IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 34

WCC No. 2002-0494

LENNIE J. THOMPSON

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

ALPINE LOG HOMES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

APPEALED 7/11/02

Summary: Claimant entered into a rehabilitation plan and finished a BA degree. He then sought additional vocational benefits, along with TTD benefits during vacation periods he was not in school.

Held: Claimant is bound by the vocational plan. Further, he has already received the maximum amount allowed for travel to and from school and has failed to show that further education is in his best interest. He has, however, shown that he continued to be TTD until December 26, 1999, and is therefore entitled to further TTD benefits during those periods, up to that date, he was not receiving rehabilitation benefits.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-610, MCA, (1999). An insurer is not entitled to reimbursement for 49 days of interim benefits paid pursuant to section 39-71-610, MCA, where the claimant proves that he was entitled to the benefits on the merits.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-1016(18), MCA, (1999). Testing and medical evaluation is a part of medical treatment, therefore claimant has not reached MMI where further diagnostic tests and evaluation are deemed medically reasonable and necessary

even though it may subsequently be determined that no further treatment would benefit claimant or where further treatment is identified and claimant refuses the treatment. Where treatment is recommended and refused, or not undertaken within a reasonable time, then MMI is reached at that time.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-1025, MCA, (1999). Travel to and from school in connection with a rehabilitation plan are encompassed within auxiliary benefits authorized in section 39-71-1025, MCA (1999).

Benefits: Interim (39-71-610) Benefits. An insurer is not entitled to reimbursement for 49 days of interim benefits paid pursuant to section 39-71-610, MCA, where the claimant proves that he was entitled on the merits to the benefits.

Benefits: Rehabilitation Benefits: Rehabilitation Plan. Where a claimant and the insurer agree to a rehabilitation plan, the parties are bound by the plan. Claimant is not entitled to rehabilitation benefits not specified in the plan.

Benefits: Rehabilitation Benefits: Rehabilitation Plan: Duress. While duress may be a basis for annulling a rehabilitation plan, the claimant must show that the insurer or rehabilitation provider took unfair advantage of claimant. Where claimant was assertive in his contacts with the rehabilitation provider and decided on his own rehabilitation plan, there was no duress and claimant is bound by the plan.

Benefits: Rehabilitation Benefits: Travel. Travel to and from school in connection with a rehabilitation plan are encompassed within auxiliary benefits authorized in section 39-71-1025, MCA (1999).

Benefits: Temporary Total Benefits. Where a claimant is participating in a rehabilitation plan and going to school, and he has not reached MMI with respect to his industrial accident, he is entitled to TTD benefits during those vacation periods he does not receive rehabilitation benefits.

Cases Discussed: *Homme v. Rauenhorst Corp.,* 227 Mont. 495, 740 P.2d 1110 (1987). The holding in *Homme* that a claimant in school has voluntarily removed himself from the labor market, thus is not suffering a wage loss on account of his injury, and is therefore not entitled to TTD benefits, was in the context of a claimant who has reached MMI and has a labor market. The holding is inapplicable to a claimant who has not reached MMI.

Cases Discussed: *Hofferber v. Plago Mining, Inc.,* 848 P.2d 468, 257 Mont. 91 (1993). The holding in *Hofferber* that a claimant in school has voluntarily removed himself from the labor market, thus is not suffering a wage loss on account of his injury, and is therefore not entitled to TTD benefits, was in the context of a claimant

who has reached MMI and has a labor market. The holding is inapplicable to a claimant who has not reached MMI.

Maximum Medical Improvement: When Reached. Testing and medical evaluation is a part of medical treatment, therefore claimant has not reached MMI where further diagnostic tests and evaluation are deemed medically reasonable and necessary even though it may subsequently be determined that no further treatment would benefit claimant or where further treatment is identified and claimant refuses the treatment. Where treatment is recommended and refused, or not undertaken within a reasonable time, then MMI is reached at that time.

¶1 The trial in this matter was held on February 28, 2002, in Missoula, Montana. Petitioner, Lennie J. Thompson (claimant), was present and represented himself. Respondent, Liberty Northwest Insurance Corporation (Liberty), was represented by Mr. Larry W. Jones. The parties filed post-trial briefs and the matter was deemed submitted for decision on March 18, 2002.

