IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 11

WCC No. 2000-0151

ALEXA HUDSON LALUM,

Petitioner,

vs.

SAFECO INSURANCE COMPANY,

Respondent/Insurer for

BI-LO FOODS,

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffered a back injury in 1995 which made her underlying scoliosis symptomatic. At the time, she was working two jobs, one as a grocery store cashier, and the other as a light-duty home health aide. She was unable to continue working as a cashier but went full time as a home health aide at higher wages than her cashier job. Thereafter, she worked at another light-duty home health aide job. In 1997 she began college and shortly thereafter reached MMI. A 5% impairment rating was given but the physician doing the rating allocated 3% of the rating to non-occupational, preexisting factors (the underlying scoliosis). A job analysis for a heavy-labor home health aide was disapproved but other light-duty jobs were approved. Every job claimant has held since her injury has paid more than her time-of-injury employment. The insurer paid only 2% for impairment and has denied permanent partial and rehabilitation benefits.

Held: (1) Claimant is entitled to the full 5% impairment rating since it is a single impairment rating for a single, indivisible condition. The "take the employee as you find her rule" applies. (2) Claimant failed to prove she suffered a wage loss. The light-duty home health aide positions she held immediately following her injury were never disapproved; she quit those jobs for reasons unrelated to her medical condition; and she has failed to show that at the time she reached MMI, the wages for those positions had decreased to less than her time-of-injury jobs. (3) The claimant is entitled to attorney fees and a penalty with respect to the additional 3% impairment award since the rules regarding impairment awards are clear: there is no apportionment under the Workers' Compensation Act.

Topics:

Attorney Fees: Denial or Delay of Payment. Insurer's failure to pay full impairment award was unreasonable since the law is clear that there is no apportionment under the Workers' Compensation Act. Claimant is therefore entitled to attorney fees. § 39-71-612 (1995).

Benefits: Impairment Awards. Insurer is liable for full impairment percentage where impairment rating is for a single, indivisible condition even though non-occupational factors may have contributed to the condition. There is no apportionment.

Benefits: Permanent Partial Benefits: Lost Earning Capacity. Where claimant's immediate post-injury jobs include higher paying light-duty positions which have never been medically disapproved, there is no wage loss and therefore no entitlement to permanent partial benefits. § 39-71-703 (1995).

Benefits: Rehabilitation Benefits. Where claimant's immediate post-injury jobs include higher paying light-duty positions which have never been medically disapproved, there is no wage loss and therefore no entitlement to rehabilitation benefits.

Impairment: Impairment Ratings. Insurer is liable for full impairment percentage where impairment rating is for a single, indivisible condition even though non-occupational factors may have contributed to the condition. There is no apportionment.

Penalties: Insurers. Insurer's failure to pay full impairment award is unreasonable since the law is clear that there is no apportionment under the Workers' Compensation Act. Claimant is therefore entitled to a penalty. § 39-71-2907 (1995).

Physicians: Impairment Ratings. Under sections 39-71-703 and -711, MCA (1995), an impairment evaluation must be based on the latest edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. Neither the Guides nor statutes permit apportionment of an impairment rating based on occupational versus non-occupational contributions.

Wages: Actual Wage Loss. Where claimant's immediate post-injury jobs include higher paying light-duty positions which have never been medically disapproved, there is no wage loss and therefore no entitlement to permanent partial benefits. § 39-71-703 (1995).

¶1 The trial in this matter was held on January 17, 2001, in Missoula, Montana. Petitioner, Alexa Hudson Lalum (claimant), was represented by Mr. Howard

Toole. Respondent, Safeco Insurance Company, was represented by Mr. Geoffrey R. Keller. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 19 were admitted through stipulation of the parties. The Court refused to admit Exhibit 20, a letter from Mr. Keller to Mr. Toole, because the document referenced the recommendations of the Department of Labor and Industry mediator. (*See* section 39-71-2410(b), MCA.)

¶3 Witnesses and Depositions: The Court received and considered the depositions of claimant and Catherine C. Capps, M.D. Claimant and Juanita Hooper Addy were sworn and testified at trial.

¶4 Issues presented: The issues stated in the pretrial order are as follows:

1. Whether Petitioner is entitled to permanent partial disability benefits in addition to the 2% impairment award previously paid as a result of her injury on September 20, 1995.

