

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 26

WCC No. 2000-0201

ANN BUSTELL

Petitioner

vs.

AIG CLAIMS SERVICE, INCORPORATED

and

THE INSURANCE COMPANY OF PENNSYLVANIA

Respondents/Insurers for

NORTH AMERICAN VAN LINES

and

J-TABS, INCORPORATED

Employers.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, a Montana resident who had driven for North American Van Lines (NAVL) and NAVL trucking firms for several years, and who had last driven for an NAVL firm just six months previous, sought employment with J-TABS. J-TABS was an interstate trucking firm and a large part of its business was hauling for NAVL. It agreed to hire claimant in November 1999, and purchased an airline ticket for her to fly from Billings, Montana, which was her home base, to Fort Wayne, Indiana, where she was to pick up her truck, update her NAVL training, and be dispatched on her first trip. Upon arriving in Fort Wayne, claimant signed a written contract with J-TABS. J-TABS' secretary, who had broad authority in J-TABS' affairs, including the authority to sign contracts, signed on behalf of J-TABS and turned over a Volvo truck to claimant to drive. Claimant completed her update class, loaded her personal gear into the truck, slept in the truck overnight, drove the truck to obtain repairs and detailing, fueled the truck using a J-TABS' credit card, and sought her first load from the NAVL dispatcher. After seeking her first load, claimant learned that NAVL required her to take a drug screening test despite the fact that she had taken four previous

tests while working for NAVL, one as recently as eight months previous, and despite federal regulations which did not require retesting.

On December 2, 1999, claimant drove her truck to the drug testing laboratory and was returning to the NAVL complex in Fort Wayne to await her first load when she was broadsided by another truck, which ran a stop light. She suffered catastrophic injuries and is a quadriplegic.

At the time of the accident, J-TABS was insured by the same insurer as NAVL. NAVL personnel contacted the third-party administrator (TPA) of the insurer to report the accident. Based on information provided solely by NAVL and J-TABS, the TPA determined that Montana had jurisdiction over the claim and submitted a First Report in Montana. The insurer, however, denied liability, asserting that claimant was not an employee of J-TABS at the time of the accident or was not in the course and scope of employment.

Claimant thereafter hired a Montana lawyer to pursue her claim and also accepted insurance monies from the other truck driver's insurer. Her Montana attorney requested mediation. The mediation took place in September 2000. At that time, and for the first time, the insurer challenged Montana jurisdiction over the claim. Mediation was unsuccessful and the claimant filed her petition with this Court. In this litigation the insurer asserts that Montana is not the proper forum for the claim and, secondarily, that the claimant was not an employee or was not in the course and scope of employment when she was injured.

Held: (1) There was an agreement of employment made orally while claimant was still in Montana and subsequently reduced to writing and signed by both J-TABS and claimant. The agreement was unconditional and contained no conditions precedent. Both parties reasonably expected that claimant would requalify to drive for NAVL; had she not qualified, then J-TABS remedy was to terminate the employment as provided in the agreement.

(2) Claimant was acting in the course and scope of her employment in taking possession of, preparing, and using the J-TABS' truck assigned to her. Since she had to qualify to drive for NAVL as a part of her employment, she was in the course and scope of her employment when driving to and from the medical laboratory for the drug screening test.

(3) Montana is the proper forum for her claim and the insurer is in any event estopped from asserting otherwise.

(4) The insurer's denial of benefits in this matter was unreasonable and entitles the claimant to attorney fees and a penalty. The insurer acted unreasonably in contesting Montana as the proper forum after it had determined, based solely on information provided by J-TABS and NAVL, that Montana was the proper forum. It also acted unreasonably in failing to properly focus on whether claimant had an agreement of employment with J-Tabs, instead it focused on whether she was qualified to drive for NAVL, which it also insured.

Topics:

Attorney Fees: Unreasonable Denial or Delay of Payment. Where the insurer caused the claim to be filed in Montana based solely on information from its insureds, and notified claimant that her remedies were in Montana, the insurer acted unreasonably when it later notified her that she should be pursuing her claim in Indiana and defended against her Montana claim based on a lack of Montana jurisdiction. Claimant is therefore entitled to attorney fees.

Attorney Fees: Unreasonable Denial or Delay of Payment. Where the insurer denied liability based on the lack of an employer-employee relationship, the insurer's focus on claimant's qualifications to drive for its primary client, North American Van Lines (NAVL), rather than upon the employment agreement between claimant and NAVL's carrier, which it also insured, was unreasonable and entitles claimant to attorney fees.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-118(1), MCA (1999). Under the 1999 Montana Workers' Compensation Act, where an interstate trucking firm hires a Montana resident who operates out of Montana for interstate driving, including driving in Montana, and the driver is injured in another state, the Montana Workers' Compensation Act is applicable to the claim. §§ 39-71-118(1) and -117(4), MCA (1999).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-117(4), MCA (1999). Under the 1999 Montana Workers' Compensation Act, where an interstate trucking firm hires a Montana resident who operates out of Montana for interstate driving, including driving in Montana, and the driver is injured in another state, the Montana Workers' Compensation Act is applicable to the claim. §§ 39-71-118(1) and -117(4), MCA (1999).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-407, MCA (1999). Where claimant, a truck driver, is employed by a trucking firm which contracts to haul loads for North American Van Lines (NAVL), that firm turns over a truck to her, and claimant drives the truck a few miles between NAVL's truck center and a medical laboratory in order to take a drug screening test required by NAVL, the claimant was in the course and scope of her employment during that travel. §§ 39-71-407(1) and (3), MCA (1999).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-118(1) MCA (1999). Employment is defined as a "contract for hire," § 39-71-118(1), MCA (1999), therefore the existence of an employment relationship is governed by contract law.

Employment: Contract for Hire. Employment is defined as a "contract for hire," § 39-71-118(1), MCA (1999), therefore the existence of an employment relationship is governed by contract law.

Employment: Oral Agreement. Even though an oral employment agreement is later reduced to writing, it is effective at the time of the making unless the parties intend that it become effective only when reduced to writing.

Employment: Existence. Where the parties enter into an agreement which contains no qualifications or conditions precedent, an employment is created even though the employee must meet certain qualifications to fulfill all her duties of employment, especially where both parties reasonably expect that the employee will meet the qualifications.

Employment: Course and Scope: Travel. Where claimant, a truck driver, is employed by a trucking firm which contracts to haul loads for North American Van Lines (NAVL), that firm turns over a truck to her, and claimant drives the truck a few miles between NAVL's truck center and a medical laboratory in order to take a drug screening test required by NAVL, the claimant was in the course and scope of her employment during that travel. §§ 39-71-407(1) and (3), MCA (1999).

Jurisdiction: Montana Employment. Under the 1999 Montana Workers' Compensation Act, where an interstate trucking firm hires a Montana resident who operates out of Montana for interstate driving, including driving in Montana, and the driver is injured in another state, the Montana Workers' Compensation Act is applicable to the claim. §§ 39-71-118(1) and -117(4), MCA (1999).

Jurisdiction: Estoppel. The Montana Workers' Compensation Court has jurisdiction over subject matter in workers' compensation matters which involve Montana residents working for employers doing business in Montana. Where the employer was doing business in Montana, and does not contest in personam jurisdiction, the Court has both subject matter and personal jurisdiction over a claim involving a truck driver who resides in and is based in Montana. Where the employer and its insurer invoke Montana as the proper forum for the claim, they may be estopped from later asserting that the claim should have been pursued in a different state.

