

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 9

WCC No. 2022-6029

VICTORY INSURANCE CO. INC.

Insurer/Appellant

vs.

DAVID R. ANDELL

Appellee.

**ORDER AFFIRMING ORDER REINSTATING BENEFITS PENDING A HEARING
(PER 39-71-610, MCA)**

Summary: The insurer appeals an order from the DLI awarding interim TTD benefits under § 39-71-610, MCA. The insurer argues that it lawfully terminated the claimant's TTD benefits because he did not attend an appointment with a physician whom the insurer had recently designated as his treating physician.

Held: The DLI correctly awarded interim TTD benefits. The claimant's treating neurosurgeon has determined that the claimant cannot return to work at this time and has recommended a lumbar fusion, which has been scheduled. Because the claimant is months away from reaching MMI, the DLI soundly reasoned that there was no purpose for the appointment with the physician whom the insurer had recently designated as his treating physician because she could not possibly say what the claimant's return-to-work restrictions will be.

¶ 1 Victory Insurance Co. Inc. (Victory) appeals an order from the Department of Labor & Industry (DLI) in which it awarded Appellee David R. Andell interim temporary total disability (TTD) benefits under § 39-71-610, MCA.

¶ 2 Pursuant to ARM 24.5.314, Victory and Andell agreed to an “informal resolution” of Victory’s appeal.¹ Therefore, on June 20, 2022, this Court conducted a hearing with counsel, via Zoom.

STANDARD OF REVIEW

¶ 3 This Court reviews *de novo* an order from the DLI regarding benefits under § 39-71-610, MCA.²

FACTS

¶ 4 On July 9, 2021, Andell suffered an industrial injury to his lumbar spine.

¶ 5 Victory has accepted liability for Andell’s injury.

¶ 6 Andell has treated with Carter E. Beck, MD.

¶ 7 Dr. Beck has twice operated on Andell’s lumbar spine.

¶ 8 Victory has paid Andell TTD benefits for those times he had a total wage loss as a result of his injury.

¶ 9 On March 23, 2022, Dr. Beck noted:

It is my impression that David is making a slow steady recovery following a discectomy. He is clearly a notch better again after this most recent surgery. I am hopeful that his residual symptoms are mostly muscular contracture and will respond to physical therapy. He does not appear ready to return to work to my eye but I will defer to his treating physician regarding work related issues.

¹ Rule 24.5.314 provides as follows:

ADJUDICATION OF INTERIM BENEFIT CLAIMS UNDER 39-71-610, MCA.

(1) Appeals of determinations by the Department of Labor and Industry regarding interim benefits under 39-71-610, MCA, may be presented to the court in letter form. The court initially addresses such appeals informally through telephone conference involving all parties.

(2) If any party objects to informal resolution of a dispute under 39-71-610, MCA, the court holds a formal evidentiary hearing on an expedited basis. Such hearing may be conducted through telephone conference if all parties agree. If requested by any party, the court promptly holds an in-person hearing in Helena or, at the court’s discretion, in some other venue at a date and time set by the court.

² *Hartford Fire Ins. Co. v. Hostetter*, 2013 MTWCC 14, ¶ 2 (citation omitted).

Dr. Beck filled out a Medical Status Form, on which he checked the box next to, "Employee Not Released to Work." In the area labeled, "List Other Restrictions," Dr. Beck wrote: "Defer to Treating Physician."

¶ 10 At this time, Victory assumed that Dr. Beck would no longer treat Andell. However, Dr. Beck had told Andell that if the physical therapy did not improve Andell's symptoms, then he would recommend a fusion.

¶ 11 Andell continued with physical therapy. However, on May 3, 2022, the physical therapist discharged Andell because "he is unable to participate in therapeutic exercise due to extreme pain levels."

¶ 12 On May 10, 2022, Andell received a letter from Victory, in which Victory stated that it had scheduled an appointment with Wendy E. Miklos, MD, for May 16, 2022. Victory informed Andell that, "Dr. Miklos will be established as your treating physician for this claim and will address return to work restrictions."

¶ 13 Andell notified Victory that he objected to the appointment with Dr. Miklos on several grounds, including that it was premature to address his return-to-work restrictions because Dr. Beck had told him that if physical therapy did not improve his symptoms, then a lumbar fusion was unavoidable. Andell did not attend his scheduled appointment with Dr. Miklos.

¶ 14 On May 16, 2022, Victory notified Andell that it was going to terminate his TTD benefits. Presumably relying upon § 39-71-1106(2), MCA – which allows an insurer to terminate compensation benefits upon 14 days' notice if the claimant unreasonably refuses to submit to medical treatment recommended by the treating physician, except for invasive procedures – the claims examiner stated: "This letter is to notify you that your compensation benefits will be terminated in 14 days from the date of this letter due to non-compliance with medical recommendations prescribed by your treating physician."

¶ 15 On May 19, 2022, Andell petitioned the DLI to order Victory to pay interim TTD benefits under § 39-71-610, MCA.

¶ 16 On June 6, 2022, Dr. Beck recommended a lumbar fusion. The surgery is scheduled for July 8, 2022.

