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Industrial Claim Appeals Office
Date of Entry of Final Order: December 5, 2006
Honorable John D. Baird
Honorable Thomas Schrant

Office of Administrative Courts
Administrative Law Judge Jill Mattoon
W.C. No. 4-620-669

^ COURT USE ONLY ^

KATHLEEN SAVIDGE,

Petitioner,

v.

AIR WISCONSIN AIRLINES, INC., INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AND THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

Case Number:
06CA2650

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REPLY BRIEF

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MISCELLANEOUS AUTHORITY

For purpose of clarity, the parties will be referred to as they were referred to in the proceedings below. Petitioner Kathleen Savidge will be referred to as (claimant). Respondents Air Wisconsin Airlines, Inc. and Insurance Company of the State of Pennsylvania will be referred to collectively as (respondents) or separately as (respondent employer) and (respondent insurer). Respondent Industrial Claim Appeals Office (ICAO) will be referred to by name.

I. SUMMARY OF THE ISSUE

The issue raised in this appeal by the claimant is whether the Order of the Administrative Law Judge denying claimant's request for the assessment of penalties against respondents for their failure to pay admitted temporary total disability benefits and the final Order of the Industrial Claim Appeals Panel are supported by the applicable law.

II. STATEMENT OF THE CASE AND FACTS

Claimant will rely on the statement of the case and facts set forth in her Opening Brief. Claimant will refer to additional facts as they pertain to the argument.

III. ARGUMENT

Respondents' argument opposing the legal assertions of claimant demonstrates a misunderstanding of the statute and regulation governing the

termination of temporary disability benefits. The applicable law can be summarized as follows.

Under section 8-42-105(3)(d)(I), liability for temporary disability benefits terminates when the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. However, where, as here, the respondents have admitted liability for temporary disability benefits, such benefits may only be terminated in accordance with Rule IX or pursuant to an Administrative Law Judge's order.

Rule IX(C)(1)(a)-(f) concerns termination of "temporary disability benefits without a hearing." As such, Rule IX(C) creates special regulatory exceptions to section 8-43-203(2)(d), which provides that: "[H]earings may be set to determine any matter, but, if any liability is admitted, payments shall continue according to admitted liability." The regulatory exceptions are necessary because the statute has long been construed as prohibiting respondents from terminating admitted benefits without first obtaining a hearing to establish the factual and legal predicates for the termination of benefits.

Because Rule IX permits the interruption or termination of the claimant's temporary benefits prior to a hearing, it has been held that the rule permissibly incorporates procedural requirements and safeguards not explicitly mandated by

the Act itself. *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *A & R Concrete Construction v. Lightner*, 759 P.2d 831 (Colo. App. 1998). The Rule seeks to ensure that where respondents desire to terminate benefits without a hearing, they are able to make an evidentiary showing which demonstrates a high degree of probability that they will succeed when the issue is tried on the merits. If the respondents are unable to meet the requirements for unilateral termination under Rule IX(C), the respondents must file a petition to suspend and continue to pay temporary disability benefits until a hearing is held to determine whether there is sufficient evidence to permit the termination of benefits under the statute. *Snyder v. Industrial Claim Appeals Panel, supra.* In that way, the claimant is not deprived of periodic indemnity benefits in the event the respondents are unable to prove grounds for the termination of benefits. Furthermore, even an administrative law judge's ultimate determination that temporary disability benefits terminated by operation of §8-42-105(3)(d)(I) does not alter the respondents' liability to pay continuing benefits under their admission prior to the administrative law judge's determination.

Respondents argue that they fully complied with §8-42-105(3)(d) and Rule IX(C)(1)(d) by providing temporary total disability benefits "until the Claimant was released to return to modified employment and the employer made a written

offer of employment which was denied by the Claimant." Respondents go on to argue that their actions were reasonable because they "followed the statutory language" and "made a reasonable interpretation of the case law of offering modified employment." Respondents' argument demonstrates the same failure to distinguish between a termination of benefits by petition under the statute and a unilateral termination of benefits under the regulations by admission as was ascribed to the order of the Administrative Law Judge in claimant's opening brief. Specifically, whether respondents had a statutory basis for terminating temporary total disability benefits under §8-42-105(3)(d)(I) is simply not relevant to the penalty claim.

