IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 59

WCC No. 2002-0612

CAROLYN McCOY

Petitioner

vs.

BENEFIS HEALTHCARE

Respondent/Insurer.

DECISION AND JUDGMENT

Summary: Claimant and insurer disagree as to claimant's entitlement to rehabilitation benefits during semester breaks and auxiliary benefits for commuting to and from school. They submit the disputes to the Court for resolution.

Held: A claimant who is continuously attending school pursuant to a rehabilitation plan is entitled to rehabilitation benefits during semester breaks and is entitled to auxiliary benefits for commuting to and from school.

Topics:

Benefits: Auxiliary. Commuting to and from school to fulfill a rehabilitation plan is "travel" required to "implement a rehabilitation plan." Under section 39-71-1025(3), MCA (1997), auxiliary benefits are available to reimburse a claimant for such travel.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-1025(3), MCA (1997). Commuting to and from school to fulfill a rehabilitation plan is "travel" required to "implement a rehabilitation plan." Under section 39-71-1025(3), MCA (1997), auxiliary benefits are available to reimburse a claimant for such travel.

Benefits: Rehabilitation Benefits. Rehabilitation benefits are payable during semester breaks where the claimant is pursuing a college degree under a rehabilitation plan prepared by the vocational consultant designated by the provider. Section 39-71-1006, MCA (1997), which governs rehabilitation benefits provides for payment of those benefits during "the period specified in the

rehabilitation plan," and the period contemplated by the statute is a calendar period not a chopped up series of periods defined by actual class attendance.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-1006, MCA (1997). Rehabilitation benefits are payable during semester breaks where the claimant is pursuing a college degree under a rehabilitation plan prepared by the vocational consultant designated by the provider. Section 39-71-1006, MCA (1997), which governs rehabilitation benefits provides for payment of those benefits during "the period specified in the rehabilitation plan," and the period contemplated by the statute is a calendar period not a chopped up series of periods defined by actual class attendance.

Statutes and Statutory Construction: Construing as a Whole. A court must look at the statute as a whole and give effect to all of its provisions and its purpose.

Statutes and Statutory Construction: Context. The terms of a statute must be considered and read in "the context in which they were used by the legislature."

¶1 This matter is submitted for decision based upon the allegations in the petition. The allegations were admitted by respondent and the only issues are legal ones.

Facts

¶2 The claimant is the petitioner in this case. She suffers from an occupational disease of her feet and low back. Her claim for compensation was accepted by her employer, Benefis Healthcare, which is self-insured. For a time, Benefis paid temporary total disability (TTD) benefits at 65% of claimant's TTD rate, apparently as a result of apportioning part of claimant's condition to non-occupational factors. *See* § 39-72-706, MCA (1997).

¶3 Claimant returned to work in a modified job for an unspecified time. However, on December 5, 2001, she was permanently restricted from returning to her original job. A vocational consultant was then designated. He determined that claimant would benefit from formal retraining and prepared a formal rehabilitation plan as contemplated by section 39-71-1006(1)(c), MCA (1997). A copy of the plan is attached to Petitioner's Brief in Support of the Issues Presented in the Emergency Petition for Trial as Exhibit 3, and Benefis does not challenge its authenticity. It calls for claimant to complete a two-year program at Montana State University - Great Falls College of Technology to obtain an Associate of Applied Science Degree in computerized office technology with a legal secretary emphasis. The plan called for claimant to enroll in the college for the 2002 summer semester and thereafter register for each subsequent semester until she obtains her degree at the end of the Spring 2004 semester. Her estimated date of completion is May 7, 2004.

¶4 As pertains to the present controversy, the plan called for Benefis to pay claimant total rehabilitation benefits during the periods of claimant's actual attendance of classes but not during semester breaks. The plan did not address auxiliary benefits for travel to and from school.

