

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 20

WCC No. 2014-3359

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MIKE SPENCER

Petitioner

vs.

ZURICH AMERICAN INS. CO.

Respondent/Insurer.

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ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND  
DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

**Summary:** Petitioner and Respondent moved for summary judgment on stipulated facts on the issue of whether Petitioner became entitled to TTD benefits after his employer terminated him while he was working in a modified position. The employer terminated Petitioner for "performance issues because he was not a 'fit for culture, property, department.'"

**Held:** Petitioner is entitled to TTD benefits from the date of his termination to the date of his surgery under § 39-71-701(4), MCA, the statute that specifically deals with the issue of whether a worker is entitled to TTD benefits after the worker is terminated while working in a modified position. The loophole that Respondent claims to have found if a worker begins modified duty before he receives TTD benefits does not exist. The stipulated facts do not show that Petitioner's termination was for "disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment." Since Petitioner's physical restrictions precluded him from returning to his time-of-injury job and employment with similar physical requirements, and since he was not at MMI, Petitioner is entitled to TTD benefits for the time period at issue.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701.** A worker with a temporary total disability is "eligible" for TTD benefits when he is injured, as that is when his physical restrictions preclude him from returning to his time-of-injury job. When

§ 39-71-701(4), MCA, states, “A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available. . .,” “requalifies” means that when the modified position is no longer available, the worker is “eligible” for TTD benefits, just as he was before he began working in the modified position, regardless of whether he actually received TTD benefits.

**Benefits: Temporary Total Disability Benefits.** A worker with a temporary total disability is “eligible” for TTD benefits when he is injured, as that is when his physical restrictions preclude him from returning to his time-of-injury job. When § 39-71-701(4), MCA, states, “A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available. . .,” “requalifies” means that when the modified position is no longer available, the worker is “eligible” for TTD benefits, just as he was before he began working in the modified position, regardless of whether he actually received TTD benefits.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-736.** While § 39-71-736(1)(a), MCA, sets a time in which TTD benefits are not paid in some claims, it does not override the plain language of § 39-71-701(1)(a), MCA. As set forth in § 39-71-701(1), MCA, § 39-71-736, MCA, is a “limitation” on when a worker actually receives TTD benefits.

**Statutes and Statutory Interpretation: Specific Over General.** When two provisions deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite provision will prevail to the extent of any opposition between them. Since § 39-71-701(4), MCA, specifically addresses the issue of whether a worker is entitled to TTD benefits when a modified position is no longer available, it is the provision that controls the issue of when a worker becomes eligible for TTD benefits in that situation.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701.** An employee who was terminated for being “not a fit for culture, property, department,” was not necessarily terminated for “disciplinary reasons” so as to preclude his eligibility for TTD benefits under § 39-71-701(4), MCA.

**Employment: Termination of Employment: Generally.** An employee who was terminated for being “not a fit for culture, property, department,” was not necessarily terminated for “disciplinary reasons” so as to preclude his eligibility for TTD benefits under § 39-71-701(4), MCA.

¶ 1 On July 18, 2014, Petitioner Mike Spencer and Respondent Zurich American Ins. Co. (Zurich) filed their respective motions for summary judgment, briefs in support, and a joint statement of stipulated facts.<sup>1</sup> The parties have stipulated “that the issues in dispute in this action are purely legal issues and accordingly, that summary judgment is the appropriate method of resolving this case.”<sup>2</sup>

Undisputed Facts<sup>3</sup>

¶ 2 On July 15, 2013, Spencer’s employer hired him as the food and beverage director for the Holiday Inn Missoula Downtown in Missoula.

¶ 3 On his day of hire, Spencer signed a document entitled Sage Associate Conduct Policy (Conduct Policy), which states, in pertinent part:

These associate conduct rules are listed as a sampling of unacceptable conduct. This list is not all inclusive and management has the right to determine unacceptable conduct and disciplinary action, including dismissal, at its own discretion.

. . . .

Commission of any of the following acts may be considered reason for remedial actions which could range from oral or written reprimand to suspension from work without pay to dismissal:

. . . .

