IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 46

WCC No. 9711-7869

RICK EASTMAN

Petitioner

vs.

INSURANCE COMPANY OF NORTH AMERICA

Respondent/Insurer for

FAMILIAN NORTHWEST

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 37-year old claimant with back injury was restricted to light to medium work and could not return to time-of-injury job. Initial vocational guidance focused on retraining in small appliance repair, but claimant enrolled in a two-year program in Major Appliance Repair and Heating & Ventilation (HVAC), which trained him for jobs either not medically appropriate or not realistically available to him in Billings, where he unequivocally intended to remain. After the insurer rejected claimant's retraining plan and refused to provide additional rehabilitation services, claimant petitioned for total rehabilitation benefits covering the two-year training period. After one trial, the WCC found claimant's plan unreasonable in light of his physical restrictions and urged the parties to develop an alternative plan. Claimant, however, completed his major appliance/HVAC training and refused to consider other options.

Held: Claimant did not prove entitlement to rehabilitation for any part of the two year major appliance/HVAC training. Claimant declined to follow more reasonable vocational guidance offered by the insurer, but insisted in enrolling in and completing a program not leading to approved jobs he was likely to obtain. He assumed the risk his program would be determined vocationally inappropriate and refused to reconsider the program despite the Court's initial findings after the first trial. Section 39-71-2001, MCA (1991) does not authorize a claimant to write his own rehabilitation plan and demand benefits in accordance with that plan.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-2001, MCA (1991). Section 39-71-2001, MCA (1991) does not authorize a claimant to write his own rehabilitation plan and demand benefits in accordance with that plan. Declining to follow reasonable vocational advice offered through the insurer, claimant enrolled in and completed a two year major appliance/HVAC program, which led only to jobs not medically appropriate or not realistically available to him in Billings, where he unequivocally intended to remain. Claimant assumed the risk his program would be determined vocationally inappropriate.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Claimant did not prove entitlement to rehabilitation for any part of the two year major appliance/HVAC training he pursued following a back injury. Claimant declined to follow more reasonable vocational guidance offered by the insurer, but insisted in enrolling in and completing a program leading to jobs either not medically appropriate or not realistically available to him in Billings, where he unequivocally intended to remain. Claimant assumed the risk his program would be determined vocationally inappropriate and refused to reconsider the program despite the Court's initial findings after a first trial. Section 39-71-2001, MCA (1991) does not authorize a claimant to write his own rehabilitation plan and demand benefits in accordance with that plan.

Vocational – Return to Work Matters: Employability. Claimant did not prove entitlement to rehabilitation for any part of the two year major appliance/HVAC training he pursued following a back injury. Claimant declined to follow more reasonable vocational guidance offered by the insurer, but insisted in enrolling in and completing a program leading to jobs either not medically appropriate or not realistically available to him in Billings, where he unequivocally intended to remain. Claimant assumed the risk his program would be determined vocationally inappropriate and refused to reconsider the program despite the Court's initial findings after a first trial. Section 39-71-2001, MCA (1991) does not authorize a claimant to write his own rehabilitation plan and demand benefits in accordance with that plan.

Vocational – Return to Work Matters: Physical Restrictions. Claimant did not prove entitlement to rehabilitation for any part of the two year major appliance/HVAC training he pursued following a back injury. Claimant declined to follow more reasonable vocational guidance offered by the insurer, but insisted in enrolling in and completing a program leading to jobs either not medically appropriate or not realistically available to him in Billings, where he unequivocally intended to remain. Claimant assumed the risk his program would be determined vocationally inappropriate and refused to reconsider the program despite the Court's initial findings after a first trial. Section 39-71-2001, MCA (1991) does not

authorize a claimant to write his own rehabilitation plan and demand benefits in accordance with that plan.

Vocational – Return to Work Matters: Retraining. Claimant did not prove entitlement to rehabilitation for any part of the two year major appliance/HVAC training he pursued following a back injury. Claimant declined to follow more reasonable vocational guidance offered by the insurer, but insisted in enrolling in and completing a program leading to jobs either not medically appropriate or not realistically available to him in Billings, where he unequivocally intended to remain. Claimant assumed the risk his program would be determined vocationally inappropriate and refused to reconsider the program despite the Court's initial findings after a first trial. Section 39-71-2001, MCA (1991) does not authorize a claimant to write his own rehabilitation plan and demand benefits in accordance with that plan.

