

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 83

WCC No. 9712-7884

ROGER HUFFMAN

Petitioner

vs.

TWIN CITY FIRE INSURANCE COMPANY

Respondent/Insurer for

BON BON ENTERPRISES

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. Although he worked immediately after his injury at a minimal wage loss, the reduction in his lifting capacity from heavy to medium has caused him to lose the ability to work in higher paying jobs. Issues presented involved entitlement to permanent partial disability benefits for wage loss, rehabilitation benefits, attorneys fees, and penalty.

Held: Claimant's physical restrictions post-injury establish his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks of punishing claimant for failing to agree to settle all of his claims. With regard to wage loss benefits, the appropriate period to assess wages is the full year post-injury, given evidence that claimant's first post-injury job was not representative of his post-injury wages. See, section 39-71-123(3), MCA (1993). On a long term basis – one year and more – claimant has suffered a wage loss exceeding \$2.00 an hour because of his injury. Where he has proven a wage loss and suggested the possibility of retraining in other aspects of entertainment industry work, claimant may be entitled to rehabilitation benefits, but the insurer has not developed a rehabilitation plan and claimant has not provided details regarding a plan, most importantly, whether his suggestion is reasonable given his education and experience and likelihood of finding new work that would minimize his wage loss. Therefore, the matter is referred back to a rehabilitation provider for evaluation and development of a plan. Penalty is awarded on what was due claimant for physical

restrictions, but attorneys fees are not awarded on that portion because that issue did not go to hearing, given the insurer's pretrial concession. See, section 39-71-612, MCA (1993.) Penalty and attorneys fees are not awarded on other benefits ordered where the insurer's denial was not unreasonable.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

section 39-71-123(3), MCA (1993). 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. With regard to wage loss benefits, the appropriate period to assess wages is the full year post-injury, given evidence that claimant's first post-injury job was not representative of his post-injury wages. See, section 39-71-123(3), MCA (1993). WCC was satisfied that since claimant returned to work, he has experienced periods of unemployment he would not otherwise have experienced. He was also forced to accept lower-paying, less physically demanding jobs when higher-paying, more physically demanding jobs, would have been available to him but for his injury. On a long term basis – one year and more – claimant has suffered a wage loss exceeding \$2.00 an hour because of his injury.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

section 39-71-612, MCA (1993). Claimant's physical restrictions post-injury established his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks of punishing claimant for failing to agree to settle all of his claims. Penalty is awarded on what was due claimant for physical restrictions, but attorneys fees are not awarded on that portion because that issue did not go to hearing, given the insurer's pretrial concession. See, section 39-71-612, MCA (1993.) Penalty and attorneys fees are not awarded on other benefits ordered where the insurer's denial was not unreasonable.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated:

section 39-71-2001, MCA (1993). 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. Although he worked immediately after his injury at a minimal wage loss, the reduction in his lifting capacity from heavy to medium has caused him to lose the ability to work in higher paying jobs. Where he has proven a wage loss and suggested the possibility of retraining in other aspects of entertainment industry work, claimant may be entitled to rehabilitation benefits, but the insurer has not developed a rehabilitation plan and claimant has not provided details regarding a plan, most importantly, whether his suggestion is reasonable given his education and experience and likelihood of finding new work that would minimize his wage

loss. Therefore, the matter is referred back to a rehabilitation provider for evaluation and development of a plan.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2001, MCA (1993). The fact that a claimant has returned to a job other than the time-of-injury job upon reaching MMI does not necessarily terminate the claimant's eligibility for rehabilitation benefits where the evidence indicates claimant has in fact suffered a wage loss. While the legislature intended a quick return to work, that does not foreclose entitlement to rehabilitation benefits without consideration to whether retraining will improve claimant's position in the job market, even though he might be able to obtain some employment without retraining. Denying rehabilitation benefits to disabled workers who find immediate employment upon reaching MMI would discourage an early return to work and would force workers to remain idle in cases where the insurer disputes their entitlement to rehabilitation benefits.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1993). Claimant's physical restrictions post-injury established his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks of punishing claimant for failing to agree to settle all of his claims. Penalty is awarded on what was due claimant for physical restrictions, but not awarded on other benefits ordered where the insurer's denial of those benefits was reasonable given the status of the facts and applicable law.

Attorneys Fees: Cases Denied. Claimant's physical restrictions post-injury established his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks of punishing claimant for failing to agree to settle all of his claims. Penalty is awarded on what was due claimant for physical restrictions, but attorneys fees are not awarded on that portion because that issue did not go to hearing, given the insurer's pretrial concession. See, section 39-71-612, MCA (1993.) Penalty and attorneys fees are not awarded on other benefits ordered where the insurer's denial was not unreasonable.

