IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 37

WCC No. 2001-0456

LYMAN GREENE

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

ALDER KOA KAMPGROUND d/b/a NANNINI BROTHERS

Employer.

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary: Claimant moves for summary judgment ordering payment of temporary total disability (TTD) benefits. He was injured in April 2000 but was shortly thereafter released to return to work in a modified position. In fact he returned to work in the modified position but thereafter quit work. The circumstances of his quitting work are disputed, the employer and the Uninsured Employers' Fund alleging that claimant quit without cause and for reasons unrelated to his ability to physically perform the modified position.

Held: The claimant is not entitled to summary judgment.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-701(4), MCA (1999). Under section 39-71-701(4), MCA, a claimant is disqualified from TTD benefits so long as he is released to a modified position and the position is available. A claimant cannot bootstrap TTD entitlement by refusing the position or quitting the position without good cause.

Benefits: Temporary Total Benefits. Under section 39-71-701(4), MCA, a claimant is disqualified from TTD benefits so long as he is released to a modified position and the position is available. A claimant cannot bootstrap TTD entitlement by refusing the position or quitting the position without good cause.

¶1 The petitioner (claimant) moves for partial summary judgment requiring the Uninsured Employers' Fund (UEF) to pay him temporary total disability (TTD) benefits. The motion is predicated upon the pleadings and upon a doctor's restriction precluding claimant from returning to his time-of-injury job. The employer and the UEF resist the motion based upon section 39-71-701(4), MCA, on the ground that an alternative position is available to claimant which is within his medical restrictions. The only facts of importance to an application are those facts alleged in the petition which are admitted by the UEF's response to the petition. Unless UEF's admissions demonstrate, as a matter of law, that claimant is entitled to TTD benefits, the motion must be denied. ARM 24.5.329(2).

¶2 As pertain to the claimant's present motion, the facts admitted in the UEF's Response to Petition are as follows:

> ¶ 2a Claimant was injured on April 7, 2000, when he fell from a ladder while trimming a tree at Alder KOA Kampground. (UEF Response, ¶ 1.)
>
> ¶2b Alder KOA Kampground (KOA) was not insured, thus the Uninsured Employers' Fund (UEF) is liable for his claim. The UEF has accepted liability for the accident. (UEF Response, ¶ 1.)
>
> ¶2c On May 15, 2000, claimant's treating physician released him to limited duty work. Claimant then returned to work with his employer in a modified position. (UEF Response, ¶ 2.)
>
> ¶2d On June 24, 2000, claimant ceased working. The UEF and employer specifically deny that claimant was terminated by the employer or that his modified position became unavailable and affirmatively allege that the claimant voluntarily quit his job over a dispute between the employer and claimant's wife or former wife. (UEF Response, ¶¶ 3-4 and Contention 3.)

¶3 The motion for summary judgment involves an application of section 39-71-701(4), MCA (1999). That section provides:

> 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.) Claimant asserts that under subsection (4) he requalified for TTD benefits when he ceased working. He argues that "reason for the termination of his

employment is irrelevant." (Motion for Partial Summary Judgment and Brief in Support at 2.) The Court disagrees.

¶4 Section 39-71-701(4), MCA, is plain on its face, requiring no interpretation, therefore it must be applied as it is written. *State v. Peplow,* 2001 MT 253, ¶ 20, 36 P.3d 922. The subsection clearly and unambiguously disqualifies a worker from receiving TTD benefits if the worker's treating physician "releases" the worker to "modified" or "alternative" job which the worker is capable of performing and which pays the same wage, and the job is in fact available to the worker. "Available" means "present or ready for immediate use" or "accessible, obtainable."[(1)] A job is "available" if the employer is willing to employ the worker in it.

¶5 A job becomes "unavailable" if the employer later refuses to allow the worker to continue in the job, or creates conditions such that the worker can no longer safely perform the job. It does **not** become "unavailable" merely because the worker quits work. If that were the case, the section would be rendered meaningless since an employee could simply refuse work and collect TTD benefits. *Ingebretson v. Louisiana-Pacific Corporation,* 272 Mont. 294, 900 P.2d 912 (1995), cited by claimant in support of his argument, is inapposite. In that case the **employer** discharged the worker for pretextual reasons to "rid [itself] of a disabled employee." *Id.*, 272 Mont. at 298, 900 P.2d at 915.

¶6 Claimant urges that the 2001 amendments to section 39-71-701(4), MCA, support his interpretation of section 39-71-701(4), MCA. His argument is without merit. The law in effect at the time of the claimant's injury governs his entitlement to benefits, thus the 2001 amendments are inapplicable. Moreover, the 2001 version of the subsection still disqualifies a worker where he is released to a modified position which is available to him. The amendments merely enumerate some circumstances in which a position is considered available despite a worker's termination of employment.[(2)]

¶7 In the present case, the claimant acknowledges that he was released to a modified position and in fact performed the modified job for approximately a month. He has not provided uncontroverted facts showing that his cessation of work was for cause or related to his inability to physically perform his job. The employer and UEF allege that the modified position continued to be available to claimant and that he voluntarily terminated his employment without cause. Having failed to demonstrate, on an uncontroverted basis, that the modified position became "unavailable to him," claimant is not entitled to partial summary judgment directing payment of TTD benefits.

¶8 Petitioner's motion for partial summary judgment is **denied**.

SO ORDERED.

DATED in Helena, Montana, this 7th day of August, 2002.

\s\ Mike McCarter
JUDGE

c: Mr. Frank J. Joseph
Mr. David L. Vicevich
Ms. Elizabeth A. O'Halloran
Ms. Julia W. Swingley
Submitted: July 24, 2002

1. Webster's Ninth New Collegiate Dictionary (1984).

2. Subsection (4), as amended in 2001, provides:

(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 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.