suffers wage loss by reason of the

discharge, transfer, or cessation, the department may allow compensation on account thereof as it considers just, not exceeding \$10,000. [Emphasis added.]

8. In its proposed findings of fact and conclusions of law, the insurer objects to the Court's consideration of claimant's entitlement, if any, under section 39-72-405, MCA, because no medical panel has determined that it is "inadvisable for him to continue in employment." (Respondent's Proposed Findings of Fact, Conclusions of Law and Judgment at 15.) In colloquy with counsel during trial, the Court ascertained that a medical panel has not in fact evaluated the claimant. But the insurer's assertion was made for the first time in its proposed findings filed February 26, 1996, three days prior to trial. Claimant's counsel indicated that this was the first time he had heard of the contention, and that it had never been raised during mediation or in negotiations. Counsel for respondent did not dispute those representations.

The rules of the Workers' Compensation Court require both parties to set out their contentions in their pleadings and, finally, in the pretrial order. ARM §§ 24.5.301(c), 24.5.302(b), and 24.5.318(f). The rules assure that the issues at stake in the case are clearly identified. The Court has examined Lumbermens' response to the petition and the Pretrial Order. It is unable to find even a hint of the issue now urged.

The requirement concerning the medical panel has procedural and evidentiary significance. It is not, however, jurisdictional. It therefore may be waived, and in this case is deemed waived. If Lumbermens was aware of the issue prior to the filing of its proposed findings but deliberately kept silent in the hope of obtaining an advantage, then its conduct violated the disclosure requirements of the Court's rules and was improper. If Lumbermens simply overlooked the requirement prior to filing its proposed findings, then it should have confessed its oversight.

9. Claimant's treating physician, Dr. Carpenter, concluded that he cannot perform his previous job unless it is modified to reduce repetitive motions and long stints of driving. The claimant's testimony persuades me that it is impractical, if not impossible, to adequately modify the job.

While Dr. Shaw and the other IME physicians found no objective reason to restrict claimant's activities, their opinions are not inconsistent with Dr. Carpenter's opinion or claimant's testimony. Dr. Shaw conceded that claimant's job could increase his symptomatology. Pain cannot always be traced to objective medical evidence. In this case, I am persuaded that the claimant's time-of-injury job caused him disabling pain and discomfort. Dr. Carpenter has treated claimant since shortly after the onset of his carpal tunnel syndrome. His medical records demonstrate many attempts to alleviate claimant's symptoms, and he ultimately concluded that claimant simply is incapable of performing his time-of-injury job. The claimant credibly testified about both his own ongoing symptomatology and the nature of his job. He has a good work ethic. He attempted to do

his job after his surgery. He was forthright in his testimony and impressed me as honest and credible.

Pain is a factor which must be considered in determining disability. *Metzger v. Chemetron Corporation*, 212 Mont. 351, 354, 687 P.2d 1033, 1035 (1984). It is a subjective phenomena and is not objectively measurable. It is not entirely within the realm of expert testimony.

In this case, the claimant is not claiming he can do nothing. He is claiming only that he cannot perform the duties of his time-of-injury job. That job, as I have characterized it, was a "go-go" job. He can do other jobs, but not that one.

10. Brenda Williams provided credible testimony that the claimant has suffered a wage loss as the result of his inability to return to his job at Nabisco. His Nabisco job was a high-paying one. While other high-paying jobs may prove to be within his reach, the likely entry level wage he will receive is far less than his ending wage at Nabisco, and it will take time for him to reach the same wage earning level he had. His prospective wage loss is greater than the maximum permitted under section 39-72-405, MCA (1991). He is therefore entitled to the maximum specified by the section.

11. Claimant has not prevailed in his request for reinstatement of temporary total disability benefits and is not entitled to an attorney fee or a penalty with regard to that issue. Whether he is entitled to an attorney fee respecting the \$10,000 award remains to be determined.

PARTIAL JUDGMENT

1. The petitioner is not entitled to additional temporary total disability benefits.
2. The petitioner is entitled to an award of \$10,000 pursuant to section 39-72-405, MCA (1991). Lumbermens shall pay that amount in a lump sum.
3. Claimant is not entitled to an attorney fee or a penalty with respect to his claim for temporary total disability.
4. Within 20 days of this decision, claimant shall file a statement of his contentions regarding any claim for attorney fees and penalty with respect to the \$10,000 award made herein. The Court will then determine whether the alleged basis for attorney fees and penalty is legally adequate. If adequate, the Court will then entertain a motion to compel discovery with respect to the insurer's file.
5. Claimant is entitled to costs.
6. Because the merits of the attorney fee and the penalty requests are unresolved, this JUDGMENT is **not** final.