Attorneys Fees: Unreasonable Denial or Delay of Payment. Claimant's physical restrictions post-injury established his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks of punishing claimant for failing to agree to settle all of his claims. Penalty is awarded on what was due claimant for physical restrictions, but attorneys fees are not awarded on that portion because that issue did not go to hearing, given the insurer's pretrial concession. See, section 39-71-612, MCA (1993.) Penalty and

attorneys fees are not awarded on other benefits ordered where the insurer's denial was not unreasonable.

Benefits: Permanent Partial Benefits: Labor Capacity. 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. Claimant's physical restrictions post-injury establish his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks

Benefits: Permanent Partial Benefits: Lost Earning Capacity. 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. With regard to wage loss benefits, the appropriate period to assess wages is the full year post-injury, given evidence that claimant's first post-injury job was not representative of his post-injury wages. See, section 39-71-123(3), MCA (1993). WCC was satisfied that since claimant returned to work, he has experienced periods of unemployment he would not otherwise have experienced. He was also forced to accept lower-paying, less physically demanding jobs when higher-paying, more physically demanding jobs, would have been available to him but for his injury. On a long term basis – one year and more – claimant has suffered a wage loss exceeding \$2.00 an hour because of his injury.

Benefits: Rehabilitation Benefits: Generally. 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. Although he worked immediately after his injury at a minimal wage loss, the reduction in his lifting capacity from heavy to medium has caused him to lose the ability to work in higher paying jobs. Where he has proven a wage loss and suggested the possibility of retraining in other aspects of entertainment industry work, claimant may be entitled to rehabilitation benefits, but the insurer has not developed a rehabilitation plan and claimant has not provided details regarding a plan, most importantly, whether his suggestion is reasonable given his education and experience and likelihood of finding new work that would minimize his wage loss. Therefore, the matter is referred back to a rehabilitation provider for evaluation and development of a plan.

Benefits: Rehabilitation Benefits: Generally. The fact that a claimant has returned to a job other than the time-of-injury job upon reaching MMI does not necessarily terminate the claimant's eligibility for rehabilitation benefits where the evidence indicates claimant has in fact suffered a wage loss. While the legislature intended a quick return to work, that does not foreclose entitlement to rehabilitation benefits without consideration to whether retraining will improve claimant's position in the job market, even though he might be able to obtain some employment without retraining. Denying rehabilitation benefits to disabled workers who find immediate

employment upon reaching MMI would also discourage an early return to work and would force workers to remain idle in cases where the insurer disputes their entitlement to rehabilitation benefits.

Benefits: Rehabilitation Benefits: Early Return to Work. The fact that a claimant has returned to a job other than the time-of-injury job upon reaching MMI does not necessarily terminate the claimant's eligibility for rehabilitation benefits where the evidence indicates claimant has in fact suffered a wage loss. While the legislature intended a quick return to work, that does not foreclose entitlement to rehabilitation benefits without consideration to whether retraining will improve claimant's position in the job market, even though he might be able to obtain some employment without retraining. Denying rehabilitation benefits to disabled workers who find immediate employment upon reaching MMI would discourage an early return to work and would force workers to remain idle in cases where the insurer disputes their entitlement to rehabilitation benefits.

Benefits: Rehabilitation Benefits: Proof of Wage Loss. A 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. Although he worked immediately after his injury at a minimal wage loss, the appropriate period to assess wages is the full year post-injury, given evidence that claimant's first post-injury job was not representative of his post-injury wages. See, section 39-71-123(3), MCA (1993). On a long term basis – one year and more – claimant has suffered a wage loss exceeding \$2.00 an hour because of his injury. Where he has proven a wage loss and suggested the possibility of retraining in other aspects of entertainment industry work, claimant may be entitled to rehabilitation benefits, but the insurer has not developed a rehabilitation plan and claimant has not provided details regarding a plan, most importantly, whether his suggestion is reasonable given his education and experience and likelihood of finding new work that would minimize his wage loss. Therefore, the matter is referred back to a rehabilitation provider for evaluation and development of a plan.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. A 48-year old driver in the movie and television industry hurt his shoulder while working on the production of Lonesome Dove in Montana. Although he worked immediately after his injury at a minimal wage loss, the reduction in his lifting capacity from heavy to medium has caused him to lose the ability to work in higher paying jobs. Where he has proven a wage loss and suggested the possibility of retraining in other aspects of entertainment industry work, claimant may be entitled to rehabilitation benefits, but the insurer has not developed a rehabilitation plan and claimant has not provided details regarding a plan, most importantly, whether his suggestion is reasonable given his education and experience and likelihood of finding new work that would

minimize his wage loss. Therefore, the matter is referred back to a rehabilitation provider for evaluation and development of a plan.