The respondents' ability to file an admission of liability unilaterally terminating claimant's benefits was conditioned upon compliance with the special procedural requirements of Rule IX(C) and respondents' failure to comply with Rule IX(C) cannot be excused because the offer of employment may have been sufficient to terminate benefits under §8-42-105(3)(d)(I). ***There is no such thing as a unilateral termination of admitted benefits under §8-42-105(3)(d)(I).*** If benefits are terminated under the statute, the sufficiency of the evidence permitting the termination of benefits under the statute has been determined by an administrative law judge following an evidentiary hearing and an order allowing the termination of benefits under the statute has been issued.

There appears to be no dispute that an insurer cannot terminate temporary disability benefits based on an offer of modified employment that the claimant cannot, as a practical matter, accept. Thus, in order to comply with the requirements of Rule IX(C)(1), respondents' June 30, 2005 admission of liability unilaterally terminating claimant's temporary total disability benefits had to be supported by evidence demonstrating a high degree of probability that the modified employment was reasonably available to the claimant. This of course was not the case as has been admitted by the respondents and found by the Administrative Law Judge. Respondents' offer of modified employment was undeniably insufficient to support the termination of benefits under Rule IX.

It is claimant's position that the ALJ's conclusion that respondents properly effected a unilateral termination of admitted temporary total disability benefits with full knowledge that the offered employment was not reasonably available to the claimant constitutes a reversible misapplication of the law. Respondents argue that there was no error because respondents' interpretation of reasonably available employment under an objective standard is supported by substantial evidence.

If respondents know the claimant cannot get to work due to her restrictions, and respondents further admit that the assistance requested by claimant should have been provided, admit that their failure to provide the assistance was unreasonable, and admit that without providing claimant with any assistance in

getting to and from work the offer of modified duty employment was not objectively workable, what part of respondents' interpretation of reasonably available employment is supported by substantial evidence?

Respondents argue that they made a reasonable interpretation of the case law, specifically, *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995), because "travel to and from work is generally considered to be outside the scope of employment". However, the Administrative Law Judge rejected respondents' theory that claimant's inability to drive to modified employment was not relevant to the termination of benefits. Specifically, in awarding claimant temporary total disability benefits beginning on the date those benefits were terminated by respondents, the Administrative Law Judge relied on *Simington v. Assured Transportation & Delivery*, 1998 WL 185094 (ICAO) (March 19, 1998).

Simington involved an insurer's appeal of an administrative law judge's order finding that the respondents improperly terminated claimant's temporary disability benefits on January 23, 1997. On January 20, 1997, the respondents mailed a certified letter to the claimant offering him reemployment within restrictions imposed by the treating physician. The letter advised that, unless the claimant returned to work on January 23, 1997, his temporary disability benefits would be terminated. The claimant did not receive the letter until January 25, 1997, and consequently failed to begin work on January 23, 1997. The respondents then

terminated temporary benefits effective January 23, 1997. In determining that the respondents improperly terminated the claimant's benefits, the ALJ found that, after the injury, the claimant moved further from the employer's place of business due to a fire at the claimant's home. The ALJ also found that, due to the injury, the claimant was taking medication which precluded him from driving to work and that respondents did not provide the claimant with transportation to and from work. Under these circumstances, the ALJ concluded that respondents' termination of benefits was improper under §8-42-105(3)(d)(I), C.R.S. 1997.

On review, the respondents in *Simington* alleged that the ALJ erred in holding that the termination of benefits was improper under §8-42-105(3)(d)(I). Relying principally on *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995), the respondents argued that, contrary to the ALJ's ruling, the claimant's inability to drive from his residence to the modified employment was irrelevant to termination of benefits under the statute.

