IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 10

WCC No. 2021-5499

NATIONAL UNION FIRE INS. OF PITTSBURGH

Appellant

vs.

BENJAMIN RAINEY

Appellee.

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

Summary: An insurer appeals an order from the DLI awarding interim benefits under § 39-71-610, MCA. The insurer asserts that the claimant's treating physician gave him a full duty release and contends that it had the right to immediately terminate his TTD benefits without complying with § 39-71-609(2)(a)-(d), MCA, which are commonly called the "*Coles* criteria."

Held: The DLI correctly awarded interim benefits. As one of the insurer's adjusters noted, the full duty release generated by the treating physician's office was most likely a mistake because it could not be reconciled with the claimant's other medical records, which indicate that his physical restrictions preclude him from returning to his time-of-injury job. Moreover, even if the physician intended to release the claimant to work, a general release to work in some unknown job is insufficient grounds for an insurer to terminate TTD benefits under the first sentence of § 39-71-609(2), MCA. Montana law requires an insurer to have a physician approve a job analysis for an actual job that the claimant is physically able, and vocationally qualified, to perform. Finally, the insurer did not have grounds to terminate the claimant's TTD benefits under the first clause of the second sentence of § 39-71-609(2), MCA, because the Medical Status Form purporting to release him to full duty cannot reasonably be construed as the treating physician's determination that he had reached MMI, had fully recovered, and could return to his time-of-injury job.

¶ 1 National Union Fire Ins. of Pittsburgh (National Union) appeals an order from the Department of Labor & Industry (DLI) reinstating Benjamin Rainey's temporary total disability (TTD) benefits under § 39-71-610, MCA.

¶ 2 Under ARM 24.5.314(2), this Court conducted a formal evidentiary hearing via videoconference on May 6, 2021. Rainey was present and was represented by Paul D. Odegaard. National Union was represented by Charlie K. Smith.

¶ 3 This Court admitted National Union's exhibits, which are attached to its Notice of Production of Exhibits for Hearing.[1] This Court admitted Rainey's exhibits, which are attached to his Notice of Production of Exhibits for Hearing.[2]

¶ 4 Peggy Payne and Rainey were sworn and testified at the evidentiary hearing.

STANDARD OF REVIEW

¶ 5 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.

¶ 6 On appeal, this Court reviews *de novo* an order from the DLI regarding benefits under § 39-71-610, MCA.[3]

¶ 7 At the hearing, this Court questioned whether a justiciable controversy existed, as National Union had informed the DLI that it had agreed to pay Rainey TTD benefits. Because National Union asserts that it has the right to be reimbursed under the last sentence of § 39-71-610, MCA, this Court ruled that a justiciable controversy exists.

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[1] Docket Item No. 2.

[2] Docket Item No. 5.

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

FINDINGS OF FACT

¶ 8 This Court finds the following facts by a preponderance of the evidence.

¶ 9 Rainey worked as a laborer on a road paving crew, a heavy-duty job which required him to be on his feet for his entire shift. This job was his sole source of income.

¶ 10 On October 25, 2018, Rainey suffered injuries, including a broken ankle, in the course of his employment.

¶ 11 National Union accepted liability for Rainey's injuries. National Union's third-party administrator, Sedgwick Claims Management Services, Inc. (Sedgwick) adjusted Rainey's claim.

¶ 12 On October 26, 2018, Kyle Lybrand, MD, of Ortho Montana, surgically repaired Rainey's ankle.

¶ 13 Dr. Lybrand restricted Rainey from weightbearing until January 10, 2019, when she advanced his weightbearing to "as tolerated," with a walking boot.

¶ 14 In March 2019, Rainey returned to work in a modified position that did not require constant standing.

¶ 15 Although Rainey continued to suffer from pain and swelling in his ankle, he wanted to return to his time-of-injury job. Thus, on April 22, 2019, Dr. Lybrand released him to return to work with no restrictions. However, she noted, "I explained if this is too much we can back him off to light duty again."

