IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 15

WCC No. 2017-4096

GALEN LARSON

Appellant

vs.

LIBERTY NORTHWEST INS. CORP.

Appellee/Insurer.

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

Summary: Appellant appeals from a Department order denying his petition for interim benefits under § 39-71-610, MCA. Appellee argues this Court should affirm because Appellant has not tendered a strong *prima facie* case for reinstatement of his TTD benefits.

Held: The Department's order is affirmed. Appellant did not tender a strong *prima facie* case for reinstatement of his TTD benefits. He declined the temporary work assignment his time-of-injury employer offered to him and did not introduce sufficient evidence to prove that the job exceeded his restrictions, or that his employer would not have actually accommodated his restrictions. His claim that Appellee would not have paid him TPD benefits is unsupported, and had that occurred, he could have sought resolution in this Court instead of declining work.

¶ 1 Appellant Galen Larson appeals an order from the Department of Labor & Industry (Department) denying his request for interim benefits under § 39-71-610, MCA. Appellee/Insurer Liberty Northwest Ins. Corp. (Liberty) 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 Liberty's case manager and Larson, and Larson's medical records.

¶ 3 On January 10, 2017, Larson suffered an industrial injury when he fractured his ankle. Larson's time-of-injury job was typically in excess of 40 hours per week, and it paid $12.00 per hour.

¶ 4 His treating physician, Justin Jacobson, MD, took him off work.

¶ 5 Liberty accepted liability for Larson's industrial injury and paid certain benefits, including temporary total disability (TTD) benefits.

¶ 6 Dr. Jacobson performed surgery on Larson's ankle later in January, but it was unsuccessful. After a follow-up examination, Dr. Jacobson recommended a fusion surgery, but required Larson to be tobacco-free for a month before surgery could occur.

¶ 7 Dr. Jacobson continued to monitor Larson's condition in the following months, while Larson was unsuccessful in tobacco cessation.

¶ 8 On August 1, 2017, Dr. Jacobson released Larson to return to work on modified duty. Dr. Jacobson expressed hope that Larson could achieve tobacco cessation so that a surgeon could fuse his ankle. He further noted, "I think the damage is done as far as his ankle is concerned. I think it is safe to allow him to partial weight bearing to hopefully allow him to work until his surgery." Dr. Jacobson restricted Larson to 50% weight bearing, and to wear a fracture boot.

¶ 9 On August 2, 2017, Debra Daniels, Senior Case Manager for Liberty, approved Dr. Jacobson's request for authorization for surgery.

¶ 10 On August 3, 2017, Dr. Jacobson confirmed in a handwritten note to Larson's attorney that Larson was released to return to work with restrictions:

> He is medically stable / starting at this point until surgery. Per my last note, he is allowed partial weight bearing and work within restrictions (with fracture boot). Surgery will not be done if not nicotine free.

¶ 11 Also on August 3, 2017, Larson's time-of-injury employer offered him a temporary work assignment in a janitorial position. The position was a 40-hour-per-week job that paid $8.25 per hour. In the letter extending the temporary assignment offer, Larson's employer stated that Larson would only be assigned duties which fit within his work restrictions. The letter stated, "Working outside of these restrictions places you at risk of further injury, and is ***not*** acceptable. Disciplinary action will follow if you are found to be

working outside of your restrictions."[1] The enclosed Job Description described the position as 33% sitting, 33% standing, and 33% walking. A handwritten comment next to "sitting" stated, "As needed." The job required occasional reaching, bending, kneeling, squatting, climbing, and lifting of up to 20 pounds. In general, the job would have required Larson to clean floors by sweeping, mopping, scrubbing, or vacuuming; gather and empty trash cans; service, clean, and supply restrooms; clean and polish furniture and fixtures; and clean windows, mirrors, equipment, and machinery.

¶ 12 Larson's employer's letter dated August 3, 2017, also states, "If reduced working hours are prescribed by your medical provider, you may be entitled to additional compensation through Montana State Fund workers' compensation insurance."[2]

¶ 13 Larson declined the temporary work assignment.

¶ 14 On August 7, 2017, Larson's counsel responded to the temporary assignment offer, stating that Larson declined the position because he believed the job duties were in excess of his physician's work restrictions, and, "Furthermore, this position comes with a drastic cut in pay."

¶ 15 On that same day, Daniels wrote to Larson regarding Larson's declining the work assignment. Daniels stated that if Larson had accepted the work assignment, Liberty would have converted his TTD benefits to temporary partial disability (TPD) benefits. However, since Larson declined, Liberty terminated his TTD benefits.[3]

¶ 16 On August 28, 2017, Larson submitted a request to the Department for interim benefits pursuant to § 39-71-610, MCA.

