

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 69

WCC No. 9503-7264

PAMELA SUE YARDE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer for

RIVERSIDE HEALTH CARE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Nursing home dietary aide argued her slip and fall permanently aggravated her back condition, preventing her from returning to her time-of-injury job. She sought an increase in her TTD rate, an award of rehabilitation benefits, penalty and attorneys fees.

Held: The accident permanently aggravated claimant's pre-existing back conditions by making them symptomatic. Although various jobs identified by the rehabilitation counselor may be appropriate and immediately available, claimant's ability to work is limited by an allergy to products common in the workplace, meaning her ability to stay in any public job is "hit or miss." Claimant's proposed training program as a medical transcriptionist was appropriate and would begin a career that can be performed at home or in a non-public office environment, involving minimal exposure to allergens. Claimant is thus entitled to rehabilitation benefits not to exceed 104 weeks to enable her to continue training toward work as a medical transcriptionist.

Topics:

Benefits: Rehabilitation Benefits: Generally. Where claimant's ability to work in public settings was limited by her pre-existing allergies, her plan to retrain as a medical transcriptionist, a profession that can be pursued at home or in a non-public office, was reasonable and necessary as part of her rehabilitation following a back injury that prevented return to her time-of-injury job. Even though other jobs existed that she could perform without retraining, it was "hit or miss" whether she would be able to function in the public workplaces required by those jobs.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Where claimant's ability to work in public settings was limited by her pre-existing allergies, her plan to retrain as a medical transcriptionist, a profession that can be pursued at home or in a non-public office, was reasonable and necessary as part of her rehabilitation following a back injury that prevented return to her time-of-injury job. Even though other jobs existed that she could perform without retraining, it was "hit or miss" whether she would be able to function in the public workplaces required by those jobs.

Penalties: Insurers. Although claims adjuster was inexperienced and made mistakes, penalty was not appropriate where the mistakes were corrected before they impacted claimant's receipt of benefits. No harm, no foul.

Penalties: Insurers. Where there was no evidence insurer attempted to manipulate preparation of job description by certified rehabilitation consultant, or attempted to influence physician reviewing the JA, insurer did not act unreasonably by submitting time-of-injury job for physician's review even though job was ultimately disapproved.

Penalties: Insurers. Under section 39-71-2001, MCA (1993), insurer did not act unreasonably in limiting designated rehabilitation consultant's initial assignment to determining whether claimant, without retraining, could return to work in a job that paid wages comparable to her time-of-injury job.

Surveillance. Videotaped surveillance was ineffectual and useless where video was of poor quality, with claimant barely visible, and merely showed her, on a single day, getting in and out of a car after classes, and arriving at and sitting at a laundromat. The short action sequences did not show activities inconsistent with claimant's pain complaints. The tape should have remained in the insurer's files and not have been presented in Court.

Vocational -- Return to Work Matters: Retraining. Where claimant's ability to work in public settings was limited by her pre-existing allergies, her plan to retrain as a medical transcriptionist, a profession that can be pursued at home or in a non-public office, was reasonable and necessary as part of her rehabilitation following a back injury that prevented return to her time-of-injury job. Even though other jobs existed that she could perform without retraining, it was "hit or miss" whether she would be able to function in the public workplaces required by those jobs.

The trial in this matter was held on July 13 and 14, 1995, in Missoula, Montana. Petitioner, Pamela Sue Yarde (claimant), was present and represented by Mr. Allan M. McGarvey. Respondent, Liberty Northwest Insurance (Liberty), was represented by Mr. Larry W. Jones. The claimant testified on her own behalf. Cynthia Bean, Dr. James R. Burton, Dr. Dana Headapohl, Terri Roach, Richard A. Hawk, and Sandy Scholl also testified. The depositions of claimant, Dr. James R. Burton, Dr. David K. Murdock, Dr. Dana Headapohl, Terri Roach, and Neil Ostlie were submitted for the Court's consideration. Exhibits 1 through 3, 7, and 17 through 19 were admitted by stipulation. Exhibits 4, 5, 6, 9, 11, 12 and 14 were admitted over the objection of Mr. Jones. Exhibit

16 was admitted over the objection of Mr. McGarvey. Exhibit 15 was objected to by Mr. Jones and was refused. Exhibits 8, 10, and 13 were not offered.

