IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 42

WCC No. 9804-7959

WALTER PALMER

Petitioner

vs.

HOME INSURANCE COMPANY

Respondent/Insurer for

NORTH AMERICAN VAN LINES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 46-year old laborer with sixth grade education and lower back injury was released to work in sedentary and light-duty jobs. Vocational Rehabilitation Provider identified three jobs as appropriate without further training or rehabilitation: small products assembler, keno caller, and telemarketer. Claimant agreed he could physically work as a keno caller or small products assembler if the jobs did not require much speed. His work skills, intelligence and memory, however, were limiting factors. Claimant's vocational expert raised questions about some jobs, and indicated claimant would at the least need considerable vocational assistance.

Held: Claimant failed to convince court he was PTD, but Court held that claimant's limited intelligence, skills, and abilities restrict his employability and that a trial period of employment, including special supervision and training, is necessary for him to have a reasonable prospect of employment. The rehab plan was insufficient in that it did not provide sufficient time for a realistic job search, a trial work period, or for training or assistance in new job. Further vocational assistance ordered.

Topics:

> **Benefits: Rehabilitation Benefits: Rehabilitation Plan.** 46-year old laborer with sixth grade education and lower back injury was released to work in sedentary and light-duty jobs. Vocational Rehabilitation Provider identified three jobs as appropriate without further training or rehabilitation: small products assembler,

keno caller, and telemarketer. Claimant agreed he could physically work as a keno caller or small products assembler if the jobs did not require much speed. Claimant's vocational expert raised questions about some jobs, and indicated claimant would at the least need considerable vocational assistance. Claimant failed to convince court he was PTD, but Court held that claimant's limited intelligence, skills, and abilities restrict his employability and that a trial period of employment, including special supervision and training, is necessary for him to have a reasonable prospect of employment. The rehab plan was insufficient in that it did not provide sufficient time for a realistic job search, a trial work period, or for training or assistance in new job. Further vocational assistance ordered.

Disability: Permanent Total. 46-year old laborer with sixth grade education and lower back injury was released to work in sedentary and light-duty jobs. Vocational Rehabilitation Provider identified three jobs as appropriate without further training or rehabilitation: small products assembler, keno caller, and telemarketer. Claimant agreed he could physically work as a keno caller or small products assembler if the jobs did not require much speed. Claimant's vocational expert raised questions about some jobs, and indicated claimant would at the least need considerable vocational assistance. Claimant failed to convince court he was PTD, but Court held that claimant's limited intelligence, skills, and abilities restrict his employability and that a trial period of employment, including special supervision and training, is necessary for him to have a reasonable prospect of employment. The rehab plan was insufficient in that it did not provide sufficient time for a realistic job search, a trial work period, or for training or assistance in new job. Further vocational assistance ordered.

Vocational – Return to Work: Employability. 46-year old laborer with sixth grade education and lower back injury was released to work in sedentary and light-duty jobs. Vocational Rehabilitation Provider identified three jobs as appropriate without further training or rehabilitation: small products assembler, keno caller, and telemarketer. Claimant agreed he could physically work as a keno caller or small products assembler if the jobs did not require much speed. Claimant's vocational expert raised questions about some jobs, and indicated claimant would at the least need considerable vocational assistance. Claimant failed to convince court he was PTD, but Court held that claimant's limited intelligence, skills, and abilities restrict his employability and that a trial period of employment, including special supervision and training, is necessary for him to have a reasonable prospect of employment. The rehab plan was insufficient in that it did not provide sufficient time for a realistic job search, a trial work period, or for training or assistance in new job. Further vocational assistance ordered.

Vocational – Return to Work: Retraining. 46-year old laborer with sixth grade education and lower back injury was released to work in sedentary and light-duty jobs. Vocational Rehabilitation Provider identified three jobs as appropriate without further training or rehabilitation: small products assembler, keno caller, and telemarketer. Claimant agreed he could physically work as a keno caller or small products assembler if the jobs did not require much speed. Claimant's vocational expert raised questions about some jobs, and indicated claimant would at the least need considerable vocational assistance. Claimant failed to convince court he was PTD, but Court held that claimant's limited intelligence, skills, and abilities restrict his employability and that a trial period of employment, including special supervision and training, is necessary for him to have a reasonable prospect of employment. The rehab plan was insufficient in that it did not provide sufficient time for a realistic job search, a trial work period, or for training or assistance in new job. Further vocational assistance ordered.