Jurisdiction: Estoppel. Where an insurer files a first report on behalf of a catastrophically injured claimant, does so based solely on information provided by its insureds, and notifies the claimant that her remedies are in Montana, and where the claimant in reliance of the insurer's representations hires a Montana lawyer and pursues her claim in Montana, and also accepts third-party monies which may jeopardize her ability to pursue her claim in the state the insurer later contends is

the proper forum, the insurer is estopped from asserting that the claim should have been pursued in another state.

Estoppel: Equitable Estoppel. Where an insurer files a first report on behalf of a catastrophically injured claimant, does so based solely on information provided by its insureds, and notifies the claimant that her remedies are in Montana, and where the claimant in reliance of the insurer's representations hires a Montana lawyer and pursues her claim in Montana, and also accepts third-party monies which may jeopardize her ability to pursue her claim in the state the insurer later contends is the proper forum, the insurer is estopped from asserting that the claim should have been pursued in another state.

Penalties: Insurers. Where the insurer caused the claim to be filed in Montana based solely on information from its insureds, and notified claimant that her remedies were in Montana, the insurer acted unreasonably when it later notified her that she should be pursuing her claim in Indiana and defended against her Montana claim based on a lack of Montana jurisdiction. Claimant is therefore entitled to a penalty.

Penalties: Insurers. Where the insurer denied liability based on the lack of an employer-employee relationship, the insurer's focus on claimant's qualifications to drive for its primary client, North American Van Lines (NAVL), rather than upon the employment agreement between claimant and NAVL's carrier, which it also insured, was unreasonable and entitles claimant to attorney fees.

¶1 The trial in this matter was held in Billings, Montana, commencing April 23, 2001, and ending April 25, 2001. Petitioner, Ann Bustell (claimant), was present and represented by Mr. Paul E. Toennis. Respondent, The Insurance Company of Pennsylvania (Insurer), was represented by Ms. Melanie S. Pfeifer and Mr. Donald S. Herndon.

¶2 Exhibits: Exhibits 1 through 5, 7 through 9, 12 through 18, 20 through 42, 44 through 46, 54, 55, and 60 through 62 were admitted without objection. Exhibit 6 was objected to and only pages 2 through 5 were admitted. Exhibit 10 was objected to and excluded except for page 5 subject to resolution of relevancy determination. After review, page 5 is deemed irrelevant to the decision in this case. Exhibits 11 and 19 were admitted subject to resolution of relevancy determination. After review, those exhibits are deemed irrelevant to the decision in this case. Exhibits 47 and 58 were refused. Exhibit 52 was withdrawn. Exhibits 43, 48 through 51, 53, 56, 57 and 59 were reserved and not offered. Exhibit 63 was admitted for appeal purposes only.

¶3 Witnesses and Depositions: The parties agreed that the depositions of Ann Bustell (volumes I and II), Kelly Bustell, Debra K. Smith, Judith A. Lawrence, Julie A. Parkison, Dawn M. King, Betty M. Swigelson, Tonya R. Caspar, Ricky L. Johnston, Jeffrey T. Moore, Mark W.

Davison, Mark R. Lance, Jeffrey Englebrecht, Tracy A. Hicks, Bethaney Phillips, and Manuela W. Hillenhagen can be considered part of the record. Claimant, Ann Bustell, was sworn and testified. Timothy McKeon, David Maynard, Kelly Bustell, Mark Davison, Valerie Bender, and Betty Swigelson were sworn and testified.

¶4 Objections to testimony of Tim McKeon and David Maynard: At trial the Court heard the testimony of Tim McKeon and David Maynard subject to respondent's objections. Their testimony has not figured in my decision and is therefore irrelevant.

¶5 Objections to Deposition Testimony: Respondent filed written objections to portions of the testimony of Debra Smith, Bethany Phillips, and Manuela Hillenhagen. It is unnecessary to rule on the objections as the testimony in question played no part in and is irrelevant to the Court's findings of fact and conclusions.

¶6 Issues Presented: As set forth in the Pretrial Order, the following issues are presented for decision:

1. Whether Petitioner was an employee of either or both J-TABS, Inc. or NAVL at the time of her accident on December 2, 1999.
2. If Petitioner was employed at the time of her accident, whether Petitioner was acting within the course and scope of her employment with J-Tabs, Inc. and/or NAVL at the time of her accident on 12/2/99.
3. Whether the insurer AIG is equitably estopped from asserting that Montana is not the proper jurisdictional forum.
4. Whether Montana is a proper jurisdictional forum for filing and administering Petitioner's claim for worker's [sic] compensation by voluntary agreement or pursuant to the worker's [sic] compensation policy contract and/or contracts between J-TABS, Inc. and NAVL.
5. Whether Montana is the proper jurisdiction pursuant to statute.
6. Whether Montana's extra-territorial jurisdiction can be extended to this claim pursuant to §39-71-402 M.C.A.
7. Whether Petitioner deviated from the course and scope of her employment.
8. Whether Petitioner is entitled to a penalty and attorney's fees.

¶7 Under the terms of a written stipulation dated October 30, 2000, the insurer has paid petitioner temporary total disability (TTD) and medical benefits associated with this December 2, 1999 accident pursuant to a Stipulation for Reservation of Rights under section 39-71-608, MCA (1997). (Ex. 61.) These medical and TTD benefits were paid retroactive to the date of mediation, September 8, 2000. On February 21, 2001, the parties

also stipulated to the admission of NAVL's First Report which was completed by both Manuela Hillenhagen and Debra Smith, two NAVL employees. (Ex. 41.)

ABBREVIATIONS

¶8 A number of abbreviations are used in the following findings of fact. Since the abbreviations are numerous, the following guide is provided for quick reference.

BW Division Blanket Wrap Division of North American Van Lines. This Division hauls new retail products.

HVP Division High Value Products Division of North American Van Lines. The HVP Division specializes in the transport of high value items.

NAVL North American Van Lines.

FINDINGS OF FACT

¶9 I begin my findings of fact with a prefatory statement concerning credibility. The parties in this case insisted that the Court personally view hours of video depositions; they declined the Court's request that they identify the portions they believed important for the Court to review, insisting that credibility is a major issue in this case. Two of the major witnesses - the claimant and Betty Swigelson - both testified in person at trial and I had ample opportunity to judge their credibility. After reviewing all of the evidence, including the depositions, I find that it was wholly unnecessary for me to review all of the tapes. The parties could and should have designated those portions which were critical to the case.

¶10 As to differences in testimony, I found claimant very credible and for the most part have adopted her version of events. On most points her testimony is independently corroborated or not even in dispute. As to Betty Swigelson's testimony, she was contradicted not only by claimant but by other witnesses as to important points. I find her testimony on important points not credible. Conflicts in testimony and credibility are resolved in accordance with my findings below.

¶11 Claimant is a truck driver. At all times mentioned in these findings the claimant resided in Billings, Montana, with her husband and children. While driving for various interstate carriers, she always returned to Billings, which was her home base.

¶12 Claimant began her truck driving career in 1995 after answering an ad to become an over-the-road truck driver for McDonald North American Van Lines (McDonald NAVL). McDonald NAVL was an agent of North American Van Lines (NAVL) with offices in Billings, Montana. NAVL is a nationwide moving company serving all lower 48 states and Canada, including Montana.

