IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 113

WCC No. 9403-7030

VERNON L. INGEBRETSON

Petitioner

vs.

LOUISIANA-PACIFIC CORPORATION

Respondent/Insurer/Employer.

Affirmed *Ingebretson v. Louisiana-Pacific Corporation*, 272 Mont. 294 (1995) (No. 94-622)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant sought temporary total disability benefits after termination of his employment for falling asleep at work. He had been back at work following an injury, even though not yet MMI, because the self-insured employer offered him work pursuant to section 39-71-701(4), MCA (1993).

Held: Claimant fell asleep at work because the employer forced him, the day before, to work a job that caused him pain and ignored his request to be relieved from that work. Where the employer's policies caused him to fall asleep at work, the employer cannot blame claimant for his sleeping, particularly when that day's job assignment was inconsequential. Moreover, the Court finds as a matter of fact that the termination for sleeping at work was a pretext for the employer to rid itself of a disabled employee, meaning that the work was "no longer available" to claimant under section 39-71-701(4), MCA (1993), entitling him to reinstatement of temporary total disability benefits. The self-insured employer is liable for TTD benefits, as well as penalty and attorneys fees.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-72-701(1), MCA (1993). Pursuant to section 39-72-701(1), MCA (1993), of the Occupational Disease Act, section 39-71-701(1), MCA (1993) of the Workers'

Compensation Act regulates an occupational disease claimant's entitlement to temporary total disability benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: section 39-71-701(4), MCA (1993). Although self-insured employer brought claimant back to work prior to MMI by offering him work within his restrictions (see section 39-71-701(4), MCA (1993)), it assigned him work that caused him pain, and refused to heed his requests for reassignment. When claimant fell asleep at work the next day, it was because his employer-caused pain had caused a sleepless night. Employer's purported termination for sleeping at work was a pretext for the employer to rid itself of a disabled employee, making the alternative job "no longer available" to claimant and entitling him to reinstatement of temporary total disability benefits. Claimant was entitled to temporary total disability benefits, attorneys fees, and penalty. **Affirmed in *Ingebretson v. Louisiana-Pacific Corporation*, 272 Mont. 294 (1995) (No. 94-622)**.

Penalty: Insurer. Although self-insured employer brought claimant back to work prior to MMI by offering him work within his restrictions (see section 39-71-701(4), MCA (1993)), it assigned him work that caused him pain, and refused to heed his requests for reassignment. When claimant fell asleep at work the next day, it was because his employer-caused pain had caused a sleepless night. Employer's purported termination for sleeping at work was a pretext for the employer to rid itself of a disabled employee, making the alternative job "no longer available" to claimant and entitling him to reinstatement of temporary total disability benefits. Claimant was entitled to temporary total disability benefits, attorneys fees, and penalty. **Affirmed in *Ingebretson v. Louisiana-Pacific Corporation*, 272 Mont. 294 (1995) (No. 94-622)**.

Benefits: Temporary Total Disability Benefits. Although self-insured employer brought claimant back to work prior to MMI by offering him work within his restrictions (see section 39-71-701(4), MCA (1993)), it assigned him work that caused him pain, and refused to heed his requests for reassignment. When claimant fell asleep at work the next day, it was because his employer-caused pain had caused a sleepless night. Employer's purported termination for sleeping at work was a pretext for the employer to rid itself of a disabled employee, making the alternative job "no longer available" to claimant and entitling him to reinstatement of temporary total disability benefits. Claimant was entitled to temporary total disability benefits, attorneys fees, and penalty. **Affirmed in *Ingebretson v. Louisiana-Pacific Corporation*, 272 Mont. 294 (1995) (No. 94-622)**.

Vocational -- Return to Work Matters: Modified Employment. Although self-insured employer brought claimant back to work prior to MMI by offering him work within his restrictions (see section 39-71-701(4), MCA (1993)), it assigned him work that caused him pain, and refused to heed his requests for reassignment. When claimant fell asleep at work the next day, it was because his employer-caused pain had caused a sleepless night. Employer's purported termination for sleeping at work was a pretext for the employer to rid itself of a disabled employee, making the alternative job "no longer available" to claimant and entitling him to reinstatement of temporary total disability benefits. Claimant was entitled to temporary total disability benefits, attorneys fees, and penalty. **Affirmed in *Ingebretson v. Louisiana-Pacific Corporation*, 272 Mont. 294 (1995) (No. 94-622)**.