¶ 16 Rainey returned to work but experienced an increase in pain and swelling due to the constant walking.

¶ 17 On June 20, 2019, Rainey returned to Dr. Lybrand. She thought that the internal hardware was causing the pain and swelling and recommended a second surgery to remove it.

¶ 18 On June 24, 2019, Dr. Lybrand surgically removed the hardware.

¶ 19 On July 15, 2019, Dr. Lybrand again released Rainey to return to his time-of-injury job.

¶ 20 However, Rainey's time-of-injury employer would not rehire him. Rainey took a job with another company and travelled to Wisconsin to work a job that required walking on uneven terrain. After a few days, Rainey could no longer work because of intolerable ankle pain.

¶ 21 On August 22, 2019, Rainey returned to Dr. Lybrand, who observed that Rainey's ankle was swollen. Dr. Lybrand also noted tenderness on palpation and weakness. Dr. Lybrand thought that Rainey's pain was caused by posterior tibial tendon dysfunction. Dr. Lybrand prescribed orthotics and physical therapy. Dr. Lybrand restricted Rainey to light duty work.

¶ 22 On October 17, 2019, Rainey returned to Dr. Lybrand. Dr. Lybrand noted that Rainey continued to have pain while walking on uneven ground, inclines, and while climbing, and that such duties were required at his time-of-injury job. Dr. Lybrand told Rainey "that he may always have off and on pain in his ankle with certain activities and it may not be totally normal again . . . [and that] he may need to find a less labor intensive job in the future." She prescribed another course of physical therapy and a walking boot. Dr. Lybrand filled out a Medical Status Form on which she checked the box next to, "Employee released to Full Duty." However, Dr. Lybrand restricted Rainey from climbing, kneeling and squatting, and lifting more than 10 pounds and wrote, "Moderate duty only."

¶ 23 On March 3, 2020, Rainey began treating with Michael R. Yorgason, MD, a foot and ankle specialist, on referral from Dr. Lybrand. Based on physical examinations, which revealed an ankle deformity, additional imaging, and diagnostic injections, Dr. Yorgason eventually diagnosed a partially torn tibial tendon, tendonitis, and ankle dysfunction. Dr. Yorgason thought that Rainey was a surgical candidate, but that Rainey should first try conservative treatments, including steroid injections, physical therapy, and a prescription strength anti-inflammatory.

¶ 24 At Rainey's first appointment with Dr. Yorgason, Dr. Yorgason restricted him to light duty, and from working at heights. Dr. Yorgason reaffirmed these restrictions at subsequent appointments.

¶ 25 In the spring of 2020, National Union retained Bonnie Lyytinen-Hale, MC, CRC, to serve as Rainey's vocational rehabilitation provider, pursuant to § 39-71-1014, MCA. Lyytinen-Hale prepared a job analysis (JA) for Rainey's time-of-injury job, which states, *inter alia*, that the job was heavy duty and required constant walking on "various outdoor surfaces."

¶ 26 On September 21, 2020, Rainey returned to Dr. Yorgason, still suffering from ankle pain. Dr. Yorgason noted that the conservative treatments had not helped and thought that they were "getting to the point where [we] will probably have to do a reconstruction of his foot." However, because Rainey was hesitant to proceed with another surgery, Dr. Yorgason recommended that Rainey continue with conservative treatments and instructed Rainey to wear an ASO brace daily "[a]s a last step."

¶ 27 On October 26, 2020, Rainey returned to Dr. Yorgason. Because Rainey was still suffering from ankle pain, Dr. Yorgason recommended surgery. However, Rainey reported "so much hell with his fracture [that] he would be very hesitant to have the surgery and start going through another process similar to what he had before."

Dr. Yorgason had Rainey undergo another course of physical therapy and prescribed a different anti-inflammatory.