No transcript of trial testimony has been prepared.

Issues Presented: Claimant asks the Court to find that her May 17, 1994 industrial accident permanently aggravated a preexisting back condition and disabled her from returning to her time-of-injury job. She further seeks an increase in her temporary total disability benefit rate and an award of rehabilitation benefits to enable her to attend school. Finally, she seeks a penalty, attorney fees, and costs.

Partial Bench Ruling: At the close of trial, the Court entered a partial bench ruling. I determined that claimant in fact suffered a permanent aggravation to her preexisting low-back condition and that her low-back condition precludes her from returning to her time-of-injury job. I also held that claimant failed to prove that Liberty acted unreasonably and therefore denied her request for a penalty and attorney fees. Finally, I noted that claimant is entitled to costs. The remaining issues were deemed submitted for decision.

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

1. Claimant is 37 years old. She is married and resides with her 11 year-old daughter in Deer Lodge, Montana.
2. Claimant is a high school graduate. (Roach Dep., Ex. D.) She has recently returned to school and is attending Montana Tech in Butte. She is enrolled in the Office Technology Program with an emphasis in medical secretarial training. (*Id.*) Her only other education was a California real estate licensing course she took some time ago.
3. In May of 1994 claimant was hired as a dietary aide at Riverside Health Care Center, which is a nursing home. Her job was to help out the cooks by doing dishes, setting up meal trays, cleaning the dining room, and performing other clean-up. (*Id.*)
4. When she was hired the claimant was guaranteed 40 hours of work each week. She was also told that overtime hours would be available if she wished to work extra hours. She was not required to work overtime. Her hourly rate of pay was \$4.80. (*Id.*)
5. Claimant worked for Riverside for approximately three weeks. The dietary manager was on vacation during that time and claimant did in fact work some overtime hours. She was paid on the first and fifteenth of each month. During the period ending May 15, 1994, claimant worked a total of 18.5 hours. (Ex. 7.) While there is no independent confirmation by way of business records or testimony, in a letter to the insurer the claimant's attorney represented that these hours were worked on two days. (*Id.*) Claimant's pay stub for the period of May 16, 1994 to May 31, 1994, shows that she worked a total of 105.9 hours. (*Id.*) Her pay stub for the period ending June 15, 1994,

shows 18.60 hours which, according to claimant's attorney, were worked over a two day period. (*Id.*)

6. On May 17, 1994, while working at Riverside, claimant slipped and fell on a wet floor, landing on her buttocks. She experienced immediate discomfort in her tailbone and low-back areas but completed her work shift. By the time she arrived home after work she was experiencing sharp shooting pain on the left side of her low back and into her buttocks and legs.

7. Claimant initially sought medical treatment on May 19, 1994, from Dr. M. S. Woltanski at the Western Montana Clinic in Missoula. (Ex. 1.16 at 3.[\(1\)](#)) At that time she was suffering "low back pain, probably musculoligamentous". Dr. Woltanski prescribed rest and medication (Ansaid and Flexeril). (*Id.*) She again saw Dr. Woltanski on May 24, 1994, for increasing back pain. (*Id.* at 1.) The doctor urged her to get more rest and use heat. (*Id.*) Her pain increased and on June 4, 1994, she went to the emergency room of St. Patrick Hospital. (Ex. 1.7.) At that time she reported low-back pain radiating into her left buttocks and some numbness of the left foot. (Ex. 1.7 at 1.)

8. Claimant continued working until early June 1994, at which time she was unable to continue working. She attempted to return to work but later on was able to work for only an hour and a half. She has not worked since that time.