¶ 17 On June 7, 2022, the DLI granted Andell's request for interim TTD benefits under § 39-71-610, MCA. The Compliance Specialist noted that the only purpose of the appointment with Dr. Miklos was to address return-to-work restrictions and reasoned that Victory did not have grounds to terminate Andell's TTD benefits because, "With surgery pending, RTW restrictions can't be addressed."

LAW AND ANALYSIS

¶ 18 Section 39-71-610, MCA, states:

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 the biweekly compensation benefits may not 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. A proceeding in the workers' compensation court brought pursuant to this section is a new proceeding and is not subject to mediation. 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.

¶ 19 This Court considers four factors to determine if a claimant is entitled to interim benefits under § 39-71-610, MCA: (1) Was liability for the claim accepted? (2) Were benefits paid, especially for a significant time period? (3) Has the claimant demonstrated he will suffer significant financial hardship if interim benefits under § 39-71-610, MCA, are not ordered? (4) Has the claimant tendered a strong *prima facie* case for reinstatement of the benefits he seeks? To meet the fourth factor, a claimant need not prove his entitlement to TTD benefits but need only tender substantial evidence which, if believed, would entitle him to the benefits.³

¶ 20 Here, the first three factors weigh in favor of granting Andell interim TTD benefits, a point that Victory does not dispute. Victory also concedes that Andell did not refuse to submit to any medical treatment recommended by Dr. Beck, and that it therefore did not have grounds to terminate Andell's TTD benefits under § 39-71-1106(2), MCA, which was the sole ground in its 14-day termination letter. However, Victory now argues that, under § 39-71-1101(2), MCA, it has the absolute right to choose Andell's treating physician. Although Victory concedes that Dr. Beck is still Andell's "treating surgeon" and has opined that Andell needs a lumbar fusion and cannot now return to work, it argues that the consequence of Andell's refusal to attend the appointment with Dr. Miklos on May 16, 2022, is the termination of his TTD benefits under § 39-71-1106(3), MCA, which provides that an insurer may terminate compensation benefits if the claimant unreasonably refuses "to provide access to health care information to health care providers, the insurer, or an

³ *Larson v. Liberty Nw. Ins. Corp.*, 2017 MTWCC 15, ¶ 20 (citations omitted).

agent of the insurer.”⁴ Victory maintains that it does not have to pay Andell’s TTD benefits until he sees Dr. Miklos.

¶ 21 Andell makes several arguments in support of his position that the DLI correctly ordered interim TTD benefits, including that his refusal to attend the appointment with Dr. Miklos was reasonable because, with a lumbar fusion scheduled, she could not address what his return-to-work restrictions will be.

¶ 22 Here, the DLI correctly granted Andell’s request for interim TTD benefits. Although Dr. Beck stated that he would defer to Andell’s treating physician for specific work restrictions, Dr. Beck also unequivocally stated that Andell was unable to return to work. Thus, Andell was entitled to ongoing TTD benefits under § 39-71-701, MCA. The DLI soundly reasoned that because Andell has been scheduled for a lumbar fusion, the results of which are obviously unknown, he is months away from the time at which a physician could address his return-to-work restrictions and, therefore, that there was no reason for Andell to see Dr. Miklos on May 16, 2022. This Court agrees with the DLI that the appointment with Dr. Miklos on May 16, 2022, would not have served any purpose because she could not have addressed what his return-to-work restrictions will be and, therefore, that Andell had reasonable grounds to refuse to attend because, “The law neither does nor requires idle acts.”⁵

¶ 23 This Court is not persuaded by Victory’s argument that this Court must reverse the DLI because, under § 39-71-1101(2), MCA, it had the absolute right to choose Dr. Miklos as Andell’s treating physician, the absolute right to send Andell to an appointment with her, even on short notice, and the right to terminate his TTD benefits as the consequence for his refusal to attend the appointment. Victory’s argument is not supported by the plain language of § 39-71-607, MCA, and § 39-71-1106(3), MCA, both of which provide that, to suspend a claimant’s TTD benefits, the insurer must prove that the claimant’s refusal to attend the medical appointment was unreasonable. As set forth above, the DLI correctly determined that Andell tendered sufficient evidence that, if believed, establishes that his refusal to attend the appointment with Dr. Miklos was reasonable.

¶ 24 Because Andell met his burden of proving a *prima facie* case that he is entitled to interim TTD benefits under § 39-71-610, MCA, this Court now enters the following:

⁴ See also § 39-71-607, MCA (stating, “Under rules adopted by the department, an insurer may suspend compensation payments pending the receipt of medical information when an injured worker unreasonably fails to keep scheduled medical appointments. If, after a medical examination, the injured worker is released to return to work, the worker forfeits the right to any suspended benefits.”).

⁵ § 1-3-223, MCA.

ORDER

¶ 25 The DLI's Order Reinstating Benefits Pending a Hearing (Per 39-71-610, MCA) is **affirmed**.

¶ 26 Pursuant to ARM 24.5.348(2), this Order is certified as a final judgment for purposes of appeal.

DATED this 27th day of June, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Joe C. Maynard
Thomas M. Murphy

Submitted: June 20, 2022