

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 114

WCC No. 9508-7362

JAN GATES

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE COMPANY

Respondent/Insurer for

DARBY LUMBER

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 34-year old lumber mill worker fell and twisted his back, leading to severe back pain. A CT scan indicated a herniated disk. Although unable to return to his time of injury job, claimant was capable, according to medical and vocational evidence, of working in various positions paying less than \$7 an hour, suggesting a wage loss of over two dollars an hour. Claimant, who did not actively seek employment, requested permanent partial disability benefits based on wage loss. While the insurer argued claimant could work other jobs paying his time of injury wage or higher, the Court was not persuaded such jobs were available within a reasonable distance of claimant's residence or could be obtained and performed by claimant. The parties also disputed claimant's entitlement to PPD benefits for lost ability to perform labor. While the insurer offered no assistance to claimant in finding work, claimant was hostile to the insurer's vocational consultant.

Held: While claimant previously worked in a heavy-labor job, he is now limited to light labor based on his physical limitations (ability to lift certain weights), even though he may be able to perform some jobs falling into a medium category. The wage loss claim is premature where claimant has not sought work and has not yet received the rehabilitation services mandated by statute. The insurer is ordered to appoint a rehabilitation provider who shall assist claimant in preparing a rehabilitation plan. Claimant is ordered to cooperate and put forth his best efforts in seeking employment. Wage loss shall be assessed after rehabilitation efforts. Request for penalty and attorneys fees denied.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2001, MCA (1993). Where a worker does not immediately return to work, the rehabilitation requirement of section 39-71-2001, MCA, must be met before any determination is made regarding claimant's post-injury wages.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2001, MCA (1993). If a rehabilitation plan calls for immediate return to work, the time for measuring wage loss is at the time when the eight weeks of rehabilitation benefits specified in section 39-71-2001(3), MCA (1993), are exhausted. If at that time the claimant has been unable to secure employment despite his best good faith efforts, his post-injury wage is zero and his entitlement to permanent partial disability benefits shall be computed accordingly. If a plan calls for retraining, then a reasonable time must be allowed for claimant to find work upon completion of the plan, at a minimum eight weeks, before wage loss is assessed.

Vocational -- Return to Work Matters: Labor Market. When assessing wage loss for purposes of permanent partial disability benefits, court will not consider jobs not available within a reasonable distance of claimant's home or which claimant would not be able to obtain and perform.

Benefits: Rehabilitation Benefits: Proof of Wage Loss. Where a worker does not immediately return to work, the rehabilitation requirement of section 39-71-2001, MCA (1993), must be met before any determination is made regarding claimant's post-injury wages.

Benefits: Rehabilitation Benefits: Proof of Wage Loss. If a rehabilitation plan calls for immediate return to work, the time for measuring wage loss is at the time when the eight weeks of rehabilitation benefits specified in section 39-71-2001(3), MCA (1993), are exhausted. If at that time the claimant has been unable to secure employment despite his best good faith efforts, his post-injury wage is zero and his entitlement to permanent partial disability benefits shall be computed accordingly. If a plan calls for retraining, then a reasonable time must be allowed for claimant to find work upon completion of the plan, at a minimum eight weeks, before wage loss is assessed.

Benefits: Rehabilitation Benefits: Generally. If a rehabilitation plan calls for immediate return to work, the time for measuring wage loss is at the time when the eight weeks of rehabilitation benefits specified in section 39-71-2001(3), MCA (1993), are exhausted. If at that time the claimant has been unable to secure employment despite his best good faith efforts, his post-injury wage is zero and his entitlement to permanent partial disability benefits shall be computed accordingly.

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Benefits: Rehabilitation Benefits: Retraining. If a rehabilitation plan calls for retraining, then a reasonable time must be allowed for claimant to find work upon completion of the plan, at a minimum eight weeks, before wage loss is assessed.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. If a rehabilitation plan calls for immediate return to work, the time for measuring wage loss is at the time the eight weeks of rehabilitation benefits specified in section 39-71-2001(3), MCA (1993), are exhausted. If at that time the claimant has been unable to secure employment despite his best good faith efforts, his post-injury wage is zero and his entitlement to permanent partial disability benefits shall be computed accordingly. If a plan calls for retraining, then a reasonable time must be allowed for claimant to find work upon completion of the plan, at a minimum eight weeks, before wage loss is assessed.

