IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 14

WCC No. 2020-5018

ASHLEY WALTERS

Petitioner

vs.

EMPLOYERS INSURANCE COMPANY OF WAUSAU

Respondent/Insurer.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

Summary: After Petitioner was injured in the course of her employment, her employer discharged her for being a "no call, no show" for two shifts. The day after her discharge, Petitioner's employer found a Medical Status Form on which her physician stated that she was not released to work on the days on which she was a "no call, no show." Realizing that it had made a mistake, Petitioner's employer contacted her to discuss her returning to work and, the day after that, to notify her that it did not consider her discharged. Petitioner did not respond. Once Petitioner was released to return to modified work, the employer offered her a position within her restrictions, but she refused to return to work on the grounds that she was not an employee. The parties filed cross-motions for summary judgment on the issue of Petitioner's entitlement to TTD benefits under § 39-71-701, MCA. Respondent argues that Petitioner is not entitled to TTD benefits because the employer timely fixed its mistake and thereafter offered her a job that was within her restrictions. Thus, Respondent maintains that the job was available to Petitioner and that her wage loss has been entirely due to her voluntary refusal to return to work. Petitioner argues that she is entitled to TTD benefits because her employment contract was irreparably severed and thus, there has been no work to which she could return.

Held: Petitioner is not entitled to TTD benefits. Because Petitioner's employer timely fixed its mistake and was thereafter willing to employ her in a modified position, the job was available to her. Petitioner offers no good reason for refusing the employer's offer of

modified employment. Thus, Petitioner's wage loss has been entirely due to her voluntary refusal to return to work. Neither § 39-71-701(4), MCA, nor the express policies of the Workers' Compensation Act, allow an injured worker to refuse an employer's offer of modified employment without good reason and collect TTD benefits from the insurer.

¶ 1 Respondent Employers Insurance Company of Wausau (Employers) moves for summary judgment on Petitioner Ashley Walters' claim for temporary total disability (TTD) benefits. Employers asserts that after Kismet Big LLC d/b/a Lake View Care Center (Lake View) notified Walters that it discharged her employment based on a mistake and that it did not consider her discharged, Lake View made work available to her that was within her restrictions. Employers argues that Walters is not entitled to TTD benefits under § 39-71-701, MCA, because the only reason she was not working is that she refused to accept the modified position.

¶ 2 Walters cross-moved for summary judgment, asserting the employment relationship was irreparably severed when Lake View discharged her. Thus, she claims that she is not an employee and, therefore, that there has been no work available to her under § 39-71-701(4), MCA. Thus, she asserts that she is entitled to TTD benefits.

¶ 3 Neither party requested a hearing.

¶ 4 For the reasons that follow, this Court grants Employers' Motion for Summary Judgment and denies Walters' Cross-Motion for Summary Judgment.

FACTS

¶ 5 On October 22, 2019, Walters injured her back in the course of her employment with Lake View.

¶ 6 That day, Walters went to the emergency department at Kalispell Regional Medical Center. Darren Sean Brockie, MD, diagnosed Walters with an upper-back strain, and took her off work for two days.

¶ 7 On October 25, 2019, Walters saw Cameron T. Gardner, MD, who diagnosed her with left-side sciatica based on her work injury. He referred her for physical therapy and restricted her to working four-hour shifts and lifting no more than 10 pounds until November 5, 2019. The same day, Walters provided her Medical Status Form to Lake View.

¶ 8 Thereafter, Walters worked a four-hour shift but doing so left her in significant pain.

¶ 9 On October 28, 2019, Walters followed-up with Dr. Gardner, who took her off work until her reevaluation on November 8, 2019. The same day, Dr. Gardner's office faxed to Lake View a Medical Status Form on which Dr. Gardner checked the "Employee Not Released to Work" box.

¶ 10 However, Lake View misplaced this Medical Status Form.

¶ 11 In accordance with Dr. Gardner's guidance, Walters did not show up for her scheduled shifts on October 30, 2019, and November 4, 2019.

¶ 12 On November 4, 2019, Lake View discharged Walters for missing her shifts without calling. Kathleen Lembrich, RN, Director of Nursing (DON) at Lake View, called Walters and informed her of the discharge.

¶ 13 On the morning of November 5, 2019, Lake View found Walters' Medical Status Form from Dr. Gardner, stating that she was not released to work. Lembrich asked Walters, via text message, to call her "asap" to discuss her employment with Lake View. When Walters questioned what there was to discuss given that her employment had been "decided," Lembrich responded, "No, I'd sure like to discuss it with you." Walters did not respond.

¶ 14 On November 6, 2019, Lembrich sent Walters a text message stating: "If you wish to discuss coming back please give me a call. I have talked to corp. [r]egarding this option."