In affirming the order of the ALJ, the *Simington* Panel noted that the record, which revealed that the claimant was precluded from driving to work because of medication prescribed by the treating physician and that the fire in the claimant's home required him to move to a more remote location where alternative means of transportation were not available, constituted substantial evidence that the employment offered was not reasonably available to the claimant under an

objective standard. The respondents' argument notwithstanding, the *Simington* Panel did not perceive this result to be inconsistent with *McKinley v. Bronco Billy's*. The Panel provided this explanation:

> *McKinley* applied §8-42-105(3)(c), C.R.S. 1997, which governs termination of temporary disability benefits when the claimant is released to 'regular employment.' That provision, unlike §8-42-105(3)(d), places no discretion in the hands of employers concerning the circumstances surrounding an offer of employment. Thus, we believe subsection (3)(d) is distinguishable from (3)(c), and necessarily imparts a reasonableness standard which precludes employers from terminating benefits based on the claimant's failure to commence employment which is impractical.

Respondents here purposely refused to assist claimant in any way in either identifying means to get to work or in providing transportation or transportation assistance so that claimant could return to modified work while honoring the significant restrictions imposed by the primary authorized treating physician. These respondents took the position that they had no obligation to act reasonably in assisting claimant in identifying a means of transportation to get to and from work when claimant was released by her treating physician for modified duty based on respondents' erroneous interpretation of cases not applicable to the facts of this case. With full knowledge that the modified employment in Denver was not reasonably available to claimant absent transportation assistance, respondents unilaterally terminated claimant's temporary disability benefits with the filing of a

general admission of liability on June 30, 2005. The same argument advanced by these respondents in attempting to justify their improper and unwarranted termination of benefits in June 2005 was considered and rejected by the *Simington* Panel in its 1998 decision. Respondents' interpretation of reasonably available employment is not a rational legal argument. Their assertion that they "fully complied with the statutory reading of the rules and subsequent case law, specifically *Bronco Billy*" and thereby "made an evidentiary showing which demonstrated a high degree of probability they could succeed when the issue was tried on its merits" is implausible.

In assessing return to work cases, the case law, statute, and rule all contemplate a very specific difference when it comes to deciding whose responsibility or burden it is to get to and from work. Colorado workers' compensation law compels an employer to make a reasonable effort to assist work-injured claimants, if necessary, in identifying and obtaining a method to get to and from work if the inability to get to and from work results from the direct consequences of the injury, physical activity limitations imposed by the authorized treating physician or surgeon (just like the instant case), or other circumstances discussed in the case law, such as a claimant's house burning down which in turn resulted in claimant having to move a significant distance from the work place.

There is a clear thread of common sense and reasonable employer conduct imposed on the employer by operation of law when a work-injured claimant is only allowed to return to modified duty. This entire topic within workers' compensation reflects the most basic tenets of workers' compensation law and tacitly recognizes that the contract for hire has changed (at least temporarily) as a direct result of the partially disabling consequences of the compensable work injury.

The respondents' argument seems to be that, even though the employer knew the claimant could not drive as a result of surgery for her work injury, and even though the employer knew that claimant was restricted to work activity that allowed no use of the right arm and very limited use of the left arm, and even though the employer knew that claimant had no way to get to and from work since she lived in Colorado Springs and worked at DIA, somehow the employer thought it would be appropriate to offer claimant a job that they knew she had no way to get to and when claimant didn't show up for the job, the employer claimed they had the right to terminate claimant's temporary disability benefits because it was somehow claimant's fault that she didn't get to work. That isn't all.

In this case, the employer admitted actual knowledge that because of her work injury, claimant had no way to get to and from work. The employer made an

affirmative, considered decision to withhold any assistance to claimant in getting to and from work for medically restricted return to work.