¶13 After replying to the McDonald NAVL ad, claimant successfully completed two weeks of training, which took place in Montana. Upon completion of the training, claimant took a drug test and an NAVL driving test. Both tests were administered in Montana.

¶14 Claimant obtained her commercial driver's license in Montana and has maintained her Montana license over the years of her truck driving.

¶15 Following her completion of training, claimant was hired directly by NAVL as a fleet driver for its Household Goods Division. She was paid a weekly salary, a food allowance, and a bonus by NAVL.

¶16 Thereafter, except for approximately four months, claimant was employed continuously by NAVL or an NAVL agent until May of 1999. Her periods of NAVL employment were as follows:

March 1995 to August 1995: Employed by NAVL, driving for the BW Division.

August 1995 to February or March 1996: Employed by McDonald NAVL, driving for the Household Goods and HVP Divisions.

February or March 1996 to August 1996: Owner and operator of her own truck, driving under contract for NAVL's BW Division.⁽¹⁾

August 1996 to approximately February 1997: Employed by McDonald NAVL, driving for the NAVL's HVP Division.⁽²⁾

June 1997 to May 1999: Employed by Jerry Davey (Davey), as an NAVL driver for NAVL's HVP Division.

¶17 Whether working as an employee for NAVL, an owner-operator for NAVL, or an employee of one of NAVL's agent companies, claimant was dispatched by NAVL from its Fort Wayne, Indiana, office. She picked up loads and delivered them throughout the United States. She was typically on the road several weeks, after which she returned home to Montana until dispatched again.

¶18 During her driving tenure for NAVL, claimant took and passed four drug screening tests. The tests are required by Federal Law, 49 USC § 31306 and 49 CFR § 382.301, and are administered to determine whether drivers are using alcohol or controlled substances. Claimant took the initial test in 1995, just before going to work for NAVL. She took another test just prior to going to work for Davey in June 1997. She underwent two additional random drug tests, one in October 1998 and the second in March 1999, while still employed by Davey and driving NAVL loads.

¶19 The results of claimant's drug tests were reported to NAVL and maintained in its computer system. (See Lawrence Dep. at 25-26.) The information was available to NAVL personnel responsible for determining whether claimant was qualified to drive. (*Id.*)

¶20 In July 1999, claimant went to work for Diversified Transfer and Storage (DTS) in Billings, Montana. DTS was not an NAVL agent.

¶21 In October 1999, while still driving for DTS, claimant stopped by NAVL headquarters in Fort Wayne, Indiana, and visited with Dawn King (King). King works as a Processing Coordinator for NAVL and knew claimant from her prior work for NAVL. (King Dep. at 5-6.) During her conversation with King, claimant learned that J-TABS, a small trucking firm hauling NAVL loads, was looking for a new driver.

¶22 J-TABS is an interstate trucking firm incorporated in Indiana in early 1999. It is owned by Betty Swigelson (Swigelson) and her husband, although Betty was the only owner involved in the matters giving rise to the present case.

¶23 Prior to incorporating J-TABS, Swigelson had driven for NAVL for fifteen years and she continued driving NAVL loads after incorporating J-TABS.

¶24 In November 1999, J-TABS' primary client was NAVL, although it also hauled some loads for United Van Lines. On November 12, 1999, J-TABS entered into agreement with the BW Division of NAVL to lease a 1999 Volvo truck it had purchased from NAVL⁽³⁾ back to the BW Division of NAVL.⁽⁴⁾ (Ex. 12.) Under the agreement, the truck was to be operated by a "Qualified Person under the immediate direct control of the Contractor [J-TABS]." (*Id.* at 4, provision 4 (b).)

¶25 Swigelson is a resident of New Mexico. Since she is on the road most of the time, J-TABS employs Tonya Caspar (Caspar) to handle payroll and other paperwork for the company. Caspar, who resides in Indiana, has broad authority to act for J-TABS, including the authority to sign contracts on behalf of the company. (Swigelson Dep. at 3; Trial Test.) J-TABS' Indiana office is at Caspar's home in Indiana. It maintains no other place of business in Indiana.

¶26 In early November, claimant and Swigelson talked by telephone. Claimant indicated her interest in going to work for J-TABS driving NAVL loads. At the time of the conversation, claimant was in New York while Swigelson was in Fort Wayne, Indiana. They reached a tentative agreement under which J-TABS would provide claimant with a Volvo 770 tractor unit and claimant would be assigned loads from NAVL's BW Division.

¶27 Shortly after the conversation, Caspar faxed a copy of a J-TABS' standard driver's agreement to claimant's home in Billings and claimant reviewed it when she arrived home in Billings shortly before Thanksgiving. Claimant thereafter talked again with Swigelson by telephone and agreed to work for J-TABS. Swigelson told claimant to sign the agreement. While the parties contemplated a written agreement, it does not appear that they deemed the written agreement a condition precedent or prerequisite to the employment. Swigelson told claimant to contact Caspar about attending an NAVL class in Fort Wayne to update her training for the BW Division and obtain information regarding travel to Fort Wayne for the

class, and to bring with her to Fort Wayne her CB radio, bedding, and enough clothing to last until Christmas. They discussed her driving schedule including what her schedule would be over Christmas time. (*Id.* at 12, 100, 104; Bustell Dep. I at 93, 95.) Swigelson testified that she told claimant that she would only be able to return home every eight to ten weeks since J-TABS did not have many loads going to Montana, however, in testimony she also indicated that NAVL's return home frequency for Montana was actually six to eight weeks. (Swigelson Dep. at 12, 55; Ex. 27.)

¶128 During the conversation, claimant also asked Swigelson if she needed to take a drug test before leaving Billings; Swigelson told her to check with Caspar. (Bustell Dep. I at 86; Bustell Dep. II at 154.) Claimant thereafter talked to Caspar, who told her that she did not need a drug test but that if NAVL wanted one she could take it after she arrived in Fort Wayne.⁽⁵⁾

¶129 Caspar talked to Judith Lawrence (Lawrence), an NAVL employee who was responsible for verifying the qualifications of current and prospective drivers, to determine what was needed for claimant to requalify to drive NAVL loads. (Caspar Dep. at 31-32; Lawrence Dep. at 31-32.) Both Caspar and Lawrence were aware of claimant's prior NAVL experience. (Lawrence Dep. at 32.) Caspar ascertained that in light of her recent driving experience with NAVL, claimant did not need to complete a standard NAVL application and only needed to complete a few items. Other than drug testing, which is discussed later on in these findings, to requalify to drive NAVL loads the claimant needed one day of training in BW procedures and the approval of both the BW Division and the HVP Division.⁽⁶⁾

¶130 Caspar made arrangements for claimant to travel from Billings to Fort Wayne on November 29, 1999, for training and to pick up her J-TABS' truck. The airline ticket was paid for by J-TABS. Through NAVL, Caspar also arranged for claimant's motel. (Caspar Dep. at 7, 37; King Dep at 15-16.) Swigelson acknowledged that J-TABS generally pays for new driver's transportation, lodging, food, and start-up costs. (Swigelson Dep. at 60.)