¶1 The trial in this matter was held on April 16, 1999, in Great Falls, Montana. Petitioner, Walter Palmer (claimant), was present and represented by Mr. Randall O. Skorheim. Respondent, Home Insurance Company (Home Insurance), was represented by Mr. G. Andrew Adamek.

¶2 Witnesses: Claimant, Michelle Rowe, and Bruce Carmichael were sworn and testified. In addition, the depositions of claimant and Michelle Rowe were submitted to the Court for its consideration.

¶3 Exhibits: Exhibits 1 through 20 were admitted without objection.

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

1. Whether the Petitioner has been permanently totally disabled since April 4, 1996, the date his temporary total benefits were converted.

2. Whether the Respondent [sic] position is unreasonable entitling the Petitioner to a 20% penalty, attorney fees, and costs.

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

FINDINGS OF FACT

¶6 Claimant is presently 46 years old. He has only a sixth grade education. He has taken the GED test but failed.

¶7 Since age 15 claimant has worked packing and loading furniture for moving companies, unloading freight cars, delivering furniture, roofing, and dishwashing. Essentially, he has been a laborer.

¶8 Sometime in 1982, 1983, or 1984, claimant went to work for North American Van Lines (North American) as a packer and laborer.

¶9 In 1984 the claimant was injured in a motorcycle accident. He injured his shoulders and suffered a head injury. Following the accident, he was off work for about a year. He then returned to work for North American as a packer and laborer.

¶10 On May 25, 1995, while working for North American, the claimant injured his lower back. At the time of his injury, North American was insured by Home Insurance, which has accepted his claim for compensation.

¶11 Since his injury, claimant has continued to suffer back pain. His pain is essentially limited to his back and is myofascial (soft tissue) in nature. (Ex. 7 at 2.) Poor posture and psychological factors may be contributing to his pain. (Exs. 6 and 7.) He has been treated with non-steroidal anti-inflammatory drugs, physical therapy, a trial of a TENS unit, and biofeedback. (Exs. 7, 8, 9.)

¶12 Claimant's treating physicians have been Jon H. Walz, Jr., D.O. and Ronald M. Peterson, M.D., of the Occupational and Sports Medicine Clinic in Great Falls.

¶13 On September 20, 1995, Dr. Walz determined that claimant had reached maximum medical improvement (MMI) and recommended functional capacity and impairment evaluations. (Ex. 7 at 52-53.)

¶14 On October 19, 1995, a functional capacity evaluation (FCE) was performed. The physical therapist performing the FCE determined that claimant was capable of light-duty work "with scattering into LIGHT-MEDIUM." (Ex. 9 at 16, underline in original.)

¶15 On October 30, 1995, Dr. Peterson reviewed the FCE and evaluated claimant. He determined that claimant could not return to his time-of-injury job and restricted claimant as follows:

> On review of the physical testing, I would suggest that Mr. Palmer limit his lifting from floor to knee to 20 pounds on an occasional basis, 10 pounds on a frequent basis. Lifting from knee to waist level should be limited to 35 pounds on an occasional basis, 20 pounds on a frequent basis. Lifting from waist to chest should be limited to 20 pounds on an occasional basis, 10 pounds on a frequent basis. Lifting from chest to overhead should be limited to 20 pounds on an occasional basis, 10 pounds on a frequent basis, with no repetitive overhead lifting or repetitive overhead activity.

> Carrying should be limited to 20 pounds with the left shoulder, 10 pounds with the right shoulder, for no more than 150 feet. Pushing should be limited to 20 pounds for no more than 150 feet. Pulling should be limited to 20 pounds for no more than 150 feet.
>
> In addition, crawling activities should be limited to a rare basis, less than once per shift. Stooping and bending should be limited to an occasional basis.
>
> These findings are based on the functional capacity evaluation results, as well as Mr. Palmer's response to physical therapy and what has been observed in clinic.

(Ex. 7 at 49.)

¶16 The insurer does not dispute Dr. Peterson's opinions or limitations.

¶17 Claimant has not worked since his injury and the issue presented by way of his petition is whether he is permanently totally disabled.

¶18 Home Insurance employed Crawford & Company (Crawford) to provide vocational services. D. Bruce Carmichael (Carmichael), a Certified Vocational Consultant, provided an Initial Employability Assessment on January 26, 1996. (Ex. 11 at 69-72.) He identified three different jobs as appropriate for and accessible by claimant: (1) Small products assembler; (2) keno caller; and (3) telemarketer. On March 7, 1996, Carmichael performed a more comprehensive employability and wage loss analysis. (*Id.* at 46.) He identified the same three jobs as ones in which claimant, without further training or rehabilitation, could be directly placed. (*Id.* at 48.)

