IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 10

WCC No. 2000-0135

ERIC DELANEY

Petitioner

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY

Respondent/Insurer for

IMPERIAL HOLLY CORPORATION

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Case Summary: Claimant was buried up to his neck in a pile of crystalline sugar and suffered soft tissue injuries. He returned to work in a heavy-labor position but had continuing back and shoulder pain. He was diagnosed with a shoulder impingement and underwent arthroscopic surgery, after which he again returned to work in a light-duty position. He worked three weeks, then quit and began attending college. His treating physician assigned a 14% impairment rating, disapproved his time-of-injury job, and precluded him from returning to heavy-duty work, which was the only kind of work available to him at his time-of-injury employer. His attorney demanded rehabilitation benefits. A vocational consultant identified alternative jobs, none of which on average pay as much as claimant's time-of-injury job. The insurer requested an IME, which was performed by Dr. Schumann at the Billings Clinic. After examining claimant the doctor wanted claimant to undergo physical therapy (PT), followed by a functional capacity exam (FCE). He did not determine restrictions or review job descriptions. Claimant underwent the PT and the FCE. Meanwhile, Schumann left his position at the Billings Clinic and Dr. Scott Ross notified the insurer that he would review the case and render opinions, which he did without ever examining the claimant. Dr. Ross approved claimant's return to his time-of-injury job. Prior to even receiving Dr. Ross' approval of claimant's time-of-injury job, the insurer denied liability for rehabilitation benefits.

Held: (1) Dr. Ross' evaluation was flawed. He did not examine claimant, he injected himself into the evaluation, and he ignored the FCE results and conclusions without good cause.

The treating physician's opinions precluding claimant from returning to work with his time-of-injury employer were entitled to greater weight and are persuasive. (2) Claimant is entitled to rehabilitation benefits since he cannot return to his time-of-injury job, has a significant impairment, and has a wage loss. (3) The insurer's pattern of conduct in adjusting this claim showed a callous disregard for the claimant and the facts; its conduct was unreasonable and claimant is entitled to both attorney fees and a penalty.

Topics:

Benefits: Rehabilitation Benefits: In General. Claimant who has a significant impairment rating, who cannot return to his time-of-injury job or any other job at his time-of-injury employer, and who has a wage loss is entitled to rehabilitation benefits under section 39-71-1006, MCA (1997). Pursuant to the rehabilitation statutes, a rehabilitation plan must be prepared and implemented.

Montana Code Annotated: 39-71-1006 (1997). Claimant who has a significant impairment rating, who cannot return to his time-of-injury job or any other job at his time-of-injury employer, and who has a wage loss is entitled to rehabilitation benefits under section 39-71-1006, MCA (1997). Pursuant to the rehabilitation statutes, a rehabilitation plan must be prepared and implemented.

Independent Medical Examination. Opinions of IME physician who did not examine claimant, who injected himself into the IME process after the physician who was charged with conducting the IME left the practice without rendering ultimate opinions, and who disregarded in toto the results and conclusions of an FCE without good reason is entitled to no weight.

Proof: Conflicting Evidence: Medical. The opinions of the treating physician are persuasive where the contrary opinions were rendered by an IME physician who did not examine claimant, who injected himself into the IME process after the physician who was charged with conducting the IME left the practice without rendering ultimate opinions, and who disregarded in toto the results and conclusions of an FCE without good reason. Under these circumstances, the IME physician's opinions are entitled to no weight.

Wages: Wage Loss. Where the average wages for jobs which claimant is approved post-injury are less than his time-of-injury wage and vocational evidence is lacking which would show that claimant can reasonably be expected to earn high-end wages which equal or exceed his time-of-injury wage, the claimant has suffered a wage loss.

Attorney Fees: Denial or Delay of Payment. Where the claims adjuster shows a callous disregard for benefits due claimant and for the facts of the case, her

conduct is unreasonable and entitles the claimant to attorney fees if the conduct results in the denial of benefits due the claimant.

Penalties: Insurers. Where the claims adjuster shows a callous disregard for benefits due claimant and for the facts of the case, her conduct is unreasonable and entitles the claimant to a penalty where the conduct results in the denial or delay in payment of benefits due the claimant.

¶1 The trial in this matter was held on November 13, 2000, in Helena, Montana. Petitioner, Eric Delaney (claimant), was present and represented by Ms. Anna M. Bidegaray and Mr. Daniel B. Bidegaray. The respondent insurer, Hartford Accident & Indemnity Company, was represented by Mr. William O. Bronson.