9. At the time of claimant's industrial accident, Riverside was insured by Liberty Northwest Insurance Corporation. She filed a claim and that claim was accepted by Liberty.

10. Liberty commenced paying temporary total disability benefits based on a \$4.80 an hour wage and 40 hour work week.

11. On September 29, 1994, Liberty's claims examiner, Cynthia Bean, sent claimant a letter offering to settle her claim for \$5,248 and notifying her that her temporary total disability benefits were being terminated effective October 13, 1994. (Ex. 5.) In analyzing the claim, Bean initially determined that Liberty was liable for only 25% of claimant's injury. Her analysis was based on a report by Dr. James R. Burton, who by that time was treating claimant, that claimant's low-back condition was 75% attributable to a preexisting condition and 25% to her industrial accident. In essence, Bean was analyzing the claim as if it was one for occupational disease. Bean was a *green* claims examiner and her analysis was admittedly wrong.

12. Claimant turned the matter over to her counsel, Mr. Allan M. McGarvey, who wrote a reply letter protesting the termination of benefits and skewering Bean's analysis of the claim. (Ex. 4.) Bean wisely relented and on October 5, 1994, notified McGarvey that Liberty was "reinstating Pam's temporary total disability benefits until further notice." (Ex. 6.)

13. Claimant was thereafter evaluated by a panel of physicians designated by Liberty. The panel found claimant to be at maximum medical healing and by letter dated November 29, 1994, Bean again gave claimant 14-day notice of termination of temporary total disability benefits. (Ex. 9.) This time the notice stuck. Claimant's

temporary total disability benefits were terminated and claimant does not request their reinstatement.

14. An enumeration of claimant's various medical examinations and treatment is unnecessary for purposes of this decision and is therefore omitted.

15. Claimant suffers from preexisting low-back abnormalities.

a. The first condition is a "lumbarization" of the S1 vertebra. Ordinarily there are five lumbar vertebrae. Each of these vertebrae are independent bony structures which are connected to the adjacent vertebrae by ligaments. The vertebrae interface at joints where they move or *articulate* with respect to one another. Movement between the vertebrae is cushioned by *intervertebral discs*, which act as shock absorbers. In most humans the last lumbar vertebra is the L5. Below it is the sacrum, which consists of vertebrae which are fused together and have no joints or discs. Normally, the L5 is followed by the S1 vertebrae. The S1 in turn is fused to the lower vertebrae which are collectively called the sacrum. In lumbarization, the vertebra which is ordinarily designated S1 is not fused to the next, lower vertebra. There may be one or more joints and a disc between it and the next lower, sacral vertebra. Thus, it is more like a lumbar vertebra and is designated L6 rather than S1. In claimant the vertebra is an L6. It has joints on both sides and therefore articulates on both sides. However, the joints are arthritic: they are narrowed and have bone spurs. The disc space between the L6 and the sacrum is narrowed and the disc at that level has atrophied.

b. The second preexisting condition is the subluxation of the L5 vertebra over the L6 vertebra. Subluxation means that the L5 vertebra is abnormally thrust forward over the L6, i.e., it is improperly aligned. The condition is also called spondylolisthesis.

c. Claimant also has a narrowing of the L4-5 disc space.

16. The May 17, 1994 industrial accident permanently aggravated claimant's preexisting conditions, by making them symptomatic. Prior to the accident the conditions were asymptomatic. This finding is based on the trial testimony of Dr. Burton, which the Court found credible and persuasive, and Dr. Burton's earlier deposition testimony (Burton Dep. at 14-17, 30). Dr. Burton's opinions were supported by the opinions of Dr. R.J. Seim, an orthopedic surgeon who participated in the medical panel evaluation of claimant, and Dr. Ethan Russo, a neurologist who also participated in the medical panel evaluation. Dr. Seim opined that by history "a substantial part" of claimant's back symptoms are from the industrial accident. (Ex. 1.13 at 3.) Dr. Russo commented, "It is true the patient has a pre-existing condition but was not having prior pain, so certainly some of her current pain complaint is attributable to the accident in question." (Ex. 1.12 at 1.) Dr. Dana Headapohl, who specializes in occupational medicine and participated in the medical panel evaluation, agreed that by history there is a clear connection between the industrial accident and the onset of claimant's symptoms. However, she is unsure whether claimant's continued symptoms are due to her injury or to her deconditioned physical condition. (Headapohl Dep. at 42-43.)