¶2 Exhibits: Exhibits 1 through 4, 6 through 10, 12, 14, 15, 17, 19, and 21 through 33 were admitted without objection. Exhibits 5, 11, 13, 16, 18, and 20 were admitted over relevancy objections with the proviso that if ultimately determined not to be relevant they would have no role in the decision. After further review, I find Exhibits 5, 13, 16, 18 and 20 unhelpful in resolving the merits of the issues presented for decision. Exhibit 34 was refused.

¶3 Witnesses and Depositions: Claimant, his wife (Eileen Thompson), Garon Corder Smith, Laurie DeYott, Daniel J. Burke, and Katherine Gail Kleinkopf testified at trial. The parties also submitted the depositions of Dr. Dana Headapohl and Jerry Zook to the Court for its consideration.

¶4 Issues Presented: The issues as set forth in the Final Pretrial Order are:

1. Whether the claimant is entitled to $1,766.00 as mileage reimbursement for the period August 3, 2000 through August 3, 2001, when he was completing his bachelor's degree (18,600 miles @ $.31 cents per mile = $5,766.00, less $4,000.00 previously paid to claimant in auxiliary benefits by the insurer).

2. Whether the claimant is entitled to wage loss benefits/rehabilitation benefits for three periods: 8/9/00 through 9/4/00; 12/23/00 through 1/28/01; 5/19/01 through 5/28/01. The first period represents the time from the termination of claimant's wage loss benefits to the commencement of rehabilitation benefits. The second and third periods represent breaks during claimant's schooling, when he did not receive rehabilitation benefits.

3. Whether claimant is entitled to reimbursement for a computer he alleges he purchased for use in his education/rehabilitation and which he claims cost $1,791.99.

4. Whether claimant is entitled to an extension of his rehabilitation plan, or a new plan to obtain a master's degree. Claimant wants benefits through December 2002, by which point he believes he will have completed his master's program.

5. Whether claimant is entitled to immediate job placement services under the existing rehabilitation plan.

6. Whether the insurer is entitled to repayment of the 49 days of benefits ordered by the Court on August 31, 2000. (Liberty Northwest Ins. Corp. v. Lennie Thompson, 2000 MTWCC 52, WCC No.2000-0140.)

(Final Pretrial Order at 2-3.)

¶5 Bench Ruling: At the end of trial, I bench ruled that the claimant is not entitled to reimbursement for mileage between his home and school. I further ruled that since he is in fact receiving job placement services his claim for those services is moot.

¶6 Having considered the Final 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

¶7 Claimant is 51 years old. He has worked as a log home builder, carpenter, restaurant owner, corrections officer at a youth detention facility, and childcare worker, along with some other short term jobs such as cashier, checker, and clerk. (Ex. 33 at 443-44.)

¶8 On November 23, 1999, while working for Alpine Log Homes (Alpine), a log struck the scaffolding on which the claimant was standing. He was knocked off the scaffolding and fell approximately five feet, hitting various parts of his body, especially his right leg, right shoulder, and head.[(1)] (*See* Ex. 29 at 2-3.)

¶9 At the time of the accident, Alpine was insured by Liberty. Liberty accepted liability for the claim and has paid both compensation and medical benefits. Through his present petition, the claimant is seeking benefits in addition to those already paid.

¶10 Shortly after the accident claimant developed a "grapefruit sized subcutaneous swelling consistent with subcutaneous hematoma. " (Ex. 29 at 3.) Claimant also experienced neck and upper back discomfort. As significant to the present controversy, he also developed "some numbness in both hands in the ulnar nerve distribution." (*Id*.)

¶11 Claimant was taken off work and Liberty commenced paying temporary total disability (TTD) benefits.

¶12 On April 24, 2000, at the request of Liberty, Dr. Dana Headapohl performed an independent medical examination (IME) of claimant. She not only examined claimant but also reviewed his medical records. (Ex. 29.) Among other things, Dr. Headapohl noted that claimant suffered a neck injury in 1987 and thereafter underwent a diskectomy and fusion at the C6-7 level. (Ex. 29 at 10.)