2. Whether Petitioner is entitled to rehabilitation benefits.

3. Whether Petitioner is entitled to an award of attorney fees under the provision of §39-71-612, MCA.

¶5 Having considered the pretrial order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant is presently 24 years old. (Ex. 7.) She graduated from high school in 1994. (Lalum Dep. at 8.) Subsequent to the industrial accident which is at issue in this case, she completed one year of college course work in accounting.

¶7 At the time of the claimant's industrial accident, claimant was unmarried, thus many of the quotations in this decision refer to her as "Alexa Hudson," her maiden name. She subsequently married and adopted her husband's surname, therefore, other quotations refer to her as Alexa Lalum or Alexa Hudson Lalum.

Time-of-Injury Work and Wages

¶8 Around May of 1995, claimant began working as a checker for Bi-Lo Foods (BI-Lo), a grocery store in Missoula. (*Id*. at 12.) She worked an average of 35 hours per week at an hourly rate of $4.25 per hour.[1]

¶9 In July 1995, claimant took on a second, concurrent job as a home care aide with Partners In Home Care (Partners). At the time of her industrial injury, claimant's hourly wage at Partners was $5.25. She was paid bi-monthly, thus, the four pay periods previous

to her industrial injury were for July 16-31, August 1-15, August 16-31, and September 1-15. Her total hours worked during those periods were 8.0, 35.25, 19.5, and 13.25, respectively. (Ex. 12.) Claimant's total hours of work for the two full months was 76. The two months (July 16 to September 15) encompassed 62 days, which amounts to 8.857 weeks (*62 ÷ 7*). Based on the prior four pay periods, claimant worked an average of 8.58 hours weekly for Partners.

¶10 If the wages and hours from both jobs are combined, at the time of her industrial accident the claimant's average weekly wage, average hours worked per week, and average hourly wage were as follows:

Average weekly wage	$195.35[2]
Average hours worked per week	43.857
Average hourly wage	$4.45[3]

Injury at Work

¶11 On September 20, 1995, claimant was checking groceries at BI-Lo While lifting a bag of cat food, she felt a shooting pain in her back. She completed her shift and returned to work the next day when she reported the incident to her employer and completed a written form describing the incident.

¶12 At the time of the claimant's back strain, BI-Lo was insured by Safeco Insurance Company (Safeco). A claim was submitted to Safeco and it accepted liability for the incident and thereafter paid medical benefits.

¶13 On September 27, 1995, claimant sought chiropractic care for her back pain at the the Moore Family Chiropractic in Florence, Montana. (Ex. 1.) She complained of "pain in her neck and upper back which radiated into her shoulders bilaterally" and "lower back pain which 'shoots through' to the front bilaterally." (Ex. 1 at 9.) During the claimant's initial visit, Jason D. Moore, D.C., identified a preexisting curvature of claimant's spine but opined that the BI-Lo incident triggered her pain. (Ex. 1 at 5, 9; Ex. 7.) As set forth later, the spinal curvature identified by Dr. Moore is scoliosis.

¶14 Within days after her September 20, 1995 injury, BI-Lo terminated claimant's employment. The termination is not at issue in this case.

¶15 Following her termination by BI-Lo, claimant sought additional work at Partners and began working full time as a home health aide. Claimant worked 116.5 hours between October 1 to October 15. (Ex. 12.) Her hours from October 1st through December 15th totaled 438.1 hours. On a weekly basis, she averaged 40.88 hours a week during that time. [4] Her average weekly wage for that period was $214.62 (*40.88 hours x $5.25 an hour*).

¶16 Claimant continued working for Partners through approximately April 1996. Her work was light duty. She testified Partners had many clients and the work she requested

and was assigned was light duty. Much of her work involved light housekeeping duties, such as cooking, helping clients dress, and socializing with and watching over her clients. (*See e.g.*, Lalum Dep. at 14.)

¶17 Claimant continued with her chiropractic treatment while working full time for Partners, however, the frequency of treatment diminished during early 1996. She began her chiropractic treatments on September 27, 1995. (Ex. 1 at 1.) Over the next month, she received eleven treatments. (*Id.*) Between October 27, 1995 and the end of November, 1995, she was treated another seven times. (*Id.*) During December 1995, she was treated four times, in January 1996 three times, in February 1996 not at all, in March 1996 two times (following an exacerbation involving a "slip,") and in April 1996 one time. (Ex. 1 at 1-2, 16, 21.)