¶131 Claimant arrived in Fort Wayne on November 30th at 12:30 a.m., and attended BW training later that day. During class she was given vouchers to pick up her NAVL uniform shirts, which she did during one of the breaks. (Bustell Dep. II at 142-43.) She also picked up NAVL log books.

¶132 That evening Caspar met claimant at her motel. At that time, claimant gave Caspar the FAX copy of the J-TABS' employee agreement, which she had signed prior to leaving Montana. Caspar provided a fresh copy of the agreement, which was thereafter signed by both claimant and Caspar, who signed on behalf of J-TABS.⁽⁷⁾ They dated the agreement for the next day, December 1, 1999. A copy of the signed agreement is found at Exhibit 13.

¶133 The signed agreement, which is attached to this decision, sets out claimant's rate of pay and provided that J-TABS was to supply claimant with uniforms, phone cards, credit

cards for fuel, and pagers. While the agreement did not expressly provide for J-TABS to provide the claimant with a truck, that provision was implicit in the contract: Section #7 of the agreement expressly governs removal of items from J-TABS' truck upon termination of employment. The agreement also provided for claimant to follow the paperwork procedures of NAVL (Section #1), accept loads from NAVL (Section #2), and check in with NAVL dispatchers in accordance with NAVL guidelines (Section #5.)

¶134 While the agreement provided for termination of claimant's employment by J-TABS at any time for any reason, the agreement did not require claimant to take and pass a drug test as a condition of employment. It contained no other conditions which claimant was required to fulfill in order for the agreement to become effective.

¶135 That evening - November 30, 1999 - Caspar drove claimant to the Volvo dealer to pick up the Volvo tractor unit referred to in ¶ 26. When Caspar and claimant arrived at the dealership, Caspar turned the truck and its keys over to claimant. (Caspar Dep. at 10-11.) Claimant was unable to start the truck; she also discovered a damaged front-end fender which had not been fixed as Swigelson had previously instructed. (Bustell Dep. I at 112, 115.) Caspar and claimant then talked to Swigelson by phone and she agreed to postpone the repairs. (*Id.* I at 88, 115.) The truck was then jump-started and claimant drove it back to her motel. After arriving at her motel, she put her personal effects into the truck, started her truck log, left the truck running for the night to recharge the battery, and went to bed at the motel.

¶136 Caspar had scheduled the truck to be "detailed" on December 1, 1999, at 9:00 a.m. The detailing involved putting lettering on the truck identifying it as a J-TABS and NAVL truck.

¶137 On the morning of December 1st, claimant drove the truck to the detailing shop, which was located at the NAVL complex. Caspar arrived about the same time as claimant. (Bustell Dep. I at 115; Caspar Dep. at 14.) Caspar gave claimant \$50 start-up money. Claimant told Caspar that the truck's microwave and refrigerator were not working. (Bustell Dep. I at 115; Bustell Dep. II at 139.) After the detailing work was complete, and with Swigelson's approval, Caspar and claimant went to the NAVL service shop to arrange for it to troubleshoot problems claimant had found with the truck. (Bustell Dep. I at 88, 116-17; Bustell Dep. II at 128; Caspar Dep. at 14-15.) Later that day, after the detailing was complete, claimant drove the truck a short distance from the detailing shop to the NAVL service shop.

¶138 Once the truck was repaired, Bustell drove it to the West Annex of the NAVL complex. She had dinner at the West Annex and later fueled the truck at the fuel islands. Since she had not yet been assigned a fuel account by NAVL, she telephoned Swigelson, who provided her with her fuel account number to use. That night claimant slept in the sleeper of the truck.

¶139 On Thursday morning, December 2, 1999, Bustell weighed her truck at the NAVL scales and paid the scale fee out of the start-up money Caspar had given her. She used an equipment voucher provided to her to obtain equipment for the trailer. She then notified the BW dispatcher that she was ready for a load.

¶140 Claimant also called Caspar to tell her that the truck was ready to go, all her paperwork had been turned in, and she was waiting for a load. At that time Caspar told her that she needed to take a drug test, and that if she hurried to RediMed - a medical laboratory where the tests were administered - before noon, the results might be back within 24 hours.⁽⁸⁾ This was the first time claimant was aware of the need for a new drug test to qualify her as a driver for NAVL.

¶141 As set forth in the federal regulations provided by the parties to the Court, the federal regulations did not require claimant to take a drug test as a prerequisite to requalifying to drive for NAVL since she had participated in authorized random drug testing within the previous twelve months. 49 CFR § 382.301 (c) and (d). However, irrespective of the regulation, and as a matter of company policy, NAVL requires drivers who have separated from NAVL service to submit to drug screening when seeking to requalify to drive NAVL loads.

¶142 Following the conversation with Caspar, claimant drove from the NAVL complex to RediMed in her J-TABS truck and submitted to drug testing. Claimant passed the drug test but the results of the test were not available until after the accident which is described in the next paragraph. (Ex. 38.)

¶143 After submitting to the drug test, claimant drove back towards the NAVL complex, stopping along the way for lunch at Wendy's. After lunch, she continued on her way back to the NAVL complex to wait to be dispatched. At the intersection of U.S. Highway 30 and Kroemer Road, which is right next to the NAVL complex, claimant's truck was broadsided by a tractor-trailer which ran a red light.⁽⁹⁾ The evidence for a finding that she was returning to the NAVL complex is overwhelming. While the respondent has refused to concede that claimant was returning to the NAVL complex, it has offered no other reasonable explanation for her being at the intersection. Its refusal to concede this fact smacks more of hardball litigation strategy than a reasonable appraisal of the facts.

¶144 The accident had catastrophic consequences. Claimant suffered injuries which have rendered her a quadriplegic. At the time her workers' compensation claim was filed (see below), she was unconscious and was unable to provide any information concerning her hiring by J-TABS or the accident.

¶145 At the time of the accident, J-TABS was insured under a workers' compensation policy obtained through NAVL. Its insurer was The Insurance Company of Pennsylvania, which also insured NAVL.

¶46 The insurer employed AIG, an adjusting firm, to adjust NAVL related claims. At the time of claimant's accident, AIG in turn employed First Notice Systems to process accident reports. Manuela Hillenhagen (Hillenhagen), an NAVL employee responsible for reporting workers' compensation accidents, contacted First Notice Systems to report the claimant's accident. Hillenhagen understood that the state where the driver was actually hired determined the state having jurisdiction over workers' compensation benefits. (Hillenhagen Dep. at 10-12.) Prior to reporting the injury to First Notice Systems, she contacted Swigelson to determine the claimant's state of hire. Swigelson told Hillenhagen that claimant had been hired out of Montana. (*Id.* at 13-14.) **Based on the information provided by Swigelson, Hillenhagen reported that claimant was a Montana employee.**

¶47 **The First Report of Injury, prepared by AIG on behalf of The Insurance Company of Pennsylvania, was prepared on a Montana form and filed in Montana.** (Ex. 2 at 2; Hicks Dep. at 15, 20-22; Phillips Dep. at 11.)

¶48 On December 22, 1999, Bethaney Phillips (Phillips), a senior claims examiner with AIG's Montana unit, denied Bustell's claim after consulting with AIG legal counsel and Debra Smith (Smith), an NAVL workers' compensation claims representative. (Ex. 5.) Phillips consulted with AIG legal counsel and Smith in making the decision to deny the claim. (Phillips Dep. at 25, 32, 65.)

