IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 2

WCC No. 2004-1085

ROBERT PURKEY

Petitioner

vs.

AIG and LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondents/Insurers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant suffered a low-back injury in 2002 for which AIG was liable. He reached maximum medical improvement with respect to the injury and returned to his time-of-injury job on September 15, 2003. Shortly thereafter, he suffered a second, work-related aggravation of his low-back condition. Liberty Mutual was the insurer at the time but denied his claim for benefits because it was informed the claimant had failed to give his employer timely notice of the 2003 aggravation. The claimant then petitioned the Workers' Compensation Court seeking a determination that Liberty Mutual is liable for the aggravation and also seeking further temporary total disability benefits from AIG for an additional six-month period on account of its alleged failure to comply with section 39-71-609, MCA (2003), when converting his 2002 injury benefits from temporary total to permanent partial benefits.

Held:

(1) The claimant did not notify his employer of his 2003 aggravation within thirty days as required by section 39-71-603, MCA (2003), therefore, Liberty Mutual Fire Insurance Company is not liable for the aggravation.

(2) AIG complied with the requirements of section 39-71-609, MCA (2003), when converting the claimant's benefits from temporary total to permanent total. Even if it did not comply with the statute, the claimant's return to work two weeks later terminated his entitlement to any further temporary total disability benefits.

Topics:

Limitations Periods: Notice to Employer. A claim for benefits is barred where the claimant fails to give his or her supervisor or other manager notice of an industrial accident within thirty days following the accident. § 39-71-603(1), MCA (2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-603 (2003). A claim for benefits is barred where the claimant fails to give his or her supervisor or other manager notice of an industrial accident within thirty days following the accident. § 39-71-603(1), MCA (2003).

Benefits: Termination of Benefits. To terminate temporary total disability benefits and convert them to permanent partial disability benefits, an insurer must comply with section 39-71-609, MCA (2003), which requires a physician's determination that the claimant has reached maximum medical improvement, specification of his or her physical restrictions, and approval of his or her return to work based on a job analysis prepared by a vocational consultant, and further requires the insurer to furnish the claimant with a copy of the physician's determination. The job analysis requirement is satisfied where the evidence shows that even though the physician did not approve a time-of-injury job analysis in writing, both the physician and the claimant understood that the physician was approving a return to work in the time-of-injury job and the physician had previously reviewed the job analysis and was aware of the job requirements.

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Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-609 (2003). To terminate temporary total disability benefits and convert them to permanent partial disability benefits, an insurer must comply with section 39-71-609, MCA (2003), which requires a physician's determination that the claimant has reached maximum medical improvement, specification of his or her physical restrictions, and approval of his or her return to work based on a job analysis prepared by a vocational consultant, and further requires the insurer to furnish the claimant with a copy of the physician's determination. The job analysis requirement is satisfied where the evidence shows that even though the physician did not approve a time-of-injury job analysis in writing, both the physician and the claimant understood that the physician was approving a return to work in the time-of-injury job and the physician had previously reviewed the job analysis and was aware of the job requirements.

Benefits: Termination of Benefits. Even if an insurer fails to comply with the requirements of section 39-71-609, MCA (2003), when terminating temporary total disability benefits, its liability for such benefits ends upon a claimant's actual return to work since section 39-71-701(7), MCA (2003), expressly prohibits a claimant from receiving both wages and temporary total disability benefits unless the insurer expressly agrees.

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Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-609 (2003). Even if an insurer fails to comply with the requirements of section 39-71-609, MCA (2003), when terminating temporary total disability benefits, its liability for such benefits ends upon a claimant's actual return to work since section 39-71-701(7), MCA (2003), expressly prohibits a claimant from receiving both wages and temporary total disability benefits unless the insurer expressly agrees.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-701(7) (2003). Even if an insurer fails to comply with the requirements of section 39-71-609, MCA (2003), when terminating temporary total disability benefits, its liability for such benefits ends upon a claimant's actual return to work since section 39-71-701(7), MCA (2003), expressly

prohibits a claimant from receiving both wages and temporary total disability benefits unless the insurer expressly agrees.