The trial in this matter was held on June 14, 1994, in Kalispell, Montana. Petitioner, Vernon L. Ingebretson (claimant), was present and represented by Mr. Jon L. Heberling. Respondent, Louisiana-Pacific Corporation (LP), was represented by Mr. Jerry Schuster. Exhibits 1 through 7 were admitted into evidence, with the exception of Exhibit 6, page 0056, which was refused. Claimant, Pat Geer and John Denning testified. The parties stipulated that the deposition of claimant may be considered by the Court in reaching its decision.

Issue: The issue in this case is claimant's entitlement to temporary total disability benefits following the termination of his employment on September 28, 1993. Claimant also seeks attorney fees and a penalty.

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

FINDINGS OF FACT

1. At the time of trial claimant was fifty-five years old.

2. On June 14, 1988, claimant was hired as a laborer for LP at the mill in Libby, Montana. From 1988 until 1993, claimant performed various jobs at LP. However, claimant worked most frequently as a forklift driver and at the time of his employment termination his "bid" job was that of forklift driver.

3. Claimant first noticed a problem with his elbows in December of 1992. (Tr. at 31.)

4. On June 2, 1993, claimant gave notice of an occupational disease to Pat Geer (Geer), plant manager for LP. The occupational disease was tendinitis in the right and left

elbows. LP filled out an Employer's First Report dated June 2, 1993, which was also signed by claimant. (Ex. 2.)

5. On June 11, 1993, claimant's occupational disease claim was denied by LP. (Ex. 3.)

6. Claimant continued to work during the month of June 1993.

7. On July 1, 1993, claimant was laid off due to a shortage of logs. (Ex. 6 at 92.)

8. The Employment Relations Division (ERD) referred claimant to Dr. John Stephens. Dr. Stephens examined claimant on July 26, 1993. Dr. Stephens diagnosed bilateral lateral epicondylitis (Ex. 1 at 11) and opined that claimant suffered from an occupational disease. Dr. Stephens further opined that claimant could perform his usual job but suggested job modification. (*Id*.)

9. On August 2, 1993, claimant returned to work at LP as a forklift driver. After one or two weeks, Geer told claimant to run the stacker. (Tr. at 34.) The stacker operator job was Vonna Anderson's job. (Tr. at 34.) The forklift driver job remained claimant's bid job.

10. On August 4, 1993, the ERD entered an order determining that claimant had an occupational disease. (Ex. 4.)

11. On August 12, 1993, claimant notified Geer that he could not work because his elbows were sore. (Tr. at 37.) Geer asked claimant to come into work for just an hour or two so that he would not have to report a lost-time accident. (Tr. at 37.) Claimant refused to go in, stating that he had an appointment with Dr. Brus and that he would come in on the following Monday. (Tr. at 37.)

12. On August 13, 1993, Dr. Brus examined claimant. Dr. Brus approved an LP job description for "stacker operator." The job was described as "to stand and keep in visual contact with 3 automatic stacking machines and on occasion pushing a button." (Ex. 1 at 13.)

13. The actual work as a stacker was more physically demanding than suggested by the job description approved by Dr. Brus. While on the stacker, claimant had to pick short, rotten or broken 2x4's off the machine or pull them down between the chains. The stacker was designed for 2x4's and when running 1x4's through the stacker, claimant had to stack many of them by hand. Stacking the 1x4's by hand required repetitive lifting. Regardless of whether the machine was running 2x4's or 1x4's, claimant often fell behind, and had to repeatedly lift the lumber.

14. On August 16, 1993, claimant returned to work. Geer directed him to work in the guard shack. (Tr. at 41-42.)

15. When working at the guard shack, claimant was instructed to stop and direct incoming vehicles. (Tr. at 95.) LP did not have a full-time day shift security guard during 1993. (Tr. at 156.) Thus, the guard shack was unattended when claimant worked the stacker. (Tr. at 158.) Geer testified that when claimant was not in the guard shack, a secretary was supposed to keep an eye on the gate. (Tr. at 158.) The secretary's office was approximately 150 yards from the gate and the secretary had to do clerical work as well. (Tr. at 57-58.) At the time claimant was assigned to the guard shack, his position was clearly a non-essential one to LP.

16. Between August 16 and September 28, 1993, claimant alternated between the stacker position and the guard shack position. (Tr. at 43.) Due to pain in his elbows, claimant usually worked the stacker for one or two days per week and was in the guard shack for the rest of the week. (Tr. at 43.) Geer testified that claimant was on the stacker about forty (40%) percent of the time. Claimant performed stacker work until he could no longer tolerate the work. His foreman would then send him to the guard shack.

