

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 57

WCC No. 2006-1536

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DALE ALDRICH

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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DECISION AND JUDGMENT

*Appealed to the Montana Supreme Court on January 15, 2008  
Affirmed on Appeal 2009 MT 40*

**Summary:** Petitioner petitioned this Court for an award of temporary total disability (TTD) benefits during the period of Petitioner's medical instability resulting from an occupational disease, notwithstanding the age or Social Security retirement status of Petitioner. Respondent argues that Petitioner is not entitled to TTD benefits because he has failed to prove an actual wage loss.

**Held:** Petitioner is not entitled to an award of TTD benefits. Pursuant to § 39-71-701, MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing. In this case, at the time Petitioner contends he was no longer at maximum healing, he had not worked for approximately eleven years and had been drawing Social Security retirement benefits for approximately two years. None of the facts presented to this Court establish that Petitioner suffered any wage loss as a result of his injury when he was no longer at maximum healing. Petitioner, therefore, has failed to meet his burden of proof that he was entitled to receive TTD benefits.

**Topics:**

**Benefits: Temporary Total Disability Benefits.** Where Petitioner petitioned the Court for TTD benefits notwithstanding his age or social security

retirement status, the mere fact that § 39-71-710, MCA, does not preclude Petitioner's eligibility for TTD benefits due to his retirement status, does not in and of itself establish his entitlement to such benefits. In order to be eligible for TTD benefits, Petitioner must first satisfy the requirements of § 39-71-701, MCA, (1) a total loss of wages, and (2) the worker must not be at MMI. Were the Court to adopt Petitioner's rationale that he should be entitled to TTD benefits without proving any actual loss of wages simply because he is no longer medically stable, it would require the Court to ignore or contravene Montana public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury. § 39-71-105(1), MCA.

**Benefits: Temporary Total Disability Benefits.** Where Petitioner had not worked for approximately eleven years and had been drawing Social Security retirement benefits for approximately two years, and none of the facts presented to the Court establish that Petitioner suffered any wage loss as a result of his injury when he was no longer at maximum healing, the Court held that Petitioner failed to meet his burden of proof that he was entitled to TTD benefits.

**Wages: Wage Loss.** Where Petitioner had not worked for approximately eleven years and had been drawing Social Security retirement benefits for approximately two years, and none of the facts presented to the Court establish that Petitioner suffered any wage loss as a result of his injury when he was no longer at maximum healing, the Court held that Petitioner failed to meet his burden of proof that he was entitled to TTD benefits.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-710.** Where Petitioner petitioned the Court for TTD benefits notwithstanding his age or social security retirement status, the mere fact that § 39-71-710, MCA, does not preclude Petitioner's eligibility for TTD benefits due to his retirement status, this does not in and of itself establish his entitlement to such benefits. In order to be eligible for TTD benefits, Petitioner must first satisfy the requirements of § 39-71-701, MCA, (1) a total loss of wages, and (2) the worker must not be at MMI. Were the Court to adopt Petitioner's rationale that he should be entitled to TTD benefits without proving any actual loss of wages simply because he is no longer medically stable, it would require the Court to ignore or contravene Montana public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury. § 39-71-105(1), MCA.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701.** Where Petitioner petitioned the Court for TTD benefits notwithstanding his age or social security retirement status, the mere fact that § 39-71-710, MCA, does not preclude Petitioner's eligibility for TTD benefits due to his retirement status, this does not in and of itself establish his entitlement to such benefits. In order to be eligible for TTD benefits, Petitioner must first satisfy the requirements of § 39-71-701, MCA, (1) a total loss of wages, and (2) the worker must not be at MMI. Were the Court to adopt Petitioner's rationale that he should be entitled to TTD benefits without proving any actual loss of wages simply because he is no longer medically stable, it would require the Court to ignore or contravene Montana public policy that wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury. § 39-71-105(1), MCA.

¶ 1 Petitioner Dale Aldrich and Respondent Montana State Fund petition this Court for resolution of the issues set forth below. The parties have agreed to submit this case for decision by this Court based on the following stipulated facts:

#### STIPULATED FACTS<sup>1</sup>

¶ 2 Petitioner worked as a millwright and was dispatched out of a union hall to various employers from time to time. Petitioner's employer for the relevant time frame was enrolled under Compensation Plan III of the Workers' Compensation Act (WCA) and was insured by Respondent.

¶ 3 Respondent accepted liability for Petitioner's occupational disease claim, which has an onset date of April 26, 1994, and which arose in Missoula County, Montana, with Northwest Erection, Incorporated, as the employer.

¶ 4 As a result of his April 26, 1994, occupational disease, Petitioner underwent surgery on his right hip in 1998. Petitioner did not reach maximum medical improvement (MMI) for his low back, bilateral hips and right knee condition until November 18, 2003. Petitioner received a combined 33% whole person impairment rating for those conditions. It was anticipated that Petitioner would have further degeneration of his conditions with the potential for additional surgery.

¶ 5 On December 5, 2005, Petitioner had surgery on his left hip due to his occupational disease.

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<sup>1</sup> All stipulated facts originate in the parties' Agreed Statement of Facts, Docket Item No. 9, except as otherwise noted.

¶ 6 Respondent has accepted liability for the surgery and has appropriately authorized the surgery and post-surgical care.

¶ 7 As the result of his occupational disease, Petitioner is not medically stable and is not expected to be medically stable for some time following his surgery.

¶ 8 Petitioner has requested that Respondent pay him temporary total disability (TTD) benefits for his period of medical instability and until he reaches MMI. He made this request on December 2, 2005, and asked that benefits begin effective the date of his pre-operative examination on November 22, 2005. Petitioner stated, "The statute which provides for termination of benefits upon retirement, § 710, provides that ' . . . the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.'"