¶2 Exhibits: Exhibits 1 through 10 and 12 were admitted without objection. Exhibit 11 does not exist.

¶3 Witnesses and Depositions: The parties submitted the deposition of Eric Delaney for the Court's consideration. Eric Delaney and Sherie Martello were both sworn and testified.

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

1. Whether claimant is entitled to vocational rehabilitation benefits?

2. Whether claimant is entitled to an increase in award for unreasonable delay or refusal to accept liability and pay proper Workers' Compensation benefits pursuant to section 39-71-2907, MCA?

3. Whether claimant is entitled to costs and attorney's fees, pursuant to section 39-71-611, MCA?

(Pretrial Order at 3.)

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

FINDINGS OF FACT

¶6 Claimant was injured in the course and scope of his employment on December 29, 1997, while "mining sugar" for his employer, Imperial Holly Corporation (Holly). (Uncontested Fact 1.) He fell into a sugar silo and was buried up to his neck in crystalline sugar. While being sucked into the sugar, he was hit in the back of the head and neck with a large rock of sugar. It took rescue workers twenty-five minutes to dig him out.

¶7 At the time of the injury, Holly was insured by Hartford Accident & Indemnity Company (Hartford). (Uncontested Fact 2.) Hartford accepted liability for the accident.

¶8 After he was extricated from the sugar, claimant was transported to Community Memorial Hospital in Sidney, Montana. When examined at the hospital he complained of pain in his neck, back, right knee, and the back of his head, and of tingling in his arms and fingers. (Ex. 9 at 7-9.) However, he had no broken bones or other major injuries. The diagnosis was "(1) [b]ack blunt trauma [and] (2) possible other injuries not evident." (*Id.* at 4.) He was discharged to home. (*Id.*)

¶9 Holly Sugar is a union shop. At the time of his industrial accident, claimant was classified as a "sugar trucker and handler." He had also worked as a "bulk loader" but had not been formally reassigned to that position.

¶10 The claimant returned to work the day after his accident and was assigned light-duty office work. He continued doing light work until January 16, 1998, when he was laid off for a month. Upon returning to work in mid-February, 1998, he successfully bid the bulk loader position and was reclassified as a permanent bulk loader. Claimant continued to work as a bulk loader through June 1998, however, he was laid off for lack of work during part of that time.

¶11 Claimant's wage as a sugar trucker and handler was $9.05 an hour. His wage upon bidding into the bulk loader position was $10.07 an hour. (Ex. 3 at 1.)

¶12 The sugar trucker and handler job is heavy labor. (Ex. 1 at 13.) The bulk loader position is heavy to very heavy. (*Id.* at 1, 5.) Claimant testified, and I find, that after his injury other employees were assigned to help him with heavy tasks.

¶13 In the months following his accident, claimant experienced back and shoulder pain.

¶14 On January 14, 1998, claimant went to Dr. Jimmie L. Ashcraft for back pain after moving about "1500 lbs. and 25 lbs. [sic] of sugar that day." (Ex. 9 at 1.) Dr. Ashcraft found "mild bilateral paraspinal spasm from the base of the neck to the mid thoracic region." (*Id.*) He diagnosed "[m]ild back spasms" and encouraged claimant "to cut back on his activities at work." (*Id.*)

¶15 On May 1, 1998, claimant went to Dr. Woodrow J. Sveen, a chiropractor, for treatment of neck, shoulder, and back pain. (*Id.* at 108-09.) Dr. Sveen's assessment was that claimant was "suffering from pain due to injuries of the neck, low back, & shoulders due to accident at work." (*Id.* at 109.)

¶16 Dr. Sveen treated claimant several times in May and June 1998. His notes set out the claimant's complaints as pain in the right shoulder, neck, low back, and legs. (*Id.* at 103-107.) Claimant also complained of headaches and difficulty in riding in cars. (*Id.*) On July 20, 1998, Dr. Sveen wrote:

> I have treated Mr. Delaney on an ongoing basis since 5/1/98. Due to the nature of the injury and the chronicity of his problems Mr. Delaney has shown little if any improvement.
>
> At this time it is highly unlikely that Mr. Delaney will be able to return to his normal work capacity/ability.

(*Id*. at 102.)