17. Neither the guard shack position nor the stacker position was a permanent position for claimant.

18. Geer arranged for claimant to see Dr. Hvidston. (Ex. 1 at 14-15.) Claimant worked for a few hours before he left for the appointment because Geer asked him to. Geer asked claimant on more than one occasion to come in for a few hours before going to a doctor's appointment so he did not have to report a lost-time accident. (Tr. at 48.)

19. Dr. Hvidston examined claimant on September 2, 1993, and diagnosed lateral epicondylitis bilaterally. (Ex. 1 at 19.) Dr. Hvidston disapproved the job description of forklift driver, which had been claimant's regular job. (Ex. 1 at 17.) Dr. Hvidston approved a modified job of stacker operator with the following conditions: "However Vernon relates help for the heavier lumber is not available and this causes pain. If he has repetitive lifting I would not approve." (Ex. 1 at 16.) Dr. Hvidston approved a job description for security officer without limitation. (Ex. 1 at 18.) LP received all three job descriptions on September 15, 1993.

20. Geer and the other LP foreman instructed claimant not to handle any heavy lumber and to ask for help whenever he needed it. (Ex. 1 at 16; Tr. at 94.) However, claimant performed repetitive lifting on many occasions. Often there was no one in view from whom claimant could request help.

21. On September 27, 1993, claimant worked the stacker, which was running cedar 1x4's. Cedar is considerably lighter than other kinds of wood. (Tr. at 98.) Claimant fell behind on the stacker and Mike Miller (Miller), an LP foreman, helped him catch up. Claimant told Miller that his elbows were sore and that he wanted to be taken off the stacker. (Tr. at 61.) Miller did not take claimant off the stacker and claimant continued to work the stacker until his shift ended.

22. After work on September 27, 1993, claimant took four Tylenol. He could not sleep that night due to the pain in his elbows. (Tr. at 62.)

23. On September 28, 1993, between 5:00 a.m. and 5:30 a.m., claimant called LP and spoke with Wes Johnson, the night security guard, and told him that he was not coming to work because of his sore elbows. (Tr. at 63.) The information was passed on to the foreman. (Tr. at 147-148.)

24. Shortly before 6:00 a.m., claimant changed his mind and decided to go to work. (Tr. at 63.) Upon arrival at work, he told Miller that his elbows were sore and that he had no sleep the night before. Miller directed claimant to go to the guard shack. (Tr. at 64.)

25. After spending about two hours in the guard shack, claimant went to his truck. His truck was parked about twelve feet from the gate. (Tr. at 65.) At his truck claimant took four Tylenol and drank part of a cup of coffee. (Tr. at 64.) Claimant sat in the passenger's seat, tilted the seat back and fell asleep. (Tr. at 65.) The Court is persuaded that he fell asleep because he had no sleep the night before and that he did not intentionally abandon his position.

26. Geer noticed that claimant was sleeping in his truck. He knocked on claimant's window and woke claimant. Claimant admitted to Geer that he was sleeping and Geer terminated claimant's employment.

27. Claimant's falling asleep at work was indirectly, if not directly, attributable to the policies of his employer. On the day prior, claimant was forced to continue working on the stacker despite his pain and his request that he be relieved. As a result, he had a sleepless night. The next morning he initially called in sick but thought better of it. LP had on prior occasions pressed him to come to work despite pain and doctor's appointments so it could avoid reporting lost employee time due to an accident. The job he reported to on the morning of his termination was a boring and insignificant one, indeed a position that was filled only when claimant was unable to work on the stacker.

28. Claimant's attorney requested LP to reinstate him. LP refused.

29. At the time of the termination, LP was aware that claimant's bid job[1] was still that of forklift driver. It was also aware that the claimant was unable to perform that bid job driving a forklift and was unable to perform the duties required of a stacker operator. In light of its knowledge, and the inconsequential nature of the duties assigned to claimant, the Court infers and finds that its "off with the head" response was a pretext for ridding itself of a disabled employee, reducing employee lost time due to accidents, and avoiding responsibility for payment of workers' compensation benefits.

30. On October 7, 1993, Dr. Hvidston prescribed physical therapy for claimant. (Ex. 1 at 19.) The course of physical therapy continued until February 10, 1994. (Ex. 1 at 33.)

31. On March 2, 1994, Dr. Hvidston prescribed another course of physical therapy. (Ex. 1 at 35.) That course of physical therapy continued until March 31, 1994. (Ex. 1 at 40-42.)

