IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 28

WCC No. 2007-1843

STEVEN SCHOENEMAN

Petitioner

vs.

LIBERTY INSURANCE CORPORATION

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moved for summary judgment, requesting reinstatement of his temporary total disability benefits because Respondent terminated them without 14 days' written notice. Respondent argues that it was paying these benefits pursuant to § 39-71-608, MCA, and because Petitioner was not at maximum medical improvement when his treating physician released him to work in some capacity, § 39-71-609(2), MCA, allows an insurer to terminate temporary total disability benefits without notice.

Held: Petitioner's motion for summary judgment is granted. Respondent bases its case on reading a single sentence of a statute out of the context of the remainder of the statute and the Workers' Compensation Act as a whole. The Court is not persuaded by this interpretation.

¶ 1 Petitioner Steven Schoeneman moved for summary judgment against Respondent Liberty Insurance Corporation alleging that Respondent failed to follow the notice requirements of § 39-71-609, MCA, and that he is therefore entitled to reinstatement of his temporary total disability (TTD) benefits. I heard oral argument on Petitioner's motion on June 14, 2007, at the Workers' Compensation Court, Helena, Montana. Subsequent to the hearing, I granted Petitioner's motion. This written Order setting forth my analysis follows.

STIPULATED FACTS[1]

¶ 2 Petitioner alleges he suffered industrial injuries to his back on July 7, 2005, December 20, 2005, and July 31, 2006, while working for Respondent's insured.[2]

¶ 3 Petitioner was terminated from his employment with Respondent's insured on August 3, 2006.[3]

¶ 4 Petitioner received correspondence from Respondent indicating that benefits would be paid to him pursuant to § 39-71-608, MCA.

¶ 5 Petitioner received one payment of benefits pursuant to § 39-71-608, MCA.

¶ 6 Petitioner did not receive 14 days' written notice of termination of benefits.

¶ 7 Petitioner has not returned to work since July 31, 2006.

¶ 8 Petitioner has not reached maximum healing ("MMI") according to his chiropractor.

¶ 9 Petitioner is restricted to lifting 30 pounds.

¶ 10 Petitioner's job required the ability to lift 100 pounds, and it could not be modified.

¶ 11 No other jobs have been approved for Petitioner returning to work. No job analyses prepared by Petitioner's rehabilitation provider have been approved.

¶ 12 Dr. Gary E. Jimmerson, D.C., testified via deposition that Petitioner would reach MMI in approximately one or two months. Dr. Jimmerson further testified that Petitioner's lifting restriction has been in effect since the date of injury.[4]

¶ 13 Although Dr. Jimmerson wrote a letter on August 10, 2006, which purported to release Petitioner to return to work without restriction, Dr. Jimmerson asserted, and the parties agree, that this letter was written solely to assist Petitioner in obtaining employment,

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[1] Respondent has agreed that for purposes of this motion, it does not contest the facts set forth by Petitioner. These Stipulated Facts are taken from Petitioner's Motion for Summary Judgment and Supporting Memorandum, except as otherwise noted.

[2] Petition for Emergency Hearing at 1.

[3] Petition for Emergency Hearing at 2; Response to Petition for Hearing at 2.

[4] Jimmerson Dep. at 6-7.

and that Petitioner intended to consult Dr. Jimmerson about any prospective jobs so they could determine if the job was appropriate for Petitioner's limitations.[5]

ISSUE

¶ 14 Whether Respondent failed to follow the statutory requirements of § 39-71-609, MCA, when it terminated benefits paid pursuant to § 39-71-608, MCA, without notice, thereby entitling Petitioner to reinstatement of his TTD benefits until Respondent gives Petitioner 14 days' written notice of termination of these benefits.

DISCUSSION

¶ 15 This case is governed by the 2005 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Petitioner's injuries.[6]

¶ 16 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[7] This matter is susceptible to summary disposition.

¶ 17 At issue is the application of § 39-71-609, MCA. Specifically, under what circumstances must an insurer give 14 days' written notice if it terminates benefits paid under § 39-71-608, MCA.[8] Section 39-71-609, MCA, states:

> (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 shall 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.

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[5] Stipulated to by the parties at oral argument.

[6] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[7] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

[8] Section 39-71-608, MCA, allows an insurer to pay benefits without admitting liability or waiving any right of defense.