¶18 In April 1996, claimant began working for Village Health Care (Village) which provides institutional care. Claimant took the job because Village paid more -- $6.50 an hour, offered to train her as a certified nursing aide (CNA), which is a higher paying job than a home health aide, and provided a regular, full-time work week of three 12-hour days per week. Claimant's duties at Village included handling medical records, doing laundry, changing beds, and bathing and transferring patients. She considered the work strenuous and did not like the type of work.

¶19 During her stint with Village, claimant earned a CNA designation.

¶20 In October 1996, claimant quit Village and went to work for Bitterroot Valley Independent Living Center (Bitterroot) in Stevensville, Montana. Bitterroot operates a residential care facility.

¶21 Claimant worked a "four on, two off" schedule for Bitterroot, meaning she worked four eight-hour days in succession, then had two days off. (Lalum Dep. at 17.) On a seven day work-week basis, she worked 37" hours a week.[5] While not positive about her hourly wage, claimant testified it was $6.50 an hour. Thus, her weekly earnings were $242.65.

¶22 While working for Bitterroot, claimant requested and was assigned "Aisle C" work, which was light-duty work. She described the work as follows:

> Well, everybody was considered independent, meaning they were all mobile. They were all able to do their own, you know, stand ups, sit downs, go to the bathroom, whatever. I passed out meals. I did the paperwork. I did laundry or housekeeping, or just general -- general stuff that they needed done. Passed out meds, you know, for them. Fresh towels. Whatever they needed.

(Lalum Dep. at 17.)

¶23 While working for Village and Bitterroot, claimant continued her chiropractic care. However, when examined by Dr. Robert J. Seim, an orthopedic surgeon, on June 19,

1997, she indicated that her job at Bitterroot was light duty and was not exacerbating her condition. He recorded:

> In May of '96 she began full-time work at North Valley Health Care in Stevensville doing patient care. The patient care amounts basically to answering the phone and being sure the patients all have their needs met. It amounts to no significant amount of bending, twisting, or other such activity. If [sic] fact, she says a good part of the time she simply sits and monitors patients. During that time at Valley Health she was given some back class on how to use her back and also used a back brace. In November of '96 the patient moved back to Stevensville and began seeing Dr. Moore on an even more regular basis. She continues to see Dr. Moore on a one-time-a-week basis, using cold packs and massage.
>
> . . . .
>
> Also the patient is stating, in assessing her job as stated earlier, that she overlooks the residents in the nursing home, does no lifting or bending. She says that her back has been much better since she has been doing this.

(Ex. 2 at 1-2.)

¶24 As noted in the previous paragraph, claimant was examined by Dr. Seim on June 19, 1997. The examination was at the request of the insurer.

¶25 On physical examination, Dr. Seim found claimant experienced back pain upon extension and seemed "tight" for a woman of her age. Of more concern:

> Diagnostic tests reveal that the patient has a very significant scoliosis present of 15 degrees in the mid-thoracic area involving the vertebrae from D7-D12. The rotatory deformity of this area is minimal with a 15 degree curve with the convexity to the right. Most impressive, however, is the patient has secondary curves above and below that of 15 degrees each which have very significant rotatory deformities present. Also noted is the fact that the patient has what appears to be a transitional vertebrae or an L6 vertebrae. This appears to have a false joint, particularly on the left side. The pedicles themselves all appear to be intact, certainly rotated, and certainly of abnormal anatomy.

(*Id.* at 3.) The physical abnormalities which Dr. Seim noted were not caused by the claimant's industrial injury, however, her condition was asymptomatic prior to the injury and the injury made her condition symptomatic.

¶26 Dr. Seim's impression of claimant's condition was:

> 1) Impression at this time is that the patient has an idiopathic scoliosis which she has had since being a teenager. She had done well with this until she began

doing a significant amount of twisting work. Thus the patient has had a mechanical abnormal back which was exacerbated or pain initiated by her twisting at the job.

2) The patient does have the subjective complaint still of some low back pain but significantly improved. Her objective findings are minimal outside of her scoliosis and her pain on extension of the back. Her complaints are consistent with her objective findings.

