IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 16

WCC No. 2006-1623

MICHELLE FABBI

Petitioner

vs.

VALLEY FORGE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appealed to the Montana Supreme Court May 14, 2008
Appeal Dismissed per Joint Motion 11/26/08

Summary: Petitioner petitioned the Court for temporary total and temporary partial disability benefits for the time periods between January 24, 2001, and November 14, 2001, and from May 2, 2002, through September 29, 2002. Petitioner also requested attorney fees, costs, and a penalty. Respondent argued that Petitioner was not entitled to the requested benefits because her physician released her to her time-of-injury job and Petitioner voluntarily terminated her employment with Respondent's insured.

Held: After being released to return to work without restrictions, Petitioner advised her employer that she was not available for further work until she notified it otherwise. Petitioner never notified her employer that she was available for work after that time. Because Petitioner voluntarily terminated her employment with her time-of-injury employer for the balance of time, she is not entitled to the requested benefits.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-712.** Where the Court determined that Petitioner voluntarily terminated her position at her time-of-injury employer, Petitioner is not entitled to indemnity benefits for the time periods at issue, notwithstanding the fact that the employer advised Petitioner by letter that it

was able to accommodate the modifications set forth in her doctor's release and offered Petitioner an opportunity to return to work in a modified position.

Vocational- Return to Work Matters: Modified Employment. Where the Court determined that Petitioner voluntarily terminated her position at her time-of-injury employer, Petitioner is not entitled to indemnity benefits for the time periods at issue, notwithstanding the fact that the employer advised Petitioner by letter that it was able to accommodate the modifications set forth in her doctor's release and offered Petitioner an opportunity to return to work in a modified position.

¶ 1 The trial in this matter was held on March 1, 2007, in Kalispell, Montana. Petitioner Michelle Fabbi was present and represented by Rex Palmer. Respondent Valley Forge Insurance Company was represented by Bryce R. Floch.

¶ 2 Exhibits: Exhibits 1 through 16, 18, and 23 were admitted without objection. No Exhibits 17, 19, and 20 were presented at the time of trial. Objections were reserved as to Exhibits 21 and 22, however, no Exhibit Nos. 21 and 22 were presented at trial.

¶ 3 Witnesses and Depositions: The deposition of Petitioner was taken, but the original was not available to be submitted to the Court. Counsel stipulated that a copy of the deposition may be used for purposes of the Court's Findings of Fact, Conclusions of Law and Judgment in lieu of the original deposition. Petitioner, Joan McChesney, Kris Carlson, and Peggy Junge were sworn and testified at trial.

¶ 4 Summary Judgment: Respondent filed a motion for summary judgment on the grounds that Petitioner voluntarily terminated her employment with her time-of-injury employer. In a conference call on October 10, 2006, the Court declined to rule on Respondent's motion pursuant to ARM 24.5.329, effectively denying the motion.

¶ 5 Issues Presented: The following contested issues of law are found in the Pretrial Order:

> ¶ 5a Petitioner's entitlement to temporary total and temporary partial disability benefits between January 24, 2001, through November 14, 2001, and May 2, 2002, through September 29, 2002.
>
> ¶ 5b Petitioner's entitlement to a penalty, reasonable attorney fees and costs.[1]

[1] Pretrial Order at 2-3.

FINDINGS OF FACT

¶ 6 Petitioner was a credible witness and I find her testimony at trial credible.

¶ 7 Petitioner suffered an industrial injury during the course and scope of her employment with Respondent's insured. She injured her right knee while transferring a patient from a bed to a wheelchair.[2]

¶ 8 At the time of her injury, Petitioner's employer, Western Medical Services (WMS), was enrolled under Compensation Plan II of the Workers' Compensation Act and was insured by Respondent.[3]

¶ 9 WMS provided temporary medical personnel such as certified nurse aides (CNA) and personal care attendants (PCA) to individual homes and nursing home facilities on an as-needed basis.[4]

¶ 10 Petitioner took the necessary courses in high school and became a CNA her senior year.[5] She worked for WMS as a CNA and PCA beginning in June 2000, and was paid a different rate of pay depending on the needs of the patients she assisted. CNA work required more specialized care and paid a higher wage than PCA work, so if CNA work was available, Petitioner chose that work. However, if PCA work was the only work available, she would accept that at times.[6]

¶ 11 Kris Carlson testified at trial and I find her testimony credible. Carlson was the franchise owner of WMS. She testified that WMS was sold to Intrepid of Medina, Minnesota, sometime in 1999.[7] Although the testimony was not entirely clear regarding the business-to-business transaction between WMS and Intrepid, Carlson testified that between 2001 and 2002, they were basically the same entity.[8]

---

[2] Pretrial Order at 2; Trial Test.