> (2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary total disability benefits or temporary partial disability benefits to permanent partial disability benefits:
>
> (a) must have a physician's determination that the claimant has reached medical stability;
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> (b) must have a physician's determination of the claimant's physical restrictions resulting from the industrial injury;
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> (c) must have a physician's determination, based on the physician's knowledge of the claimant's job analysis prepared by a rehabilitation provider, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;
>
> (d) shall give notice to the claimant of the insurer's receipt of the report of the physician's determinations required pursuant to subsections (2)(a) through (2)(c). The notice must be attached to a copy of the report.

¶ 18 Petitioner argues that written notice was required in his case, and since Respondent failed to provide such notice, its termination of benefits is void as a matter of law and Petitioner's benefits should be retroactively reinstated until such time as Respondent gives 14 days' written notice of termination. Respondent responds that since Petitioner was not at MMI when he was released to return to work in some capacity, Respondent was not required to give notice before terminating his benefits.

¶ 19 At issue is how to interpret "released to work in some capacity." Petitioner points out that his 30-pound weight restriction precludes him from returning to his time-of-injury position, and that a modified position was not available. Petitioner argues that a release requires presentation of job analyses to his medical provider, and his provider's approval that one or more of the analyzed jobs falls within his capabilities. Respondent argues that § 39-71-609, MCA, does not mention job analyses as being a requirement in order for a claimant to be released "in some capacity."

¶ 20 Petitioner argues that Respondent's interpretation of this statute does not square with the public policies which underpin the WCA. Petitioner argues that it makes little sense to read § 39-71-609, MCA, as requiring an insurer to give written notice before terminating a claimant's benefits after the claimant has been found to be at MMI, and yet not requiring notice if the insurer terminates TTD benefits prior to MMI being reached. Petitioner further argues that it is absurd to interpret the statute as setting forth criteria which define what it means to be "released to work in some capacity" as applying only to

post-MMI work releases, and interpreting "released to work in some capacity" differently for pre-MMI claimants. Petitioner asserts that in order for an insurer to terminate TTD benefits because of a release to return to work in some capacity, that release must be meaningful in that some job must exist which suits an injured worker's vocational abilities and physical limitations.[9]

¶ 21 Petitioner further points to § 39-71-105(4), MCA, which provides that Montana's workers' compensation and occupational disease insurance systems are intended to be primarily self-administering and that the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits. If insurers are allowed to terminate benefits unilaterally and without notice, Petitioner argues, claimants have no choice but to obtain legal representation to attempt to get those benefits reinstated. Petitioner asserts that the interpretation Respondent urges upon this Court leaves the statutory scheme open for abuse because insurers could elect to pay benefits on almost every claim under the disputed liability provisions of § 39-71-608, MCA, order the claimant to submit to an IME, and upon receiving the opinion of an IME doctor that the claimant could return to work in *some* capacity, terminate the claimant's benefits, thereby eliminating the need to pay TTD benefits.

¶ 22 By way of comparison, in cases in which a claimant receives TTD benefits without the insurer asserting a reservation of rights, those benefits are governed by § 39-71-701, MCA, which provides in pertinent part:

> (1) [A] worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.
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> . . . .
>
> (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 to the worker for any reason except for the worker's incarceration . . . resignation, or termination for disciplinary reasons . . . .

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[9] *See, e.g., Benhart v. Liberty Northwest*, 2007 MTWCC 3.

¶ 23 Respondent argues that § 39-71-609(2), MCA, should be read so that the first sentence[10] refers to a claimant who has not yet reached MMI, while the remainder refers to a claimant who has reached MMI. Respondent argues that the remaining criteria found in § 39-71-609(2)(a)-(d), MCA, applies only after MMI is reached. Therefore, Respondent concludes, since Petitioner has not yet reached MMI, Respondent properly terminated his benefits on the date he was released to work in some capacity.

¶ 24 Respondent concedes that its interpretation of § 39-71-609, MCA, may lead to a harsh result, but argues that this is how the legislature intended the statute to operate. Respondent argues that so long as a worker who is not yet at MMI has been released to work "in some capacity," it is irrelevant whether any job exists which the worker is physically and vocationally qualified to perform, and that an insurer is free to terminate that claimant's TTD benefits without notice.

¶ 25 Section 39-71-609, MCA, was amended in 1995 and again in 2001. Prior to 1995, the statute consisted only of the language now codified as § 39-71-609(1), MCA. In 1995, the first sentence of § 39-71-609(2), MCA, was added. In 2001, § 39-71-609(2), MCA, obtained its current form, with the language beyond the first sentence becoming part of the statute.