¶19 On July 3, 1996, Carmichael prepared a Vocational Rehabilitation Plan. The plan called for eight weeks of rehabilitation benefits in conjunction with vocational services to assist claimant in finding a job. (Ex. 20.) While the plan did not expressly specify the jobs which claimant was to pursue, the prior vocational reports unmistakably show that the plan contemplated placement of claimant as a small products assembler, a keno caller, or telemarketer.

¶20 Carmichael forwarded the plan to claimant's attorney, Mr. Randall O. Skorheim (Skorheim). On July 16, 1996, Carmichael discussed the plan with Skorheim. Skorheim told Carmichael that claimant's intelligence had not been adequately evaluated and that he had a pending Social Security Disability claim. He advised Carmichael that claimant would not agree to the proposed rehabilitation plan. Home Insurance then instructed Crawford to close its file.

¶21 Home Insurance terminated claimant's temporary total disability (TTD) benefits, presumably after Dr. Walz found claimant at MMI and the rehabilitation plan was submitted to claimant. The date of termination is not at issue. Claimant requests that permanent total disability (PTD) benefits be restored retroactively to the date his TTD benefits were

terminated. The Court assumes that by not raising an issue concerning the date, the date is not at issue and the parties can agree on the date without Court intervention.

¶22 Thereafter, nothing transpired until April 15, 1998, when the claimant filed his present petition. An amended petition was filed December 7, 1998, and the matter was thereafter tried on April 16, 1999. An April 19, 1997 report of psychologist Stephen C. Wagner, Ph.D., indicates that during the interim the claimant pursued social security disability benefits. The Court is not apprized of the outcome of that proceeding and the outcome is irrelevant in any event.

¶23 Claimant asserts that he is permanently totally disabled. The Court must determine whether he has a reasonable prospect of physically performing regular employment on a recurrent basis. § 39-71-116(19), MCA. In considering claimant's employability, the Court will consider claimant's age, physical condition, education, work history, skills, and abilities.

¶24 Initially, claimant's physical condition does not preclude him from all work. He has been released to work in sedentary and light-duty jobs. At trial, claimant agreed that he is physically capable of working as a keno caller and small products assembler if those jobs do not require much speed.

¶25 Claimant's work history is a limiting factor. He has worked as a laborer all his life. Thus, he has developed few skills which would qualify him for other work. On the other hand, the jobs identified by the rehabilitation plan require few skills or abilities.

¶26 Claimant's age -- 46 years old -- is not a positive factor but he is not so old in present society and economic conditions as to compel a conclusion that he cannot learn other non-laboring jobs, or that employers will disqualify him from consideration.

¶27 Claimant's intelligence and memory are limiting factors which require serious and careful consideration in determining his ability to work.

¶28 Dr. Stephen C. Wagner, the psychologist who performed a social security evaluation on April 19, 1997, tested claimant. On the Wechsler Adult Intelligence Scale, claimant had a verbal IQ of 71, a performance IQ of 83, and a full scale IQ score of 76, placing claimant "in the middle of the borderline range of intellectual functioning." (Ex. 6 at 4.) Testing also found claimant's memory somewhat impaired, however, Dr. Wagner noted that had claimant "really made an effort, he could have done somewhat better." (*Id.* at 5.) Academically, claimant tested as follows:

Subject	Grade Level
Reading	6.8
Spelling	2.6

Arithmetic 4.9

(*Id*. at 6.) Commenting on the test results, Dr. Wagner observed:

> Walters performance on the WRAT-Ill would suggest that he is marginally literate at best. His reading ability would enable him to read many materials intended for the general consumption, although he would have a difficult time understanding some of them, because of his limited vocabulary. His spelling ability is extremely weak, and it is felt that he would [have] a difficult time communicating through even very simple correspondence.
>
> His math ability is also somewhat impaired. He had a difficult time on anything beyond column additions/subtractions. Even there his error rate was approximately ten to 15 percent without the benefit of a calculator. It is felt that Walter has the necessary math skills to manage his own funds, provided he uses a calculator to do most of his calculations in order to reduce his error rate.
>
> MENTAL STATUS - SUMMARY AND CONCLUSIONS:
>
> Based on the results of this evaluation, Walter is felt to be a man of borderline intellectual ability. While his memory ability tested out somewhat lower using the WMS-R, it is not felt that Walter really put forth an optimal effort during that part of testing.