Benefits: Rehabilitation Benefits: Rehabilitation Providers. Where claimant has a wage loss, the insurer must immediately designate a rehabilitation provider who shall assist claimant in developing a rehabilitation plan in accordance with section 39-71-2001, MCA (1993).

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Benefits: Permanent Partial Benefits: Labor Capacity. While claimant previously worked in a heavy-labor job, he is now limited to light labor based on his physical limitations, even though he may be able to perform some jobs falling into a medium category.

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Wages: Wage Loss. When assessing wage loss for purposes of permanent partial disability benefits, court will not consider jobs not available within a reasonable distance of claimant's home or which claimant would not be able to obtain and perform.

The trial in this matter came on December 11, 1995, in Kalispell, Montana. Petitioner, Jan Gates (claimant), was present and represented by Ms. Laurie Wallace. Respondent was represented by Mr. Larry W. Jones. Opening statements were made by counsel. Exhibits 1 through 16 were admitted by stipulation. Additionally, the deposition of Dr. Sable was submitted for the Court's consideration. The petitioner and Gerry B. Blackman were sworn and testified.

Issues presented: Pursuant to section 39-71-703(3)(c) and (d), MCA, the petitioner seeks permanent partial disability benefits for wage loss and physical restrictions.

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

FINDINGS OF FACT

1. Petitioner is 34 years old. He is common-law married and has two young children. He has an eighth grade education.
2. Claimant has worked a variety of jobs, generally doing "whatever he can." He worked on a seismograph crew around 1980. He worked at several restaurants in Texas as a dishwasher and prep-cook between 1981 and 1985. He has also delivered pizzas, been self-employed as an auto mechanic for a short time, and worked as a hot-tar roofer for a short time. Claimant returned to Montana and settled in the Hamilton area around 1990. After returning to Montana, claimant went to work for Jim Blue Logging in November of 1990. He was a truck mechanic's helper but did little actual mechanic work. He then worked as a

truck detailer for one month in June of 1991. His next job was building log homes with Neville Log Homes in August of 1991. His employment with Neville lasted until November 1992. He then went to work for Darby Lumber in March 1993 and continued working there until he was injured. Over the years he has had gaps in his employment due to medical problems and lack of job opportunities.

3. Claimant was born in Missoula, Montana, and has resided in western Montana for most of his life. With the exception of several years spent in Texas and Minnesota, he has resided in the Bitterroot Valley since around 1980, living in the Darby, Hamilton, and Victor areas.

4. For the last four years claimant has lived five miles south of Connor, Montana. His home is approximately 80 miles south of Missoula.

5. At Darby Lumber claimant started work on the graveyard shift doing cleaning. He then worked on the green chain at the stud mill. He next took a position where he rotated every two hours between the green chain, a spotter position, and rover. He then began training as a board edger, however, he was injured about a week later.

6. Claimant was injured on August 16, 1993 when, after removing a jam from the board edger, he fell and twisted his back. He felt his back snap. He finished his shift but his back continued to hurt. Claimant was off work for a week, then returned to work for an additional three months. He ultimately quit due to continuing back pain.

7. Claimant was examined by Dr. Alan Rossi on the same day as his injury. (Ex. 8 at 44.) Dr. Rossi noted that claimant had intermittent back pain in the past and that x-rays had been taken in April of 1992. Dr. Rossi diagnosed a "possible acute herniated disc" and arranged for a CT scan of his spine. He prescribed anti-inflammatories and muscle relaxants.