¶5 The plan was tendered to claimant, who signed it on June 5, 2002, but only after inserting a provision which expressly reserved her right to claim total rehabilitation benefits during semester breaks and to claim auxiliary benefits for her travel to and from school. Benefis never signed the agreement. However, claimant apparently commenced school in June as contemplated and Benefis is apparently paying her benefits in accordance with the plan.

¶6 On July 15, 2002 the claimant filed her present petition requesting that the Court determine her entitlement to total rehabilitation benefits during semester breaks. Those breaks do not include a summer vacation as claimant will be attending school year round. The semester breaks during which claimant asserts she should be paid (assuming she is progressing satisfactorily in school) are as follows:

August 2, 2002 - September 2, 2002	31 days
December 21, 2002 - January 14, 2003	24 days
May 10, 2003 - June 4, 2003	25 days
August 1, 2003 - September 1, 2003	31 days
December 20, 2003 - January 13, 2004	23 days
	134 days

(Petitioner's Brief in Support of the Issues Presented in the Emergency Petition for Trial at 2.) In addition, she seeks reimbursement under the auxiliary benefits provision, § 39-71-1025, MCA (1997), for her travel between her home in Vaughn, Montana, and the Great Falls college campus.

Discussion and Resolution

¶7 Even though it did not sign the plan, Benefis does not contest the basic provisions of the plan. Its dispute with claimant is solely with regard to her claim that she is entitled to benefits during semester breaks and to travel reimbursement. Those matters involve interpretation of the rehabilitation and auxiliary benefits provisions.

I. Auxiliary Benefits

¶8 The recent decision in *Applegate v. Liberty Northwest Ins. Corp.,* 2002 MTWCC 45, ¶ 18, makes it clear that under section 39-71-1025, MCA (1999), a claimant attending school under a rehabilitation is entitled to reimbursement for travel to and from school:

> Section 39-71-1025, MCA (1999), provides for payment of reasonable travel expenses "used to . . . (3) implement a rehabilitation plan that has been filed with the department . . ." The provision is broad: it covers any travel necessary to implement a rehabilitation plan. It contains no exclusions which would permit the insurer or this Court to disregard daily commuting, and such an exclusion cannot be inserted. § 1-2-101, MCA, ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). I therefore conclude that commuting 84 miles daily to and from school is "travel," that the travel is required to "implement a rehabilitation plan," and that claimant is entitled to reimbursement for that travel.

The 1997 version of section 39-71-1025, MCA, which is in play in this case, is identical to the 1999 version construed in *Applegate*, thus what was said there applies here.

¶9 Benefis' reliance on ARM 24.29.1710 is misplaced. As noted by the Department of Labor and Industry in a brief to this Court, the regulation was promulgated by the Division of Workers' Compensation under earlier versions of the rehabilitation statutes. The Department acknowledges that it has no application to the 1997 and 1999 versions of the auxiliary benefits provision, and the Court agrees. If it did, it would contravene the clear language of section 39-17-1025, MCA (1997), in which case the statute would override the regulation.[(1)] "[A]n agency's rules are valid only if they are 'consistent and not in conflict with the statute.' . . . [W]hen an administrative rule adds additional requirements to a statute, the rule is invalid." *Safeway, Inc. v. Montana Petroleum Release Compensation Bd.,* 281 Mont. 189, 194-95, 931 P.2d 1327, 1330 (1997).

¶10 In the present case, claimant's residence and the college campus where she attends school are in different cities, thus she is required to commute to school. Her commute constitutes reasonable travel to implement her rehabilitation plan. She is therefore entitled to reasonable reimbursement for her commute.

II. Benefits During Semester Breaks

¶11 The payment of biweekly compensation benefits during schooling or retraining is governed by section 39-71-1006 , MCA (1997), which provides in relevant part:

> (1) A worker is eligible for rehabilitation benefits if:
>
> . . .
>
> (c) a rehabilitation plan is agreed upon by the worker and the insurer and a written copy of the plan is provided to the worker. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning date and a completion date.

