IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 49

WCC No. 2000-0221

VICTORIA PETERSEN

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

DILLARD'S DEPARTMENT STORES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant suffers from painful plantar faciitis of both feet. Her treating physician attributed 70% of her condition to her work as a hairdresser and the insurer accepted liability under the Occupational Disease Act. Claimant is precluded from returning to work as a hair dresser and a vocational consultant hired by the insurer prepared a rehabilitation plan calling for claimant to take computer courses which would lead to employment as a clerical office worker. The claimant rejected the plan and demanded 104 weeks of rehabilitation benefits so she could embark on a two-year educational program; however, at trial, she presented neither a rehabilitation plan nor any supporting evidence for one. She also demanded $10,000 pursuant to section 39-72-405, MCA (1997). At trial the insurer agreed to pay her $7,000 but she seeks the additional $3,000.

Held: The claimant is not entitled to rehabilitation benefits as she does not have a plan and there is unrebutted vocational evidence that a two-year program is not appropriate. She is also not entitled to an additional $3,000 under section 39-72-405, MCA, since she failed to provide persuasive evidence of a wage loss and even if there were a wage loss it would be short term and not enough to justify any additional award.

Topics:

> **Benefits: Rehabilitation Benefits.** Claimant is not entitled to rehabilitation benefits where she has rejected a plan proposed by the insurer's vocational consultant and has not presented any alternative plan. § 39-71-1006, MCA (1997).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-1006 (1997). Claimant is not entitled to rehabilitation benefits where she has rejected a plan proposed by the insurer's vocational consultant and has not presented any alternative plan. § 39-71-1006, MCA (1997).

Occupational Disease: Indemnity (39-72-405) Awards. Proof of wage loss is a prerequisite to any award under section 39-72-405, MCA (1997).

¶1 The trial in this matter was held in Missoula, Montana, on January 19, 2001. The parties requested and were provided an opportunity to file post-trial memoranda addressing wage loss and apportionment issues. The final memorandum was submitted on March 30, 2001, and the matter was then deemed submitted.

¶2 Exhibits: Exhibits 1 through 8, 10 and 11 were received into evidence without objection. There is no exhibit 9.

¶3 Witnesses and Depositions: Claimant was the only witness testifying at trial. In addition, the parties submitted the depositions of claimant and Dr. Glen J. Jarrett for the Court's consideration.

¶4 Issues Presented: The issues, as set forth in the Pretrial Order, are: "Whether Petitioner is entitled to permanent partial disability benefits and rehabilitation benefits."

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

FINDINGS OF FACT

¶6 Claimant is 40 years old. She completed the 9th grade but in 1997 obtained a GED. She has worked most of her life as a restaurant cashier, waitress, bartender, and cocktail waitress. (Ex. 5 at 50-51.)

¶7 In December 1998, claimant completed cosmetology school and became licensed as a hair stylist, designer, and cosmetologist. At about the same time as her graduation, she went to work in the Hair and Nail Salon at Dillard's Department Store in Missoula. She was initially hired as a receptionist. In that job she answered the telephone and greeted customers. Then, on January 6, 1999, she was hired as a hairdresser at a wage of $7 per hour.

¶8 Dillard's had a dress code for its hairdressers. The code required claimant to "wear coordinated suits or dresses" and "shoes which are traditionally thought of as dress shoes." (Ex. 10 at 1.) She was told by her supervisor that dress shoes meant high heels, therefore claimant wore high heels while working for Dillard's.

¶9 By May 1999, claimant had developed plantar faciitis in both feet, making it difficult for her to stand and walk. She was initially treated for her condition by Dr. Glen J. Jarrett, who is an orthopedic surgeon specializing in foot and ankle surgery. (Ex. 1 at 2.) Dr. Jarrett has continued to follow claimant and ultimately opined that 70% of the claimant's condition is attributable to her work at Dillard's, while 30% is attributable to non-occupational factors. (*Id*. at 18.) He opined that the claimant's wearing of high heeled shoes was a significant contributor to her condition. (*Id*.) His opinion, which is unrebutted, is persuasive and I therefore find that claimant's work at Dillard's is 70% responsible for her plantar faciitis.