Penalties: Insurers. Claimant's physical restrictions post-injury established his entitlement to PPD benefits for lost lifting capacity; the insurer's refusal to pay these benefits was unreasonable and smacks of punishing claimant for failing to agree to settle all of his claims. Penalty is awarded on what was due claimant for physical restrictions, but not awarded on other benefits ordered where the insurer's denial of those benefits was reasonable given the status of the facts and applicable law.

Wages: Prospect of Employment. A 48-year old driver in the movie and television industry hurt his shoulder while working on the production of *Lonesome Dove* in Montana. With regard to wage loss benefits, the appropriate period to assess wages is the full year post-injury, given evidence that claimant's first post-injury job was not representative of his post-injury wages. See, section 39-71-123(3), MCA (1993). WCC was satisfied that since claimant returned to work, he has experienced periods of unemployment he would not otherwise have experienced. He was also forced to accept lower-paying, less physically demanding jobs when higher-paying, more physically demanding jobs, would have been available to him but for his injury. On a long term basis – one year and more – claimant has suffered a wage loss exceeding \$2.00 an hour because of his injury.

Wages: Wage Loss. A 48-year old driver in the movie and television industry hurt his shoulder while working on the production of *Lonesome Dove* in Montana. With regard to wage loss benefits, the appropriate period to assess wages is the full year post-injury, given evidence that claimant's first post-injury job was not representative of his post-injury wages. See, section 39-71-123(3), MCA (1993). WCC was satisfied that since claimant returned to work, he has experienced periods of unemployment he would not otherwise have experienced. He was also forced to accept lower-paying, less physically demanding jobs when higher-paying, more physically demanding jobs, would have been available to him but for his injury. On a long term basis – one year and more – claimant has suffered a wage loss exceeding \$2.00 an hour because of his injury.

¶11 The trial in this matter was held on May 6, 1998, in Helena, Montana. Petitioner, Roger Huffman (claimant), was present and represented by Mr. Rex Palmer. Respondent, Twin City Fire Insurance Company (Twin City), was represented by Mr. William O. Bronson. At the conclusion of the trial, the Court permitted claimant's attorney time to review printouts of Twin City's electronic records pertaining to this case. The Court received notice on May 19, 1998 that the review had been completed and that the case should be deemed submitted as of that date.

¶12 Exhibits: Exhibits 1 through 15 and 50 through 80 were admitted without objection. There were no Exhibits 16 through 49.

¶13 Witnesses: Linda Slavik and claimant were sworn and testified.

¶14 Partial Bench Ruling: At the conclusion of the trial, the Court issued a partial bench ruling ordering a penalty paid as to the physical restrictions issue; a further rehabilitation evaluation; and at least a 10% wage loss.

¶15 Issues Presented: The issues, as restated by the Court, are as follows:

- Whether claimant is entitled to a penalty and attorney fees with respect to benefits paid for physical restrictions.
- Whether claimant is entitled to wage loss benefits pursuant to section 39-71-703(3)(c), MCA (1993). If so, in what amount?
- Whether claimant is entitled to rehabilitation benefits.
- Whether claimant is entitled to a penalty and attorney fees with respect to any wage loss and rehabilitation benefits which may be awarded by the Court.

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

FINDINGS OF FACT

I. Claimant and His Work History

¶17 Claimant is currently 48 years of age. (Ex. 5.) He has two years of college. (Ex. 55a at 133.)

¶18 Claimant has worked as a driver, flagger, delivery driver for a linen supply company, delivery driver of office supplies, tree thinner and carpet layer/house remodeler. (*Id.*)

¶19 Since 1991, claimant has worked as a driver in the movie and television industry. His employment has been on specific movie and television productions. He has been hired anew on each new movie or project.

¶10 Prior to his industrial injury, claimant supplemented his income, when not working on a movie, by working as a general laborer on road construction and at other jobs.

II. Industrial Injury

¶11 During the summer of 1993, the claimant was employed by Bon Bon Enterprises (Bon Bon) on the set of Lonesome Dove, a movie which was being filmed, at least in part, in Yellowstone County, Montana. Claimant was employed as a truck driver.

¶12 On August 19, 1993, while working on the Lonesome Dove set, claimant injured his left shoulder while lifting a 200-pound tailgate on a 5-ton truck.

III. Acceptance of Claim for Compensation

¶13 On September 23, 1993, Bon Bon filed an Employers' First Report of Injury. (Ex. 4.) On May 26, 1994, claimant completed and submitted a Claim for Compensation. (Ex. 5.)

