

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 65

WCC No. 9905-8237

HARRY DARRAH

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer/Employer.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Case Summary: Claimant demanded reinstatement of TTD benefits under the theory that work was "no longer available" to him during a strike called by his union. Respondent moved for summary judgment on the argument that work was available, but claimant simply refused to cross the picket line. Claimant responded that work is "no longer available" to a union employee during a strike because crossing a picket line is not an option.

Held: Personal, social, and philosophical reasons for refusing to cross a picket line do not make the work "no longer available." However, trial was necessary because the record and offers of proof did not rule out the possibility that the job offered claimant during the strike was illusory or would have exceeded his physical restrictions.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-701(4), MCA (1997). Claimant demanded reinstatement of TTD benefits under the theory that work was "no longer available" to him during a strike called by his union. Respondent moved for summary judgment on the argument that work was available, but claimant simply refused to cross the picket line. Claimant responded that work is "no longer available" to a union employee during a strike because crossing a picket line is not an option. WCC held that claimant's personal, social, and philosophical reasons for refusing to cross a picket line do not make the work "no longer available." However, trial was necessary because the record and offers of proof did not rule out the possibility that the job offered claimant during the strike was illusory or would have exceeded his physical restrictions.

Benefits: Union Strikes. Claimant demanded reinstatement of TTD benefits under 39-71-701(4) with the theory that work was "no longer available" to him during a strike called by his union. Respondent moved for summary judgment on the argument that work was available, but claimant simply refused to cross the picket line. Claimant responded that work is "no longer available" to a union employee during a strike because crossing a picket line is not an option. WCC held that claimant's personal, social, and philosophical reasons for refusing to cross a picket line do not make the work "no longer available." However, trial was necessary because the record and offers of proof did not rule out the possibility that the job offered claimant during the strike was illusory or would have exceeded his physical restrictions.

¶1 The claimant herein seeks three weeks of temporary total disability benefits.

¶2 On July 16, 1998, claimant suffered a work-related injury while working for respondent (ASARCO) at its East Helena plant. (Darrah Dep. at 8.) On November 3, 1998, pursuant to section 39-71-701(4), MCA (1997), claimant returned to work in a modified position. (*Id.* at 8-10.) On February 8, 1999, claimant's union struck ASARCO's East Helena plant. (*Id.* at 9-11.) The strike lasted three weeks and claimant declined to cross his union's picket lines. (*Id.* at 11.) He now seeks temporary total disability benefits for the three-week period, urging that during those three weeks the modified job was not "available" to him within the meaning of section 39-71-701(4), MCA.

¶3 Respondent moves for summary judgment on the ground that the job was available and that claimant simply refused to come to work on account of the strike.

Factual Background

¶4 This matter involves approximately \$1,000.⁽¹⁾ After receiving the summary judgment motion, I held a telephone conference with counsel and urged them to mediate their differences, pointing out that the value of attorney fees alone will far exceed any potential recovery or liability. I pointed out that the question presented is unusual, indeed, as far as I can ascertain, this is the first time it has ever been presented. I suggested that it is unlikely the question will arise in the future. Moreover, as the history of the Workers' Compensation Act indicates, the law applicable to this situation may change. Despite my urging, the parties were unable to settle their differences.

¶5 In light of the legal nature of the question presented by the petition, I entered an Order permitting claimant to make an offer of proof with respect to the facts he expects to prove at trial.⁽²⁾ That Order was consistent with this Court's policy to minimize litigation expense and expedite proceedings. The policy is reflected in ARM 24.5.329, which provides in relevant part:

24.5.329 SUMMARY JUDGMENT (1) (a) A party may, at any time after the filing of a petition for hearing, move for a summary judgment in the party's favor upon all or any part of a claim or defense. The time for filing shall be fixed by the court as provided by ARM 24.5.316(1).

(b) Because cases in the workers' compensation court are heard on an expedited basis, a motion for summary judgment may delay trial without any corresponding economies. The time and effort involved in preparing briefs and resolving the motion may be as great or greater than that expended in resolving the disputed issues by trial. For these reasons, summary judgment motions typically will be disfavored. The court may decline to consider individual summary judgment motions where it concludes that the issues may be resolved as expeditiously by trial as by motion.

¶6 For purposes of ruling on the motion for summary judgment, the Court assumes claimant would produce testimony supporting his offer of proof.

¶7 Almost all of the offered testimony involves claimant's reasons, grounded in allegiance to his union, for refusing to work during the strike. This includes testimony by claimant "regarding the effect on him and his family if he were to attempt to work during a strike situation." (Petitioner's Brief in Opposition to Motion for Summary Judgment, and Offer of Proof, at 2). It includes testimony by Don Judge, Executive Secretary of the Montana AFL-CIO, about "the philosophy of union membership, the practical effect of a union member crossing a picket line, and the fact that union and employment activity does not end with a strike, but that animosities can be carried on between striking and nonstriking workers for the remainder of their working lives." (*Id.*) It includes testimony indicating that "there are concerns over employee safety, assistance of employees on the job, and the effect on families of striking and nonstriking employees." (*Id.*) Finally, it includes "further testimony as to what has happened to Union members who crossed the picket line, and their current status with the Employer, the Union, and their fellow employees." (*Id.*)