> The plan must specify the cost of tuition, fees, books, and other reasonable and necessary retraining expenses required to complete the plan.
>
> (2) A disabled worker is entitled to receive biweekly compensation benefits at the worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. The rehabilitation plan must be completed within 26 weeks of the completion date specified in the plan. Rehabilitation benefits must be paid biweekly while the worker is satisfactorily progressing in the agreed-upon rehabilitation plan. Benefits under this section are not subject to the lump-sum provisions of 39-71-741.

The language governing biweekly compensation does not speak to semester breaks. The Court must therefore fall back on the more general terms of the statute to ascertain the intent of the legislature in that regard.

¶12 In construing section 39-71-1006, MCA, the Court must look at the statute as a whole and give effect to all of its provisions and its purpose. *Skinner Enterprises, Inc. v. Lewis and Clark County Bd. of Health,* 286 Mont. 256, 272, 950 P.2d 733, 742 (1997) ('In construing a statute, this Court must read and construe each statute as a whole so as to avoid an absurd result "and to give effect to the purpose of the statute."'). The terms of the section must be considered and read in "the context in which they were used by the legislature." *State v. Stanko,* 1998 MT 323, ¶ 53, 292 Mont. 214, 974 P.2d 1139.

¶13 In examining section 39-71-1006, MCA, I note initially that subsection (1)(c) requires that a rehabilitation plan "must specify a beginning date and a completion date." It does not require enumeration of specific dates of school attendance, rather it requires only that the period of schooling or retraining be designated by when it begins and when it ends. Secondly, I note that subsection (2) provides that "benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks." As with the provision for beginning and completion dates, it contemplates a continuous span of time rather than chopping the plan into discrete pieces based on actual classroom attendance. The language in the two subsections is more consistent with an interpretation of the section as providing for payment of benefits during the entire *calendar* period of retraining rather than just during actual classroom attendance. Moreover, it is consistent with the plain purpose of the provision for benefits, which is to assure claimant an income during the period of retraining.

¶14 If respondent's interpretation of the section were adopted, non-continuous, non-calendar periods would have to be used in fixing rehabilitation benefits. The interpretation would extend the maximum time for completion of a rehabilitation program and for rehabilitation benefits beyond a 104-calendar-weeks period since the semester and other breaks would not be counted as a part of the rehabilitation period. This is a "you can't have your cake and eat it too" situation for the insurer: If it insists that benefits are not payable

during semester breaks, then it cannot insist that those semester breaks count towards the 104-week limitation. Thus, a rehabilitation period could be stretched to 2 ½, 3 or even greater *calendar* period depending on the length of semester breaks and whether the claimant takes off summers. Such interpretation is contrary of the express legislative purpose to return workers to work as quickly as possible. The more reasonable interpretation of section 39-71-1006, MCA, is that it contemplates a calendar program that is continuous except for inherent and unavoidable, short-term semester or retraining breaks, and that it similarly contemplates payment of benefits during that calendar period.

¶15 I therefore conclude that claimant is entitled to rehabilitation benefits during her semester breaks so long as she continues to attend school each semester and is satisfactorily progressing towards her degree.

JUDGMENT

¶16 Claimant is entitled to rehabilitation benefits during her semester breaks so long as she continues to attend school each semester and is satisfactorily progressing towards her degree.

¶17 Claimant is entitled to reasonable auxiliary benefits to reimburse her for reasonable travel to and from school up to a maximum of $4,000.

¶18 The parties should be able to compute the actual amounts payable to claimant and the Court therefore makes no attempt to do so. The Court retains jurisdiction to compute the amounts on an ongoing basis should the parties be unable to agree on the amounts.

¶19 Claimant is entitled to her costs and shall file her memorandum of costs in accordance with Court rules.

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

¶21 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 19th day of November, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Norman L. Newhall
Mr. Leo S. Ward
Mr. Mark Cadwallader
Submitted: November 14, 2002

1. The foregoing discussion only applies to the 1997 and 1999 versions of the law and are not intended to indicate that the regulation would be void when applied to cases arising under earlier versions of the law.