¶1 The trial in this matter was held at the Richland County Courthouse in Sidney, Montana, on September 23, 2004. Petitioner, Robert Purkey, appeared in person and with his counsel, Mr. Norman L. Newhall. Respondent AIG was represented by Mr. Donald R. Herndon. Respondent Liberty Mutual Fire Insurance Company (Liberty Mutual) was represented by Ms. Carrie L. Garber.

¶2 Exhibits: Exhibits 1 through 61, 70, and 71 were admitted without objection. Page 2161 of Exhibit 80 was admitted; the remaining pages of exhibit 80 were withdrawn. There were no exhibits numbered 62 through 69 or exhibits numbered 72 through 79.

¶3 Witnesses and Depositions: Robert Purkey, Andrea Workman, Chris Stobb, Marvin L. Howe, Sharon Nelson, Mike Obergfell, and Kurt Koffler testified at trial. In addition, the parties submitted the depositions of Robert Purkey, Sharon Nelson, and Mike Obergfell to the Court for its consideration.

¶4 Post-trial Evidence: During trial the Court learned that some of the information from AIG's file had been redacted during discovery but that claimant's counsel had not been informed of the redaction. The Court ordered that AIG provide the claimant's counsel with a privilege log concerning the redaction and left the record open in the event that claimant's counsel might seek to compel disclosure of additional information and then seek to present additional evidence. The information the Court ordered AIG to provide was thereafter provided. That information did not lead to any additional discovery issues or evidence. The record was therefore deemed closed.

¶5 Issues Presented: The issues, as stated in the Pretrial Order, are as follows:

¶5a Whether Petitioner suffered a compensable injury to his back on or about September 21, 2003, while working for Sidney Sugars.

¶5b Whether Petitioner provided notice required by § 39-71-603, M.C.A., to his employer within 30 days of the date he contends he was injured on the job.

¶5c Whether the employer or the employer's agent had actual notice of the injury within 30 days.

¶5d Whether Petitioner is entitled to workers' compensation benefits from Liberty Mutual for the September 21, 2003 injury, including medical

benefits, wage loss benefits and any other benefits afforded under the Workers' Compensation Act.

¶5e Whether AIG complied with Section 39-71-609 for the conversion of wage loss benefits payable for the November 16, 2002 injury.

¶5f Whether Petitioner is entitled to wage loss benefits from AIG from and after August 29, 2003 for the November 16, 2002 injury.

¶5g Whether AIG acted unreasonably in refusing to pay wage loss benefits after August 29, 2003, such that Petitioner is entitled to attorney fees and penalty.

¶5h Whether Liberty Mutual acted unreasonably in denying liability for the September 21, 2003 injury, such that that [sic] Petitioner is entitled to attorney fees and penalty.

(Pretrial Order at pp. 2-3.)

¶6 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶7 On November 16, 2002, petitioner, Robert Purkey (claimant), injured his low back while working at the Sidney, Montana, sugar beet processing plant owned and operated by Sidney Sugars, Incorporated (Sidney Sugars). At the time of his injury, he was working as a "rock-and-coke loader," which was a seasonal job.

¶8 The claimant's job as a "rock-and-coke loader" involved his driving a front-end loader most of the day but he was also required to check and clean screens on the tops of bins and do some occasional shoveling.

¶9 At the time of the claimant's 2002 injury, Sidney Sugars was insured by AIG. On December 11, 2002, that insurer accepted liability for the injury.

¶10 The claimant's primary symptoms following his 2002 industrial injury were low-back and right leg pain. (Exs. 2, 7, 8, 18, and 20.) He was initially treated by Dr. O. Pete Council, a family practitioner.

¶11 The claimant was taken off all work on November 18, 2002, but then released to light duty on November 21, 2002. (Exs. 2 and 3.)

¶12 On December 4, 2002, the claimant was again taken off all work and referred by Dr. Council to Dr. Eugen J. Dolan, a neurosurgeon, for a consultation. (Ex. 7.) Dr. Dolan saw the claimant on December 9, 2002, and noted that a CT scan suggested spinal stenosis at the L3-4 and L4-5 levels. He recommended a trial of a Medrol Dosepak (a steroidal drug) but noted that if the claimant did not improve he should have an MRI. (Ex. 8.)