17. Dr. Burton testified that the claimant is unable to return to her time-of-injury job. Dr. Burton testified at trial that although he initially approved claimant's return to her time-of-injury job he later learned that the position entailed stooping, bending, and other physical demands which are beyond claimant's ability. (Burton trial testimony; Burton Dep. at 20-21.) Dr. Headapohl agreed that claimant is unable to return to her time-of-injury job but based her opinion solely on claimant's preexisting condition, which makes her susceptible to further injury. (Headapohl Dep. at 39.) She noted that people can and do work in pain. (*Id.* at 39-40.) However, in testimony at trial Dr. Headapohl conceded that based on claimant's reports of pain alone, she would not advise claimant to return to work as a dietary aide. In Dr. Burton's opinion, claimant's disabling condition is due to a combination of the preexisting conditions and her injury. (Burton Dep. at 26-27.) Dr. Seim expressed the opinion that claimant's injury precludes her from returning to her previous work as a dietary aide. (Ex. 1.13 at 3.) Considering these opinions and the claimant's continued reports of pain increasing with activity, I find that claimant's inability to return to her time-of-injury job is due to a combination of her preexisting condition, which makes her more susceptible to reinjury, and her pain, which was triggered by her injury.

18. At the time of her May 17, 1994 industrial accident, the claimant's labor market had already been sharply limited by an allergy to colophony, which is a "rosin residue obtained from evergreen trees and used in a variety of products including adhesives, nail polish, clothing rosin, varnishes, ink, and in the production of paper and paper boxes." (Ex. 1.9 at 11.) She also has an allergy to "fragrance", which is used in certain products and aerosols. (Ex. 2 at 45-46.) "Fragrance" consists of approximately six different chemicals which are put into products to give them fragrance. The specific chemicals used in particular products are trade secrets. (*Id.*)

19. The claimant worked in California as a title searcher from 1976 through 1979, 1982 through 1983, and again from 1987 through 1990. (Yarde trial testimony; Roach Dep. Ex. D.) She has also worked as a sales clerk, receptionist, cashier/checker (in a lumber company and a grocery store), and child-care worker. (*Id.*) All of these positions were semi-skilled and involved sedentary or light-duty work. (*Id.*) Claimant's job as a dietary assistant was an unskilled position. (*Id.*)

20. Due to her colophony allergy, claimant experiences dermatitis, which is the itching, burning and swelling of her skin, when handling certain types of paper and adhesives. (Yarde Dep. at 23-27.) Fragrance causes itchy rashes on her face and itchy and watery eyes. (Ex. 2 at 45.) While working as a grocery checker in 1991 and a lumber company cashier in 1992, claimant experienced contact dermatitis as a result of her exposure to colophony and fragrance. Her reactions were apparently triggered by colophony in brown paper bags at the grocery store and her exposure to fragrance in aerosol sprays at the lumber company. (Murdock Dep. at 25; Ex. 2 at 46.) She was unable to continue working in either job.

21. Some paper products have colophony, others do not. (Murdock Dep. at 26-27.) Determining which products cause an allergic reaction is made on a trial and error basis by actual exposure to the products. (*Id.* at 30-31.) Thus, claimant's ability to perform jobs which involve the handling of paper products, including ordinary office jobs, will have to be determined on a trial basis. (*Id.* at 46.) Similarly, based on her experience at

the lumber company, her ability to perform specific jobs may be limited by the amount of fragrance at the job site.

22. Claimant was able to successfully work as a child-care worker and dietary aide but these jobs did not expose her to significant amounts of colophony or fragrance. She has not been approved to return to work in either job.

