

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 12

WCC No. 9608-7594

STEPHEN A. SEARS

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

COULTER CORPORATION

Employer.

ORDER DENYING MOTION FOR RECONSIDERATION

Summary: Claimant requested reconsideration of order denying summary judgment. Claimant repeated his argument that TTD benefits were not properly terminated under criteria of *Coles v. Seven Eleven Stores*, WCC No. 2000 (1985) where physician had not been given a "technically accurate" job description for purposes of considering claimant's ability to work.

Held: Motion denied. The statutes governing temporary total disability benefits expressly provide that a claimant is entitled to TTD benefits only until such time as the claimant reaches maximum medical healing. Section 39-71-609, MCA (1995) sets out the requirements for terminating TTD benefits. Under subsection (2) of that section, TTD "benefits may be terminated on the date that the worker has been released to return to work in some capacity." While insurers are well advised to continue following the practices identified in *Coles*, including providing technically accurate job descriptions to physicians evaluating return to work, the *Coles* criteria are not mandated by statute. Extending TTD benefits for non-compliance with *Coles* criteria irrespective of whether statutory criteria for terminating benefits are met would in effect impose a penalty of sorts on the insurer, without statutory justification. Where claimant does not contend he was in fact still TTD, the Court refuses to extend TTD benefits based on alleged non-compliance with one of the criteria of *Coles*.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-609, MCA (1995). Where claimant does not contend he was in fact still TTD, the Court refuses, on motion for reconsideration, to extend TTD benefits based on alleged non-compliance with one of the criteria of *Coles*. Claimant had repeated his argument that TTD benefits should have been continued because the insurer failed to provide the physician evaluating his ability to return to work a "technically accurate" job description. WCC adheres to original ruling that technical failure to comply with *Coles* does not warrant extending TTD benefits where statutory criteria for terminating benefits are met. The statutes governing temporary total disability benefits expressly provide that a claimant is entitled to TTD benefits only until such time as the claimant reaches maximum medical healing. Under section 39-71-609(2), MCA (1995), TTD "benefits may be terminated on the date that the worker has been released to return to work in some capacity." While insurers are well advised to continue following the practices identified in *Coles*, including providing technically accurate job descriptions to physicians evaluating return to work, extending TTD benefits for non-compliance with *Coles* criteria irrespective of whether statutory criteria for terminating benefits are met would in effect impose a penalty of sorts on the insurer, without statutory justification.

Benefits: Termination of Benefits: Coles. Where claimant does not contend he was in fact still TTD, the Court refuses, on motion for reconsideration, to extend TTD benefits based on alleged non-compliance with one of the criteria of *Coles*. Claimant had repeated his argument that TTD benefits should have been continued because the insurer failed to provide the physician evaluating his ability to return to work a "technically accurate" job description. WCC adheres to original ruling that technical failure to comply with *Coles* does not warrant extending TTD benefits where statutory criteria for terminating benefits are met. The statutes governing temporary total disability benefits expressly provide that a claimant is entitled to TTD benefits only until such time as the claimant reaches maximum medical healing. Under section 39-71-609(2), MCA (1995), TTD "benefits may be terminated on the date that the worker has been released to return to work in some capacity." While insurers are well advised to continue following the practices identified in *Coles*, including providing technically accurate job descriptions to physicians evaluating return to work, extending TTD benefits for non-compliance with *Coles* criteria irrespective of whether statutory criteria for terminating benefits are met would in effect impose a penalty of sorts on the insurer, without statutory justification.

¶1 On April 8, 1997, this Court issued an Order Denying Summary Judgment. The summary judgment was sought by claimant based upon an alleged failure of the insurer to comply with (1) the *Coles* criteria applicable to the termination of temporary total disability

benefits and (2) the requirement that the Department of Labor and Industry be notified of such termination. Claimant thereafter moved for reconsideration with respect to the first issue. Oral argument on the motion was held on October 31, 1997.

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

Discussion

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

"(1) a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit;

"(2) a physician's determination of the claimant's physical restrictions resulting from an industrial accident;

"(3) *a physician's determination, based on his knowledge of the claimant's former employment duties, that he can return to work, with or without restrictions, on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition;*

"(4) notice to the claimant of receipt of the report attached to a copy of the report."

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

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

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

¶6 Plainly, a detailed job description is not necessary in all cases. It serves no purpose whatsoever where the claimant has completely recovered and the physician imposes no restrictions on the claimant's vocational activities. Where the physician is the claimant's treating physician, it is reasonable to expect that the physician has claimant's best

interests at heart and has discussed the nature of the claimant's job duties in sufficient detail for the physician to reach a conscientious and medically sound decision. Where the job requirements are common knowledge, such as for secretaries and keno callers, requiring a detailed job description is a waste of time and money unless there is something unusual about the particular position and, even then, such peculiarity can be ascertained in discussion between the physician and his or her patient.

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

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

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

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

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

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

(*Id.*)

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

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

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

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

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

(Exhibit to Claimant's Brief in Support of Motion for Summary Judgment at 11.) The duties described could conceivably require standing more than the "30 minutes at a time" or sitting "more than 30-60 minutes" at a time, as limited by Dr. McLean. At least, it is not clear from the face of the job description that these activities are within the restrictions.

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

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

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

39-71-609. Denial of claim after payments made or termination of all benefits or reduction to partial benefits by insurer -- fourteen days' notice required --

exception. (1) *Except as provided in subsection (2), if an insurer determines to deny a claim on which payments have been made under 39-71-608 during a time of further investigation or, after a claim has been accepted, terminates all biweekly compensation benefits, it may do so only after 14 days' written notice to the claimant, the claimant's authorized representative, if any, and the department. For injuries occurring prior to July 1, 1987, an insurer must give 14 days' written notice to the claimant before reducing benefits from total to partial. However, if an insurer has knowledge that a claimant has returned to work, compensation benefits may be terminated as of the time the claimant returned to work.*

(2) *Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity.* [Italics added for emphasis.]

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

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

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

¶18 Even if the *Coles* criteria are applicable to the termination of benefits in this case, I decline to expand them to include a requirement that the insurer furnish the releasing physician with a technically correct job description. I pointed out in my original order that the technical requirements adopted in *Coles* and *Wood* are not ones set forth in the statute governing termination of temporary total disability benefits, rather they are judicially

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

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

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

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

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. James G. Hunt

Mr. Jason G. Dykstra

Submitted: October 31, 1997