¶ 17 On August 31, 2017, the Department denied Larson's request for interim benefits. This appeal followed.

¶ 18 Neither party requested a formal evidentiary hearing under ARM 24.5.314(2). Thus, on September 11, 2017, this Court convened an informal telephone conference and heard argument pursuant to ARM 24.5.314(1).

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[1] Emphasis in original.

[2] The letter's reference to the Montana State Fund is an obvious error, as it is undisputed that Liberty is the insurer liable for Larson's claim.

[3] Although Liberty's letter states it is terminating Larson's TPD benefits, this is obviously a typographical error, as it was paying Larson TTD benefits and terminated his TTD benefits for his refusal to accept the alternative position.

Analysis and Resolution

¶ 19 This case is governed by the 2015 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Larson's industrial accident.[4]

¶ 20 Appeals from Department determinations regarding interim benefits under § 39-71-610, MCA, are subject to *de novo* review by this Court.[5] 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?[6] 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.[7]

¶ 21 Liberty concedes that Larson meets the first three factors to determine if a claimant is entitled to interim benefits, but argues that Larson has not tendered a strong *prima facie* case for reinstatement of his TTD benefits. Liberty argues that Larson is not entitled to TTD benefits under § 39-71-712(3), MCA, which provides in relevant part that a worker is not eligible for TPD or TTD benefits if 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 refuses to accept the modified or alternative position.[8]

¶ 22 Larson maintains that the Department should have approved his request for interim benefits and that this Court should overturn that decision on appeal because he has a strong *prima facie* case for reinstatement of his TTD benefits. Larson makes three arguments in support of his position that Liberty did not have sufficient grounds to terminate his TTD benefits under § 39-71-712(3), MCA.

¶ 23 Larson first argues he was not able to perform the alternative position because the job duties of the proffered janitorial position exceeded his work restrictions. Larson argues that he could not meet the walking and standing requirements and that his employer would not have actually allowed him to sit down as needed.

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

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

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

[7] *Hostetter*, ¶ 2 (citing *Graham*, ¶ 6).

[8] *See Kellberg v. Liberty Northwest Ins. Corp.*, 2001 MTWCC 48 (claimant not eligible for TTD benefits when he quit a modified job position until such time as that position would no longer have been available), *recons. denied,* 2001 MTWCC 48A; *Vallance v. Montana Contractor Comp. Fund*, 2006 MTWCC 15 (where claimant chose not to participate in a modified work program, he was not eligible for TTD benefits).

¶ 24 However, this Court agrees with Liberty that Larson did not offer sufficient evidence to establish that the janitorial job exceeded his restrictions. Dr. Jacobson did not completely restrict Larson from standing and walking; rather, Dr. Jacobson restricted him to 50% weight bearing and wearing a fracture boot. While Dr. Jacobson's release does not specify the amount of standing and walking Larson can do, it is clear that Dr. Jacobson thinks Larson can do some standing and walking as part of his job duties. Moreover, Larson offers insufficient evidence in support of his claim that his employer would not actually allow him to sit as needed, and this Court agrees with Liberty that Larson's contention is merely speculative.[9] Thus, on this record, this Court determines that the job description — which states that that job required sitting, standing, and walking, and which states that Larson could sit "as needed" — fit within Dr. Jacobson's restrictions.

¶ 25 Second, Larson claims that the Job Description does not constitute a legally sufficient offer of an alternative position because it was not prepared by a vocational rehabilitation provider. However, although having a job analysis prepared by a vocational rehabilitation specialist is the better practice, Liberty is correct that § 39-71-712, MCA, does not require that a vocational rehabilitation provider prepare a job analysis for the modified or alternative employment.[10]

¶ 26 Third, Larson contends that he was not obligated to accept the temporary work assignment because it paid $3.75 less per hour than his time-of-injury job and offered less hours, and because he did not think Liberty would have paid him TPD benefits in accordance with § 39-71-712, MCA. He points to the sentence in his employer's letter dated August 3, 2017, indicating that he "may be" entitled to additional benefits if prescribed reduced working hours, and argues that it is proof that Liberty did not intend to pay TPD benefits for his reduced wage.