¶1 The first phase of the trial in this matter was held on February 3, 1998, in Billings, Montana. Petitioner, Rick Eastman (claimant), was present and represented by Mr. R. Russell Plath. Respondent, Insurance Company of North America (North America), was represented by Mr. Leo S. Ward. The second phase of the trial was held on April 26, 1999. The same parties and attorneys appeared.

¶2 Exhibits: Exhibits 1 through 6 were admitted without objection and used at both phases of the trial.

¶3 Witnesses and Depositions: Claimant, Rick Ostermiller, Ray Williams, Will Lynn, Steve Stokes, Dwight Martin, Walter Ware, and Michele Fairclough were sworn and testified at the first proceeding. In addition, the depositions of claimant and his wife, Kerri Tallerico, were considered by the Court. At the second trial, claimant and his wife testified.

¶4 Issue Presented: The following issue was presented for decision:

Whether claimant is entitled to total rehabilitation benefits retroactive to November 4, 1996, for training he received in a two-year program at the Billings Vo-Tech.

Overview

¶5 Claimant suffered a back injury and is restricted from performing heavy labor. He developed and submitted a plan for retraining calling for technical college training in small appliance repair. The insurer approved his plan subject to confirmation that he would be physically able to perform small appliance repair. Meanwhile, claimant started school in heating, ventilation, and air conditioning (HVAC). Within a couple of months of starting school, claimant's treating physician disapproved a sample position for a HVAC service technician. Claimant then tried to convince the insurer's designated rehabilitation provider that he was physically capable of working as a HVAC sales representative, and his treating

physician medically approved the position. However, the vocational provider determined that a job as a sales representative was not realistically available to claimant in the Billings, Montana area, where claimant indicated he intended to stay. His retraining plan was disapproved and he petitioned the Court, seeking payment for two full years of HVAC schooling.

Bench Ruling and Disposition at First Trial

¶6 At the close of the first trial the Court bench ruled. I held that available jobs for which claimant would qualify upon completing his HVAC schooling were heavy labor and that his plan was unreasonable in light of his physical restrictions. I encouraged the parties to work together to develop and implement a further plan. With the agreement of the parties, a final decision in the case was postponed while they attempted to develop a new plan.

Second Trial Phase

¶7 Despite the Court's urging, the parties were unable to agree on a new plan. On April 28, 1998, the Court held a telephone conference with the parties' attorneys. They informed the Court that claimant had decided to complete his HVAC training and was unwilling to consider alternative options. They agreed that in light of his decision, rehabilitation efforts would cease and that upon graduation, rehabilitation assistance would then be offered to claimant in finding employment.

¶8 Claimant received his associate's degree in HVAC in December of 1998. Upon completing his studies, claimant renewed his request that the Court retroactively award him two years of rehabilitation benefits. A further hearing was set to permit claimant to present further evidence concerning his entitlement to rehabilitation benefits. The scope of the second hearing was clearly delimited by the Court's Order:

> On January 4, 1999, I held a telephone conference to discuss the matter with counsel. As a result of that conference, I have decided to allow claimant to present evidence of his job search to support a request for rehabilitation benefits with respect to the job search, and any other evidence he wishes to present. **However, I have indicated, and reiterate through this Order, that I do not intend to reopen or reconsider my February 3, 1998 finding the HVAC program inappropriate.** [Emphasis added.]

(Order Setting Trial Date (January 5, 1999).)

¶9 Having considered the Pretrial Order, the testimony presented at both phases of the 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

¶10 At the time of the first phase of the trial claimant was 37 years old. He resided, and continues to reside in Billings, Montana with his wife, Kerri Tallerico, and their two young children.

¶11 On April 24, 1992, claimant suffered a back injury while employed with Familian Northwest (Northwest). (Uncontested Fact No. 1.) At the time of the injury Northwest was insured by Insurance Company of North America. North America accepted his claim for benefits and paid claimant appropriate medical and wage-loss benefits.

¶12 Claimant was initially treated conservatively, however, on July 28, 1994, he underwent a microdiscectomy at the L5-S1 level. (Ex. 2 at 66, 88.) Subsequently, two different physicians rated his impairment at 18% and 20% respectively. (Ex. 2 at 85, 90.) The insurer adopted the 20% rating and has paid the impairment award accordingly. (Ex. 4 at 7.)

