IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 48

WCC No. 2001-0349

RICHARD KELLBERG

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

TIMBERWELD MANUFACTURING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant injured his back at work but returned to a modified position within two weeks. A month and a half after returning to work he quit his job, telling his employer that he was moving to western Montana because he wanted to be closer to relatives and his wife would have better job opportunities. Ten months later he demanded that his temporary total disability benefits be reinstated retroactively to the day he quit his job.

Held: While claimant was continuing to experience back pain at the time he quit, his reasons for quitting were unrelated to his medical condition. However, he has persuaded the Court that the modified job would have ended by October 31, 2000. Since he has not reached maximum medical healing, he is entitled to reinstatement of temporary total disability benefits as of November 1, 2000, because the modified job was no longer available. § 39-71-701(4), MCA (1999). Since he put the insurer in the position of playing "what if" or, more accurately, "what would have happened had claimant not voluntarily quit," the insurer was not unreasonable in resisting his demand for reinstatement of benefits.

Topics:

> **Benefits: Temporary Total Benefits.** Where a claimant is released to return to work in a modified position and quits that position prior to maximum medical improvement but for reasons unrelated to his injury, he is not entitled to reinstatement of benefits until such time as the job would have become unavailable

to him either because it would have ended or he had become physically unable to do the work.

Benefits: Termination of Benefits: Return to Work. Where a claimant is released to return to work in a modified position and quits that position prior to maximum medical improvement but for reasons unrelated to his injury, he is not entitled to reinstatement of benefits until such time as the job would have become unavailable to him either because it would have ended or he had become physically unable to do the work.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-701(4), MCA (1999). Where a claimant is released to return to work in a modified position and quits that position prior to maximum medical improvement but for reasons unrelated to his injury, he is not entitled to reinstatement of benefits until such time as the job would have become unavailable to him either because it would have ended or he had become physically unable to do the work.

Attorney Fees: Unreasonable Denial or Delay of Payment. Where injured claimant is released to return to work in a modified position and does so, then quits the job, giving the employer reasons unrelated to his medical condition, and without a medical determination that he is unable to continue in the job, it is not unreasonable for the insurer to resist his later demands for reinstatement of temporary total disability benefits.

Penalties: Insurers. Where injured claimant is released to return to work in a modified position and does so, then quits the job, giving the employer reasons unrelated to his medical condition, and without a medical determination that he is unable to continue in the job, it is not unreasonable for the insurer to resist his later demands for reinstatement of temporary total disability benefits.

¶1 The trial in this matter commenced on July 19, 2001, in Superior, Montana. It continued in Columbus, Montana, on July 23, 2001. Claimant, Richard Kellberg, was personally present only during the proceedings in Superior. However, his attorney, Mr. David W. Lauridsen was present during all proceedings. Respondent was represented throughout by Mr. Larry W. Jones.

¶2 Testimony: The claimant and Jamie Kern, a claims adjuster, testified in Superior. Sam Blaylock, Dan Barta, and Ron Larson testified in Columbus. In addition, the parties have submitted depositions of Christopher J. Lang, M.D., Richard Klee, M.D., Shirley Adams, claimant, and claimant's wife for the Court's consideration.

¶3 Exhibits: Exhibits 1 through 6 were all admitted without objection.

¶4 Issues: The issues, as rephrased by the Court, are as follows:

¶4A Whether the claimant is entitled to reinstatement of temporary total disability benefits and, if so, when.

¶4B Whether the claimant is entitled to a penalty, attorney fees and costs.

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 The claimant is 48 years of age. He completed the 8th grade and three years ago obtained a GED. He has worked primarily as a laborer in low-paying jobs and has not had consistent, long-term employment, although he testified that he did hold one job for six years.

¶7 In October 1999, claimant went to work for Timberweld Manufacturing at its plant in Columbus, Montana. Claimant was employed at an hourly wage of between $8.00 and $8.50 an hour and worked four 10-hour shifts per week.

¶8 Timberweld manufactures laminated beams for buildings, employing 25 to 30 persons at its Columbus plant. Claimant's job was as a Finisher, which required him to putty flaws in beams, scrape excess putty, sand, plane beams, paint, and drill holes. The job entailed frequent use of heavy saws and drills weighing 20 to 30 pounds. (Ex. 4.)

