IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 2

WCC No. 9708-7810

DAVID LEASTMAN

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

CENEX

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary of Case: 46-year old Cenex manager whose 20 years of work for Cenex store involved heavy labor injured his back lifting. He continued working for five months, then stopped due to back pain. Based upon evidence claimant could not return to his time of injury job and has suffered a wage loss, he asked for rehabilitation benefits. The insurer argued claimant was not entitled to rehab benefits because he had no wage loss and had, in any event, failed to follow plans recommending by rehabilitation providers.

Held: Claimant is entitled to rehabilitation benefits, as well as penalty and attorneys fees. Contrary to the insurer's argument, section 39-71-1006, MCA (1995) does not vest unfettered discretion in either the insurer or the rehabilitation provider to require claimant to accept rehabilitation advice; claimant is entitled to petition the WCC, as he has done, for a determination of his entitlement to rehabilitation benefits. Under section 39-71-1006, MCA (1995), a rehabilitation plan must attempt to achieve a reasonable reduction in the worker's actual wages. Claimants with permanent partial disability are entitled to a rehabilitation plan where statutory criteria are met, even if completion of the plan requires delay in return to work. The statute also requires more than a theoretical exercise and recitation of job assessments; it requires a careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or

her "age, education, training, work history, residual physical capacities and vocational interests." If there is a reasonable prospect that retraining or further education will result in significantly higher wages, then the plan must provide for such. Here, the analysis performed by the insurer's vocational consultants was inadequate; the record leads the WCC to conclude claimant's plan for education in computer science will expand his job market and significantly increase his wages. Because the insurer's plans were inadequate, claimant will be allowed to proceed with his plan. 104 weeks of rehabilitation benefits were ordered, along with penalty and attorneys fees based on the insurer's unreasonable hardening of its position toward payment of any benefits after claimant refused to acquiesce to its inadequate plan. However, following the parties' post-decision negotiations to resolve the matter without appeal, the WCC issued an Order Nunc Pro Tunc for Entry of Judgement and Dismissal with Prejudice based upon the parties' resolution.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-1006, MCA (1995). Contrary to the insurer's argument, section 39-71-1006, MCA (1995) does not vest unfettered discretion in either the insurer or the rehabilitation provider to require claimant to accept rehabilitation advice; claimant is entitled to petition the WCC, as he has done, for a determination of his entitlement to rehabilitation benefits.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-1006, MCA (1995). Claimants with permanent partial disability are entitled to a rehabilitation plan where statutory criteria are met, even if completion of the plan requires delay in return to work.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-1006, MCA (1995). Section 39-71-1006, MCA (1995) requires more than a theoretical exercise and recitation of job assessments to meet rehabilitation requirements. The statute requires a careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or her "age, education, training, work history, residual physical capacities and vocational interests." If there is a reasonable prospect that retraining or further education will result in significantly higher wages, then the plan must provide for such. Here, the analysis performed by the insurer's vocational consultants was inadequate, but the record leads the WCC to conclude claimant's plan for education in computer science will expand his job market and significantly increase his wages. Because the insurer's plans were inadequate, claimant will be

allowed to proceed with his plan. 104 weeks of rehabilitation benefits were ordered, along with penalty and attorneys fees based on the insurer's unreasonable hardening of its position toward payment of any benefits after claimant refused to acquiesce to its inadequate plan.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2907, MCA (1995). After claimant refused to adhere to insurer's rehabilitation provider's advice, insurer refused any rehabilitation benefits. Coupled with the rehabilitation provider's inadequate job of evaluating claimant's realistic job prospects with and without retraining, the delay and denial of benefits caused by this position was unreasonable, giving rise to a penalty and attorneys fees.

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-611, MCA (1995). After claimant refused to adhere to insurer's rehabilitation provider's advice, insurer refused any rehabilitation benefits. Coupled with the rehabilitation provider's inadequate job of evaluating claimant's realistic job prospects with and without retraining, the delay and denial of benefits caused by this position was unreasonable, giving rise to a penalty and attorneys fees.