¶13 On February 5, 2003, Dr. Dolan again saw the claimant. He noted at that time that the claimant had been undergoing physical therapy and that his symptoms had "dramatically improved" and speculated that claimant could reach maximum medical improvement (MMI) in a month. (Ex. 10.) However, Dr. Dolan further noted that "[i]n view of his evidence of spinal stenosis and his age" even upon claimant's reaching MMI he would permanently restrict the claimant to standing and walking no more than four hours per day, to lifting no more than twenty pounds, and to lifting eleven to twenty pounds only occasionally. (*Id*.) These restrictions are incompatible with the claimant's time-of-injury job.

¶14 Following Dr. Dolan's February 5, 2003 report, AIG scheduled the claimant to see Dr. Gregg L. Singer, who is a physiatrist. By the time the claimant saw Dr. Singer on June 17, 2003, the claimant's back and leg pain had worsened in comparison to when he had last seen Dr. Dolan. (Ex. 18 at 1.) Dr. Singer recommended an MRI. (*Id*. at 3.) In responding to questions put to him by a rehabilitation counselor designated by AIG, Dr. Singer ruled out the claimant's return to his time-of-injury job and specifically noted the "permanent restrictions of 20 pounds lifting" placed on the claimant by Dr. Dolan. (Ex. 17.) His responses were sent directly to Andrea Workman (Andrea Workman or Workman), who was adjusting the claim for AIG. (*See id.*)

¶15 A lumbar MRI was done on June 18, 2003. It showed spinal stenosis, most remarkably at the L3-4 level, degenerative changes at multiple levels, and disk bulges at L4-5 and L5-S1. (Exs. 19-20.) Dr. Singer reviewed the MRI with Dr. Dolan and recommended treatment with a Medrol Dosepak and physical therapy. (Ex. 20 at 2.)

¶16 On July 2, 2003, the claimant's back and leg pain had improved remarkably. (Ex. 23 at 4.) Dr. Singer recommended that he continue with physical therapy and felt that if he continued to do well he would be at MMI in one month. (*Id*. at 5.) Meanwhile, Dr. Singer observed that Dr. Dolan's prior restriction to light-duty work was appropriate. (*Id*.) He reviewed and approved several light-duty jobs. (*Id*. at 2-3.) He disapproved the claimant's time-of-injury job, stating, "Mr. Purkey is not able to return to his time-of-injury position as a rock-and-coke loader per the job analysis that has been reviewed." (*Id*. at 3.)

¶17 The claimant continued to improve. In early August he received a "recall" notice from Sidney Sugars asking if he were interested in returning to work for the fall 2003 season. He replied that he was. (Ex. 26 at 1.)

¶18 On August 18, 2003, Dr. Singer again saw the claimant, who reported feeling "100% better" and that "[h]is back and leg are no longer bothering him." (Ex. 28 at 1.) Dr. Singer attributed the improvement in large part to the Medrol Dosepak. (*Id*.) He found the claimant to be at MMI, rated his impairment at ten percent, and released him to full-time work at medium duty, approving his lifting of up to fifty pounds. (*Id*. at 2 and Ex. 29 at 2.) However, he also noted:

> I explained to Mr. Purkey that he can expect to have episodes of discomfort. He may wish to try another Medrol Dosepak in the future if he can be seen by a local physician. I would be happy to see him here in the future if needed.

(Ex. 28 at 2.)

¶19 At the time he saw Dr. Singer on August 18, 2003, the claimant believed he was able to return to work and told Dr. Singer so. He testified that he specifically discussed his job duties with Dr. Singer and told him that he mostly drove a front-end loader but did some shoveling. The claimant's own testimony shows that both he and Dr. Singer understood that Dr. Singer was releasing him to return to work at his time-of-injury job, and that the claimant wanted that release. Moreover, a subsequent September 9, 2003 FAX communication from the claimant's then attorney, Mr. Marvin L. Howe (Marvin Howe or Howe), indicates that his attorney understood that Dr. Singer was releasing the claimant to his time-of-injury job. (Ex. 34.) The claimant's own testimony indicated that his normal job duties were within the fifty pound lifting limitation imposed by Dr. Singer and that he was not misled by Dr. Singer, AIG, or Sidney Sugars when returning to work.