¶ 28 On December 21, 2020, Rainey returned to Dr. Yorgason. Rainey was still suffering from ankle pain. Dr. Yorgason's medical record states:

> Treatment options were reviewed with the patient at today's visit. We discussed continuing conservatively, he has all the tools to continue conservatively including anti-inflammatories, bracing, arch supports, and physical therapy.
>
> We discussed surgical treatment could include a posterior tibial tendon reconstruction and a left ankle arthroscopy. We discussed this has about a 90% chance of improving his pain although it may not completely alleviate all this pain. Following this type of surgery he'll be in a cast and nonweightbearing for 6 weeks followed by a walking boot for a couple of weeks and would likely be 3 months before he is walking well in a tennis shoe.
>
> He is not sure what direction he wants to pursue at this time. This is a Worker's Compensation case. He reports he is not currently working. He will think about his treatment options.

¶ 29 After this appointment, a Medical Status Form was generated. The box next to "Employee released to Full Duty" was checked. However, there was no other information about Rainey's physical restrictions on the form and the box next to "Max. Medical Improvement (MMI)" was not checked. The Medical Status Form had Dr. Yorgason's electronic signature. Dr. Yorgason's office faxed his medical record from this appointment and the Medical Status Form to Sedgwick.

¶ 30 At this time, Regan Johnson was adjusting Rainey's claim.

¶ 31 On January 20, 2021, Johnson emailed Lyytinen-Hale and Paul Odegaard, Rainey's attorney. Johnson asked Lyytinen-Hale to send Rainey's time-of-injury JA to Dr. Yorgason for his review and signature because "Mr. Rainey was released to work full duty recently."

¶ 32 Odegaard replied to Johnson's email, asserting that it was premature to have Dr. Yorgason review the JA. Odegaard explained that Rainey was not at MMI and was scheduled to undergo another course of physical therapy. Odegaard also asserted that the Medical Status Form was inaccurate and "auto generated."

¶ 33 Johnson replied to Odegaard's email and copied Lyytinen-Hale. Johnson acknowledged that, based on Rainey's medical records, Dr. Yorgason probably did not intend to release him to his time-of-injury job. Johnson's email states:

> I sent this [Medical Status Form] to your office when I received it because ***it seemed like a mistake*** and asked for a response, but I never received one. Please have your client contact the clinic to request an updated medical status form and have it sent. ***I agree that it doesn't make sense when looking at the medical notes***, but that is what was received from the doctor. It could be interpreted as him being released to full duty pending his decision on another surgery. I am not the doctor, so I cannot know what he is thinking and can only go off of what documents I am sent.[4]

¶ 34 Lyytinen-Hale replied to Johnson's email, stating that she would not send Rainey's time-of-injury JA to Dr. Yorgason.

¶ 35 This Court finds that, as Johnson thought, Dr. Yorgason's full duty release was likely a mistake and that Dr. Yorgason did not actually intend to release Rainey to his time-of-injury job. Dr. Yorgason did not have Rainey's time-of-injury JA. Therefore, he could not have released Rainey to full duty because Dr. Yorgason did not know the duties of Rainey's time-of-injury job. Moreover, the medical records demonstrate that Dr. Yorgason had limited Rainey to light duty. Rainey's condition had not substantially changed from the time Rainey first saw Dr. Yorgason and December 21, 2020, the date the Medical Status Form purporting to release Rainey to full duty was generated.[5]

¶ 36 From Rainey's date of injury, National Union paid Rainey TTD benefits for the time he was not released to work.[6]

¶ 37 On February 23, 2021, Peggy Payne became the adjuster. She reviewed Rainey's file with Johnson for a half hour to an hour. They discussed Johnson's concerns with the Medical Status Form and his thoughts that they should get "clarification" from Dr. Yorgason.