7. With respect to the matters decided herein, 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 15th day of March, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Norman H. Grosfield

Mr. Thomas A. Marra

Memorandum attached

Submitted: February 29, 1996

Memorandum

TO: Judge Mike McCarter

FROM: Greg Overturf, Law Clerk

DATE: April 17, 2001

RE: WCC Cases in which Dr. Shaw has testified

As you requested, the following is a list of the cases in which Dr. William Shaw has provided testimony or other medical evidence in the Worker's Compensation Court. The research is not exhaustive; I have limited myself to the actual decisions of the Worker's Compensation Court identified through a Montlaw search for "Shaw." This, of course, excludes those cases in which Dr. Shaw has participated which never went to trial.

I have classified Dr. Shaw's position in these cases as being either adverse, supportive or neutral to the claimant. Included as neutral are those instances when Dr. Shaw has played a minor role in the central issues of the case. My research indicates Dr. Shaw often testifies on the side of the insurer. However, he has also been supportive of claimants in several cases. In others he was either neutral or peripherally involved in the main issue. I have identified 19 cases in which he was adverse to the claimant, 5 in which he was supportive, and 13 in which he was neutral.

Shorten v. State Fund, WCC No. 9508-7366 (December 22, 1995) - adverse

Burgan v. Nationwide, WCC No. 9505-7308 (October 4, 1995) - supportive

Larson v. Cigna, WCC No. 9307-6828 (September 19, 1995) - adverse

South v. Transportation Ins. Co., WCC No. 9403-7019 (August 25, 1995) - neutral

Rooney v. Credit Gen. Ins., WCC No. 9411-7166 (June 29, 1995) - neutral

McNeese v. State Fund, WCC No. 9407-7084 (May 5, 1995) - supportive

ANR Freight v. Farmers Ins., WCC No. 9411-7182 (January 26, 1995) - supportive

Kober v. Buttrey, WCC No. 9311-6951 (May 9, 1994) - adverse

Ostermiller v. American Stores, WCC No. 9402-6996 (April 7, 1994) - neutral

Kloepfer v. Lumbermens, WCC No. 9305-6796 (January 18, 1994) - adverse

Ruggles v. State Fund, WCC No. 9303-6730 (September 3, 1993) - supportive

Ferguson v. American Stores, WCC No. 9209-6580 (December 15, 1993) - adverse

Allison v. State Fund, WCC No. 9209-6588 (April 19, 1993) - neutral

Atkinson v. State Fund, WCC No. 9207-6532 (April 6, 1993) - neutral

Standley v. Alexis, WCC No. 9203-6399 (November 6, 1992) - adverse

Beery v. CNA, WCC No. 9108-6217 (September 16, 1992) - adverse

Aetna v. Ray Main, WCC No. 9112-6315 (July 21, 1992) - neutral

Hash v. State Fund, WCC No. 9109-6255 (April 17, 1992) - adverse

Griffin v. State Fund, WCC No. 9103-6100 (March 26, 1992) - adverse

White v. Aetna, WCC No. 9011-6005 (March 10, 1992) - adverse

Metzger v. State Fund, WCC No. 9108-6239 (January 10, 1992) - neutral

Westervelt v. Montana Power Co., WCC No. 9105-6142 (December 11, 1991) - adverse

Kelly v. State Fund, WCC No. 9007-5924 (September 12, 1991) - adverse

Meidinger v. Western Energy Corp., WCC No. 9007-5909 (July 12, 1991) - adverse

Sowl v. Lumbermans Mutual, WCC No. 9010-5990 (April 25, 1991) - neutral

Roberts v. Buttrey, WCC No. 9010-5991 (February 8, 1991) - neutral

Chapman v. National Union Fire, WCC No. 8911-5557 (October 19, 1990) - supportive

Jaenish v. EBI/Orion, WCC No. 8805-4804 (July 20, 1990) - adverse

Laber v. NATLSCO-Kemper, WCC No. 8812-5021 (June 7, 1990) - adverse

Romero v. State Fund, WCC No. 8812-5022 (April 4, 1990) - adverse

Miller v. Garrett Freightways, WCC No. 8808-4879 (October 18, 1989) - adverse

O'Brien v. Montana Ins. Guarantee, WCC No. 8810-4922 (July 12, 1989) - adverse

Romero v. CNA, WCC No. 8809-4914 (May 5, 1989) - neutral

Jakovac v. Osco Drug, WCC No. 8703-4275 (April 27, 1988) - adverse

Hueth v. Orion, WCC No. 8703-4260 (December 11, 1987) - neutral

Gessner v. Nat. Med., WCC No. 8609-3845 (August 5, 1987) - neutral

Hathaway v. State Fund, WCC No. 8507-3144 (April 2, 1987) - neutral

1. The letter was offered at the deposition of Dr. Shaw. Claimant's attorney objected to the letter on relevance grounds, though not to its authenticity. However, he did not pursue the objection in his proposed findings of fact and conclusions of law, as required by Court rules, and it is deemed withdrawn. ARM 24.5.322(5).