¶10 At the time claimant developed plantar faciitis, Dillard's was insured by Liberty Mutual Fire Insurance Company (Liberty). Liberty accepted liability for the condition as an occupational disease.

¶11 Claimant has been treated conservatively with rest, a cast and splints, and injections. (Ex. 1.) On June 7, 2000, Dr. Jarrett concluded that she had reached maximum medical improvement (MMI). (*Id*. at 16.) However, claimant continues to have difficulty with her feet and may ultimately need surgery. (*Id*. at 19.)

¶12 Dr. Jarrett took claimant off work in May 1999, and has never approved her return to her time-of-injury job. On December 22, 1999, Dr. Jarrett specifically disapproved a job description for hairdresser at Dillard's.

¶13 In August 1999, claimant sought vocational rehabilitation services through the Montana Vocational Rehabilitation program of the Montana Department of Public Health and Human Services (DPHHS) (Ex. 6 at 3.) She expressed an interest in clerical work. (*Id*.) With the assistance of a vocational counselor she developed a plan to become an office worker. (*Id*. at 9-11.) The plan was signed March 20, 2000, and called for her to take basic computer application courses and obtain on-the-job training and job placement assistance. (*Id*.) Meanwhile, in January 2000, claimant began a computer literacy course. *(Id*. at 18.) She completed the course on February 10, 2000. (*Id*.)

¶14 At the same time claimant was receiving guidance and assistance from the DPHHS program, Liberty hired its own vocational consultant to evaluate claimant. (Ex. 5 at 2.) Kathy Kleinkopf (Kleinkopf), a Certified Rehabilitation Counselor, was assigned the case. She initially met with claimant on November 18, 1999.

¶15 Kleinkopf tested claimant and reviewed her work history. She identified five jobs she felt were appropriate for claimant and prepared job analyses for each of them. The jobs were (1) hairdresser (claimant's time-of-injury job), (2) nail technician (for which claimant is licensed), (3) an apparel sewing machine operator, (4) inside salesperson of beauty and barber supplies, and (5) desk clerk. (Ex. 5 at 6-45.) The job analyses were all submitted to Dr. Jarrett, who approved only the sewing machine operator and the nail technician. (*Id*. at

13, 21, 28, 39, 44.) For the latter position he noted that she should have a padded mat when standing and a high stool for sitting. (*Id*. at 13.)

¶16 Kleinkopf's research in early 2000 disclosed that Dillard's had recently hired two nail technicians at an entry wage of $7.00 per hour, the same wage claimant had received as a hairdresser. (Ex. 5 at 51.) She suggested that claimant submit an application for a future opening. (*Id*.) She also reported that Sun Mountain Sports (Sun Sports) had hired six apparel sewing machine operators the previous year at an entry wage of $6.25 per hour. (*Id*. at 52.) She ascertained that the statewide average wage was $5.58 for nail technicians and $7.13 for apparel sewing machine operators and that the jobs existed in significant numbers, 2,630 and 943 statewide positions respectively. (*Id*. at 76.)

¶17 In April 2000, Kleinkopf learned that claimant had completed an introductory computer literacy course and intended to take the additional computer courses outlined in the March 20, 2000, DPHHS vocational plan. (*Id*. at 55.) Kleinkopf found that claimant's goal of becoming a clerical worker was consistent with her aptitudes and prepared two more job analyses for clerical jobs she might be able to do upon completion of her course work. (*Id*. at 56.) The jobs were receptionist and computer operator I. Dr. Jarrett approved the latter job unconditionally and approved the receptionist position with a note indicating, "May need to accommodate her with as much sit time as possible." (*Id*. at 64, 72.)