¶ 26 The two most recent revisions to § 39-71-609, MCA, were made subsequent to this Court's decision in *Coles v. Seven Eleven Stores*,[11] in which this Court held that an insurer unreasonably terminated a claimant's TTD benefits and began paying permanent partial disability benefits where the claimant had reached MMI but had limited vocational skills and was precluded by physical restrictions from returning to her time-of-injury employment. The Court held that the claimant, until vocationally retrained, was permanently totally disabled, noting that the insurer did not introduce any evidence which could establish that the claimant had a reasonable prospect of employment in any type of job.

¶ 27 The Court further stated:

> In Lindquist v. Sletten Construction Co., . . . this Court held that an insurer has a duty to investigate a claim for compensation before it denies the claim. In the instant case, it appears the insurer followed what, based on the Court's experience, is the industry's general practice of converting a claimant from temporary total to permanent partial disability benefits on receipt of a physician's impairment rating. But disability is not a purely medical condition;

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[10] "Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity."

[11] *Coles*, Docket No. 2000, File No. 583-138 (Nov. 1984) (*aff'd* 217 Mont. 343, 704 P.2d 1048).

> an insurer is responsible for paying injured workers "in the manner and to the extent" provided by the Act. MCA § 39-71-407 (1983). This statute alone imposes a duty on an insurer to investigate and to determine the nature and extent of an injured worker's disability before it converts a claimant from temporary total to permanent partial disability benefits. The insurer can seek medical examinations . . . and . . . can obtain rehabilitation evaluations.[12]

¶ 28 In reaching its decision in *Coles*, this Court set forth the minimum information necessary for an insurer to discharge its duty to investigate. These criteria were adopted by the Montana Supreme Court in *Wood v. Consolidated Freightways, Inc.*,[13] and are now codified in § 39-71-609(2)(a)-(d), MCA.

¶ 29 The parties have drawn this Court's attention to previous cases in which this Court concluded that TTD benefits were properly terminated when claimants had been released to work. *Edgar v. Legion Ins. Co.*[14] was decided under the pre-1995 version of § 39-71-609, MCA. In *Edgar*, the claimant suffered a work-related injury to her back and when she reached MMI, her treating physician restricted her to light duty and precluded her from returning to her time-of-injury employment as a personal care attendant.[15] The claimant did not follow those restrictions and continued to work as an attendant until she suffered another back injury.[16] Once she reached MMI from the latter incident, her treating physician released her to return to work with a 5% impairment rating and the same light-duty restrictions she had previously disregarded. Although he did not consider any job analyses at that time, the claimant's treating physician had considered job analyses and approved four jobs for the claimant after her previous back injury when he had given her the same restrictions.[17]

¶ 30 In *Edgar*, this Court concluded that the claimant was not entitled to reinstatement of her TTD benefits.[18] In reaching its decision, the Court noted that § 39-71-609(2), MCA, as it existed at the time, did not require approval for specific jobs, but only required that the claimant be released to work in some capacity. The Court stated, "The term 'work in some

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[12] *Coles* at 10.

[13] *Wood*, 248 Mont. 26, 808 P.2d 502.

[14] *Edgar*, 2001 MTWCC 33.

[15] *Edgar*, ¶¶ 8-11.

[16] *Edgar*, ¶¶ 12-13.

[17] *Edgar*, ¶ 23.

[18] *Edgar*, ¶ 45.

capacity' must be construed in accordance with its ordinary and generally understood meaning."[19]

¶ 31 Although the Court determined that the *Coles* criteria did not apply because it had previously held that the legislature's enactment of § 39-71-609(2), MCA, nullified the *Coles* criteria, the Court further concluded that the *Coles* criteria had been met.[20] Although the claimant argued that the third criteria – a physician's determination that a claimant could return to work to her time-of-injury job or another job for which she is fitted by age, education, work experience, and physical condition – had not been met, the Court concluded that it had because the claimant's treating physician had previously approved several job analyses. The Court noted, "If the Court ignored claimant's 1994 injury, her 1994 vocational work up, and [her treating physician's] approval of several job analysis [sic] prepared in 1994, then her argument might be persuasive."[21]

¶ 32 *Sears v. Travelers Ins.* was decided under the 1995 version of § 39-71-609, MCA.[22] In *Sears*, the claimant was given 14 days' written notice of termination while the Department of Labor and Industry was not. The claimant underwent an independent medical examination (IME), and the IME doctor reviewed the claimant's job description and concluded that the claimant was able to return to the type of job he held at the time of his injury. The claimant argued that the job descriptions which the IME doctor approved were inadequate and therefore the *Coles* criteria were not satisfied. The Court disagreed, reasoning that the *Coles* criteria only require a physician to base his determination on his "knowledge" of the job position, and do not require a technical job description prepared by a vocational consultant.