¶13 I summarized Dr. Headapohl's findings in a prior decision involving interim benefits, *Liberty Northwest Insurance Corporation v. Lennie Thompson,* 2000 MTWCC 53, as follows:

> With respect to claimant's "upper back/neck/shoulder," she reached several conclusions, which require quoting. First, she rendered the following diagnoses, covering all of his conditions, including the back:
>
> > 1. Status post C6-7 discectomy/laminectomy - pre-existent.
> >
> > 2. Minimal MRI changes - slight posterior bulging at L4-5 and L5-S1 with no neurologic compromise. These findings are not clinically significant; no evidence of radiculopathy is noted on examination today. The patient is also noted to have some mild degenerative facet hypertrophy from L3-4 through L5-S1 which was obviously pre-existent.
> >
> > 3. Bilateral numbness and tingling of the fourth and fifth digits with a positive Tinel's at the right cubital tunnel. Bilateral cubital tunnel syndrome versus radiculopathy.
> >
> > 4. Lumbar Strain.
> >
> > 5. Right carpal tunnel-per electrodiagnostics. Unrelated and asymptomatic.
>
> (*Id.* at 12.) Second, in answer to a query about maximum medical improvement and further medical treatment, she said:
>
> > Mr. Thompson has a pre-existent medical impairment rating based on his prior surgeries. There is no additional cervical impairment rating based on permanent material worsening of his pre-existent condition.
> >
> > Based on electrodiagnostic studies he has evidence of right carpal tunnel. This condition will likely improve with conservative therapy.
>
> (*Id.* at 13.) Third, when asked whether claimant had reached MMI and had an impairment, she wrote:
>
> > He has no impairment from the cervical condition.

> There is no impairment rating for the ulnar nerve symptoms as electrodiagnostics are negative.

(*Id.* at 14.) Fourth, Dr. Headapohl concluded, as did all other doctors from whom reports are available, that claimant cannot go back to work at his time-of-injury employment. Her opinion advising against return to the time-of-injury job was based on claimant's weakness in his arms and hands, which she could not relate to his accident:

> Mr. Thompson has intrinsic muscle weakness and decreased grip in both hands, right greater than left, however it is not at all clear that these findings resulted from his injury. There is no mention in the ER report of his striking his elbows or of hand symptoms immediately following the accident, which would be expected in a traumatic ulnar nerve injury. As his construction job involving building low [sic - should be log] homes requires good bilateral grip, he would appear to be incompatible for this position.

(*Id.*)

2000 MTWCC 53 ¶ 7. Dr. Headapohl's full report is found in this case at Exhibit 29.

¶14 In the prior action, I held that a report by Dr. Henry Gary raised an issue as to whether claimant had in fact reached MMI:

> Dr. Gary has provided a letter which provides significant, prima facie support for claimant's assertion that his benefits were prematurely terminated. His analysis is somewhat different from Dr. Headapohl's. He concludes that claimant suffers "chronic cervical strain secondary to this injury." (Gary's August 16, 2000 letter.) He found the strain limits claimant's "ability to do any significant physical work" and, by implication, precludes his return to his time-of-injury job. He also finds that the "numbness of the ulnar aspect of his hands . . . is most likely related to cervical myospasm and not to carpal tunnel syndrome or to any problem from the C5-6 disc bulge." (*Id.*) Dr. Gary therefore provides a direct connection between claimant's November 23, 1999 accident and his disabling arm weakness.

2000 MTWCC 53 ¶ 8.

¶15 Based upon Dr. Gary's letter, on August 31, 2000, I issued an Order directing Liberty to pay interim benefits under section 39-71-610, MCA. 2000 MTWCC 53. I expressly reserved "jurisdiction to order claimant to repay the benefits in the event he does not prevail on the merits of his request for further compensation benefits." *Id.* at ¶ 15.

¶16 Claimant did not pursue further benefits until he brought his present petition on January 17, 2002.

¶17 Meanwhile, claimant, who had over the years completed over two years of college courses (Ex. 33 at 442), enrolled at the University of Montana for the fall semester of 2000. He began classes on September 5, 2000, and completed requirements for a bachelor's degree in Sociology on July 23, 2001.