¶13 Claimant has a high school education. In addition, in the early 1980s he completed one year of training at the Billings Vo-tech Center in major appliance repair. While claimant worked out of his garage for a short time repairing washers, dryers, refrigerators, and stoves, he never used his training in a regular employment setting. He testified that the work was not steady and he could not rely on it for regular income. (Eastman Dep. at 7.)

¶14 The parties agree that claimant's time-of-injury job and his prior jobs were heavy labor.

¶15 Following his injury, claimant was restricted by various physicians to light to medium work, thereby precluding him from returning to his time-of-injury job. (Exs. 2 at 60-64, 74, 76, 80, 90, ex. 5 at 1.) The approval for medium work was by Dr. Shumann, who examined claimant in 1993, prior to his surgery. (Ex. 2 at 74, 76.) Dr. Snider, who performed an IME on July 17, 1996, did not specifically approve or disapprove medium work, rather he commented that claimant should avoid heavy labor and work within the guidelines of the functional capacity evaluation (FCE). (Ex. 2 at 90.) Dr. McDowell, the orthopedic surgeon who operated on claimant in 1994 and has treated him since then, limited claimant to light duty (ex. 2 at 60, 63), as has Dr. Shaw, a specialist in occupational disease who performed an IME on July 11, 1995. (Ex. 2 at 79-80). The FCE indicated light to medium work but was done in 1993, prior to surgery. (Ex. 2 at 40, 45.) As indicated by the foregoing summary, post-surgery the claimant has been approved to return to work in only light duty positions.

¶16 Claimant was initially on temporary total disability (TTD) benefits until December 2, 1993. On December 2nd Michele Fairclough (Fairclough), the claims adjuster assigned to his case, wrote a letter informing claimant that his entitlement to TTD had ended and that North America would begin paying permanent partial disability (PPD) benefits. (Ex. 5 at 1.) Fairclough also indicated that if he was interested in retraining, claimant should contact her. (*Id*. at 2.)

¶17 At that point in time, claimant was unsure what he wanted to do. (Trial Test.) Although there were some settlement negotiations, he did not pursue rehabilitation or retraining. The issue of retraining and rehabilitation remained dormant until 1996.

Rehabilitation Services

¶18 In November 1996, claimant and his counsel contacted Ms. Fairclough by telephone to discuss retraining. In a letter dated November 4, 1996, claimant's counsel memorialized their conversation. (Ex. 4 at 6.) He wrote:

> Rick (claimant) is meeting with SRS to develop a rehab plan for **small appliance repair**. He is going to provide the information to me which I will then forward to you. It is my understanding that CIGNA will initiate Total Rehab benefits **once** Rick is enrolled in a full-time retraining plan, *and that* **the job he is retraining to has been approved by his treating physician.** [Emphasis added.]

(*Id.*)

¶19 Claimant enrolled and began taking classes at the Billings Vo-tech Center beginning January 13, 1997. His intention was to complete a two-year program leading to an associate's degree in Major Appliance Repair and Heating & Ventilation (HVAC). (Ex. 4 at 3.) His intention was communicated to Fairclough on December 19, 1996. (Ex. 4 at 3.)

¶20 The claimant's enrollment in the major appliance/HVAC program was contrary to the understanding reflected in his attorney's November 4, 1996 letter. First, the program was not for small appliance repair, as that letter had indicated. Second, his treating physician had not approved jobs for major appliance repair or HVAC positions.

¶21 Fairclough referred claimant's file to Crawford and Company (Crawford), a rehabilitation provider, in February 1997 to determine whether major appliance and HVAC repair jobs were consistent with claimant's physical restrictions. Patricia Murray (Murray) was assigned claimant's file.

¶22 Murray prepared a job analysis for major appliance service technician for Sears and on March 10, 1997, forwarded it to claimant's treating physician, Dr. Gregory S. McDowell for his review. (Ex. 1 at 42.) Dr. McDowell disapproved the position because it involved heavy labor. (*Id.* at 48 and Ex. 2 at 59.)

¶23 When claimant discovered that Dr. McDowell had disapproved the position, he enlisted the help of his instructor Dave Foster (Foster). He asked Foster to help him convince Murray that he would be employable after graduating from the two-year program and receiving his associate's degree.

¶24 On April 23rd Murray met with claimant and Foster to discuss the type of employment claimant could expect to find after completing his training. (Ex. 1 at 25.) At that time the

possibility of an HVAC sales position was mentioned. (*Id.* at 26.) Foster told Murray that the Vo-tech program had 100% placement for its graduates and that 20% of those graduates went on to work in sales as opposed to service. (*Id.* at 2.)