Attorneys Fees: Unreasonable Denial or Delay of Payment. After claimant refused to adhere to insurer's rehabilitation provider's advice, insurer refused any rehabilitation benefits. Coupled with the rehabilitation provider's inadequate job of evaluating claimant's realistic job prospects with and without retraining, the delay and denial of benefits caused by this position was unreasonable, giving rise to a penalty under section 39-71-2907, MCA (1995).

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Claimants with permanent partial disability are entitled to a rehabilitation plan where statutory criteria are met, even if completion of the plan requires delay in return to work.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Section 39-71-1006, MCA (1995) requires more than a theoretical exercise and recitation of job assessments to meet rehabilitation requirements. The statute requires a careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or her "age, education, training, work history, residual physical capacities and vocational interests." If there is a reasonable prospect that retraining or further education will result in significantly higher wages, then the plan must provide for such. Here, the analysis performed by the insurer's vocational consultants was inadequate, but the record leads the WCC to conclude claimant's plan for education in computer

science will expand his job market and significantly increase his wages. Because the insurer's plans were inadequate, claimant will be allowed to proceed with his plan. 104 weeks of rehabilitation benefits were ordered, along with penalty and attorneys fees based on the insurer's unreasonable hardening of its position toward payment of any benefits after claimant refused to acquiesce to its inadequate plan.

Benefits: Rehabilitation Benefits: Rehabilitation Providers. Contrary to the insurer's argument, section 39-71-1006, MCA (1995) does not vest unfettered discretion in either the insurer or the rehabilitation provider to require claimant to accept rehabilitation advice; claimant is entitled to petition the WCC, as he has done, for a determination of his entitlement to rehabilitation benefits.

Penalties: Insurers. After claimant refused to adhere to insurer's rehabilitation provider's advice, insurer refused any rehabilitation benefits. Coupled with the rehabilitation provider's inadequate job of evaluating claimant's realistic job prospects with and without retraining, the delay and denial of benefits caused by this position was unreasonable, giving rise to a penalty and attorneys fees.

Vocational – Return to Work Matters: Employability. Section 39-71-1006, MCA (1995) requires more than a theoretical exercise and recitation of job assessments to meet rehabilitation requirements. The statute requires a careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or her "age, education, training, work history, residual physical capacities and vocational interests." If there is a reasonable prospect that retraining or further education will result in significantly higher wages, then the plan must provide for such. Here, the analysis performed by the insurer's vocational consultants was inadequate, but the record leads the WCC to conclude claimant's plan for education in computer science will expand his job market and significantly increase his wages. Because the insurer's plans were inadequate, claimant will be allowed to proceed with his plan. 104 weeks of rehabilitation benefits were ordered, along with penalty and attorneys fees based on the insurer's unreasonable hardening of its position toward payment of any benefits after claimant refused to acquiesce to its inadequate plan.

Vocational – Return to Work Matters: Retraining. Section 39-71-1006, MCA (1995) requires more than a theoretical exercise and recitation of job assessments to meet rehabilitation requirements. The statute requires a careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must

compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or her "age, education, training, work history, residual physical capacities and vocational interests." If there is a reasonable prospect that retraining or further education will result in significantly higher wages, then the plan must provide for such. Here, the analysis performed by the insurer's vocational consultants was inadequate, but the record leads the WCC to conclude claimant's plan for education in computer science will expand his job market and significantly increase his wages. Because the insurer's plans were inadequate, claimant will be allowed to proceed with his plan. 104 weeks of rehabilitation benefits were ordered, along with penalty and attorneys fees based on the insurer's unreasonable hardening of its position toward payment of any benefits after claimant refused to acquiesce to its inadequate plan.

¶1 The parties have submitted this matter for decision based upon (1) agreed facts set forth in the Pre-trial Order, (2) the depositions of David Leastman (September 25, 1997 and March 26, 1998), Bob G. Zadow, JoAnn "Joey" Gordon, Dennis McLuskie, and Lorayne Leastman, (3) ten exhibits, and (4) briefs.