The law requires a determination that the employer have a winnable argument in support of the withholding of temporary disability benefits in a case in which the employer terminates those benefits by the filing of an admission. Given the "high degree of probability" standard, there appears to be an elevated burden on the respondents seeking a pre-hearing termination of indemnity benefits that otherwise must be paid until a hearing is held and an order is issued. Thus, in order to comply with the regulatory exception to the statute prohibiting the termination of admitted benefits without first obtaining a hearing to establish the factual and legal predicates for the termination of benefits, respondents' admission of liability unilaterally terminating claimant's temporary total disability benefits had to be supported by evidence demonstrating a high degree of probability that the modified employment was reasonably available to the claimant. This of course was not the case. Respondents' offer of modified employment was undisputedly insufficient to support a termination of benefits by the filing of an admission.

Here, the law clearly compelled the continued payment of temporary disability benefits because the Workers' Compensation Act recognizes that when a work-injured claimant continues under medical care and is only released to work with restrictions, the employer must continue the payment of temporary indemnity

benefits at least until such time as an administrative law judge hears the case and makes a determination whether the employer's efforts to assist claimant were in fact reasonable and satisfactory. Again, the employer loses the argument under that standard and in fact, that is exactly what happened here. Once the matter was heard by the Administrative Law Judge, the Judge determined that claimant never did have a way to get to work and the employer failed to take reasonable steps, or any steps, to assist claimant in getting to and from work.

The mean-spirited, intentional conduct on the part of the employer resulted in the economic deprivation of temporary disability benefits to claimant for nearly a year. One of the other basic goals of the Workers' Compensation Act is the avoidance of economic destitution of work-injured employees and their families. As noted above, this claimant went without financial benefits of any kind for almost a year. This case simply has to be remanded for determination of penalties for respondents' intentional, willful withholding of claimant's temporary disability benefits.

It is noted as a final matter that, contrary to the assertion of respondents, claimant did not argue in her Opening Brief that, "respondents were required to request a hearing because they did not have the statutory right to terminate temporary total disability benefits as it would violate due process." Respondents again fail to appreciate the distinction between a termination of benefits by petition

under the statute and a unilateral termination of benefits under the regulations by admission. Furthermore, claimant did not raise the "issue" of due process.

The concept of due process, however, and its presumption that parties to a workers' compensation matter will be treated fairly, is why an employer cannot unilaterally terminate temporary disability benefits by the filing of an admission of liability unless the employer can show a strong likelihood that it will prevail when the issue is tried on the merits. This is how and where the Administrative Law Judge committed reversible error.

Given her other findings, had the Administrative Law Judge applied this standard of strong likelihood of success at hearing, she obviously would have reached a contrary conclusion regarding the award of penalties. After all, there can be no greater measure or demonstration of the respondents' failure to show the likelihood that they will prevail at hearing than the decision that is issued finding that they clearly failed to meet that burden.

More importantly, not only did the employer in this case fail to meet the good faith standard of reasonably assisting claimant in getting to and from work when the claimant was medically restricted from any driving, the employer testified that although they could have and should have assisted claimant in getting to and from work, on the advice of the insurance adjuster, the employer made an intentional decision to not assist claimant in any way. The employer then had the

audacity to blame claimant because she was physically unable to get to work and exploited that inability and blame by alleging that claimant was responsible for her inability to work (get to and from work) as the basis for the wrongful unilateral termination of claimant's temporary total disability benefits.

The concept of due process reflects the inherent fairness that the Workers' Compensation Act is supposed to incorporate. Contrary to the suggestion of respondents, claimant's use of the term due process was not a constitutional challenge to §8-42-105(3)(d) and the issue is not being raised for the first time on appeal. In any event, the Court of Appeals has initial jurisdiction to resolve constitutional challenges to the statute. *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995)

Respectfully submitted this 12th day of June, 2007.

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CERTIFICATE OF SERVICE/MAILING

I hereby certify that on this 13th day of June, 2007, the original and five (5) copies of the foregoing REPLY BRIEF were sent by same-day carrier to the Clerk of the Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203 and that a true and correct copy of the foregoing was placed in the U.S. Mail, postage prepaid and properly addressed to the parties listed below:

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