¶18 While attending classes in the fall of 2000, claimant was examined by Dr. Thomas A. Rickard, an orthopedic surgeon. The examination was done at the request of Liberty after claimant filed an occupational disease claim for his previously diagnosed carpal tunnel syndrome.[(2)]

¶19 Dr. Rickard reviewed claimant's medical records, including reports by Drs. Gary, Headapohl, and Russo. (Ex. 1 at 1-2.) He examined claimant on November 17, 2000. At that time the claimant was "complaining of numbness of both ring and little fingers and occasional numbness of his right thumb." (*Id*. at 2.) Dr. Rickard agreed that claimant had carpal tunnel syndrome but went on to find that he also had ulnar nerve entrapment related to his industrial injury:

> Electrodiagnostic studies performed by Dr. Russo confirm the presence of right carpal tunnel syndrome. Symptomatically and based on physical examination, he also has entrapment neuropathies of both ulnar nerves at the elbow.
>
> Because his hand numbness, particularly his ring and little fingers, developed shortly after his time of his injury it is likely that his ulnar nerve entrapment neuropathies are work-related.

(*Id*.) The ulnar neuropathies were diagnosed as cubital tunnel syndrome. (*Id*.) Dr. Rickard found that claimant was not at MMI with respect to the cubital tunnel syndrome and recommended surgery. (*Id*. at 2-3.)

¶20 Liberty thereafter accepted liability for the cubital tunnel syndrome. Surgery was scheduled for December 26, 2000, and Liberty agreed to reinstate TTD benefits retroactively **if** claimant proceeded with the surgery. (Ex. 6.)

¶21 Claimant did not follow through with the surgery and on January 2, 2001, he notified Liberty that he would not agree to surgery. (Kern Test.) As a result of claimant's failure to follow through with the surgery, Liberty refused to reinstate his TTD benefits.

¶22 Dr. Headapohl disapproved claimant's return to work, in part because of symptoms which Dr. Rickard ultimately attributed to cubital tunnel syndrome. No doctor approved claimant's return to work at his time-of-injury job.

¶23 In light of Dr. Rickard's opinion and claimant's inability to return to work in his time-of-injury job, Liberty's claims adjuster referred claimant's case to Kathy Kleinkopf (Kleinkopf) for a vocational assessment. Kleinkopf is a certified rehabilitation counselor.

¶24 Kleinkopf evaluated claimant and worked with him to develop a rehabilitation plan. In light of claimant's initial hostility to her and her efforts, Kleinkopf's assistance to claimant is commendable.

¶25 Kleinkopf concluded that with the medical restrictions imposed by Dr. Rickard claimant was still employable in a number of jobs without further education. (Ex. 34 at 445, 452-53.) However, she also concluded that claimant's earnings would substantially increase with completion of a degree. She therefore concurred with his plan to complete a B.A. degree by the summer semester of 2001. With claimant's input, she drafted a rehabilitation plan. A copy of the plan is found at Exhibit 24. During trial the claimant questioned the authenticity of the signatures on the plan. Kleinkopf testified that she and claimant signed the original document and that she then sent the original to William Trezise (Trezise), a Liberty rehabilitation consultant working in Portland, Oregon. The Court ascertained that the original document signed by claimant and Kleinkopf was still in Trezise's possession. The parties agreed that Trezise should forward the original to the Court so I could determine if it appeared that the signatures on it were original signatures. Subsequently, he did so. I examined the original and the signatures appeared to be in ink and the document an original.[(3)] I so notified Mr. Thompson and Mr. Jones and invited them to inspect it. Neither have done so to my knowledge and Mr. Thompson has not since attacked its authenticity. In any event, I found Kleinkopf's testimony that claimant signed it credible and persuasive.

¶26 The plan called for Liberty to pay rehabilitation benefits for the Fall 2000, Spring 2001, and Summer 2001 semesters. (Ex. 24.) In addition to biweekly benefits to be paid during each semester, the plan also called for Liberty to pay tuition and fees, $300 per semester for books, and $4,000 as an auxiliary benefit. (*Id*.)