¶ 15 Because Walters did not respond to Lembrich's text messages, Laurie Normandy, Administrator of Lake View, sent a letter to Walters on November 6, 2019, which stated that Lake View did not consider her discharged:

> We have been trying to contact you to inform you that you have not been discharged from Lake View Care Center. Therefore, please disregard the conversations we had with you on November 4th.
>
> We understand you have a follow up appointment on Friday, November 8 at 8:30 am. If your physician releases you to work, you are on the schedule for 12:00 pm on November 8. Please bring your medical status report with you. If not released, we expect a phone call from you on November 8 by 10:00 am and a copy of the medi[c]al status report.
>
> Any call offs or changes to your schedule must be CALLED into the facility in accordance with our attendance policy. You should ask to speak with me or Kat Lembrich, DON. We do not allow staff to communicate through text or email. Therefore, any communication must be through a phone call. All other forms of communications will not be recognized.[1]
>
> To confirm, you are expected to be at work Friday, November 8 at Noon or call by 10:00 am Friday, November 8, after your follow up appointment with the doctor. If we do not receive a response from you by 12:00 pm on Friday,

[1] Emphasis in original.

> November 8, we will assume that you do not plan to return to work. At that time, you will be considered to have voluntarily resigned your position.

¶ 16 On November 8, 2019, one of Walters' medical providers took her off work. Thus, Employers started paying Walters TTD benefits.

¶ 17 By mid-February 2020, Walters had attended physical therapy and undergone electromyography and a nerve conduction study. On February 17, 2020, Justin L. Shobe, PA-C, referred Walters for pain management and pool-based physical therapy. He released her to return to work but restricted her to half days and sedentary duties, with occasional bending, no climbing, and lifting up to 10 pounds until February 28, 2020. Starting on March 2, 2020, he thought Walters could return to full hours though still with sedentary duties and the same lifting restrictions. Shobe's office notified Lake View of Walters' restrictions.

¶ 18 On February 18, 2020, Nathaniel Branch – the claims examiner handling Walters' claim – e-mailed Walters' attorney, stating that Lake View had modified work for her within her restrictions.

¶ 19 On February 19, 2020, Normandy sent Walters a text message, stating that she had put Walters on the schedule starting the following day from 11:00 a.m. to 3:00 p.m., and that this would be her schedule, "this week and next week Monday-Friday."

¶ 20 Walters responded with a text message stating, "that's funny knowing that you already fired me."

¶ 21 Normandy replied with a screen shot of her letter from November 6, 2019, and a text stating, in part, "You are still an employee . . . ."

¶ 22 Also on February 19, 2020, Walters' attorney e-mailed a letter to Branch, stating that Lake View had discharged Walters on November 4, 2019, and that, as a result, she was entitled to TTD benefits under § 39-71-701, MCA.

¶ 23 Branch responded the same day, explaining the mistake that led to Walters' discharge and that she had been reinstated. Thus, Branch stated that Employer's position was that Walters would not be entitled to TTD benefits when Lake View had modified work for her:

> It is our position that Ashley is still employed and that the employer has attempted to extend an offer of work of 4 hours a shift within the restrictions. I will be changing the benefits from TTD to TPD starting on Monday, 2/24/2020. Hopefully that will provide Ashley with sufficient time to coordinate her return to work, should she opt to take the job offer.

¶ 24 Walters did not show for her scheduled shift on February 20, 2020, or for her scheduled shifts in the following week.

¶ 25 On February 21, 2020, Walters' attorney e-mailed a letter to Branch, stating that once Lake View discharged Walters, whatever work it had available for her became unavailable and that she was, therefore, entitled to TTD benefits.

¶ 26 Employers stopped paying Walters TTD benefits, asserting that she was not entitled to TTD benefits because Lake View had modified work available.

¶ 27 Walters filed her Petition for Trial on April 30, 2020, seeking TTD benefits, as well as costs, fees, and a penalty.

LAW AND ANALYSIS

¶ 28 This case is governed by the 2019 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Walters' industrial accident.[2]

¶ 29 For this Court to grant summary judgment, the moving party must establish that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.[3] In this case, the parties agree that this matter is appropriate for summary judgment.

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

> (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, 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.
>
> . . . .
>
> (4) 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 as provided for

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

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

> in 39-71-744, 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.

¶ 31 Employers argues that under this statute, Walters is not entitled to TTD benefits because the only reason Walters has not been working is that she refused to accept Lake View's offer of modified work, which is within her restrictions and at the same wage she was making before. In support of its position that Walters is not entitled to TTD benefits, Employers cites *Rushford v. Montana Contractor Compensation Fund*, where this Court ruled that the insurer was not liable for TTD benefits because Rushford did not have a loss of wages as a result of his injury; rather, he had a loss of wages because he turned down modified work because he had moved out-of-state.[4] Employers also asserts that awarding Walters TTD benefits under the facts of this case would violate one of the express policies of the WCA, which is to return injured workers to work.

