IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 18

WCC No. 2018-4395

TIM CLARK

Appellee/Claimant

vs.

ARCH INSURANCE COMPANY

Appellant/Insurer.

ORDER AFFIRMING DEPARTMENT OF LABOR & INDUSTRY'S
ORDER GRANTING INTERIM BENEFITS

Summary: Appellant appeals from a Department order granting Appellee's petition for interim TTD benefits under § 39-71-610, MCA.

Held: The Department's order is affirmed. Appellant did not demonstrate that the Department erred in awarding interim benefits, and Appellee presented substantial evidence to establish a *prima facie* case for interim TTD benefits.

¶ 1 Appellant Arch Insurance Company (Arch) appeals an order from the Department of Labor & Industry (Department) granting Appellee/Claimant Tim Clark (Clark) interim temporary total disability (TTD) benefits under § 39-71-610, MCA. Clark argues this Court should affirm.

Facts and Procedural History

¶ 2 This Court takes the following facts and procedural history from correspondence between the parties' attorneys, correspondence between Coventry's nurse case manager and Clark, and Clark's medical records.

¶ 3 On October 31, 2017, Clark was injured in the course of his employment with Riverside Contracting. During the accident in which Clark rolled a semitrailer, he sustained a blow to his head and lost consciousness.

¶ 4 Following the accident, Clark remained employed and worked his assigned shifts. However, Clark experienced numerous near accident situations.

¶ 5 On December 6, 2017, Paul Johnson, MD, diagnosed Clark with a mild traumatic brain injury. Dr. Johnson noted that Clark was suffering from increased levels of anxiety, memory loss, attention disorder, headaches, restlessness, and outbursts of anger. Dr. Johnson took Clark off work shortly thereafter.

¶ 6 Thereafter, Clark underwent a course of physical therapy and prescription medications.

¶ 7 On May 31, 2018, Clark had an appointment with Dr. Johnson. Dr. Johnson noted that Clark "seems to have gotten worse." Dr. Johnson also noted that Clark "feels very unsafe and unsure of himself been having lots of anxiety if he was to make a mistake at work and hurt somebody." Dr. Johnson noted, "Patient's anxiety and anger are of a big concern at this point. His sleep disturbance is affecting his quality of life. Patient has significant anxiety in regards to returning to work and would almost seem like posttraumatic stress disorder." Dr. Johnson filled out a Medical Status Form in which he released Clark to "light duty driving" but stated that Clark could not do "big rig" or "equipment" driving.

¶ 8 After this appointment, Dr. Johnson met with Clark, Clark's attorney, and Candi Krezelak, RN, nurse case manager for Arch. Krezelak sent an email in which she summarized what Dr. Johnson said during this meeting. Krezelak reported that Dr. Johnson stated Clark had a traumatic brain injury and was still suffering from high levels of anxiety, depression, anger, headaches, irritability, and memory loss. Krezelak also stated that Dr. Johnson referred Clark for a neuropsychological examination and to a neurologist.

¶ 9 At the end of her email, Krezelak included a message from Clark's employer stating that it had a light-duty job for Clark, that being operating a power broom on highway construction. The employer stated it was an "easy job" with no big trucks or big equipment and that Clark would move from project to project.

¶ 10 On June 5, 2018, Krezelak sent Dr. Johnson a Job Analysis (JA) for the power broom operator position and asked whether Clark could perform this job. In general, the JA states that the job entails driving a pickup truck pulling a trailer loaded with a power broom, unloading the power broom to sweep the highway of loose gravel, and driving to the next project. On June 26, 2018, Dr. Johnson approved the JA.

¶ 11 However, following a June 28, 2018, appointment with Clark, Dr. Johnson filled out a Medical Status Form in which he wrote that Clark was not released to perform "out of town work" and could only work "local" jobs. Moreover, Dr. Johnson wrote, "no heavy machinery."

¶ 12 Dr. Johnson also answered questions from Krezelak. Dr. Johnson stated his diagnosis was post concussive syndrome, mild traumatic brain injury and that Clark was still suffering from anxiety, disturbed sleep, mood change, and outbursts of anger. Dr. Johnson said he was "unsure" when Clark would reach MMI or return to full duty, and stated that determination would be made after referrals to counseling, neurology, and a neuropsychologist. Dr. Johnson also stated that "local light duty work may help." Dr. Johnson stated he would like to see Clark again "after all referrals."

¶ 13 On July 6, 2018, Krezelak asked Dr. Johnson to clarify what he meant in a previous Medical Status Form by "light duty driving," and if Clark was limited to a certain distance he could drive. Dr. Johnson responded, "sweeper, regular pick-up truck, etc. No limit to hours worked. No out of town overnight work." When asked for the medically objective rationale behind the out-of-town restriction, Dr. Johnson wrote "patient stated when he could do light work[,] 'I fucking ain't going out of town to work!' " Dr. Johnson also referred Clark for behavioral health counseling.

¶ 14 On July 13, 2018, Krezelak notified Clark's counsel of another available job, this time as a "parts runner." Although Krezelak stated the job was "in Great Falls," she thereafter clarified that the job required Clark to drive to Bynum, which is more than 60 miles from Great Falls.

