

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 43

WCC No. 9608-7594

STEPHEN A. SEARS

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

COULTER CORPORATION

Employer.

ORDER AND FINAL JUDGMENT

Summary: Following the WCC's order denying summary judgment, which held that Coles criteria were satisfied in connection with respondent's termination of TTD benefits, and did not apply to claimant's case in any event, both parties proffered evidence they would produce at trial and asked the Court whether these raised issues requiring trial.

Held: None of the evidence offered by either party has any bearing on the Court's decision that respondent's failure to create a technically accurate job description does not require extension of TTD benefits under the circumstances of this case. Trial is not necessary and final judgment entered.

Topics:

Summary Judgment: Motion for Summary Judgment. Where motion for summary judgment may have resolved all issues in the case, parties proffered evidence they would introduce at trial and posed the question whether this evidence would be material to any issue. The WCC ruled that such evidence would not impact its determination on summary judgment, which appeared dispositive of the case. Final judgment entered.

Introduction

¶1 This Court has previously entered orders denying summary judgment and denying reconsideration of the order denying summary judgment. Those orders determined that the

Coles criteria were satisfied in connection with respondent's termination of temporary total disability benefits and that, in any event, the *Coles* criteria do not apply to claims arising on and after July 1, 1995.

¶12 The question now presented to the Court is what issues remain to be determined. Following discussions with counsel for the parties, the parties agreed to submit an offer of proof with respect to the facts they would produce at any trial. On its part, the Court agreed to rule whether the proffered facts are material to the present controversy. After reviewing the proffers, I find that they are not material and that final judgment must be entered for respondent.

Discussion

¶13 The evidence the petitioner would offer at trial is in connection with his allegation that the insurer failed to comply with the *Coles* criteria because the physician who released him to his time-of-injury job did not have a technically accurate job description for the job. Petitioner previously offered, and the Court accepted as true, a rehabilitation expert's affidavit verifying that the job description provided to the releasing physician was inaccurate. His additional evidence at trial would be that, contrary to the job description actually furnished, the claimant was required to lift "much more than 50 pounds on the job."

¶14 The additional evidence would not affect the outcome in this case. The Court has already found that an inaccurate job description did not void the insurer's termination of benefits. The additional evidence would only bolster petitioner's contention that the job description was in fact inaccurate, but no matter how much he bolsters that contention, the Court has already determined that *Coles* does not require an accurate job description (at least where the job description is not deliberately misleading or phony) and that *Coles* no longer applies in any event.

¶15 Petitioner might still prevail in this case if he were to offer evidence that at the time of the termination of his benefits he had not reached maximum medical healing or, if he had reached maximum medical healing, that he was unable to return to any employment. However, he has not pursued either ground and his proffer would be insufficient to establish either of those two propositions.

¶16 On its part, the respondent would attempt to prove that any error with regard to the release by Dr. McLean, which release was a part of the *Coles* notice given petitioner, is harmless since petitioner's treating physician, Dr. Maxwell, had previously released claimant to work without restrictions and with a zero percent impairment rating. Respondent would further attempt to prove that its claims adjuster was aware of Dr. Maxwell's release, relied upon it in deciding to terminate benefits, and requested Dr. McLean's evaluation only to "confirm the finding." Finally, it would offer evidence which it

believes would show that since termination of temporary total disability benefits the claimant has received some wages from teaching swimming lessons.

¶7 As with petitioner's proposed evidence, the evidence tendered by respondent would not change the result in this case. As an initial matter, the evidence regarding claimant's receipt of wages may be relevant to claimant's entitlement to temporary total disability benefits during the periods he received wages, however, respondent has already prevailed and the evidence would only provide alternative grounds supporting this Court's decision. The evidence of Dr. Maxwell's release would not satisfy *Coles* since his report was not the basis of the termination letter and was not provided to petitioner. Thus, it did not satisfy part four of *Coles*, which requires that the insurer provide the petitioner with a copy of the releasing physician's report.

JUDGMENT

¶8 Based upon the previous rulings of this Court, and the offers of proof tendered by the parties with respect to what they would attempt to prove at any trial, the Court finds that final judgment should be entered as follows:

¶9 1. The petitioner is not entitled to further temporary total disability benefits on account of any deficiency in the job description provided to Dr. McLean. Petitioner has not offered any evidence showing that he has in fact been temporary totally disabled during any period of time since his temporary total disability benefits were terminated.

¶10 2. The petition is **dismissed with prejudice**.

¶11 3. This judgment is certified as final for purposes of appeal.

¶12 4. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Order and Final Judgment.

DATED in Helena, Montana, this 13th day of May, 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. James G. Hunt

Mr. Jason G. Dykstra

Submitted: April 27, 1998