¶ 33 Alternatively, the claimant argued that the insurer's failure to provide 14 days' written notice to the Department of Labor and Industry rendered its termination ineffective. This Court reviewed the language of § 39-71-609, MCA (1995), and concluded that § 39-71-609(2), MCA, "[o]n its face . . . permits termination of [TTD] benefits upon the claimant's release to return to work **without** any prior written notice to either the claimant or the Department."[23]

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[19] *Edgar*, ¶ 37.

[20] *Edgar*, ¶¶ 38-39

[21] *Edgar*, ¶ 41.

[22] *Sears*, 1997 MTWCC 18.

[23] *Sears* at 8 (emphasis in original).

¶ 34 The claimant moved for reconsideration on the *Coles* criteria issue only.[24] The Court reiterated its previous holding that a technically accurate job description is not required under the statutes, noting: "Plainly, a detailed job description is not necessary in all cases. It serves no purpose whatsoever where the claimant has completely recovered and the physician imposes no restrictions on the claimant's vocational activities."[25]

¶ 35 In denying the claimant's motion for reconsideration, this Court observed, "If the claimant in this case continued to be [TTD] in the face of the termination of his benefits, that would be one thing and I would unhesitatingly reinstate his benefits."[26] The Court further advised, "Despite the result I reach in this case, insurers will be ill-advised to terminate TTD benefits without notice, without complying with *Coles*, and without providing the releasing physicians with technically accurate job descriptions."[27]

¶ 36 In the *Sears* decision and the Order denying the motion for reconsideration in that case, the Court described the *Coles* criteria as criteria which an insurer must satisfy prior to terminating TTD benefits.[28] The Court did not discuss these criteria as applying solely to any termination of TTD benefits after MMI has been reached. Following Respondent's reading of the current statutory language which includes the *Coles* criteria, however, an insurer would have to meet the *Coles* criteria in order to terminate TTD benefits if a claimant has reached MMI, yet could terminate TTD benefits without notice if a claimant has not reached MMI.

¶ 37 Finally, *Daulton v. MHA Workers' Compensation Trust*[29] was determined under the 1997 version of § 39-71-609, MCA. In *Daulton*, the WCC found the claimant was "released to 'return to work in some capacity'" where two doctors approved a job analysis which had been prepared by a vocational consultant, even though evidence suggested that the claimant might not be able to perform the job because of pain.[30]

¶ 38 Petitioner argues that *Edgar*, *Sears*, and *Daulton* are all factually distinguishable from his case. In all three cases, the claimants were at MMI when their benefits were

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[24] *Sears v. Travelers Ins.*, 1998 MTWCC 12 ("Motion for Reconsideration").

[25] *Motion for Reconsideration*, ¶ 6.

[26] *Motion for Reconsideration*, ¶ 19.

[27] *Motion for Reconsideration*, ¶ 20.

[28] *Sears*; *Motion for Reconsideration*, ¶ 3.

[29] *Daulton*, 2001 MTWCC 37.

[30] *Daulton*, ¶ 27.

terminated. Furthermore, in all three of those cases, some form of job analysis was submitted, although in *Edgar*, as described above, the approved job analyses were old and in *Sears*, a general "job description" rather than a technical analysis prepared by a vocational consultant was provided. Finally, in all three of those cases, the claimant was given notice prior to his or her TTD benefits being terminated. In *Sears*, the notice issue was present because the insurer in that instance notified the claimant but not the Department of Labor and Industry. As noted above, this Court warned insurers that termination without notice was ill-advised, and further asserted that it would "unhesitatingly" have reinstated the claimant's TTD benefits if he had actually been temporarily totally disabled at the time the insurer terminated his TTD benefits.