32. Claimant's elbow tenderness continues. Claimant has not reached maximum medical healing.

33. The Court finds that claimant was a credible witness.

34. LP's refusal to pay claimant temporary total disability benefits was unreasonable.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont. 318, 730 P.2d 380 (1986).* Thus, the 1993 version of the Occupational Disease Act governs the case.

2. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 483-484, 512 P.2d 1304 (1973);* ***Dumont v. Aetna Fire Underwriters,*** *183 Mont. 190, 598 P.2d 1099 (1979).*

3. To determine claimant's entitlement to compensation, the Court looks to section 39-72-701(1), MCA, which states:

> The compensation to which an employee temporarily totally disabled or permanently totally disabled by an occupational disease other than pneumoconiosis, or the beneficiaries and dependents of the employee in the case of death caused by an

[1]Bid job refers to a union seniority system by which a job opening is filled. Typically, a job opening is filled by the union member with the highest seniority who seeks or "bids" the job.

> occupational disease other than pneumoconiosis, are entitled under this chapter shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time as is provided in cases of temporary total disability, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act. [Emphasis added.]

As a result of the highlighted language, section 39-71-701, MCA, regulates temporary total disability benefits payable under the Occupational Disease Act.

Temporary total disability is defined as "a condition resulting from an injury as defined in this chapter that results in total loss of wages and exists until the injured worker reaches maximum medical healing." § 39-71-116 (28), MCA. Section 39-71-701, MCA, provides that temporarily totally disabled workers are entitled to temporary total disability benefits. However, the 1991 Legislature wrote in an exception. That exception is found in subsection (4) of 39-71-701, MCA, which 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.]

On its face, subsection (4) requires payment of temporary total disability benefits to a worker released to perform a modified or alternative job when the alternative or modified position is "no longer available" to him. The Court need not consider whether the "no longer available" language applies in cases where the worker refuses to work in a modified or alternative position, or he is terminated by the employer for deliberate misconduct which he knows, or should know, will result in his termination. This is not such a case. Rather, it is a case where the employer has fired a worker, and thereby made the position unavailable, because of circumstances created by the worker's occupational disease. Moreover, in this case the employer's termination of claimant's employment was pretextual. Under these circumstances, the alternative positions previously available to claimant have become unavailable.

Claimant is, therefore, entitled to temporary total disability benefits upon satisfying the waiting period prescribed by section 39-71-736(1), MCA. Such benefits shall continue so long as claimant remains temporarily totally disabled, or until an appropriate modified or alternative position again becomes available to him.

4. Claimant seeks a penalty. There is no penalty provision in the Occupational Disease Act for cases tried in the Workers' Compensation Court. However, a penalty is provided under section 39-71-2907, MCA, which was initially enacted in 1975 as a part of a separate statute establishing the Court. 1975 Mont. Laws, ch. 537, sec. 3. As enacted, it was not a part of the Workers' Compensation Act. On its face, the section is not limited to proceedings brought under the Workers' Compensation Act. It provides in relevant part that the Court "may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay. . . ." LP's refusal to pay benefits was unreasonable and claimant is entitled to a twenty (20%) percent increase in the temporary total disability benefits due now and in the future.

5. The Occupational Disease Act provides that the practice and procedures prescribed in the Workers' Compensation Act apply to occupational disease claims. § 39-72-402(1), MCA. Section 39-71-611, MCA, provides:

> The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
> (b) the claim is later adjudged compensable by the workers' compensation court; and
> (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

Since LP was unreasonable in refusing to pay claimant temporary total disability benefits after his termination, claimant is entitled to attorney fees and costs.

JUDGMENT

1. Claimant is temporarily totally disabled within the meaning of section 39-71-701, MCA.

2. Upon satisfying the waiting period prescribed by section 39-71-736(1), MCA, claimant is entitled to temporary total disability benefits from September 28, 1993. Benefits shall continue until claimant is no longer temporarily totally disabled, a medically approved

alternative position again becomes available to him, or Louisiana-Pacific is otherwise excused from paying benefits.

3. Louisiana-Pacific is liable for costs and attorney fees in an amount to be determined by the Court.

4. In addition to the temporary total disability benefits ordered herein, Louisiana-Pacific shall pay to claimant as a penalty an additional amount equal to twenty (20%) percent of the amount of temporary total disability benefits.

5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 14th day of December, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jon L. Heberling
Mr. Jerry Schuster