¶20 On August 18th Dr. Singer did not specifically review and approve a time-of-injury job analysis prepared by a rehabilitation provider. In fact, he had previously received such analysis (Ex. 14 at 1-2, 97-102), and disapproved it on July 2, 2003 (Ex. 23 at 3). It was not until February 5, 2004, that Dr. Singer gave his written approval to the same job description, an approval that he indicated was effective as of August 18, 2003. (Exs. 44 and 45.) However, Dr. Singer had reviewed the job description previously in early July and was therefore aware of the analysis and job requirements when he released the claimant to return to work on August 18, 2003.

¶21 The job description was **not** materially inaccurate as now alleged by the claimant. Moreover, the claimant discussed his time-of-injury job with Dr. Singer and felt capable of returning to it; neither he nor Dr. Singer were misled by the job description.

¶22 On August 27, 2003, AIG notified the claimant in writing that it was terminating his temporary total disability (TTD) benefits as of August 29, 2003, and commencing payment of permanent partial disability (PPD) benefits based on a ten percent impairment rating on that date. (Ex. 32.) At trial, the claimant admitted receiving a copy of Dr. Singer's August 18, 2003 report in conjunction with the notice.

¶23 The termination notice drew a protest by the claimant's then attorney, Marvin Howe, but only because the claimant was not going to return to work until September 15, 2003; Howe requested that TTD benefits be paid up to that date. (Ex. 34.) He did not contest the claimant's ability to return to work or challenge the adequacy of AIG's notice.

¶24 In fact, the claimant did return to work at Sidney Sugars on September 15, 2003.
¶25 On September 21, 2003, the claimant assisted in an attempt to put a heavy scale back on its base. He was not instructed to do so. Rather, he saw Kurt Koffler (Koffler), a fellow employee, using a pry bar while trying to reposition the scale. (Purkey Dep. at 26.) After observing Koffler struggle for a short while, the claimant got another pry bar and started prying on the scale along with Koffler. (*Id*.)

¶26 By the claimant's own admission, no specific incident occurred while he was using the pry bar. However, shortly thereafter he began having back pain similar to what he had previously experienced. Within five minutes after the pain started he knew it was not going to go away.

¶27 The claimant testified that shortly thereafter he told Mike Obergfell (Mike Obergfell or Obergfell) that he hurt his back and would not be in the following day because he would have to see a doctor. The claimant alleges that Obergfell was a supervisor and that his report to Obergfell constituted notice to the employer within the meaning of section 39-71-603, MCA (2003).

¶28 I am unpersuaded that the claimant in fact reported any injury or his need to see a doctor to Obergfell. Obergfell denied that the claimant ever reported any injury to him and I found his testimony to be credible. I note that the claimant admitted that he did not tell his designated supervisor, Steve Arnold (Steve Arnold or Arnold), of the accident even though he met with Arnold within an hour or so after the alleged incident. (Purkey Dep. at 37; Tr. Test.) According to the claimant, he "trusted" Mike Obergfell to tell Arnold of the incident. (Purkey Dep. at 37.) I did not find claimant's explanation credible, and find that claimant plainly knew that his designated supervisor was Arnold. Moreover, claimant testified that he was in significant pain when he met with Arnold that afternoon (id.), which was all the more reason for him to report the incident rather than remaining silent.

¶29 Further, even if the claimant reported an injury to Obergfell, the claimant admitted, as I have already noted, that his designated supervisor was always Steve Arnold. Obergfell worked as an "extra-station" employee, a job which entailed checking to see that work at the plant was timely completed; he also performed actual labor. (Obergfell Dep. at 5.) If he found tasks had not been timely completed, he asked the employees responsible for the tasks to complete them or reported to Steve Arnold, who had the authority to order the work done. (*Id*. at 6.) He reported directly to Arnold, as did the claimant. He was a union member. (*Id*. at 5.)

