IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 12

WCC No. 9905-8237

HARRY DARRAH

Petitioner

vs.

ASARCO, INCORPORATED

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant worked for ASARCO in East Helena, Montana, for 26 years. After recovering from a bad acid burn at work, claimant returned to work under restrictions. When his union called a strike, claimant stayed away from work. Under section 39-71-701(4), MCA (1997), claimant argued he requalified for TTD benefits because his modified or alternative job was "no longer available" to him due to the strike. Employer argued job was offered to claimant during strike.

Held: Claimant did not "requalify" for TTD benefits where he was not working due to his personal decision to honor his union's strike. Claimant did not prove real job was not available to him or did not accommodate his restrictions.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-701(4), MCA (1997). Claimant did not requalify for TTD benefits on the argument his job was no longer available to him during a strike called by his union where evidence indicated he refused to cross picket lines, not that work was "no longer available" to him because job offered was illusory or was different job which would have exceeded his physical restrictions.

Benefits: Union Strikes. Claimant did not requalify for TTD benefits under 39-71-701(4), MCA (1997) on the argument his job was no longer available to him during a strike called by his union where evidence indicated he refused to cross picket lines, not that work was "no longer available" to him because job offered was illusory or was different job which would have exceeded his physical restrictions.

¶1 The trial in this matter was held on March 3, 2000, in Helena, Montana. Petitioner, Harry Darrah (claimant), was present and represented by Mr. Norman H. Grosfield. Respondent was represented by Mr. Todd A. Hammer.

¶2 Exhibits: Exhibits 1 through 3, 5 through 7, and 10 were admitted without objection. Exhibits 4 and 8 were withdrawn. Foundation was laid for Exhibit 9 and it was admitted.

¶3 Witnesses and Deposition: Thomas F. McIntyre, Lloyd A. Doney, and the claimant were sworn and testified. The telephonic deposition of the claimant was provided to the Court for its consideration.

¶4 Issue: The sole issue presented for decision is whether claimant is entitled to temporary total disability benefits for the period February 8, 1999, through February 28, 1999.

¶5 Having considered the testimony of the witnesses, the deposition, the exhibits admitted at trial, the parties' proposed findings of fact and conclusions of law, the credibility of the witnesses, and the arguments of the parties, the Court now makes the following:

FINDINGS OF FACT

¶6 The claimant has been employed by ASARCO at its East Helena plant for the last 26 years.

¶7 On July 16, 1998, claimant was badly burned by sulfuric acid while working for ASARCO. At the time of the accident, ASARCO was self-insured. It accepted liability for the claim and has paid benefits.

¶8 At the time of his accident, claimant was working as an operator in ASARCO's acid plant. The acid plant is one of four production departments at the East Helena refinery and converts sulfur dioxide into sulfuric acid. It produces an average of 250 tons of sulfuric acid daily.

¶9 Claimant returned to work in late 1998. He was medically restricted from working on the floor of the acid plant and assigned to work in the control room. His duties were to supervise and monitor the operations of the acid plant. He assigned other workers to perform physical tasks required in the plant itself. Those tasks included the operation of valves in plant piping and cleanup of spills, as needed.

¶10 At the time of his 1998 injury, and for many years prior, the claimant was a member of the union at the East Helena ASARCO plant. He was paid an hourly wage.

¶11 Beginning February 8, 1999, the union went on strike. The strike lasted through February 28, 1999. During the strike the union maintained picket lines at the East Helena plant.

¶12 During three previous strikes at the East Helena ASARCO plant, claimant crossed picket lines and worked. However, those strikes were "wildcat" or unauthorized strikes. The 1999 strike was authorized and claimant was unwilling to cross picket lines. Eighteen other union members, out of approximately 65 total union workers, did cross picket lines during the strike.

¶13 The East Helena ASARCO plant continued to operate during the 20-day strike. In addition to union members crossing picket lines, ASARCO brought in salaried, nonunion employees from its other refineries to operate the plant. All four departments in the plant continued to operate. The acid plant continued to produce sulfuric acid at slightly lower levels than before the strike.

¶14 At least some of the replacements who worked in the acid plant during the strike had acid plant experience even though they had not worked at the East Helena facility. Prior to the strike the acid plant employed seven full-time, regular employees. During the strike it employed five full-time and two part-time employees. One of those replacement employees was an acid plant supervisor from ASARCO's El Paso, Texas, plant. Another was an acid plant supervisor from ASARCO's Hayden plant. Claimant offered no evidence which would permit the Court to infer or find that the operation of the acid plant by the replacement employees created additional danger or difficulties in the plant's operation.

Based on the condition of the plant when he returned to work after the strike, claimant himself acknowledged that the replacement employees did a good job operating the plant.

¶15 Thomas F. McIntyre, who was the overall supervisor of all four departments at the plant, testified without contradiction that had claimant crossed the picket line during the 1999 strike he would have continued to perform the same job he did prior to the strike. Thus, he could have remained in the control room and supervised as he did before.

¶16 Following the strike, claimant returned to work in the same job he was performing prior to the strike and has continued working at that job.

¶17 Claimant testified that had he worked during the strike, and had replacement employees been unable to solve problems within the plant, he would have felt compelled to go onto the floor of the plant and take care of the problems himself, thus exceeding his medical restrictions. However, he presented no credible evidence which would allow this Court to infer or find that in fact the replacement workers were incapable of caring for problems arising in the acid plant during the strike. He failed to persuade me that in fact his job would have changed during the strike. To the contrary, the evidence persuaded me that he would have continued to do the same job as before. I find that during the 1999 strike his job at ASARCO was available to him had he been willing to cross picket lines.

CONCLUSIONS OF LAW

¶18 Claimant's entitlement to benefits is governed by the 1997 version of the Workers' Compensation Act since his injury occurred when that version was in effect. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986*)*.

¶19 The controversy in this case involves the interpretation and application of section 39-71-701(4), MCA (1997), 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 reachedmaximum 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 disable**d, as defined in 39-71-116. [Emphasis added.]

Both parties agree that at the time of the 1999 strike the claimant was working under section 39-71-701(4), MCA, hence the Court assumes, as it must, that he had not reached maximum medical improvement at the time.

¶20 The Court previously considered whether claimant requalified for benefits because of his unwillingness to cross picket lines. (Order Denying Motion For Summary Judgment, 1999 MTWCC 65.) In response to ASARCO's motion for summary judgment, claimant argued that his prestrike job was "no longer available" because, for personal, social, philosophical and practical reasons, he was unwilling to cross picket lines. While I did not, and do not, doubt his reasons for not crossing the picket line, I found them insufficient, holding that under section 39-71-701(4), MCA, the job was available to him as long as his employer offered him continued work in the position. However, I denied ASARCO's motion for summary judgment because claimant also indicated that no work was in fact available to him had he crossed picket lines, i.e. the job was illusory.

¶21 At trial the claimant failed to prove that the position available to him during the strike was illusory or that it was a different job which required him to exceed his physical restrictions. A preponderance of the evidence showed that had he been willing to cross picket lines he would have continued to do the same job, performing the same duties as immediately before the strike. He therefore failed to prove that he requalified for temporary total disability benefits as provided under section 39-71-701(4), MCA (1997).

JUDGMENT

¶22 The claimant is not entitled to temporary total disability benefits for the February 8 to February 28, 1999 period. His petition is **dismissed with prejudice**.

¶23 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM

24.5.348.

¶24 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law And Judgment.

DATED in Helena, Montana, this 8th day of March, 2000.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman H. Grosfield
Mr. Todd A. Hammer
Submitted: March 3, 2000