

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 43

WCC No. 2005-1300

DELORES CHOI

Petitioner

vs.

COSTCO WHOLESALE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant seeks temporary total disability benefits, claiming she cannot work on account of pain. She also seeks authorization for a medical procedure recommended by her neurologist.

Held: The claimant quit working on account of conflict with her employer and the emotional stress arising from that conflict, not on account of pain as she now claims. Her pain does not prevent her from working at her time-of-injury job and she is not entitled to TTD benefits. Her request for authorization for the medical procedure is moot since the insurer has now authorized it.

Topics:

Benefits: Temporary Total Benefits. To be entitled to temporary total disability benefits, an injured worker must prove that she has suffered a total loss of wages on account of her industrial injury. Where the loss of wages is due to factors unrelated to the injury and the injury does not preclude her from working at her time-of-injury job, the claimant is not entitled to temporary total disability benefits.

¶1 The trial in this matter was held in Kalispell, Montana, on June 21, 2005. The petitioner was present and represented by Mr. David W. Lauridson. The respondent was represented by Mr. G. Andrew Adamek. Because of a family medical emergency, one of the expected witnesses – Danette Gildart – was unable testify. By agreement of counsel,

she thereafter testified by telephone on July 18, 2005. The case was deemed submitted at the conclusion of her testimony.

¶2 Exhibits: Exhibits 1 through 5, 7 and 8 were admitted without objection. Exhibit 6 was to consist of two office notes of Dr. Loren S. Vranish. Those notes were originally to be attached to Dr. Vranish's deposition but were apparently misplaced and were not in fact attached. They were to be supplied post-trial; however, by letter dated June 22, 2005, Mr. Adamek advised the Court that Dr. Vranish's office could not locate the notes but that the notes are already in evidence as Exhibit 5 at pages 9 and 22. Thus, there is no Exhibit 6.

¶3 Witnesses and Depositions: The petitioner, John Bartlett, Laurie Shay, Melissa Stoltz, Jennifer Lee Gemmrig, and Janet McCully testified. In addition, the parties submitted the depositions of the petitioner, Dr. Loren S. Vranish, Edith Paxman, Dr. Bret D. Lindsay, and Dr. Laura Csaplar for the Court's consideration.

¶4 Issues Presented: At the time of trial, two issues were presented. As set forth in the Pretrial Order, those issues were:

¶4a Whether Petitioner's current alleged right lower extremity condition and alleged disability arose out of and in the course of her employment on October 15, 2001 and/or July 1, 2000, while employed by Costco Wholesale Corporation in Kalispell, Flathead County, Montana.

¶4b Whether Petitioner is entitled to payment of temporary total disability benefits retroactive to May 6, 2004, and medical benefits.

(Pretrial Order at 7.) The issue concerning the claimant's lower extremity condition and medical benefits concerns the insurer's refusal to authorize a lumbar sympathetic blockade recommended by Dr. Lindsay for diagnostic purposes. Subsequent to trial, the insurer agreed to authorize the procedure. (June 24, 2005 letter of G. Andrew Adamek to Judge McCarter.) That issue is therefore moot. Thus, the Court addresses only the question of the claimant's entitlement to retroactive temporary total disability benefits.

¶5 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

¶6 The petitioner (claimant) worked for Costco Wholesale Corporation (Costco) at its Kalispell store for approximately ten years. Costco is a large warehouse-type retailer.

¶7 The claimant worked part time – twenty-five hours a week. She worked in various capacities, including in the bakery, in concessions, as a stocker, as a front-end assistant, and as a temporary cashier.

¶8 On July 19, 2000, the claimant injured her right knee when she tripped and fell at work. (Ex. 1 at 1.)

¶9 On October 15, 2001, the claimant suffered a crush-type injury to her right foot when a forklift ran over it. (*Id.* at 2.) An x-ray of the foot showed a nondisplaced fracture of the distal phalanx of the right second toe. (Ex. 5 at 131.)

¶10 Costco, which self insures, accepted liability for her injuries.

¶11 The claimant was released to return to work without restriction with respect to her knee injury on September 16, 2000. (Ex. 3 at 15.) With respect to her foot injury, the claimant was released to return to work without restriction on October 24, 2001 (*Id.* at 16), and in fact returned to work. She continued working until April 2004.

