

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 1

WCC No. 2012-3021

KIM TREVINO

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

RECONSIDERATION GRANTED – 03/29/13

Summary: Respondent moved for summary judgment on Petitioner's claim of entitlement to permanent partial disability and vocational rehabilitation benefits, arguing that Petitioner was at maximum medical improvement and released to return to her time-of-injury employment and that Petitioner believes she is capable of performing her time-of-injury job. Petitioner objected to Respondent's motion, arguing that a question of fact exists as to whether she can perform her time-of-injury job.

Held: The undisputed facts support a conclusion that Petitioner is capable of performing her time-of-injury job. Thus, she is not entitled to additional permanent partial disability benefits nor vocational rehabilitation benefits and Respondent is entitled to summary judgment in its favor.

¶ 1 Respondent Montana State Fund (State Fund) moves this Court for summary judgment in its favor. State Fund contends that Petitioner Kim Trevino should not prevail in her claim against State Fund for permanent partial disability (PPD) and vocational rehabilitation benefits.¹ Trevino objects to State Fund's motion, arguing that a genuine issue of fact exists which precludes summary judgment in this matter.²

¹ Motion for Summary Judgment and Brief in Support (Opening Brief), Docket Item No. 11.

² Petitioner's Brief Opposing Respondent's Motion for Summary Judgment (Response Brief), Docket Item No. 12.

Undisputed Facts³

¶ 2 Trevino worked as an “ironer” at National Laundry. On June 28, 2009, she suffered an industrial injury to her right shoulder. She filed a workers’ compensation claim and State Fund accepted liability.⁴

¶ 3 The ironer job at National Laundry is a physically demanding job, classified as medium duty, which includes grasping, gripping, reaching, and lifting on a continuous basis at varying levels.⁵

¶ 4 Trevino earned \$10.20 per hour in her position at National Laundry.⁶

¶ 5 Trevino last worked for National Laundry in July 2011.⁷ She was placed on temporary total disability (TTD) benefits at that time. State Fund terminated those TTD benefits on March 6, 2012.⁸

¶ 6 Trevino’s injury was a partial thickness rotator cuff tear on the right, resulting in residual symptoms of pain and some loss of strength and range of motion.⁹

¶ 7 On November 21, 2011, Dr. Lawrence Iwerson evaluated Trevino. He opined that her right shoulder condition was not surgical. He found her at maximum medical improvement (MMI).¹⁰

¶ 8 On December 14, 2011, Trevino’s treating physician, Greg Vanichkachorn, M.D., declared Trevino to be at MMI. He assessed her as having a 1% whole person impairment rating.¹¹

¶ 9 State Fund has paid Trevino her impairment award.¹²

³ Neither party objected to the other’s proffered facts.

⁴ Opening Brief at 2.

⁵ Response Brief at 2.

⁶ Response Brief at 2.

⁷ Opening Brief at 2.

⁸ Response Brief at 2.

⁹ Response Brief at 2.

¹⁰ Opening Brief at 2.

¹¹ Opening Brief at 2.

¶ 10 On January 3, 2012, Trevino underwent a Functional Capacity Evaluation (FCE). The FCE therapist provided conditions for Trevino in regard to her time-of-injury position, noting, “The concern with this position is the amount and type of reaching she may have to do with her right arm . . . needs to limit reaching within a range that keeps her elbow close to her body.”¹³ However, the therapist did approve the time-of-injury job.¹⁴

¶ 11 On February 13, 2012, Dr. Vanichkachorn approved Trevino to return to work in her time-of-injury job without restrictions. He also approved job analyses for the positions of ironer catcher, bar towel folder, customer care representative, group home worker, assembler, motel desk clerk, people greeter, and taxi dispatcher.¹⁵ These alternate jobs pay less than Trevino’s time-of-injury job.¹⁶

¶ 12 Trevino agrees that she can perform her time-of-injury job.¹⁷

¶ 13 After Trevino was released to return to work without restrictions, she asked Philip Maurer, the production manager at National Laundry, for her job back. Maurer told her that he needed to hear from State Fund’s claims adjuster and told Trevino to wait a couple of weeks to hear back from him. Trevino waited for two months, but Maurer never called her back.¹⁸

¶ 14 In April 2012, Trevino called Maurer. Maurer told Trevino that National Laundry had given her ironer position to someone else. However, this statement was untrue and Trevino’s position was vacant at that time.¹⁹

¶ 15 In July 2012, National Laundry hired a permanent replacement for Trevino’s ironer position at National Laundry.²⁰

¹² Opening Brief at 2.

¹³ Response Brief at 2-3.