8. The CT scan of claimant's lumbar spine revealed a "small lt. sided disc herniation at L4-5." (*Id.* at 46.) Dr. Rossi felt the CT results were consistent with claimant's complaints and on November 30, 1993, he referred him to Dr. Richard Dewey, a neurosurgeon, for further treatment. (*Id.*)

9. Dr. Dewey examined claimant on December 7, 1993. His office notes reflect that claimant had returned to work one week after the injury, but that on "November 12 he was standing in his front yard. He experienced a recurrence of severe back pain and left leg pain which has persisted." (Ex. 6 at 39.) Dr. Dewey agreed that the CT scan showed a small disc herniation at L4-5. He felt that surgical intervention would likely be required but wanted to first try conservative measures to alleviate the symptoms. He also recommended an EMG of the left leg. (*Id.* at 40.)

10. An EMG was administered by Dr. Gary Cooney on December 7, 1993. It was normal in all aspects. (Ex. 7.) Dr. Cooney noted that "[t]hese findings do not categorically exclude the possibility of a recent lumbosacral nerve root injury, however." (*Id.*)

11. Dr. Dewey advised claimant to begin a stretching program and requested he return for follow-up. After examining claimant on January 20, 1994, Dr. Dewey felt he could no longer perform heavy labor but that he did not require surgery. (Ex. 4 at 28.)

12. Claimant returned to Dr. Dewey on March 15, 1994 reporting an increase in pain in his back and lower left extremity. Another EMG was obtained, again with normal results. On March 24, 1994, an MRI was done. It revealed very mild degenerative changes. Dr. Dewey reviewed the MRI and found no disc herniation or nerve root compression. (Ex. 4 at 28⁽¹⁾.)

13. At the request of claimant's attorney, Dr. Michael D. Lahey, an orthopedic surgeon, evaluated claimant on May 4, 1994. Dr. Lahey ordered new x-rays which revealed "decreased disc height at L3-4 and mild angulation through that disc space with flexion/extension maneuvers." (Ex. 1 at 2.) His impression was that claimant suffered from "[l]umbosacral strain, presumably due to discogenic or facet pain in the lumbar spine" and "[d]econditioning." Dr. Lahey recommended physical therapy and continued use of anti-inflammatories. (*Id.* at 3.)

14. Claimant again saw Dr. Dewey on June 6, 1994. His leg pain was gone, however, he was still having muscle spasms in the back and thigh. Dr. Dewey emphasized the need for continued stretching and provided the claimant with a prescription to the Lost Trails Hot Springs for a hot bath with stretching. (Ex. 6 at 42.)

15. Dr. Lahey then became claimant's treating physician. On July 18, 1994, Dr. Lahey prescribed an "elastic lumbosacral arthrosis [sic]." He also referred claimant to Marcus Daly Hospital for a low-back conditioning program. (Ex. 1 at 5.)

16. Claimant has undergone physiotherapy at Marcus Daly Hospital since July 25, 1994. (Ex. 5.) He reported to Dr. Cheatle in December 1994 that the therapy had improved his flexibility but had not reduced his pain. (Ex. 4 at 29.)

17. In a follow-up visit with Dr. Lahey on August 22, 1994, claimant reported he had suffered a flare-up of his back pain after chasing his son and standing too long at a birthday party. Dr. Lahey recommended he see Dr. Wemple for advice regarding chronic pain management techniques. (Ex. 1 at 5.)

18. Claimant was seen by Dr. Wemple on a regular basis for several months beginning in October of 1994, with only limited success. (Ex. 3.)

19. On December 20, 1994, claimant was examined by Dr. Martin Cheatle, a psychologist, at the request of the insurer. Dr. Cheatle felt the claimant had "back pain and dysfunction that is significantly out of proportion with clinical data to date." (Ex. 4 at 33.) His impression was that claimant had a somatoform pain disorder and "[p]ersistent musculoskeletal left paralumbar pain and stated left lower extremity pain secondary to degenerative changes; complicated by deconditioning and somatization." (*Id.* at 32.) He recommended a

Functional Capacity Evaluation (FCE) and urged "vocational counseling and job placement to avoid the patient developing a more severe chronic pain syndrome." (*Id.* at 33.)

20. Claimant was seen by Dr. Lahey for follow-up on October 12 and November 28, 1994. His condition had gradually improved, however, he continued to suffer flare-ups of his pain. (Ex. 1 at 7.)

