

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 1

WCC No. 2008-2075

NANCY PUGH

Petitioner

vs.

CHARTER OAK FIRE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for a determination of temporary total disability (TTD) benefits due to her. Petitioner argues that she was constructively discharged from her time-of-injury employment and is entitled to TTD benefits pursuant to § 39-71-701(4), MCA. Petitioner contends she is also entitled to TTD benefits for a period of time following her cubital tunnel release surgery.

Held: Petitioner voluntarily resigned her employment and was not constructively discharged. Petitioner failed to meet her burden of proof that she suffered a total loss of wages as a result of her injury after her voluntary resignation.

Topics:

Employment: Termination of Employment: Generally. Where Petitioner put her house up for sale in October 2004 and sold it shortly thereafter, sent the sale proceeds to her daughter to invest in a house in Colorado Springs, shipped belongings to Colorado Springs, hired an assistant manager and informed him that the manager position would be available in the spring of 2005 because she planned to move to Colorado, the Court concluded that Petitioner's tender of a letter of resignation following a critical performance review was a voluntary resignation from her employment and not a constructive discharge.

Employment: Termination of Employment: Generally. The Montana Supreme Court has held that the occurrence of a constructive discharge is "usually a question of fact determined by the totality of the circumstances." Although Petitioner disagreed with a letter the company president wrote criticizing her job performance and imposing specific changes, the Court did not believe either the letter or the conditions imposed upon Petitioner in the letter motivated her resignation. Therefore, the Court concluded that Petitioner was not constructively discharged and cannot avail herself of § 39-71-701(4),MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. The Montana Supreme Court has held that the occurrence of a constructive discharge is "usually a question of fact determined by the totality of the circumstances." Although Petitioner disagreed with a letter the company president wrote criticizing her job performance and imposing specific changes, the Court did not believe either the letter or the conditions imposed upon Petitioner in the letter motivated her resignation. Therefore, the Court concluded that Petitioner was not constructively discharged and cannot avail herself of § 39-71-701(4),MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-2-903. The Montana Supreme Court has held that the occurrence of a constructive discharge is "usually a question of fact determined by the totality of the circumstances." Although Petitioner disagreed with a letter the company president wrote criticizing her job performance and imposing specific changes, the Court did not believe either the letter or the conditions imposed upon Petitioner in the letter motivated her resignation. Therefore, the Court concluded that Petitioner was not constructively discharged and cannot avail herself of § 39-71-701(4), MCA.

Benefits: Temporary Total Disability. Petitioner failed to demonstrate that she suffered a total loss of wages as a result of her injury where she voluntarily resigned from the company, moved to Colorado Springs to be closer to her daughter and grandchild, worked sporadically as a caterer, and acknowledged that her injury did not limit her from obtaining restaurant and grocery jobs. Petitioner's decision not to seek office employment was not because of her injury, but because she wanted to be available to provide day care for her grandchild.

¶ 1 The trial in this matter was held on September 1, 2009, in Great Falls, Montana, and continued on September 2, 2009, in Helena, Montana. Petitioner Nancy Pugh (Pugh) was

present and represented by Richard J. Martin. Respondent Charter Oak Fire Insurance Company (Charter Oak) was represented by G. Andrew Adamek.

¶ 2 Exhibits: Exhibits 1 through 10 were admitted without objection. Exhibit 11 was admitted over Pugh's objection at trial for purposes of impeachment.

¶ 3 Witnesses and Depositions: The depositions of Pugh and Patrick J. Thomas, M.D., were taken and submitted to the Court. Pugh, Brian Lewis McKinney (McKinney), Cynthia Schultz (Schultz), and Mike Lutins (Lutins) were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:¹

¶ 4a Whether Pugh is entitled to TTD benefits pursuant to § 39-71-701, MCA, after the cessation of her work at Air Host, Inc. in April 2005.

¶ 4b What periods of time and what amounts of TTD benefits are payable?

FINDINGS OF FACT

¶ 5 I found the trial testimony of the witnesses to be credible.