¶2 Objections to Exhibits: Liberty objects to the Court's consideration of Exhibits 3, 5 and 6 on relevancy grounds. It has not argued its objections in its brief. In any event the Court finds Exhibit 3 relevant to claimant's rehabilitation plan. Exhibits 5 and 6 are relevant to his claim for attorney fees and a penalty. All exhibits, as well as the depositions, are admitted as evidence and considered by the Court in reaching its decision.

¶3 Issues Presented: The following issues are set forth in the Pre-trial Order:

A. Whether the Petitioner is entitled to vocational rehabilitation benefits pursuant to Part 10 of the Montana Workers' Compensation Act.

B. Whether the Respondent/Insurer wrongfully discontinued Petitioner's temporary total disability benefits on June 21, 1996.

C. Whether in accordance with Section 39-71-2907, M.C.A., Claimant is entitled to an increased award of 20% of benefits based upon Respondent/Insurer's alleged unreasonable refusal to place Petitioner on vocational rehabilitation benefits and/or Respondent/Insurer's alleged wrongful discontinuance of Petitioner's temporary total disability benefits on June 21, 1996.

D. Whether in accordance with Section 39-71-611, M.C.A., Respondent/Insurer shall pay reasonable costs and attorney fees to the Petitioner as established by the Court.

The second issue, alleging wrongful discontinuance of temporary total disability (TTD) benefits, was not argued by claimant in his briefs and is deemed waived.

¶4 Having considered the agreed facts, the depositions, the exhibits, and the parties' briefs, the Court makes the following:

FINDINGS OF FACT

¶5 Claimant is 46 years old. He is married and has six children. At the time this case was submitted for decision he was living in Newburg, Oregon, where he is currently attending college at George Fox University and pursuing a bachelor of science (BS) degree in computer science. (D. Leastman 3/26/98 Dep. at 39.)

¶6 From 1975 to 1996 the claimant was employed by Cenex in Glendive, Montana. In approximately 1986 he was promoted to manager. Claimant managed the Cenex store for the next ten years.

¶7 Even as manager, claimant's job required him to perform very heavy labor. (Ex. 10 at 30-33.) According to Cenex, the job could not be modified. (*Id*. at 18-19.)

¶8 On July 25, 1995, claimant injured his back when he and a coworker lifted two 30 gallon barrels of chemicals into the back of a pickup. (Ex. 4.)

¶9 At the time of claimant's industrial accident, Cenex was insured by Liberty Mutual Fire Insurance Company (Liberty). Liberty accepted liability for the accident.

¶10 Despite his injury, claimant continued working until November 1995, at which time his back pain forced him to cease working. (Ex. 1 at 43.)

¶11 Following his cessation of work, Liberty began paying claimant TTD benefits. It continued paying TTD benefits until June 21, 1996, when it converted his benefits to permanent partial disability (PPD) benefits. (pre-trial order, Uncontested Fact D at 3.)

¶12 At the time of his injury, claimant was earning either $14.06 per hour (Ex. 9 at 22) or $13.40 per hour (Ex. 9 at 6). For purposes of this decision, it is unnecessary for the Court to determine his exact hourly rate.

¶13 One of the issues raised in the Pre-trial Order is claimant's entitlement to further TTD benefits. In his briefs the claimant has not argued for further TTD benefits or cited any facts which would support such entitlement. Moreover, claimant's treating physician declared claimant at maximum medical improvement (MMI) on May 2, 1996. (Ex. 1 at A5.) There is no basis for any award of further TTD benefits and the issue merits no further consideration.

¶14 While he has reached MMI, claimant cannot return to his time-of-injury job. As early as March 22, 1996, Dr. Steven J. Rizzolo, an orthopedic surgeon and claimant's treating physician, indicated that claimant cannot return to his Cenex job. On March 22nd he wrote,

"I think that vocational rehabilitation has already been instituted and I think that is a good idea. I would look at only sedentary positions." (Ex. 1 at A4.)

