IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 53

WCC No. 2000-0140

LIBERTY NORTHWEST INSURANCE, CORPORATION,

Petitioner/Insurer for

ALPINE LOG HOMES,

Employer,

vs.

LENNIE THOMPSON,

Claimant/Respondent.

ORDER FOR 39-71-610 BENEFITS

Summary of Case: Claimant suffered two falls at work in November 1999, injuring his low back, leg, and neck. He had previously suffered a neck injury and had neck surgery. The insurer paid temporary total disability (TTD) and medical benefits. It terminated TTD benefits and denied permanent partial disability (PPD) benefits based on an independent medical examination (IME) by Dr. Dana Headapohl, who found that claimant had reached maximum medical improvement (MMI) with respect to his injuries and suffered no impairment. Claimant seeks reinstatement of TTD or PPD benefits under section 39-71-610, MCA, while he mediates his entitlement to further benefits.

Held: Where there are conflicting medical opinions, one supporting claimant, the first factor (strong prima facie case) for reinstatement of benefits is satisfied. Claimant has provided a strong prima facie case for reinstatement based on an opinion of Dr. Henry Gary, a neurosurgeon, who opined that claimant's fall resulted in a neck strain which continues to preclude him from his time-of-injury job. Dr. Headapohl agreed claimant could not return to the time-of-injury job based on his preexisting neck condition but her IME report and correspondence with the claims adjuster indicates she did not relate any neck strain to claimant's accidents. Her report does not address whether he is at MMI from neck strain and or has an impairment therefrom, and there is no MMI determination with respect to neck strain. The second two factors - financial need and duration of previous benefits - also cut in favor of claimant. Forty-nine days of benefits ordered with caveat that the Court

makes no decision on the merits and that claimant will have to repay benefits if it is ultimately determined he is entitled to no further benefits.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-610 (1999)**. In ruling on a request for interim benefits, the Court looks to three factors: (1) whether there is a strong prima facie case on the merits; (2) financial need; and (3) duration of previous benefits. Where there are conflicting medical opinions, one supporting claimant, the first factor is satisfied.
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> **Constitutions, Statutes, Regulations and Rules: Workers' Compensation Court Rules: ARM 24.5.314**. In ruling on a request for interim benefits, the Court looks to three factors: (1) whether there is a strong prima facie case on the merits; (2) financial need; and (3) duration of previous benefits. Where there are conflicting medical opinions, one supporting claimant, the first factor is satisfied.
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> **Benefits: Interim (39-71-610) Benefits**. In ruling on a request for interim benefits, the Court looks to three factors: (1) whether there is a strong prima facie case on the merits; (2) financial need; and (3) duration of previous benefits. Where there are conflicting medical opinions, one supporting claimant, the first factor is satisfied.

¶1 Liberty Northwest Insurance Corporation (Liberty) appeals from a July 13, 2000 Order of the Department of Labor and Industry directing Liberty to reinstate Lennie Thompson's (claimant's) temporary total disability benefits. The Order was issued under section 39-71-610, MCA, 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.

While Liberty's initiating document is designated an "appeal", the matter is considered *de novo*. *Smith v. State Compensation Ins. Fund*, 2000 MTWCC 9, ¶ 22.

¶2 It is undisputed that claimant was injured on November 8 and 23, 1999; Liberty accepted liability for the claims for compensation; and Liberty paid temporary total benefits for a time, terminating those benefits following an independent medical examination by Dr. Dana Headapohl.

¶3 An initial telephonic hearing was held on July 26, 2000. At that time the parties submitted reports of Dana Headapohl, M.D., H. Brett Heath, M.D., and Gilbert J. Roberts, D.C. Based on the medical reports, I found insufficient evidence to order either interim temporary total or permanent partial disability benefits. The minute entry for the hearing, which I drafted, sets forth my reasoning:

> [A]fter reviewing the reports of Dr. Dana Headapohl, Dr. H. Brett Heath, and Dr. Gilbert J. Roberts, there is insufficient evidence to order 610 temporary total disability (TTD) benefits or permanent partial disability (PPD) benefits. Reinstatement of TTD benefits requires some evidence that claimant has not reached maximum medical improvement (MMI). Only Dr. Headaphol [sic] addressed MMI, finding that claimant has reached MMI. Reinstatement of PPD benefits requires some evidence not only of claimant's inability to return to his time-of-injury job and a resulting wage loss, but an impairment. While there is substantial evidence indicating claimant cannot return to his time-of-injury job, and that he has been unable to find other employment despite trying, thus providing some evidence of a wage loss, Dr. Headapohl found no impairment and the other physicians did not address the matter.