¶ 38 Nevertheless, Payne did not seek clarification from Dr. Yorgason. Instead, on February 26, 2021, Payne terminated Rainey's TTD benefits solely on the basis of the Medical Status Form. She interpreted the Medical Status Form as a determination that Rainey was at MMI without any permanent impairment and a release for him to return to his time-of-injury job. Thus, Payne thought that the Medical Status Form gave National Union the immediate right to terminate Rainey's TTD benefits and that she did not need to comply with the criteria in § 39-71-609(2)(a)-(d), MCA.

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[4] Emphasis added.

[5] Given the discrepancies between the Medical Status Form and the other medical records, National Union should have sought clarification from Dr. Yorgason. *See Marcott v. La. Pac. Corp.*, 275 Mont. 197, 209-11, 911 P.2d 1129, 1137-38 (1996) (holding that a workers' compensation insurer must make a "reasoned review of all available evidence in the case . . . followed by an impartial evaluation of the evidence reviewed."). *See also Berry v. Mid Century Ins. Co.*, 2020 MTWCC 10, ¶ 65 (stating, "An insurer must fairly and reasonably evaluate all facts and opinions with respect to medical issues." (citation omitted)).

[6] This Court is troubled by the times that National Union's TTD payments were late.

¶ 39 On April 7, 2021, Rainey requested the DLI to order National Union to pay Rainey TTD benefits, pursuant to § 39-71-610, MCA.

¶ 40 National Union agreed to pay Rainey the TTD benefits as an act of "good faith." However, it asserts that Rainey is not entitled to the TTD benefits and that it has the right to be reimbursed for the TTD benefits it has paid since February 26, 2021, under § 39-71-610, MCA.

¶ 41 On April 15, 2021, the DLI issued its Order Reinstating Benefits Pending a Hearing (Per 39-71-610, MCA).

¶ 42 National Union appeals. It asks this Court to reverse the DLI's Order Reinstating Benefits Pending a Hearing and order Rainey to reimburse it for the TTD benefits paid.

ANALYSIS

¶ 43 This case is governed by the 2017 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Rainey's industrial accident.[7]

¶ 44 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.[8]

¶ 45 Here, the first three factors weigh in favor of granting Rainey interim benefits, a point that National Union does not dispute. However, National Union argues that upon receipt of Dr. Yorgason's full duty release, it had the immediate right to terminate Rainey's TTD benefits under § 39-71-701(1), MCA, and the first sentence of § 39-71-609(2), MCA, which states, "Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity." National Union also asserts that it had the right to terminate Rainey's TTD benefits under the first clause of the second sentence of § 39-71-609(2), MCA, which states that an insurer may terminate TTD benefits when, at MMI, the claimant has no permanent physical impairment. It argues that by releasing Rainey to full duty, Dr. Yorgason implicitly determined that Rainey was at MMI, that he had fully recovered and had no physical restrictions, and that he could return to work at his time-of injury job. National Union contends that the Montana Supreme Court's decision in *Ford v. Sentry Casualty Co*. supports its position that it did

[7] *Ford v. Sentry Cas. Co*., 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

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

not need to comply with the criteria for terminating TTD benefits in § 39-71-609(2)(a)-(d), MCA.

¶ 46 Rainey asserts that National Union did not have sufficient evidence to terminate his TTD benefits because the full duty release was most likely a mistake. Rainey argues that if Dr. Yorgason intended to release him to work, the release was insufficient evidence because Dr. Yorgason did not review a JA and therefore could not know the job duties to which he was releasing Rainey. He relies on this Court's decision in *Schoeneman v. Liberty Ins. Corp*.[9] in support of his position that an insurer cannot terminate TTD benefits under the first sentence of § 39-71-609(2), MCA, unless the physician has approved a JA for an actual job that the claimant is physically able, and vocationally qualified, to perform. Rainey also argues that National Union did not have grounds to terminate his TTD without complying with the criteria in § 39-71-609(2)(a)-(d), MCA, because Dr. Yorgason has not determined that he is at MMI and because he will have a permanent impairment. Rainey asserts that *Ford* is inapplicable to this case because it dealt with whether a claimant is initially eligible for TTD benefits under § 39-71-701(1), MCA, and not whether an insurer could terminate a claimant's TTD benefits under § 39-71-609(2), MCA. Rainey argues that because he had been receiving TTD benefits, National Union could not terminate his TTD benefits or convert his TTD benefits to permanent partial disability (PPD) benefits until it complied with § 39-71-609(2)(a)-(d), MCA.