¶17 On June 19, 1998, claimant saw Dr. M. Clay Vaughan, an orthopedic surgeon, with respect to "numbness on the left side of his body." (*Id*. at 124.) Dr. Vaughan recorded that claimant "does have tenderness in the lower cervical spine and upper thoracic spine as well as in the upper lumbar spine." (*Id*.) His impression was:

> Severe [sic] injuries to the entire spine and to the left shoulder with possible rotator cuff tear.

(*Id*.)

¶18 Dr. Vaughan ordered an MRI of claimant's left shoulder and a bone scan. The MRI was done on June 25, 1998. The radiologist's impressions were:

- Subcoracoid bursitis.
- Minimal biceps tenosynovitis.
- Probable old partial tear of the supraspinatus tendon versus strain.

(*Id*. at 16.) The bone scan found no evidence of spinal or other fractures. (*Id*. at 17.)

¶19 Following the MRI and bone scan, Dr. Vaughan diagnosed (1) severe musculoligamentous to the entire spine with no fractures; and (2) ligamentous and tendinous injuries to the left shoulder. (*Id*. at 124.)

¶20 On July 1, 1998, Dr. Vaughan performed arthroscopic surgery on claimant's left shoulder. (*Id*. at 22, 24.) He also injected 80 milligrams of Depo-Medrol and Marcaine into the left biceps tendon. (*Id*.) Claimant's pre- and post-operative diagnosis was "acromion impingement syndrome of the left shoulder and biceps tendinitis." (*Id*.)

¶21 Following surgery, Dr. Vaughan prescribed physical therapy (PT). (*Id*. at 47, 54.) Claimant went to three PT sessions between August 24 to August 28, 1998, then discontinued the therapy because Hartford denied coverage for the therapy.

¶22 Hartford's claims adjuster was Sherie Martello (Martello). At trial she testified that she was uncertain if the PT claims were ever paid because she was not handling the file at that time. She testified that Hartford paid for the surgery but that she never went back to check whether it paid for the PT. I find that Hartford did not pay for the PT and that its failure to do

so caused claimant to cease treatment. Hartford's actions in this regard were unreasonable.

¶23 Following his surgery, claimant was off work for about three weeks. He then returned to a light-duty position at Holly Sugar. He worked in the position until August 21, 1998, when he quit work and enrolled in school at Williston State College in Williston, North Dakota.

¶24 Claimant testified, and I find, that the light-duty position he was assigned upon returning to work was temporary and that to continue working for Holly Sugar on a permanent basis he would have been required to lift at least 50 pounds.

¶25 Since August 1998, claimant has been attending college. In addition to attending school, he is working as a disc jockey for about 10 hours a week at $5.15 an hour. He plans to transfer to a four-year college to pursue a bachelor's degree in aviation science as an air traffic controller. A further discussion of his vocational plans is set out later in this decision. Meanwhile, a further explication of claimant's subsequent medical history is necessary.

¶26 On November 12, 1998, claimant had a sudden onset of "pain to lower right side of back" and sought treatment at the local hospital's emergency room (ER). (Ex. 9 at 58.) The history taken at the ER notes as follows:

> This 21-year-old male was sitting at a computer and experienced abrupt onset of discomfort over the right paralumbar area. He states that in December, 1997 he was buried in "1 ½ tons of sugar at the Holly Sugar Factory." **He states he has had some recurring neck and back discomfort since.** He has had no radicular symptoms. **He has had no recent recalled history of discreet trauma.** . . .

(*Id.* at 57, emphasis added.) The ER physician noted "discomfort on direct palpation over the right paralumbar musculature with some local paralumbar musculature spasm." (*Id.*) The doctor diagnosed paralumbar strain with spasm, and recommended bed rest for one or two days. (*Id.*)

¶27 Hartford refused payment for the November 12, 1998 emergency room visit, declaring that it was "not related" to his industrial accident. (Ex. 10 at 4.) Given claimant's history, and the lack of a contemporaneous medical opinion that the claimant's visit was unrelated to his industrial injury, I am unable to find any reasonable explanation for that denial. The denial was unreasonable.

¶28 On November 25, 1998, claimant went back to Dr. Vaughan. (Ex. 9 at 54.) Dr. Vaughan's office note reads:

> . . . sudden back pain while he was studing [sic] at the computer at college and pain radiated into his right lateral hip while sitting at the computer. On examination the patient has tenderness over the right greater trochanter and some mild spasm in the lower back. X-rays of his back show congenital spina bifida of S1, but no other

> abnormalities. AP of the pelvis is normal. DX [diagnosis]: Acute low back strain and right greater trochanteric bursitis. He will take Naprosyn b.i.d. and see me on a prn basis if his symptoms do not diminish over the next few weeks. (He has full ROM [range of motion] of his left shoulder, but has persistent acromion impingement syndrome and pain with abduction and external rotation. He will continue studing [sic] as much as possible.)

