IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 18

WCC No. 2000-0041

AUBREY SCHNEIDER

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

JOEL BOS d/b/a/ BOS TOP DAIRY

Employer.

ORDER REGARDING 39-71-610 BENEFITS

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code: 39-71-610 (1999). Insurer appealed DOL order for payment of 49-day benefits. After telephonic conference with both counsel, WCC reviewed case on basis of medical records and physician correspondence. In this accepted liability case, the Court examined length of time benefits were paid, existence of financial hardship to claimant, and facts supporting case for reinstating TTD. Seven months of benefits is not insignificant. No information regarding financial hardship was presented. The prima facie case for benefits is the critical factor. Where records show conflicting medical opinion, WCC would more probably than not find "strong prima facie case" for reinstatement of benefits because claimant need not prove in 49-day benefits case that he will prevail, only that there is some evidence in his favor which is substantial and not facilely disregarded. 49-day benefits not ordered, however, where medical opinion favorable to claimant indicates he is not at MMI because he needs PT and work hardening, which he was offered but dropped. Having provided no justification for failing to treat, claimant has not presented a sufficient.

Benefits: Interim (39-71-610) Benefits. Insurer appealed DOL order for payment of 49-day benefits. After telephonic conference with both counsel, WCC reviewed case on basis of medical records and physician correspondence. In this accepted liability case, the Court examined length of time benefits were paid, existence of

financial hardship to claimant, and facts supporting case for reinstating TTD. Seven months of benefits is not insignificant. No information regarding financial hardship was presented. The prima facie case for benefits is the critical factor. Where records show conflicting medical opinion, WCC would more probably than not find "strong prima facie case" for reinstatement of benefits because claimant need not prove in 49-day benefits case that he will prevail, only that there is some evidence in his favor which is substantial and not facilely disregarded. 49-day benefits not ordered, however, where medical opinion favorable to claimant indicates he is not at MMI because he needs PT and work hardening, which he was offered but dropped. Having provided no justication for failing to treat, claimant has not presented a sufficient case.

Maximum Medical Improvement. Claim for 49 day benefits under 39-71-610 rejected because claimant has not shown prima facie case for reinstatement of TTD benefits. Physician opining he had not reached MMI rested opinion on his need for PT and work hardening, but record indicated claimant had been offered those treatments but failed to attend.

Proof: Maximum Medical Improvement. Claim for 49 day benefits under 39-71-610 rejected because claimant has not shown prima facie case for reinstatement of TTD benefits. Physician opining he had not reached MMI rested opinion on his need for PT and work hardening, but record indicated claimant had been offered those treatments but failed to attend.

¶1 The petitioner in this case seeks reinstatement of temporary total disability (TTD) benefits and an order directing the insurer to pay for physical therapy and other treatment ordered by his treating physician. (Petition for Hearing (March 3, 2000).) While pursuing his present petition, he also requested the Department of Labor and Industry to order the insurer to pay interim TTD benefits under section 39-71-610, MCA. On March 15, 2000, the Department approved his request. The insurer, Liberty Northwest Insurance Corporation (Liberty), appealed that determination. (March 31, 2000 Letter of Larry W. Jones to the Court.)[(1)] The appeal was docketed as a part of the Court file in this case.

¶2 On March 31, 2000, the Court held a telephone conference with Mr. Larry W. Jones, attorney for Liberty, and Mr. Geoffrey C. Angel, attorney for petitioner. Counsel agreed to submit the appeal upon medical records and correspondence from Dr. Robert A. Jackson, a family practitioner, and Dr. Scott K. Ross, who specializes in occupational medicine. After reviewing the records and correspondence, and considering the arguments made during the telephone conference, I find that petitioner has failed to present facts sufficient to justify an order for interim benefits.

