

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 78

WCC No. 9809-8064

CARL WALLACE

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

PROFESSIONAL FARM SYSTEMS

Employer.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Summary: Claimant sought summary judgment awarding him retroactive TTD benefits on argument that insurer terminated benefits without giving him fourteen days notice or complying with the requirements attributed to *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985). Undisputed facts demonstrated that benefits were terminated after claimant reached MMI and had completed training in real estate, began work as a real estate salesman, and received his first commission.

Held: Under 39-71-609, MCA (1981), and *Larsen v. CIGNA Ins. Co.*, 276 Mont. 283, 915 P.2d 863 (1996), the insurer was not required to give 14-days notice or meet other requirements attributed to *Coles* because claimant had returned to work and was no longer experiencing a total loss of wages. WCC rejected claimant's distinction between wages for hours worked or salary and commissions, noting that for purposes of return to work in these circumstances "wages" simply means gross earnings, or anything of value received as consideration for work constituting economic gain to the worker.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-609, MCA (1981). Under 39-71-609, MCA (1981), and *Larsen v. CIGNA Ins. Co.*, 276 Mont. 283, 915 P.2d 863 (1996), the insurer was not required to give 14-days notice or meet other requirements attributed to *Coles* because claimant had returned to work as a real estate salesman, had received his first commission, and was no longer

experiencing a total loss of wages. WCC rejected claimant's distinction between wages for hours worked or salary and commissions, noting that for purposes of return to work in these circumstances "wages" simply means gross earnings, or anything of value received as consideration for work constituting economic gain to the worker.

¶1 Based upon an industrial injury occurring May 21, 1982, claimant, Carl Wallace, seeks summary judgment awarding him total disability benefits retroactive to July 28, 1987, and 500 weeks of permanent partial disability benefits commencing when he reaches age 65. He further seeks a 20% penalty, attorney's fees, and costs. The motion is **denied**.

Facts

¶2 Claimant's Motion for Summary Judgment sets forth 18 numbered factual allegations, most of which are not disputed by respondent. (See Response to Petitioner's Motion for Summary Judgment at 2.) The relevant undisputed facts taken from the Motion for Summary Judgment are as follows:

1. Claimant was injured on May 21, 1982, while employed by Professional Farm Systems, which was insured by State Fund. The insurer accepted liability, has paid all medical benefits, and has paid some bi-weekly disability benefits. (Claimant's undisputed facts ¶ 1.)

2. Claimant's injury involved a herniated disk which was surgically removed on May 26, 1982. Claimant was evaluated by the Mayo Clinic in 1985 and again in 1993. On both occasions, the diagnosis was early onset arachnoiditis causing fixation of lumbar nerve roots, leading to friction with spine movement and radicular pain. An evaluation by Dr. Ron Peterson in February 1997, confirmed this diagnosis. (Claimant's undisputed facts ¶ 1.)

3. Claimant was paid temporary total disability benefits from May 24, 1982, until May 14, 1985. At that time, he attempted to return to his time-of-injury job, and received permanent partial disability benefits from May 15, 1985, until November 4, 1985, when he stopped working due to his injury. Temporary total disability benefits were reinstated on November 5, 1985, and continued until July 28, 1987. (Claimant's undisputed facts ¶ 5.)

4. At the request of the State Fund, claimant was examined by Dr. David Friedrich on November 5, 1986. (Claimant's undisputed facts ¶ 14.) Dr. Friedrich found claimant to have reached maximum medical improvement and provided a five percent impairment rating. He limited claimant to light work with occasional restrictions on stooping or bending. (Claimant's undisputed facts ¶ 15.)

5. Dr. Friedrich was not provided with a specific description of claimant's time- of-injury job. He was not provided with job descriptions for any occupations that may have been included in claimant's normal labor market. Dr. Friedrich was not given information about claimant's work experience, other than being told claimant had been a farmer and a salesman. (Claimant's undisputed facts ¶ 16.)

6. On July 28, 1987, claimant's benefits were converted from temporary total to permanent partial because he had obtained his realtor's license and was an independent contractor under a broker at Bison Realty in Great Falls. (Claimant's undisputed facts ¶ 8). The evaluation by Dr. Friedrich on November 5, 1986, was also a basis for the change in benefit rate. (Claimant's undisputed facts ¶ 14.)

7. When claimant's benefits were converted on July 28, 1987, he was not given notice that Dr. Friedrich's report had been received by State Fund, nor given a copy of the report attached to a notice. (Claimant's undisputed facts ¶ 17.)