¶14 At the time of claimant's injury, Bon Bon was insured by Twin City. Twin City accepted liability for the claim.

IV. Medical Treatment

¶15 Claimant was initially treated for his injury by Dr. Patrick R. Robins, an orthopedic surgeon. (Ex. 1.) Dr. Robins referred claimant to Dr. Stephen G. Powell, who is also an orthopedic surgeon.

¶16 Dr. Powell initially treated claimant conservatively with physical therapy and injections in the shoulder. (Ex. 2.) He concluded that claimant suffered from "subacromial impingement and acromioclavicular joint internal derangement" of his left shoulder. (*Id.* at 15.) On May 25, 1994, he performed surgery to correct the conditions. (*Id.*)

V. Impairment Rating and Release to Return to Work

¶17 On October 12, 1994, Dr. Powell found claimant to be at maximum medical improvement. (Ex. 2 at 25.) He rated claimant's impairment at 7% and released him to return to work as a driver. His office note, which was forwarded to the insurer, states:

He is released to work as a driver. This is moderate physical labor and not extremely heavy. Those types of work are not within his capabilities at the present time.

(*Id.*)

VI. Return to Work

¶18 Upon his release to return to work, claimant immediately went to work on the television program Amazing Grace. Since that time he has worked as a driver on numerous productions. (Ex. 80 at 9-12.)

¶19 However, due to continuing shoulder problems, claimant has avoided heavy work. On his first post-injury job (Amazing Grace), claimant limited his lifting. His supervisor confirmed that he "was trying to help him [claimant] stay 'clear of heavy work'" (Ex. 57 at 1.)

¶20 Because of his inability to perform heavier labor, claimant avoided jobs that required heavy lifting. For example, he did not apply for work on the movies Volcano and Titanic because the driving duties included heavy lifting.

¶21 Even though claimant has undertaken driving jobs not requiring heavy lifting, he has continued to experience shoulder pain and limited motion. In December 1995, he left a job with Greenlight Productions due to shoulder pain exacerbated by his fueling of trucks. (Tr. Test.; Ex. 80 at 10.) Shoulder problems also caused him to change jobs from a Universal Pictures project to a Walt Disney production in June 1996. (*Id.* at 11.) At Universal, unloading cable exacerbated claimant's shoulder pain.

¶22 His continuing shoulder pain is documented by Dr. Powell. On September 12, 1995, Dr. Powell characterized claimant as "doing pretty well," but noted:

He says that he still has pain with activities above his shoulders and forward. Also with lifting a lot of weight. He says that he has problems if he lifts more than about 25 to 35 pounds frequently. This has limited his ability to do the jobs that he was doing before but is able to drive and has been able to work around his limitations.(Ex. 2 at 33.)

¶23 On September 11, 1996, Linda Slavik, the claims adjuster for Twin Cities, wrote to Dr. Powell asking him to clarify whether his original, October 1994, release to return to work was a release to claimant's time-of-injury job. (Ex. 65.) Dr. Powell responded:

Roger Huffman will have persistent problems with lifting heavy objects in the neighborhood of 40 to 50 pounds, it appears, and he certainly had permanent limitation on lifting objects above his shoulder height. I would expect that his permanent restrictions will be that he will be able to do medium labor activity as you define in your letter. If, in fact, Mr. Huffman wants to try his job as a "trial return" I have no problems with that. Apparently he was working around his limitations and not really doing all of the duties which were normally required of his job, according to him in our last discussion. I would not give him a permanent release to this type of work without having some follow-up with him.

If you have any questions, please contact me.

(Ex. 2 at 36.) On December 23, 1996, Dr. Powell again wrote to Ms. Slavik, this time recommending that claimant change jobs:

Roger Huffman continues to have problems which is limiting his ability to do his profession on an unrestricted basis. His trial return to work was successful but only when his activities were limited. He is probably going to require a change in his job type.

If you have any questions, please contact me.

(Ex. 2 at 39.)

¶24 Against this background, the claimant seeks wage-loss benefits, rehabilitation benefits, penalties and attorney fees.

Penalty and Attorney Fee Request with Respect to Restrictions

¶25 On March 5, 1997, Twin Cities conceded that claimant was entitled to benefits under section 39-71-703(3)(d), MCA (1993), on account of physical restrictions resulting from his injury and a resultant loss of laboring capacity. (Ex. 72.) However, the insurer indicated that it wanted to close the claim on a full and final compromise basis:

The Hartford has reviewed the recent medical information supplied to us, and has concluded that it will go ahead and pay an additional indemnity to your client based upon the lifting restriction criteria set forth in Section 39-71-703, MCA. Beyond that, however, the insurer does not believe it is liable for additional benefits. **If agreeable to your client, the insurer would also like to go ahead and close this claim on a full and final basis for the sums already paid plus the lifting restriction indemnity to be paid, leaving only the medicals open.** Please advise if this would be acceptable. [Emphasis added.]