¶25 Murray followed up on the possibility of HVAC sales. In June she prepared a job analysis for sales and forwarded it to Dr. McDowell for his review. (Ex. 1 at 14.) In her correspondence to Dr. McDowell, Murray indicated that it was "likely that Mr. Eastman could find employment as a Sales Representative (Outside Salesman) selling heating, air conditioning, and refrigeration equipment and parts." (*Id.*) Dr. McDowell approved the sales position, which requires only light labor, on June 20, 1997.

¶26 After the position was medically approved, Murray conducted labor market research to determine the availability of HVAC sales jobs. Because claimant had unequivocally stated his intention to remain in Billings, Murray researched only the local Billings market. Her research did not support Foster's claim of 20% placement of Vo-tech graduates in sales jobs, at least in Billings. *(*Ex. 1 at 2.) While the employers she contacted indicated that an associate degree in HVAC was a prerequisite to employment, they all indicated that they filled their sales positions internally and that there was little turnover in HVAC sales jobs in Billings. (*Id*.) With respect to hiring externally, the employers said "*under the right circumstances,* they would consider hiring an outside salesperson from the applicant pool." (*Id*.) It was Murray's opinion that to find employment "[i]t may be necessary for Mr. Eastman to relocate . . . ." (*Id*.)

¶27 Based on Murray's report, the insurer rejected claimant's retraining plan. No further rehabilitation services were provided.

February 1998 Proceeding

¶28 At the first phase of the trial in February 1998, claimant had completed his first year of training, which focused on major appliance repair, and had just begun his second year, which focused on HVAC repair.

¶29 In his deposition claimant testified that after service technician was disapproved by Dr. McDowell, he began looking for alternatives that would allow him to stay in the retraining program. (Eastman Dep. at 30.) However, he testified at trial that he had no prior experience or training in sales and that the HVAC program offered no courses in sales. He had not investigated the sales market in the Billings area. He was not sure what he would do if he completed the training and could not find a job in sales. He did not preclude the possibility that he may pursue a job in repair and testified that he still believes he can do HVAC repair. I find that in February 1998 claimant fully believed that he could perform HVAC repair and that he was likely to pursue a job in HVAC repair.

¶30 Conflicting testimony was presented regarding claimant's potential labor market for a job in HVAC sales. Walter L. Ware (Ware) is an instructor in the HVAC department at the Vo-

tech. He was claimant's second-year HVAC instructor. Ware testified that in his opinion claimant could find a job in HVAC sales and he generally agreed with Foster's representation that 20% of graduates found jobs in sales. (Trial Test.) However, he provided only anecdotal testimony to support his position. He did not know the specific backgrounds or physical limitations of the graduates in question.

¶31 Will Lynn (Lynn) also testified at trial. He is a certified rehabilitation counselor and has worked for Crawford for ten years. Lynn took over claimant's file after Murray left Crawford; previously he had supervised Murray and was familiar with claimant's case. Murray and Lynn had discussed the labor market research she performed and both felt there was a discrepancy between what Foster had told her and what she had found in her own research.

¶32 Lynn testified that the labor market research done by Murray did not support claimant's participation in the major appliance/HVAC program. Lynn did his own labor market research, which confirmed Murray's finding that there were few jobs available in Billings in the area of HVAC sales and little employment potential for claimant.

¶33 Prior to trial, Lynn also did a statewide labor market search for potential employment in HVAC sales. His research determined that HVAC sales jobs do not constitute a very large labor market and that within the market there is very low turnover. Many of the sales positions require the ability to perform heavy labor on occasion. He also confirmed that the normal hiring practice within the industry is to promote a salesperson from within the business, in other words, promote someone working in a service and repair position. In his written report, Lynn noted:

> We have spoken with 31 Montana HVAC employers, only 3 of which have ever hired a HVAC vo-tech graduate into a sales job. My review of Pat Murray's contacts with Dave Foster of the HVAC program at MSU-Billings indicated that 20% of their graduates go into sales; neither Ms. Murray's research, nor mine, has been able to identify this kind of employment potential.

(Ex. 1 at 59.)