[3] Pretrial Order at 2.

[4] Trial Test.

[5] Trial Test.

[6] Trial Test.

[7] For the sake of continuity and clarity, Intrepid and WMS are collectively referred to as WMS in the Findings of Fact, Conclusions of Law and Judgment.

[8] Trial Test.

¶ 12 Petitioner testified that she was contacted by phone by WMS and informed about available shifts and positions. Except for one time period that Petitioner worked with one particular client, she did not have a set schedule and worked various jobs and shifts.[9]

¶ 13 Carlson testified that it was the employee's responsibility to let the office know her shift availability. It was the policy of WMS to have employees call the office every week and provide their availability so that it could be recorded on the office calendar. When a work shift became available, the office scheduler could then contact an employee.[10]

¶ 14 Petitioner began treating with Albert D. Olszewski, M.D., and his physician's assistant, Charles L. Whitaker, on November 27, 2000, for her right knee injury.[11] PA-C Whitaker kept Petitioner off work until January 9, 2001, at which time she was placed on light-duty work by Dr. Olszewski.[12]

¶ 15 On January 16, 2001, Dr. Olszewski stated in a treatment note that Petitioner's work restrictions were to continue for one more week, at which time her work restrictions would be lifted.[13] Pursuant to this release, Petitioner's work restrictions were lifted effective January 23, 2001.

¶ 16 A notation on the Petitioner's January employee calendar at WMS reflects that on January 24, 2001, Petitioner contacted WMS and informed them that she would not be available for any further work shifts until she called WMS to advise them otherwise.[14] Although Petitioner testified that she had no specific recollection of calling WMS and saying that she was no longer available for any future work shifts, she does not dispute that she may have made such a call.[15]

¶ 17 There is no evidence that Petitioner called WMS after January 24, 2001, to inquire about available work shifts, nor did WMS call Petitioner to inquire about her availability. Petitioner testified that the reason she did not call WMS was that it was the practice of

---

[9] Trial Test.

[10] Trial Test.

[11] Ex. 4 at 1.

[12] Ex. 4 at 2 and 3.

[13] Ex. 4 at 4.

[14] Ex. 16 at 937.

[15] Trial Test.

WMS to call her when it had work shifts available.[16] This is contradicted by Carlson's testimony, however, who testified that the WMS employee handbook required employees to call in to advise of their availability on a weekly basis.[17] Based on the facts before me, I find that it was Petitioner's responsibility to make her availability known to WMS and she failed to do so.

¶ 18 On February 1, 2001, Petitioner applied for employment with Harmony House, a facility providing specialized medical care to patients in a homelike setting. Notably, Petitioner testified that she did not notify WMS that she had accepted another position at Harmony House.[18]

¶ 19 During the time period Petitioner was employed at Harmony House, another WMS employee was also employed there. On occasion, the WMS office scheduler would call Harmony House at a time when Petitioner was working and Petitioner would answer the phone, identifying herself by her first and last name.[19] Petitioner testified that at no time did she inquire about why WMS had stopped calling her, nor did the scheduler inquire as to why Petitioner had stopped calling.[20]

¶ 20 Petitioner worked for Harmony House until November 15, 2001. Petitioner's employment at Harmony House was interrupted for a period of time when she was put on bed rest by her obstetrician.[21]

¶ 21 Petitioner testified that between February 2001 and June 2001 she was able to perform her job duties at Harmony House.[22]

---

[16] Trial Test.

[17] Trial Test.

[18] Trial Test.

[19] Trial Test.

[20] Trial Test.

[21] Trial Test.

[22] Trial Test.