¶ 47 A claimant's eligibility for TTD benefits, and the circumstances under which an insurer may thereafter terminate the claimant's TTD benefits, or convert the claimant's TTD benefits to PPD benefits, is primarily governed by two statutes, which are to be read together.[10] Section 39-71-701(1), MCA, governs a claimant's initial eligibility for TTD benefits; it states, in relevant part:

> [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.

¶ 48 For claimants who have been eligible for and receiving TTD benefits, § 39-71-609(2), MCA, governs the termination of the claimant's TTD benefits and, when applicable, the conversion of the claimant's TTD benefits to PPD benefits. It states:

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[9] 2007 MTWCC 28.

[10] *Daulton v. MHA Workers' Comp. Trust*, 2001 MTWCC 37, ¶ 31 (explaining that § 39-71-701, MCA (1997), must "be read together with section 39-71-609, MCA (1997), which governs termination of claimant's temporary total disability benefits." (citations omitted)).

> (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;
>
> (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.

The criteria for terminating a claimant's TTD benefits, or converting a claimant's TTD benefits to PPD benefits, in § 39-71-609(2)(a)-(d), MCA, are commonly called the "*Coles* criteria," as this Court first adopted similar criteria in *Coles v. Seven Eleven Stores*.[11]

¶ 49 For three separate reasons, Rainey has tendered a strong *prima facie* case that National Union did not have grounds to terminate his TTD benefits.

¶ 50 *First*, Rainey has made a strong showing, indeed one that has convinced this Court, that the Medical Status Form was likely a mistake and that Dr. Yorgason did not actually intend to release him to full duty at his time-of-injury job. Thus, National Union did not have sufficient evidence to terminate his TTD benefits.

¶ 51 *Second*, even if Dr. Yorgason actually intended to release Rainey to work, Montana law does not allow an insurer to terminate TTD benefits based solely upon a physician's general statement that the claimant could work in some unknown job. In *Schoeneman*, this Court ruled that a physician must approve an actual job for which the claimant is qualified before an insurer can terminate the claimant's TTD benefits under the first sentence of § 39-71-609(2), MCA. Although Schoeneman was not at MMI and had restrictions that precluded him from returning to his time-of-injury job, his chiropractor

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[11] WCC No. 2000 at 11 (Findings of Fact and Conclusions of Law and Judgment (Nov. 20, 1984)), *aff'd,* 217 Mont. 343, 704 P.2d 1048 (1985). The Montana Supreme Court ratified the *Coles* criteria in *Wood v. Consolidated Freightways, Inc*., 248 Mont. 26, 30, 808 P.2d 502, 505 (1991). In 2001, the Montana Legislature enacted the criteria now codified at § 39-71-609(2)(a)-(d), MCA. 2001 Mont. Laws, Ch. 174, §§ 1 and 2.

generally released him to work.[12] The insurer made the same argument that National Union makes in this case; it argued that the chiropractor's general release gave it the right to terminate Schoeneman's TTD benefits without notice, asserting that under the first sentence of § 39-71-609(2), MCA, "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."[13]

¶ 52 Nevertheless, this Court agreed with Schoeneman that, "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 unsupportable."[14] This Court ruled that §§ 39-71-609(2) and -701, MCA, do not permit an insurer to terminate a claimant's TTD benefits when "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 [the] claimant is being released actually exists or whether the claimant is vocationally qualified to perform the job."[15] Instead, this Court concluded that 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."[16] Thus, this Court ruled that the insurer did not have grounds to terminate Schoeneman's TTD benefits based on the chiropractor's statement that Schoeneman could work in some job; Judge Shea reasoned as follows:

> 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 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.[17]

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[12] *Schoeneman*, ¶¶ 5, 8, 9, 10, 12, 13.