¶8 All of the evidence set forth in the previous paragraph relates to claimant's reasons, arguably compelling, for his refusal to cross picket lines and work at any job for ASARCO. However, claimant's offer of proof also suggests that during the strike the modified position he had been working was in fact an illusory job and not in fact available to him. Claimant states that "[t]here will be factual disputes as to whether work was truly available to the Petitioner or whether employees were merely allowed to return to the premises of the Employer, doing nothing other than providing a tool for the Employer to break the strike and to force animosities among striking workers." (*Id.*) The offer of proof also suggests that claimant was told by management there was no work available to him: "[T]here will also be testimony from Petitioner that he was advised by management that there truly was no work available and they would have had nothing for him to do during the strike period." (*Id.*)

Summary Judgment Standard

¶9 Summary judgment is appropriate only where uncontroverted, material facts require, as a matter of law, judgment for the moving party. ARM 24.5.329(2); *Schelske v. Creative Nail Design, Inc.*, 280 Mont. 476, 482, 933 P.2d 799, 802 (1997). In this case, I have assumed that claimant will be able to support his offer of proof with actual evidence. In many instances, his offer of proof is already supported. I therefore must determine whether the respondent is entitled to summary judgment even if I accept the claimant's offer of proof as true.

Discussion

¶10 The controversy in this case involves the interpretation and application of section 39-71-701(4), MCA (1997),⁽³⁾ which provides as follows:

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 for any reason to the worker and the worker continues to be temporarily totally disabled**, as defined in 39-71-116. [Emphasis added.]

¶11 Petitioner argues he requalified for benefits because work in an alternative or modified position was "no longer available" to him during the strike. He reads the "no longer available" language as encompassing labor disputes, pointing out that personal, social, and philosophical reasons may preclude a union worker from reporting to work during a strike. His argument is unpersuasive.

¶12 What is at issue in this case is claimant's entitlement to workers' compensation benefits. Workers' compensation benefits are payable, as a general matter, on account of the worker's inability to work or a disability which reduces the worker's wages or ability to earn wages. The law is neutral with respect to labor disputes between employers and their employees.

¶13 Section 39-71-701(4), MCA (1997), sets forth an exception to the general rule that a worker unable to perform his or her time-of-injury job and not yet at maximum medical improvement is entitled to temporary total disability (TTD) benefits, § 39-71-701(1), MCA. It provides that if the worker is released to a modified or alternative position he or she is able and qualified to perform, and if that position pays the same or a higher wage than the employee was earning at the time of injury, then TTD benefits are not available. The second sentence of the section makes it clear that the modified or alternative job must in fact be "available" to the injured worker.

¶14 "Available" is defined in Webster's New World Dictionary and Thesaurus, Accent Software International, Macmillan Publishers, Version 1.0 - 1995, as follows:

1. That one can avail oneself of; that can be used; usable.
2. That can be gotten, had or reached; handy; accessible.

The definition refers only to the fact that a worker, if he or she chooses, can take advantage of the opportunity. That ASARCO made the job available to claimant is all that is necessary. That claimant may have had good reasons for not crossing picket lines does not make the position unavailable.

¶15 Respondent cites several cases from other jurisdictions for the proposition that benefits are properly refused if an employee is not working because of his decision to honor a strike. These cases provide substantial authority for the conclusion the Court has already reached. The cases cited are *Roseburg Forest Products v. Phillips*, 113 Or.App. 721, 833 P.2d 1359, 1361 (1992) ("For the purpose of determining claimant's entitlement to temporary compensation, we conclude that he withdrew from the work force when he decided to participate in the strike."); *Jones v. Auto Specialties Manufacturing Co.*, 177 Mich.App. 59, 441 N.W.2d 1, 3 (1988) ("Because there was no competent evidence that plaintiff was an involuntary striker, we must also agree with defendant that the WCAB erred in concluding that plaintiff was entitled to benefits during the time he was off work due to the strike."); *Pigue v. General Motors Corp.*, 317 Mich. 311, 26 N.W.2d 900 (1947) (Where a worker was able to perform work, but declined to do so because of his union's strike, the worker was not entitled to benefits during the strike period.); *Latta v. W.C.A.B.*, 510 A.2d 896, 897-898 (Pa. 1986) (Claimant was not entitled to reinstatement of total disability benefits where he was out of work because of strike, not because of "any disability related to his work injuries.")

¶16 The inquiry, however, is not at an end. Claimant's offer of proof suggests that his pre-strike job was not in fact available even had he crossed picket lines. He asserts that he was "advised by management that there truly was no work available and they would have had nothing for him to do during the strike period." (Petitioner's Brief in Opposition to Motion for Summary Judgment, and Offer of Proof at 2.) Claimant also suggests that even though ASARCO might have paid him had he crossed the picket line, there was in fact no work for him to perform, thus the work was illusory. Whether or not "illusory work" or pay for no work satisfies section 39-71-701(4), MCA, raises significant issues this Court is unwilling to address absent a factual record. If the remuneration proffered by ASARCO to claimant during the strike was simply payment for him to cross a picket line, and nothing more, then it is at least questionable whether there was a **real** job available to claimant.

ORDER

¶17 The motion for summary judgment is **denied** and this matter shall be set for trial. Further discovery and the evidence at trial shall be limited in accordance with this decision.

DATED in Helena, Montana, this 29th day of October, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield

Mr. Todd A. Hammer

Date Submitted: September 9, 1999

1. The maximum temporary total disability rate applicable to the time of claimant's injury is \$384 a week. Three weeks of benefits at that rate is \$1,062.
2. Ordinarily, claimant would have been required to cite admissible evidence from depositions, interrogatory answers, production, and affidavits. ARM 24.5.329(3). He would have therefore been put to substantial expense just to put together a factual response to the motion.
3. Since the injury occurred while the 1997 version of the Workers' Compensation Act was in effect, the 1997 version of the Act applies to his claim. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986)