¹⁴ Reply Brief in Support of State Fund’s Motion for Summary Judgment (Reply Brief) at 2.

¹⁵ Opening Brief at 2.

¹⁶ Response Brief at 4.

¹⁷ Opening Brief at 2.

¹⁸ Response Brief at 3.

¹⁹ Response Brief at 3.

²⁰ Response Brief at 3.

¶ 16 Maurer testified that it was “hard to say” if Trevino could perform the ironer job with the conditions placed on her by the FCE evaluator.²¹

¶ 17 Trevino is eligible to be rehired at National Laundry. She recently submitted a job application to National Laundry, but no positions were available at the time.²²

¶ 18 L. Beth Morris, MA, CCRC, is the certified vocational rehabilitation consultant who performed an employability and wage-loss assessment on Trevino’s file. Morris concluded, “Given Ms. Trevino’s ability to return to work within her local labor market without incurring a wage loss, retraining appears neither necessary nor appropriate at this time.”²³

¶ 19 Trevino presently works part-time as a housekeeper at a hotel in Great Falls. She makes \$8.25 per hour.²⁴

Analysis and Decision

¶ 20 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.²⁵ Trevino has alleged material facts remain in dispute, as set forth below. I have determined that the material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 21 This case is governed by the 2007 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Trevino’s industrial accident.²⁶

¶ 22 In considering State Fund’s motion, I note that summary judgment is an extreme remedy which should not be a substitute for a trial on the merits if a material factual controversy exists. Moreover, all reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the nonmoving party.²⁷ Because trials

²¹ Response Brief at 3.

²² Opening Brief at 3.

²³ Opening Brief at 3.

²⁴ Response Brief at 4.

²⁵ ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

²⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

²⁷ *Delaware v. K-Decorators, Inc.*, 1999 MT 13, ¶ 55, 293 Mont. 97, 973 P.2d 818.

in this Court are held on an expedited basis pursuant to ARM 24.5.329(1)(b), summary judgment is particularly disfavored in this Court.²⁸

I. Whether this Court should grant summary judgment to State Fund on the issue of Trevino’s entitlement to PPD benefits.

¶ 23 Under § 39-71-703, MCA, an injured worker is entitled to PPD benefits if the worker suffers a permanent partial disability and has an actual wage loss as a result of the injury. Section 39-71-116(1), MCA, defines “actual wage loss” as “the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury.” State Fund contends that Trevino is not entitled to PPD benefits because she has not suffered a wage loss as a result of her industrial injury.

¶ 24 In the present case, State Fund notes that it is undisputed that Trevino has been released to return to her time-of-injury job without restriction by her treating physician, and further notes that Trevino herself has testified that she believes she is capable of performing her time-of-injury job.²⁹ State Fund argues that Trevino is presently experiencing a wage loss because she is underemployed and not due to her industrial injury.³⁰

¶ 25 Trevino responds that issues of material fact exist as to whether her industrial injury precludes her from performing her time-of-injury job and whether she has suffered an actual wage loss as a result of her industrial injury.³¹ Specifically, Trevino alleges that there are “different opinions” as to whether she can perform her time-of-injury job, noting that the FCE evaluator placed limitations on her ability to do the work. Trevino further contends that Maurer’s statement that it was “hard to say” whether she could perform the job constitutes a “different opinion” as to whether she can perform the job.³² Trevino further argues that it is logical to conclude that National Laundry failed to give her the ironer job back because her former employer believes she is not capable of performing those job duties.³³

²⁸ See *Oens v. Employee Benefits Ins. Co.*, 2003 MTWCC 40, ¶ 5.

²⁹ Opening Brief at 4.

³⁰ Opening Brief at 4.

³¹ Response Brief at 4.

³² Response Brief at 4.

³³ Response Brief at 4.

¶ 26 As noted above, this Court views summary judgment motions with disfavor. In this instance, since State Fund is the moving party, I make all reasonable inferences in Trevino's favor. As State Fund notes, it is well-established that the definition of actual wage loss encompasses the question of what an individual is qualified to earn, and the "qualified to earn" provision takes into account the possibility that an injured worker may not immediately return to work after reaching MMI, or may be underemployed.³⁴ In the present case, it is clear that if I conclude that Trevino's industrial injury has not precluded her return to her time-of-injury job without restriction, then I must conclude she has not suffered an "actual wage loss" as she will be qualified to earn her time-of-injury wage.

¶ 27 The facts pertinent to the question of whether Trevino's industrial injury has precluded her from returning to her time-of-injury job as an ironer at National Laundry are as follows:

1. Trevino testified that she believes she can perform her time-of-injury job.
2. Trevino's treating physician approved the job analysis for Trevino's time-of-injury job without restriction.
3. The FCE therapist expressed concern regarding Trevino's time-of-injury job, but ultimately approved the job analysis.
4. The production manager at National Laundry opined that it was "hard to say" whether Trevino could perform the time-of-injury job.