8. The termination of temporary total disability benefits and the letter informing claimant of this change in benefits were simultaneous. Claimant did not receive 14-days notice prior to conversion of benefits. Claimant did not receive the medical report until January 15, 1997, when his counsel received a copy of the State Fund claim file. (Claimant's undisputed facts ¶ 18.)

9. Any income claimant realized as a realtor derived from commissions. His relationship with real estate brokers has always been as an independent contractor. (Claimant's undisputed facts ¶ 9.)

10. From 1987 through 1996, claimant's average income from real estate commissions was \$4,480 per year. In six of these ten years, claimant's income from real estate was less than \$4,000 per year. In only one of these years was claimant's income from real estate commissions in excess of \$10,000. (Claimant's undisputed facts ¶ 10.)

11. In 1989, claimant attempted to teach shop in the Great Falls Public School system, but discontinued after approximately one week due to his injuries. He earned \$615. (Claimant's undisputed facts ¶ 13.)

¶13 Although the State Fund does not agree with claimant's characterization of his pre-injury work as agricultural, there appears to be no dispute as to his actual employment history. Claimant testified he worked for a seismograph crew after high school, then worked for the United States Department of Agriculture (USDA) for approximately twenty-six years. (Wallace Dep. at 7, 10.) He began with the USDA as a clerk and field supervisor, then moved into "office manager trainee; [and then] office manager, which eventually they changed the name to account executive director." (*Id.* at 8.) As an account executive director, claimant supervised other employees (as many as fifteen to seventeen at times)

and operated the office. (*Id.* at 9.) Claimant retired from that position and draws a federal pension. (*Id.* at 9-10.)

¶14 After retiring from the USDA, claimant went to work for Professional Farm Systems, where he worked at the time of his injury in 1982. (*Id.* at 11.) His work "involved a number of things, but the majority of it was selling grain handling equipment and storage." (*Id.* at 10.) Claimant testified that sometimes prospective customers were provided to him, and sometimes he sought them out. (*Id.* at 12.) Claimant was paid "wages plus commission." (*Id.* at 11.)

¶15 At various points after his injury, claimant performed some work other than in real estate. The parties apparently agree claimant worked for a time in a candle-making business operated by his family and did "spot jobs" for the USDA. The insurer, however, disputes the length of time claimant worked in the candle business and the amounts he earned from the USDA. (Claimant's alleged undisputed facts ¶ 11, 12; Response to Petitioner's Motion for Summary Judgment at 2.) At minimum, however, claimant concedes that he was employed by the USDA for the following number of weeks:

1991 - 14 weeks

1992 - 22 weeks

1993 - 13 weeks

1994 - 13 weeks

1995 - 10 weeks

1996 - 15 weeks

1997 - 8 weeks

(Motion for Summary Judgment at 8.)

Summary Judgment Standard

¶16 Summary judgment may be granted where the uncontroverted, material facts require judgment as a matter of law. ARM 24.5.329; *Schelske v. Creative Nail Design, Inc.*, 280 Mont. 476, 482, 933 P.2d 799, 802 (1997).

Discussion

¶17 Claimant was injured in 1982, hence his entitlement to benefits is governed by the 1981 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 226 Mont. 318, 321, 720 P.2d 380, 382 (1986). Section 39-71-701, MCA (1981), sets out the criteria for temporary total disability benefits, providing in relevant part:

39-71-701. Compensation for injuries producing temporary total disability. (1)

Weekly compensation benefits for injury producing total temporary disability shall be 66 2/3% of the wages received at the time of the injury. . . .

Section 39-71-116(19), MCA (1981), defines temporary total disability as follows:

(19) "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 is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence. [Emphasis added.]

¶8 Ordinarily, the claimant bears the burden of establishing his right to compensation. *DuMont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979). Claimant, however, argues, in essence, that he is relieved of his burden of proof because the State Fund did not give him 14-days notice of its intent to terminate his benefits, as required by section 39-71-609, MCA (1981), and failed to comply with the *Coles* requirements for termination of benefits. He argues that those failures automatically entitle him to total disability benefits through the present time *except* for the weeks he worked for the USDA. He contends that his return to work as a real estate salesman, as well as his real estate sales commissions, should be disregarded since he worked as an independent contractor, not as an employee.

¶9 At issue is the applicability of section 39-71-609, MCA (1981), which provides:

Denial of claim after payments made or termination of benefits by insurer - fourteen days' notice required. 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 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 division. **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.** [Emphasis added.]

Respondent contends that neither the 14-day notice requirement nor the *Coles* criteria apply since claimant had returned to work and the insurer had knowledge of the return to work.