¶9 On April 11, 2000, claimant was operating a drill when the bit bound and the drill housing wrenched him around and twisted his back. He had difficulty getting out of bed the next morning. On April 18, 2000, he sought medical care with Dr. Richard Klee, a family practitioner in Columbus. His primary complaints at that time were of low-back pain and spasms. Dr. Klee diagnosed "Low back pain/strain." (Ex. 6 at 1-2.)

¶10 Timberweld was insured by Liberty, which accepted liability for his injury.

¶11 On April 28, 2000, Dr. Klee released claimant to return to work as of May 1, 2000, in a light-duty capacity but also referred claimant to Dr. Christopher Lang, an orthopedic surgeon practicing in Billings. (Ex. 6 at 3-4.)

¶12 Claimant in fact returned to work on May 1, 2000. He was paid temporary total disability benefits for the period he was off work prior to May 1st, but after applying the waiting period, § 39-71-736(1)(a), MCA (1999), his total TTD benefits amounted to one week.

¶13 Upon his return to work, claimant was told by the plant manager, Sam Blaylock (Blaylock), to work at his own pace, not to lift or strain, to take it easy and to not do anything which might result in injury. He was not required to use either the saw or drill and limited himself to puttying, scraping, and painting, which did not require any significant lifting. All

of his work was performed standing, however, he was permitted to take breaks and sit down and was also free to go home early if needed. On one day shortly after he returned to work, he in fact went home early. Otherwise, claimant worked without complaint.

¶14 On June 12, 2000, claimant gave Blaylock two weeks' notice that he was quitting his job. Claimant, who is married and has small children, told Blaylock that he was quitting and moving to western Montana because his wife needed to be closer to her family. In his trial testimony, claimant recalled telling Blaylock that he was moving to Superior because his wife was having trouble finding a job. Without any further explanation to his employer, he did not show up for the next shift, or the shift thereafter, and after three missed shifts his employment was terminated for his unexcused absences. (Ex. 1 at 2, 4.)

¶15 Blaylock testified that Timberweld has one, and occasionally two, workers on light duty at any given time but only for short periods of time. When asked how long the company would keep a worker on light duty, he responded that the most anyone had been on light duty was two to three months but that the company would allow it for three to six months. The company does not have permanent light duty or sedentary jobs available but Blaylock said it would create a short-term sedentary position if there is a prospect of getting the worker back to his regular job.

¶16 At the time claimant left his job, he was being actively treated by Dr. Lang. He first saw the doctor on May 22, 2000, and was diagnosed with lumbar strain and a "[r]ight-sided meralgia paresthetica or compression of the lateral femoral cutaneous nerve." (Ex. 6 at 9.) On June 7, 2000, claimant was complaining of "odd left thigh pain with groin and inner thigh burning." (*Id*. at 12.) Dr. Lang ordered an MRI, which disclosed spinal stenosis at the lumbar level. (*Id*. at 13.) On June 16, 2000, he ordered an epidural steroid injection, which was administered on the same day. (*Id*. and Ex. 6 at 21-22.) Claimant was supposed to return to Dr. Lang four to six weeks thereafter, but, having moved to Superior, never did so. He testified that the epidural injection provided two to three months of good relief.

¶17 Dr. Lang did not take claimant off his modified job. He approved claimant working so long as he did not lift more "than 10 to 15 pounds of either repetitive or maximum lifting" and "minimize[d] any repeated twisting or bending of the neck or low back." (Ex. 6 at 11, 14.)

¶18 Prior to quitting his job, claimant did not complain to any physician about his modified work and had not obtained a medical determination that he should no longer do the job.

¶19 At trial the claimant testified that he quit his job at Timberweld because he couldn't stand anymore, this referring to the fact that his job required him to stand while doing it. His testimony was not credible. He did not complain about standing to either his doctors or his employer, and indeed did not complain about any other aspect of the modified job. As noted, claimant acknowledged telling his employer that he was quitting because his wife

wanted to be nearer her family and she was also having trouble finding a job in Columbus. When deposed his wife testified that one of the reasons they left Columbus was because she had difficulty finding a good-paying job, also the cost of living in Columbus was higher. (D. Kellberg Dep. at 5.) While Dr. Lang's testimony, which is discussed later, persuades me that standing was causing claimant some difficulty in working, I find that the reasons claimant gave his employer were in fact the reasons he quit. The more difficult question is whether he could have continued working at the modified job had he not quit.