¶18 After receiving Dr. Jarrett's approvals, Kleinkopf prepared a vocational plan calling for claimant to complete "basic course work in computer literacy, keyboarding, and beginning word processing" and then seek employment as a receptionist, entry level computer operator, general office clerk, or file clerk. (*Id*. at 82.) She submitted the plan to the claimant, claimant's attorney, and Liberty's claims adjuster. Claimant's attorney responded on her behalf, rejecting the plan and demanding that benefits be provided "for a two-year retraining program in a nonspecified curriculum referenced as 'computer skills classes.'" (*Id*. at 86.) Noting claimant's limited skills and test scores (7th grade level language and 8th grade mathematics skills, low abstract and mechanical reasoning aptitude scores, but above average clerical speed and accuracy), Kleinkopf wrote the insurer about the proposal, saying:

> . . . Ms. Petersen is not an appropriate candidate for two-year training. It appears that such a program would simply set her up for failure in a formal academic setting in which she would most likely struggle and have difficulty in competing successfully.

(*Id*. at 87.)

¶19 At trial claimant offered no rebuttal to Kleinkopf's opinion, no alternative vocational plan whatsoever, and, indeed, no vocational evidence of her own. When asked at

deposition as to the specifics of her vocational plan, she could not offer any. (Petersen Dep. at 23.)

¶20 Claimant did not follow through with the DPHHS plan for retraining and did not complete the recommended computer courses. Instead, on November 7, 2000, she went back to work on her own as a nail technician, renting a booth at the One Stop Nail Shop (One Stop) in Missoula for $110 a week. At the time of trial she was still working at One Stop. After paying for her rent and supplies, her earnings were negligible. (Ex. 11.)

¶21 Claimant's work at the One Stop is not a reliable indicator of what she can earn in the open labor market. She did not seek employment at Dillard's, which pays $7 an hour, or any other regular employment, choosing instead to try to establish her own nail business. While she apparently believed that she could make more working on her own, she did not take into consideration the expense of establishing that business and the time it takes to build up a clientele. I therefore find that her meager earnings are not an accurate indicator of what she can earn in the open labor market, and instead rely upon the earnings information provided by Kleinkopf.

¶22 That information shows that claimant is employable both as a nail technician and as an apparel sewing machine operator. The latter position pays $6.25 entry level wage at Sun Mountain Sports in Missoula and pays up to $7.50 an hour for more experienced workers. (Ex. 5 at 52, 81.) As to the nail technician job, Kleinkopf identified 13 jobs at 4 different establishments in Missoula, with 6 openings (apparently during the prior year) and entry wages between $280.00 ($7.00/hour) and $600.00 ($15.00/hour) per week. She further notes that nail technicians are required to pay booth rental. However, Kleinkopf's prior contact with Dillard's, indicates that if hired claimant would be on salary of $7.00 an hour for 6 months "during which time she could establish a regular clientele" and that thereafter she could expect to make $8.00 to $10.00 per hour. (*Id*. at 52.) Lacking any vocational evidence whatsoever from claimant concerning either of the positions, I am unpersuaded that claimant suffered a wage loss. Moreover, even if she did, any wage loss would be short, not long-term. The information furnished for nail technicians indicates that earnings increase as they establish a regular clientele. The information for Sun Mountain indicates that as sewing machine operators gain experience their wages increase to and exceed the $7.00 an hour claimant was earning at the time of her occupational disease.

CONCLUSIONS OF LAW

¶23 The claimant's occupational disease is governed by the 1997 version of the Occupational Disease Act (ODA) since that was the version in effect at the time her disease began and was diagnosed. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶24 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).

¶25 Even though claimant's entitlement falls under the ODA, she is eligible for the vocational rehabilitation benefits available under the Workers' Compensation Act. *Henry v. State Compensation Ins. Fund,* 1999 MT 126, 294 Mont. 448, 982 P.2d 456. Therefore, section 39-71-1006, MCA (1997), governs. It provides in relevant part:

> **39-71-1006. Rehabilitation benefits.** (1) A worker is eligible for rehabilitation benefits if:
>
> (a) (i) the worker meets the definition of a disabled worker as provided in 39-71-1011; or
>
> (ii) the worker has, as a result of the work-related injury, a whole person impairment rating of 15% or greater, as established by objective medical findings, and has no actual wage loss;
>
> (b) a rehabilitation provider, as designated by the insurer, certifies that the worker has reasonable vocational goals and reasonable reemployment opportunity. If eligible because of an impairment rating of 15% or more, with rehabilitation the worker will have a reasonable increase in the worker's wage compared to the wage that the worker received at the time of injury. If eligible because of a wage loss, the worker will have a reasonable reduction in the worker's actual wage loss with rehabilitation.
>
> (**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. [Emphasis added.]