¶ 22 Petitioner and her husband moved to Kooskia, Idaho, on December 22, 2001, because her husband accepted employment in that area.[23] Petitioner did not inform WMS that she was moving and did not provide a forwarding address or phone number to it.[24]

¶ 23 Petitioner was examined by Dr. Olszewski again on March 6, 2001, at which time Dr. Olszewski opined that she was not at MMI and noted her restrictions to avoid regular squatting, kneeling, and crawling.[25] Dr. Olszewski recorded in his treatment notes that Petitioner was working for Harmony House where she was not required to perform any patient lifts.[26]

¶ 24 Dr. Olszewski wrote to the insurance adjuster in charge of Petitioner's claim, Patrick Wallace, on March 6, 2001, stating that Petitioner was a surgical candidate for knee surgery after her pregnancy.[27]

¶ 25 Petitioner was placed on bed rest near the end of May or beginning of June in 2001. She gave birth to her child on September 10, 2001.[28]

¶ 26 Petitioner's treating physician released her to return to work without restriction effective January 23, 2001.[29] Petitioner does not dispute the evidence which demonstrates that on January 24, 2001, she called her employer and advised that she was unavailable to work any shifts until further notice. It is also undisputed that Petitioner failed to notify WMS that she was available or willing to work any future shifts after her communication of January 24, 2001. Finally, after advising WMS that she was not available for additional work pending further notice, Petitioner sought and obtained employment elsewhere and then moved to another state without notifying WMS of either event. The evidence does not support any conclusion other than Petitioner voluntarily terminated her employment at WMS on January 24, 2001, after being released to return to work without restriction by her treating physician.

---

[23] Trial Test.

[24] Trial Test.

[25] Ex. 4 at 5.

[26] *Id.*

[27] Ex. 4 at 6.

[28] Trial Test.

[29] Ex. 4 at 4.

¶ 27 On November 14, 2001, Dr. Olszewski performed a right knee arthroscopic excision of the medial and lateral plica.[30]

¶ 28 On February 26, 2002, Dr. Olszewski released Petitioner to return to work with restrictions.[31] He conditionally approved a PCA job analysis with modifications including kneeling or squatting on rare occasions and no crawling.[32] This prompted WMS to send a letter to Petitioner dated March 8, 2002.[33] This letter advised Petitioner that WMS was able to accommodate the modifications set forth in Dr. Olszewski's release and offered Petitioner an opportunity to return to work in a modified PCA position.[34] The letter requested that Petitioner contact WMS and advise of her availability for future work shifts by March 15, 2002. The letter further stated that if Petitioner failed to respond by March 15, 2002, her file at WMS would be closed. Because WMS was unaware that Petitioner had relocated to Idaho, the letter was originally mailed to Petitioner's home in Kalispell but was returned to the sender. It was re-sent on March 13, 2002, to Petitioner's Idaho address.[35] Petitioner testified that she received the letter sometime after March 15, 2002.

¶ 29 Petitioner testified that she did not refuse to take the job offered on March 8, 2002. However, Petitioner testified she would probably have been physically incapable of traveling from Idaho in an automobile and probably never had the intention of returning to Montana.[36]

¶ 30 Carlson testified that in March 2002, WMS had many PCA and CNA shifts available to employees and up to 40 hours of work per week for an individual employee.[37]

¶ 31 Joan McChesney testified at trial. I find her testimony credible.

---

[30] Ex. 4 at 12.

[31] Ex. 4 at 19.

[32] *Id*.

[33] Trial Test.

[34] Ex. 16 at 46.

[35] Trial Test.

[36] Trial Test.

[37] Trial Test.

¶ 32 McChesney was the human resource director for WMS in 2001 and 2002.[38] She testified that during this period of time, WMS had a return-to-work program and work was available to employees for up to 40 hours per week should they choose to accept assignments.

¶ 33 McChesney authored the March 8, 2002, letter in conjunction with Respondent's insurance adjuster to offer Petitioner a full-time, modified, light-duty position.[39]

¶ 34 McChesney testified that, at the time she authored the letter, she was unaware that Petitioner had moved to Idaho.[40]

¶ 35 McChesney testified that she and Petitioner had a good relationship and even if she had known Petitioner had moved to Idaho, McChesney would still have sent her the March 8, 2002, letter in order to try to persuade her to return to Kalispell.[41]

¶ 36 On April 17, 2002, Wallace wrote to Petitioner advising her that her TTD benefits would be terminated fourteen days from the date of the letter.[42]

CONCLUSIONS OF LAW

¶ 37 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's employment-related injury.[43]

¶ 38 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[44]

¶ 39 This dispute centers around two discrete periods of time. I address each period separately.