¶ 39 Several factors have persuaded me that Petitioner's interpretation of the applicable statutes is correct. As a preliminary consideration, the public policy of the WCA is to provide benefits to injured workers at a reasonable cost to employers, and wage-loss benefits should bear a reasonable relationship to actual wages lost as a result of a work-related injury.[31] Section 39-71-608, MCA, is designed to be advantageous to both injured workers and insurers, as it allow insurers to pay benefits under a reservation of rights, giving insurers ample time to investigate the merits of a claim without unduly delaying an injured worker's receipt of benefits. Sections 39-71-609 and -701, MCA, set forth the means by which insurers may terminate TTD benefits. All of these statutes contemplate a claimant who is employable in the sense that a job exists which the claimant is physically and vocationally qualified to perform. I find Respondent's argument that § 39-71-609(2), MCA, provides an intentional legislative loophole to allow the termination of benefits, without notice, for claimants who are not physically and vocationally able to obtain employment to be unpersuasive.

¶ 40 Respondent's argument rests on the premise that being released to work in some capacity within the context of § 39-71-609, MCA, means that a physician, without regard to a claimant's vocational abilities or whether the claimant is physically capable of returning to his time-of-injury employment, simply determines that the claimant is probably physically capable of some job, irrespective of whether the theoretical job to which claimant is being released actually exists or whether the claimant is vocationally qualified to perform the job. Respondent points to *Sears* and *Edgar* in support of its argument. Respondent's reliance on *Sears* and *Edgar* in support of this argument is misplaced.

¶ 41 Read in their entirety, it is clear in both *Edgar* and *Sears* that this Court did not contemplate a situation such as the one at hand – in which Petitioner's TTD benefits were terminated prior to his reaching MMI, where his physical restrictions preclude him from returning to his time-of-injury employment, and where no modified or alternate position is

[31] § 39-71-105(1), MCA.

available to him. This is amply demonstrated in *Sears* where, as noted above, even though the claimant was given notice and his physician had approved a job description, this Court asserted that it would unhesitatingly have reinstated that claimant's benefits if in fact that claimant was still temporarily totally disabled. This Court then explicitly warned insurers against taking the action Respondent has taken in this case.

¶ 42 In *Edgar*, this Court stated, "The term 'work in some capacity' must be construed in accordance with its ordinary and generally understood meaning."[32] The Court then went on to determine that the claimant in that case had indeed been released to work in some capacity. Unlike the present case, however, the claimant in *Edgar* was at MMI and released to work in light-duty positions for which job analyses had been previously approved by her treating physician. Furthermore, in *Sears*, while holding that a technical job description was not required, the Court found it significant that the claimant was at MMI and without restrictions, and therefore presumably able to return to his time-of-injury employment. This, also, is distinguishable from the situation in the case at hand.

¶ 43 Therefore, although Respondent argues that the present case is on-point with *Edgar*, *Sears*, and *Daulton*, I find these cases readily distinguishable as discussed above.

¶ 44 At oral argument, Respondent acknowledged that its interpretation of the statutes could lead to a harsh result or, in fact, a "black hole" into which pre-MMI claimants could fall, resulting in an injured worker who is unable to return to work yet unable to obtain workers' compensation benefits. To excise a single sentence of one statute and interpret it in such a way contravenes the public policy of the WCA as a whole and is simply insupportable.

¶ 45 It bears reiterating that the dispute at issue in this case is not whether an insurer may or may not terminate benefits after it has begun paying them pursuant to § 39-71-608, MCA. Rather, the issue is simply whether the insurer is required to give 14 days' written notice prior to the termination of those benefits. This Court noted in *Sears* that an insurer would be ill-advised to terminate benefits without notice, without complying with *Coles*, and without providing the releasing physicians with technically accurate job descriptions. While the Court in *Coles* was willing to accept an insurer's termination where the claimant had reached MMI and the releasing physician had been given a job description, neither of those factors are present here. It would seem axiomatic that "released to return to work in some capacity" must mean at least some capacity to work in the practical sense and not merely the hypothetical sense. In the present case, I am hard-pressed to consider a claimant to have been released to return to work in some capacity when he is not at MMI, cannot

[32] Edgar, ¶ 37.

return to his time-of-injury job, and there exists absolutely no evidence that ***any*** job exists that he may perform in his present physical and vocational condition.

¶ 46 For the foregoing reasons, I am granting Petitioner's motion for summary judgment and ordering reinstatement of his TTD benefits until such time as the statutory requirements for termination of these benefits are met.

ORDER AND JUDGMENT

¶ 47 Petitioner's motion for summary judgment is **GRANTED**.

¶ 48 This JUDGMENT is certified as final for purposes of appeal.

¶ 49 Any party to this dispute may have twenty days in which to request reconsideration from this ORDER AND JUDGMENT.

DATED in Helena, Montana, this 11th day of July, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Sara R. Sexe
Larry W. Jones
Submitted: June 14, 2007