¶26 As set forth in subsection (c), the statute requires a plan that is agreed to by the claimant and insurer. Where the claimant and insurer disagree or cannot agree on a plan, the disagreement becomes a dispute within the jurisdiction of the Workers' Compensation Court, which will then determine whether the plan proposed by claimant is reasonable. *Leastman v. Liberty Mutual Fire Ins. Co.,* 1999 MTWCC 2 at ¶ 62 (citing §§ 39-71-2401(1), -2905, MCA); and see *Reeves v. Liberty Mutual Ins. Co.,* 275 Mont. 152, 161, 911 P.2d 839, 844 (Nelson, J., specially concurring).

¶27 In this case, claimant has failed not only to present vocational evidence in support of a proposed plan, she has presented no plan at all. The Court fails to understand how claimant's attorney could allow her to reject the plan proposed by both the DPHHS counselor and Kathy Kleinkopf and then fail to offer even the most rudimentary plan in support of his assertion that the Court should award 104 weeks of benefits. The request for rehabilitation benefits is **denied**.

¶28 Claimant further requests that she be awarded $10,000 under section 39-72-405, MCA (1997). The section provides in relevant part:

> **39-72-405. General limitations on payment of compensation.**
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> . . . .
>
> (2) When an employee in employment on or after January 1, 1959, because the employee has an occupational disease incurred in and caused by the employment that is not yet disabling, is discharged or transferred from the employment in which the employee is engaged or when the employee ceases employment and it is in fact, as determined by the medical panel, inadvisable for the employee on account of a nondisabling occupational disease to continue in employment and the employee suffers wage loss by reason of the discharge, transfer, or cessation, compensation may be paid, not exceeding $10,000, by an agreement between the insurer and the claimant. If the parties fail to reach an agreement, the mediation procedures in Title 39, chapter 71, part 24, must be followed.

¶29 At trial Liberty agreed to pay $7,000 without prejudice to claimant arguing for $10,000, but also without conceding that claimant has a wage loss. At the parties' requests, the Court permitted post-trial briefing as to whether it can and should order payment of an additional $3,000. In her post-trial brief claimant argues two things: first, that the Court wrongly decided *Baumgartner v. Liberty Northwest Ins. Co.,* WCC No. 9611-7642 (April 14, 1997) and, second, that apportionment is unconstitutional in any event. Liberty responds that claimant failed to establish a wage loss and is therefore not entitled to anything more than what it voluntarily agreed to pay. Liberty's argument is persuasive and dispositive, therefore I do not reach claimant's arguments.

¶30 Section 39-72-405, MCA (1997), which is quoted in paragraph 27 requires proof of wage loss: Claimant has failed to carry her burden of persuasion as to wage loss. Moreover, even if I were persuaded that there was a wage loss, I have found that such loss would be short term. In light of that fact, even if I were to make an award without consideration of non-occupational factors it would not be more than $7,000.

¶31 Claimant is entitled to costs but only with respect to the section 39-72-405, MCA, issue. That matter did go to trial and at the close of trial the insurer agreed to pay the $7,000, so I deem her as prevailing on that issue.

JUDGMENT

¶32 Pursuant to Liberty's agreement, made in open Court at the close of trial, Liberty shall pay claimant $7,000 if it has not already done so. The claimant is not entitled to any additional amount under section 39-72-405, MCA, or to rehabilitation benefits.

¶33 Claimant is entitled to costs with respect to her claim under section 39-72-405, MCA (1997), only. She shall submit her memorandum of costs in accordance with the Court's rules.

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

¶35 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 28th day of August, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Howard Toole
Mr. Larry W. Jones
Submitted: March 30, 2001