¶ 6 Pugh was hired as a manager for the Great Falls, Montana, Air Host operation in February 2002.² Prior to working for Air Host, Pugh owned and operated the restaurant Kickers in Great Falls. She also has several years of experience working as a caterer.³

¶ 7 The corporate headquarters of Air Host is located in Memphis, Tennessee.⁴ John Simank (Simank) is the Executive Vice President of Air Host. Simank was Pugh's supervisor during her employment with Air Host. Simank's office is located in Memphis, but he traveled to Great Falls once or twice a year to meet with Pugh.⁵

¶ 8 As a manager for Air Host, Pugh's responsibilities included overseeing the operations of the airport restaurant, gift shop, and catering business. Pugh ordered food

¹ Pretrial Order at 2.

² Ex. 1.

³ Trial Test.

⁴ Ex. 1; Trial Test.

⁵ Trial Test.

for the restaurant and banquet events, kept an inventory, and hired and supervised Air Host employees.⁶

¶ 9 In 2003, the airport in Great Falls underwent an extensive renovation that lasted approximately eight months. The renovation project included parts of the Air Host operation and caused some disruption to Air Host's restaurant and catering services. On August 16, 2003, while in the course and scope of her employment, Pugh tripped over an electrical outlet box that was protruding from the floor during the renovation project work conditions.⁷ Pugh testified that she landed on the floor with her arms outstretched and heard a snapping sound.⁸

¶ 10 Pugh was taken to the emergency room and diagnosed with a fracture of her proximal left humerus. Her shoulder was placed in a sling and she was given a prescription for Vicodin.⁹ Pugh returned to work within two days of her injury. Pugh testified that she needed the assistance of other employees to lift heavy objects, but she could perform all other duties of her employment.¹⁰

¶ 11 As a result of her injury, Pugh was referred to Patrick J. Thomas, M.D., an orthopedic surgeon in Great Falls.¹¹ Dr. Thomas examined Pugh on August 25, 2003. Dr. Thomas' notes reflect that Pugh was not experiencing any numbness, tingling, or neck pain at that time.¹² Dr. Thomas' impression was that Pugh had a minimally displaced left humeral tuberosity fracture.¹³

¶ 12 On March 8, 2004, Pugh reported to Dr. Thomas with symptoms of numbness originating in her left elbow and extending out to her hand.¹⁴ Pugh had been experiencing

⁶ Trial Test.

⁷ Pretrial Order, Uncontested Fact 1; Trial Test.

⁸ Trial Test.

⁹ Ex. 2 at 6.

¹⁰ Trial Test.

¹¹ Trial Test.

¹² Ex. 4 at 3.

¹³ Ex. 4 at 4.

¹⁴ Ex. 4 at 9.

these symptoms for approximately one to two months prior to this visit.¹⁵ Dr. Thomas diagnosed Pugh with ulnar neuritis in her left elbow and recommended that Pugh seek physical therapy to improve her range of motion and strength in her left shoulder. He also recommended follow-up with W. Lea Gorsuch, M.D., for treatment of Pugh's ulnar nerve symptoms.¹⁶

¶ 13 On April 28, 2004, Dr. Gorsuch examined Pugh. Pugh complained that she was experiencing tingling and pain in her left elbow, hand, and shoulder.¹⁷ Dr. Gorsuch's impression was that Pugh had a probable left peripheral neuropathy and questioned whether there was compression of the ulnar nerve.¹⁸

¶ 14 Pugh packed up her house in Great Falls in October of 2004 and readied it for sale. The house sold in November 2004 and Pugh moved in with her sister. During this time, she sent some of her furniture and restaurant equipment from her house in Great Falls to her daughter's house in Colorado Springs, Colorado. Pugh testified that her daughter paid for the move and hoped Pugh would leave her job at Air Host and move to Colorado Springs because she knew how stressful the job was and how many hours Pugh was working.¹⁹ Pugh sent the proceeds from the house sale to her daughter to invest in a house in Colorado Springs. Pugh testified that she hoped to one day spend part of the year at her house in Florida and part of the year living near her family in Colorado Springs.²⁰

¶ 15 McKinney was hired to be the assistant manager at Air Host in Great Falls in October 2004. Pugh had recommended McKinney for the position because she had previously worked with him when she operated Kickers. McKinney was a sales representative for Food Services of America at that time and Pugh was impressed by McKinney's work ethic.²¹

¶ 16 McKinney initially turned down the assistant manager position because he had concerns about Pugh's management style. However, Pugh informed McKinney that they

¹⁵ Trial Test.