¶49 The denial was based on the insurer's determination that claimant was not an "employee" and was "not acting in the course and scope of any employment with North American Van Lines at the time of [her] accident." (Ex. 5.) **The denial was not based on any objection to Montana as the proper venue for the claim, indeed it specifically notified claimant that if she disagreed with the insurer's determination she should pursue remedies provided under the Montana Workers' Compensation Act:**

If you wish to contest this denial of your claim, you have the right to proceed to workers' compensation mediation under Section 39-71-2401, MCA, *et seq.* If you are still dissatisfied with the results at the completion of the mediation process, you will have the right to file a petition for benefits before the Montana Workers' Compensation Court. Finally, appeals from the final decisions of the Workers' Compensation Court are made directly to the Montana Supreme Court.

(Ex. 5.)

¶50 **I find it significant that the insurer's invoking of Montana as the venue for the claim was not based upon any information that claimant provided the insurer or its administrators, rather it was based upon information furnished by J-TABS and NAVL, i.e., upon information furnished by its insureds.**

¶51 In approximately April 2000, the claimant hired a Montana attorney to assist her in pursuing her claim in Montana. (See Phillips Dep. at 68 for date of hire.) Her attorney filed for

mediation, as provided by Montana statutes, § 39-71-2401, *et seq.*, MCA. **At the time of mediation, which was held in September 2000, the insurer for the first time informed claimant that it had changed its position regarding venue and now objected to Montana as the proper forum for the claim. It informed claimant that she should have filed her claim in Indiana.**

¶52 Meanwhile, claimant had employed an Indiana attorney to pursue her claim against the truck driver who ran the stop light and caused her injuries. While she did not file a civil action against the other driver, his insurance company has provided claimant with approximately \$300,000 to assist her in buying a handicap accessible house, a handicap van, and other handicap items. While the dates she received the monies are not specified in the evidence, claimant testified that the insurance company paid for the van used to transport her from Denver's Craig Hospital (Craig), where she underwent rehabilitation, back to Montana. (Bustell Dep. II at 196.) Claimant was discharged from Craig on May 10, 2000, and she arrived home in Billings on May 11, 2000. (*Id.* at 177.) **Thus, claimant received third-party insurance monies prior to the insurer repudiating Montana as the proper venue for her workers' compensation claim.**

¶53 Three of the ultimate factual issues in this case are intertwined with questions of law. Therefore, some of the discussion in the following Conclusions of Law section constitute mixed findings of fact and conclusions of law. Insofar, as that discussion contains additional findings of fact, the findings shall be deemed a part of the findings of fact section as well.

CONCLUSIONS OF LAW

¶54 The 1999 version of the Workers' Compensation Act applies since that was the law in effect on the date of claimant's injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶55 The claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶56 The first questions confronting the Court are whether claimant was an employee of J-TABS at the time of her accident and, if so, whether she was in the course and scope of her employment when she was injured. If claimant was not an employee or was not acting in the scope and course of employment, then the Court need not consider whether Montana is the proper forum for this claim since claimant would not in any event be entitled to benefits under the Montana Workers' Compensation Act.

¶57 An employee is a person "who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written." § 39-71-118(1), MCA (1999). An employer, as defined by 39-71-117 includes "an independent

contractor who has a person in service under an appointment or contract of hire, expressed or implied, oral or written" § 39-71-117(1)(a), MCA (1999). Under these sections, an employment relationship is a contract between the employer and employee. Whether or not the employment relationship exists is a question of contract law. *Gentry v. Douglas Hereford Ranch, Inc.*, 1998 MT 182, ¶ 38, 290 Mont. 126, 962 P.2d 1205 (1998) ("an employment relationship is contractual in nature").

¶158 "The essential elements of a contract are 1) parties capable of contracting; 2) their consent; 3) a lawful object and 4) adequate consideration." *Interstate Production Credit Ass'n v. Abbott*, 223 Mont. 405, 408, 726 P.2d 824, 826 (1986). All elements were present in the present case: (1) Claimant and Swigelson (J-TABS) were capable of entering into the employment contract; (2) Swigelson (J-TABS) agreed to employ claimant for specified compensation and arranged for her to begin employment, while the claimant agreed to work for J-TABS for the specified compensation; (3) the object of the agreement - interstate truck driving - was lawful; and (4) there was adequate compensation - claimant was to provide truck driving services in return for monetary compensation, the adequacy of which no one challenges.

¶159 The insurer insists, however, that there was no agreement for employment since the claimant had to qualify as an NAVL driver. The answer to that assertion is two-fold.

¶160 First, neither the agreement reached by the claimant and Swigelson before claimant left Montana nor the subsequently executed written agreement condition employment upon claimant taking a drug test or qualifying for NAVL. Certainly, an agreement may contain a condition precedent which must be met before the agreement springs to life. "A condition precedent is a condition which must be met before the agreement becomes effective." *Depee v. First Citizen's Bank of Butte*, 258 Mont. 217 220, 852 P.2d 592, 593 (1993). In *Depee*, unlike the present case, there was a specific, express provision in a contract for the sale of a mobile home which stated that the sale was conditioned upon bank approval.

¶161 Second, it is clear from the facts and circumstances of claimant's hiring that the parties anticipated that claimant would qualify to drive for NAVL and gave no thought to the possibility that she might not. Their failure to contemplate and provide for a failure to qualify is no surprise. Claimant had worked for NAVL and its agents for several years. Her most recent work was only six months previous. She had taken and passed four drug screening tests, including two random tests, one of which had been done less than a year previous. Indeed, federal regulations governing drug testing did not require her to take a new drug test as she had been subjected to random drug testing within the previous year. 49 CFR § 382.301(c)(2)(ii).

¶162 The issue in this case is whether claimant was an employee, not whether J-TABS may have breached its agreement with NAVL. The employment agreement was express and

without a condition precedent. The simple answer to the respondent's contention that claimant was required to qualify to drive for NAVL is in the termination provision: J-TABS could have terminated the agreement had she not qualified.

¶63 The next issue is whether claimant was in the course and scope of her employment at the time of the accident. Section 39-71-407(1), MCA (1999), provides in relevant part:

(1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury **arising out of and in the course of employment** . . . [Emphasis added.]

The "arising out of" and the "in the course" language refer to different aspects of employment. "The language 'in the course of employment,' generally refers to the time, place, and circumstances of an injury in relation to employment." *Pinyerd v. State Compensation Ins. Fund*, 271 Mont. 115, 119, 894 P.2d 932, 934 (1995). "The phrase 'arising out of' is related to the concept of causation." *Id.* at 120. Both prongs are met in this case.

¶64 Claimant was hired by J-TABS to drive NAVL loads. Implicit in her hiring was a requirement that she become qualified to drive NAVL loads. The Volvo truck had been turned over to her and she was seeking an NAVL load when she learned that there was one final hurdle to her obtaining a load, that hurdle being NAVL's insistence that she submit to a new drug screening test. To take the test, she had to travel from the NAVL complex to the RediMed office, then back to NAVL to await the test results and then be dispatched on her first NAVL load.