¶ 15 On July 27, 2018, Arch's attorney sent an email to Clark's attorney, stating, *inter alia*, "The employer has alternative duty available for Mr. Clark within Dr. Johnson's restrictions. The work is within the local area and does not require him to be out of town overnight."

¶ 16 Clark's counsel responded with an email stating, *inter alia*, "Our understanding about the 'in town' job is that it involves driving all day to distant locations to deliver parts and returning home the same day. Tim does not think that he is able to drive that much. Please provide the proof from Dr. Johnson that Tim can drive that much for Tim's immediate review."

¶ 17 On August 1, 2018, Arch sent Clark a letter stating that his employer "again" had work available as a power broom operator and instructed Clark to contact his employer "to discuss the date you will be returning to work." Arch also notified Clark that since he had been released to light duty and since his employer "has work for you within your restrictions, you are no longer entitled to TTD benefits." Thus, Arch advised it was terminating his temporary total disability (TTD) benefits.

¶ 18 On August 17, 2018, Clark petitioned the Department to issue an order awarding interim benefits pursuant to § 39-71-610, MCA.

¶ 19 On August 30, 2018, the Department granted Clark's request for interim benefits.

¶ 20 On September 7, 2018, Arch filed a Notice of Appeal of the Department Order pursuant to ARM 24.5.314.

¶ 21 Neither party requested a formal evidentiary hearing under ARM 24.5.314(2). Thus, on October 5, 2018, this Court convened an informal telephone conference and heard argument pursuant to ARM 24.5.314(1).

Law and Analysis

¶ 22 This case is governed by the 2017 version of the Montana Workers' Compensation Act (WCA) because that was the law in effect at the time of Clark's injury.[1]

¶ 23 Appeals from Department findings regarding interim benefits under § 39-71-610, MCA, are subject to *de novo* review by this Court.[2] This Court considers four factors to determine if a claimant is entitled to interim benefits under the statute: (1) Was liability accepted for the claim? (2) Were benefits paid, especially for a significant time period? (3) Has the claimant demonstrated that he will suffer significant financial hardship if interim benefits are not ordered? (4) Has the claimant tendered a strong *prima facie* case for reinstatement of the benefits he seeks?[3] To tender a strong *prima facie* case, a claimant need not prove that he is entitled to TTD benefits, but need only tender substantial evidence which, if believed, would entitle him to TTD benefits.[4] Thus, the role of a § -610 hearing is "only to determine whether sufficient circumstances exist to warrant an order that the insurer pay [interim] benefits."[5]

¶ 24 Arch concedes that Clark meets the first three factors to determine if a claimant is entitled to interim benefits, but argues that Clark has not tendered a strong *prima facie* case for reinstatement of his TTD benefits. Arch argues that Clark is not entitled to TTD benefits under § 39-71-701(4), MCA, because his treating physician has released him to return to a modified or alternative position that he is able and qualified to perform with the same employer and he unilaterally refuses to accept the modified or alternative position. Arch cites *Osborne v. Planet Ins. Co.*, where this Court explained:

> The clear purpose of section 39-71-710[sic](4), MCA, is to return the worker to employment as soon as possible. To promote that purpose the legislature made a specific provision for termination of temporary total

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

[2] *Hartford Fire Ins. Co. v. Hostetter*, 2013 MTWCC 14, ¶ 2 (citing *Smith v. State Comp. Ins. Fund*, 2000 MTWCC 9, ¶ 20).

[3] *Mont. Health Network v. Graham*, 2002 MTWCC 61, ¶ 5 (citation omitted).

[4] *Mont. Health Network*, ¶ 6.

[5] *New Hampshire Ins. Co. v. Matejovsky*, 2015 MTWCC 15, ¶ 21 (quoting *Schneider v. Liberty Northwest Ins*. Corp., 2000 MTWCC 18A, ¶ 4).

> disability benefits where the employer offers the injured worker a modified or alternative job at full wages and the worker's treating physician approves the worker's return to work. The statute does not excuse a worker from returning to work even though the worker believes that he or she is unable to work. While the worker may refuse to return to work, the consequence of such refusal is no job and no benefits. The worker who attempts to return to work and who genuinely cannot perform the job because of his or her injury can of course seek reevaluation by his or her treating physician, who may then determine that the worker is not capable of doing the job and thereby rescind the release.[6]

Arch maintains that there is no objective medical reason why Clark cannot return to work at either of the alternative jobs offered by his employer, and that his refusal to do so is based solely on his lack of desire to work.

¶ 25 Clark asserts the Department correctly approved his request for interim TTD benefits and that this Court should affirm that decision on appeal because he has demonstrated a strong *prima facie* case. Clark contends that there is no objective medical evidence supporting Arch's position that he could return to work in the modified positions offered by his employer. Instead, Clark argues Dr. Johnson's restrictions prohibit him from completing the job requirements of the parts runner and the power broom operator because he cannot work out of town.