(*Id*. at 3.) Dr. Seim recommended an exercise program and anti-inflammatory drugs, however, he countenanced against further chiropractic treatment. (*Id*.) He opined claimant had not yet reached maximum medical improvement (MMI) with respect to the September 1995 injury. (*Id*. at 4.)

¶27 Following Dr. Seim's report, on July 24, 1997, the insurer asked Crawford and Company to provide it with vocational services. (Ex. 14 at 1.) The insurer also requested another evaluation by Dr. Catherine C. Capps, who is an orthopedic surgeon.

¶28 Dr. Capps examined the claimant on August 19, 1997. Before examining claimant, she reviewed the medical records of Dr. Moore and the IME of Dr. Seim. (Ex. 3 at 2.) After examining claimant, she diagnosed:

1) Preexistent idiopathic scoliosis.

2) Mechanical back pain.

3) Dermatomal sensory loss with decreased strength, left extensor hallucis longus with preservation of reflexes, rule out herniated nucleus pulposus.

(*Id*. at 3.) Dr. Capps referred claimant to physical therapy in Stevensville, requesting that claimant be taught back exercises she could do at home. She asked claimant to refrain from chiropractic treatment in order to assess whether physical therapy would be helpful. (*Id*. at 3-4.)

¶29 In August 1997, claimant left her employment with Bitterroot to attend the University of Montana Technical College in Missoula. She began a program leading to an associate degree in accounting. (Lalum Dep. at 8-9.) She started school because she believed she could not keep doing the type of work she was doing and wanted to "do something to use my head a bit more." Irrespective of her ability to continue work in her prior occupations, the claimant's decision to seek further education was wise and justified. She is intelligent, poised, and motivated to educate herself and obtain better jobs.

¶30 Claimant attended college for two semesters, funding her schooling through student loans. (*Id*. at 9.) She worked part time in the delicatessen department of a grocery store for a few weeks but quit because she found the work too strenuous. (*Id*. at 18; Ex. 3 at 9; Trial Test.)

¶31 During the fall of 1997, claimant continued to experience back pain and was treated by Dr. Capps, who authorized both chiropractic adjustment for a while and further physical therapy, as well as anti-inflammatories. (Exs. 3 at 9; 5 at 12.)

¶32 On November 4, 1997, Dr. Capps declared claimant at MMI and rendered an impairment rating of 5% of the whole person, 3% of which she attributed to preexisting scoliosis. She also disapproved the claimant's time-of-injury job with BI-Lo and restricted her to lifting up to 35 pounds occasionally and 20 pounds rarely. (Ex. 3 at 10.) Dr. Capps felt too much twisting was required for the cashier position at BI-Lo (*Id.*)

¶33 With respect to the impairment rating, Dr. Capps wrote:

> [T]he patient has a preexistent scoliosis which is figuring clinically into her syndrome. Overall the patient has an impairment rating of 5% of the whole person, but I feel 3% should be apportioned to her preexistent scoliosis and the difficulties with this.

(*Id*.) Based on Dr. Capps' apportionment of the impairment rating, Safeco paid claimant a 2% impairment award. (Ex. 8 at 1.)

¶34 At her deposition taken November 3, 2000, Dr. Capps conceded that the claimant's industrial injury made her underlying condition symptomatic and that her apportionment was "speculative." She testified as follows:

> Q. The other two percent of the impairment rating, what compromises that, puts that additional percent up 2 percent above the preexisting scoliosis?
>
> A. For her symptoms, for her injuries.
>
> Q. According to the guidelines, the additional symptoms would warrant an additional 2 percent?
>
> A. She wasn't given an additional 2 percent. I gave her a 5 percent rating, but I apportioned, like, three-fifths of it to the preexistent scoliosis because that's a structural problem. She had false joint, but --
>
> Q. Sure.
>
> A. -- but **the injury is what rendered her more symptomatic.** She did apparently have some, you know, low-grade symptoms, you know, twisting and doing stuff in real life, but it wasn't until the cat food thing.
>
> **Q. Great. I didn't know how you came to that division of those percentages.**
>
> A. Well, it's basically speculative.