(Id.)

¶26 Claimant's attorney wrote back, rejecting the compromise settlement and demanding "prompt payment of the lifting restriction entitlement" (Ex. 73.) Twin Cities responded on March 25, 1997, that it would pay the lifting restriction, amounting to 15% or \$9,502.50,⁽¹⁾ but would pay it only on a biweekly basis retroactive to February 10, 1997, when it had received the results of a Functional Capacities Evaluation (FCE) it had requested. (Ex. 74.)

¶27 At the time Twin Cities requested the FCE, it had already received Dr. Powell's medical opinion that claimant was limited to medium labor. That opinion was set forth in his October 1994 release. The FCE merely **confirmed** that opinion. It was not new information. In that light, and given Twin Cities request that claimant enter into a full and final compromise settlement in exchange for payment for the physical restriction, Twin Cities refusal to pay the 15% retroactive to October 1994 smacks of punishment for claimant's refusal to execute a full and final compromise settlement in exchange for Twin Cities' payment of benefits which Twin Cities admitted were due him. Twin Cities failure to pay the benefits retroactive to October 1994 was unreasonable.

Wage Loss Benefits

¶28 Claimant's case for a loss of wages was based on his testimony. He presented no expert testimony. However, his testimony was persuasive. He impressed me as knowledgeable regarding driving opportunities in the movie/television industry, the requirements of the jobs, and the range of pay.

¶129 Upon his return to work on the *Amazing Grace* set, claimant earned \$12.00, or \$5.24 less than his time-of-injury wage. However, claimant's subsequent job history puts into question whether that loss was due to the nature of the movie and television industry. Post-injury claimant has worked on numerous movie and television sets and his wages have been as high as \$21.52 an hour, which is \$2.28 higher than his time-of-injury job. (Ex. 80 at 12.)

¶130 Claimant provided his income tax returns, which show that in 1993 - the year of his injury - he earned \$39,088. His earnings in subsequent years were less, as follows:

1994 . . . \$10,539

1995 . . . \$29,972

1996 . . . \$36,371

The earnings for 1994 were, of course, reduced by claimant's period of temporary total disability. I do not find the lesser wages in 1995 and 1996 especially persuasive of a loss of wages since the nature of claimant's employment in the movie and television industry subjects him to the *market of the moment* for his services. That market reflects the vagaries of the industry. Thus, it is conceivable that his high income year in 1993 was unusual and is not indicative of what he could reasonably expect to receive in subsequent years.

¶131 That said, claimant's testimony established that as he gained experience in the industry and as he "networked" with sources in the industry, he was better able to find and secure employment. His testimony is buttressed by his employment history⁽²⁾ and I find it convincing.

¶132 While some of the claimant's post-injury jobs paid more than this time-of-injury job, claimant testified that he lost wages because in several instances he had to forego higher paying driving jobs due to his inability to perform the physical demands required. In those cases he either accepted less physically demanding, lower paying work, or was forced into unemployment.

¶133 Claimant was also unable to return to road construction work.

¶134 Claimant testified, and I find, that he lost work that was otherwise available to him at the end of movie production because the work required heavy labor. However, even though he may have been positioned to do that sort of work, it was not regular work he had previously performed. His loss was one of future opportunity rather than of actual work or wages.

¶135 Excluding the loss of opportunity for post-production work, I find that as a result of his injury the claimant experienced a loss of wages in excess of \$2 an hour over the one-year

period following his reaching MMI and returning to work. That loss has continued to present. Proof of lost wages does not require certainty, it requires only that the Court be persuaded on a more-likely than not basis as to the loss. Applying that standard, I am satisfied that since he returned to work the claimant has experienced periods of unemployment he would not have otherwise experienced. He was also forced to accept lower-paying, less physically demanding jobs when higher paying, more physically demanding jobs, were available. While it is impossible to quantify his actual loss of wages with mathematical precision, such precision is not required.

Rehabilitation Benefits

¶136 Even though claimant returned to work immediately upon reaching MMI, he did not return to his time-of-injury job. On October 24, 1994, his attorney wrote the adjuster a letter stating that claimant was working in a modified position and "is interested in retraining into one of the other lighter duty technical type areas in the entertainment industry to recoup the loss he has experienced as a result of his injury." (Ex. 6 at 1-2.) On February 9, 1995, claimant's attorney wrote that claimant "believes he can regain part of his earning capacity by training into more technical aspects in the film industry." (Ex. 9 at 2.)