¶ 32 Walters argues that she is entitled to TTD benefits under this statute because, after Lake View discharged her, their employment contract under § 39-2-101, MCA,[5] was irreparably severed. Walters contends that Lake View could not rescind her discharge and, as a result, she remains eligible for TTD benefits as there has been no modified work available to her under § 39-71-701(4), MCA.

¶ 33 Walters is not entitled to TTD benefits for two reasons.

¶ 34 First, Walters is not entitled to TTD benefits under § 39-71-701, MCA, because she is not suffering a total loss of wages as a result of her injury. The uncontroverted evidence shows that Lake View offered her a modified position that she was able to perform. This Court has previously ruled that under § 39-71-701(4), MCA, "A job is 'available' if the employer is willing to employ the worker in it."[6] The undisputed facts show that Lake View was willing to employ Walters in the modified position; thus, the job was available to her under § 39-71-701(4), MCA. Walters offers no good reason for refusing Lake View's offer of modified employment. Thus, on this record, the sole reason Walters is suffering a wage loss is that she voluntarily refused to return to a job that is available to her. Under established case law holding that an injured worker is not entitled to TTD benefits under § 39-71-701(4), MCA, if she refuses modified employment within her restrictions,[7] Walters is not entitled to TTD benefits.

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[4] 2014 MTWCC 16, ¶¶ 208-11.

[5] Section 39-2-101, MCA, states, "The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person."

[6] *Greene v. Uninsured Employers' Fund*, 2002 MTWCC 37, ¶ 4.

[7] *See, e.g.*, *Vallance v. Mont. Contractor Comp. Fund*, 2006 MTWCC 15, ¶¶ 45-46 (claimant not eligible for TTD benefits where he chose not to participate in a modified work program); *Kellberg v. Liberty Nw. Ins. Corp.*, 2001 MTWCC 48, ¶ 35 (claimant not eligible for TTD benefits when he quit a modified job position until such time as that

¶ 35 Second, a ruling granting Walters TTD benefits would run counter to the stated policies of the WCA. Section 39-71-105(1), MCA, states, in relevant part, that: "Wage-loss benefits are not intended to make an injured worker whole but are intended to provide assistance to a worker at a reasonable cost to the employer. Within that limitation, the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease." And, subsection (3) provides: "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."[8] A ruling that Lake View could not timely correct its mistake or a ruling that the modified employment was unavailable to Walters even though Lake View was willing to employ her would unnecessarily delay her return to work and allow her to obtain wage-loss benefits that have no relationship to the actual wages lost due to injury because she could be earning wages.

¶ 36 This Court is not persuaded by Walters' arguments.

¶ 37 Walters argues that "[o]nce the employment contract has been severed, the employer cannot rescind the termination." However, Montana law is not so rigid that an employer cannot timely correct a mistake; indeed, Lake View acted in good faith when it timely corrected its mistake.[9] Moreover, there is no law prohibiting an employer and employee from entering into another employment contract. The WCA recognizes that there are situations in which an injured worker will no longer be an employee but that the injured worker and her employer will enter into another employment contract. Indeed, it provides that when an injured worker is capable of returning to work within two years from the date of injury, the employer must give her a "reemployment preference" "over other applicants for a comparable position that becomes vacant."[10]

¶ 38 Here, Lake View realized that it had made a mistake the day after it discharged Walters and asked her to contact it to discuss her employment. Walters did not respond and offers no explanation as to why she did not do so. The following day, Lake View notified her that it did not consider her discharged. Walters offers no reason why she does not accept Lake View's determination that she was not discharged nor any good reason for refusing to accept Lake View's offer of modified employment; e.g., she does

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position would no longer have been available), *recons. denied* 2001 MTWCC 48A; *Rushford*, ¶¶ 208-10; *Larson v. Liberty Nw. Ins. Corp*., 2017 MTWCC 15, ¶ 29 (claimant not eligible for TTD benefit because he "voluntarily declined the temporary work assignment without attempting it").

[8] *See also Larson*, ¶ 29 (citation omitted) (stating, "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. This objective includes returning workers to alternative positions.").

[9] *See Gates v. Life of Mont. Ins. Co*., 196 Mont. 178, 184-85, 638 P.2d 1063, 1066-67 (1982) (holding that employment contracts contain an implied covenant of good faith and fair dealing); *Draggin' Y Cattle Co. v. Junkermier, Clark, Campanella, Stevens, P.C*., 2019 MT 97, ¶ 47, 395 Mont. 316, 439 P.3d 935 ("Implied as a matter of law in every contract is a covenant of good faith and fair dealing requiring 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.' ").