¶12 Over the next three years, the claimant continued to experience pain in her right foot and leg. A January 18, 2002 office note of Dr. Loren S. Vranish, who was her family physician at the time, noted that the claimant had “pain in her low back and also in her right leg, having some difficulties with her feet.” (Ex. 5 at 29.) On January 14, 2003, she sought care for right leg and foot pain and was prescribed Lortab. (*Id.* at 57.) In January 2004, she saw Dr. Patrick J. Burns, a neurologist, about her leg pain. Her pain was exacerbated by cold. Dr. Burns suspected the claimant had an “impairment of small fiber nerve function” and recommended she avoid frequent exposure to extreme cold. (Ex. 3 at 23.)

¶13 The claimant’s leg pain was aggravated by cold temperatures when she was assigned to work near the store entrance and was thus exposed to colder temperatures. However, Costco accommodated her by reassigning her to work away from the door. On February 24, 2003, a Family Nurse Practitioner working with Dr. Burns noted that the claimant’s pain was being effectively managed with prescription medications. (Lindsay Dep. Ex. 1, 02/24/03 office note.)

¶14 From August 28, 2002, forward, the claimant worked principally as a front-end assistant. Her job consisted of assisting cashiers by requesting members to present their Costco membership cards, helping unload customers’ carts, turning items over for scanning, and sweeping and cleaning. Occasionally, she helped at the hot dog stand, at the front door (see previous paragraph), and in the fall of 2003 she became an assistant cashier, a job similar to that of a front-end assistant but apparently more limited to the checkout counters.

¶15 During her last few months of employment at Costco, the claimant became very upset with Costco over several matters. First, she was upset and angry over Costco's failure to hire her full time and felt Costco was discriminating against her because she is a Native American. She was also very upset over Costco's handling of an alleged affair between one of its supervisors and a subordinate employee and upset over alleged remarks made by another employee which she interpreted as disparaging her Native American heritage. During this time she became very emotional and angry, filed a discrimination complaint against Costco (which was dismissed), sought help from other employees in advancing her complaints, and complained bitterly about the alleged affair and Costco's failure to sufficiently punish the supervisor. The claimant's friendships with some of her co-employees ruptured as a result of her vehement complaints.

¶16 In April of 2004, the claimant applied for a position as a front-end supervisor. She did not get the job. Instead, two others were promoted to permanent front-end supervisors and another to temporary supervisor. The claimant testified that she did not feel she was treated unfairly but objected to the promotions because one of the individuals promoted spent too much time talking on the phone and drinking lattes and because Costco needed more front-end assistants rather than additional supervisors. Notwithstanding her testimony, and as evidenced by her subsequent behavior, I am persuaded that the claimant indeed felt she was unfairly treated and was very upset by it.

¶17 In April of 2004, the claimant filed a complaint with the Montana Human Rights Commission alleging that she had been subjected to harassment and denied a promotion on the basis of race.

¶18 On April 24, 2004, John Bartlett (Bartlett), manager of the Kalispell store, met with the claimant at her request. The claimant presented him with a four-page list of written complaints. (Ex. 4.) In her list, the claimant complained about: (1) the hiring of two permanent supervisors when the posting was only for one; (2) the hiring of an individual as a permanent supervisor whom she viewed as less qualified than another individual who was hired only as a temporary supervisor; (3) a rule prohibiting front-end employees from having water or other beverages while working; (4) too many personal calls made by some employees while they were working; (5) some supervisors not doing their jobs; (6) too many supervisors and not enough front-end helpers; (7) being passed over for full-time employment; and (8) a fellow employee calling her "Pocahantas" and "Hiawatha." The only mention of her injuries in the four-plus pages of handwritten complaints was in conjunction with complaints about not enough "callers" (front-end assistants). She wrote in relevant part:

We have people with injuries working and no one cares that they have no callers.

Example: My knee was hurt in 2000. My foot ran over by a fork lift 2002 left with permanent nerve damage. Debbie Archer is working with an injured knee, you can see the pain in her face, why doesn't one of the Supervisors that are just standing there box for her? Ruth Webster has a bad shoulder. Kelly was almost left blind because of an accident. She should of been taken right to the E.R.

(Ex. 4 at 2-3.)