23. Terri Roach, a certified rehabilitation counselor, was retained by Liberty to conduct a job analysis of claimant's position as a dietary assistant. (Roach Dep. at 6-7.) She was later asked to assess alternative employment options with Riverview and to document direct employment and short term employment retraining options for claimant. (*Id.*; Roach Dep. Ex. D.)

24. Roach identified a number of jobs as immediately available to claimant in light of her physical limitations and without further training. Those jobs were motel desk clerk, keno caller, freight rate clerk, hostess/greeter, telemarketer and receptionist.

a. The first two jobs -- keno caller, motel desk clerk -- were approved by Drs. Burton and Headapohl. However, Dr. Headapohl expressly noted that she was approving the positions "assuming no problem with paper allergy or use of cotton gloves." (Burton Dep. Exs. B and C.) Her approval was consistent with the caution by Dr. Murdock, who has treated claimant for her allergic dermatitis, that claimant's ability to perform jobs which involve the handling of paper will have to be determined on a trial and error basis.

b. Roach also indicated that the position of freight rate clerk had been medically approved but the Court did not locate that approval in the exhibits.

c. Based on the medical approvals, Roach determined that claimant should also be able to perform the other jobs.

25. The various jobs identified by Roach are available in significant numbers. (Roach Dep. Ex. D.) Wages for these positions are typically between \$4.25 to \$ 6.50 per hour. (*Id.*)

26. In January of 1995, claimant enrolled at the Division of Technology of Montana Tech in Butte as a student in the Office Technology Program with an emphasis on Medical Secretarial Training. Her course of study is medical receptionist/transcriptionist and claimant intends to become a medical transcriptionist.

27. Roach's employment by Liberty did not encompass the development of a retraining plan for claimant. However, Roach analyzed claimant's plan to become a medical transcriptionist and concluded that it is appropriate. (Trial testimony and Roach Dep. Ex. D.) Wages for medical secretaries and transcriptionists range from \$5.00 to \$8.18 an hour. (Roach Dep. Ex. D.) Claimant's time-of-injury wage was \$4.80.

28. Claimant is doing well in her classes. She is motivated to continue her training and the Court is persuaded that she will successfully complete her courses and launch a new career as a medical transcriptionist.

29. The job of medical transcriptionist involves the transcription of medical notes. Transcription is accomplished by use of a computer and a word processing program. Claimant's contact with paper and other allergens will be very limited.

30. I find that claimant's retraining program is reasonable and appropriate. Her labor market has been sharply limited by her injury. Unskilled jobs which were previously available to her in light of her allergies are no longer available to her. While she presently **may** be able to perform the jobs identified by Roach, her ability to perform any specific job can only be determined on a trial basis. For claimant, it is a hit-or-miss situation. Her contact with paper, adhesives, and fragrance may cause her dermatitis to flare-up. It is impossible to predict which jobs she can perform. A succession of unsuccessful job trials may further hamper her prospects for employment. On the other hand, embarking in a training program for an occupation that can be performed at home or in a non-public office environment, and which involves minimal exposure to allergens, claimant will enhance her employability and eliminate the unpredictability.

31. Liberty employed a detective to conduct surveillance of claimant, presumably to determine whether claimant's daily activities are consistent with her pain complaints. The surveillance took place on a single day and consisted of a video of claimant getting into her car after classes, later arriving by car at a laundromat and disembarking, and sitting in the laundromat reading a magazine. I specifically mention this surveillance because it was ineffectual and useless. The detective did the best job he could given his limited assignment. But most of the videotape was of poor quality, showing claimant, who was barely visible, sitting in the laundromat. The short action sequences did not show activities inconsistent with claimant's pain complaints. This kind of evidence should have remained in the insurer's files and should not have been presented in Court.