¶34 Lynn's written report also expressed his primary concerns if claimant went forward with the two-year program:

According to Ms. Murray's notes, during one of her meetings with Mr. Eastman in March of 1997, he was considering doing "something on his own" after graduation in the HVAC field. His goal later became Salesperson, after some discussion with Ms. Murray, but I am not convinced that Mr. Eastman does not intend to operate his own HVAC repair business after he graduates. If this is the case, it would appear he would need to disregard his physician's restrictions to perform this type of heavy work; I would doubt, as a small business owner, that he could successfully modify his job to eliminate unnecessary stress on his low back.

Given the lack of labor market for sales jobs, I anticipate that there is an even greater chance that Mr. Eastman will pursue HVAC technician employment following graduation, because that is what he is being trained to do. Dr. McDowell has disapproved a job analysis for a HVAC position - and these jobs are typically not modifiable.

(*Id*.)

¶35 The Court was and is persuaded by Lynn's and Murray's opinions. I found that there are few jobs in sales and that claimant, even with an associate degree would not be competitive for those jobs since they are primarily filled internally. It was my own impression after listening to claimant testify at the first trial phase that he was unwilling to heed the restrictions placed on him by his physicians and would likely end up in a heavy labor position. I orally found, and reiterate that finding, that the major appliance/HVAC program in which claimant enrolled is unlikely to lead to employment within claimant's physical restrictions.

¶36 Regarding Mr. Ware's testimony, I said in my oral ruling:

> I heard Mr. Ware, and he's a fine academician and a fine teacher, and he's very articulate. But I don't think he has a handle on what the real world is like out there.

(Partial Trial Tr. at 7.)

April 26, 1999 Proceeding

¶37 Claimant testified that he graduated from the Vo-tech sometime in December 1998. Upon graduation he conducted a short and informal job search. He testified that he briefly looked for either a repair or a sales position. The Court notes that although appliance and HVAC repair had been disapproved by Dr. McDowell because of claimant's physical limitations, he nevertheless looked for repair jobs.

¶38 In his approximately one-month job search claimant did not apply for any jobs. He testified that he looked to see what jobs were available but found none.

¶39 In February 1999, claimant and his wife purchased a building and at the end of March 1999 they opened "The Appliance Shack." The business retails used stoves, refrigerators, washers, and dryers which claimant purchases from new appliance retailers, who take them on trade-in. Claimant reconditions the used appliances, then displays them for sale in the showroom part of the building purchased in February.

¶40 Claimant testified that he does not believe his self-employment exceeds his lifting restriction of 50 lbs or less. (This assumes that his current restriction allows medium work.) He testified that the used appliances are dropped off at his place of business. He then moves them on a dolly approximately 30 feet into his repair shop. When the appliances are

sold, he loads them with an electronic lift gate into the back of his truck and delivers them curbside to his customers, again using an appliance dolly.

¶41 Whether or not claimant is in fact keeping within his medical restrictions, this Court previously determined that his evidence concerning the major appliance/HVAC repair program was unpersuasive. The only issue left open at the end of the first proceeding was whether some other retraining program or job placement assistance is appropriate.

¶42 Moreover, the additional evidence claimant tendered, even if considered, was insufficient to establish the major appliance/HVAC training as a reasonable rehabilitation plan.

¶43 Initially, claimant could not articulate how the second year in HVAC repair assists him in his business. He does not work on any of the commercial HVAC units which were the subject of his second year of training. While claimant testified it is his hope that he will expand his business to include commercial units, such expansion would put him in conflict with his physical restrictions. The certification he would have received had he completed only one year would be sufficient to engage in the work he currently does.

¶44 The Court is also unpersuaded that even the first year of training was a prerequisite or significantly helpful to claimant opening his own business. He had already taken one year of major appliance training, although the course was in 1981 and he did not receive credit for it when beginning his two year program. More importantly, he testified that he has done appliance repair in the past, though not on a full-time basis, and that his prior work was similar to what he does now.

Resolution

¶45 I find that the claimant has failed to prove entitlement to rehabilitation benefits for any part of his two year major appliance/HVAC training.

¶46 In an opening statement to the Court during the second trial phase, counsel for insurer indicated the insurer's willingness to pay for one year of the program, however, it does not appear from the context and tenor of the overall discussion among the Court and counsel that the insurer intended any more than an offer of settlement, one which the claimant rejected.

