

CONTENTIONS OF THE PARTIES

Claimant asserts that he is entitled to temporary total or partial disability (TTD) benefits after his February 16, 2006 injury. Claimant was terminated on February 23, 2006 for abandoning his post, but Claimant argues that he was unable to perform his job because his prescription medications made him drowsy and groggy.

Defendants contend that Claimant is not entitled to anymore TTDs than have already been paid. Claimant violated Employer's attendance policy and was terminated for reasons unrelated to his industrial injury. Defendants argue that but for Claimant's termination light-duty work would have been available to him.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Oral testimony by Claimant and Becky Clemens at hearing.
2. Claimant's Exhibits 1 - 120 admitted at hearing.
3. Defendants' Exhibits E and J - O admitted at hearing with Exhibit J pages 207 and 215 withdrawn.
4. The Commission's legal file in the above entitled case.

In its post-hearing brief, Defendants request that portions of Claimant's brief be stricken because Claimant failed to make appropriate citations. While it is preferred to have fully cited briefs, the Commission finds that striking Claimant's brief is not warranted. Accordingly, Defendants' motion to strike Claimant's brief is denied.

After having fully considered the above evidence and arguments of the parties, the Commission hereby issues its decision in this matter.

FINDINGS OF FACT

1. Claimant was 28 years of age and resided in the Coeur d'Alene area at the time of the hearing. He was receiving Social Security Disability for Charcot-Marie-Tooth disorder.

2. Claimant was employed in blade preparation for Employer, Buck Knives. Claimant had received a verbal warning for absences from his work station when Claimant was using the restroom too frequently. As a result of the warning, Claimant was moved from stamp to blade preparation. Claimant worked the night shift from approximately 4:30 p.m. to 2:30 a.m.

3. On February 16, 2006, Claimant was carrying finished blades on trays when he suffered a slip and fall accident. Claimant felt immediate, intense pain in his neck and right shoulder. A maintenance worker took Claimant to North Idaho Immediate Care Center (NIICC) in Post Falls. There, Dr. Hjeltness diagnosed a right shoulder strain and prescribed Darvocet, Ibuprofen, and Skelaxin (a muscle relaxant). Claimant returned to work with a 10 pound right arm lifting restriction and a restriction prohibiting lifting above the shoulder and below the waist. There was no restriction from operating machinery or equipment. Ex. B p. 3.

4. Claimant testified that the medication made him drowsy and nauseous. On February 17, 2006, he told his supervisor that he was nodding off and that his safety goggles struck the grinding wheel. Employer has no report documenting an incident where Claimant struck the grinding wheel. Claimant was moved to a position removing debris from the blades with a drill press.

5. Claimant spoke with his supervisor again about his drowsiness and the supervisor told Claimant to stop taking the medication. Claimant followed the direction and discontinued his medication.

6. On February 22, 2006, Claimant had a follow up appointment with Dr. Hjeltness. Claimant reported that his supervisor told him to stop taking his medication. Dr. Hjeltness told Claimant to continue taking his medication and noted that the same return to work restrictions applied. Ex. B p. 9.

7. On February 23, 2006, Claimant went to work. Claimant testified that at lunch he informed his supervisor that he was extremely nauseous, groggy, and tired and that he was going to lie down. Claimant fell asleep in his car in the parking lot. He was working the night shift and when he woke up at 3 a.m. everyone had left. Claimant returned home and went to bed. Claimant's supervisor reported that Claimant did not return from lunch and did not notify him that he was leaving. Ex. J p. 214.

8. The next day, Friday, Claimant went back to work to speak with the human resources department. He described what happened the night before and asked if he would be written up. The human resource officer said that she would inform Claimant of the resolution when a decision was made. Claimant was escorted off the property by the security officer.

9. Claimant does not normally work weekends. On Monday, February 27, Employer called and told Claimant he was fired for abandoning his post. Claimant's termination letter states that Claimant left the premises during his shift, did not clock out and did not notify anyone that he was leaving. The letter further states that a search took place to find him. Ex. J p. 211. Employer's HR manager testified that Claimant's supervisor reported that Claimant fell asleep at a gas station. Tr., p. 87. There was no report from Employer's security guard regarding a vehicle in the parking lot at 3:00 a.m. on February 24, 2006. Tr., p. 74.

10. After his termination from Employer, Claimant worked for Huntwood Industries as a drawer assembler from March 7 through March 24, 2006. Claimant testified that he left Huntwood because he was having too much shoulder pain.

11. Claimant applied for work at convenience stores, gas stations, and restaurants, but was not able to obtain employment because the minimum lifting requirement was 30 pounds and Claimant was having a difficult time lifting five pounds. Claimant has been looking for work through the Coeur d'Alene Press, Craig's List, Help Wanted Dot Com, Monster, and the Job Service.