¶19 During the April 24th meeting, Bartlett went over each of the complaints with the claimant. According to a co-employee, the most significant issue for the claimant was the failure of Costco to promote her [hire her full time]. The co-employee also recalled the claimant complaining about names another co-employee called her and about other co-employees not working like they should; she could not recall the claimant saying anything about her leg or foot. Similarly, Bartlett testified that the claimant did not talk about any of her injuries but did talk about the alleged affair between two employees.

¶20 Another co-employee testified that the claimant was very upset and that the claimant told her that Bartlett would not listen to her complaints. The claimant told the co-employee that "she couldn't take it anymore," and could not watch the employee allegedly involved in an affair "throw her life away."

¶21 On April 29, 2004, the claimant was working as a cashier. She became visibly upset and said she "couldn't take it anymore." Her supervisor relieved her from further work and told her to go home. She never returned to work.

¶22 On May 4, 2004, the claimant's family physician, Dr. Laura Csaplar, faxed Costco a statement written on a prescription pad stating, "work release 5/3/4 - 5/6/4 'Anxiety.'" (Ex. 3 at 24.) The Court reads this as intending to take the claimant off work rather than to release her to return to work. It was followed by a May 7, 2004 FAX of a Certification of Health Care Provider stating that the claimant was suffering from "stress resulting in decreased weight" and indicating a probable duration of disability of three months. (*Id.* at 27-29.)¹ On May 13, 2004, the claimant applied for a leave of absence from Costco for the period May 2, 2004, to August 1, 2004. The reason she gave, in her own handwriting, was "Stress - Anxiety." (*Id.* at 31.) Then on May 14, 2004, the claimant's family physician faxed

¹The certificate is dated May 6, 2003, but reading other portions of the certificate show that the 2003 date was a mistake and that Dr. Csaplar signed it on May 6, 2004.

Costco a disability insurance form taking the claimant off work effective May 1, 2004. The condition cited as disabling was “Anxiety/Stress.” (*Id.* at 26.) There was no mention of leg pain or any foot injury in any of the foregoing communications. However, a medical note by Dr. Csaplar for May 6, 2004, indicates that the claimant was complaining of “persistent” leg pain on account of which she was unable to do her job, as well as anxiety and stress from “medical problems.” (Ex. 5 at 84.)

¶23 On May 25, 2004, Dr. Csaplar referred the claimant for a neurological consultation due to her complaints of chronic, increasing pain in her foot and leg. Dr. Csaplar noted, “[s]he now finds she is unable to do her job secondary to the pain.” (*Id.* at 93.)

¶24 The claimant now asserts that she did not return to work on account of foot and leg pain associated with her foot injury. Dr. Lindsay, who has treated the claimant most recently for her leg pain, recorded in his most recent office note that he could not find an objective basis for her complaints and only reluctantly offered further testing:

At this point, Delores [claimant] continues to struggle with right lower extremity pain and paresthesias. Her exam does not disclose any objective evidence of a sympathetically mediated pain syndrome. She had had very subtle findings suggestive of this in the past. Despite the fact that Delores has little in the way of objective findings, she does have significant subjective complaints without obvious pain behaviors. I do feel that despite my relative reticence to advocate for her, that she probably does deserve an attempt at lumbar sympathetic blockade for diagnostic and therapeutic considerations. I do not feel comfortable filling out an FMLA² leave form given that I do not know what her diagnosis is.

(*Id.* at 168.) Dr. Lindsay did take her off work but did so based on her pain complaints. (See Lindsay Dep. Ex. 1, 04/28/05 office note.)

¶25 There is no doubt that the claimant does suffer some leg pain and numbness. However, the question the Court must answer is whether that pain and numbness was the cause of the claimant leaving work and never returning and whether her pain is so severe that she could not continue performing her job.

¶26 After careful review of the testimony and exhibits in this case, and assessing the witnesses’ credibility, I find that the claimant stopped working because of personal conflicts with Costco management and employees and not on account of leg pain. I further find that

²FMLA refers to the Family and Medical Leave Act of 1993.

her leg pain is not as severe as she claims and does not prevent her from working at Costco.

¶27 There are numerous factors supporting my conclusion. Initially, the facts leading up to her leaving work show that the precipitating factor in her leaving work was her unhappiness with her treatment by Costco and the emotional stress and anxiety it created.