Facts

¶3 The facts before the Court include the allegations of the Petition for Hearing insofar as they are admitted by Liberty's Response to Petition for Hearing, and medical records and correspondence of Dr. Jackson and Dr. Ross, as follows:

- July 30, 1999 report of Dr. Ross.
- September 20, 1999 report of physical therapist Lynnell Crouse.
- September 21, 1999 report of Dr. Ross.
- September 23, 1999 report of Dr. Ross.
- September 25, 1999 letter of Dr. Ross to Jackie Hess, RN.
- November 12, 1999 letter of Dr. Ross to Kerri Wilson.
- November 17, 1999 physical therapy prescription of Dr. Jackson.
- November 17, 1999 letter of Dr. Jackson to Geoffrey C. Angel.

The salient facts derived from these sources are set out below.

¶4 Petitioner suffered a work-related back injury on March 14, 1999. He was initially treated by Dr. Jackson, who has continued to provide treatment. Dr. Jackson's medical records are not provided, but from the history taken by Dr. Ross and his medical records review, it appears that petitioner struck his left shoulder, left upper back, and head at work and thereafter complained of headaches, neck pain, left arm pain, and pain and numbness of the left hand. At Dr. Jackson's request, he was examined by Dr. Kofman, who is apparently a neurologist. According to Dr. Ross, Dr. Kofman's May 7, 1999 neurological examination of petitioner was normal.

¶5 Dr. Ross then examined petitioner on July 30, 1999, and found claimant not at MMI. Dr. Ross prescribed a treatment plan which included tapering of narcotic medications, a home exercise program, and consideration of a work-conditioning program. It is not clear who made the referral to Dr. Ross.

¶6 Thereafter, on September 20, 1999, claimant began a work-conditioning program under the supervision of a physical therapist. The therapist examined him and instructed him "in lumbar extension exercises and cervical retraction exercises." He was scheduled for a daily "work condition program" to "be followed by physical therapy as appropriate."

¶7 Following the September 20th session, petitioner complained of severe headache and back pain. Dr. Ross saw him the next day, September 21, 1999, and commented, "In my opinion, the patient exhibits exaggerated and embellished pain response throughout the evaluation." The doctor prescribed that petitioner continue his medications, add over-the-counter Tylenol for headaches, and continue with work conditioning, limiting his lifting to less than 25 pounds. Petitioner did not return to the work-conditioning program and apparently did not keep a September 24, 1999 appointment with Dr. Ross. His failure to do so is not explained in the information provided to the Court.

¶8 On September 25, 1999, Dr. Ross replied to an inquiry from an RN employed by Liberty, apparently as a medical case manager. In his reply, he found petitioner at MMI, found no impairment, and determined that claimant had no physical restrictions as a consequence of his 1999 injury. On November 12, 1999, Dr. Ross reported he had reviewed additional medical records of Dr. Jackson and that the records did not change his opinions.

¶9 Dr. Jackson disagrees with Dr. Ross. In a November 17, 1999 letter to petitioner's attorney, he states:

> This is to follow-up on a note that I wrote for Mr. Schneider today. Hopefully, he showed this to you. I understand that he has been told by Dr. Ross in Billings that he is at maximum medical improvement. I do not agree with this assessment. There is certainly a substantial deficit still present from his prior level of function.
>
> I still believe that Mr. Schneider would benefit from physical therapy. The goal with this, as noted on his physical therapy prescription today, is to achieve some work hardening, as well as improve range of motion in his neck and shoulders. Mr. Schneider is a recreational weight-lifter. I believe, if he's able to return to this hobby, he'll have substantial improvement in his overall quality of life. However, he needs some guidance form physical therapy as to the type and extent of exercises he may perform.

(Medical Records of Dr. Jackson and Dr. Ross at 1.) The quoted material is the only medical information provided by or for Dr. Jackson.