(*Id*.)

¶29 Claimant returned to Dr. Vaughan on February 10, 1999. In his office note on that date, the doctor wrote:

> **All of his lower back, upper back, and left shoulder symptoms are directly related to the initial injury when a large amount of sugar landed on his back, neck and left shoulder on December 29, 1997.**

(*Id*. at 125a, underlining in original, bolding added.) On February 17, 1999, Dr. Vaughan authored a letter to Hartford's claims adjuster in response to Martello's inquiries about claimant. He opined that claimant's:

> . . . left shoulder condition which necessitated surgery on July 1, 1998 was directly related to that injury, the periarticular left shoulder scarring and inflammation, with reasonable medical certainty is directly related to the trauma which occurred on 12/29/97.
>
> The episode of back pain Mr. Delaney experienced while studying in November of 1998 was also directly related to his injury in Dec[ember] 27, 1997. **He has had recurrent residual back discomfort with muscle spasm, and I feel that all of his neck, left shoulder, and lower back problems are directly related to the injury on December 27, 1997, with reasonable medical certainty**. The multiple soft tissue injuries he sustained caused musculoligamentous tears followed by healing with scar tissue formation. **He can certainly expect to have further recurrent difficulties with his neck, left shoulder and lower back**.

(*Id*. at 126, emphasis added.)

¶30 Martello ignored Dr. Vaughan's letter for eight months. Finally, in Martello's activity log of October 13, 1999, she noted that after "Dr. Vaughan had confirmed this was related, in his opinion. . . . I updated injs [injuries] & called Dr ofc [office] to resubmit bill", since "we had denied [this] as not related." (Ex. 10 at 4, capitalization in original.) Martello's log entry was made almost one year after the claimant sought medical treatment at the emergency room, and eight months after Dr. Vaughan wrote to Martello relating his episode to his industrial accident. While Dr. Vaughan's office was apparently told to resubmit his bill, Martello's activity log does not reflect whether the ER visit was ever paid by Hartford. The

long delay between Dr. Vaughan's letter and Martello's failure to assure payment of the ER bill was unreasonable.

¶31 In a February 17, 1999 letter to Martello, Dr. Vaughan placed claimant at maximum medical improvement (MMI) and assigned him a 14% whole-person impairment rating for muscular ligamentous injures to the entire spine. (Ex. 9 at 126-127.)

¶32 On March 17, 1999, Martello requested a vocational evaluation by Board Certified Rehabilitation Consultants (BCRC). (Ex. 2 at 10; Tr. Test.) On March 25, 1999, she sent claimant 6 weeks of permanent partial disability benefits and offered him payment of his 14% impairment rating in a lump sum. (Ex. 8 at 1.) Hartford thereafter paid claimant the 14% impairment award.

¶33 BCRC developed job analyses for both the sugar trucker and handler and the bulk loader jobs. (Ex. 1 at 1, 9.) The jobs were classified as heavy, and heavy-very heavy, respectively. (*Id*.)

¶34 The job analyses for sugar trucker and handler and the bulk loader jobs were submitted to Dr. Vaughan. On June 15, 1999, he disapproved both jobs. (*Id*. at 7, 15.)

¶35 BCRC then developed job analyses for alternative jobs. (Exs. 1 and 2.)

¶36 On July 14, 1999, claimant's attorney wrote to Martello and demanded that a vocational rehabilitation plan be established. (Ex. 8 at 3.) The letter implicitly proposed that the claimant's plan, already undertaken, for a college education be approved. (*Id*.)

¶37 Martello responded by requesting an Independent Medical Examination (IME). In her request, she wrote:

> DR. VAUGHAN HAS NOT APPROVED THE JOB OF INJURY OR THE JOB CLMT [CLAIMANT] WAS WORKING AT WHEN HE QUIT. WE NEED RESTRICTIONS TO WORK WITH. DR. VAUGHAN RELATES ALL THE NECK, LT [LEFT] SHOULDER & LOW BACK PROB [PROBLEMS] TO THIS INJ [INJURY] & EVEN THO [SIC] **HAVING NO PROBS [PROBLEMS] NOW**, EXPECTS HIM TO HAVE FUTURE PROBLEMS IN THESE AREAS. NEED ANOTHER OPINION ON SCAR TISSUE CAUSING FUTURE PRB [PROBLEMS].