¶27 Liberty in fact paid the benefits provided by the plan, including the $4,000 auxiliary benefit. The plan called for payment of rehabilitation benefits during school except for vacation periods of a week or longer. Liberty complied with the agreement, paying biweekly compensation/rehabilitation benefits for the following time periods:

From	Through	Days	Weekly Rate	Charge
09/05/00	12/22/00	109	292.54	4555.26
05/05/01	05/18/01	14	292.54	585.08
04/21/01	05/04/01	14	292.54	585.08
01/29/01	04/20/01	82	292.54	3426.89
06/26/01	07/09/01	14	292.54	585.08
06/12/01	06/25/01	14	292.54	585.08
05/29/01	06/11/01	14	292.54	585.08

07/24/01	08/03/01	11	292.54	459.69
07/10/01	07/23/01	14	292.54	585.08
				$11,952.29

(Final Pretrial Order, Statement of Uncontested Facts ¶ 4.)

¶28 Through his present petition, the claimant seeks benefits in addition to those provided in the rehabilitation plan. Specifically, he seeks milage reimbursement for his travel to and from school, TTD benefits for the periods he was not in school, payment for a computer he purchased to assist him in his studies, and an extension of the plan to cover a master's degree. The findings that follow relate to those prayers.

¶29 Claimant asserts that he agreed to the rehabilitation plan under duress and that he should therefore be allowed to seek a new or extended rehabilitation plan. His evidence of duress is unconvincing. He testified that he was not afraid to assert his rights. The record in the case is replete with instances in which he did so. He was initially confrontational with Kleinkopf, indicating that he was not at all intimidated in his dealings with Liberty. The clincher, however, is his self-representation in this case. He represented himself vigorously and effectively.

¶30 With respect to his claim for reimbursement for a computer, he purchased the computer in question in the fall of 2000, prior to the preparation and execution of the rehabilitation plan. Moreover, his evidence that the purchase was essential is not convincing. Certainly, the purchase of the computer made it more convenient for him to access class notes and other information, but there was substantial, persuasive evidence showing that the University of Montana has many computers available to its students for them to use at no charge. Claimant failed to persuade me that those computers were inadequate for him to pursue his studies.

¶31 Turning to the claimant's request that Liberty be ordered to pay for his master's degree program, claimant has presented no expert evidence in support of his plan. Moreover, although he has already embarked on a master's program, his grades so far are unimpressive and indicate that he is struggling. During the semester preceding the trial, he garnered two "C's" and an incomplete. He failed to persuade me that his continued schooling is in his best interests or that it will increase his earning capacity or job opportunities.

¶32 Finally, Liberty, through Kleinkopf, is presently providing claimant with assistance in finding a job.

CONCLUSIONS OF LAW

¶33 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶34 Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he 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).

¶35 As set out in the statement of issues, the claimant seeks various benefits in addition to those already paid. In addition, Liberty counterclaims for reimbursement of the interim benefits previously ordered by the Court, arguing that claimant was not entitled to further TTD benefits. I consider all of the contentions but not in the order they are stated.

¶36 Initially, as noted in the last finding of fact (¶ 32), at the time of trial Liberty was providing claimant with assistance in finding a job. His request that the Court order Liberty to do so is therefore moot. This disposes of the fifth stated issue.

¶37 I next consider the claimant's travel claim, which I rejected at trial. Rehabilitation benefits are governed by Title 39, ch. 71, Part 10, MCA (1999). Section 39-71-1006(2), MCA (1999), provides for payment of biweekly compensation at the claimant's TTD rate during the claimant's participation in a rehabilitation plan agreed to by both claimant and the insurer. Subsection 3 of section 39-71-1006, MCA, provides for "payment for tuition, fees, books, and other reasonable and necessary retraining expenses, **excluding travel and living expenses** paid pursuant to the provisions of 39-71-1025, as set forth in department rules and as specified in the rehabilitation plan." (Emphasis added.)