(*Id*. at 6.)

¶29 Even with claimant's limited mental abilities, Dr. Wagner concluded that he is capable of returning to competitive, non-laboring employment:

> This examiner is of the opinion that Mr. Palmer should be capable of some type of competitive employment, although he may be unable to return to the type of physically demanding work he had once done. In completing the Medical Assessment of Ability to do Work-Related Activities (mental) one finds good ability to follow work rules and function independently. He would be fair with regard to relating to co-workers, dealing with the public, using judgement with the public, interacting with supervisors, dealing with work stresses, and maintaining attention and concentration.

(*Id*. at 7.)

¶30 Claimant was also examined by Robert A. Velin, Ph.D., who is both a clinical psychologist and a neuropsychologist. As did Dr. Wagner, Dr. Velin found claimant's intelligence and ability to be in the borderline range. (Ex. 17 at 5-6.) However, he also concluded that claimant is capable of learning and performing new jobs:

SUMMARY OF NEUROLOGICAL IMPLICATIONS: The current data do suggest this gentleman has some neurocognitive limitations which are very likely related to his obvious developmental disorder and his significant closed head injury. They have implications for his ability to function in many everyday tasks and activities in the occupational realm, but do not in and of themselves disqualify him from many employment possibilities. The fact that Executive Functions are quite intact strongly indicates that he should be able to learn new compensatory strategies in a variety of environments. Furthermore, although learning is somewhat limited in terms of initial acquisition, with increased repetition, he would be able to learn many basic routines, which is consistent with his employment history while at North American Vanlines. Motor functions in his dominant hand are sufficiently decreased that tasks requiring very fine motor coordination may be difficult, but certainly real--world trials are warranted in this area before excluding him from any occupational environment requiring these abilities.

Given his strongly intact Executive Functions, one would be well advised to use these as the primary strengths for retraining. He could likely do well in relatively simple retail settings where the vast majority of the work is done via computer assisted devises. He should be more than sufficient in providing change subsequent to purchases, that initial calculations are completed by a computer system or other calculation-aiding device.

Importantly, Mr. Palmers overall clinical condition is likely to be seriously compromised if he is blocked from the employment field, as data within the chronic pain literature clearly indicate that return to work as soon as possible is the most beneficial course of action.

In short, although this gentleman does have some neurocognitive deficits, these do not, in and of themselves, exclude him from the possibility of employment in the jobs that have been listed as possible options. All testing to date very likely underestimates his full set of abilities secondary to varying effort. Certainly his history is suggestive of attempts to modify his general background; as demonstrated by numerous inconsistencies. Additionally, motor testing should be reexamined as with increased exposure he very likely will gain increased efficiency, particularly in the realm of fine motor control. In the end, Mr. Palmer is functioning very similarly to most other individuals with six years of education. Although it is increasingly difficult to find employment for such individuals in our society, such positions due [sic] exist even if at the lower end of the pay scale. The fact that he was able to function in a single employment position catagory [sic] as long as he did is heartening, and provided orthopedic issues do not interfere, his cognitive capacity is sufficient for retraining in low-level positions.

> It should also be noted that standardized testing is likely to underestimate actual ability, as most of his knowledge up to this point in time has been obtained via on the job and via direct experience. Any efforts to retrain or place him in a new occupational environment should utilize this same strategy. He will likely not do well in situations where **he** has to continually learn new detailed verbal information, but he is able to conceptualize and shift to new problems solving strategies quite effectively and this speaks positively to his ability to learn from interactive experiences.

(*Id*. at 7-8.)

¶31 On February 14, 1996, Dr. Peterson medically approved production assembler, telemarketer, and keno caller as jobs claimant is physically capable of performing. (Ex. 11 at 28-29.) On November 24, 1998, Dr. Peterson approved six jobs. He unconditionally approved telemarketer, keno caller, production inspector, and courtesy driver. He also approved production machine operator so long as claimant is not required to engage in overhead activity on a repetitive basis and fast food worker so long as claimant does not sweep, mop, or engage in twisting or overhead work. (*Id*. at 30.)

¶32 Carmichael testified that claimant is capable of performing the jobs approved by Dr. Peterson and that keno caller, production inspector, production machine operator, and production assembler are available in Montana.