¶ 9 Respondent refused to pay TTD benefits on December 5, 2005, stating, "Since Mr. Aldrich has retired and removed himself from the workforce, no temporary total disability benefits are due since he is not suffering a wage loss per 39-71-701."

¶ 10 Petitioner has not worked in gainful employment since 1994.

¶ 11 Respondent arranged a physical and vocational evaluation for an employability and wage-loss analysis for Petitioner which resulted in physician approval of two jobs in October 2001. Being born October 25, 1938, Petitioner was 63 years old in October 2001. Respondent's vocational consultant concluded that the approved jobs were not available in Petitioner's local labor market at that time. She recommended against vocational rehabilitation but concluded, "Should his physical symptoms improve, or if he chooses to move [outside his local area], he may be able to pursue alternative work."

¶ 12 Following the physical and vocational evaluation in October 2001, Respondent determined that Petitioner should be deemed permanently totally disabled (PTD) on November 8, 2001.

¶ 13 By letter dated November 9, 2001, Respondent notified Petitioner of its determination, stating, "The Montana State Fund, however, has the right to re-review this permanent total status if additional information is received that would indicate otherwise." As a matter of practice, Respondent reserves the right to revisit any determination of PTD status at any time. If the claimant no longer meets the statutory criteria for such status, Respondent reserves the right to terminate PTD benefits. Respondent has not revisited its determination of Petitioner's disability status. It paid Petitioner PTD benefits from November 2001 until November 30, 2003, when benefits were terminated due to Petitioner's receipt of full Social Security retirement benefits.

¶ 14 Petitioner began receiving Social Security disability benefits effective August 1, 1994. Petitioner's Social Security disability benefits were converted to full Social Security retirement benefits effective December 1, 2003.

¶ 15 Petitioner has not been released to return to his job of injury or any employment with similar physical requirements. At the time of injury, Petitioner's employment as a millwright was classified as having heavy-duty physical demands as defined in the WCA.

¶ 16 Petitioner has not been released to return to any job position that pays an equivalent or higher wage than he received at the time of injury.

### ISSUES

¶ 17 The parties have set forth the following issues to be resolved by this Court:<sup>2</sup>

¶ 17a Whether Respondent is required to pay temporary total disability benefits during the period of Petitioner's medical instability resulting from occupational disease, notwithstanding the age or social security retirement status of Petitioner.

¶ 17b Whether Respondent should be required to pay a penalty, attorney fees and costs pursuant to §§ 39-71-611, -612, and -2907, MCA, for refusing to pay Petitioner temporary total disability benefits during the period of medical instability resulting from his occupational disease.

### DISCUSSION

¶ 18 This case is governed by the 1993 version of the Montana Workers' Compensation Act since that was the law in effect at the onset of Petitioner's condition.<sup>3</sup>

¶ 19 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>4</sup>

¶ 20 In this case, Petitioner argues that, notwithstanding his retirement status, he is entitled to TTD benefits during the time he was medically unstable. The focus of

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<sup>2</sup> Docket No. 10.

<sup>3</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>4</sup> *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).

Petitioner's argument is on the language found in § 39-71-710, MCA, which sets forth the benefits to which a retired worker is entitled. Petitioner notes that this statute provides that a retiree remains eligible for TTD benefits.

¶ 21 Petitioner's argument is correct insofar as it goes. However, the mere fact that § 39-71-710, MCA, does not preclude Petitioner's eligibility for TTD benefits due to his retirement status, does not in and of itself establish his entitlement to such benefits. In order to be eligible for TTD benefits, Petitioner must first satisfy the requirements of § 39-71-701, MCA.

¶ 22 Section 39-71-701(1), MCA provides, in pertinent part:  
[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.

¶ 23 This statute sets forth a two-part test to establish entitlement to TTD benefits. First, a worker must establish a total loss of wages. Second, the worker must not be at maximum healing. In the present case, Petitioner alleges that he was no longer at maximum healing as of November 22, 2005, the date of his pre-operative examination. Although this satisfies the second part of the test set forth in § 39-71-701(1), MCA, at the time Petitioner contends he was no longer at maximum healing, he had not worked for approximately eleven years. Prior to his pre-operative exam, he had been at MMI since 2001 and had been drawing Social Security retirement benefits since December 1, 2003. None of the facts presented to this Court establish that Petitioner suffered an actual wage loss as a result of his injury when he was no longer at maximum healing in 2005. Petitioner therefore has failed to meet his burden of proof that he is entitled to receive TTD benefits.

¶ 24 Section 39-71-105(1), MCA, provides that the public policy of this state is that the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease. If I were to adopt Petitioner's rationale that he should be entitled to TTD benefits without proving any actual loss of wages simply because he is no longer medically stable, it would require me to ignore or contravene this stated public policy.

#### ORDER AND JUDGMENT

¶ 25 Respondent is not required to pay TTD benefits during the period of Petitioner's medical instability resulting from his occupational disease.

¶ 26 Petitioner is not entitled to his costs.

¶ 27 Petitioner is not entitled to attorney fees pursuant to §§ 39-71-611, -612, MCA.

¶ 28 Petitioner is not entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 29 Petitioner's Petition for Hearing is **DISMISSED WITH PREJUDICE**.

¶ 30 Pursuant to ARM 24.5.348(2), this Order and Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

¶ 31 Any party to this dispute may have twenty days in which to request reconsideration of this Order and Judgment.

DATED in Helena, Montana, this 20th day of December, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Rex Palmer  
Kevin Braun  
Submitted: July 18, 2006