[10] § 39-71-317(2) – (4), MCA.

not assert that Lake View did anything that made it intolerable for her to return.[11] On this record, Walters' refusal to return to Lake View to work in a job that was available to her was her voluntary choice.

¶ 39 Walters also alleges that Lake View discharged her in retaliation for filing a workers' compensation claim, in violation of § 39-71-317(1), MCA, which provides, in part, "An employer may not use as grounds for terminating a worker the filing of a claim under this chapter." She argues that because she was discharged for filing a claim, she is entitled to TTD benefits because the cause of her total loss of wages is her injury. However, Walters ignores the rest of this subsection, which states, "The district court has exclusive jurisdiction over disputes concerning the grounds for termination under this section." Walters has not presented a decision from a district court that Lake View discharged her in retaliation for filing her claim. Thus, this Court cannot grant her summary judgment on the grounds that Lake View discharged her in retaliation for filing her claim.[12]

¶ 40 Finally, citing *Pugh v. Charter Oak Fire Ins. Co.*,[13] Walters argues that a ruling in favor of Employers would create an incongruent situation in Montana law in which a resignation is treated differently than a discharge and argues that fairness dictates that this Court rule that she is entitled to TTD benefits. In *Pugh*, this Court ruled that Pugh was not entitled to TTD benefits because she did not suffer a total loss of wages as a result of her injury; rather, she suffered a total loss of wages because she voluntarily resigned so she could move to Colorado and help take care of her grandchild.[14] Walters reasons as follows:

> The same standard that applies to an employee who terminates their employment with an employer should apply to an employer who terminates an employee and then tries to hire them back.
>
> If the employer is able to rescind a termination of an employee, then an employee would equally be able to rescind a resignation.
>
> . . . .
>
> If an employee terminates their employment, they are not entitled to temporary total disability benefits. When an employer terminates an

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[11] *See* § 39-2-903(1), MCA (providing, in pertinent part, that " 'Constructive discharge' means 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.").

[12] Although this Court does not have jurisdiction to decide whether Lake View discharged Walters in retaliation for filing her claim, this Court notes that Walters did not present any evidence supporting her allegation. Her unsupported allegation does not create an issue of fact because, "the party opposing summary judgment must present substantial evidence, as opposed to mere denial, speculation, or conclusory statements, raising a genuine issue of material fact." *McLeish v. Rochdale Ins. Co.,* 2011 MTWCC 18, ¶ 26 (citation omitted).

[13] 2010 MTWCC 1.

[14] *Pugh*, ¶¶ 23, 34.

> employee, after the filing of a work comp claim, the employment contract has ended and the employer may not later rescind their termination.

¶ 41 However, this decision does not create an incongruity nor an unjust situation in Montana law. This Court has ruled that under § 39-71-701(4), MCA, "A job becomes 'unavailable' if the employer later refuses to allow the worker to continue in the job . . . ."[15] Thus, if the converse of this case occurred – i.e., if an injured worker timely withdrew a resignation made under a mistake of fact, but the employer refused to bring her back without good reason – then the insurer could not refuse to pay TTD benefits under § 39-71-701(4), MCA, because modified employment would be unavailable to the injured worker.

¶ 42 Under the WCA, as reinforced by *Pugh*, and cases like it, injured workers who can return to work but choose not to are not entitled to TTD benefits.[16] As this Court has previously explained,

> The clear purpose of section 39-71-710[sic](4), MCA, is to return the worker to employment as soon as possible. To promote that purpose the legislature made a specific provision for termination of temporary total disability benefits where the employer offers the injured worker a modified or alternative job at full wages and the worker's treating physician approves the worker's return to work. . . . While the worker may refuse to return to work, the consequence of such refusal is no job and no benefits. . . .[17]

¶ 43 Likewise, while this Court makes no ruling on the current status of Walters' employment with Lake View, the consequence of Walters' refusal to accept work from Lake View, which was within her restrictions, is no TTD benefits.

¶ 44 Because this Court has determined that Walters is not entitled to TTD benefits, she is also not entitled to costs or attorney fees under §§ 39-71-611 or -612, MCA, nor a penalty under § 39-71-2907, MCA.

¶ 45 Accordingly, this Court enters the following:

ORDER

¶ 46 Employers' Motion for Summary Judgment is **granted**.

¶ 47 Walters' Cross-Motion for Summary Judgment is **denied**.

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[15] *Greene*, ¶ 5.

[16] *Supra* note 7.

[17] *Osborne v. Planet Ins. Co.*, 1994 MTWCC 74A-2, at 15-16.

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

DATED this 30th day of July, 2020.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Garry D. Seaman
Joe C. Maynard

Submitted: July 2, 2020