¶65 The suggestion by the insurer, and in some of Swigelson's testimony, that claimant was not authorized to drive the Volvo truck flies in the face of compelling evidence showing otherwise, and is disingenuous. Swigelson told claimant that she would be assigned the Volvo. She designated Caspar to act on behalf of J-TABS in getting claimant into the truck and onto the road, indeed Caspar was authorized to sign the employment agreement between the claimant and J-TABS. Caspar took claimant to the Volvo dealership to pick up the truck and turned the truck over to claimant, who proceeded with preparing it for the road. Caspar provided her start-up money, and Swigelson provided account information for her to fuel the truck. J-TABS clearly turned the truck over to claimant and authorized her to drive it and do whatever was necessary to prepare the truck and herself for hauling NAVL loads. Claimant's use of the truck in driving to RediMed and returning to the NAVL complex to await dispatch on a load was "in the course" of her employment since part of her employment was to do what was necessary to qualify for NAVL loads. I similarly conclude that the accident "arose out of" her employment since it was causally connected to her use of the truck to go from the NAVL complex, where she was awaiting assignment of her first NAVL load, to RediMed and back.

¶166 Claimant's travel to and from RediMed satisfy the travel criteria of section 39-71-407(3), MCA (1999), which provides:

(3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:

(a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and

(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(b) the travel is required by the employer as part of the employee's job duties.

The tests of both subsection (a) and subsection (b) are satisfied. As required by subsection (a)(i), J-TABS furnished claimant with transportation by providing her with the truck. As required by subsection (a)(ii), claimant's travel to RediMed was required as an integral part of her employment. The criteria of subsection (b) are also satisfied since claimant's job duties included completing the necessary steps to qualify to haul for NAVL.

¶167 Since claimant was in the course and scope of her employment when injured, if Montana is a proper forum for her claim then she is entitled to all benefits provided by the Montana Workers' Compensation Act. I must therefore address the insurer's contention that Montana lacks or is precluded from exercising jurisdiction over the claim.

¶168 Applying the recent Supreme Court decision in *Schimmel v. Montana Uninsured Employers' Fund*, 2001 MT 280, I find that claimant is a covered employee under Montana law and entitled to benefits from the insurer. In *Schimmel* the Supreme Court interpreted section 39-71-118(1), MCA, which defines an employee for purposes of the Montana Workers' Compensation Act.⁽¹⁰⁾ It determined that a provision setting forth criteria for a "employee or worker in this state," § 39-71-118(10), MCA, applied only to loaned employees. Thus, a worker must only meet the broad "employee" definition of section 39-71-118(1), MCA, to fall under Montana jurisdiction. That definition encompasses "each person in this state . . . who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written." I have addressed the "contract of hire" issue and found that there was an employment agreement, thus the only remaining question is whether claimant is a "person in this state."

¶169 I conclude that claimant is a "person in this state" as meant by section 39-71-118(1), MCA (1999). She resided in Montana. She was hired out of Montana: Swigelson (J-TABS) knew she lived in Montana and would be returning home when not on the road. Thus, while driving would take her throughout the United States, claimant's home base was Montana

where she would return upon completion of a driving cycle and from where she would be redispached.

¶70 Section 39-71-117(4), MCA (1999), which governs motor carriers, is also applicable in this case. The section provides:

(4) An interstate or intrastate common or contract motor carrier doing business in this state⁽¹¹⁾ who uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:

(a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3); or

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation insurance on the drivers in Montana both at the inception of employment and during all phases of the work performed.

All of the criteria of the section are met. J-TABS was an interstate motor carrier. As an NAVL contractor, J-TABS carried goods throughout all of the lower 48 states of the United States, including Montana, thus it did business in Montana and used drivers in Montana. To paraphrase *Schimmel*, "it certainly takes no stretch of the statutory language to fit it around" J-TABS. 2001 MT 280 at ¶ 10. In *Schimmel* the Supreme Court noted, "Jasper Express used a Montana resident driver to pick up and drop off numerous loads in Montana. Nothing more is required."

¶71 Even if I were to find that the employment agreement between J-TABS and claimant does not meet the technical requirements for claimant's employment to fall under the Montana Workers' Compensation Act, I conclude that this Court nonetheless has subject matter jurisdiction over the dispute and that the insurer is estopped from disputing the applicability of Montana law to the claim. "Jurisdiction is the power to hear and determine the particular action or proceeding as well as to make such orders and render such judgment therein as the law authorizes in the class of actions or proceedings to which it belongs." *State v. Moorman*, 279 Mont. 330, 336, 928 P.2d 145, 148 (quoting from *State v. District Court of Eighteenth Judicial Dist.*, 147 Mont. 263, 267, 410 P.2d 933, 935 (1966)). While subject matter jurisdiction is never waived and can be raised at any time, *id.*, this Court has broad jurisdiction to resolve disputes involving workers' compensation claims. § 39-71-2905, MCA. It thus has jurisdiction over the subject matter.⁽¹²⁾ The issue of Montana jurisdiction is more properly phrased as whether Montana is the proper forum. Estoppel may be considered in connection with that question.

¶72 "As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the

worse." *Selley v. Liberty Northwest Ins. Corp.*, 299 Mont. 127, 130, 998 P.2d 156 (2000)(citations omitted). The doctrine is designed to prevent one party from unconscionably taking advantage of a wrong while asserting a strict legal right, and will be invoked where "justice, honesty, and fair dealing" are promoted. *In re Marriage of K.E.V.* 267 Mont. 323, 331-32, 883 P.2d 1246, 1251 (1994). The six elements of equitable estoppel are:

1. There must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts;
2. These facts must be known to the party estopped at the time of the conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;
3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when it was acted upon by him;
4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon;
5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it; and
6. He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reasons of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it.

Kuzara v. State Compensation Ins. Fund, 279 Mont. 223, 231, 928 P.2d 136, 141 (1996) (citations omitted). All six elements must be satisfied, *Billings Post No. 1634 v. Montana Dep't of Revenue* 284 Mont. 84, 90, 943 P.2d 517, 520 (1997), and they must be satisfied by clear and convincing evidence, *Beery v. Grace Drilling*, 260 Mont. 157, 163, 859 P.2d 429, 433 (1993).

¶73 All six elements for estoppel have been established by clear and convincing evidence:

¶73a The submission of the claim to Montana amounted to a representation by the insurer that the claim was governed by the Montana Workers' Compensation Act. Based on information provided by J-TABS and NAVL, the insurer (actually its adjuster) determined that the claim for compensation at issue in this case was governed by Montana law and that the claim should be submitted in Montana. Claimant had no involvement in that determination, indeed, she was undergoing intensive medical treatment for catastrophic injuries when the claim was submitted. While the insurer denied liability on December 22, 1999, the sole

grounds for denial was that claimant was not an "employee" and "was not injured in the course and scope of her employment with NAVL."

¶73b The insurer was fully informed of the facts when it submitted the claim, indeed it relied **solely** upon information provided by its insured.

¶73c There is no evidence indicating that the claimant was aware that Montana was not the proper jurisdiction for the claim. ⁽¹³⁾

¶73d The insurer clearly intended that the claim be determined in Montana. Under the circumstances it was "natural and probable" that claimant would pursue her claim in Montana. **The suggestion that claimant should have disputed Montana jurisdiction and pursued her claim in Indiana is disingenuous. An insurer cannot insist that a claim be pursued in one state and when the claimant does so then assert that she should have pursued her claim in another state.**

¶73e The claimant relied upon the insurer's invocation of Montana jurisdiction by hiring a lawyer to pursue her claim. She first learned during mediation that the insurer had changed its position concerning the state where she should pursue her claim.