32. Claimant devoted substantial trial time to her assertion that Liberty acted unreasonably in adjusting her claim. Indeed, her first witness was the insurer's claims' examiner, who she called as an adverse witness in an attempt to prove unreasonableness. With respect to her allegations of unreasonableness, I find:

- a. Liberty's claims' adjuster, Cynthia Bean, was inexperienced.
- b. Bean's attempt to apportion liability between a preexisting condition and claimant's injury was based on a misunderstanding of the law. Claimant was not affected by the misunderstanding since it was timely corrected.
- c. Bean's initial notice of termination of temporary total disability benefits was rescinded before the benefits were to cease. No harm, no foul.
- d. Liberty did not act unreasonably in submitting a job analysis for claimant's time-of-injury job to Dr. Burton to determine if he would approve of her return to work. Since a physician's approval or disapproval of a particular job depends on the accuracy of the physical demands of the job, an accurate job description is essential to his opinion. The fact that Dr. Burton ultimately disapproved of claimant's return to work as a dietary aide does not make Liberty's request unreasonable. Liberty turned the matter over to a certified rehabilitation

consultant. There is no credible evidence that it attempted to manipulate the job description the consultant prepared or that it attempted to influence Dr. Burton's approval of that description. There is no credible evidence that the vocational counselor deliberately withheld or distorted the physical demands of the position.

e. Liberty did not act unreasonably in limiting its designated vocational consultant's assignments. As discussed in the conclusions of law that follow, rehabilitation provisions of the Workers' Compensation Act do not automatically entitle claimant to retraining or additional education. Liberty did not act unreasonably in asking the consultant to determine if claimant, without retraining, could return to work in a job which paid wages comparable to those she was receiving at the time of her injury.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Claimant's accident occurred in May of 1994, consequently the 1993 version of the Workers' Compensation Act applies. *Gaffney v. Industrial Accident Board*, 129 Mont. 394, 287 P.2d 256 (1955); *Houts v. Kare-Mor*, 257 Mont. 65, 847 P.2d 701 (1992).

2. The long standing rule in Montana is that the employer takes the employee as he finds her. *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 575 P.2d 67 (1978). The employee is entitled to compensation if she suffers from a preexisting condition which is "lit-up aggravated or accelerated by an industrial injury." *Robins v. Anaconda Aluminum Co.*, 175 Mont. 514, 575 P.2d 67 (1978). In *Birnie* the Supreme Court held that an industrial accident which aggravated a claimant's arthritic condition was disabling and compensable since it resulted in his inability to return to his time-of-injury job. The claimant in this case suffers from several preexisting back conditions. The Court is persuaded that claimant's May 17, 1994 industrial accident "lit up" her preexisting low-back conditions by making them symptomatic.

3. As found in Finding of Fact 17, the industrial accident of May 17, 1994, is disabling and precludes claimant from returning to work at her time-of-injury job as a dietary aide.

4. Claimant worked fewer than four pay periods prior to her injury. Therefore, her temporary total disability rate is governed by section 39-71-123(3)(a), MCA, which provides that if:

(a) the term of employment for the same employer is less than four pay periods .
... the employee's wages are the hourly rate times the number of hours in a week **for which the employee was hired to work.** [Emphasis added.]

The claimant testified that she was hired with the understanding she could work as much overtime as she wished. Neil Ostlie, who hired claimant, was unable to recall any specific mention of overtime and testified that he has never guaranteed overtime to any employee. The conflict in testimony is not critical. I have accepted claimant's version of the conversation, which I found to be credible. Nonetheless, it is clear from both her and Ostlie's testimony that she was hired to work only forty hours a week. Any additional

hours were optional. Liberty calculated her temporary total disability rate based on forty hours of work each week. Its calculation was correct.

5. Claimant seeks rehabilitation benefits to allow her to complete her schooling as a medical receptionist/transcriptionist. Rehabilitation benefits are governed by section 39-71-2001, MCA, which provides:

Rehabilitation benefits. (1) An injured worker is eligible for rehabilitation benefits if:

(a) the injury results in permanent partial disability or permanent total disability as defined in 39-71-116;

(b) a physician certifies that the injured worker is physically unable to work at the job the worker held at the time of the injury;

(c) a rehabilitation plan completed by a rehabilitation provider and designated by the insurer certifies that the injured worker has reasonable vocational goals and a reemployment and wage potential with rehabilitation. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests.