¹⁶ Ex. 4 at 9.

¹⁷ Ex. 4 at 11.

¹⁸ Ex. 4 at 12.

¹⁹ Trial Test.

²⁰ Trial Test.

²¹ Trial Test.

could work out any problems that may arise. Pugh also told McKinney that the manager position would be his when she moved to Colorado Springs in the spring of 2005.²²

¶ 17 McKinney testified that Pugh did not provide him with job training or clear directives of his responsibilities after he was hired. Their working relationship eventually became strained.²³ Based on his observations of Pugh's mismanagement of Air Host, McKinney eventually called Simank and relayed his concerns.²⁴

¶ 18 In the early part of 2005, Jim Lofino (Lofino), a manager for the Air Host operations in Moline, Illinois, arrived at the Air Host operation in Great Falls. Pugh arrived at work one morning to find Lofino and McKinney in the Air Host office with various files spread across the desk. Lofino spent approximately one month in Great Falls reviewing time cards, payroll records, and other business records.²⁵

¶ 19 During the latter part of Lofino's visit, Pugh received a letter from Simank. This letter detailed Simank's increasing concern about Pugh's management of Air Host operations in Great Falls. Simank specified certain issues of concern which included, "poor financial performance, continuing severe bookkeeping and accounting problems, discrepancies as to the allocation of banquet tips among employees, and serious food inventory control problems."²⁶ Other areas of concern expressed by Simank included Pugh's extended absences without authorization, contract bookkeeping services Pugh had authorized, and poor personnel practices.²⁷ As a result of Pugh's poor performance review, she was placed on probationary status and told by Simank that "[u]nless we see immediate and sustained improvement in the areas I have mentioned in this letter, further disciplinary action up to and including termination will be taken."²⁸

¶ 20 Pugh and Lofino went to breakfast together after she read Simank's letter. Pugh testified that after her conversation with Lofino, she decided to resign from her employment

²² Trial Test.

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.

²⁶ Ex. 7 at 1.

²⁷ *Id.*

²⁸ Ex. 7 at 6.

with Air Host.²⁹ On April 5, 2005, Pugh tendered a letter of resignation to Air Host effective April 6, 2005.³⁰ Pugh then retained attorney Roger T. Witt³¹ to represent her and entered into a termination of employment agreement with Air Host which provided her “a special monetary allowance” of \$4500.³²

¶ 21 Following her resignation from Air Host, Pugh did not seek employment in Great Falls, but rather moved to Colorado Springs six weeks after her resignation. Pugh testified that she moved to Colorado Springs to be with her daughter for the birth of her grandchild. Pugh hoped to provide support to her daughter and grandchild during this period of time.³³

¶ 22 While living in Colorado Springs, Pugh worked at a few small catering events. Pugh also applied for employment at several restaurants and grocery stores. Pugh testified that she was unsure if she applied for these jobs before or after her cubital tunnel release surgery that occurred in 2007.³⁴ Pugh did not apply for any office employment because she wanted to be available to help her daughter during the daytime.³⁵ Pugh testified that nothing would have prevented her from seeking employment prior to her April 2007 cubital tunnel release surgery.³⁶

¶ 23 Having reviewed the totality of the circumstances surrounding Pugh’s cessation of employment with Air Host, I find as a matter of fact that Pugh voluntarily resigned her position from Air Host in April 2005. I find that Pugh’s decision to resign from Air Host was unrelated to her employment conditions. It is apparent to me that Pugh intended to resign from Air Host long before receiving Simank’s letter. Specifically, I note the following:

¶ 23a Pugh put her house up for sale in October 2004. Her house sold shortly thereafter in November. Pugh sent the proceeds from her house sale to her daughter to invest in a house in Colorado Springs and moved in with her sister.

²⁹ Trial Test.

³⁰ Ex. 7 at 7

³¹ Trial Test.

³² Ex. 7 at 8.

³³ Trial Test.

³⁴ Trial Test.

³⁵ Pugh Dep. 45:12-25.

³⁶ Trial Test.

¶ 23b After her house was sold, Pugh did not put all of her housewares in storage in Great Falls, but rather shipped her furniture and restaurant equipment to her daughter's home in Colorado Springs.