28. Failing to perform job satisfactorily or efficiently.

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<sup>1</sup> Petitioner’s Motion for Summary Judgment and Brief in Support (Spencer’s Brief), Docket Item No. 9; Respondent’s Motion for Summary Judgment and Brief in Support (Zurich’s Brief), Docket Item No. 8; and Petitioner’s and Respondent’s Amended Stipulated Undisputed Facts (Stipulated Facts), Docket Item No. 7.

<sup>2</sup> Stipulated Facts at 3.

<sup>3</sup> Stipulated Facts, unless otherwise noted.

¶ 4 On September 13, 2013, Spencer suffered an industrial injury when his right shoulder popped while he reached for a box.

¶ 5 On September 15, 2013, Spencer was seen at Urgent Care with complaints of shoulder, back, and leg pain. Spencer was released to modified duty with no lifting over ten pounds for four hours per day. His release noted that his prescription medication could affect his ability to work safely. Physical therapy was recommended.

¶ 6 Zurich accepted liability for Spencer's industrial injury and paid medical benefits.

¶ 7 The employer initially accommodated Spencer's work restrictions at his time-of-injury wages.

¶ 8 On September 24, 2013 – 11 days after Spencer's industrial accident – the employer terminated Spencer for "performance issues because he was 'not a fit for culture, property, department.'"

¶ 9 After Spencer's termination, Zurich refused to pay temporary total disability (TTD) benefits because "Mr. Spencer's inability to work for the insured is not related to his 9-13-13 work related injury, but for HR issues."

¶ 10 On February 26, 2014, Spencer underwent shoulder surgery. The specific procedure performed was a right shoulder arthroscopic subacromial decompression, debridement, and distal clavicle incision. Zurich authorized and paid for the surgery.

¶ 11 After Spencer's surgery, Zurich began paying TTD benefits because Spencer could not work due to the surgery.

¶ 12 On May 27, 2014, Spencer was declared at maximum medical improvement (MMI) and returned to full duty with no restrictions.

¶ 13 Zurich continues to deny liability for TTD benefits from the time of Spencer's termination on September 24, 2013, until the time of his February 26, 2014, surgery.

¶ 14 Spencer has withdrawn his claim for permanent partial disability benefits, leaving the dispute over TTD benefits as the only remaining issue in this case.<sup>4</sup>

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<sup>4</sup> Compare Petition for Hearing at 4, with Spencer's Brief at 1.

### Analysis and Decision

¶ 15 This case is governed by the 2011 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Spencer's industrial injury.<sup>5</sup>

¶ 16 The parties present two issues: (1) whether this case falls under § 39-71-701(1) or § 39-71-701(4), MCA; and (2) if this case falls under § 39-71-701(4), MCA, whether the employer terminated Spencer for "disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment."

¶ 17 Section 39-71-701, MCA, states, in relevant part:

(1) Subject to the limitation in 39-71-736 and subsection (4) of this section, 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.

. . . .

(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 as provided for in 39-71-744, resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled, as defined in 39-71-116.

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<sup>5</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687; § 1-2-201, MCA.

¶ 18 Zurich maintains that this case is controlled solely by § 39-71-701(1), MCA. Zurich argues that Spencer is not entitled to TTD benefits because he did not suffer a total loss of wages “as a result of an injury”; rather Zurich argues that Spencer suffered a total loss of wages as a result of his “termination for performance related issues.”<sup>6</sup> Although Spencer was working in a modified position at the time of his termination, Zurich argues that § 39-71-701(4), MCA is inapplicable “because this is not a case in which a worker ‘requalified’ for TTD after having once qualified for it.”<sup>7</sup> Zurich contends that under § 39-71-736(1)(a), MCA, Spencer never became “eligible” for TTD benefits.<sup>8</sup> The Court disagrees with Zurich’s position.

¶ 19 Zurich’s argument that § 39-71-701(4), MCA, is inapplicable to Spencer’s claim does not comport with the plain language of the WCA. Section 39-71-701(1)(a) and (b), MCA, states that 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” or “*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.”<sup>9</sup> The WCA defines “temporary total disability” as “a physical condition resulting from an injury, as defined in this chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing.”<sup>10</sup> Under these provisions, a worker with a temporary total disability is “eligible” for TTD benefits when he is injured, as that is when his physical restrictions preclude him from returning to his time-of-injury job.