¶137 Claimant wants to be retrained as a production designer and set decorator in the movie industry. According to claimant, the position does not require lifting; requires training that cannot be learned on-the-job; and provides equivalent or greater wages than claimant's time-of-injury job.

¶138 With respect to claimant's request for rehabilitation benefits, previous findings of fact have established that claimant has suffered significant (in excess of \$2 an hour) wage loss; that he cannot return to his time-of-injury job; and that he should find a new vocation other than truck driving.

¶139 While retraining appears essential to claimant regaining his earning capacity, the Court is unable to evaluate whether retraining as a production designer and set decorator is reasonable. A rehabilitation plan was never developed or even pursued because the insurer determined that rehabilitation benefits were not due in any case. Claimant, on his part, has not provided the Court with sufficient information for it to make an informed and reasoned judgment as to the appropriateness of retraining as a production designer and set decorator. For example, the Court does not have sufficient information to determine whether claimant has the education and experience necessary to undertake the program; to determine the length of training; or to determine the amount by which the claimant's wages would be enhanced upon completion of the program.

Penalty/Attorney Fee on Wage Loss and Rehabilitation Benefits

¶40 Claimant requests both a penalty and attorney fees with respect to any wage loss and rehabilitation benefits that may be awarded. His request requires the Court to consider whether the insurer's denial of those benefits was unreasonable.

¶41 With respect to wage loss benefits, I find that Twin Cities' refusal of benefits was not unreasonable. While claimant's wages for his first post-injury job were less than his time-of-injury wages, the wage history provided by claimant for his jobs in the movie/television industry indicate that there is a wide variation in wages. At the time of his injury the claimant was earning \$19.24 an hour. (Ex. 80 at 8.) Post-injury the claimant earned as much as \$21.52 an hour. (*Id.* at 11.) Given the nature of claimant's employment, it is difficult to compare pre- and post-injury wages, especially without expert testimony.

¶42 While Dr. Powell indicated in December 1996 that claimant should find another vocation, he did not rule out medium work of the sort claimant performed on a number of his post-injury jobs.

¶43 While I am persuaded that claimant has suffered a wage loss due to his injury, that loss is not beyond reasonable dispute.

¶44 I also find that Twin Cities denial of rehabilitation benefits was not unreasonable. Rehabilitation benefits require a wage loss. While I have found that claimant suffered a wage loss, the wage loss issue was reasonably debatable. Moreover, the history of contacts between claimant and Twin Cities' adjuster provide less than a clear case for reeducating claimant as a production designer and set decorator.

CONCLUSIONS OF LAW

I. Applicable Law

¶45 Claimant was injured on August 19, 1993. His entitlement to benefits is governed by the 1993 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Burden of Proof

¶46 Claimant must prove his entitlement by a preponderance of the evidence. *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).

III. Permanent Partial Disability Benefits

¶47 Section 39-71-703, MCA (1993) provides for permanent partial disability benefits. It reads:

39-71-703. Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or

permanent total disability benefits, the worker is entitled to a permanent partial disability award.

(2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

(a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;

(b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%; and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

(4) The weekly benefit rate for permanent partial disability is 66 % of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

Claimant has already been paid benefits with respect to his education, age, impairment and lifting restrictions. (Exs. 11 and 74.) Thus, the only controversy is over wage loss benefits which may be due under subsection (3)(c), MCA.

¶48 If the Court must compare claimant's time-of-injury wage with the wage he received on his first post-injury job, he suffered in excess of a \$2.00 an hour wage loss. Pre-injury he was earning \$19.24 an hour. Post-injury he earned \$12.00 working on the Amazing Grace set. However, his loss of wages must be the "result of the industrial injury." § 39-71-703(3)(c), MCA (1993). Claimant's post-injury job history indicates that at least some of the wage difference was due to the nature of the industry and the availability of jobs. Three of his post-injury jobs paid more than his time-of-injury job, one of them \$2.28 more.

¶49 As I determined in the recent case of *Edward Steve McGillis v. State Compensation Ins. Fund*, WCC No. 9806-7995, 1998 MTWCC 79, (November 2, 1998), section 39-71-703(3)(c), MCA (1995), does not specify the time period in which wage loss should be measured. In that case I noted that the first post-injury job may not reflect a claimant's true wage loss since the job, if a short-term one, may represent a lucky break which shortly ends. (*Id.* at 15-16.) In attempting to determine what period should be used to measure wage loss, I looked to section 39-71-123(3), MCA (1995), which governs calculations for purposes of benefits. (*Id.*) Under that section the four weeks prior to injury is the presumptive period for determining wages, however, if that four weeks does not fairly measure wages, a longer period of up to a year may be used. In *McGillis* I used a year to measure wage loss. (*Id.*)

¶50 In this case, the claimant's post-injury employment history demonstrates that the wages for his first post-injury job are not representative of his post-injury wages and that the nature of the industry affected his wages. Nonetheless, as I have determined, on a long term basis - one year and more - that claimant has suffered a wage loss exceeding \$2.00 an hour on account of his injury.

