Savidge, K. v. ICAO

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA2650
Industrial Claim Appeals Office of the State of Colorado
WC No. 4620669

Kathleen Savidge,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Air Wisconsin Airlines, Inc., and Insurance Company of the State of Pennsylvania,

Respondents.

ORDER AFFIRMED

Division A
Opinion by: JUDGE ROMÁN
Furman and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: December 6, 2007

Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office of the State of Colorado

Senter Goldfarb & Rice, LLC, William M. Sterck, Denver, Colorado, for Respondents Air Wisconsin Airlines, Inc. and Insurance Company of the State of Pennsylvania

In this workers' compensation action, claimant, Kathleen Savidge, seeks review of the final order issued by the Industrial Claim Appeals Office (Panel) affirming the decision of the Administrative Law Judge (ALJ), who had denied her request for penalties against employer, Air Wisconsin Airlines, Inc. and its insurer, Insurance Company of the State of Pennsylvania (collectively referred to as employer). We affirm.

I. Background

Claimant, a resident of Colorado Springs, was working as a customer service agent for employer at Denver International Airport (DIA) when she sustained an admitted, work-related injury to her wrist and thumb that required surgery.

After her surgery the claimant was unable to drive to work due to the medical restrictions. Although her authorized treating physician (ATP) released her to modified duty, he prohibited her from driving.

Pursuant to section 8-42-105, C.R.S. 2007, employer offered claimant modified employment at DIA, which was within her work restrictions, but outside of her driving restrictions.

Claimant spoke to her supervisor about the possibility of flying from the Colorado Springs Airport to Denver International Airport. Nonetheless, she testified that the problem was getting to the Colorado Springs Airport, since there was no bus service from her home to the Colorado Springs Airport and a taxi would have been prohibitively expensive.

Employer acknowledged that it was aware that claimant could not drive and had no way to get to work, but testified it declined to make arrangements to transport the claimant to work based on its understanding of the law. As a result, claimant, unable to get to work to perform the modified job duty offered, rejected the offer of modified employment.

Based on claimant's rejection and relying on Department of Labor and Employment Rule IX (C), 7 Code Colo. Reg. 1101-3, now renumbered with changes not applicable here at Rule 6 -1(4), employer unilaterally discontinued claimant's temporary total disability (TTD) benefits.

Even though claimant timely sought a hearing before an ALJ to pursue (1) continuation of benefits and (2) penalties for

employer's allegedly improper termination of benefits, she went nearly a year without receiving benefits.

The ALJ eventually ordered claimant's TTD benefits retroactively reinstated from the date they were terminated. In doing so, the ALJ found that claimant's lack of transportation to work made acceptance of the offer of modified employment impractical. However, the ALJ denied claimant's request for penalties, concluding claimant did not demonstrate that employer had violated applicable rules and statutes when it terminated her TTD benefits.

Employer did not appeal the decision to reinstate claimant's TTD benefits; however, claimant appealed the ALJ's decision to deny her request for penalties. The Panel affirmed. This appeal followed.

II. Penalties

Claimant contends the Panel erred in affirming the ALJ's decision not to award penalties. Specifically, she contends employer's offer of modified employment was unreasonable given its knowledge of claimant's lack of transportation.

Under section 8-43-304(1), C.R.S. 2007, an ALJ may impose a fine up to $500.00 per day on any employer who "fails, neglects, or refuses to obey any lawful order of the director or the Panel." *Pioneers Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97, 98 (Colo. App. 2005). The failure to comply with a procedural rule is a failure to obey an "order" within the meaning of section 8-43-304(1). *Id.* at 98.

An employer fails to obey an order if it fails to take the action that a reasonable employer would take to comply with the order. The employer's action is therefore "measured by an objective standard of reasonableness and actual knowledge that the conduct was in bad faith is not required." *Jimenez v. Indus. Claim Appeals Office*, 107 P.3d 965, 967 (Colo. App. 2003). The reasonableness of an employer's actions depends on whether the action was predicated on a rational argument based in law or fact. *Id.* at 967.