(Capps Dep. at 23-24, emphasis added.) Notwithstanding the testimony, Safeco continued in its insistence that claimant is due only a 2% impairment award and has persisted in its refusal to pay the additional 3%.

¶35 In December 1997, claimant returned to work for Partners as a CNA, although she also continued her schooling. She worked between 20 and 40 hours a week at a wage which was between $6 and $7 an hour. (Lalum Dep. Ex. 1 at 3.) She worked for Partners for nearly a year. (Lalum Dep. at 18-19.) Her CNA work at Partners required her to lift and transfer patients.

¶36 Claimant completed her first year of college but did not return for a second year because she no longer qualified for student loans.

¶37 In August 1998, claimant married. In October 1998 she and her husband moved to Spokane, Washington. After moving to Spokane, claimant worked for a temporary employment service for approximately four months earning $7.50 an hour. She then had a baby and became a stay-at-home mom for a time.

¶38 In September 1999, claimant began working as a medical transcriptionist. (*Id*. at 21-22.) She earned $7.50 to $8.00 per hour and worked 15 to 20 hours per week on average. (Lalum Dep. Ex. 1 at 3.)

¶39 Around January 2000, claimant quit transcriptionist work and opened a child day-care center with a partner. She testified the transcriptionist job § A wasn't giving me enough hours and enough pay" and that she also "wanted to continue to be a stay-at-home mom." (Lalum Dep. at 21.) She did not consider seeking more transcription hours because she wanted to be able to "spend more time with my daughter." (*Id*. at 22.)

¶40 Claimant managed the day-care center, including the bookkeeping, earning between $5 and $6 an hour and working an average of 55 hours weekly. (Lalum Dep. Ex. 1 at 4.)

¶41 On September 1, 2000, claimant sold her share of the day-care business to her partner and began working as a legal secretary for a law office in Missoula. Her employment was through a staffing service. (Lalum Dep. at 27.) She was paid $7.50 per hour for 372 hours per week. At trial, claimant testified that the law office plans to buy out her contract with the staffing service and that she expects a raise to $8.25 per hour after three months of further employment.

¶42 Claimant still wants to obtain her college degree, but she will also consider staying on as a legal secretary if she continues to like the work. (*Id*. at 10, 30.)

¶43 Since reaching MMI, claimant has continued to have back pain. In February 2000, she began treating with Dr. Karl E. Buechsenschuetz, an orthopedic surgeon. While initially uncertain whether the claimant's 2000 flareup was related to her industrial accident, on April 15, 2000, he concluded it was since the injury caused her underlying condition to

become symptomatic. (Ex. 4 at 3, 6.) While treating claimant during the late winter and the spring of 2000, he prescribed physical therapy and anti-inflammatories, and at claimant's request, ultimately prescribed some further chiropractic treatments. (*Id*. at 10.)

Vocational Evidence

¶44 Claimant did not present her own vocational evidence, rather she relied on vocational information developed by the insurer. That information was developed in response to demands by claimant's attorney, who wrote the insurer's claims adjuster on February 28, 1998, asserting that claimant was entitled to rehabilitation benefits. He wrote that claimant "could not do any employment-based lifting after [the BI-Lo] injury, and she elected to pursue her education." (Ex. 18 at 1.) He argued:

> Her condition has stabilized and she is pursuing a sensible course to change employment directions. . . .
>
> . . . .
>
> [T]his is a request to immediately appoint a rehabilitation provider to evaluate the program that Alexa is involved in and develop a plan that pays for 114 weeks of rehabilitation benefits under her Workers' Compensation claim. To the Vocational Rehabilitation Program, this is your notice that benefits are claimed under both Workers' Compensation Rehabilitation and Vocational Rehabilitation, and Ms. Hudson would invite your agency to coordinate benefits between the two programs.

(Ex. 18 at 1-2.)

¶45 Within days of receiving the demand, Safeco's claims adjuster requested Crawford and Company to complete employability and labor market assessments, develop at least four alternative job analyses, and develop a rehabilitation plan. (Ex. 14 at 6.)