¶30 The claimant has presented no evidence of any other report to any supervisor within thirty days after September 21, 2003. He did attempt to piece together bits of evidence in

an attempt to persuade me that Sidney Sugars and its supervisors in fact were aware of the September 21st incident and aggravation, but I am unpersuaded. The cloth he weaves through the bits and pieces is simply too threadbare to be persuasive, especially as against the direct and credible testimony of Andrea Workman, Sharon Nelson (Sharon Nelson or Nelson), and Mike Obergfell denying any knowledge of claimant reinjuring his back.

¶31 The claimant continued working on September 21st and was involved in another, non-injury accident when he drove his front-end loader into some doors. According to the claimant, Steve Arnold suspended him for two days, but then terminated his employment. However, his personnel file indicates that his termination was effective the next day, September 22, 2003, and that on that day he acknowledged the termination in a written Notice of Disciplinary Action placed in his personnel file. (Ex. 38 at 2.)

¶32 The claimant's termination was reported to Andrea Workman, AIG's adjuster, on September 22, 2003.

¶33 On September 26, 2003, the claimant went to see Dr. Council. Dr. Council's office contacted Sharon Nelson, the Employee Relations Coordinator for Sidney Sugars, to advise that the claimant had come in for back pain; Dr. Council's office staff asked where they should send his bill for the visit. (Nelson Tr. Test and Exs. 43 at 2 and 59 at 2.) It is not clear from the record what Nelson replied, although it is clear that Sidney Sugars did not accept responsibility for the billing. Lacking the identification of a party responsible for payment, Dr. Council apparently declined to see the claimant.[1]

¶34 The claimant's request to see Dr. Council for back pain was reported by Sharon Nelson to Andrea Workman on September 29, 2003. Workman made a note summarizing the phone call:

> They advised receipt of phone call from Dr. Council's office advising claimant had come in with back pain and Council's office wanted to know where they should send the bill. Employer advised them the claimant was no longer working there. I advised claimant was MMI from our injury, was released to return to work and did return to work, impairment was paid in full. If he sustained a new injury, he should file a claim with their new insurer. Advised them if claimant contacts me, that's what I would relay to him.

(Ex. 59 at 2.)

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[1]Andrea Workman had a telephone conversation with Sharon Nelson on September 29, 2003, and her note of the conversation indicates that Nelson related that she had told Dr. Council's office that the claimant was no longer employed by Sidney Sugars.

¶35 Workman testified that she specifically asked Nelson if the claimant had sustained a new injury and that Nelson had replied that Sidney Sugars was unaware of any new injury. Workman conceded that she had **no** information indicating that the claimant had reinjured or aggravated his back injury. She only knew that he was suffering from renewed back pain.

¶36 The claimant did telephone Workman sometime after September 21st but Workman was unavailable. He left a message on her answering machine saying he wanted to talk to her. She unsuccessfully attempted to call him back but testified that she would have only told him that he had to contact his attorney, Marvin Howe, and communicate with her through Howe.

¶37 Following his failure to obtain treatment from Dr. Council, claimant contacted Howe, who was still representing him at the time. On October 1, 2003, Howe faxed a letter to Andrea Workman. (Ex. 80.) In that FAX, Howe wrote:

> Dear Andrea:
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> As you are probably aware, when my client was first injured he saw Dr. Council in Sidney. Due to the extent of his back injury, Dr. Council referred Mr. Purkey to Dr. Gregg Singer. Later, Dr. Singer referred my client to Dr. Rosen. When my client last saw Dr. Rosen, Dr. Rosen indicated to him that he should follow up with Dr. Council regarding further treatment, pain medications, etc. Recently, my client attempted to see Dr. Council, but he was informed that he needed to get the insurer's okay first. Will you please authorize my client to continue to see Dr. Council? I believe that this is only fair and reasonable in view of the distances involved. In fact, most of my clients in Eastern Montana, who have treating physicians in Billings, are allowed to see local doctors for follow up on renewal of pain medications or other injury-related problems.
>
> Please let me know your answer as soon as possible.
>
> Thank You,
> /s/ Marvin L. Howe

(Ex. 80.)