[13] *Schoeneman*, ¶ 24.

[14] *Schoeneman*, ¶ 44.

[15] *Schoeneman*, ¶ 40.

[16] *Schoeneman*, ¶ 39.

[17] *Schoeneman*, ¶ 45 (emphasis in original). *See also Wood*, 248 Mont. at 30-31, 808 P.2d at 505-06 (holding that an insurer must comply with the *Coles* criteria before terminating TTD benefits and that this Court had erred in finding that the claimant could return to work based on a comparison of the vocational rehabilitation evidence with the medical evidence because, "Absent a physician's determination that Wood could return to work in one of the jobs listed by the vocational rehabilitation counselor, there is no substantial credible evidence in the record to support the finding that Wood could return to work in one of these jobs.").

¶ 53 This same reasoning applies in this case. The Medical Status Form purporting to release Rainey to full duty does not constitute a "release to work in some capacity" under the first sentence of § 39-71-609(2), MCA, because Dr. Yorgason has not approved an actual job for which Rainey is physically able, and vocationally qualified, to perform. As in *Schoeneman*, there is no evidence that any job exists that Rainey may perform in his present physical and vocational condition. Thus, National Union did not have grounds to terminate Rainey's TTD benefits under the first sentence of § 39-71-609(2), MCA.

¶ 54 National Union's reliance on *Ford* is misplaced because the Montana Supreme Court did not address the same issue that exists in this case and did not hold that an insurer could terminate TTD benefits on the basis of a general release to work in an unknown job. In *Ford*, the insurer was not paying Ford TTD benefits; thus, the court did not address whether the insurer could terminate his TTD benefits under § 39-71-609(2), MCA.[18] Instead, the court addressed whether Ford was eligible for TTD benefits under § 39-71-701(1), MCA.[19] Ford alleged that he suffered a cervical disk injury in the course of his employment and that he was eligible for TTD benefits under § 39-71-701(1), MCA, because he was "incapable of working due to his cervical disk condition."[20] However, the Supreme Court affirmed this Court's finding that Ford did not suffer a cervical disk injury in his industrial accident and merely suffered a cervical strain.[21] When only considering Ford's cervical strain, the physician on which this Court relied in making its findings determined that Ford had reached MMI within months of his strain, had a 0% impairment rating, had no permanent limitations or restrictions, and could return to his time-of-injury job.[22] Because Ford had fully recovered from his cervical strain and could have returned to his time-of-injury job without restrictions, the Montana Supreme Court affirmed this Court's ruling that Ford was not eligible for TTD benefits under § 39-71-701(1), MCA.[23]

¶ 55 Unlike *Ford*, the issue in this case is not whether Rainey was initially eligible for TTD benefits under § 39-71-701(1), MCA. It is undisputed that National Union was paying Rainey TTD benefits for which he was eligible under § 39-71-701(1), MCA. Therefore, the issue in this case is whether National Union had the right to terminate Rainey's TTD benefits under § 39-71-609(2), MCA, based solely on the Medical Status Form purporting to release him to full duty. As set forth above, it did not have that right because (1) the purported full duty release was most likely a mistake and, (2) even if Dr. Yorgason intended to release Rainey to work in some job, under *Schoeneman*, it did not have that right because Dr. Yorgason did not release Rainey to an actual job.[24]

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[18] *Ford*, ¶¶ 29, 60, 61, 62.

[19] *Id*.

[20] *Ford*, ¶ 62.

[21] *Id*.

[22] *Ford* , ¶ 63.

[23] *Ford*, ¶ 64.

[24] *Schoeneman*, ¶¶ 39, 40, 45.