¶46 Crawford assigned Steven J. Achabal (Achabal), a vocational consultant to the case. On March 30, 1998, Achabal identified the following jobs as ones which claimant is qualified to perform based on her experience:

Job	Physical	Entry Level wages
Cashier	Light Duty	$5.15 - $6.10/hr
Home Health Aide	Heavy duty	$6.50 - $8.23/hr
Certified Nursing Assistant	Heavy duty	$6.25 - $9.20/hr
Waitress	Medium Duty	$4.25 - $6.43/hr + tips
Salesperson, General Merchandise	Light Duty	$5.15 - $9.00/hr
Fast Food Worker	Light Duty	$5.15 - $6.05/hr

Hostess	Light Duty	$5.50 - $7.25/hr

(*Id*. at 14-15.) He developed job analyses for cashier, hostess, fast food worker, and salesperson and forwarded them to Dr. Capps for review. Dr. Capps approved the fast food worker with the proviso that lifting be limited to 25 pounds and approved the other positions without qualifications. (Exs. 14 at 17; 3 at 21-22.)

¶47 Thereafter, in May 1998, Achabal forwarded a job analysis for the home health aide to Dr. Capps for review. The description included transferring patients and was classified as heavy duty. (Ex. 14 at 60.) Dr. Capps disapproved the job.

¶48 No job description for the lighter-duty work claimant was doing for Partners in 1995 and 1996 and for Bitterroot in 1996 and 1997 was ever prepared or provided to a physician for review. Thus, while those jobs have not been approved, they also have not been disapproved.

¶49 On June 19, 1998, a month after Dr. Capps disapproved the heavy-duty home health aide job description, Achabal concluded that claimant "should be able to secure light to medium duty employment with wages above her time of injury [sic] job." (Ex. 14 at 23.)

¶50 While Achabal provided vocational advice during the adjustment of the claim, he did not testify. His information is provided by way of exhibits setting forth his written correspondence, reports, etc.

¶51 Safeco, however, had Juanita Hooper Addy (Addy), a Certified Rehabilitation Counselor, testify at trial. Addy reviewed the vocational records prepared by Crawford and Company (ex. 14), including Dr. Capps' opinions regarding specific jobs (ex. 3 at 21-23), and concurred with Achabal's earnings estimates for the positions approved by Dr. Capps.

¶52 Addy also provided Montana wage information for legal secretary and administrative assistant, however, she was unable to say that claimant was qualified for these jobs without her one year of college.

¶53 Safeco has denied liability for both rehabilitation benefits and permanent partial disability benefits based on its belief that claimant suffered no wage loss.

Resolution: Impairment Award

¶54 Dr. Capps' testimony shows that the impairment rating she rendered was a singular impairment rating for claimant's back condition and not separate impairment ratings for two different conditions, one work-related and the other not. She apportioned a single impairment rating based upon what she felt were the work-related and non-work related contributions to claimant's condition, and even then conceded that her apportionment was not based on AMA guides but speculation. As set forth in the conclusions of law, the

Workers' Compensation Act does not permit apportionment between work-related and non-work related factors, thus, the entire 5% is due claimant.

Resolution: Wage Loss

¶55 Claimant has failed to present persuasive evidence that she suffered a wage loss as a result of her 1996 industrial injury. While the injury precluded her from returning to her job as a cashier at BI-Lo, and while Dr. Capps ultimately disapproved a job description for heavy work as a home health aide, the claimant's actual work history following her injury shows that **light-duty** home health aide positions were available and that those positions paid more than what she was earning at BI-Lo and more than she was earning when her time-of-injury BI-Lo wages are averaged with her time-of-injury home health aide wages. The claimant's actual post-injury wages when working full time for Partners immediately following her industrial injury were greater than her time-of-injury wages on an hourly basis ($5.25 an hour for Partners versus $4.25 an hour for BI-Lo or $4.45 an hour when BI-Lo and her preinjury Partners' weekly wages are combined).[6] Her wages while working at Bitterroot were $6.50 an hour. Claimant worked less hours post-injury for both Partners and Bitterroot than the total hours she was working on average when she was injured. However, she has not provided evidence that her injury prevented her from working more hours. Even if the lesser number of hours is factored in, claimant's average post-injury wages at both Partners and Bitterroot were greater than her time-of-injury wages. The comparisons are as follows:

Employer	Weekly wage
BI-Lo& Partners (time-of-injury)	$195.35
Partners (1996-97 post-injury)	$211.84
Bitterroot (1996-97 post-injury)	$242.65

¶56 Claimant presented no evidence of wage inflation which might show that the wages she earned at Partners in 1996 and 1997 and at Bitterroot in 1996 and 1997 were inflated by time, i.e., that they were more than what she would have earned in those jobs had she been employed in them at the time of her injury. Thus, she has failed to persuade me that her post-injury wages at Partners and Bitterroot were less than her time-of-injury wages.