21. Claimant underwent a physical capacities evaluation on January 23 and 24, 1995. The examiner, Richard Smith, P.T. concluded claimant was able to perform most light to medium jobs.

The therapist felt claimant's physical abilities were limited in the following areas:

- 1) Decreased endurance in low back muscles, limiting continuous forward bending.
- 2) Decreased tolerance for continuous walking.
- 3) Decreased fine motor dexterity and speed in right hand.
- 4) Decreased trunk rotation mobility.

(Ex. 10 at 54.) The physical therapist also concluded that he cannot lift more than 30 pounds overhead or continuously lift and carry 10 to 20 pounds, and also cannot walk continuously.

Based on the medical records and the claimant's testimony at trial, I find the above limitations, coupled with the movement and lifting restrictions imposed by his physicians, to be an accurate description of his physical limitations.

22. Claimant also suffers an impairment of his right hand, which was injured when a glass pane broke in his hand. He has had extensive nerve and tendon reconstruction and has difficulty grasping small objects. He also lacks full-range of motion of his thumb.

23. Dr. Lahey saw claimant on February 13, 1995 and rated him at a 6% whole body impairment. (Ex. 1 at 9.)

24. Claimant was earning \$9.50 per hour at the time of injury. The parties agree he is unable to return to his time-of-injury position.

25. Gerry B. Blackman, a certified rehabilitation consultant working for Board Certified Rehabilitation Consultants of Montana (B.C.R.C.), was hired by the insurer to evaluate claimant's employability. She identified the following jobs as within claimant's capabilities: big wheel off bearer, core block off bearer, paint line dry end feeder, auto parts counter person, lubrication servicer, tacking machine operator, and pizza cook. (Ex. 11 at 1.) All were approved by either Dr. Lahey or Dr. Sable.

26. Ms. Blackman testified at trial that jobs of auto parts counter person, lubrication servicer, tacking machine operator, and pizza cook all paid less than \$7.00 per hour. She also testified and I am persuaded that claimant is capable of performing these positions. Among the jobs, they are positions available in significant numbers. Employers could and would accommodate claimant's need for regular breaks.

27. The insurer concedes that if claimant is only able to work at jobs paying less than \$7.00 per hour, he is entitled to a 20% award for lost wages. However, it contends that the remaining three positions, big wheel off bearer, core block off bearer, and paint line dry end feeder have wages of \$9.50 or more.

28. Big wheel off bearer, core block off bearer, and paint line dry end feeder are all positions at White Pine Sash, a small wood products manufacturer in Missoula, Montana. All three positions require either lifting and/or stooping and bending which appear to be outside the limitations set by Dr. Lahey. Dr. Lahey did not approve claimant's return to a rover position and the physical requirements for the above three positions appear similar. Equally troublesome is Gerry Blackman's testimony regarding the availability of these jobs. She indicated that these positions are not realistically available at White Pine Sash in Missoula. Further, they are not available in the Bitterroot Valley within a reasonable distance from claimant's home. Because of the relatively high wage, these are desirable jobs which do not have a high turnover rate. I am not persuaded that claimant would be able to obtain and perform one of these jobs.

29. Ms. Blackman confirmed that the position claimant was filling at the time he was injured was a heavy position. Moreover, claimant credibly testified at trial that he was required to lift over 50 pounds when working as a rover, qualifying that as a heavy position.

30. Claimant is now restricted to light or medium work according to the Functional Capacities Evaluation. His ability to do medium work is not, however, unqualified. Claimant is unable to lift over 30 pounds overhead, unable to continuously lift and carry 10-20 pounds, and unable to walk continuously. (Ex. 10 at 55.) Dr. Lahey would add to this list "that claimant avoid repetitive bending, [or] twisting of the lumbar spine." (Ex. 1 at 7.)

31. The claimant has not attempted to find employment. He testified at trial that he did not believe any employer would hire him with his back injury. I find that claimant is both misinformed about his employability and unmotivated to pursue employment.