¶47 There is also no equitable basis for ordering the insurer to pay for any part of the program. Claimant never pursued the insurer's 1993 offer to provide vocational services, rather he waited until late 1996 to proffer his own plan, which the insurer agreed to. Then claimant failed to fulfill the terms of his own plan. First, he did not enroll in small appliance repair but rather in major appliance/HVAC repair. Second, he did not obtain approval for jobs the major appliance/HVAC repair program would qualify him for. In starting school he assumed the risk that the program might be determined to be vocationally inappropriate. In

fact, that was what occurred. Even then, when faced with the Court's finding in February 1998 denying his plan, claimant refused to go back to the drawing board to find a more appropriate program. Rather he proceeded with his schooling and made a second attempt to obtain full funding for his original plan even though the Court had made it clear in February 1998 and subsequently that its finding that his original program was inappropriate was final. Had an insurer engaged in this conduct, it's conduct might well have been held unreasonable and a penalty awarded.

Reasonableness

¶48 The insurer has not acted unreasonably. It offered vocational services early on but claimant did not avail himself of them. When claimant decided he wanted retraining, the insurer acted reasonably in approving his plan subject to medical confirmation that the jobs he was training for were medically appropriate. When claimant unilaterally changed the plan from small appliance repair to major appliance/HVAC repair, thus raising even more significant issues concerning claimant's physical ability to perform jobs in that field, the insurer requested additional vocational analysis which ultimately determined that the field was not vocationally appropriate.

CONCLUSIONS OF LAW

I. Governing Law

¶49 The 1991 version of the Workers' Compensation Act applies to this claim. *Buckman v. Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶50 The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

III. Rehabilitation Benefits

¶51 Claimant seeks 104 weeks of rehabilitation benefits pursuant to section 39-71-2001, MCA (1991), which states:

> **39-71-2001. 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.
[Emphasis added.]

¶52 There is no dispute that subsections 1(a) and 1(b) are satisfied in this case. However, no rehabilitation plan was ever prepared by a rehabilitation provider as is contemplated by 1(c). While the insurer offered vocational assistance early on, claimant did not pursue the offer until 1996, when he proffered his own plan.

¶53 Claimant contends that his enrollment in major appliance/HVAC repair at the Vo-tech constitutes a rehabilitation plan. Section 39-71-2001, MCA, however, does not authorize claimant to write his own rehabilitation plan. The Supreme Court addressed similar issues in *Reeves v. Liberty Mut. Fire Ins. Co.*, 275 Mont. 152, 911 P.2d 839, (1996). Reeves

petitioned the Workers' Compensation Court to approve her proposed rehabilitation plan after it had been denied by the insurer. *Reeves* at 153, 911 P.2d at 839. Her proposed plan was to return to school and obtain a master's degree in counseling. *Id.* The Court found her plan was unreasonable because Reeves could not establish a reasonable expectation that her plan would improve her position in the job market. *Id.*, 911 P.2d at 840. The Supreme Court affirmed.

¶54 Justice Nelson in a specially concurring opinion commented on a claimant's right to formulate his/her own rehabilitation plan. Referring to section 39-71-2001, MCA, he stated:

> . . . [T]he statute clearly does not authorize her to come up with her own rehabilitation plan as she is not a rehabilitation provider under the statute nor has she been designated in that capacity by the insurer (assuming that she had the professional qualifications in the first place). Moreover, simply because the claimant comes up with a plan of how *she wants* to be rehabilitated, that does not obligate the insurer to agree with her plan nor does it obligate the department or the court to approve it.

Id. at 160, 911 P.2d at 844.

¶55 Thus, the Workers' Compensation Act affords no authority for claimant to determine his own rehabilitation plan, enroll in that plan, and then demand rehabilitation benefits. As in *Reeves*, this Court has found that claimant's proposed plan unreasonable. Moreover, in this case the insurer offered assistance in vocational planning and claimant failed to follow-up, thus depriving the insurer's vocational provider from doing a comprehensive analysis and develop a plan in light of that analysis. Rather, the provider and the insurer were put in a position of simply reacting to claimant's demands.

¶56 Claimant is not entitled to attorney fees or a penalty since he has failed to prove that the insurer acted unreasonably in refusing to pay for his major appliance/HVAC repair program.

JUDGMENT

¶57 1. Petitioner is not entitled to rehabilitation benefits with respect to his Vo-tech training in major appliance/HVAC repair.

¶58 2. Petitioner is not entitled to attorney fees and costs pursuant to section 39-71-612, MCA.

¶59 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶60 4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 29th day of July, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. R. Russell Plath
Mr. Leo S. Ward
Submitted: April 26, 1999