¶15 Dr. Rizzolo became claimant's treating physician on March 13, 1996, upon referral by Liberty's medical case manager. (Ex. 1 at A1 and Ex. 8.) On May 2, 1996, Dr. Rizzolo determined that claimant had reached MMI, rated his impairment at 5% of the whole person, and determined that claimant could not return to his time-of-injury job. Based on a functional capacity evaluation (FCE), which is found at Exhibit 1, pages A66-A73, Dr. Rizzolo opined that claimant was restricted to sedentary to medium labor, the latter with restrictions. (Ex. 1 at A5.) The restrictions he placed on the claimant were:

> Permanent restrictions include no long distance driving, the ability to alternate sitting and standing every 45 to 60 minutes with more sitting than standing. His lifting restrictions are 25 pounds occasionally and 10 pounds frequently.

(*Id.*) As a legal matter, the lifting restrictions limit claimant to light-duty work. § 39-71-703(9)(c), MCA (1995).

¶16 On May 1, 1996, Dr. Rizzolo approved job analyses for the positions of cashier, accounting assistant, and retail convenience store manager (with modifications). (McLuskie Dep. Ex. 1 at 83, 95 and 54.) The job description for retail store manager lists lifting requirements of 30-50 pounds on an occasional basis and classifies the job as a medium laboring position. (*Id.* at 51, 54.) As noted in the previous paragraph, Dr. Rizzolo limited claimant to lifting 25 pounds on an occasional basis and his approval of the job was conditioned upon modifying the position to limit lifting to "12 packs."[(1)] The limitations imposed by Dr. Rizzolo amounted to a disapproval of the retail store manager job.[(2)]

¶17 On February 20, 1997, Dr. Rizzolo approved additional job analyses for sales representative and micro-computer support specialist but did so upon the condition that both positions be modified to restrict lifting of greater than 25 pounds to a "rare" basis and to allow a 10-minute break every 60 to 90 minutes when claimant drives. (Ex. 1 at A8.)

¶18 Based on his physical limitations, his inability to return to his time-of-injury job, and lost wages, the claimant seeks rehabilitation benefits.

¶19 As an initial matter, claimant must demonstrate a loss of wages to be eligible for rehabilitation benefits. § 39-71-1006(1)(a), MCA. Liberty contends that claimant has failed to satisfy this initial hurdle.

¶20 Liberty's contention is disingenuous, frivolous and beyond legitimate advocacy. By its own actions, Liberty has admitted that claimant suffered a wage loss. Liberty has paid permanent partial disability benefits. Those benefits are payable only if claimant suffered a wage loss. § 39-71-703(1)(a), MCA (1995). Moreover, on August 29, 1996, its own rehabilitation provider wrote:

> It is clear that Mr. Leastman is medically precluded from returning to his job of injury and will experience a significant wage loss upon re-entering the job market. Without retraining, Mr. Leastman is limited to light-duty, entry level employment earning $4.25 - 7.00 per hour. . . .

(Ex. 10 at 10.) As reported by Liberty's claims adjuster, in April 1996, claimant's employer offered him a $5.00 an hour job as a Data Entry/Accounting Clerk in Sidney, Montana. (*Id.* at 14.) The offer represented a pay-cut of $8.40 to $9.00 an hour.[(3)] Annually, the offered job represented a loss of $17,472.00 to $18,720.00.[(4)] In addition to the loss of wages, claimant would also have been forced to commute 108 miles daily or relocate to Sidney. It is not surprising that claimant rejected the offer.

¶21 Liberty's sole evidence of no wage loss was based on a report and testimony of Joey Gordon (Gordon), the second vocational consultant employed by Liberty, concerning office manager jobs for which claimant might qualify. (Respondent's Reply Brief at 10, Proposed Finding 45.) Gordon identified potential office manager positions paying from $8.73 per hour to $15.25 per hour. (Ex. 9 at 24.) Liberty seized the higher figure as proof of no wage loss. But Gordon's report repudiates any expectation that claimant can access high paying managerial jobs outside of Cenex:

> Wages vary with type of employer, training and experience. Average entry wage is about $1,480/month, average wage is about $2,055/month.
>
> **Employers usually require experience and familiarity with the organization's activities. Bookkeepers and or secretaries often advance to office managers within the company. Some employers require a college degree.** [Emphasis added.]