¶10 The *Coles* requirements were engrafted⁽¹⁾ upon section 39-71-609, MCA (1981), by this Court in *Coles v. Seven Eleven Stores*, Docket 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). As set forth in *Wood*, in addition to giving 14-days notice of termination of benefits, prior to any termination of benefits the following requirements must be met:

- (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.
[Emphasis omitted.]

Id. at 30, 808 P.2d at 505.

¶11 On its face, section 39-71-609, MCA (1981), does not require a 14-day notice where a worker has "returned to work." Moreover, post-*Coles* decisions hold that the *Coles* requirements do not apply where a worker has returned to work.

¶12 In *Larson v. CIGNA Ins. Co.*, 276 Mont. 283, 915 P.2d 863 (1996), the Montana Supreme Court distinguished cases in which the claimant had returned to work. "When a claimant returns to work, he or she is no longer experiencing a loss in wages and, therefore, the insurer can rightfully terminate temporary total disability benefits **without proceeding with an investigation under § 39-71-609** . . . the *Coles* criteria do not apply in this case." *Id.* 276 Mont. at 294, 915 P.2d at 870 (emphasis added).

¶13 In *Weaver v. Buttrey Food and Drug*, 255 Mont. 90, 841 P.2d 476 (1992), claimant asserted she had not been "gainfully employed" since the termination of her temporary disability benefits, even though she earned income from work in a tavern she and her husband owned. Claimant had argued that "[s]he is paid no money as a direct wage for her work at the tavern...and receives no benefits." 255 Mont. at 97, 841 P.2d at 481. The Court rejected the argument, noting as follows:

This Court, however, has adopted the "economic gain" standard for determining eligibility for total disability benefits. *Anderson v. Hammer* (1992), 826 P.2d 931, 936, 49 St. Rep. 165, 168. Under the Workers' Compensation Act, "wages" simply means gross earnings, or "anything of value received as consideration for work...constituting real economic gain to the employee." *Scyphers v. H & H Lumber* (1989), 237 Mont. 424, 426, 774 P.2d 393, 394.

Id.

¶14 In *Ware v. State Compensation Insurance Fund*, WCC No. 9508-7361 (1996), this Court followed *Weaver*, finding the claimant ineligible for total disability benefits during a period of self-employment. Claimant had been injured while working as a carpenter and had returned to work in a modified capacity. He then moved to Missouri to be closer to his children, which he had planned to do prior to his injury. In Missouri he performed a series of jobs involving construction, electrical work, patching fences, and various other odd jobs. Contending he did not reach maximum medical improvement until he had surgery, claimant sought retroactive temporary total disability benefits for the period prior to surgery which was performed after his Missouri jobs. His request for benefits encompassed periods during which he was working, albeit while self-employed. Citing *Weaver*, this Court concluded claimant was not entitled to temporary total disability benefits during a period of self-employment:

Weaver teaches that an injured worker capable of continuing to perform work within his or her normal labor market is ineligible for temporary total disability benefits whether or not the worker continues to work as a true employee or undertakes self-employment. *Weaver* also shows that a worker's normal labor market may include jobs he or she in fact performs ubsequent to injury.

Ware at 11 (emphasis in original).

¶15 The *Ware* decision further noted that in *Weaver* the claimant was determined to be ineligible for total disability benefits "even though part of the time for which she sought benefits she was only working part-time." *Id.*

¶16 In this case, the claimant concedes he was working as "an independent contractor under a broker at Bison Realty in Great Falls" prior to the termination of temporary total disability benefits. (Claimant's undisputed fact ¶ 8). He contends, however, this was not "return to work" under section 39-71-609, MCA, because he was an independent contractor and received income in the form of commissions. This argument is without merit.

¶17 Claimant has presented no evidence that he was physically unable to actively pursue real estate sales or earn commissions. Under *Weaver* and *Ware*, at the time he associated himself with Bison Realty and announced he was engaged in real estate sales, he "returned to work." The fact that claimant worked as an independent contractor does not distinguish his case from *Weaver* and *Ware*, which specifically considered the application of section 39-71-609, MCA, where the claimant returns to work as an independent contractor. Thus, the 14-day notice requirement of section 39-71-609, MCA (1981), and the *Coles* requirements were inapplicable.

¶18 Claimant's argument that earnings as an independent contractor do not constitute "wages" from employment is specious. If correct it would mean that a worker injured in an

industrial accident could earn as much as, **or even 100 times more than**, he or she was earning at the time of the injury and still be entitled to total disability benefits so long as post-injury earnings are attributable to work as an independent contractor. Section 39-71-609, MCA, does not refer to wages or employment, only to a "return to work."