¶73f In reliance on the insurer's representation and in pursuing her claim in Montana, the claimant acted to her detriment. She hired a Montana attorney. Moreover, while the insurer was asserting Montana as the applicable forum for her claim, the claimant accepted monies from the insurer of the third-party trucker who caused the accident. Her acceptance of those monies, if not barring a claim for workers' compensation benefits under Indiana law, at least raises significant issues as to her entitlement in Indiana. Indiana Code, section 22-3-2-13, provides:

22-3-2-13 Claims against third persons; subrogation; procedures. Sec. 13.

Whenever an injury or death, for which compensation is payable under chapters 2 through 6 of this article shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto, the injured employee, or his dependents, in case of death, may commence legal proceedings against the other person to recover damages notwithstanding the employer's or the employer's compensation insurance carrier's payment of or liability to pay compensation under chapters 2 through 6 of this article. In that case, however, if the action against the other person is brought by the injured employee or his dependents and judgment is obtained and paid, and accepted **or settlement is made** with the other person, **either with or without suit, then from the amount received by the employee or dependents there shall be paid to the employer or the employer's**

compensation insurance carrier, subject to its paying its pro-rata share of the reasonable and necessary costs and expenses of asserting the third party claim, the amount of compensation paid to the employee or dependents, plus the medical, surgical, hospital and nurses' services and supplies and burial expenses paid by the employer or the employer's compensation insurance carrier **and the liability of the employer or the employer's compensation insurance carrier to pay further compensation or other expenses shall thereupon terminate**, whether or not one (1) or all of the dependents are entitled to share in the proceeds of the settlement or recovery and whether or not one (1) or all of the dependents could have maintained the action or claim for wrongful death. [Emphasis added.]

The mere possibility that claimant may face defenses to her claim if pursued in Indiana constitutes detriment. I therefore conclude that all elements are met to estop the insurer from contesting this claim based on an assertion that it should have been brought in Indiana, or any state other than Montana.

¶74 Having found that claimant is entitled to benefits, I must now consider whether she is entitled to attorney fees and a penalty. Both awards require that I find that the insurer's denial of liability was unreasonable. §§ 39-71-611 and -2907, MCA (1999).⁽¹⁴⁾

¶75 I find that the insurer's refusal to accept liability in this case was unreasonable, therefore claimant is entitled to both attorney fees and a penalty. While the insurer has raised some legitimate issues in this case, its overall conduct in denying this claim is abhorrent. Especially troublesome is the insurer's reversal of position concerning the state in which the claim should be pursued. Based on information provided by its own insured (J-TABS) and NAVL, the insurer determined that the claim in this case was subject to Montana law.⁽¹⁵⁾ The insurer submitted a first report of injury to Montana, denying liability based only upon its assertion that claimant was not an employee of J-TABS. It was only after the claimant obtained a lawyer to pursue her claim in Montana, and during mediation, that the insurer for the first time asserted that the claim should have been pursued in Indiana. In the meantime, claimant had hired a lawyer to pursue her claim in Montana and had accepted monies from the insurer for the truck driver who caused her injuries. The claimant's injuries were catastrophic - she is a quadriplegic. The insurer was, or should have been, aware of the huge stake she had in her workers' compensation claim. It led her to believe that she should pursue workers' compensation benefits in Montana, then repudiated its position when she did so. Its attempt to show that an attorney purportedly representing her in Indiana was considering pursuing her claim in Indiana, and therefore she should not have relied on its assertion of Montana jurisdiction, only adds to my finding of unreasonableness. Its position is in callous disregard for its own determination that Montana was the proper jurisdiction.

¶176 Further, the insurer failed to evaluate the employment agreement between J-TABS and claimant on its own merits. Rather, it viewed the matter as if it was adjusting a claim against NAVL, which it also insured, and focused on the qualification requirement in the agreement between J-TABS and NAVL. The insurer gave little if any consideration to facts, which if honestly assessed, would have shown that claimant's qualifying to drive for NAVL was a formality and a foregone conclusion as between claimant and J-TABS. Moreover, an honest assessment of the facts should also have persuaded the insurer that the truck which claimant was driving at the time of the accident had been turned over to her by J-TABS and that she was authorized to drive it. The fact that the insurer's primary insured was NAVL rather than J-TABS, appears to have colored its adjustment of this claim.

¶177 Since the claimant has prevailed, she is also entitled to her costs in an amount to be determined in accordance with the Court's rules.

JUDGMENT

¶178 This Court has jurisdiction over the claim in this matter.

¶179 Claimant suffered work-related injuries on December 2, 1999, when the truck she was driving collided with another truck which ran a red light. At the time of the accident, claimant was in the scope and course of her employment with J-TABS. J-TABS' insurer - The Insurance Company of Pennsylvania - is liable for her injuries and shall pay claimant benefits as provided under the Montana Workers' Compensation Act. No determination is made as to the amounts due claimant. The Court retains continuing jurisdiction to determine the amounts should the parties be unable to agree on what is due claimant.

¶180 The insurer's denial of liability in this case was unreasonable, therefore, in addition to other benefits, it shall pay claimant her attorney fees as provided in section 39-71-611, MCA (1999), and the penalty as provided in section 39-71-2907, MCA (1999). As with benefits, the Court retains continuing jurisdiction to determine the amounts should the parties be unable to agree on what is due claimant.

¶181 The insurer shall pay claimant for her costs in this action. Claimant shall submit her memorandum of costs in compliance with this Court's rules.

¶182 This JUDGMENT is certified as final for purposes of appeal.

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

¶184 DATED in Helena, Montana, this 15th day of May, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis

Mr. Donald R. Herndon

Ms. Melanie S. Pfeifer

Submitted: June 27, 2001

Attachment: Exhibit 12 - Signed J-Tabs, Inc. Driver Agreement

1. In February or March 1996, the claimant purchased a used truck from NAVL and commenced driving for NAVL as an owner-operator. Her stint driving as an owner-operator was short lived. Her truck had continual mechanical problems and in August 1996, NAVL bought the truck back from claimant.

2. In early 1997, claimant went to work for RPS, a trucking company headquartered in Billings, Montana. RPS was not affiliated with NAVL. After only two trips for RPS, claimant broke her wrist and was off work for three months. (Bustell Dep. I at 59.)

3. Ex. 15. The truck was purchased by Thomas Swigelson on August 7, 1998, prior to J-TABS' incorporation.

4. Tonya Caspar signed the agreement on behalf of J-TABS. See ¶125 concerning Caspar's authority to sign contracts for J-TABS.

5. (Bustell Dep. I at 83, 86-87, 105; Bustell Dep. II at 154.) Although Caspar did not recall this conversation, she also testified that is what she would have told claimant if the subject had arisen. (Caspar Dep. at 5, 35.)

6. NAVL required that both the division for which she previously drove and the division for which she would be working approve claimant in order for her to drive NAVL loads. The HVP Division, for which claimant had driven until May 30, 1999, approved her rehiring on November 30, 1999. (Ex. 31; Caspar Dep. at 33; Lawrence Dep. at 11-13.) On December 3, 1999, the BW Division approved claimant's hire. (*Id.*)

7. According to Caspar, she did not see Bustell sign the agreement but told her to sign it and make a copy for herself. (Caspar Dep. at 8-9, 39.) At one point in her deposition, Caspar recalled claimant left the agreement for her at the front desk and she later picked it up and signed it on December 1, 1999. (*Id.* at 8, 48.) At still another point of the deposition, she stated that Bustell gave the signed agreement back to her and then she signed it. (*Id.* at 39.) In any event, it is clear that the agreement was signed by and intended to be effective as of December 1, 1999.