¶20 Claimant also testified as to objectionable job conditions, suggesting, although never actually asserting, that the conditions of his employment led to or contributed to his quitting. He testified that other workers used foul language, called him Friar Tuck on account of his bible reading, and after he returned to work in a modified position asked him how long he was going "to milk" the situation. However, he never complained to his supervisor about his co-employee's remarks. Even though there is convincing evidence that he has a long-standing social phobia which causes him to tend to avoid other people, his own testimony demonstrated that he was coping with his co-employees' remarks by avoiding and ignoring them. I am persuaded that their conduct did not trigger his decision to quit.

¶21 Since moving to Superior, claimant has not worked other than to do a few carvings and light housework, and care for his children. However, his back condition appears to have worsened.

¶22 On October 26, 2000, claimant began treating with Dr. Karl Buechsenschuetz, an orthopedic surgeon practicing in Missoula. (Ex. 6 at 23-24.) At that time he was complaining of both low-back and bilateral leg pain. Dr. Buechsenschuetz prescribed physical therapy and an anti-inflammatory (Vioxx). Claimant's condition initially improved with physical therapy; by December 8, 2000, he was walking up to two miles every other day. (Ex. 6 at 24, 32.) However, by March 2, 2001, his pain had worsened and he was "complaining of stabbing pains in his right thigh." (Ex. 6 at 27.) Claimant also told the doctor that "[h]is worse [sic] position is standing." (*Id*.) In light of the relief claimant had obtained from the prior epidural, Dr. Buechsenschuetz recommended another epidural, however, he went on to note that in light of his "fairly significant foraminal stenosis" consideration should be given to a new MRI and surgery if the epidural did not provide significant improvement. (*Id*.) At the time of trial, claimant had not yet had the epidural.

¶23 Dr. Lang testified by deposition. He indicated that at the time he last saw he claimant he believed claimant might need surgery if he did not respond to physical therapy and epidural injections, however, he was unable to provide any further opinion because claimant did not come back for a follow-up examination. (Lang Dep. at 7.) On the other hand, he opined that the claimant's working within the restrictions he had imposed was safe from a medical standpoint even if surgery were ultimately required. (*Id*. at 7-8.) He

acknowledged that working could "have continued causing the pain and the burning sensation in his thigh." (*Id*. at 7.) When asked if claimant were capable of working four 10 hour shifts while standing on concrete, he replied, "No. Certainly not without worsening his symptoms." (*Id*. at 9.)

¶24 On June 28, 2001, Dr. Lang wrote a letter to claimant's attorney in response to the attorney's inquiry about claimant's condition. In that letter he noted the restrictions he had imposed on claimant's work and went on to say, "He essentially was . . . capable of sedentary work only." (Ex. 6 at 14.) During deposition, he was asked about his statement.

> Q. When you say on your June 28th letter, bottom of the first page, "He essentially was with this problem capable of sedentary work only," do you mean sit-down type work?
>
> A. Correct. Not necessarily all day long, but certainly the - at least half of the day.

(Lang Dep. at 9.)

¶25 Dr. Buechsenschuetz was not available to testify either at trial or through deposition, so the Court must rely solely on his records.

¶26 Finally, the Court heard the testimony of Jamie Kern (Kern), a claims adjuster who first became involved with claimant's file in December of 2000. When Kern first got the file in December, information in the file indicated that claimant had given two weeks' notice of quitting his job with Timberweld and had then just quit. In July, August, and September 2000, the insurer wrote letters to claimant asking him to call. He finally responded in September and talked to Kern's predecessor. He indicated he wanted further medical treatment and the adjuster agreed to him seeing Dr. Buechsenschuetz. At that time or some other time the claimant also indicated to the adjuster that he was trying to get a carving business going and was seeking state assistance. In late December, the insurer received Dr. Buechsenschuetz's reports. Kern, who had been recently assigned the file, reviewed his reports and thought claimant might possibly be entitled to some further temporary total disability benefits. She planned to request further medical information, as well as job descriptions for the time-of-injury and modified positions, however, she was transferred to another job before she was able to do so. Another adjuster was then assigned to the file but the requests were never made.

¶27 Claimant's first demand for reinstatement of temporary total disability benefits was made in April 2001.

Resolution

¶28 The claimant clearly has not reached maximum medical improvement. The insurer does not contend otherwise.

