

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 18

WCC No. 9608-7594

STEPHEN A. SEARS

Petitioner

vs.

TRAVELERS INSURANCE

Respondent/Insurer for

COULTER CORPORATION

Employer.

ORDER DENYING SUMMARY JUDGMENT

Summary: Insurer terminated injured worker's temporary total disability benefits with 14-days written notice to his attorney, but not to the Department of Labor and Industry. Claimant argued the termination of benefits was ineffective where (1) the physician who opined he could return to work relied on a job description that was not sufficiently detailed and technically accurate; and/or (2) 14-days notice had not been given to the DOL prior to termination of TTD benefits.

Held: While criteria for termination of TTD benefits were adopted by the WCC in *Coles v. Seven Eleven Stores*, WCC No. 2000 (11/20/84), affirmed 217 Mont. 343, 704 P.2d 1048 (1985), and embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), the WCC will not now add to the *Coles* requirements, which are not mandated by the statutes at issue in this case. A detailed and technically accurate job description, which would undoubtedly have to be prepared by a vocational consultant hired by the insurer, and which would then be subject to attack by a vocational consultant hired by claimant, is not required by section 39-71-701, MCA (1993), or the language of *Coles*. As for the argument based on lack of notice to the DOL, the governing statute is section 39-71-609, MCA (1995), which allows termination of TTD benefits on the date the worker has been released to work in some capacity, without 14-days notice to any party. While claimant argues the 1993 statute applies because that statute was in effect on his date of injury, *Buckman v. Montana Deaconess Hospital*, 224

Mont. 318, 321, 730 P.2d 380, 382 (1986), that rule applies only to substantive provisions, not to provisions governing procedure.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated:

Section 39-71-609, MCA (1995). Section 39-71-609, MCA (1995), allows termination of TTD benefits on the date the worker has been released to work in some capacity, without 14-days notice to any party. While claimant argues the 1993 statute applies because that statute was in effect on his date of injury, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), that rule applies only to substantive provisions, not to provisions governing procedure.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated:

section 39-71-701, MCA (1993). While criteria for termination of TTD benefits were adopted by the WCC in *Coles v. Seven Eleven Stores*, WCC No. 2000 (11/20/84), affirmed 217 Mont. 343, 704 P.2d 1048 (1985), and embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), the WCC will not now add to the *Coles* requirements, which are not mandated by the statutes at issue in this case. A detailed and technically accurate job description, which would undoubtedly have to be prepared by a vocational consultant hired by the insurer, and which would then be subject to attack by a vocational consultant hired by claimant, is not required by section 39-71-701, MCA (1993), or the language of *Coles*.

Benefits: Termination of Benefits: Coles. While criteria for termination of TTD benefits were adopted by the WCC in *Coles v. Seven Eleven Stores*, WCC No. 2000 (11/20/84), affirmed 217 Mont. 343, 704 P.2d 1048 (1985), and embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), the WCC will not now add to the *Coles* requirements, which are not mandated by the statutes at issue in this case. A detailed and technically accurate job description, which would undoubtedly have to be prepared by a vocational consultant hired by the insurer, and which would then be subject to attack by a vocational consultant hired by claimant, is not required by section 39-71-701, MCA (1993), or the language of *Coles*.

Benefits: Termination of Benefits: Fourteen-Day Notice. Section 39-71-609, MCA (1995), allows termination of TTD benefits on the date the worker has been released to work in some capacity, without 14-days notice to any party. While claimant argues the 1993 statute applies because that statute was in effect on his date of injury, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), that rule applies only to substantive provisions, not to provisions governing procedure.

Benefits: Termination of Benefits: Release to Return to Work. While criteria for termination of TTD benefits were adopted by the WCC in *Coles v. Seven Eleven Stores*, WCC No. 2000 (11/20/84), affirmed 217 Mont. 343, 704 P.2d 1048 (1985), and embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991), the WCC will not now add to the *Coles* requirements, which are not mandated by the statutes at issue in this case. A detailed and technically accurate job description, which would undoubtedly have to be prepared by a vocational consultant hired by the insurer, and which would then be subject to attack by a vocational consultant hired by claimant, is not required by section 39-71-701, MCA (1993), or the language of *Coles*.

