

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 14

WCC No. 2013-3180

HARTFORD FIRE INS. CO.

Petitioner/Appellant

vs.

DENNIS HOSTETTER

Respondent/Appellee.

ORDER DENYING PETITIONER'S APPEAL OF DEPARTMENT ORDER GRANTING INTERIM BENEFITS TO RESPONDENT UNDER § 39-71-610, MCA

Summary: Petitioner appealed from a Department order granting interim benefits to Respondent under § 39-71-610, MCA, arguing that Respondent had neither demonstrated financial hardship nor presented a strong prima facie case which are required for him to be entitled to such benefits. Respondent objected to Petitioner's appeal, arguing that he is entitled to interim benefits and that he has proven the necessary factors to prove such entitlement.

Held: Respondent has met the four factors this Court considers in determining whether a claimant is entitled to interim benefits under § 39-71-610, MCA. Therefore, Petitioner's appeal is denied and the Department's order granting interim benefits is affirmed.

Topics:

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.314. Where Respondent had no objection to Petitioner's request to resolve an appeal of interim benefits on an informal basis via conference call, the Court agreed to do so pursuant to ARM 24.5.314.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-610. Appeals from Department determinations regarding interim benefits under § 39-71-610, MCA, are subject to *de*

novo review by this Court. This Court considers four factors in making a determination: (1) whether liability was accepted; (2) whether benefits were paid, especially for a significant time period; (3) whether the claimant has demonstrated he will suffer significant financial hardship without interim benefits; and (4) whether the claimant has tendered a strong prima facie case for reinstatement of the benefits. To meet the fourth factor, a claimant need not prove entitlement to TTD benefits, but need only tender substantial evidence which, if believed, would entitle him to the benefits.

Benefits: Interim (39-71-610) Benefits: Criteria for Awarding. Appeals from Department determinations regarding interim benefits under § 39-71-610, MCA, are subject to *de novo* review by this Court. This Court considers four factors in making a determination: (1) whether liability was accepted; (2) whether benefits were paid, especially for a significant time period; (3) whether the claimant has demonstrated he will suffer significant financial hardship without interim benefits; and (4) whether the claimant has tendered a strong prima facie case for reinstatement of the benefits. To meet the fourth factor, a claimant need not prove entitlement to TTD benefits, but need only tender substantial evidence which, if believed, would entitle him to the benefits.

Benefits: Interim (39-71-610) Benefits: Procedure. Since this matter was before the Court for disposition on an informal basis, and given the expedited nature of the proceedings, the Court allowed the claimant the opportunity to file a sworn affidavit describing his financial hardship where unsubstantiated assertions by his counsel were insufficient proof.

Benefits: Interim (39-71-610) Benefits. Where the claimant filed an affidavit asserting that: his TTD benefits were his only significant source of income; termination of his benefits had left him unable to afford gas to travel to his medical appointments; and he had not been able to pay his rent that month, the Court concluded claimant had fulfilled the third factor by demonstrating that he would suffer significant financial hardship if he did not receive interim benefits.

Benefits: Interim (39-71-610) Benefits. Where the Court found the claimant had presented substantial evidence that his treating physician was one of his choosing and not the alleged treating physician chosen for him by the insurer, and that the claimant's actual treating physician had not released him to return to work in any capacity, the Court concluded

that the claimant had tendered a strong prima facie case for reinstatement of his TTD benefits.

Benefits: Interim (39-71-610) Benefits. Where the Court found that uncertainty existed as to whether the alternative job offered by the claimant's time-of-injury employer fit within the restrictions set for him by a medical provider (and assuming *arguendo* that this provider qualified as the claimant's treating physician), the Court further found that a question remained as to whether the offered position was appropriate for the claimant. The Court therefore concluded that the claimant had tendered a strong prima facie case for reinstatement of his TTD benefits.