¶38 Travel and living expenses are encompassed in section 39-71-1025, MCA (1999), which provides:

> **Auxiliary rehabilitation benefits.** In addition to benefits otherwise provided in this chapter, separate benefits not exceeding a total of $4,000 may be paid by the insurer for reasonable travel and relocation expenses used to:
>
> (1) search for new employment;
>
> (2) return to work but in a new location;
>
> (**3) implement a rehabilitation plan** that has been filed with the department; and
>
> (4) attend an on-the-job training program. [Emphasis added.]

Section 39-71-1006, MCA, which generally provides for rehabilitation benefits, specifically excludes travel benefits that are encompassed under section 39-71-1025, MCA. The latter section, as quoted above, explicitly provides for a maximum payment of $4,000 for various things, **including** travel required to "implement a rehabilitation plan." These provisions are

plain and clear on their face and must be applied as written. "When interpreting a statute, we look first to the plain meaning of its words. When the statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is no need to resort to extrinsic means of interpretation." *Marriage of Christian*, 1999 MT 189 ¶12, 295 Mont. 352, 983 P.2d 966. Since the claimant was paid the full $4,000 allowed under the section, and that payment encompassed his travel in connection with the implementation of his rehabilitation plan, he is entitled to nothing more in connection with his travel.

¶39 Next, I consider claimant's request for reimbursement for his computer. Initially, I note that such reimbursement is not within the rehabilitation plan. The plan was executed by both claimant and Liberty. The plan is authorized by section 39-71-1006(1)(c), MCA, and amounts to a contract between the claimant and Liberty.

¶40 Claimant argues that he is entitled to abrogate the plan and seek additional benefits. He alleges that he is not bound by the plan because he was under "duress" when he agreed to it. Duress, if present, vitiates the party's consent to the agreement. What constitutes duress is defined in section 28-2-407, MCA, as follows:

> **28-2-407. What constitutes undue influence.** Undue influence consists in:
>
> (1) the use by one in whom a confidence is reposed by another or who holds a real or apparent authority over him of such confidence or authority for the purpose of obtaining an unfair advantage over him;
>
> (2) taking an unfair advantage of another's weakness of mind; or
>
> (3) taking a grossly oppressive and unfair advantage of another's necessities or distress.

¶41 The facts in this case do not show undue influence or duress. Liberty designated Kleinkopf as its vocational provider. Claimant's initial contact with Kleinkopf was hostile and assertive. There is no credible evidence that Kleinkopf took advantage of claimant. There is not a scintilla of evidence indicating that she was unfair or that her conduct was oppressive. To the contrary, she agreed with the re-education plan he had already embarked upon. The plan even called for retroactive payment for his prior college semester. There is no basis for annulling the agreement.

¶42 Since there is no basis for annulling the agreement, there is also no basis for ordering benefits in addition to those set out in the rehabilitation agreement. Claimant's demand that Liberty pay for his further education leading to a master's degree must therefore be denied. Moreover, as set forth in ¶ 31, I am unpersuaded that claimant's pursuit of a master's degree is in his best interest or that it will increase his earning capacity or employability.

¶43 The only remaining questions are whether claimant is entitled to some additional TTD benefits or whether he should reimburse Liberty for the 49 days of interim TTD benefits this Court previously ordered.

¶44 Liberty terminated claimant's TTD benefits effective on June 21, 2000. Pursuant to this Court's August 31, 2000 Order for 39-71-610 Benefits, Liberty paid claimant an additional 49 days of TTD benefits, bringing his TTD benefits up through August 8, 2000. In light of section 39-71-737, MCA (1999), which prohibits concurrent payment of different classes of benefits. Section 39-71-737, MCA (1999), provides, "Compensation must run consecutively and not concurrently, and payment may not be made for two classes of disability over the same period, except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits." Claimant is not entitled to TTD benefits during the periods he received rehabilitation benefits. Thus, his claim for TTD benefits is limited to the day after his benefits were terminated through September 4, 2000, and to his school vacation periods.

¶45 The claimant's entitlement to TTD benefits after June 21, 2000, is governed by section 39-71-701, MCA (1999), which provides in relevant part:

> **39-71-701. Compensation for temporary total disability -- exception.** (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:
>
> (a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or
>
> (b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

Application of this section is complicated by Liberty's initial denial of liability for claimant's cubital tunnel syndrome, the belated opinion relating of the condition to his industrial injury, and the belated recommendation for surgery. It is further complicated by claimant's refusal of surgery, which would probably improve his condition.