¶ 27 There is no merit to Larson's argument that he was justified in refusing the alternative position because it paid less per hour, and offered fewer hours, than his time-of-injury job. Under § 39-71-712(1) and (2), MCA, if a claimant makes less than his time-of-injury wage in a modified or alternative position, the insurer must pay: "the difference between the injured worker's average weekly wage received at the time of the injury, subject to a maximum of 40 hours a week, and the actual weekly wages earned during the period that the claimant is temporarily partially disabled, not to exceed the injured worker's temporary total disability benefit rate." Therefore, had Larson accepted the alternative position, he would have had the right to TPD benefits and, when combined

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[9] *Schwartzkopf v. Indus. Acc. Bd.*, 149 Mont. 488, 492, 428 P.2d 468, 470 (1967) ("[A]n award of compensation must be based on b[e]tter evidence than speculation.").

[10] *See Daulton v. MHA Workers' Comp. Trust*, 2001 MTWCC 37, ¶ 34 (interpreting § 39-71-609, MCA (1997), which, unlike its current version, did not require a job analysis prepared by a rehabilitation provider: "The term 'work in some capacity' must be construed in accordance with its ordinary and generally understood meaning. . . . On its face 'in some capacity' is broad, indicating a release to any sort of work is sufficient. Had the legislature intended a more careful job analysis, then it could have set forth additional criteria."), *recons. denied*, 2001 MTWCC 37A.

with his wages, he would have received an amount close to his average weekly wage, an amount that almost certainly would have been greater than his TTD benefits.

¶ 28 Moreover, Larson provides no support for his contention that Liberty would not have paid him TPD benefits in accordance with § 39-71-712, MCA. Although Larson claims that his employer's letter dated August 3, 2017, is proof that Liberty would not have paid TPD benefits for the reduced wage, Liberty is the insurer and is therefore solely responsible for paying Larson his benefits in accordance with the Workers' Compensation Act.[11] This Court has no reason to conclude that Liberty would not have paid TPD benefits in accordance with § 39-71-712, MCA, if Larson would have worked the alternative position, as Liberty would have been legally obligated to do so and the calculation as to the amount of TPD benefits due and owing is simple. Had Liberty refused to pay TPD benefits in accordance with § 39-71-712, MCA, Larson could have brought that dispute to this Court, which would have ruled that Liberty was obligated to pay benefits in accordance with § 39-71-712, MCA, and awarded Larson his attorney fees and assessed a penalty if Liberty's refusal was unreasonable.[12]

¶ 29 An objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.[13] This objective includes returning workers to alternative positions. If the job duties ultimately exceeded Larson's work restrictions — e.g., if there was too much walking and standing and the employer did not allow him to sit as needed — Larson could have sought clarification from Dr. Jacobson and, if Dr. Jacobson disapproved the modified job, Larson would have had the right to reinstatement of his TTD benefits.[14] However, since Larson voluntarily declined the temporary work assignment without attempting it, he is not entitled to reinstatement of benefits.[15] Since Larson did not tender a strong *prima facie* case for reinstatement of his TTD benefits, this Court affirms the Department's order denying him interim benefits under § 39-71-610, MCA.

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[11] *See* § 39-71-2203(3), MCA (stating, "Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that the insurer is directly and primarily liable to and will pay directly to the employee or in case of death to the employee's beneficiaries or major or minor dependents the compensation, if any, for which the employer is liable."); *see also Am. Zurich Ins. Co. v. Montana Thirteenth Jud. Dist. Ct.*, 2012 MT 61, ¶¶ 13-15, 364 Mont. 299, 280 P.3d 240 (explaining that while employer has some common interests with its workers' compensation insurer, the insurer is "exclusively liable" for benefits and has "direct liability" to the claimant).

[12] *See* §§ 39-71-611, -612, and -2907, MCA.

[13] § 39-71-105(3), MCA.

[14] *Ranes v. Lumbermans Mut. Cas. Co.*, 1996 MTWCC 49 (where claimant tried, but was unable, to perform the job duties of a modified job position, the job became "unavailable" to claimant under § 39-71-712(3)(c), MCA, because she was unable to perform it, thus rendering her eligible for TTD benefits); *see Vallance*, ¶ 29 (where claimant refused to perform tasks which his supervisor believed fell within his work restrictions, claimant was expected to clarify restrictions with his treating physician).

[15] *See Vallance*, ¶¶ 45-46 (where claimant declined a work assignment with duties which fell within his work restrictions, he was not entitled to TTD or TPD benefits).

Order

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

¶ 31 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 this 25th day of September, 2017.

(SEAL)

/s/ DAVID M. SANDLER
Judge

c: Eric Rasmussen
Morgan M. Weber

Submitted: September 11, 2017