(Ex. 9 at 24 and *see* Gordon Dep. at 17-18.) Claimant does not have a college degree and his only experience and familiarity is within Cenex.

¶22 To date Liberty has paid claimant nothing in rehabilitation benefits and in this proceeding contends he is due none. Since claimant has suffered a wage loss, and the parties have not agreed to a rehabilitation plan, the Court must address the merits of claimant's proposed plan. *Reeves v. Liberty Mutual Fire Ins. Co.,* 275 Mont. 152, 161, 911 P.2d 839, 844 (1996) (Nelson, J., specially concurring). I must also determine whether Liberty has unreasonably denied rehabilitation benefits. §§ 39-71-611, 612, 2907, MCA (1995).

¶23 Liberty engaged a rehabilitation provider in February 1996, prior to claimant reaching MMI. Dennis McLuskie (McLuskie), a certified rehabilitation counselor working for Crawford & Company Healthcare Management, was assigned to the case. (McLuskie Dep. at 5-6; Ex. 10 at 36.)

¶24 McLuskie initially met with claimant on April 11, 1996. (Ex. 10 at 17.) At that time, claimant had already completed approximately two years of courses, including several computer related courses, at Dawson Community College (DCC) in Glendive. (Ex. 3.) McLuskie noted that claimant was majoring in computer science and was "9 to 12 credits short of receiving an Associated [sic] of Applied Science Degree in Computer Science." (Ex. 10 at 17.) In his April 17, 1996 report to Liberty, McLuskie reported:

> Mr. Leastman is unsure at this time regarding his options in returning to employment. He has indicated his first desire would be to return to work in some capacity with his employer of injury.

(*Id*. at 20.) McLuskie's statement did not tell the whole story. His handwritten note of his April 11th meeting with claimant says, in relevant part:

> Client into office & I completed the initial interview. Would like to RTW [return to work] with Cenex, **but cannot afford the $5.00 hr.** [Emphasis added.]

(McLuskie Dep. Ex. 2 at 201.)

¶25 McLuskie's handwritten note is in reference to the $5 an hour in Sidney which was offered to claimant in early April. (Ex. 10 at 14.) In a May 22, 1996 report, McLuskie reported:

> On 4/17/96, I was advised by Ms. Scholl [Liberty's claims adjuster] that the claimant's employer of injury, Cenex of Montana, had offered Mr. Leastman an alternative light-duty position as a Data Entry/Accounting Clerk in their Sidney, Montana office. After considering this job offer, Ms. Scholl indicated the claimant had declined this job offer since the starting wage for this position was $5 per hour.

(*Id*.) As I have previously noted, it is hardly surprising that claimant refused the offer. The wage of the offered position was at least $8 an hour less than what claimant had been earning and the job would have required him to commute 108 miles a day or move to Sidney.

¶26 It is apparent from McLuskie's notes and correspondence (Ex. 10) that claimant expressed an interest in further education in computer science, and McLuskie began exploring what additional courses claimant would need to complete to obtain a community college degree. In a Status Report to Sandy Scholl (Scholl) on May 22, 1996, McLuskie noted that the claimant was 22 credits short of receiving his degree in computer science from DCC. (Ex. 10 at 15.) Discussions with career advisor Trish Matteson (Matteson), at DCC revealed possibilities for the claimant to take the necessary additional credits over a two-semester period. Matteson also provided information regarding the wages which could be earned by those individuals completing an associate's (AA) degree in computer science. She reported that in the Glendive area the entry level wage for persons with an AA degree in

computer science ranged from approximately $6 to $8 per hour, increasing to $10 with experience. (*Id*.)

¶27 On the other hand, McLuskie determined that claimant's wage potential without retraining was between $4.25 and $7.00 an hour. On August 29, 1996, he wrote to Sandy Scholl, Liberty's claims examiner, "Without retraining Mr. Leastman is **limited to light-duty, entry level employment earning $4.25-7.00 per hour**." (*Id*. at 10; emphasis added.)

