IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 48A

WCC No. 2001-0349

RICHARD KELLBERG

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

TIMBERWELD MANUFACTURING

Employer.

ORDER AMENDING PARAGRAPH 31 AND OTHERWISE

DENYING RESPONDENT'S POST-TRIAL MOTIONS

Summary: Insurer filed a motion requesting amendment, clarification, or reconsideration of the Court's decision, arguing that the Court overlooked or ignored its prior decision in *Osborne v. Planet Ins.,* WCC No. 9307-6842, Findings of Fact, Conclusions of Law and Judgment (August 22, 1994). Specifically, it argues that since claimant quit his modified job he is ineligible for temporary total disability benefits and has failed to prove that the modified job is unavailable or that the medical release for the job has been rescinded.

Held: Claimant established that the modified job was unavailable as of November 1, 2001. Court is entitled to rely on the employer's initial testimony regarding the length of modified jobs and is not bound by later testimony indicating a longer time. The testimony was conflicting testimony and the Court is entitled to determine which part of the testimony it should credit. *Osborne* is not inconsistent with the Court's determination in this case.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-701(4), MCA (1999).** Any construction of section 39-71-701(4), MCA, which precludes claimant from requalifying for temporary total disability after a modified position would have ended would amount to penalty and is contrary to the plain language of the section.

Burden of Proof: Conflicting Evidence: Generally. Where a witness gives conflicting testimony, the Court must determine what testimony, if any, is the more credible.

Cases Discussed: *Osborne v. Planet Ins*. *Osborne v. Planet Ins.* does **not** hold that a claimant is disqualified from receiving temporary total disability benefits where he proves by a preponderance of the evidence that after he refused or quit modified work the work became unavailable.

¶1 Respondent (Liberty) moves, in the alternative, for amendment, clarification, or reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment in this matter. The motions are **denied** except as to paragraph 31, which erroneously refers to March 2, 2000 - the reference should be to March 2, 2001.

Discussion

¶2 Liberty argues several grounds for its motions. Only one is meritorious and is limited to paragraph 31. That paragraph refers to March 2, 2000. The reference misstates the year, which should be 2001. The error was a typographical one, therefore paragraph 31 shall be amended accordingly.

¶3 Liberty further argues that the Court erred when it determined in paragraph 31 that the claimant's modified job would have ended on November 1, 2000. It urges that the finding is speculative and not supported by a preponderance of credible evidence. The argument is without merit. Sam Blaylock (Blaylock), the plant manager, initially testified that the longest time an injured worker had been kept on light duty was two to three months but that he would authorize three to six months light duty. His testimony was as follows:

- Okay. And what's the longest time you've ever had someone be on light duty?
- I would say approximately two to three months.
- Okay. So you're not suggesting to the Court that Kellberg could be on light duty for six months, a year, two years down the line, are you?
- **Hopefully not. But if a doctor suggested or diagnosed someone to be on light duty for six months or three months, I would do that.**

(Tr. at 12-13, emphasis added.)

¶4 Blaylock later testified that Timberweld might have kept claimant on indefinitely even if he could only do light or sedentary work. (Tr. at 13-14, 17.) Liberty argues that this testimony was uncontradicted and therefore has to be accepted as fact by the Court. Liberty is wrong. "In cases tried to the court without a jury, it is the duty and function of the court to resolve conflicts in evidence." *Groves v. Clark*, 1999 MT 117, ¶ 18, 294 Mont. 417, 982 P.2d 446 (1999). Blaylock contradicted himself. His initial testimony as to a three to six

month limitation of modified duty was the more genuine and credible. It provided substantial, direct evidence for my finding that Timberweld would not have retained claimant on modified duty beyond November 1, 2000.

¶5 Liberty argues that by quitting his modified job the claimant created a hypothetical, speculative situation as to what would have happened had claimant continued to work in the modified job. However, the Court does not decide the issue based on guess or conjecture. Claimant was required to prove, **on a more likely than not basis**, that the modified job would have ended even if he had continued to work. He satisfied that burden.

¶6 Liberty takes umbrage at the Court's failure to mention *Osborne v. Planet Ins.,* WCC No. 9307-6842, Findings of Fact, Conclusions of Law and Judgment (August 22, 1994), and reproves the Court for failing to follow that decision. In *Osborne* I held:

> The clear purpose of section 39-71-7[01] (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. The statute does not excuse a worker from returning to work even though the worker believes that he or she is unable to work. While the worker may refuse to return to work, the consequence of such refusal is no job and no benefits. The worker who attempts to return to work and who genuinely cannot perform the job because of his or her injury can of course seek reevaluation by his or her treating physician, who may then determine that the worker is not capable of doing the job and thereby rescind the release.

(Conclusion of Law 2 at 15-16). My holding in *Osborne* was and is the starting point in this case. That was understood at the commencement at trial and has never changed. My holding in *Osborne*, however, is not as expansive as Liberty would like it to be. I did not hold that once a claimant has been released to a modified job that he may never requalify for temporary total disability benefits if he refuses or quits the modified position.

¶7 A holding that claimant who refuses or quits a modified position may not requalify for temporary total disability benefits even though a preponderance of the evidence indicates that the job would have ended would amount to a penalty assessed against the claimant. Section 39-71-701(4), MCA (1999), provides for no such penalty. It simply 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 for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.

Moreover, such construction is contrary to the plain language of the last sentence, which expressly provides that the claimant shall requalify for benefits when the "modified or alternative position is no longer available for any reason . . . ." My decision finding that claimant requalified for TTD benefits on November 1, 2000, because the modified position was no longer available to him at that time is not contrary to my holding in *Osborne* and is consistent with the plain language of the section.

¶8 I also found in this case that "at least as of March 2, 200[1], he [claimant] was no longer able to perform the modified position even if he had been allowed to sit for significant periods of time." ¶ 31. Liberty correctly points out that the release for claimant to return to work in a modified position was never rescinded. The finding, however, is not critical to the resolution of the case since I found that the modified job would have ended several months early, on November 1, 2000: The more important finding was that claimant failed to prove that prior to November 1, 2000, he was physically unable to perform the modified job. Whether a release must be rescinded for claimant to requalify for benefits when the modified job continues to be available need not be answered. Certainly, withdrawing medical approval for the modified job is preferable. On the other hand, section 39-71-701(4), MCA (1999), also contains language which states that the claimant must be "able" to perform the modified job. The use of that word may encompass consideration of the broader concept of "disability," which is not solely a medical issue. In any event, I need not consider in this case whether rescission of a release is required.

¶9 Citing section 39-71-701(2), MCA (1999), and *Onstad v. Payless Shoes,* 2000 MT 230, ¶ 65, 301 Mont. 259, 9 P.3rd 38 (Trieweiler, T., dissenting), Liberty also argues, as a general proposition, that temporary total disability must be supported by objective medical findings. I am mystified by Liberty's point. There is ample objective evidence that claimant injured himself on April 11, 2000, and that the symptoms caused by that injury impair his ability to work and engage in other activities.

ORDER

¶10 Paragraph 31 of the Court's Findings of Fact, Conclusions of Law and Judgment is amended as follows:

¶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, 2001. 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, 2001, 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).

¶11 Liberty's motions are otherwise **denied**.

DATED in Helena, Montana, this 15th day of November, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. David W. Lauridsen
Mr. Larry W. Jones
Submitted: October 1, 2001