32. The claimant desires to remain in Connor and has no plans to move out of the Bitterroot Valley.

33. Missoula is outside claimant's local job market. It is not reasonable to expect him to commute to a job in or beyond Missoula.

34. The insurer has offered claimant no assistance in finding a job. On the other hand, the claimant was hostile to Blackman.

35. The insurer's conduct in this case was not unreasonable. The Court has not adopted either party's approach to measuring wage loss. The classification of claimant's time-of-injury job as heavy and his classification post-injury were reasonably debatable.

CONCLUSIONS OF LAW

1. The statutes in effect on the date of injury apply in determining the benefits due. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Since claimant's injury occurred in August of 1993, the 1993 laws apply.

2. The 1993 Workers' Compensation Act provides for permanent partial disability benefits in section 39-71-703, MCA, which reads:

Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.

(2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

(a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;

(b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%; and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

(4) The weekly benefit rate for permanent partial disability is 66% of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

3. Subsection (3)(c) and (3)(d) are at issue in this case. Subsection (3)(d) provides for percentage award based upon loss of ability to perform physical labor. At issue in this case is whether the claimant, who was working in a heavy-labor job at the time of his injury, is now limited to medium or light-labor activity.

I find that claimant's physical limitations place him in the light category even though he may be able to perform some jobs that fall into a medium category. Medium labor is defined by statute as the ability to lift up to 50 pounds occasionally and up to 25 pounds frequently. § 39-71-703(6)(b), MCA (1993).

While the FCE indicates claimant can perform "most light to medium jobs," he is able to lift 50 pounds occasionally only up to his waist. Overhead lifting is limited to a maximum of 30 pounds. More importantly, he is unable to lift 25 or even 20 pounds on a frequent basis.

Since claimant is unable to perform the lifting requirements defined as medium, he must be classified under the light-duty category. Accordingly, he is entitled to a 20% award under section 39-71-703(3)(d), MCA (1993).

4. The wage loss claim is premature.

A claimant is entitled to permanent partial benefits if he is no longer permanently totally or temporarily totally disabled and he meets the definition of permanent partial disability. Permanent partial disability is defined as:

A condition, after a worker has reached maximum medical healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and (b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.

Section 39-71-116 (18), MCA (1993). Claimant has satisfied those requirements.

Entitlement to benefits based on wage loss is governed by subsection(3) (c) of section 39-71-703, MCA, which bears repeating here.

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%. [Emphasis added.]

"Actual" contemplates a wage in existence, not merely the potential for a wage. The dictionary definition of "actual" is: 1. Existing in act or fact; real; . . . 2. Existing now; present; current Random House Unabridged Dictionary (2d Ed. 1993). The meaning of the word is plain on its face and therefore not subject to interpretation. *Doull v. Wohlschlager*, 141 Mont. 354, 363-64, 377 P.2d 758, 763 (1963).

If the worker returns to his old job, or to a job which pays as well as his time-of-injury job, he has no wage loss. If he returns to a position which pays less, then his wage loss is the difference between his old wage and his new wage. The issue raised in this case is how to measure post-injury wages when the claimant has not returned to work, and when do you measure lost wages. Both parties refer to this Court's decision in *Gjerde v. Employers Insurance of Wausau*, WCC No. 9408-7134 (December 8, 1994) as determinative of those issues. However, *Gjerde* is distinguishable on its facts since claimant was seeking further retraining, while in this case claimant has simply made no effort to secure employment. Moreover, in *Gjerde* I failed to consider the specific language of the statute and simply adopted the parties' quasi-loss-of-earning capacity arguments. Insofar as *Gjerde* is inconsistent with the present decision, it is overruled.

These issues were also not considered in the Order Denying Motion for Partial Summary Judgment entered in this case on November 7, 1995. In the summary judgment motion, the insurer urged the Court to use the highest potential wage; the claimant wanted the Court to average the wages of the approved jobs. The Court rejected both approaches because an accurate measurement of what claimant can earn depends on specific facts.