¶28 In a May 22, 1996 report, McLuskie stated that he had been told by Scholl to place the file in a "pending status until I received further instructions from her." (*Id*. at 15.) However, on June 17, 1996, Scholl told him to "come up with a plan in terms of Gates[5]& they will stand behind it." (McLuskie Dep. Ex. 2 at 189.)

¶29 During the summer of 1996 claimant became firmly committed to completing his AA degree in computer science and transferring to a four-year college to complete a bachelor degree (BA). (Ex. 10 at 10; McLuskie Dep. at 16.) Claimant pursued and obtained assistance from the Department of Public Health and Human Services' Division of Disability Services (DPHHS) to allow him to attend DCC during the 1996-97 school year and complete his AA degree. (Ex. 2; McLuskie Dep. Ex. 2 at 185, 181.)

¶30 Liberty suggests that during the summer of 1996 the claimant impeded McLuskie's efforts to establish a rehabilitation plan. (Respondent's Reply Brief, Proposed Finding 32, at 8.) The suggestion is utterly without merit. McLuskie's notes and letters reflect the following contacts after he was instructed on June 7, 1996, to "come up with a rehabilitation plan:"[6]

- On June 18, 1996, McLuskie wrote to claimant requesting further information regarding completion of an AA degree at DCC. (McLuskie Dep. Ex. 2 at 189; Ex. 10 at 12.)
- On June 27, 1996, McLuskie received a written reply from claimant. (McLuskie Dep. Ex. 2 at 189.)
- On June 27, 1996, McLuskie called claimant's home. Claimant was not there but McLuskie talked to his wife, told her that he needed more information concerning the requirements for claimant to complete his course college course work, and asked that claimant get in touch with him "ASAP." (*Id*. at 188.)
- On June 28, 1996, claimant returned McLuskie's call, told him that he needed 22 credits to graduate from DCC that he would start classes in August, and that he would graduate in two semesters. (*Id*.)
- On July 30, 1996, McLuskie attempted to call claimant but there was no answer.[7] (*Id*. at 186.)

- On August 13 and 14, 1996, McLuskie attempted to telephone claimant but there was "no answer." (*Id*. at 182; quoted verbatim.)
- On August 14, 1996, McLuskie wrote to claimant asking him to schedule a personal appointment so they could talk. (Ex. 10 at 11; McLuskie Dep. Ex. 2 at 182.)
- On August 22, 1996, claimant returned McLuskie's call and advised him that DPHHS had agreed to provide assistance for his further schooling. (McLuskie Dep. Ex. 2 at 181.)

¶31 On August 29, 1996, McLuskie wrote to Scholl, providing the following opinions.

> It is clear that Mr. Leastman is medically precluded from returning to his job of injury and will experience a significant wage loss upon re-entering the job market. Without retraining, Mr. Leastman is limited to light-duty, entry level employment earning $4.25-7.00. Therefore, it is reasonable to believe that Mr. Leastman would benefit from short-term retraining. However, I cannot support Mr. Leastman's current retraining plan for a number of reasons: 1) Mr. Leastman's retraining goal is not reasonable since he has specifically stated he will not relocate upon graduation to seek employment; 2) he has indicated that instead of returning to employment upon completion of the final two years of coursework to obtain a Bachelors Degree in Computer Science. It is therefore my opinion that Mr. Leastman's retraining goal is a poorly chosen vocational goal for returning to work in the Glendive area, and there is limited earning potential for this occupation in Glendive. Further, this vocational goal does not offer a reasonable likelihood that Mr. Leastman's post-training earning potential will approximate his pre-injury earnings, or substantially reduce his wage loss.
>
> In summary, I cannot support Mr. Leastman's current vocational goal, based on a lack of post-training earning potential in the Glendive labor market, his unwillingness to consider relocating for employment once he graduates, and his indication that rather than returning to work, he will continue further retraining beyond his Associate of Applied Science Degree. As I indicated before, Mr. Leastman could likely benefit from retraining; unfortunately, his present course of study does not appear to have re-employment and wage potential, unless he is willing to relocate and conduct an active job search.