Statutes and Statutory Interpretation: Applicable Law. Section 39-71-609, MCA (1995), allows termination of TTD benefits on the date the worker has been released to work in some capacity, without 14-days notice to any party. While claimant argues the 1993 statute applies because that statute was in effect on his date of injury, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), that rule applies only to substantive provisions, not to provisions governing procedure.

Statutes and Statutory Interpretation: Procedural. Section 39-71-609, MCA (1995), allows termination of TTD benefits on the date the worker has been released to work in some capacity, without 14-days notice to any party. While claimant argues the 1993 statute applies because that statute was in effect on his date of injury, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986), that rule applies only to substantive provisions, not to provisions governing procedure.

Introduction

Petitioner, Stephen A. Sears (claimant), injured his back on October 27, 1994, in a work-related accident. His employer's insurer, Travelers Insurance (Travelers), accepted liability for his injury and paid temporary total disability benefits from November 7, 1994 through December 15, 1994, when claimant returned to work. (Letter of Jason G. Dykstra (March 12, 1997); Letter of James G. Hunt (March 14, 1997).)⁽¹⁾ Travelers reinitiated temporary total disability benefits on February 8, 1995, but terminated them once again on August 29, 1995, pursuant to a fourteen-day notice of termination. (*Id.*)

Motion for Summary Judgment

The claimant seeks reinstatement of temporary total disability retroactive to August 29, 1995, and continuing through June 3, 1996. (Petition for Hearing; Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgment (Petitioner's Reply at 4.) He moves for summary judgment on the grounds that the insurer (1) failed to comply

with the *Coles* criteria when terminating benefits in August 1995, and (2) failed to notify the Department of Labor and Industry (Department) of the termination as required by section 39-71-609(1), MCA. The motion has been briefed and is ready for decision.

Undisputed Facts

Claimant's opening brief sets out a list of the facts claimant believes to be uncontested and which, he argues, entitle him to judgment. (Claimant's Brief in Support of Motion for Summary Judgment (Claimant's Brief) at 1-2.) Accompanying his brief is an affidavit of his attorney with numerous documents attached.

In its answer brief, Travelers does not dispute the claimant's facts or the authenticity of the documents; it does not even address them. Under the Court's rules regarding summary judgment motions, "Any party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party." ARM 24.5.329(3). The rule requires the opposing party to identify any of the facts recited by the moving party which the opposing party disputes. Since Travelers does not deny the facts and documents set out in claimant's brief, and since its own statement of facts does not contradict any of claimant's facts, the claimant's statement of facts is deemed uncontroverted.

Travelers sets out additional facts it believes are uncontroverted and attaches several supporting documents. (Respondent's Response to Petitioner's Motion for Summary Judgment at 2-4 (Respondent's Brief).) Addressing the additional facts, claimant says, "For the purposes of this motion, Sears [claimant] will not dispute any of the facts recited by Respondent and they [sic] court may assume each is true." (Petitioner's Reply at 1.) Travelers' facts should therefore be deemed uncontroverted, as well.

Through correspondence filed with the Court, the parties have also agreed to the specific dates on which compensation was paid to claimant.⁽²⁾

Despite the numerous facts conceded by the parties, I nonetheless concluded that the factual underpinnings of the motion should be clarified. Not all of the facts set out in the parties' briefs are relevant to the present motion and not all the relevant facts are set out in the form required by Court rules. To avoid any doubt concerning the facts, I prepared a revised statement of undisputed facts and sent it to counsel asking that they confirm the truth of the facts recited therein or advise me of which facts are in dispute.