¶ 23c At the time that Pugh sold her house in 2004, McKinney was hired to be the assistant manager at Air Host. When McKinney was hired, Pugh informed him that her management position would be available to McKinney in the Spring of 2005 because she was planning to move to Colorado.

¶ 23d Pugh's daughter was due to give birth in May 2005, and her daughter had encouraged her to move to Colorado Springs. Pugh wanted to be present to provide support for her family in Colorado.

¶ 24 John H. Pak, M.D., examined Pugh in Colorado Springs on November 13, 2006, and December 5, 2006. Pugh complained of "pain associated with the left shoulder that radiates down to the lateral side associated with numbness and tingling of the little finger, ring finger and thumb."³⁷ Dr. Pak questioned whether Pugh might have a rotator cuff tear and ordered an MRI of Pugh's shoulder.³⁸ Dr. Pak ordered an EMG because Pugh was still experiencing nonspecific numbness and weakness in the left arm.³⁹ On March 20, 2007, Dr. Pak recommended a cortisone injection to Pugh's left shoulder in light of her continued symptoms and EMG results. Dr. Pak suggested that Pugh see David M. Bierbrauer, M.D., for a cubital tunnel release.⁴⁰

¶ 25 Dr. Bierbrauer performed a left elbow cubital tunnel release on Pugh in April 2007.⁴¹ Approximately two weeks post-surgery, Dr. Bierbrauer reported that Pugh was "doing well." He noted that Pugh may do all activities as tolerated and requested that she return in four weeks for another recheck.⁴² Approximately six months post-surgery, Dr. Bierbrauer examined Pugh and again opined that she may do all activities as tolerated.⁴³

³⁷ Ex. 6 at 1.

³⁸ Ex. 6 at 2.

³⁹ Ex. 6 at 3.

⁴⁰ Ex. 6 at 4.

⁴¹ Trial Test., Ex. 6 at 5.

⁴² Ex. 6 at 16.

⁴³ Ex. 6 at 19.

¶ 26 In response to an inquiry from Pugh's counsel, Dr. Bierbrauer sent a letter on October 17, 2008. The letter states:⁴⁴

I will attempt to answer your questions. The questions you are asking whether or not her cubital tunnel syndrome was caused by the injury on August 17, 2003. I assume by this injury you are referring to her humerus fracture. Certainly, by the patient's own admission, her symptoms were not present until after her humerus fracture. Since the symptoms are temporarily related to the injury, there is high likelihood of association between the injury and her subsequent cubital tunnel syndrome. This could be explained by direct injury to the nerve at the time of her fracture as well as potential for local swelling and scarring as a result of the fracture.

¶ 27 Dr. Thomas was the only physician deposed for this case. He admitted that his knowledge of cubital tunnel syndrome is limited⁴⁵ and that he has no experience diagnosing cubital tunnel syndrome.⁴⁶ Dr. Thomas opined that it is unlikely that the fracture of Pugh's humerus created her cubital tunnel syndrome.⁴⁷

CONCLUSIONS OF LAW

¶ 28 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Pugh's industrial accident.⁴⁸

¶ 29 Pugh bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁴⁹

Issue 1: Whether Pugh is entitled to TTD benefits pursuant to § 39-71-701, MCA, after the cessation of her work at Air Host, Inc. in April 2005.

¶ 30 Section 39-71-701(1), MCA, states in pertinent part:

⁴⁴ Ex. 6 at 24.

⁴⁵ Thomas Dep. 5:10-12.

⁴⁶ Thomas Dep. 9:19-25.

⁴⁷ Thomas Dep. 19:23-25.

⁴⁸ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁴⁹ *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).

[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 and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

¶ 31 Pugh suffered no wage loss for approximately twenty months after her injury because she immediately returned to her time-of-injury job and worked continuously at that position until April 6, 2005, when she tendered her resignation letter to Air Host. Pugh contends that she was constructively discharged from her employment and, as such, is entitled to TTD benefits pursuant to § 39-71-701(4), MCA,⁵⁰ which states:

If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available to the worker for any reason except for the worker's incarceration, . . . resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled, as defined in 39-71-116.