¶33 According to Carmichael, the four jobs are repetitive in nature, involve a limited number of tasks, and require no prior experience or training. For production inspector, he gave as an example a position with Jan-Bar, Incorporated, a company in Great Falls which manufactures baseball caps. Production inspectors for the company inspect caps to assure that buttons are sewn on properly, that the panels of the cap are fairly equal, and that there are no long strings dangling from the cap. Jan-Bar has three inspectors. With turnover, there is one opening a year. Carmichael further testified that there are 21 existing positions in Great Falls and 276 statewide for production machine operators and production assemblers. For keno caller, he identified ten full-time and seven part-time positions just in Great Falls, with one to two openings a year.

¶34 Michelle Rowe (Rowe), also a certified vocational consultant, testified on behalf of claimant. She agreed that physical restrictions imposed by claimant's treating physician permit him to perform sedentary and light labor. Her hesitation to approve the positions approved by Dr. Peterson and Carmichael was based on other factors.

¶35 Rowe performed limited testing. Her testing showed claimant reading at a fourth grade level, spelling at a third grade level, and computing arithmetic at a fourth grade level. He ranked in the lowest 5% in performing number comparisons and the lowest 1% in performing name comparisons.

¶36 Rowe reviewed the job analysis for keno caller, telemarketer, and small products assembler.

¶37 She had three concerns with keno caller. First, she noted claimant's alcohol propensities. Second, she noted that claimant had a felony record and therefore might be tempted to steal if dealing with money. Third, she said that keno callers may have to perform other duties, specifically they might have to fill in for a cashier and carry money bags, which might weigh up to 25 pounds. While her concerns are legitimate, I am unpersuaded that they are significant obstacles to claimant obtaining employment as a keno caller. Claimant denies being an alcoholic or having a drinking problem. Medical notes regarding the subject indicate that any problem he may have had were many years ago. Moreover, while working it is unlikely that he would have an opportunity to drink. As to his felony conviction, it was for theft approximately 20 years ago. In light of his nearly 20-year history of good behavior, and the lack of affirmative evidence that his conviction is disqualifying, I am unpersuaded that his conviction is disqualifying, that it would significantly impair his ability to obtain employment, or that he would reoffend. Finally, while Carmichael conceded that he had not specifically explored the possibility that keno callers might be called upon to perform other duties, Rowe failed to persuade me that keno callers are routinely required to perform duties which claimant is incapable of performing. Claimant has difficulty grasping and lifting with his right hand, but his physical restrictions do no preclude him from lifting up to 35 pounds with his left hand, or both hands, up to waist level. (Ex. 7 at 49.) After considering all of the evidence, I find that claimant is able and qualified to work as a keno caller and that he has a reasonable opportunity for employment as a keno caller.

¶38 Rowe testified that the telemarketer job identified by Carmichael has changed significantly since 1995 and now requires computer skills and high productivity. Her testimony as to this position was persuasive. Moreover, after listening to claimant speak during trial, I am persuaded that he would have difficulty expressing himself. Having listened to too many telemarketing calls, I find it improbable that claimant could perform that job successfully.

¶39 Rowe also testified that delivery driver is not an appropriate job. The Court agrees. Claimant has not had a driver's license since 1985. The insurer failed to offer evidence that claimant is able to obtain a driver's license or drive on a regular basis.

¶40 Rowe questioned but did not rule out claimant working as a production inspector. She contacted Jan-Bar, the firm identified by Carmichael. She agreed that claimant is physically capable of performing the work but based on other factors (intelligence, education, and vocational skills), she opined that he would need a "trial" period of work to determine if in fact he can perform the job on a regular basis.

¶41 With respect to production machine operator, Rowe testified that such positions are typically medium-labor positions. However, she conceded that the position identified by Carmichael was a light position and said that she was unable to contact the particular employer.

¶42 Claimant has not been employed, nor has he sought work, since his industrial injury. In his pretrial deposition he testified that he was unwilling to try any jobs *not* involving manual labor. (Palmer Dep. at 98.) At trial he testified that he would like to return to work as a laborer but is willing to try any job. He agreed that he can physically perform the work of a keno caller and a small products assembler if those jobs do not require "much speed."

¶43 After considering all of the evidence, I am unpersuaded that claimant was or is permanently totally disabled.

¶44 On the other hand, I find that claimant's limited intelligence, skills, and abilities restrict his employability and that a trial period of employment, perhaps including special supervision and training, is necessary for him to have a reasonable prospect of employment. It may also take longer than usual to place claimant in a job. The rehabilitation plan prepared by Carmichael is therefore insufficient in that it does not provide sufficient time for a realistic job search, for a trial work period, or for training or assistance in a new job.