IV. Rehabilitation Benefits

¶51 Claimant's entitlement to rehabilitation benefits is governed by section 39-71-2001, MCA (1993), 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 the worker cannot return to the job held at the time of injury, 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. [Emphasis added.]

¶152 As an initial matter, eligibility for rehabilitation benefits is limited to claimants who are permanently partially or totally disabled. § 39-71-2001(1)(a), MCA (1993). Claimant is certainly not permanently totally disabled. Thus, his entitlement is dependent on whether he is permanently partially disabled.

¶153 Section 39-71-116(19), MCA (1993), defines permanent partial disability as follows:

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

As admitted by the insurer, claimant has a medically determined physical restriction. As found by the Court, that restriction impairs his ability to work. Thus, he satisfies the definition of permanent partial disability.

¶154 The second hurdle to rehabilitation benefits is the requirement that a physician certify that the worker is physically unable to return to his time-of-injury job. § 39-71-2001(1)(b), MCA (1993). Dr. Powell opined that claimant cannot return to his time-of-injury job. The second hurdle is satisfied.

¶155 Having met these criteria, claimant is entitled to the rehabilitation benefits and services provided in subsection (2) of section 39-71-2001, MCA (1993). § 39-71-2001 (4), MCA (1993). Subsection (2) provides for **up to 104 weeks** of benefits based on a rehabilitation plan developed by the rehabilitation provider and filed with the Department of Labor and Industry. Claimant must agree to the plan. See § 39-71-2001 (1)(d), MCA (1993).

¶156 Quoting a popular saying, "the devil is in the details." Section 39-71-2001, MCA (1993), does not require any specific rehabilitation plan or any specific duration of benefits.

¶157 One of the rehabilitation options is for an immediate return to work at some job other than the time-of-injury job. Subsection (3) provides that if the plan calls for job placement then the insurer's liability is limited to eight weeks of benefits. It does not specifically address what should happen if the claimant returns to a job, other than the time-of-injury job, upon reaching MMI, as occurred in this case. Does such a return to work terminate the claimant's eligibility for rehabilitation benefits? I conclude it does not.

¶158 "In interpreting a statute, the prime consideration must be defining the objectives the legislature sought to achieve." *Hern Farms, Inc. v. Mutual Benefit Life Ins. Co.*, 280 Mont. 436, 441, 930 P.2d 84, 87 (1996). Generally, legislative purpose must be determined from the plain words of the statute, *id.*, including coordinate provisions, *Howell v. State*, 263 Mont. 275, 286, 868 P.2d 568, 575 (1994).

¶159 Subsection (2) of section 39-71-105, 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.

While it might be argued from this general statement of legislative intent requires the quickest return to work without consideration as to the nature of the job or the loss of earnings, that interpretation would ignore the broader purposes evidenced in the rehabilitation provisions. Section 39-71-2001(1)(c), MCA (1993), sets out the considerations for preparing a rehabilitation plan:

(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.

The plain language of this subsection indicates that a rehabilitation plan must consider a host of factors other than the quickest return to work. Included among those factors are "wage potential" and the worker's "vocational interests." If the legislature intended to limit vocational rehabilitation benefits to the quickest return to work, it would not have needed the elaborate provision it set out in section 39-71-2001, MCA (1993): it could have merely specified that if a worker is capable and qualified to work at a fast food restaurant, as a keno caller, or as a parking lot attendant, then the insurer need only provide eight weeks of job placement benefits.

¶160 It is plain to this Court that the legislature intended a quick return to work be but one consideration and that it intended that any rehabilitation plan developed under section 39-

71-2001 give consideration to returning the injured worker to a job which is compatible with his or her age, education, training, work history, physical ability, vocational interests **and prior wages**. Accordingly, one of the considerations of any rehabilitation plan should be whether retraining will improve the worker's "position in the job market." *Reeves v. Liberty Mutual Fire Ins. Co.*, 275 Mont. 152, 158, 911 P.2d 839, 842 (1996). Improving a worker's position in the job market encompasses improving his or her ability to obtain higher paying jobs where the injury has resulted in a wage loss. *Id.*

¶61 Denying rehabilitation benefits to disabled workers who find immediate employment upon reaching MMI would discourage an early return to work and would force workers to remain idle in cases where the insurer disputes their entitlement to rehabilitation benefits. Such interpretation of section 39-71-2001, MCA, is inconsistent with the plain language providing that any worker unable to return to his or her time-of-injury job "is entitled to rehabilitation benefits." It is also inconsistent with the early return to work language of section 39-71-105(2), MCA (1993). I find that section 39-71-2001, MCA, does not require a worker to forgo employment and elect impoverishment while awaiting an insurer's decision whether to provide rehabilitation services.