(Ex. 12, capitals in original, bolding added.)

¶38 At trial, Martello was challenged with respect to the statement that claimant was having "no probs now." She responded that she "must have assumed it because of his not actively treating anything at the time." I am not persuaded by her excuse. Her adjustment of this claim was sloppy at best, at worst it demonstrates a callous indifference to the claim.

¶39 When asked to explain her written comment that "[w]e need restrictions to work with," Martello stated that it referred to the fact that she needed to know claimant's "physical restrictions" because a functional capacity evaluation (FCE) had not been done yet, and

vocational rehabilitation needed the information in order "to find claimant more jobs." Martello could not recall whether she ever asked Dr. Vaughan for his opinion as to claimant's abilities but conceded that "normally" she asked the treating physician for restrictions before requesting an IME. In her testimony Martello said she requested the IME because she was losing confidence in Dr. Vaughan's objectivity, however, the reasons she proffered for her waning confidence were unsupported by anything in Dr. Vaughan's records and were unconvincing.

¶40 An IME was done by Dr. Thomas L. Schumann at the Billings Clinic. Dr. Schumann specializes in occupational medicine.

¶41 Dr. Schumann examined claimant on August 19, 1999. (Ex. 9 at 83.) In his examination, Dr. Schumann expressly noted that claimant "does not demonstrate any symptom magnification behavior." (*Id*. at 85.)

¶42 The doctor found "no objective findings" in his examination, noting that claimant exhibited a "full range of motion of the left shoulder," however, he assigned claimant a 10% impairment rating based upon the records he had to review at the time. (*Id*. at 87.) He diagnosed upper and lower back musculoskeletal strain injuries and concurred with Dr. Vaughan's determination of MMI as of February 17, 1999. (*Id*. at 85-86; Ex. 2 at 11.) Dr. Schumann went on to write:

> Diagnosis of injury sustained in the incident of 12/29/97: As evidenced from the records available from that time frame include upper and low back musculoskeletal strain injuries. I would be interested in seeing interval chiro-practic records since those are all that are available between January of 1998 and June of 1998 when Mr. Delaney first saw Dr. Vaughn [sic] before considering the question of relatedness of his left shoulder problems to the injury of 12/29/97.

(Ex. 9 at 85.) Dr. Schumann was apparently referring to claimant's chiropractic visits with Dr. Sveen between May and July 1998.

¶43 In his report to Hartford, Dr. Schumann addressed the relatedness of claimant's condition to his industrial accident, stating:

> It is unlikely in my opinion that the symptoms present at this time are causally related **in total** to [the] incident of 12/29/97. There is some evidence of preexisting depression and certainly that can have an impact on pain perception in chronic pain circumstances. . . . I would need a psychological evaluation by someone experienced in chronic pain evaluation . . . before determining if attributability and apportionment in that regard would be appropriate.

(*Id*. at 86, emphasis added.) Dr. Schumann's note makes it clear that claimant's industrial injury **is** related to his present symptoms, he only questions whether there were other

contributing factors. Dr. Schumann's desire to identify other contributing factors and apportion causation is irrelevant to resolution of the issues in this case and to the adjustment of the claim since the Workers' Compensation Act does not permit apportionment.

¶44 Dr. Schumann deferred consideration of claimant's physical restrictions and the job analyses submitted to him for review. He indicated he wanted claimant enrolled "in a short (2-3) week course of Physical Therapy for instruction in a home exercise program for his neck, upper back, low back, and left shoulder." (*Id.* at 86.) He then wanted an FCE to be performed to "objectively determine abilities and limitations and facilitate job analysis review." (*Id.)*

¶45 On September 25, 1999, claimant began PT with Eldon A. Johnson (Johnson), a physical therapist. (*Id.* at 71a.) He went to therapy "two to three times per week for two weeks and then backed off to 1-2 times per week." (*Id.*) Claimant's last visit was on November 8, 1999. (*Id.* at 60.) He was then scheduled for an FCE with Johnson. (*Id.*)

¶46 The FCE was done on November 16, 1999. (Ex. 9 at 61.) Johnson's FCE report sets out a medical history. As relevant here, the history states:

> Significant medical history is **face, arms, and legs go "numb" every day**. Post injury treatments have consisted of medication, physician care, physical therapy care, and chiropractic care. These treatments have resulted in minimal perceived benefits. Current complaints include **pain throughout the whole spine (lumbar, thoracic, cervical), bilateral hip pain, left shoulder pain and decreased function. The patient feels better as the day progresses, and taking a hot bath. The patient feels worse bending, sitting, rising, in the morning, in the evening, and lifting heavy objects.**

(*Id.*, emphasis in original.) Johnson performed Waddell's tests, which he found positive for 3 of the 6 tests; Johnson interpreted the results as indicating symptom magnification. (*Id.* at 69-70.) That finding is at odds with Dr. Schumann's determination that claimant did not demonstrate symptom magnification. (*See* ¶ 41.) Also inconsistent with the Waddell's findings is Johnson's determination that claimant's movement patterns did not improve with distraction. (*Id.* at 69-70.) Moreover, the "validity profile" for the FCE found that claimant's results were valid in 5 of the 6 categories tested, indicating that claimant exerted maximum effort. (*Id.* at 69.) The one category deemed invalid was "dynamic lifts": Claimant requested the dynamic lifting activities be stopped during testing. (*Id.* at 67, 69.) And, while claimant reported "pain levels up to 9" during repetitive activities, he refused to discontinue the activities when offered the opportunity to do so. (*Id.* at 64.)

¶47 Johnson felt the testing was sufficiently valid to make a determination as to claimant's physical abilities. He found that claimant was "qualified" to perform medium labor,

specifically that he could lift up to 45 pounds occasionally (0-33% of the time), lift up to 18 pounds frequently (34-66% of the time), and lift 9 pounds constantly. However, he also determined that lifts of 45 pounds more than five times a day would put claimant "at significant risk." Therefore, he recommended that claimant be limited to light-medium work involving occasional lifting up to 33 pounds and frequent lifting up to 15 pounds. (*Id.* at 71.) **Johnson also recommended that claimant find another occupation.** (*Id*. at 70.)

¶48 Although the FCE was received by Martello on November 30, 1999 (see date stamp on Ex. 9 at 61-71), she did not forward it to claimant's attorney until March 2000, this despite a written request made on January 24, 2000 by claimant's attorney that Martello "[p]lease forward a copy to my office of every piece of correspondence that you have issued or received regarding Eric Delaney since your letter of September 21, 1999." (Ex. 8 at 7.) Martello failed to provide a reasonable explanation for her failure to promptly provide the report to claimant's attorney.

¶49 On January 27, 2000, Martello sent a letter to Dr. Schumann asking for his opinions in light of the PT and FCE, however, by that time Dr. Schumann had left the Billings Clinic. (Ex. 9 at 72.) The letter referred to the FCE and commented: "You will note in the FCE report that Mr. Delaney has many current complaints including complaints of numbness in face, arms & legs. He also complains of bilateral hip pain. **These are issues that have not been mentioned before**. Which, if any, of his current conditions do you feel are related to this 1997 injury at work?" (*Id.*, emphasis added.) Martello was questioned at trial about her comments. She was asked to review several of claimant's medical records. Those records clearly showed that the complaints of "numbness" had been mentioned before. Claimant's attorney directed Martello to claimant's ER records for December 29, 1997, Dr. Vaughan's records for June 19, 1998, and Dr. Schumann's IME report from August 19, 1999, which all noted claimant's previous complaints of numbness and/or tingling. She failed to provide any cogent, reasonable explanation for her comments.

¶50 By the time of Martello's January 27, 2000 letter to Dr. Schumann, the doctor had left the Billings Clinic. Dr. Scott Ross, another specialist in occupational medicine at the Billings Clinic, took it upon himself to answer the questions which Dr. Schumann had deferred. (*Id.*) He did so without ever examining the claimant.

¶51 Dr. Ross wrote to Martello on February 12, 2000, providing his opinions. (*Id.* at 72-74.) He questioned the validity of the FCE based on what he felt were "several inconsistencies" in the FCE exam. He disregarded the FCE conclusions in toto. (*Id*.) He concluded that none of claimant's current conditions are related to his 1997 injury at work. He based his opinion on his interpretation of Dr. Schumann's physical examination of claimant as normal without objective findings and his conclusion that the FCE was "invalid." (*Id.* at 73.) He reviewed eight job analyses supplied by the BCRC and approved claimant for all eight jobs submitted to him. The jobs he approved were:

- Card dealer
- Cashier, convenience store
- Motel desk clerk
- Radio announcer
- Bartender
- Fast food worker
- Hammer mill operator/tender
- Yard and factory worker

(*Id*. at 74.) The jobs did not include either the claimant's time-of-injury job as sugar trucker and handler or the bulk loader position.