8. Caspar testified that she had assumed claimant would be tested when she arrived on Tuesday. (Caspar Dep. at 19.) When she found out that claimant had not been tested, Caspar asked Lawrence, who was in charge of determining claimant's qualifications for NAVL, if claimant could be temporarily qualified so she could start out with a load while

awaiting the test results. (*Id.* at 19, 43.) Lawrence told her temporary qualification was not possible. (*Id.* at 19-20, 43; Lawrence Dep. at 4-5.)

9. The First Report of Injury had erroneously stated the accident occurred on NAVL property. It actually occurred at the intersection of Kroemer Road and U.S. Highway 30, adjacent to the NAVL complex.

10. See paragraph 57 above.

11. The 2002 legislature struck "doing business in this state" and substituted "maintains a place of business in this state."

12. This Court clearly has personal jurisdiction over J-TABS and its insurer. J-TABS, as an NAVL carrier, carried goods from, to, and through Montana. J-TABS was aware that claimant was a Montana resident and that she would return to and be dispatched from Montana when not on the road. In any event, respondent has not challenged the Court's in personam jurisdiction.

13. A claims adjuster for the insurer testified that she was contacted by an attorney who said he was representing the claimant and said that he would be pursuing a workers' compensation claim in Indiana. However, she refused his request for a copy of the denial letter because he did not have an attorney agreement with claimant, and none was forthcoming. (Phillips Dep. at 67-69.) There is no evidence that claimant authorized an attorney to pursue a workers' compensation claim on her behalf in Indiana. To the contrary, she hired an attorney to pursue the claim in Montana. Even had she hired an attorney to pursue the claim in Indiana and then abandoned that effort, she was entitled to rely on the insurer's representation that Montana was the proper forum.

14. Section 39-71-611, MCA (1999) provides in relevant part:

39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable. (1) 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.

Section 39-71-2907, MCA (1999), provides in relevant part:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

....

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, **the insurer unreasonably** delays or **refuses to make the payments**.

15. The fact that the insurer employed third parties to adjust its claims does not excuse it from the penalty and attorney fees. It is responsible for the actions of its agents.

J-Tabs, Inc. Driver Agreement

Listed below are the procedures and regulations that are to be adhered to with no deviation. Any such deviation must be pre-approved by J-Tabs, Inc. and North American Van Lines, Inc.

Section #1

Paperwork Procedures

It is the responsibility of the driver to follow all procedures set forth by North American Van Lines, Inc. (NAVL). Such items shall include logs, vouchers, physicals, T.V.C.'s and any others described by the company for which you're driving. These items shall be sent in on a timely manner, at a minimum of one time per week. They shall arrive at NAVL no later than Tuesday following the work week it was performed.

All drivers shall send the following to the J-Tabs, Inc., office: 1) advance tracking sheet with all receipts attached, 2) a copy of the voucher that was sent to the NAVL, 3) copies of Bill of Ladings, 4) copies of phone logs, 5) copies of any bills for repairs made to the truck. All these items shall be sent in a timely manner, at a minimum of once a week, no later than Tuesday of the following week.

Note: It is the responsibility of the driver to provide receipts to equal the advances taken on a given contract or voucher. Any receipts totaling less than the advance taken shall be deducted from the driver's pay for that week.

Section #2

Load Acceptance and Refusals

As a driver for J-Tabs, Inc., you shall be required to accept all loads assigned by NAVL as long as you are able to deliver the load safely. A driver may be terminated for refusal of any load assigned to him/her.

Section #3

Safety

Safety shall be the number one priority. NAVL, with J-Tabs, Inc., will always keep a high standard of safety. Any violation of safety rules and regulations may be cause for discipline and/or termination. An accident which you are involved in must be reported to J-Tabs, Inc., within 24 hours and must be reported to NAVL as per their guidelines.

Section #4

Shutdowns

Any shutdown (such as bad weather, vacation, mechanical failure and no freight) must be pre-approved by NAVL.

Section #5

Check-In Policy

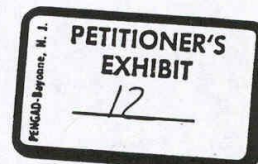
Driver shall check in with NAVL as per their guidelines. Drivers shall check in with designated J-Tabs, Inc., officials a minimum of once per week. Call 219-745-7983 for designated check-in time.

Section #6

J-Tabs, Inc., Property

Drivers will be given certain items for them to use for company use only. Such items shall include, but are not limited to,:

1. Company uniforms: J-Tabs, Inc., will provide 3 shirts. All other uniform accessories will be at the expense of the driver.
2. Phone or phone cards, to be used for company use only. The driver is given 1000 minutes for company use. All personal calls are paid by the driver.
3. Fuel cards, to be used for fueling company vehicles only.
4. Pagers



Any items not returned to J-Tabs, Inc., upon termination of employment shall be subject to the following costs, which shall be deducted from driver's final paycheck:

- Company Uniforms: Cost plus 20%
- Phones: Cost plus 20%
- 3. Phone Cards: \$15.00 per card
- 4. Fuel Cards: \$15.00 per card
- 5. Pagers: Cost plus 20%

Section #7

Caring For Equipment

All drivers shall be expected to take care of and treat the equipment as if it were their own. Anything placed in the cab of the truck by the driver which must be attached by either glue or adhesive must remain in the truck following termination of employment either by the driver or J-Tabs, Inc. Items which are bolted on may be removed by the driver following termination of employment. No paint jobs or graphics shall be placed on the outside of the truck without prior consent from J-Tabs, Inc. No pets are allowed on the vehicle unless prior consent from J-Tabs, Inc.

Section #8

Customer Service

We shall expect all drivers to keep customer service as a top priority while operating in J-Tabs, Inc., service. Please keep in mind that the customer is the lifeline of the business. We also expect all drivers to operate in a professional manner on the road and dress in a professional manner.

Section #9

Termination Procedures

Driver may be terminated at any time for any reason by J-Tabs, Inc. A driver terminating must provide J-Tabs, Inc., written two-week notice. Drivers terminating prior to one full year of service shall be responsible for recruiting/processing costs that were incurred by J-Tabs, Inc. These shall include, but are not limited to, travel, hotel reimbursements, drug tests, and any other applicable fees.

Section #10

Driver Pay Schedule

The driver shall be paid once a week, provided all paperwork has been turned in according to the schedule outlined in Section #1. The driver shall receive their paychecks by regular mail, to their homes, unless otherwise specified. All other payment types are subject to approval and all applicable bank fees will be charged to the driver.

Driver Pay

Driver shall receive \$0.30 per commission mile on statement plus 50% of layovers, and 50% of all handling charges. J-Tabs, Inc. will pay 50% of health insurance.

By signing below, I hereby agree to and accept the above regulations and pay schedule:

ANN C BUSTELL
Driver's Printed Name

12/1/99
Date

Ann C Bustell
Driver's Signature
05762641
J-Tabs, Inc.

12/1/99
Date