¶57 While claimant's employment at both Partners and Bitterroot antedated her reaching MMI, she has presented no evidence to indicate that those jobs were unavailable to her after she reached MMI. She left Partners in April 1996 because she secured a job paying more money. (¶18.) She left Bitterroot in August 1997 to attend school. And as found earlier, neither job, as claimant has described them, has been medically disapproved. Taking her description at face value, they appear to be light-duty jobs and all of the light-duty jobs submitted to Dr. Capps for her review were approved by her.

Resolution: Reasonableness of Insurer's Denials

¶58 It should be clear from the foregoing findings of facts that the insurer's denial of benefits which are tied to wage loss was reasonable. The impairment award is another matter. After Dr. Capps' deposition, the insurer was on notice that the 5% rating was for a single condition rather a cumulation of two separate, distinct conditions, and that claimant's industrial accident caused her underlying, preexisting back condition to become symptomatic.

CONCLUSIONS OF LAW

¶59 Claimant's entitlement to benefits is governed by the 1995 version of the Workers' Compensation Act (Act), which was the law in effect at the time of her injury. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 392 (1986).

¶60 Claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *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).

¶61 Permanent partial disability benefits and rehabilitation benefits may be awarded only if the claimant suffered a wage loss. The applicable statutes are sections 39-71-703 and 39-71-1006, MCA (1995). Section 39-71-703, MCA (1995), provides in relevant part:

> **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 if that worker:
>
> **(a) has an actual wage loss as a result of the injury**; *and*
>
> (b) has a permanent impairment rating . . . . [Emphasis added.]

Section 39-71-1006, MCA (1995), provides in relevant part:

> **Rehabilitation benefits.** (1) A disabled worker as defined in 39-71-1011 is eligible for rehabilitation benefits if:
>
> **(a) the worker has an actual wage loss as a result of the injury; . . .** [Emphasis added.]

¶62 Claimant bears the burden of proving that she has an "actual wage loss as a result of the injury." She has not discharged her burden. After her injury, she worked in what she described as light-duty jobs and earned more than she was earning at her time-of-injury jobs. The jobs she performed for Partners and Bitterroot have not been medically disapproved, and the medical restrictions imposed by claimant's physicians do not on their

face preclude her from performing the duties she described as required by those jobs. By any measure, the wages which claimant in fact earned immediately following her injury exceeded her time-of-injury wages, and she has offered no proof that she was incapable of performing those jobs upon reaching MMI.[7]

¶63 The fact that claimant was not working those home health jobs and was attending school at the time she reached MMI does not require any different measure of lost wages. Wage loss is defined in subsection 5(c) of section 39-71-703, MCA (1995), as follows:

> Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns **or is qualified to earn after the worker reaches maximum healing**. [Emphasis added.]

¶64 The claimant's termination of employment with Partners in 1997 and Bitterroot were not the result of any restrictions put on her by her physicians or because of her inability to perform her work. She left Partners in 1996 for a better paying job. She left Bitterroot in 1997 to attend school. She has therefore failed to prove that she was incapable of doing those jobs at the time she reached MMI or that the pay scale for those jobs had eroded such that when she reached MMI they paid less than her time-of-injury job.

¶65 Claimant did not suffer a wage loss and therefore is not eligible for rehabilitation benefits or for permanent partial disability benefits other than an impairment award.

¶66 The impairment award is a different matter. Whether or not claimant suffered a wage loss, she was entitled to an impairment award. Section 39-71-703(2), MCA (1995), provides:

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

The impairment rating is a medical determination which must be made using the AMA impairment guides. Section 39-71-711, MCA (1995), provides:

> **Impairment evaluation -- ratings.** (1) An impairment rating:
> (a) is a purely medical determination and must be determined by an impairment evaluator after a claimant has reached maximum healing;
> **(b) must be based on the current edition of the Guides to Evaluation of Permanent Impairment published by the American Medical Association**;
> (c) must be expressed as a percentage of the whole person; and
> (d) must be established by objective medical findings. [Emphasis added.]