(d) a rehabilitation plan between the injured worker and the insurer is filed with the department. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of social and rehabilitation services to use the funds.

(2) After filing the rehabilitation plan with the department, the injured worker is entitled to receive rehabilitation benefits at the injured worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. Rehabilitation benefits must be paid during a reasonable period, not to exceed 10 weeks, while the worker is waiting to begin the agreed upon rehabilitation plan. Rehabilitation benefits must be paid while the worker is satisfactorily completing the agreed-upon rehabilitation plan.

(3) If the rehabilitation plan provides for job placement, a vocational rehabilitation provider shall assist the worker in obtaining other employment and the worker is entitled to weekly benefits for a period not to exceed 8 weeks at the worker's temporary total disability rate. If, after receiving benefits under this subsection, the worker decides to proceed with a rehabilitation plan, the weeks in which benefits were paid under this subsection may not be credited against the maximum of 104 weeks of rehabilitation benefits provided in this section.

(4) If there is a dispute as to whether an injured worker can return to the job the worker held at the time of injury, the insurer shall designate a rehabilitation provider to evaluate and determine whether the worker can return to the job held at the time of injury. If it is determined that he cannot, the worker is entitled to rehabilitation benefits and services as provided in subsection (2).

(5) A worker may not receive temporary total or biweekly permanent partial disability benefits and rehabilitation benefits during the same period of time.

(6) The rehabilitation provider, as authorized by the insurer, shall continue to work with and assist the injured worker until the rehabilitation plan is completed.

....

(7) A worker may not receive both wages and rehabilitation benefits without the written consent of the insurer. A worker who receives both wages and rehabilitation benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.

Claimant has established that she is permanently unable to return to her time-of-injury job and is permanently partially disabled. Therefore, she is entitled to rehabilitation benefits under the statute. The issue in this case is what sort of rehabilitation benefits must be provided.

6. The rehabilitation plan proposed by claimant was not prepared by Liberty's designated rehabilitation provider and has not been certified by the insurer. Thus, the requirements of subsection (1)(c) of 39-71-2001, MCA, have not been met. However, Liberty has taken the position that claimant is able to return to work in other jobs and is therefore not entitled to additional rehabilitation benefits. Its position effectively precludes consideration and approval of the plan she has submitted. Thus, there is an issue concerning claimant's entitlement to benefits and that issue must be resolved by the Court. § 39-71-2905, MCA.

7. Statutory interpretation is at the root of the rehabilitation dispute between claimant and Liberty. In *Gjerde v. Employers Insurance of Wausau*, WCC No. 9408-7134, (December 9, 1994), this Court cited *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1980), for the statutory principle that words and subparts of a statute cannot be read in isolation, rather, the statute must be read together and harmonized. That principle is reaffirmed here.

8. A rehabilitation plan must initially meet the requirement that "the injured worker has **reasonable** vocational goals and a reemployment and wage potential with rehabilitation." § 39-71-2001(c), MCA. These criteria are met in the present case. Claimant has the education, skills and motivation to complete the courses necessary to enable her to become a medical transcriptionist. Employment as a transcriptionist is likely to lead to employment at a higher wage than claimant was earning at the time of her industrial accident. Considering her abilities and disabilities, I am persuaded that her goal is reasonable.

9. In *Gjerde* I held that the rehabilitation benefits statutes, read in their entirety, contemplate a continuum of rehabilitation options, including an immediate return to work in a job for which a claimant is qualified and able to perform. Section 39-71-1011(4), MCA, provides:

39-71-1011. Definitions. As used in this chapter, the following definitions apply :

...