Generally, determination of the reasonableness of the employer's conduct is an issue of fact for the ALJ. *See Id.* However, the issue may become one of law if reasonable minds can draw but one conclusion from the undisputed facts. *See Schrieber v. Brown*

& Root, Inc., 888 P.2d 274 (Colo. App. 1993).

Here, the ALJ found that the employer did not violate either section 8-42-105(3)(d), C.R.S. 2007, or Rule IX(C). Section 8-42-105(3)(d) provides that temporary total disability benefits shall continue until the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee, and the employee fails to begin such employment. Similarly, Rule IX(C) provides that an employer may terminate temporary disability benefits without a hearing by filing an admission of liability with a certified letter to the claimant, containing an offer of modified employment (setting forth duties, wages and hours) and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions. Claimant does not allege a technical defect in employer's offer of modified employment.

Claimant contends instead that employer's offer of modified employment was unreasonable because it violated the spirit of 8-42-105(3)(d)(I), C.R.S. 2007, and Rule IX(C) by extending the offer when it knew that claimant had medical driving restrictions that

prohibited her from accepting the position. Employer acknowledges it was aware of claimant's medical driving restrictions when it extended the offer of modified employment.

A review of the record thus reveals that the following material facts are undisputed:

- Employer filed an admission of liability with a certified letter to the claimant, containing an offer of modified employment, setting forth duties, wages and hours;
- The letter contained a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions;
- The letter said nothing about claimant's medical driving restrictions;
- Employer was aware of claimant's medical driving restrictions but made no attempt to accommodate those driving restrictions.

Where the facts are not in dispute, we closely scrutinize an employer's legal argument that its decision to unilaterally withhold payments was reasonable. *See Jiminez*, 107 P.3d at 968 (Webb, J.

specially concurring) (a determination of objective reasonableness based on a rational legal argument requires consideration of the argument that was made.)

Here, employer contends its actions were reasonable based on the decision of another division of this court in *McKinley v. Bronco Billy's*, 903 P.2d 1239, 1241 (Colo. App. 1995), which upheld an ALJ's decision to terminate a claimant's TTD benefits for failure to commence her duties, even though the claimant's medical restriction against night driving prevented her from working night hours scheduled by employer.

This case differs from *McKinley,* however, in that it addresses an offer of modified employment under section 8-42-105(3)(d), whereas the division in *McKinley* affirmed the termination of TTD benefits where the treating physician released the claimant to regular employment under 8-42-105(3)(c).

The division in *McKinley* concluded that section 8-42-105(3)(c) unambiguously provides for the termination of benefits upon a claimant's release to return to regular employment and therefore, the ALJ was bound to terminate temporary total disability benefits

as of the date the claimant was released to return to regular employment.

The purpose of temporary disability benefits, however, is to compensate for actual loss of wages during the time the claimant is temporarily unable to work because of the injury. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542, 548 (Colo. 1995), *overruled in part by* Colo. Sess. Laws 1999, ch. 90, §§ 8-42-103(1)(g), 8-42-105(4) at 266.

We nevertheless agree with the ALJ and Panel that a finding that the claimant was unable to accept modified employment does not compel as a matter of law the imposition of penalties. The standard for imposing penalties is not identical to the standard for awarding benefits. *See Pena*, 117 P.3d at 87. Penalties are not appropriate if the ALJ determines that the employer acted reasonably under the circumstances. *See Jiminez*, 107 P.3d at 967.

Under the circumstances of this case, we agree with the ALJ and the Panel that the employer did not act unreasonably. We do so because we cannot say that it was irrational as a matter of law for employer to rely on the *McKinley* decision. Likewise we cannot say that it was irrational as a matter of law for employer to rely on

an offer of modified employment which, at least on its face, complied with section 8-42-105(3)(d) and Rule IX(C).

The order is affirmed.

JUDGE FURMAN and JUDGE TERRY concur.