¶ 28 Given the facts set forth above, I see no way by which Trevino could prevail on this issue. Her treating physician, the FCE therapist, and Trevino herself all believe she can perform her time-of-injury job. Trevino's supervisor testified, at best, that he did not know. While Trevino argues that there are "different opinions" which preclude summary judgment in this case, even with drawing all inferences in her favor, I cannot conclude that "Yes," "Yes," "Yes, although I have concerns," and "I don't know" truly constitute "different opinions."

¶ 29 While Trevino further argues that the only possible explanation for National Laundry's failure to give her this job back must be because National Laundry does not believe she can perform her time-of-injury job duties, I find that the only evidence Trevino has presented in support of this is her guess that this is the only "logical" conclusion to draw. By engaging in the same sort of speculation as Trevino given the

³⁴ Opening Brief at 4; see *Masters v. Liberty Northwest Ins. Corp.*, 2000 MTWCC 1, ¶ 37.

same set of facts, I can think of several possible explanations for National Laundry's failure to give Trevino her job back – some benign, some not. Although Trevino's speculation led her to conclude that National Laundry does not think she can perform her time-of-injury job due to her industrial injury, Trevino has not proffered any evidence in support of this speculation and therefore I cannot conclude that it constitutes a factual dispute precluding summary judgment.

¶ 30 From the evidence before the Court, I do not see any possible way in which Trevino can prove that she is precluded from performing her time-of-injury job and is therefore entitled to PPD benefits. Therefore, I conclude that State Fund is entitled to summary judgment in its favor on this issue.

II. Whether this Court should grant summary judgment to State Fund on the issue of Trevino's entitlement to vocational rehabilitation benefits.

¶ 31 State Fund further argues that it is entitled to summary judgment on Trevino's claim for vocational rehabilitation benefits. State Fund notes that, pursuant to § 39-71-1006(1), MCA, an injured worker is eligible for rehabilitation benefits if the worker meets the definition of disabled worker as provided in § 39-71-1011, MCA, or if the worker has, as a result of the work-related injury, a whole person impairment rating of 15% or greater. State Fund contends that Trevino does not meet the basic eligibility requirements for rehabilitation benefits because she is neither a "disabled worker" as that term is defined in the Workers' Compensation Act nor does she have a whole person impairment rating of 15% or greater.

¶ 32 It is undisputed that Trevino received a whole person impairment rating of 1%. Therefore, the only way in which she would be eligible for rehabilitation benefits under § 39-71-1006, MCA, is if she meets the definition of disabled worker as provided in § 39-71-1011(2), MCA, which states:

"Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury.

¶ 33 Trevino argues that, if this Court determines that she cannot perform her time-of-injury job as an ironer at National Laundry, then she would qualify as a "disabled worker" under the applicable statutes.³⁵ As set forth above, I have not made such a determination. Therefore, I further conclude that Trevino is not a "disabled worker" as

³⁵ Response Brief at 6.

that term is defined in § 39-71-1011(2), MCA. Since Trevino does not have an impairment rating of 15% or greater and does not meet the statutory definition of being a “disabled worker,” she is not entitled to vocational rehabilitation benefits under § 39-71-1006, MCA. State Fund is therefore entitled to summary judgment on this issue.

III. Whether this Court should grant summary judgment to State Fund on the issues of Trevino’s entitlement to her costs, attorney fees, and a penalty.

¶ 34 State Fund further argues that it is entitled to summary judgment on the issues of whether Trevino is entitled to her costs, attorney fees, and a penalty against State Fund under the applicable statutes.³⁶ State Fund argues that under §§ 39-71-611, -2907, MCA, this recovery would only be available to Trevino if she prevailed in her other claims.³⁷ Trevino does not dispute this to be the case, and indeed the language of the applicable statutes does not support recovery of these items unless a claimant prevails on the underlying issue. Since I have determined that State Fund is entitled to summary judgment in its favor on the issues of Trevino’s entitlement to PPD and vocational rehabilitation benefits, I further conclude that State Fund is entitled to summary judgment in its favor on these remaining issues since Trevino is not the prevailing party.

Order

¶ 35 Respondent’s motion for summary judgment is **GRANTED**.

¶ 36 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 23rd day of January, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Richard J. Martin
Kevin Braun
Submitted: January 15, 2013

³⁶ Opening Brief at 2.

³⁷ Opening Brief at 6.