In 1993 the legislature repealed the loss-of-earning-capacity measure in partial disability cases and substituted the objective wage-loss measure. The language of the statute contemplates an actual return to work. The real question, of course, is how to determine actual wage loss when there has been no return to work, and how long can you defer determination pending a return to work. Claimant argues that the wage loss benefit should be determined as soon as the claimant is determined to be at maximum medical improvement (MMI) and that if he is not working then his "actual wage" is zero. This analysis leads to an absurd result since most claimants are not working when they reach MMI. Absurd results should be avoided whenever possible. *United States v. Ryan*, 284 U.S. 167 (1931); *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964). The insurer offers no specific timetable, adhering to its potential earning analysis.

Section 39-71-703(3)(c), MCA (1993) is silent on this matter. However, a specific provision of a statute cannot be read in isolation. All of the provisions of the Act must be harmonized and combined together to give effect to them all. *Lake v. Lake County*, 233 Mont. 126, 132, 759 P.2d 161, 165 (1988). The Act must be construed as a whole and all of its provisions coordinated. *Handlos v. Cyprus Indus. Minerals*, 243 Mont. 314, 317, 794 P.2d 702, 703 (1990). We will therefore consider other provisions of the Act in attempting to resolve the critical questions.

Initially, I note that the legislature has expressly stated that a primary objective of the Act is to return workers to actual jobs:

A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

Section 39-71-105(2), MCA (1993). In furtherance of that objective, the legislature adopted provisions for the rehabilitation of workers who cannot return to their time-of-injury job. Specifically, the legislature adopted section 39-71-2001, MCA (1993):

Rehabilitation benefits. (1) An injured worker is eligible for rehabilitation benefits if:

(a) **the injury results in permanent partial disability** or permanent total disability as defined in 39-71-116;

(b) a physician certifies that the injured worker is physically unable to work at the job the worker held at the time of the injury;

(c) a rehabilitation plan completed by a rehabilitation provider and designated by the insurer certifies that the injured worker has reasonable vocational goals and a reemployment and wage potential with rehabilitation. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests.

(d) a rehabilitation plan between the injured worker and the insurer is filed with the department. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of social and rehabilitation services to use the funds.

(2) After filing the rehabilitation plan with the department, the injured worker is entitled to receive rehabilitation benefits at the injured worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. Rehabilitation benefits must be paid during a reasonable period, not to exceed 10 weeks, while the worker is waiting to begin the agreed-upon rehabilitation plan. Rehabilitation benefits must be paid while the worker is satisfactorily completing the agreed-upon rehabilitation plan.

(3) If the rehabilitation plan provides for job placement, a vocational rehabilitation provider shall assist the worker in obtaining other employment and the worker is entitled to weekly benefits for a period not to exceed 8 weeks at the worker's temporary total disability rate. If, after receiving benefits under this subsection, the worker decides to proceed with a rehabilitation plan, the weeks in which benefits were paid under this subsection may not be credited against the maximum of 104 weeks of rehabilitation benefits provided in this section.

(4) If there is a dispute as to whether an injured worker can return to the job the worker held at the time of injury, the insurer shall designate a rehabilitation provider to evaluate and determine whether the worker can return to the job held at the time of injury. If it is determined that the worker cannot return to the job held at the time of injury, the worker is entitled to rehabilitation benefits and services as provided in subsection (2).

(5) A worker may not receive temporary total or biweekly permanent partial disability benefits and rehabilitation benefits during the same period of time.

(6) The rehabilitation provider, as authorized by the insurer, shall continue to work with and assist the injured worker until the rehabilitation plan is completed.

(7) A worker may not receive both wages and rehabilitation benefits without the written consent of the insurer. A worker who receives both wages and rehabilitation benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301. [All emphasis added.]

The language of subsection (4) is mandatory: if a worker cannot return to his time-of-injury job, he is "entitled to rehabilitation benefits and services as provided in subsection (2)." If there is any dispute concerning the worker's ability to return to his time-of-injury job, subsection (4) states "the insurer **shall** designate a rehabilitation provider." (*Id.*) Moreover, even if there is no dispute, and both parties agree the worker cannot return to his time-of-injury job, the second sentence of subsection (4) provides that the worker is entitled to benefits and services. Under subsection (3), at a minimum a worker who is unable to return to his time-of-injury job is entitled to eight weeks of rehabilitation benefits and vocational assistance in job placement.