¶ 32 Section 39-2-903(1), MCA, defines constructive discharge as:

the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative.

¶ 33 The Montana Supreme Court has held that the occurrence of a constructive discharge is “usually a question of fact determined by the totality of the circumstances.”⁵¹

⁵⁰ Pretrial Order at 3.

⁵¹ *Bellanger v. American Music Co.*, 2004 MT 392, ¶ 14, 325 Mont. 221, 104 P.3d 1075 (citing *Snell v. Montana-Dakota Utils. Co.*, 198 Mont. 56, 65, 643 P.2d 841, 846 (1982); *Niles v. Big Sky Eyewear*, 236 Mont. 455, 461, 771 P.2d 114, 118 (1989); *Kestell v. Heritage Health Care Corp.*, 259 Mont. 518, 524, 858 P.2d 3, 11 (1993); *Jarvenpaa v. Glacier*

For the reasons detailed above at ¶ 23, I have found that Pugh voluntarily resigned her employment with Air Host in 2005 for reasons unrelated to her employment conditions. Although Pugh may have disagreed with Simank's letter, I do not believe either the letter or the conditions imposed upon her in the letter motivated her resignation. As noted above, it is apparent to me that Pugh had intended to resign from Air Host long before receiving Simank's letter. Therefore, I conclude that Pugh was not constructively discharged and cannot avail herself of the provisions of § 39-71-701(4), MCA.

¶ 34 Moreover, Pugh has failed to demonstrate that she suffered a total loss of wages "as a result of [her] injury"⁵² after her voluntary resignation from Air Host. Pugh acknowledged that after leaving Air Host, she moved to Colorado Springs to be closer to her daughter and assist with caring for her newborn grandchild. Pugh worked sporadically as a caterer in Colorado Springs and sought employment from several restaurants and a grocery store. Pugh acknowledged that her injury did not limit her from obtaining these jobs. Pugh was asked whether she sought office employment during this time and stated that she did not; however, her decision to not seek office employment was not because of her injury, but rather because she wanted to be available during the day to care for her grandchild.

¶ 35 In April 2007, Pugh underwent cubital tunnel release surgery. The parties dispute whether Pugh's cubital tunnel syndrome is causally related to her August 16, 2003, industrial injury. For purposes of deciding Pugh's entitlement to TTD benefits, the Court need not determine whether a causal relationship exists because Pugh has failed to meet her burden of proof that she suffered a loss of wages as a result of her cubital tunnel syndrome.

¶ 36 Dr. Bierbrauer performed Pugh's cubital tunnel release surgery and follow-up care. Dr. Bierbrauer did not testify at trial and was not deposed. His only comments regarding Pugh's cubital tunnel syndrome are found in his treatment notes and a brief letter addressed to Pugh's counsel dated October 17, 2008. Dr. Bierbrauer's letter was limited to the issue of causation and does not address Pugh's work limitations. His treatment notes begin two weeks after Pugh's surgery and continue through approximately six months post-surgery. Beginning with the treatment note two weeks post-surgery, Dr. Bierbrauer notes that Pugh may "do all activities as tolerated."⁵³ His final treatment note regarding Pugh's cubital tunnel release reiterates that Pugh "may do all activities as

Elec. Coop., 271 Mont. 477, 484, 898 P.2d 690, 694 (1995)).

⁵² § 39-71-701(1)(a), MCA.

⁵³ Ex. 6 at 16.

tolerated.”⁵⁴ While one might assume that Pugh was limited during at least the two weeks immediately following her cubital tunnel release surgery, the record is devoid of any evidence that would allow the Court to reach such a conclusion. Therefore, I must conclude that Pugh has failed to meet her burden of proof that she is entitled to TTD benefits after the cessation of her work at Air Host in April 2005.

Issue 2: What periods of time and what amounts of TTD benefits are payable?

¶ 37 Having determined that Pugh is not entitled to any TTD benefits, Issue 2 is moot.

JUDGMENT

¶ 38 Pugh is not entitled to temporary total disability benefits pursuant to § 39-71-701, MCA, after the cessation of her work at Air Host in April 2005.

¶ 39 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 12th day of January, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
G. Andrew Adamek
Submitted: September 2, 2009

⁵⁴ Ex. 6 at 19.