¶38 It is noteworthy that Howe's FAX did not mention any new accident. The message implicitly indicates that the treatment sought by the claimant was with respect to back pain stemming from his 2002 injury, not from some new injury or aggravation. Marvin Howe is an experienced workers' compensation attorney and testified in this matter but was precluded from testifying as to his communications with his client. Even so, in light of his experience and the notorious rules governing subsequent aggravations of preexisting conditions, I find it unlikely that he was aware of any work-related incident or aggravation on September 21, 2003. His lack of awareness is consistent with the claimant's failure to report any injury or incident to his employer on September 21st.

¶39 Workman did not contact Howe in follow-up to his FAX, nor did she authorize the claimant to see a physician for his back pain. She also did not ask Sidney Sugars to do any follow-up investigation to determine if the claimant had suffered a new injury or aggravation. Rather, she contacted counsel for AIG to ask for direction. **At the time of Workman's request for legal direction, she had no information indicating that the claimant had suffered a new injury or aggravation.**

¶40 On or about October 21, 2003, counsel for AIG wrote a memo indicating that she had "written to Claimant's attorney . . . regarding the request for Claimant to see Dr. Council." (Ex. 54 at 4.) In that memo she also wrote, "[i]t is unclear if Claimant is seeking treatment for a flare up or if an event has occurred which constitutes an aggravation or new injury." (*Id*.) At the time of the inquiry, AIG's counsel **had no information indicating that the claimant had suffered a new injury or aggravation.**

¶41 There is no indication that the request was sent earlier than October 21st or that the claimant's counsel received the inquiry prior to October 22nd, which was thirty-one days after the September 21st pry-bar incident.

¶42 As noted earlier, the claimant was unable to see Dr. Council on September 26, 2003, because AIG did not authorize the visit. Ultimately, he returned to Dr. Dolan on February 25, 2004. Dr. Dolan found at that time that the claimant's symptoms after September 21, 2003[2] "are exactly the same, with the same distribution, as the symptoms of his previous injury." (Ex. 57 at 32.) Nonetheless, he opined that the claimant suffered an aggravation on September 21st.[3]

¶43 Both AIG and Liberty Mutual denied liability for the claimant's post-September 21st back condition. Liberty Mutual denied liability on account of the claimant's failure to report the September 21st pry-bar incident to his employer within thirty days as required by section 39-71-603, MCA (2003). AIG denied liability based on the claimant's reaching MMI prior to September 21st and then suffering a new work-related aggravation to his back.

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[2]Dr. Dolan's office note refers to September 22, 2003, as the date of the pry-bar incident, however, the parties and the Court agree that the incident occurred on September 21, 2003.

[3]See footnote 2.

CONCLUSIONS OF LAW

¶44 The claim with respect to AIG is governed by the 2001 version of the Montana Workers' Compensation Act, while the claim against Liberty is governed by 2003 laws since those laws were in effect at the time of the claimant's respective industrial accidents. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶45 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Ricks v. Teslow Consol.,* 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶46 The claimant reached MMI on August 18, 2003. After that date, AIG was not liable for any new work-related injury to the claimant's back or for any work-related material aggravation of his preexisting back condition. *Belton v. Carlson Transp.,* 202 Mont. 384, 658 P.2d 405 (1983); *Kelly v. State Compensation Mut. Ins. Fund,* 254 Mont. 200, 835 P.2d 774 (1992).

¶47 The claimant urges, however, that AIG is liable for TTD benefits for the period between August 28, 2003, and February 27, 2004, because it failed to completely comply with section 39-71-609(2), MCA (2003) until the latter date. (Claimant's Proposed Conclusions of Law numbers 4 through 6, especially number 5.) The subsection provides:

> (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:
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> (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.

§ 39-71-609(2), MCA (2003). Only compliance with subsection (c) is at issue since Dr. Singer found the claimant at MMI on August 18, 2003, and listed the claimant's physical restrictions, thus complying with subparagraphs (a) and (b). AIG also provided claimant

with a copy of Dr. Singer's August 18th report, thus complying with subsection (d). I further find and hold that subsection (c) was satisfied. While he did not formally sign the time-of-injury job analysis on August 18th, Dr. Singer had previously reviewed the job analysis, albeit disapproving it upon that prior review, and was therefore aware of the analysis and claimant's job duties when he approved the claimant's return to work in his time-of-injury job. TTD benefits were properly terminated by AIG.