¶28 The history of the claimant's conflict with Costco and her anxiety also lend support to my conclusion. In January 2003, the claimant sought counseling from a licensed clinical social worker. At that time her primary complaint, as noted in the therapist's notes, was about work. The claimant complained that

[claimant] has worked for Costco for 5 years and is still waiting for a full time job. New people come in and are advanced ahead of her. When she complains, her supervisor tells her she can go to work someplace else. She thinks this is because she is Native American and has tattoos.

(Paxman Dep. Ex. 1, 1/17/03 therapy note.) The claimant identified other personal problems. The therapist noted that she was taking Xanax for anxiety and characterized her "present state" as "anger over current work situation." (*Id.*)

¶29 In subsequent sessions, the claimant continued to complain about Costco. On February 18, 2003, she was upset with a supervisor and told her therapist that she "knows her life career isn't with Costco." (*Id.*, 2/18/03 therapy note.) On July 22, 2003, she sought counseling because she had been criticized by her supervisor and had left work in tears. (*Id.*, 7/22/03 therapy note.) On July 25, 2003, the claimant and her counselor discussed the claimant's "Costco self" and her "employment options." (*Id.*, 7/25/03 therapy note.) On July 28, 2003, the claimant applied for a leave of absence, citing anxiety, as well as an allergic reaction. (Ex. 3 at 17-19.)

¶30 There was then a nine-month hiatus in therapy sessions. The next session was on April 23, 2004, the day before the claimant's meeting with Bartlett. Indeed, the session was requested by the claimant in anticipation of that meeting. The therapist recorded the "focus" of the session was "Manager's insults and a meeting tomorrow about this." Significantly, and presciently, the office note recorded, "**[W]e discussed her need to leave CostCo to develop her potential.**" (Paxman Dep. Ex. 1, 4/23/04 therapy note (emphasis added).)

¶31 In an October 14, 2004 medical note, Dr. Csaplár noted that "Ms. Choi has been in counseling with Edie Paxman, per Ms. Choi tried deconditioning but she is unable to walk into Costco secondary to anxiety." (Ex. 5 at 103.)

¶32 Other actions by the claimant indicate she quit working on account of conflict at Costco rather than leg pain. Shortly after she quit working, the claimant told a co-employee that she felt she could not work at Costco because she could not emotionally handle being there. Moreover, in April of 2004, shortly before she stopped working, the claimant prepared a video audition for the television program “Big Brother,” which is a television reality show involving persons living together in the same house. For the video, the claimant climbed a tree, ran across a bridge, and rode a bike without apparent difficulty. The claimant was upbeat about landing a role on the program.

¶33 Co-workers recalled the claimant complaining of foot or leg pain only when cold, as was the case when she worked near the door. Given the claimant’s vigorous and vociferous complaints about co-employees, supervisors, and lack of promotion, I am unable to believe that the claimant would have kept silent about her leg pain if it had been significant while working. The testimony of the co-employees demonstrated that the claimant’s pain complaints at work were associated with cold and that her pain was not otherwise significant.

¶34 I therefore find that the claimant did not cease working on account of leg pain and that her leg pain is not so severe as to prevent her from continuing to work at Costco. I find that she is physically capable of continuing to work at Costco. In that light, she has not suffered a wage loss on account of either of her two workers’ compensation injuries.

CONCLUSIONS OF LAW

¶35 This case is governed by the 1999 and 2001 versions of the Montana Workers’ Compensation Act since those were the laws in effect at the time of the claimant’s industrial accidents. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

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

¶37 The claimant is entitled to temporary total disability benefits only if she can show she suffered a wage loss on account of her industrial injury. Section 39-71-701, MCA (1999-2001), provides in relevant part:

39-71-701. Compensation for temporary total disability – exception. (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
(a) **when the worker suffers a total loss of wages as a result of an injury**

(Emphasis added.) As I have found, the claimant quit working because of conflicts with Costco and its management, and the emotional stress it occasioned, not on account of any pain or physical limitations arising from her prior work-related injuries. She is therefore not entitled to temporary total disability benefits.

¶38 The specific medical benefits issue raised in this case is moot.

JUDGMENT

¶39 The claimant is not entitled to temporary total disability benefits and the medical benefits issue she raised is now moot; therefore, her petition is **dismissed with prejudice**.

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

¶41 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 1st day of August, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. G. Andrew Adamek
Submitted: July 18, 2005