¶46 After claimant's cubital tunnel syndrome was diagnosed and surgery recommended, Liberty agreed to **retroactively** reinstate TTD benefits **if** claimant underwent the recommended surgery. Claimant did not agree to the surgery, deciding to continue with his schooling. In light of his declination of surgery, Liberty argues that he was at MMI when it terminated benefits in June 2000. It urges that MMI must be determined "with 20/20 hindsight" and that since claimant refused surgery he was at MMI on June 21, 2000. (Liberty's Post Trial Brief at 6.) Liberty's argument is not persuasive.[(4)]

¶47 Initially, Liberty is advocating an extra-statutory penalty. As noted, it agreed that claimant was due retroactive benefits so long as he pursued surgery. According to Liberty, his declination of surgery worked a forfeiture of TTD benefits otherwise due him. I decline the invitation to write such a forfeiture provision into the law. § 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 . . . .")

¶48 Moreover, claimant was not in fact at MMI until his condition was diagnosed and he was offered the surgery. Section 39-71-116(18), MCA (1999), defines MMI as follows, as follows:

> (18) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing process when further material improvement would not be reasonably expected from primary medical treatment.

A determination of MMI requires, in the first instance, an accurate evaluation and diagnosis of the medical conditions caused by the industrial injury. Without a definitive determination of the claimant's condition, how can proper treatment be prescribed? Lacking evaluation and diagnosis, and at least an opportunity to pursue further treatment, how can it be said that "further material improvement would not be reasonably expected from primary medical treatment?" If Liberty's 20/20 hindsight argument were adopted, an insurer could seek retrospective reimbursement from claimants who undergo failed treatment or who need further testing and evaluation but are ultimately determined would not benefit from further treatment.

¶49 In this case, on June 21, 2000, claimant's cubital tunnel symptoms had been dismissed by Dr. Headapohl as unrelated to his industrial injury, and that determination was adopted by Liberty. Thus, claimant was cut-off from further evaluation of or treatment for his cubital tunnel syndrome. Under these circumstances I conclude that claimant was not at MMI until his cubital tunnel syndrome was diagnosed and he was offered surgery and given a reasonable time to undergo the surgery. The surgery in fact was scheduled on December 26, 2000, but claimant then decided not to undergo it. I therefore conclude that as of December 26, 2000, he had reached MMI with respect to the cubital tunnel syndrome. Of course, he had previously reached MMI with respect to his other work-related injuries.

¶50 Liberty further contends that claimant is not entitled to further TTD benefits because he did not suffer a "total loss of wages **as a result of an injury** . . . . " (Liberty's Post Trial Brief at 7.) It argues that claimant's wage loss in this case was the result of his college attendance, not the result of his injury. It cites *Homme v. Rauenhorst Corp.,* 227 Mont. 495, 740 P.2d 1110 (1987), as authority for its argument. In that case, the Supreme Court affirmed a decision of this Court finding that claimant was ineligible for TTD benefits while attending school.

¶51 *Homme* is distinguishable. The claimant in that case had reached MMI and had been receiving permanent partial disability benefits. The evidence further established that upon reaching MMI the claimant was capable of working and had a normal labor market but had elected to undertake retraining. In this case the claimant had not reached MMI. While he had been medically restricted from returning to his job, he had not been offered rehabilitation services.

¶52 Where a claimant is not at MMI and unable to return to work, he is entitled to TTD benefits irrespective of his activities, at least so long as he is **not** working and earning wages. The exception is where the time-of-injury employer offers him a job he is physically capable of doing. § 39-71-701(5), MCA (1999).[(5)] Liberty has not cited a single case, and the Court is unaware of one, where section 39-71-701, MCA, has been construed to deny claimant TTD benefits absent MMI because he might be able to find alternative employment compatible with his physical condition.