As a result of the responses received from counsel, the paragraph concerning claimant's termination of employment has been revised. Further, at respondent's request, a paragraph concerning Dr. Maxwell's discharge of claimant and the insurance adjuster's reliance on that discharge has been added. Deeming the fact irrelevant, claimant agreed that the Court may accept the additional fact as true for purposes of the motion.⁽³⁾

The undisputed facts, as restated are as follows:

1. Claimant injured his low back on October 27, 1994, while working for Coulter Corporation.
2. Coulter was insured by Travelers, which accepted liability for the injury.
3. Travelers instituted payment of temporary total disability benefits on November 7, 1994.
4. Travelers terminated temporary total disability benefits as of December 15, 1994, since claimant returned to work for Coulter on December 17, 1994.
5. Claimant was terminated by Coulter on February 3, 1995.
6. On February 8, 1995, claimant returned to his treating physician complaining of low-back pain. His physician took claimant off work.
7. Travelers reinstated temporary total disability benefits effective February 8, 1995.
8. On July 20, 1995, claimant underwent an independent medical examination by Dr. Terry E. McLean. On August 4, 1995, Dr. McLean sent Travelers his final report, which stated in relevant part:

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.

(Attachment to Affidavit of Jim Hunt.)

9. On August 11, 1995, Travelers gave claimant, through his attorney, 14-days written notice that it was terminating his temporary total disability benefits . The notice stated in full:

Enclosed is a copy of Doctor McLean's final evaluation. He has also confirmed that Mr [sic] Sears is at maximum medical improvement and has suffered no permanent impairment.

This letter is fourteen (14) day notice for termination of temporary total benefits. By copy of this letter I am also advising Mr [sic] Sears.

(Attachment to Affidavit of Jim Hunt.)

10. Temporary total disability benefits were terminated on August 30, 1995.
11. The job descriptions reviewed by Dr. McLean were for Customer Service Specialist III and Customer Service Specialist I. (Attachment to Affidavit of Jim

Hunt.) The description for the Specialist III is dated as prepared on May 7, 1991, and is signed and dated by the claimant on November 30, 1992. (*Id.*)

12. According to an Affidavit of Lawrence L. Rowan, M.sc., Crc, which is attached to Petitioner's Brief, the

two position descriptions from COULTER are inadequate to determine the physical employment duties of either position. For example, neither position description addresses sitting demands, standing demands, postural changes, carrying, or other nonexertional and exertional demands as found in acceptable job analyses used to determine whether an injured worker can perform a particular job.

(Affidavit of Lawrence L. Rowan, M.sc., Crc. at 1-2.)

13. Mr. Rowan is a certified rehabilitation counselor. (*Id.* at 1) His opinion, as set forth in the previous paragraph, is not challenged by Travelers.

14. On June 16, 1995, Dr. Maxwell (claimant's treating physician) determined that claimant was at maximum medical improvement, discharged him from care, and approved his return to work without restrictions. Dr. Maxwell assigned a zero percent impairment rating.

15. Diane Nelson, who was adjusting the claim for Travelers, relied upon both Dr. Maxwell's release and the IME report of Dr. McLean in terminating claimant's temporary total disability benefits on August 30, 1995.

16. Claimant returned to work on June 3, 1996.

Discussion

In ruling on claimant's summary judgment motion, the Court must determine whether the facts, as recited above, entitle claimant to judgment as a matter of law. ARM 24.5.329(2).

I.

Temporary total disability ends when a claimant has reached maximum medical healing or returns to work. Section 39-71-116(28), MCA (1993), provides:

"Temporary total disability" means a condition resulting from an injury as defined in this chapter that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

Section 39-71-701, MCA (1993), which governs the payment of temporary total disability benefits, provides that such benefits cease upon the claimant's reaching a status of maximum healing or his release to return to work in the same position or in a modified or alternative position with an equivalent wage:

39-71-701. Compensation for temporary total disability -- exception. (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing.

(2) The determination of temporary total disability must be supported by a preponderance of medical evidence.

(3) Weekly compensation benefits for injury producing temporary total disability are 66 % of the wages received at the time of the injury. The maximum weekly compensation benefits may not exceed the state's average weekly wage at the time of injury. Temporary total disability benefits must be paid for the duration of the worker's temporary disability. The weekly benefit amount may not be adjusted for cost of living as provided in 39-71-702(5).

(4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.

...

Ordinarily, the claimant bears the burden of proving his entitlement to benefits. *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). To satisfy that burden he must establish that during the time for which he seeks benefits he suffered a total loss of wages on account of his industrial injury, that he had not reached maximum medical improvement, and that he had not been released to return to his old job or an equivalent job with equal pay. § 39-71-116 (28) and -701, MCA (1993).