¶45 Home Insurance did not act unreasonably in refusing claimant's request for PTD benefits.

CONCLUSIONS OF LAW

¶46 The claimant's industrial injury, which occurred on May 25, 1995, is governed by the 1993 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶47 Claimant seeks PTD benefits from the date his temporary total disability benefits were terminated. His request is governed by sections 39-71-702 and -116(19), MCA (1993), which govern the benefits payable. The latter section defines PTD as follows:

> (19) "Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

¶48 The evidence concerning claimant's physical capacity shows that he can return to work in sedentary and light positions. Six jobs have been identified as within his physical

limitations. Thus, the issue the Court must address is whether the claimant has a "reasonable prospect of" regular employment in any of the identified positions.

¶49 Claimant bears the burden of proving, by a preponderance of evidence, that he is entitled to benefits. *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). He must persuade the Court that, even though he is physically able to perform the six jobs identified by the insurer's vocational consultant, he nonetheless has no reasonable prospect of obtaining and performing those jobs.

¶50 As set forth in the findings of fact, I am persuaded that claimant, with adequate vocational assistance, has a reasonable prospect of obtaining and keeping regular employment. The proof of the pudding, however, will be finding him a job and training him to do the job. Dr. Velin and Rowe provide persuasive evidence that claimant needs more vocational assistance than provided in the rehabilitation plan proposed by Carmichael on July 10, 1996. This Court has previously held that rehabilitation benefits, § 39-71-1011, MCA (1993), were not intended as a mere "theoretical exercise." *Leastman v. Liberty Mutual Fire Ins.,* 1999 MTWCC 2. Claimants are individuals, not abstractions. A rehabilitation plan must take into account their individual abilities and restrictions. It must determine, on a realistic basis, whether they are capable of working and, if so, in what jobs. A plan must provide rehabilitation services tailored to the individual.

¶51 The rehabilitation plan in this case was prepared and proffered to claimant in 1996. At the time of the proffer, claimant rejected it because he was pursuing social security benefits and his attorney questioned his intellectual ability to perform non-laboring jobs. While I have determined that the 1996 plan is inadequate, it is claimant's burden to show that he has no reasonable prospect of physically performing regular employment irrespective of the vocational assistance offered. He has failed to do so and has not offered or sought approval for an alternative plan.

¶52 While the specific issue presented in this case is claimant's entitlement to PTD benefits, I find that it is within the broader issues raised by the pleadings to grant claimant relief with respect to the proposed rehabilitation plan. Both the claimant and insurer have put the rehabilitation plan at issue.

¶53 Claimant has established that the 1996 rehabilitation plan was inadequate because it does not provide a long enough period for obtaining employment and fails to provide sufficient assistance in securing and performing a new job. While claimant has not provided an alternative plan, *see Reeves v. Liberty Mutual Fire Ins.,* 275 Mont. 152, 911 P.2d 839 (1996), *Gates v. Liberty Northwest Ins. Co.*, Findings of Fact, Conclusions of Law and Judgment (12/29/95), it is clear that any plan must provide for longer time for claimant to seek work, for more intensive vocational assistance in finding a job, and for training or on-the-job assistance if needed. The Court cannot and should not structure a specific plan but

it can and does remand the matter to the vocational provider to develop a plan in accordance with this decision, subject to claimant's agreement and a right to petition the Court once more should the parties fail to agree on a reasonable plan.

¶54 In light of claimant's reluctance, as expressed in his deposition, to work in a non-laboring job, the Court admonishes him that he has an obligation to seek and obtain employment irrespective of whether the employment involves labor.

¶55 Claimant is not entitled to attorney fees or a penalty since he has failed to persuade the Court that the insurer acted unreasonably. §§ 39-71-611, -612, 2907, MCA (1993).

¶56 Claimant is entitled to his costs since he has prevailed with respect to a substantial number of issues raised by both parties.

JUDGMENT

¶57 1. The claimant is not presently entitled to PTD benefits. However, he is entitled to rehabilitation benefits appropriate to his situation. The insurer's rehabilitation plan is insufficient and its vocational provider shall develop a more appropriate plan in accordance with the Court's findings of fact and conclusions of law in this case.

¶58 2. Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

¶59 3. Claimant is not entitled to attorney's fees or a penalty.

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

¶61 4. 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 21st day of July, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Randall O. Skorheim
Mr. G. Andrew Adamek
Date Submitted: April 16, 1999