¶ 20 Likewise, under the first sentence of § 39-71-701(4), MCA, a worker with a temporary total disability is “no longer eligible” for TTD benefits when he begins working in a modified position at his time-of-injury wage. As Spencer points out, Zurich relied upon the first sentence of § 39-71-701(4), MCA, when it did not initiate TTD benefits after Spencer’s injury because Spencer was “no longer eligible” for such benefits as Spencer had begun working in a modified position at an equivalent wage. Since a worker with a temporary total disability is “no longer eligible” for TTD benefits when he begins working in a modified position, he must have been “eligible” for such benefits before then. Thus, when § 39-71-701(4), MCA, states, “A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer

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<sup>6</sup> Zurich’s Brief at 4.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> Zurich’s Brief at 7.

<sup>9</sup> § 39-71-701(1)(a), (b), MCA (emphasis added).

<sup>10</sup> § 39-71-116(39), MCA.

available . . .,” the word “requalifies” means that when the modified position is no longer available to the worker, he is again “eligible” for TTD benefits, just as he was before he started working in the modified position. It does not mean that the worker must have actually received TTD benefits before he began the modified position. No loophole in the WCA precludes a temporarily totally disabled worker from obtaining TTD benefits merely because he did not previously receive TTD benefits.<sup>11</sup> Unless the worker is incarcerated, has resigned, or is terminated for “disciplinary reasons,” the second sentence of § 39-71-701(4), MCA, recognizes that if the modified position is no longer available, and the worker remains temporarily totally disabled, he has a wage loss as a result of his injury and is therefore entitled to TTD benefits.

¶ 21 As for Zurich’s argument that Spencer never became “eligible” for TTD benefits before or at the time he started working in the modified position under § 39-71-736(1)(a), MCA, this Court is unpersuaded.<sup>12</sup> That statute states: “Except as provided in subsection (1)(c), compensation may not be paid for the first 32 hours or 4 days’ loss of wages, whichever is less, that the worker is totally disabled and unable to work because of an injury. A worker is eligible for compensation starting with the 5th day.” While § 39-71-736(1)(a), MCA, sets a time in which TTD benefits are not paid in some claims, it does not override the plain language of § 39-71-701(1)(a), MCA, which states that the worker is “eligible” for TTD “when the worker suffers a total loss of wages as a result of an injury” or the definition of “temporary total disability.” As set forth in § 39-71-701(1), MCA, § 39-71-736, MCA, is a “limitation” on when a worker actually receives TTD benefits. Moreover, § 39-71-736(1)(c), MCA, states, in relevant part, “If the worker is totally disabled and unable to work in any capacity for 21 days or longer, compensation must be paid retroactively to the first day of total wage loss . . . .” This shows that a worker is “eligible” for TTD benefits during the first four days of his temporary total disability.

¶ 22 Even if a conflict exists within the WCA as to when an injured worker is first “eligible” for TTD benefits, § 39-71-701(4), MCA, controls. “It is a well-settled rule of statutory construction that the specific prevails over the general. When two provisions deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite provision will prevail to the extent of any

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<sup>11</sup> See, e.g., *Schoeneman v. Liberty Ins. Corp.*, 2007 MTWCC 28, ¶ 44, in which this Court refused to interpret a statute in a way that would cause 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.” As the Court explained, “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.”

<sup>12</sup> Zurich’s Brief at 7.

opposition between them.”<sup>13</sup> Section 39-71-701(4), MCA, specifically addresses the issue of whether a worker is entitled to TTD benefits when a modified position is no longer available. Section 39-71-701(4), MCA, is therefore the provision that controls.