My ruling at that time, however, was not final. Mr. Thompson indicated he was seeking additional medical information from Dr. Henry H. Gary, a neurosurgeon. I therefore deferred final decision and provided claimant an opportunity for a further hearing, indicating that the hearing could be in person in Helena or by telephone, at the parties' option.

¶4 Thereafter, claimant submitted additional medical documentation and on August 24, 2000, the Court held a second telephonic hearing. Claimant, who was in Washington State, and Liberty agreed to proceed via telephone. The discussion which follows is based on information and documentation provided at both hearings. A list of the medical records is set out in the Appendix to this Order.

¶5 Claimant is 49 years old and, according to Dr. Headapohl's report, has worked construction most of his life. He suffered a neck injury in 1987 and underwent a C6-7 discectomy and fusion in 1987. He worked for Alpine Log Homes, which is Liberty's insured, for two and a half years prior to the industrial accidents at issue in this proceeding.

¶6 Claimant was involved in two work-related accidents in November 1999. According to Dr. Headapohl's report, on November 9, 1999 he strained the muscles of his left low back while rolling a log, then on November 23, 1999, he fell from scaffolding, "striking his right

leg on a cross bar kind of rolling on his right shoulder and landing on his head with a hard hat on . . . ." (IME at 1-2.) Following his accidents, claimant suffered pain in his thigh, neck, and numbness in his hands. He has been diagnosed as suffering from carpal tunnel syndrome, which Dr. Ethan Russo, who participated in conducting the IME, attributed to occupational overuse. (August 16, 2000 Report of Dr. Gary and June 7, 2000 letter of Dr. Heath.)[(1)]

¶7 Liberty terminated benefits based on Dr. Headapohl's responses to questions submitted to her by the claims adjuster. With respect to claimant's low-back injury, she specifically found he had reached "maximum medical healing" and suffered no impairment. (IME at 12-13.) With respect to claimant's "upper back/neck/shoulder," she reached several conclusions, which require quoting. First, she rendered the following diagnoses, covering all of his conditions, including the back:

- Status post C6-7 discectomy/laminectomy - pre-existent.
- Minimal MRI changes - slight posterior bulging at L4-5 and L5-S1 with no neurologic compromise. These findings are not clinically significant; no evidence of radiculopathy is noted on examination today. The patient is also noted to have some mild degenerative facet hypertrophy from L3-4 through L5-S1 which was obviously pre-existent.
- Bilateral numbness and tingling of the fourth and fifth digits with a positive Tinel's at the right cubital tunnel. Bilateral cubital tunnel syndrome versus radiculopathy.
- Lumbar Strain.
- Right carpal tunnel-per electrodiagnostics. Unrelated and asymp-tomatic.

(*Id*. at 12.) Second, in answer to a query about maximum medical improvement and further medical treatment, she said:

> Mr. Thompson has a pre-existent medical impairment rating based on his prior surgeries. There is no additional cervical impairment rating based on permanent material worsening of his pre-existent condition.
>
> Based on electrodiagnostic studies he has evidence of right carpal tunnel. This condition will likely improve with conservative therapy.

(*Id*. at 13.) Third, when asked whether claimant had reached MMI and had an impairment, she wrote:

> He has no impairment from the cervical condition.
>
> There is no impairment rating for the ulnar nerve symptoms as electrodiagnostics are negative.

(*Id.* at 14.) Fourth, Dr. Headapohl concluded, as did all other doctors from whom reports are available, that claimant cannot go back to work at his time-of-injury employment. Her opinion advising against return to the time-of-injury job was based on claimant's weakness in his arms and hands, which she could not relate to his accident:

> Mr. Thompson has intrinsic muscle weakness and decreased grip in both hands, right greater than left, however it is not at all clear that these findings resulted from his injury. There is no mention in the ER report of his striking his elbows or of hand symptoms immediately following the accident, which would be expected in a traumatic ulnar nerve injury. As his construction job involving building low [sic - should be log] homes requires good bilateral grip, he would appear to be incompatible for this position.

(*Id.*)

¶8 Dr. Gary has provided a letter which provides significant, prima facie support for claimant's assertion that his benefits were prematurely terminated. His analysis is somewhat different from Dr. Headapohl's. He concludes that claimant suffers "chronic cervical strain secondary to this injury." (Gary's August 16, 2000 letter.) He found the strain limits claimant's "ability to do any significant physical work" and, by implication, precludes his return to his time-of-injury job. He also finds that the "numbness of the ulnar aspect of his hands . . . is most likely related to cervical myospasm and not to carpal tunnel syndrome or to any problem from the C5-6 disc bulge." (*Id.*) Dr. Gary therefore provides a direct connection between claimant's November 23, 1999 accident and his disabling arm weakness.