Discussion

¶10 The appeal under consideration involves section 39-71-610, MCA (1999), which provides:

> **39-71-610. Termination of benefits by insurer -- department order to pay disputed benefits prior to hearing or mediation -- limitation on order -- right of reimbursement.** If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing before the workers' compensation court or prior to mediation, but in no event may the biweekly compensation benefits be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of the hearing or mediation. A party may appeal this order to the workers' compensation court. If after a hearing before the workers' compensation court it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for the payments by the claimant.

As I concluded in a recent decision, *Kevin Smith v. State Compensation Ins. Fund*, 2000 MTWCC 9 (February 17, 2000), the Court's jurisdiction under the section is *de novo*. Thus, both parties must be afforded an opportunity to present their position.[(2)]

¶11 The recent *Smith* decision also sets out criteria for determining whether to grant interim benefits under section 39-71-610, MCA:

> ¶28 The more difficult question is what factors must the Department, and ultimately the Court, consider in determining whether to exercise its discretion in favor of the petitioning claimant. The section provides no guidance, however, common sense and experience suggest that the decision must be guided by facts and circumstances of the particular case. In an accepted liability case where benefits have been paid for a lengthy period of time, where the claimant will suffer severe financial hardship from any interruption of benefits, and where the claimant has, at least at first glance, a strong prima facie case for reinstatement of benefits, an order for benefits under section 39-71-610, MCA, will likely be entered. On the other hand, in a case of contested liability where there is an absolute defense of likely merit, where the case for reinstatement of benefits is facially weak, or where little financial hardship will result, the facts may preponderate against an order for benefits.

Smith at 6. This is an accepted liability case, therefore the Court will examine the length of time benefits were paid to petitioner, any financial hardship to petitioner on account of the cut-off of benefits, and the facts supporting his case for reinstatement of TTD benefits.

¶12 The duration of benefits is not clear other than it was less than a year. If benefits commenced right after the injury and terminated shortly after Dr. Ross' MMI opinion, then petitioner was on benefits for approximately seven months. The duration of benefits is not insignificant.

¶13 Neither petitioner nor Liberty has furnished any information concerning financial hardship. Therefore, this factor is neither a positive or negative indicator for interim benefits.

¶14 The last factor - the petitioner's prima facia case on the merits - is the critical factor in this case. The Court has only limited information. That information shows a conflict of medical opinions. If that was all that were involved, then I would more probably than not find that petitioner has presented a "strong prima facia case for reinstatement of benefits." He is not required to persuade me he *will* prevail, only that his prima facia case for reinstatement is supported by some evidence which is substantial and not facilely disregarded. In this case, however, Dr. Jackson's opinion that petitioner has not reached MMI is predicated on his further opinion that petitioner will benefit by work hardening and physical therapy. But where a claimant refuses treatment which may improve his condition, he is at MMI since lacking his commitment to therapy his medical condition will not

improve. Petitioner was offered work hardening and physical therapy assistance in September 1999 but dropped out of the program. He has provided no explanation showing that his failure to continue in the program or keep his September 24, 1999 appointment with Dr. Ross was reasonable and justified.

¶15 I therefore conclude that petitioner has not presented a sufficient case for reinstatement of benefits.

ORDER

¶16 For the reasons set forth in the foregoing discussion, the March 15, 2000 Order Reinstating Benefits Pending a Hearing is **reversed** and **set aside**. Petitioner's request for interim benefits under section 39-71-610, MCA, is **dismissed**.

DATED in Helena, Montana, this 4th day of April, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Geoffrey C. Angel
Mr. Larry W. Jones

Submitted: March 31, 2000

1. Because of the need for prompt decisions in section 39-71-610, MCA, appeals, the Court permits the appeals to be initiated by letter or other written communication and has not required the filing of a formal pleading. The Court presently has under consideration a proposed Court rule which will expressly authorize that informal procedure in section 39-71-610, MCA (1999) cases.

2. Labeling a request for review by the Court an "appeal" is a misnomer. Nonetheless, since the statute uses the word "appeal," that term is loosely used by the Court in considering section 39-71-610, MCA (1999) requests.