¶ 1 Petitioner/Appellant Hartford Fire Ins. Co. (Hartford) wrote to this Court to appeal an order of the Department of Labor and Industry which granted interim benefits to Respondent Dennis Hostetter under § 39-71-610, MCA. Pursuant to ARM 24.5.314, Hartford asked the Court to resolve this matter on an informal basis via conference call.¹ Respondent Dennis Hostetter had no objection.²

¶ 2 On June 20, 2013, I convened a conference call with the parties to discuss Hartford's appeal. This Court has previously held appeals from Department determinations regarding interim benefits under § 39-71-610, MCA, are subject to *de novo* review by this Court,³ and that the Court will consider four factors in determining whether a claimant is entitled to interim benefits under the statute.⁴ In the present case, since Hostetter suffered his industrial injury on May 8, 2012, the 2011 statutes apply.⁵ The four factors are: (1) Was liability for the claim accepted? (2) Were benefits paid, especially for a significant time period? (3) Has the claimant demonstrated he will suffer significant financial hardship if interim benefits under § 39-71-610, MCA, are not ordered? (4) Has the claimant tendered a strong prima facie case for reinstatement of the benefits he seeks?⁶ The Court has explained that to meet the fourth factor, a claimant need not prove his entitlement to temporary total disability

¹ Letter to Court (Appeal of DLI Order Pursuant to ARM 24.5.314), Docket Item No. 1.

² E-Mail Correspondence From Rex Palmer to Court, Docket Item No. 3.

³ *Smith v. State Compensation. Ins. Fund*, 2000 MTWCC 9, ¶ 20.

⁴ *Montana Health Network v. Graham*, 2002 MTWCC 61, ¶ 5 (citing *Smith v. State Compensation Ins. Fund*, 2000 MTWCC 9, ¶ 28).

⁵ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁶ *Graham*, ¶ 5.

(TTD) benefits, but need only tender substantial evidence which, if believed, would entitle him to the benefits.⁷

¶ 3 In the present case, Hartford admits that Hostetter has met the first two factors. As to the third factor, Hartford argues that Hostetter has not sufficiently demonstrated that he will suffer significant financial hardship if he does not receive interim benefits. Hartford notes that Hostetter has not submitted any affidavits or witness statements, and that while Hostetter's counsel has argued that Hostetter will suffer significant financial hardship, those arguments are unsupported.⁸

¶ 4 During oral argument, Hostetter's counsel alleged that Hostetter has been unable to afford to attend physical therapy appointments and that he was unable to pay his rent for June 2013. Hostetter's counsel stated that while Hostetter's landlord has been understanding of Hostetter's situation, the landlord has indicated that he will begin eviction proceedings if Hostetter fails to pay both his June and July rent on or before July 1, 2013.⁹

¶ 5 During oral argument, I stated that, given that this matter was before the Court for disposition on an informal basis, and given the expedited nature of the proceedings, I would allow Hostetter the opportunity to file a sworn affidavit describing his financial hardship.¹⁰

¶ 6 Hostetter filed the affidavit on June 21, 2013, in which he asserted that his temporary total disability (TTD) benefits were his only source of income other than his travel reimbursement, that termination of his benefits had left him unable to afford gas to travel to his medical providers, and that he did not have the money to pay his rent for the month of June.¹¹ From the representations he has made, I conclude that Hostetter has demonstrated that he would suffer significant financial hardship if he does not receive interim benefits and therefore he has fulfilled the third factor.

¶ 7 The fourth factor asks whether the claimant has tendered a strong prima facie case for reinstatement of his benefits. As noted above, this Court has held that to

⁷ *Graham*, ¶ 6.

⁸ Telephonic Informal Resolution of Appeal of Department Order - Minute Book Hearing No. 4477 (Oral argument).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Affidavit of Dennis Hostetter, Docket Item No. 6.

tender a strong prima facie case, the 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.¹²

¶ 8 During oral argument, Hartford maintained that Hostetter has not tendered a strong prima facie case for reinstatement of his benefits because Michael Righetti, M.D., whom Hartford considers to be Hostetter's treating physician, has released Hostetter to return to work in a sedentary position and, according to Hartford, Hostetter's time-of-injury employer has made a job available to Hostetter which accommodates his restrictions and which provides the same wage as his time-of-injury position.

¶ 9 Hostetter disputes both of these assertions. He maintains that his treating physician is not Dr. Righetti, but is Dr. Katie Kovacich-Smith, and that Dr. Kovacich-Smith has not released Hostetter to return to work in any capacity. He further maintains that the job position his time-of-injury employer has made available has been characterized as light-duty rather than sedentary, and that he has not been provided with a job analysis or other sufficiently detailed information from which he can determine that the job is within the restrictions set for him by Dr. Righetti.