Under the plain terms of section 39-71-701(1), MCA, an injured worker is not entitled to temporary total disability benefits after he or she has reached maximum medical healing or has been released to return to his or her time-of-injury job. However, despite the rule prohibiting Courts from inserting additional requirements into a statute, § 1-2-101, MCA; *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 93-94, 874 P.2d 1217, 1219 (1994), more than a decade ago this Court adopted technical criteria governing termination of temporary total disability benefits. Those criteria have the effect, in some cases, of requiring continued payment of temporary total disability benefits beyond maximum healing or a release to return to work.

The criteria were adopted in *Coles v. Seven Eleven Stores*, WCC No.2000, decided November 20, 1984, affirmed 217 Mont. 343, 704 P.2d 1048 (1985), and formally embraced by the Supreme Court in *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991); accord *Ness v. Anaconda Minerals*, 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993). There are four criteria, all of which must be met prior to termination of temporary total disability benefits. They 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 at 30, 808 P.2d at 505 (italics in original).

Claimant argues that the *Coles* criteria were not satisfied in his case because the job description upon which Dr. McLean based his determination that claimant could return to his time-of-injury job was flawed. In support of his argument he provides an affidavit of a vocational consultant swearing that the description was inadequate.

Claimant's argument would require the adoption of a new requirement that a technically accurate job description be provided to the physician releasing claimant to work. I decline the invitation to do so. The *Coles* criteria are intended to assure that benefits to injured workers are not arbitrarily cut off or reduced. A detailed and technically accurate job description, which would undoubtedly have to be prepared by a vocational consultant hired by the insurer, and which would then be subject to attack by a vocational consultant hired by claimant, is not required by section 39-71-701, MCA (1993), or the language of *Coles*. The third *Coles* criteria requires that the physician base his determination on "his knowledge" of the position. It does not specify how he is to acquire that knowledge, nor does it require employment of a vocational consultant. Moreover, the purpose of the *Coles* criteria -- to protect the claimant from an arbitrary termination of benefits -- can be satisfied without imposing upon the insurer the heavy burden urged by claimant. Here, the physician was supplied with a job description prepared by the employer for the claimant's position. It was an existing description, not one prepared solely for purposes of determining claimant's entitlement to benefits. That procedure provided sufficient assurance that benefits would not be arbitrarily terminated.

Claimant's first argument is unpersuasive.

II.

As his second ground for summary judgment, claimant argues that the insurer's failure to provide a 14-day notice of termination of benefits to the Department rendered its notice ineffective.

The notice at issue was sent on August 11, 1995. At that time, section 39-71-609, MCA, as amended by the 1995 legislature, provided as follows:

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.]

On its face the amended section permits termination of temporary total disability benefits upon the claimant's release to return to work **without** any prior written notice to either the claimant or the Department.

Claimant argues that the 1993 version of section 39-71-609, MCA, should be applied in this case. That version did not contain the exception set out in subsection (2) of the amended statute.

As a general rule, the law in effect at the time of the injury determines a claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). However, that rule applies only to substantive provisions, not to provisions governing procedure. *Wolfe v. Webb*, 251 Mont. 217, 227, 824 P.2d 240, 246 (1992) (citing *State Comp. Mut. Ins. Fund v. Sky Country, Inc.*, 239 Mont. 376, 379, 780 P.2d 1135, 1137 (1989); *Weiss v. State*, 219 Mont. 447, 449, 712 P.2d 1315, 1316 (1986).) Section 39-71-609, MCA, is procedural. The 1995 version of the section therefore applies. The claimant is not entitled to further benefits based on the insurer's failure to notify the Department of the termination of temporary total disability benefits.

The motion for summary judgment is **denied**.

DATED in Helena, Montana, this 8th day of April, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Hunt

Mr. Jason G. Dykstra

Submitted: February 20, 1997

1. Mr. Dykstra's letter provides the dates temporary total disability benefits were paid and Mr. Hunt's letter concurs with the dates. Thus, the dates are deemed by the Court to be agreed facts.

2. See paragraph 1 of this order and footnote 1.

3. The proposed fact has been reworded, broken into two paragraphs, and positioned differently than suggested by respondent. The changes are a matter of style and do not change the substance of the paragraph.