¶53 *Hofferber v. Plago Mining, Inc.,* 848 P.2d 468, 257 Mont. 91 (1993), also cited by Liberty, is also distinguishable. In that case the claimant suffered a knee injury and had two surgeries, the first in 1981 and the second in 1985. In 1985 he began school at Montana State University. The Court noted that the claimant had sought TTD benefits following his second surgery in 1985 and had been awarded benefits through "May 12, 1986, the period of recovery from the second surgery." 257 Mont. at 92, 848 P.2d at 469. Thus, as of May 12, 1986, he was no longer TTD. He continued his schooling and several years later experienced additional knee problems which led to a recommendation of a third surgery which would have required him to miss only one or two days of class. The date of the recommendation was February 14, 1991. The date of the surgery was January 14, 1992, eleven months later.

¶54 Hofferber then sought TTD benefits retroactive to February 14, 1991. This Court rejected the request and the Supreme Court affirmed, citing *Homme*. But like Homme, Hofferber had previously reached MMI, had been approved to return to work, and in fact had worked for some time before he decided to attend college. After the second surgery he again returned to MMI. Given these facts, the Court found that he was "voluntarily out of the job market attending college." It held that "Hofferber did not meet the statutory requirements because he attended college and failed to prove that he was unable to work or that his training was part of a rehabilitation program."

¶55 The facts in *Hofferber* are certainly more analogous to the facts of this case than are the facts in *Homme.* However, they are different in critical areas. Specifically, claimant had reached MMI and been approved to return to work prior to attending college. He again reached MMI with respect to the second surgery in 1986 and continued his schooling rather than return to the labor market. He failed to show that he was unable to work, thus his loss

of wages was deemed due to his voluntary removal from the labor market rather than an inability to work.

¶56 In this case, claimant never reached MMI. Moreover, he was not offered rehabilitation benefits to which he was entitled. I therefore conclude that Liberty is not entitled to reimbursement of the 49 days of benefits it paid under section 39-71-610, MCA, and is liable for further TTD benefits for the periods of August 9, 2000 through September 4, 2000, and December 23, 2000 through December 26, 2000.

¶57 Claimant is not entitled to TTD benefits after December 26, 2000, because at that time he is deemed to have reached MMI. As shown by Kleinkopf's evaluation he was at that time employable in occupations compatible with his physical restrictions. The rehabilitation plan simply increased his employability and earning capacity.

¶58 Claimant is entitled to his costs.

JUDGMENT

¶59 Claimant is not entitled to mileage for his attendance at the University of Montana.

¶60 Claimant is not entitled to reimbursement for the computer he purchased in the fall of 2000.

¶61 Claimant's request for vocational job assistance is moot since Liberty has agreed to provide such assistance and it is in fact being provided.

¶62 Claimant is bound by the rehabilitation plan he executed. He is not entitled to rehabilitation benefits in addition to those specified in the plan.

¶63 Liberty is not entitled to reimbursement to the 49 days of interim benefits this Court previously ordered.

¶64 Claimant is entitled to additional TTD benefits for the periods of August 9, 2000 through September 4, 2000, and December 23, 2000 through December 26, 2000.

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

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

¶67 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 12th day of June, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lennie J. Thompson
Mr. Larry W. Jones
Submitted: March 18, 2002

1. Claimant also suffered an earlier industrial accident on November 9, 1999, involving his low back. That injury is not involved in the present case.

2. According to Jamie Kern (Kern), the claims adjuster for Liberty, the OD claim was filed August 9, 2000. The claim was ultimately denied.

3. The original is signed only by claimant and Kleinkopf. The copy submitted to the Court is also signed by adjuster Kern. She did not have the original and I infer that she was sent a copy by Trezise and signed the copy. In any event, Kern testified she approved the plan.

4. Liberty cites language from *Irish v. State Compensation Ins. Fund*, WCC No. 9303-6741, Findings of Fact, Conclusions of Law and Judgment, filed April 10, 1995, at pp. 11-13. The quoted portions talk about statutory interpretation and emphasizes the use of common sense. As set out in the paragraphs that follow the one in which this footnote appears, I believe my analysis in this case is more consistent with "common sense" than is Liberty's analysis.

5. Section 39-71-701(4), MCA (1999), provides:

> (4) If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available for any reason to the worker and the worker continues to be temporarily totally disabled, as defined in 39-71-116.