¶ 10 From the limited record as presented to the Court, it appears that Hostetter treated with Dr. Kovacich-Smith after his industrial injury. At oral argument, Hartford acknowledged that Hostetter treated with Dr. Kovacich-Smith for a long period of time, although Hartford maintains that it never formally designated Dr. Kovacich-Smith as Hostetter's treating physician. Hartford has argued that Dr. Kovacich-Smith cannot be considered Hostetter's treating physician because Dr. Kovacich-Smith failed to assume the treating physician's duties as set forth in § 39-71-1101(2)(b)-(d), MCA.¹³ Specifically, Hartford contends that Dr. Kovacich-Smith failed to timely send medical records to Hartford, failed to make timely determinations, and failed to follow the treatment guidelines.¹⁴ Hartford acknowledged, however, that while it never formally designated Dr. Kovacich-Smith as Hostetter's treating physician, it did pay for Hostetter's treatments with Dr. Kovacich-Smith for some time prior to when Hartford sent Hostetter to see Dr. Righetti.¹⁵

¹² See ¶ 2, above.

¹³ Letter to Court, Ex. 2 at 3.

¹⁴ *Id.*

¹⁵ Oral argument.

¶ 11 Hostetter responds that § 39-71-1101, MCA, does not allow an insurer to unilaterally remove a treating physician and appoint a treating physician of its choosing. Hostetter argues that while Hartford now claims Dr. Kovacich-Smith was never his treating physician, Hartford did in fact authorize and pay for Hostetter's treatment with Dr. Kovacich-Smith for months before it began contending that Dr. Kovacich-Smith was not, and had never been, the treating physician.¹⁶ While Hostetter admits that some delay may have occurred in Hartford's obtaining medical records from Dr. Kovacich-Smith, Hostetter contends that in at least one instance, Hartford's requests were not received by Dr. Kovacich-Smith because Hartford was sending the requests to an incorrect fax number.¹⁷

¶ 12 As to Hostetter's argument regarding Dr. Righetti's releasing him to sedentary work, Hartford argues that § 39-71-701(4), MCA, does not obligate it to create an alternative job analysis for the physician's approval. Hartford further argues that although Dr. Righetti released Hostetter to sedentary work and Hostetter's time-of-injury employer described the available job as "light-duty," the context of the employer's correspondence indicates that the employer was willing to accommodate Hostetter's restrictions regardless of classification.¹⁸

¶ 13 Hostetter responds that § 39-71-701(4), MCA, requires that a release to return to work prior to maximum medical improvement come from a treating physician. Hostetter argues that Dr. Kovacich-Smith has not released him to return to work.¹⁹ He further argues that the work which his time-of-injury employer has proffered has been classified as "light-duty," and therefore it is not within the restrictions set by Dr. Righetti, even if Dr. Righetti were considered his treating physician.²⁰

¶ 14 As noted above, in order to fulfill the fourth factor, a claimant must tender a strong prima facie case for reinstatement of benefits, and this is accomplished by tendering substantial evidence which, if believed, would indicate his entitlement to TTD benefits.²¹ While more evidence may be presented at trial, in the informal and expedited situation before the Court, I am convinced that Hostetter has made a strong prima facie

¹⁶ Letter to Court, Ex. 3 at 2.

¹⁷ Oral argument.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Letter to Court, Ex. 3 at 4.

²¹ See ¶ 2, above.

case. From the evidence before the Court, I find that Hostetter has presented substantial evidence that Dr. Kovacich-Smith was his treating physician and, as such, determined that he was not yet capable of returning to work in any capacity. Furthermore, I find that enough uncertainty exists regarding whether the alternative job offered by Hostetter's time-of-injury employer fits within the restrictions made by Dr. Righetti that, even assuming *arguendo* that Dr. Righetti is the treating physician, a question remains as to whether the job offered is appropriate for Hostetter's restrictions. For these reasons, I conclude that Hostetter has fulfilled the fourth factor. Therefore, having undertaken a *de novo* review of the Department's determination, I conclude that Hostetter is entitled to interim benefits pursuant to § 39-71-610, MCA.

Order

¶ 15 Petitioner's appeal from the Department determination granting Respondent interim benefits is **DENIED**.

¶ 16 The Department's order to pay interim benefits pending a hearing or mediation is **AFFIRMED**.

¶ 17 Petitioner shall reinstate Respondent's benefits pursuant to § 39-71-610, MCA.

DATED in Helena, Montana, this 25th day of June, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Jeffrey B. Smith
Rex Palmer

Submitted: June 21, 2013