---

[38] Trial Test.

[39] Trial Test.

[40] Trial Test.

[41] Trial Test.

[42] Ex. 23 at 3.

[43] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[44] *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).

Petitioner's Benefit Entitlement from January 24, 2001, through November 14, 2001

¶ 40 Petitioner was released to return to work without restrictions by her treating physician effective January 23, 2001. On January 24, 2001, she voluntarily terminated her employment with WMS. On February 1, 2001, she applied for work as a PCA at another facility, Harmony House, and continued working there until her knee surgery on November 14, 2001. On March 6, 2001, her treating physician noted the restrictions of avoiding regular squatting, kneeling, and crawling. Petitioner continued to work with these restrictions in place at Harmony House through November 14, 2001, except for a three to four month interlude when she was placed on bed rest by her obstetrician due to her pregnancy.

¶ 41 Irrespective of the fact that Petitioner voluntarily terminated her employment with WMS on January 24, 2001, she is not entitled to any indemnity benefits during the period of January 23, 2001, through March 5, 2001, because she was released to return to work without restrictions during this period, and therefore was neither totally nor partially disabled. For the period of March 6, 2001, through November 13, 2001, Petitioner is not entitled to TTD benefits because she was employed with Harmony House and, therefore, cannot be considered totally disabled pursuant to § 39-71-701, MCA. Petitioner is not entitled to TPD benefits for the same period pursuant to § 39-71-712(4), MCA, because she had voluntarily terminated her position with WMS on January 24, 2001.

Petitioner's Benefit Entitlement from May 2, 2002, through September 29, 2002

¶ 42 On November 14, 2001, Petitioner underwent arthroscopic knee surgery. Petitioner's TTD benefits were reinstated on this date. On February 26, 2002, Dr. Olszewski conditionally approved a PCA job analysis with modifications. In response to this release from Dr. Olszewski, Respondent notified Petitioner that her TTD benefits would be terminated effective May 1, 2002. Notwithstanding the fact that Petitioner had voluntarily terminated her employment with WMS on January 24, 2001, WMS nevertheless advised Petitioner by letter dated March 8, 2002, that WMS was able to accommodate the modifications set forth in Dr. Olszewski's release and offered Petitioner an opportunity to return to work in a modified PCA position. Although Petitioner testified that she did not refuse to take the job offered on March 8, 2002, she acknowledged that she probably never had the intention of returning to Montana. Furthermore, I have already found that Petitioner had voluntarily terminated her employment with WMS on January 24, 2001.

¶ 43 Pursuant to § 39-71-712(4), MCA, Petitioner is not entitled to either TPD or TTD benefits for this period of time because she refused to accept the modified positions that were available to her at WMS. By notifying WMS on January 24, 2001, that she was not available for further work until she notified them to the contrary, Petitioner removed herself from the job pool at WMS for any positions – modified or otherwise. Despite this

notification from Petitioner, WMS advised Petitioner in the letter of March 8, 2002, that they could accommodate the modifications set forth in Dr. Olszewski's February 26, 2002, letter. By this time, however, Petitioner had relocated to Idaho and acknowledged at trial that she probably would not have returned to Montana to accept the position. Therefore, Petitioner is not entitled to indemnity benefits for the period of time between May 2, 2002, and September 29, 2002.

Attorney Fees, Costs, and Penalty

¶ 44 Petitioner has not prevailed on any of the issues presented to this Court. Therefore, she is not entitled to attorney fees, costs, or a penalty.

JUDGMENT

¶ 45 Petitioner is not entitled to either temporary total or temporary partial disability benefits for any of the time periods at issue.

¶ 46 Petitioner is not entitled to a penalty, attorney fees, and costs.

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

DATED in Helena, Montana, this 16th day of April, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Rex Palmer
Bryce R. Floch
Submitted: April 4, 2007