Considering the language requiring "actual wage loss," together with the mandatory language of the rehabilitation statute, I conclude that in cases where the worker does not immediately return to work the legislature intended that the rehabilitation requirement of section 39-71-2001, MCA, be met before any determination is made regarding the claimant's post-injury wages. The purpose of section 39-71-2001, MCA, is to assist claimants in finding actual employment, and actual employment is a prerequisite to actual wages.

In this case, a vocational rehabilitation counselor was designated for the express purpose of determining claimant's ability to return to work, thus triggering the provisions of section 39-71-2001, MCA. However, neither the insurer nor claimant followed through. The insurer failed to authorize the counselor to assist claimant in developing a plan. Claimant on his part expressed hostility to any assistance by the counselor and to seeking a job. He has made no effort whatsoever to obtain employment.

I therefore find the request for wage loss benefits to be premature. The parties must comply with section 39-71-2001, MCA. Indeed, the rehabilitation process prescribed by the section must be commenced immediately upon the insurer's receipt of notice stating that a claimant has reached MMI. The insurer is required to authorize a rehabilitation provider to work with the claimant to develop a plan. The claimant is required to cooperate with the rehabilitation provider in developing and carrying out a plan. If the plan calls for employment, claimant must diligently seek employment and refrain from self-defeating behaviors in doing so. If retraining is called for, claimant must diligently pursue his retraining and, upon completion, diligently seek employment.

If upon execution of the plan the claimant finds employment, then the wage he earns shall be used to compute his entitlement for wage loss benefits. If despite his best, good faith

efforts, claimant is unable to find employment, his wage loss must be computed using zero as his actual wage, because in fact his wage will be zero.

5. If the rehabilitation plan calls for an immediate return to work, the time for measuring wage loss is at the time the eight weeks of rehabilitation benefits specified in section 39-71-2001(3), MCA, are exhausted. If at that time claimant has been unable to secure employment despite his best good faith efforts, his post-injury wage is zero, and his entitlement shall be computed accordingly. If the plan calls for retraining then a reasonable time must be allowed for claimant to find work upon completion of the plan. At a minimum, eight weeks, the same as for a immediate return to work, must be allowed for the claimant to find work. The Court makes no determination whether a longer time is permitted. If the claimant is unable to find employment despite his best good faith efforts, then his post-injury wage is zero and his entitlement should be computed accordingly.

6. Since the insurer's conduct in this case was not unreasonable, claimant is not entitled to either attorney fees or a penalty. §§ 39-71-612 and 39-71-2907, MCA (1993).

7. Claimant is entitled to his costs.

JUDGMENT

1. Claimant is entitled to a 20% award under section 39-71-703(3)(d), MCA, which the insurer shall pay forthwith.

2. The insurer shall designate a rehabilitation provider who shall assist claimant in developing a rehabilitation plan in accordance with section 39-71-2001, MCA.

3. The claimant is ordered to cooperate with the rehabilitation provider and to put forth his best efforts in meeting the goals of the agreed upon rehabilitation plan.

4. A determination of the benefits due claimant for wage loss is premature but must be ultimately calculated according to the analysis set forth in the Court's conclusions of law.

5. Claimant is not entitled to attorney fees or a penalty.

6. The claimant is awarded his costs.

7. The Court retains jurisdiction to enforce this Order.

8. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

9. 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 29th day of December, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Ms. Laurie Wallace

Mr. Larry W. Jones

Submitted: December 11, 1995

1. Dr. Dewey's office notes for treatment on January 20, 1994 and thereafter were not tendered to the Court. The information concerning these later visits is taken from Dr. Martin Cheattle's report of December 20, 1994. (Ex. 4.) It is apparent from that report that Dr. Cheattle reviewed Dr. Dewey's records.