¶ 23 Since this case falls under § 39-71-701(4), MCA, the cases on which Zurich relies are inapposite to the case at bar, as none involve the issue of whether a worker is entitled to TTD benefits when a modified position is no longer available.<sup>14</sup>

¶ 24 Zurich also argues that it is not liable for TTD benefits pursuant to § 39-71-701(4), MCA, because Spencer was terminated for “disciplinary reasons” after violating his employer’s policies. Zurich maintains that the reason for Spencer’s termination — “performance issues because [he] was ‘not a fit for culture, property, department’” — constitutes “failing to perform his job satisfactorily or efficiently,” one of the grounds in which the employer could take “remedial actions” up to and including dismissal under its Conduct Policy.<sup>15</sup>

¶ 25 However, the Court agrees with Spencer that the phrase “termination for disciplinary reasons caused by a violation of the employer’s policies that provide for termination of employment” means termination for misconduct.<sup>16</sup> This Court recognized this in *Bagley v. Montana State Fund*,<sup>17</sup> where this Court determined that Bagley was terminated for “disciplinary reasons” because he refused to work the hours to which he was released, misrepresented that he had attended training for which he was paid, and then failed to report to work. Thus, this Court ruled that Bagley was not entitled to TTD benefits under § 39-71-701(4), MCA.<sup>18</sup>

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<sup>13</sup> *Ditton v. Department of Justice Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont. 122, 319 P.3d 1268 (citations omitted). See also § 1-2-102, MCA (“In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.”), and *Hopkins v. Uninsured Employers’ Fund*, 2009 MTWCC 12, ¶ 11 (“If the specific statute conflicts with the general statute and cannot be harmonized to give effect to both, the specific statute controls over the general statute ‘to the extent of the inconsistency.’”) (citation omitted).

<sup>14</sup> See Zurich’s Brief at 4 (listing cases).

<sup>15</sup> Zurich’s Brief at 5-6.

<sup>16</sup> Spencer’s Brief at 7.

<sup>17</sup> *Bagley*, 2009 MTWCC 29.

<sup>18</sup> *Id.* at ¶¶ 49-50. See also *Stancil v. MHA Workers’ Comp. Trust*, 2007 MTWCC 51, ¶¶ 34-39, 52 (ruling that Petitioner, a nurse, did not suffer a wage loss as a result of his injury because he was terminated for “behavioral issues” that included insubordination, demeaning behavior towards co-workers, providing prescription medication to a



¶ 26 Nothing in the stipulated facts demonstrates that Spencer was terminated for “disciplinary reasons” or that he violated any of his employer’s policies. A worker who is not a “fit” has not necessarily engaged in misconduct. Moreover, a worker could satisfactorily and efficiently perform his job duties and still not be considered a “fit” under whatever subjective criteria his particular employer uses to decide who is a “fit.” The proffered reason for Spencer’s termination — “performance issues because he was ‘not a fit for culture, property, department’”<sup>19</sup> — is far too nebulous for the Court to make the determination that Spencer failed to perform his job duties satisfactorily or efficiently. Surely if the employer had specific problems with the way Spencer performed his job duties, it would have so stated. From the evidence presented, the Court cannot determine that Spencer was terminated for “disciplinary reasons caused by a violation of the employer’s policies that provide for termination of employment”<sup>20</sup> and Spencer is therefore entitled to TTD benefits for the period at issue.

#### ORDER AND JUDGMENT

¶ 27 Petitioner’s motion for summary judgment is **GRANTED**. Petitioner is entitled to TTD benefits between the date of his termination and the date of his surgery.

¶ 28 Respondent’s motion for summary judgment is **DENIED**.

¶ 29 Pursuant to ARM 24.5.348(2), and the parties’ stipulation that “the issues in dispute in this action are purely legal issues and accordingly, that summary judgment is the appropriate method of resolving this case,” this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 21<sup>st</sup> day of October, 2014.

(SEAL)

/S/ DAVID M. SANDLER  
\_\_\_\_\_  
JUDGE

c: Andrew D. Huppert  
Steven W. Jennings

Submitted: July 18, 2014

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co-worker without a physician’s knowledge, and attempting to procure a prescription medication for himself without a prescription).

<sup>19</sup> See ¶ 8, above.

<sup>20</sup> § 39-71-701(4), MCA.