¶19 Claimant's reliance upon statutory definitions of employment and wages is misplaced. While section 39-71-118(1)(a), MCA (1981), defines employment as excluding independent contractors,⁽²⁾ the section is concerned with insurance coverage requirements, as evidenced by the further exclusion of household and domestic service. The section has nothing to do with whether a worker returning to work in an independent contractor capacity is entitled to continued temporary total disability benefits. Moreover, the argument ignores other provisions of the Workers' Compensation Act which consider independent contractors as both employers and employees. Subsection (2) of section 39-71-118, MCA (1981), expressly refers to partnerships and sole proprietorships as employers and their members as employees, providing in relevant part:

If the employer is a partnership or sole proprietorship, such employer may elect to include as an employee within the provisions of this chapter any member of such partnership or the owner of the sole proprietorship devoting full time to the partnership or proprietorship business.

Under these provisions, sole proprietors performing work for others as independent contractors are in essence their own employees.

¶20 Claimant's argument that commissions cannot be considered wages, is similarly misguided. Again, section 39-71-609, MCA, refers to a "return to work", not to wages. Moreover, the definition of wages at the time of his injury was a broad one, encompassing "average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week." § 39-71-116(20), MCA (1981). The definition is obviously pertinent to determination of wages for the purpose of determining benefits and does not exclude consideration of earnings from work as an independent contractor in determining whether a claimant has returned to work. The specific inclusion of commissions in a 1987 law adopting a new section regarding wages, § 39-71-123, MCA, does not change the law in effect in 1981 and does not exclude consideration of commissions for purposes of determining whether a claimant has returned to work.

¶21 The cases relied upon by claimant with regard to wages are similarly inapplicable. Claimant cites decisions holding that post-injury income in the form of capital profits does not affect a claimant's entitlement to total disability benefits. In *Tehle v. Alpine Plumbing*, 254 Mont. 25, 835 P.2d 1 (1992), the injured worker's family continued his plumbing business after his disabling injury. According to the Court:

This case hinges upon the distinction between two important concepts: "wages" and "income from profits." Mike asserts that due to his injuries he sustained a total loss of wages. While he performs minor duties for the business, he is not involved in any of the physical plumbing activities in which he previously engaged. Further, he has not taken a salary draw from the business since his injuries. Consequently, he has earned no wages and is therefore entitled to continued temporary total disability benefits under section 39-71-701, MCA (1987).

Id. at 27, 835 P.2d at 2. Similarly, in *Chatfield v. Industrial Accident Board*, 140 Mont. 516, 374 P.2d 226 (1962), the Court distinguished between income from work and profits from investments:

Any income which the claimant has received from the ranch is a result of his capital investment and not from the sweat of his brow. The fact that claimant was able to "boss" his own ranch does not indicate an ability to compete on the labor market for a similar position elsewhere.

Id. at 520, 374 P.2d at 228. These cases recognize that disability may continue even while an individual passively earns profits **from investments**. They have no application

¶22 In the present case, the undisputed factual record shows claimant began working as a realtor *prior* to termination of temporary total disability benefits. It is undisputed that he had earnings after returning to work as a realtor. Trial Exhibit 16, which includes reports of a rehabilitation provider and which is part of the record in this case, indicates that claimant had in fact earned a commission prior to the July 28, 1987 termination of his benefits. (Ex. 16 at 1.)

ORDER

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

¶24 SO ORDERED.

DATED in Helena, Montana, this 7th day of December, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Randall O. Skorheim

Mr. Greg E Overturf

Date Submitted: August 19, 1999

1. The requirements are not set forth in the section, which only requires 14-days notice, nothing more. This Court has refused to expand the requirements in light of the prohibition

against courts inserting requirements omitted by the legislature. In *Sears v. Traveler's Insurance*, WCC No. 9608-7594, Order Denying Summary Judgment (April 8, 1987), I noted:

[D]espite 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.

Id. at page 6. While this Court must apply *Coles*, I wonder whether insertion of the additional requirements would withstand scrutiny in light of the Supreme Court's more recent pronouncements regarding the rule "prohibiting Courts from inserting additional requirements into a statute, § 1-2-101, MCA."

2. Subsection 118(1)(a) provides:

Employee, worker, and workman defined. (1) The terms "employee", "workman", or "worker" mean:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay. Casual employees as defined by 39-71-116(3) are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic service is excluded.