¶ 56 *Third*, National Union did not have sufficient evidence to terminate Rainey's TTD benefits under the first clause of the second sentence of § 39-71-609(2), MCA, which, as noted above, allows an insurer to terminate a claimant's TTD benefits in those claims in which, at MMI, the physician determines that the claimant has no "permanent physical impairment."[25] There is no merit to National Union's claim that the Medical Status Form purporting to release Rainey to full duty is proof positive that Dr. Yorgason had determined that he was at MMI, that he had fully recovered without permanent impairment, and that he could return to work in his time-of-injury job. On the Medical Status Form, Dr. Yorgason did not check the box indicating that Rainey was at MMI and the rest of Rainey's medical records indicate that Rainey is not at MMI. Rainey's medical records also establish that he has not fully recovered from his injury, that he will likely have a permanent physical impairment, and that he is restricted to light duty and could not return to his time-of-injury job or a job with similar physical requirements.

¶ 57 Because Rainey was, and is, receiving TTD benefits for which he is eligible, and because his time-of-injury employer ended his employment,[26] National Union most likely will not be able to terminate his TTD benefits until Rainey reaches MMI.[27] At that time, National Union may terminate Rainey's TTD benefits under the first clause of the second sentence of § 39-71-609(2), MCA, if his physician determines that he has no permanent physical impairment – *i.e.*, if his physician determines that he has fully recovered and has no restrictions on his vocational activities.[28] If Rainey has a permanent physical impairment, National Union may not terminate his TTD benefits, or convert his TTD benefits to PPD benefits, until it complies with the *Coles* criteria, including § 39-71-609(2)(c), which provides that the claimant's physician must approve a JA for a job "for

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[25] *See Schoeneman*, ¶ 34 (citing *Sears v. Travelers Ins.*, 1998 MTWCC 12, ¶ 6) (explaining that "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.").

[26] If Rainey was still working for his time-of-injury employer, and if Rainey's treating physician released him to work in an available position for that employer that paid an equivalent or higher wage than he received at the time of his injury, National Union could suspend his TTD benefits before he reached MMI under § 39-71-701(4), MCA, which states as follows:

> 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.

[27] There are other situations that could arise in which National Union could terminate Rainey's TTD benefits before he reaches MMI. For example, if Rainey started working, National Union could terminate his TTD benefits under § 39-71-701(7), MCA. As another example, if Rainey was uncooperative with his treating physician, National Union could terminate his TTD benefits under § 39-71-1106(1), MCA.

[28] *Schoeneman*, ¶ 34.

which the claimant is suited by age, education, work experience, and physical condition." As stated by the Montana Supreme Court, in those claims in which the claimant reaches MMI and has a permanent physical impairment, "Compliance with the *Coles* test is a mandatory prerequisite for benefit reduction or termination."[29]

¶ 58 Because National Union did not have grounds to terminate Rainey's TTD benefits based solely on the Medical Status Form purporting to release him to full duty, Rainey was entitled to interim benefits under § 39-71-610, MCA. Accordingly, this Court now enters the following:

ORDER

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

¶ 60 Because Rainey prevailed, he is entitled to his costs under § 39-71-611, MCA.

¶ 61 After awarding Rainey his costs, this Court will enter a final judgment.

DATED this 30th day of June, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Paul D. Odegaard
Charlie K. Smith

Submitted: May 12, 2021

[29] *Ness v. Anaconda Minerals Co*., 279 Mont. 472, 476, 929 P.2d 205, 208 (1996). *See also Daulton*, 2001 MTWCC 37, ¶ 33 (stating that, pursuant to *Wood*, an insurer must satisfy the *Coles* criteria "before terminating TTD benefits."); *Sears v. Travelers Ins*., 1998 MTWCC 12, ¶ 18 (citing *Ness v. Anaconda Minerals Co.*, 257 Mont. 335, 339-40, 849 P.2d 1021, 1023-24 (1993) (stating, "Non-compliance with the *Coles* criteria extends temporary total disability benefits **irrespective** of whether the claimant continues to meet the criteria for payment of such benefits.") (emphasis in original)).