¶52 On February 28, 2000, Martello wrote claimant's attorney informing her that Dr. Ross had approved claimant's "return to both of the jobs that he did at Imperial Holly Sugar. Therefore, Mr. Delaney is not eligible for rehabilitation benefits and we are denying his request for such." (Ex. 8 at 8.)

¶53 As evident from the list of jobs which Dr. Ross approved (¶ 51), Dr. Ross did **not** approve either of the jobs claimant had performed at Holly Sugar.

¶54 At trial, Martello claimed that when she denied rehabilitation benefits she was confused by Dr. Ross' earlier approval of other positions and thought he had approved claimant's time-of-injury job, as well as the bulk loader position. Her explanation indicates **at best** that she was careless and sloppy in reviewing the case and Dr. Ross' report.

¶55 Subsequent to her denial of rehabilitation benefits, Martello recognized her error and asked BCRC to fax Dr. Ross the job analyses for the claimant's time-of-injury job and the bulk loader position. The job analyses were faxed to the doctor on March 30, 2000. (Ex. 9 at 76.) He approved them on April 1, 2000. (Ex. 1 at 8, 16.)

¶56 BCRC prepared a Final Employability Assessment Report (final report) on April 19, 2000. (Ex. 2 at 10.) The Final Report States:

> As Mr. Delaney has been released to return to his time-of-injury position of sugar trucker and handler or the alternative position of bulk loader in which he was employed in after his injury, a vocational rehabilitation plan has not been developed.

(*Id*. at 17.) The report also addressed the wages claimant might earn in the alternative jobs approved by Dr. Ross:

> Research on the approved alternative job analyses reveals that they exist in both the statewide and local labor markets. Based on the published labor market data, it appears that Mr. Delaney is employable in these alternative occupations with a wage range of $5.15 to $9.16 per hour, **with an average wage of $7.16 per hour.**

> Based on actual employer contacts in the claimant's local labor market, it appears that Mr. Delaney is currently employable in these alternative occupations with a wage range of $5.15 to $10.00 per hour, **with an average wage of $7.58 per hour**.

(*Id*., emphasis added.) The average wage set out in the report was more than a dollar less than claimant earned at his time-of-injury job.

¶57 Martello did not forward the alternative job analyses to Dr. Vaughan until April 13, 2000, a month and a half after she had denied rehabilitation benefits. Dr. Vaughan approved six positions -- card dealer, convenience store cashier, motel desk clerk, fast food worker, bartender, and radio announcer. (Ex. 1.)

Resolution

¶58 Hartford does not seriously contend that claimant's shoulder and back conditions are unrelated to his injury. Moreover, there is ample medical opinion supporting the relationship between claimant's industrial accident and his subsequent shoulder and back problems. The IME by Dr. Schumann supports the relationship. While he raised an apportionment issue, the Workers' Compensation Act does not permit apportionment.

¶59 I further find that claimant cannot return to his time-of-injury job or any other job at Holly Sugar. Dr. Ross' opinions are unsupported and ignore the FCE and other medical evidence in the case. He injected himself into the evaluation upon the departure of Dr. Schumann. He did not examine the claimant. He rejected the conclusions of the FCE examiner and the physical limitations the examiner placed upon the claimant despite the fact that the examiner found that the exam was valid under five of the six validity criteria. He ignored the fact that the FCE examiner did not qualify the ultimate restrictions he placed upon claimant. I give no credence or weight to Dr. Ross' opinions.

¶60 Based on the vocational evidence developed by Hartford, I find that as a result of the claimant's industrial injury he has suffered a wage loss. The average wages for the alternative jobs approved by Dr. Vaughan are substantially less than his time-of-injury wage. While the upper wages of those jobs may equal or approach claimant's time-of-injury wage, the evidence fails to show that the claimant can earn those upper wages.

¶61 I find that Hartford's denial of the claimant's request for rehabilitation benefits was unreasonable. Martello evidenced a total disregard for the treating physician's opinions. Indeed, she did not seek his opinions regarding alternative jobs until after she denied rehabilitation benefits. She seized upon Dr. Ross' opinions to deny benefits despite the obvious shortcomings of his opinions. Her failure to promptly and timely consider and address the information brought to her attention was inexcusable. Her overall adjustment of this claim was at best careless and sloppy. I am persuaded that it was worse: she callously and unreasonably disregarded facts and for months ignored claimant's requests

for medical benefits. She was more focused upon finding a basis for denying benefits than on the merits of the claim.