¶ 26 This Court agrees with Clark because there are too many inconsistencies and ambiguities in the restrictions Dr. Johnson placed on Clark for this Court to determine if Dr. Johnson released Clark for the power broom operator or parts runner positions. Dr. Johnson was given a JA of the power broom operator job and approved Clark for the position on June 26, 2018. But, in his Office Visit notes from June 28, 2018, Dr. Johnson stated that Clark "may do light duty such as regular sized vehicle. He can do work within the region. No overnight travel." And, Dr. Johnson filled out a Medical Status Form that day, writing that Clark may do "light duty driving" in a "local" job but that he was prohibited from work using "heavy machinery" and was not permitted to work out of town. Dr. Johnson also stated that local, light-duty work may help. The following week, Dr. Johnson slightly changed Clark's work restrictions. Krezelak sent Dr. Johnson a note asking him to "clarify light duty driving" and to state his position on whether Clark had any time- or distance-based restrictions. Dr. Johnson responded: "sweeper, regular pick-up truck, etc. No limit to hours worked. No out of town overnight work."

¶ 27 This Court can discern that Dr. Johnson thinks Clark can drive a car or a pickup truck in the area in and around Great Falls and operate some machinery. But, because of the lack of specificity, this Court cannot determine what Dr. Johnson considers to be Clark's limits. This Court does not know what Dr. Johnson considers to be "light duty

[6] 1994 MTWCC 74A-2 at 15-16 .

driving"; i.e., is it the type of vehicle, the distance and duration, the type of road, or a combination of these factors? This Court also does not know what Dr. Johnson considers to be the "local" Great Falls' "region"; i.e., does the Great Falls' region extend 15, 25, 50, 75, or 100 miles or more out of Great Falls?

¶ 28 Under § 39-71-701(4), MCA, a worker loses eligibility for TTD benefits when the worker's physician releases the worker to "return to the same, a modified, or an alternative position" with an equivalent or higher wage. Arch is correct that this Court does not require a treating physician to approve a JA for a modified job or for light duty under § 39-71-701(4), MCA.[7] However, the treating physician must have sufficient information about the position for this Court to conclude that the physician actually approved it. In other words, if a treating physician approves a JA that lacks specificity in location, frequency and duties, the approval is meaningless when determining what kind of employment a worker has been released to perform. While Dr. Johnson approved the power broom position, the JA did not say where Clark was going to perform the work and there is no evidence that Arch informed Dr. Johnson where the work was going to be. Thus, this Court cannot determine that Dr. Johnson approved the actual position.

¶ 29 If the treating physician does not approve an actual job, he must give specific restrictions that clearly describe what a worker can and cannot do in the worker's modified duty. Since this Court does not know what Dr. Johnson meant by "light duty driving" or by "local" work or "work within the region," it cannot determine whether the power broom operator position or the parts runner position are actually within the restrictions Dr. Johnson has placed upon Clark. As for the parts runner position, this Court does not know if Dr. Johnson considers a 66-mile drive to Bynum, which is mostly on a two-lane highway, to be "light duty driving" or a job within the Great Falls' "region." Moreover, this Court does not know how often Clark's employer expected him to make the drive from Great Falls to Bynum and, if Clark's employer expected him to make the trip several times per day, whether Dr. Johnson would consider that "light duty driving." Likewise, as set forth above, there is no indication in the record where Clark's employer was going to send him to operate the power broom and, at the hearing, Arch's attorney admitted that Arch did not know the locations. Because the evidence is insufficient to show that Dr. Johnson released Clark to perform the actual duties of either the power broom operator or the parts runner positions, this Court determines that Clark set forth a *prima facie* case for reinstatement of his TTD benefits.

¶ 30 As a final point, Arch makes a great deal out of the fact that Clark swore when he emphatically told Dr. Johnson that he was not going out of town to work. Arch argues that this proves that Clark simply does not want to work. However, Clark's outburst is insufficient to prove that contention. The record establishes that Clark has a brain injury, the symptoms of which include anger, irritability, and anxiety about returning to work. Dr. Johnson has referred Clark to specialists, thereby indicating that Dr. Johnson is

[7] *See, e,g.*, *Larson v. Liberty Northwest Ins. Corp.,* 2017 MTWCC 15, ¶ 25.

convinced that Clark needs treatment beyond which he provides. On this record, this Court is not convinced that Clark does not want to work.

¶ 31 This Court does not condone an injured worker unilaterally refusing to return to work and has ruled that a claimant who does so is not entitled to ongoing TTD.[8] But, there must be sufficient evidence that a worker is in fact rejecting employment to which his treating physician has released him. Here, Clark made a *prima facie* case by showing that Dr. Johnson did not have sufficient knowledge of the parts runner or power broom operator positions to make informed decisions as to whether Clark could perform those jobs, and the restrictions placed on Clark were vague. Thus, the Department's decision to award interim benefits was correct under the WCA.

¶ 32 Accordingly, this Court enters the following:

ORDER

¶ 33 The Department's Order granting interim benefits under § 39-71-610, MCA, is **affirmed**.

¶ 34 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 18th day of October, 2018.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Thomas J. Murphy
Joe C. Maynard

Submitted: October 5, 2018

[8] *See, e.g.*, Larson, ¶ 29.