¶62 The claimant in this case insisted from the moment he reached MMI that he was entitled to rehabilitation benefits. His return to work at a modified job while awaiting action of the insurer on his request did not disqualify him from those benefits.

¶63 However, no rehabilitation plan was ever developed. The claimant has not provided the Court with sufficient evidence for it to make an informed and reasoned judgment as to the appropriateness of retraining as a production designer and set decorator. For example, the Court does not have sufficient information to determine whether claimant has the education and experience necessary to undertake the program; to determine the length of training; or to determine the amount by which the claimant's wages would be enhanced upon completion of the program.

¶64 I therefore conclude that this matter should be referred back to a rehabilitation provider for further evaluation and the development of a rehabilitation plan.

V. Penalty and Attorney Fees

¶65 Any award of a penalty and attorney fees require a finding that the insurer unreasonably refused or delayed benefits. §§ 39-71-612 and -2907, MCA (1993).

¶66 An award of attorney fees further requires that the matter have gone to hearing. Section 39-71-612, MCA (1993), requires in relevant part:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates

to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

¶167 I have determined as a matter of fact that Twin Cities unreasonably delayed benefits due claimant on account of his physical restriction. Claimant was injured in 1993 and reached MMI in October 1994. On March 25, 1997, Twin Cities finally admitted he was due benefits based on a physical restriction to medium labor and the fact that he had been performing heavy labor. § 39-71-703(3)(d), MCA (1993). However, Twin Cities refused to pay the benefits retroactive. It justified its refusal on the fact that had only recently received the results of an FCE . As I have already noted, the FCE merely **confirmed** the restrictions imposed by claimant's physician in October 1994. Moreover, the refusal to pay the benefits retroactive to MMI followed the insurer's request that claimant execute a full and final compromise release of all other benefits in exchange for the benefits. I have found as fact that:

Twin Cities refusal to pay the 15% retroactive to October 1994 smacks of punishment for claimant's refusal to execute a full and final compromise settlement in exchange for Twin Cities' payment of benefits Twin Cities admitted were due him. Twin Cities failure to pay the benefits retroactive to October 1994 was unreasonable.

Accordingly, claimant is entitled to a penalty in the amount of 20% of the benefits paid for physical restriction, however, he is not entitled to attorney fees because the amount was paid without resort to litigation.

¶168 Claimant's further request for a penalty and attorney fees with respect to wage loss and rehabilitation benefits is denied. While I have found that he is entitled to wage loss benefits in the amount of 20% and to a further rehabilitation evaluation, his entitlement was not clear and was reasonably disputable. His requests raised significant issues of both fact and law.

¶169 With respect to his wage loss claim, claimant's post-injury job history showed that at one job he earned wages exceeding his wage at his time-of-injury job. The nature of his employment showed that he went from job to job and that his wages on each job varied. He presented no expert evidence showing that his post-injury jobs, even though more physically limited, paid less on average than his pre-injury jobs.

¶170 With respect to his claim for rehabilitation benefits, his immediate return to work upon reaching MMI, as well as a legitimate question as to whether he suffered a wage loss,

raised legitimate issues as to his entitlement to rehabilitation benefits under section 39-71-2001, MCA (1993). That those issues were resolved in his favor does not render the insurer's conduct unreasonable. It is sufficient that its position was not beyond the pale of reasonable legal advocacy.

JUDGMENT

¶71 1. Pursuant to section 39-71-703(3)(c), MCA, claimant is entitled to a 20% award for lost wages. The parties have not asked the Court to determine the amount due, however, the Court retains jurisdiction to determine the amount if they disagree.

¶72 2. Twin Cities shall designate a rehabilitation provider to prepare a rehabilitation plan.

¶73 3. Twin Cities shall pay claimant a 20% penalty with respect to claimant's physical restrictions. The amount of the penalty which shall be paid is \$1,900.05.

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

¶75 5. 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 16th day of November, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Rex Palmer

Mr. William O. Bronson

Submitted: May 19, 1998

1. The award was based on claimant's performing heavy labor prior to his injury and his ability to perform only medium labor after his injury. § 39-71-703(3)(d), MCA (1993).

2. See Ex. 80 at 7-12.