¶62 Finally, I note that medical benefits that should have been paid may not have been paid. The petition does not seek payment of any of those medical expenses, however, this decision should make clear that they must be promptly paid.

CONCLUSIONS OF LAW

¶63 The claimant's injury occurred on December 29, 1997, therefore the 1997 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986.)

¶64 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1204 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190 598 P.2d 1099 (1979).

¶65 Rehabilitation benefits are governed by section 39-71-1006, MCA (1997). Under subsection (1), an injured worker is eligible for benefits if he or she suffers a 15% or greater impairment or meets the definition of a disabled worker. The subsection provides:

> **39-71-1006. Rehabilitation benefits.** (1) A worker is eligible for rehabilitation benefits if:
>
> (a) (i) the worker meets the definition of a disabled worker as provided in 39-71-1011; or
>
> (ii) the worker has, as a result of the work-related injury, a whole person impairment rating of 15% or greater, as established by objective medical findings, and has no actual wage loss;

The claimant in this case does not have a 15% or higher impairment rating, thus he must meet the "disabled worker" definition, as follows:

> **39-71-1011. Definitions.** As used in this chapter, the following definitions apply: . . . (2) "Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury.

¶66. The claimant meets the definition. (1) He has a permanent impairment - even the IME doctor who examined claimant (Dr. Schumann) agrees. He had surgery on his shoulder, so there is objective evidence for the impairment. (2) He cannot return to his time-of-injury job - the only physician who says he can is Dr. Ross, and I have found his opinion unsupported

and meriting no weight. (3) The claimant has an actual wage loss based on the average wages he might earn in other jobs within his post-injury labor market.

¶67 Since the claimant meets the definition of a disabled worker, the insurer is required to designate a rehabilitation provider to prepare a rehabilitation plan. Subsection (b) of section 39-71-1006, MCA (1997), provides in relevant part that a disabled worker is eligible for rehabilitation benefits if "(b) a rehabilitation provider, as designated by the insurer, certifies that the worker has reasonable vocational goals and reasonable reemployment opportunity . . ." A "rehabilitation plan" is defined in section 39-71-1011(4), MCA (1997):

> (4) "Rehabilitation plan" means a written individualized plan that assists a disabled worker in acquiring skills or aptitudes to return to work through job placement, on-the-job training, education, training, or specialized job modification and that reasonably reduces the worker's actual wage loss.

¶68 No rehabilitation plan was ever developed or considered in this case because Hartford determined that claimant is not a disabled worker and therefore ineligible for rehabilitation benefits. That determination was wrong. The claimant is entitled to a full evaluation to develop an appropriate rehabilitation plan. That does not mean he is entitled to approval of his current plan to become an air traffic controller. He has not presented the Court with a vocational plan or justification, and I will not endorse his present academic support without that support. Indeed, his academic record to date raises serious questions as to the appropriateness of his current goal.

¶69 The claimant has requested an award of attorney fees. Attorney fees are awarded where the insurer has unreasonably refused benefits. §§ 39-71-611, -612, MCA (1997). In this case, Hartford's refusal to authorize preparation of a rehabilitation plan was unreasonable. The claimant is therefore entitled to attorney fees in an amount to be determined by the Court.

¶70 Claimant has also requested a penalty pursuant to section 39-71-2907, MCA (1997), which 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:
>
> (a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or . . . .

Hartford's outright denial of rehabilitation benefits was unreasonable and benefits have therefore been unreasonably delayed. The claimant is entitled to a 20% premium with respect to rehabilitation benefits ultimately determined due him.

¶71 Since claimant has prevailed, he is entitled to his costs.

JUDGMENT

¶72 1. Claimant is a disabled worker entitled to rehabilitation benefits. Hartford must designate a rehabilitation provider to develop an appropriate rehabilitation plan.

¶73 2. Claimant is entitled to attorney fees in an amount to be determined by the Court. ARM 24.5.343.

¶74 3. Claimant is entitled to a 20% increase in any rehabilitation benefits he ultimately receives.

¶75 4. Claimant is entitled to costs in an amount to be determined by the Court pursuant to its rules.

¶76 5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶77 6. 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.

DATED in Helena, Montana, this 1st day of March, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Anna M. Bidegaray
Mr. Daniel B. Bidegaray
Mr. William O. Bronson
Submitted: November 13, 2000