¶29 I have already found that claimant quit work in the modified position for the reasons he gave to the employer. The more difficult question is whether the claimant's medical condition would have eventually disabled him from continuing to work in the modified position or whether the modified position would have ended in any event, and if so, when.

¶30 Because claimant quit the job, he has made it more difficult for the Court, as well as the insurer, to determine when the modified position would have become unavailable. The fact that the determination is difficult, however, does not mean that a determination cannot be made. The determination must be made only on a more probable than not basis, or with 51% certainty.

¶31 On a more probable-than-not basis, I find that the modified job would not be available currently to claimant and that currently he could not do the job in any event. The testimony of Timberweld's plant manager convinces me (more than 51%) that the modified job would not have lasted indefinitely. The longest period of time anyone has worked in light duty is two to three months, and the manager indicated that the company would have considered extending modified work up to five to six months. Moreover, claimant's condition has worsened. His difficulty standing, along with stabbing leg pain, is medically documented by Dr. Buechsenschuetz as of March 2, 2000. Together with Dr. Lang's concerns in June 2000, with his ability to stand for long periods, his increased symptoms, *even though not working,* convince me that at least as of March 2, 2000, he was no longer able to perform the modified position even if he had been allowed to sit for significant periods of time. On the other hand, claimant's actual work up to June 12, 2000, without complaint and under extremely flexible conditions, and his improvement for two to three months following the June 16, 2000 epidural injection are enough to convince me that he could have continued working for at least an additional three months. Putting both factors together, I find that the modified position would have ended on November 1, 2000, which is about the same time as he first sought care from Dr. Buechsenschuetz (October 26, 2000).

¶32 As to the insurer's handling of the claim, I am unpersuaded its denial of further temporary total disability benefits was unreasonable under the circumstances. While one of the claims adjusters handling claimant's claim recognized the possibility that claimant might be entitled to further temporary total disability benefits, claimant's quitting work for reasons unrelated to his medical condition have put both the insurer and the Court in the position of playing "what if" or, more accurately, "what would have happened had claimant not voluntarily quit." Moreover, his request for TTD benefits was made nearly ten months after he quit.

CONCLUSIONS OF LAW

¶33 Claimant's entitlement to benefits is governed by the 1999 version of the Workers' Compensation Act since that version was the law in effect at the time of his industrial

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

¶34 His entitlement to temporary total disability benefits is governed by section 39-71-701, MCA, which provides in relevant part:

> **39-71-701. Compensation for temporary total disability -- exception.** (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 for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.** [Emphasis added.]

When Dr. Klee approved and claimant took the modified position, claimant no longer qualified for temporary total disability benefits, first because he was released to a modified position with his employer which he could perform, and, second, because he no longer had a total wage loss. Thus, he could requalify for benefits only if the modified job became "no longer available for any reason."

¶35 The "any reason" language relates to the modified job and does not encompass claimant's quitting because he wanted to move somewhere else to be near to relatives or where his wife might have better job opportunities. However, the fact that claimant voluntarily quit while the job was available does not preclude claimant from proving that at some point of time thereafter the job in fact did become unavailable to him. He has persuaded me that the modified job was in fact unavailable to him on and after November 1, 2000, because it is unlikely the employer would have kept him in that position or any other position after that date. Even if the employer would have maintained him in that the modified position past that date, by March 2, 2001, at the latest, and more likely by November 1, 2001, the job was unavailable to him for a second reason, specifically, by that

time he was physically incapable of performing the modified job. Claimant is therefore entitled to reinstatement of his temporary total disability benefits retroactive to November 1, 2000.

¶36 Since claimant has prevailed he is entitled to his costs, however, he is not entitled to attorney fees or a penalty as those items require proof that the insurer has unreasonably withheld benefits. §§ 39-71-611, -2907, MCA (1999). He has failed to persuade me the insurer was unreasonable in resisting reinstatement of benefits.

JUDGMENT

¶37 Liberty Northwest Insurance Corporation shall reinstate claimant's temporary total disability benefits retroactive to November 1, 2000.

¶38 Claimant is entitled to his costs but not to attorney fees or a penalty.

¶39 This JUDGMENT is certified as final for purposes of appeal. ARM 24.5.348.

¶40 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 24TH day of August, 2001.

(SEAL)

\S\ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. Larry W. Jones
Submitted: August 17, 2001