In this case there was a single impairment rating of 5% for a single condition. That condition was made symptomatic by claimant's injury.

¶67 It is a well settled and notorious rule of workers' compensation "that an employer takes its employee as it finds her, and that if her disability is aggravated by an underlying physical or emotional condition, that the employer is liable for disability which results from that aggravation." *Satterlee v. Lumbermen's Mut. Cas. Co.*, 280 Mont. 85, 92-93, 929 P.2d 212, 216-217 (1996); *Schumacher v. Empire Steel Mfg.*, 175 Mont. 411, 413-14, 574 P.2d 987, 988 (1977). Dr. Capps' allocation of the 5% impairment rating was an attempt to apportion causation. While apportionment is permissible under the Occupational Disease Act, § 39-72-706, MCA (1995), there is no similar provision in the Workers' Compensation Act. Moreover, as she conceded, her apportionment was purely speculative. There is no legal or factual basis for the insurer paying anything less than the full 5% impairment award.

¶68 Moreover, in light of the well settled rules set out in the previous paragraph, once Dr. Capps' deposition was taken the insurer should have paid the 5%. At the deposition, it became clear that the 5% rating was for a single condition, not two distinct, separately rateable conditions, and that Dr. Capps was attempting to apportion causation. Dr. Capps is not schooled in workers' compensation law, thus, her error is excusable. However, the insurer should have recognized her error and paid up. Its failure to do so, and its insistence on taking the issue to trial was unreasonable, thereby entitling claimant to both attorney fees and a penalty with regard to that issue. § 39-71-612 and 39-71-2907, MCA (1995).[8]

¶69 Claimant is entitled to her costs since she prevailed on the impairment award issue.

JUDGMENT

¶70 1. Safeco Insurance Company is liable for and shall pay claimant an additional 3% impairment award.

¶71 2. Claimant is **not** entitled to rehabilitation benefits or permanent partial disability benefits.

¶72 3. The insurer shall pay a 20% penalty on the 3% impairment award, which is payable to the claimant.

¶73 4. Claimant is entitled to attorney fees and costs in amounts to be determined by the Court pursuant to its rules.

¶74 5. 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.

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

DATED in Helena, Montana, this 19th day of March, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole
Mr. Geoffrey R. Keller
Submitted: January 17, 2001

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[1] Some of the exhibits reference a higher rate of pay (exs. 8 at 1 and 14 at 16), however, claimant agreed at trial that she was paid $4.25 an hour.

[2] Her earnings from BI-Lo were $148.75 weekly (*35 hours x $4.25 per hour*). Her earnings from Partners were $46.60 (*8.875 hours x $5.25 per hour*). The two total $195.35.

[3] Average weekly wage divided by average hours worked per week (*$195.35 ÷ 43.857 = 4.45*).

[4] *438.1 hours ÷ 75 days, x 7 days = a weekly average of $40.88*.

[5] *32 hours ÷ 6 x 7 = a weekly average of 37.33*.

[6] *See* paragraphs 9, 10, and 15, and footnotes 1, 2, 3, and 4.

[7] Since claimant's employment immediately following her injury shows she was capable of earning more than she did at her time-of-injury job, I need not consider alternative jobs the claimant is able and qualified to perform, or the wages for those jobs. The best evidence of her post-injury wages and earning capacity is her work for Partners and Bitterroot. I also need not consider the fact that the wages identified by vocational consultants for other jobs are not comparable to claimant's time-of-injury wages because the wages are for later years and therefore may be inflated. See *Anderson v. Hammer*, 252 Mont. 73, 78, 826 P.2d 931, 934-935 (1992)*; Lamb v. Missoula Imports, Inc.*, 230 Mont. 183, 198, 748 P.2d 965, 967 (1998)("Earning capacity must be measured by comparing pre-injury earning capacity with post-injury earning capacity *in the same time frame*.") Finally, I need not consider claimant's jobs after attending college for one year.

[8] Section 39-71-612, MCA (1995), provides in relevant part:

> **Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge.** (1) If an insurer pays . . . compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or

offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable.

Section 39-71-2907, MCA (1995), 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 . . . .