¶48 Moreover, even if AIG failed to technically comply with the requirements of section 39-71-609(2), MCA (2003), the claimant would be entitled only to TTD benefits through September 14, 2003. That is because he in fact returned to work on September 15, 2003. Section 39-71-609(1), MCA, expressly provides that benefits may be immediately terminated without any sort of notice upon a worker's actual return to work, providing in relevant part, "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." AIG was aware claimant returned to work prior to September 21, 2003. Moreover, a worker is prohibited from receiving TTD benefits while working. § 39-71-701(7), MCA (2003), provides:

> (7) A worker may not receive both wages and temporary total disability benefits without the written consent of the insurer. A worker who receives both wages and temporary total disability benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.

¶49 I turn to whether Liberty Mutual is liable for the September 21, 2003 aggravation. It has denied liability based on section 39-71-603(1), MCA (2003), which provides:

> **Notice of injuries other than death to be submitted within thirty days**. (1) A claim to recover benefits under the Workers' Compensation Act for injuries not resulting in death may not be considered compensable unless, within 30 days after the occurrence of the accident that is claimed to have caused the injury, notice of the time and place where the accident occurred and the nature of the injury is given to the employer or the employer's insurer by the injured employee or someone on the employee's behalf. Actual knowledge of the accident and injury on the part of the employer or the employer's managing agent or superintendent in charge of the work in which the injured employee was engaged at the time of the injury is equivalent to notice.

The only notice the claimant asserts he gave to a supervisor within the thirty-day period was to Mike Obergfell. I have found as a matter of fact that even if Obergfell was his supervisor, which he was not, the claimant did not in fact inform him of any injury or accident. Moreover, I am unpersuaded that any person working in a supervisory capacity for Sidney Sugars, including Obergfell if he were to be considered a supervisor, was aware

of any accident or injury within thirty days of September 21, 2003. Therefore, the claim against Liberty Mutual is barred under section 39-71-603(1), MCA (2003).

¶50 In reaching my decision, I note that AIG's handling of the claimant's request to seek medical care shortly after the September 21st incident was unreasonable and that had AIG acted promptly in investigating the request it is likely that notice of the September 21, 2003 aggravation would have been provided to Sidney Sugars within the thirty days as required in section 39-71-603, MCA (2003). AIG's adjuster, without any information whatsoever indicating that the claimant had suffered a new injury, refused to authorize medical treatment requested on September 26th and again on October 1, 2003. She asked the employer if it was aware of any new accident and received a reply in the negative. She could have specifically requested an interview of the claimant through his attorney or asked his attorney if the claimant had suffered a new accident; she did neither. She did no investigation whatsoever. Instead, she booted the matter to counsel, thus delaying any investigation and assuring that any evidence of a subsequent injury would not be uncovered until the thirty-day notice period had expired.

¶51 An insurer has a duty to promptly and reasonably investigate claims for benefits. *Stevens v. State Compensation Mut. Ins. Fund,* 268 Mont. 460, 466, 886 P.2d 962, 966 (1994). The duty extends to a decision to reduce or terminate benefits with respect to an accepted claim, *Lovell v. State Compensation Mut. Ins. Fund,* 260 Mont. 279, 288-89, 860 P.2d 95, 101-102 (1993), and by analogy to any denial of particular benefits with respect to an accepted claim. The duty is one which the insurer owes directly to the claimant. Indeed, section 39-71-2203, MCA (2003), which governs workers' compensation insurers, including AIG, provides in relevant part:

> **Content of policies – policies subject to approval, change, or revision by department.** (1) All policies insuring the payment of compensation under this chapter must contain . . . .
>
> (2) **No such policy shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation all the installments of compensation** or other payments in this chapter provided for and that the obligation shall not be affected by any default of the insured after the injury or by any default in the giving of any notice required by such policy or by this chapter or otherwise. **Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation.**
>
> (3) Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that **the insurer shall be directly and primarily liable to and will**

> **pay directly to the employee** or in case of death to his beneficiaries or major or minor dependents, the compensation, if any, for which the employer is liable.