12. Claimant testified that he is waiting for left shoulder surgery with Dr. Olscamp and the C-T myelogram for his neck. Tr., p. 41.

13. Surety paid TTDs from September 1, 2006 (the date of Claimant's right shoulder surgery) through November 15, 2006 (the date Claimant was released to light duty work after surgery).

DISCUSSION AND CONCLUSION

14. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1996).

Temporary Total Disability

15. Idaho Code § 72-408 provides that income benefits for total and partial disability are paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C. P. Clare and Company, 100 Idaho 761,

763, 605 P.2d 939, 941 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, an injured worker is entitled to temporary disability benefits unless and until such evidence is presented that the worker has been released for light duty work *and* that (1) the former employer has made a reasonable and legitimate offer of employment to the worker who is capable of performing such a job under the terms of a light work release and which employment is likely to continue throughout the period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of a light duty work release. Malueg v. Pierson Enterprises, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

16. The issue of TTDs in this case revolves around Claimant's termination from his job with Employer. The parties do not dispute that at the time of his termination Claimant was in a period of recovery and that Claimant had been released to light duty work with restrictions. Therefore, Claimant is entitled to TTD benefits unless Employer offered Claimant reasonable and legitimate work or reasonable work was available in the general labor market.

17. If Employer made a reasonable, actual offer of suitable employment which was refused by Claimant, Employer is not liable for TTD benefits beyond the date of refusal. Here, if Employer fired Claimant because of the injury, no actual offer of suitable employment was made. On the other hand, if Claimant was fired for cause unrelated to the injury, then he has refused suitable employment.

18. After Claimant's injury he was prescribed medication and returned to work with a 10 pound right arm lifting restriction and a restriction prohibiting lifting above the shoulder and below the waist. There was no restriction from operating machinery or equipment. Ex. B p. 3.

19. Employer offered Claimant a job which fit within his restrictions. Claimant performed the job and repeatedly told his supervisor that he was drowsy. On the last day Claimant worked, he went to his car at his lunch break because the medication was making him tired and groggy. He slept through the remainder of his shift. Claimant testified that he told his supervisor he was going to rest in his car and the supervisor's note says that Claimant did not speak with him. Ultimately, Employer fired Claimant for abandoning his post.

20. If, as Claimant argues, he had told his supervisor that he was going to rest in his car and he never returned for the second half of the shift, it seems very unlikely that the supervisor would not have sent someone out to look for Claimant. Claimant's car was approximately twenty feet from the entry door. The Commission finds it more likely that Claimant did not inform his supervisor that he was going to his car for lunch. When Claimant did not return from lunch his supervisor did not know where to look for him and Claimant was left to sleep through the remainder of the shift. We find that Claimant abandoned his post when he did not return from lunch on February 23, 2006.

21. We do not dispute that Claimant's medication made him drowsy. But according to the restrictions given by Claimant's treating doctor, the position Employer offered was reasonable. There was no problem with the lifting restriction imposed and there was no restriction on operating equipment. Additionally, Dr. Hjeltness was aware of Claimant's complaint of drowsiness. When Claimant returned on February 22, 2006 for his check up, Claimant reported that he stopped taking his medication on his supervisor's recommendation. Yet, Dr. Hjeltness did not change Claimant's medications, did not release Claimant from work, and did not modify his restrictions to limit the machinery Claimant would operate. Dr. Hjeltness specifically implemented the same restrictions as previously imposed.

22. After Claimant came back to work for Employer in a light duty capacity he returned to his doctor and no changes to his restrictions were made. If Claimant felt he needed additional restrictions he could have requested such from his doctor. If the treating doctor had informed Employer of additional needs, then Employer would have had the opportunity to comply. Employer had no additional guidelines which would help it find Claimant a different position. As it was, Employer used all the information at its disposal and offered Claimant a reasonable job. Claimant worked at the job for several days until he left at his lunch break on February 23, 2006, and did not return for the second half of his shift. Claimant was fired for abandoning his post. Employer terminated Claimant for a cause unrelated to the injury, thus he has refused suitable employment.

23. The evidence in the record shows that Defendants offered a suitable and reasonable position to Claimant which Claimant refused. Temporary total or partial disability benefits are denied.

CONCLUSION OF LAW AND ORDER

1. Claimant has failed to prove he is entitled to temporary total or partial disability.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 27th day of January, 2009.

INDUSTRIAL COMMISSION

Participated but did not sign
R.D. Maynard, Chairman

/s/
Thomas E. Limbaugh, Commissioner

_____/s/_____
James F. Kile, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2009, a true and correct copy of the **FINDINGS, CONCLUSION, AND ORDER** was served by regular United States Mail upon each of the following:

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_____/s/_____