¶9 Dr. Headapohl does not address claimant's cervical strain. She noted the absence of acute arm symptoms as a basis for questioning whether claimant injured his ulnar nerve in this fall. Correspondence following the November 23rd injury between the emergency room physician, who saw claimant after his accident, and Liberty's claims adjuster indicates that Dr. Headapohl, or at least the claims adjuster, questioned whether claimant suffered a cervical strain. The ER physician wrote that while claimant did not mention neck pain at the time, his primary focus was on his thigh injury and his thigh pain may have distracted him from any mention of neck symptoms. Dr. Gary provided a similar statement.

¶10 The disagreement in diagnosis and causation is significant because Dr. Headapohl did not address whether claimant has reached MMI with respect to a cervical strain or whether in light of claimant's arm symptoms the strain may result in an impairment. Whether she might conclude claimant is at MMI with respect to neck strain and has no impairment therefrom, I can only speculate. The important fact for present purposes is that there is a legitimate disagreement as to causation and diagnosis for a disabling condition and there is no MMI determination of record with respect to cervical strain.

¶11 Claimant is not required to present evidence demonstrating he is entitled to reinstatement of benefits; that quantum of proof would require a full hearing on the merits and defeat the purpose of section 39-71-610, MCA (1999), which is intended to provide interim benefits while claimant litigates the merits. On the other hand, he must present a "strong prima facie case" for reinstatement. *Smith v. State Compensation Ins. Fund*, 2000 MTWCC 9, ¶ 28. Where the request for reinstatement is based on conflicting medical opinions, one of which supports reinstatement, the standard is satisfied. *See Schneider v. Liberty Northwest Ins. Corp.,* 2000 MTWCC 18, ¶14. Claimant in this case has met his burden.

¶12 The other factors which may be considered under section 39-71-610, MCA, are financial hardship and the duration of the prior benefits. Here, claimant is suffering financial hardship and the duration of benefits - several months - is not insignificant. In addition, the physicians who have treated and examined him, including Dr. Headapohl, have found him unable to return to his time-of-injury job. He has been unable to find other employment.

¶13 In determining that claimant is entitled to interim benefits under section 39-71-610, MCA (1999), I make no final determination as to the merits of his request for reinstatement of temporary total disability benefits or the merits of any claim for permanent partial disability benefits. Those matters must be determined after a full hearing. I also make no determination as to any occupational disease claim. Finally, if the claimant fails to prevail at a hearing on the merits, he is on notice that he will have to repay the benefits I am ordering Liberty to pay.

ORDER

¶14 1. Liberty shall pay claimant benefits under section 39-71-610, MCA (1999), for a period of 49 days, the maximum provided. Since more than 49 days have transpired since claimant's benefits were terminated, the benefits shall be paid in a lump sum at claimant's temporary total disability rate.

¶15 2. The Court reserves jurisdiction to order claimant to repay the benefits in the event he does not prevail on the merits of his request for further compensation benefits.

¶16 3. This Order is certified as final for purposes of appeal.

¶17 4. Any party to this dispute may have 20 days in which to request a rehearing from this order for 39-71-610 benefits.

DATED in Helena, Montana, this 31st day of August, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Larry W. Jones
Mr. Lennie Thompson - Certified Mail

APPENDIX

3/22/2000 office report from Bitterroot Clinic, Hamilton, MT.

4/24/2000 IME report from Dana Headapohl, M.D.

6/07/2000 letter from H. Brett Heath, M.D., Bitterroot Clinic to Liberty Northwest

6/09/2000 letter from Henry H. Gary, M.D., Neurological Associates, P.C. to Mr. Thompson

6/26/2000 letter from William L. Doyle, M.D., Marcus Daly Memorial Hospital, to Ms. Scholl

6/28/2000 letter from Gilbert J. Roberts, D.C. to Ms. Scholl

8/02/2000 Department of Labor letter to Ms. Scholl

8/02/2000 Department of Labor letter to Mr. Thompson from Mark Cadwallader

8/09/2000 letter from Mr. Thompson to Dana Headapohl, M.D. re: Independent Medical Evaluation Report

8/16/200 letter from Henry H. Gary M.D., Neurological Associates, P.C. to Whom It May Concern

8/16/2000 Functional Capacity Evaluation from Betsy Hart, OTR/L at WORCcenter

Including a Physical Work Performance Evaluation Summary

8/18/2000 letter from Dana Headapohl, M.D., St. Patrick Hospital to Mr. Thompson answering questions raised in his letter of 8/9/2000

1. The Court was not supplied with Dr. Russo's report. His findings are referred to in the cited reports of Drs. Gary and Heath.