§ 39-71-2203, MCA (2003) (emphasis added).

¶52 AIG's failure to investigate is especially egregious in light of the specific medical information its adjuster had concerning the likelihood that the claimant would suffer a relapse of symptoms from his original 2002 injury (¶ 18), and in light of Dr. Dolan's admonition early on that the claimant should never return to his time-of-injury job (¶ 13). With this information, the adjuster was aware that even though the claimant had reached MMI, AIG should anticipate flare-ups in the future for which it would be liable. On September 26, 2003, the claimant was requesting acute care for his back. AIG's adjuster had a duty to either immediately authorize the care or immediately investigate the request to determine liability. She did neither.

¶53 However, despite AIG's unreasonable conduct and the likelihood that diligent investigation on its part would have resulted in timely notice to the employer concerning the September 21st aggravation, I cannot consider whether AIG might be liable to the claimant for the September 21st aggravation on account of its conduct. I am limited to considering issues raised in the Pretrial Order. While those issues must be liberally construed, a particular issue must at least be fairly implicit within the broader ones stated in the Pretrial Order:

> [A] failure to raise an issue in the pretrial order may result in a waiver. *Har-Win, Inc. v. Consolidated Grain & Barge Co*. (5th Cir. 1986), 794 F.2d 985; *Miles v. Tennessee River Pulp & Paper Co.* (11th Cir. 1989), 862 F.2d 1525. The purpose of the pretrial order is to prevent surprise, simplify the issues, and permit the parties to prepare for trial. Bache v. Gilden (1992), 252 Mont. 178, 181-82, 827 P.2d 817, 819. However, this Court said in *Bell v. Richards* (1987), 228 Mont. 215, 217, 741 P.2d 788, 790, that the pretrial order "should be liberally construed to permit any issues at trial that are 'embraced within its language.' " (Quoting *Miller v. Safeco Title Ins. Co.* (9th Cir. 1985), 758 F.2d 364, 368.) **But the theory or issue must be at least implicitly included in the pretrial order.** *United States v. First Nat'l Bank of Circle* (9th Cir. 1981), 652 F.2d 882, 886; *ACORN v. City of Phoenix* (9th Cir. 1986), 798 F.2d 1260, 1272.

Nentwig v. United Indus., Inc., 256 Mont. 134, 138-39, 845 P.2d 99, 102 (1992) (emphasis added). The only contention advanced by the claimant against AIG is with respect to the sufficiency of its notice of termination of TTD benefits and conversion to PPD benefits. *See* issues stated at paragraphs 5e and 5f herein. Indeed, in his Proposed Findings of Fact and Conclusions of Law, claimant's request for reinstatement of TTD benefits from AIG is limited to TTD benefits for the period from August 29, 2003, until February 27, 2004, when he concedes that AIG complied with section 39-71-609, MCA (2003). (Proposed

Conclusions of Law numbers 4 through 6, especially number 5.) The claimant has not sought indemnity benefits from AIG for any period after February 27, 2004, or any further medical benefits from AIG. He has not contended that AIG is liable for his back condition after the September 21st aggravation, and no amount of liberal construction of the pretrial issues will allow him to do so now.

¶54 Since neither AIG nor Liberty Mutual are liable for the benefits requested by claimant, claimant is not entitled to attorney fees or a penalty from either insurer.

JUDGMENT

¶55 AIG is not liable to the claimant for further TTD benefits and the petition against it is **dismissed with prejudice**.

¶56 Liberty Mutual is not liable to the claimant on account of any injury or aggravation the claimant suffered on or about September 21, 2003, while working for Sidney Sugars, and the petition against it is **dismissed with prejudice**.

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

¶58 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 13th day of January, 2005.

(SEAL)

/s/ MIKE McCARTER
JUDGE

c: Mr. Norman L. Newhall
Mr. Donald R. Herndon
Ms. Carrie L. Garber
Submitted: September 23, 2004