(4) "Rehabilitation plan" means an individualized plan to assist a disabled worker in acquiring skills or aptitudes to return to work through **job placement**, on-the-job training, education, training, or specialized job modification. [Emphasis added.]

Expressly, a rehabilitation plan contemplates a **return to work**. It contemplates **whatever means** which will assure that goal.

10. In determining whether a rehabilitation plan is "reasonable" and will return the claimant to work, the Court must consider the overall purposes and objectives of the Workers' Compensation Act. See *Montana Talc Co. v. Cyprus Mines Corp.*, 229 Mont. 491, 498, 748 P.2d 444, 448 (1987).

11. One of the express objectives of the Act is to return the worker to work as soon as possible. Section 39-71-105(2), MCA (1993), provides:

(2) A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to **return a worker to work as soon as possible** after the worker has suffered a work-related injury or disease. [Emphasis added.]

12. Having considered the specific provisions and purposes of the rehabilitation provisions, I find that claimant's rehabilitation plan is reasonable and necessary for her return to work. While she **may** be employable without retraining, such employment is dependent on the specific work environment. The jobs which she might be able to perform are jobs which may expose her to colophony and/or fragrance, and thereby trigger an allergic dermatitis. It is probable that she will be unable to perform many of the jobs available to her. She is faced with a trial-and-error, hit-or-miss approach to employment which may further erode her employment prospects if the initial jobs she tries are "misses." In contrast, her plan to become a medical transcriptionist minimizes her potential exposure to colophony and fragrance and provides her with a reasonable prospect of employment.

My conclusion in this regard should not be construed as an endorsement of retraining benefits for claimants who are physically able to return to work in jobs which pay wages equal to those of their time-of-injury employment. Critical to this decision is the fact that without retraining Yarde's preexisting allergies make her employability doubtful. With the retraining she proposes, she is likely to find employment.

13. Claimant has requested a penalty and attorney fees. Both are predicated upon her showing that Liberty's conduct in this case was unreasonable and that she was denied benefits to which she was entitled.

Section 39-71-611, MCA (1987), provides:

Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable. (1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
(b) the claim is later adjudged compensable by the workers' compensation court; and (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

(2) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

Claimant has failed to carry her burden of proof under the cited statutes. Even though Bean's initial analysis of the case was wrong, her analysis did not prevail and did not result in any denial of benefits. Claimant's challenge to Liberty's submission of job analysis for approval by her treating physician and its pursuit of an independent medical evaluation is without merit. Medical opinions concerning a claimant's ability to return to work are dependent upon the accuracy of job descriptions. Insurers are entitled to independent medical evaluations. § 39-71-605, MCA. Claimant failed to present even a prima facie case that the job description submitted to Dr. Burton was false or skewed, or that the insurer attempted to influence the vocational consultant's description. She failed to show that the insurer attempted to manipulate medical opinions.

JUDGMENT

1. Claimant is entitled to rehabilitation benefits not to exceed 104 weeks, § 38-71-2001(3), MCA, to enable her to complete courses at Montana Tech and enable her to work as a medical transcriptionist. The specific amount of benefits was not at issue in this case. Therefore, the Court retains continuing jurisdiction over any dispute concerning the duration of the benefits.
2. Claimant's wages for purposes of compensation were correctly calculated. She is not entitled to an increase in her rate of benefits. She is not entitled to additional temporary total disability benefits.
3. Claimant is not entitled to attorney fees or a penalty.
4. Claimant is entitled to costs in an amount to be determined by the Court. She shall submit a certified affidavit of costs within 20 days of this decision. Liberty shall then have 10 days in which to file its objections.
5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
6. 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 7th day of September, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Allan M. McGarvey
Mr. Larry W. Jones

1. Exhibit 1 consists of medical records of 17 different medical providers. The exhibit is partitioned into 17 parts, all of which are tabbed. The documents under each separate tab are numbered internally, each beginning with page 1. Thus, "Ex. 1.16 at 3" refers to page 3 of tab 16 of exhibit 1.