(Ex. 10 at 10.)

¶32 McLuskie's August 29th opinions are problematic from the get-go.

- First, there is nothing in McLuskie's notes to indicate that claimant told him he would not relocate upon completing his education. The only indication concerning claimant's unwillingness to relocate was his refusal to accept the offer of a $5 an

hour Cenex position in Sidney. That refusal does not remotely equate to a refusal to relocate for a significantly better paying job. Claimant testified that he will go where he can find a good paying job. (D. Leastman 9/25/97 Dep. at 10.)

- Second, McLuskie's own research did not support his conclusion that claimant would not substantially reduce his wage loss. Without further education, McLuskie computed claimant's entry level earning capacity in Glendive at between $4.25 an hour (minimum wage) and $7.00 an hour. With an AA degree, the information he was provided indicated that claimant's entry level earnings in Glendive would range from $6.00 to $8.00 an hour, increasing to $10.00 an hour with experience. McLuskie did not provide any information indicating that claimant's wage would increase with experience absent completion of an AA degree. He provided no prediction as to the wage claimant could reasonably expect to obtain either pre- or post-education. Thus, the only realistic comparison is between the means of the two. The pre-education mean is $5.625. The post-education entry level mean is $7.00. The post-education mean wage is 24% higher than the pre-education mean and translates to an additional $1.375 an hour and an additional $2,860 per year.[(8)] Whatever McLuskie thought, a 24% increase in earning capacity is significant, **especially** in light of claimant's preinjury wage.
- Third, McLuskie assumed that the rehabilitation provisions of the Workers' Compensation Act would require claimant to seek and find employment upon completion of an AA degree. As discussed in the Court's Conclusions of Law, there is no such requirement.

¶33 McLuskie never developed or submitted a specific rehabilitation plan. He viewed claimant's intention to continue with his education as stalemate. (Ex. 10 at 1.)

¶34 In August 1996 claimant began attending DCC full time. He completed his AA degree in May 1997 and graduated with a 3.68 grade point average. (Ex. 3.)

¶35 Meanwhile Liberty continued to refuse rehabilitation benefits. In October 1996 Debbie Fotopoulos, another claims adjuster for Liberty, requested McLuskie to meet with claimant "immediately to have you [claimant] address some more questions that have arisen regarding your retraining plan." (Ex. 10 at 5.) McLuskie wrote to claimant on October 11th and met with him on October 24th. During the October 24th meeting, claimant told McLuskie that job opportunities he had explored required a BS degree and that he intended to enroll in a four-year college upon graduation from DCC so he could complete a BS degree in computer science. (*Id.* at 1.) He indicated that he was looking at several out-of-state schools. (*Id.*)

¶36 Liberty then changed rehabilitation providers, hiring Gordon to perform further analysis. (Ex. 9 at 50.) Gordon initially wrote to claimant on December 12, 1996, and met

with him on December 17, 1996. (*Id*. at 49 and 50.) She thereafter performed a job market analysis.

¶37 In February 1997, while Gordon was doing her analysis, the claimant was accepted to a BS degree program at George Fox University in Newberg, Oregon. He subsequently moved his family to Oregon in September 1997, and enrolled at George Fox University. He is presently working towards a degree in computer science. He will graduate in the fall of 1999. (D. Leastman's Dep. 3/26/98 at 39.)

¶38 On March 21, 1997, Gordon submitted a rehabilitation plan for six months job placement assistance upon claimant's completion of his AA degree. (Ex. 9 at 4-7.) Claimant refused the plan, indicating his desire to complete a BS degree.

¶39 As noted earlier, based upon the highest paying job for which claimant was theoretically qualified, Gordon determined that claimant "could earn $7.00 to $15.00 per hour with his present skills and abilities" (Ex. 9 at 6) and "potentially would experience little or no wage loss" (Gordon Dep. Ex. 5 at 3). She further determined that an AA degree in computer science "will allow him to earn a salary between $21,000 to $35,000 entry level." (Ex. 9 at 7.) The post-AA degree salary range translates to $10.10 to $16.83 an hour.

¶40 As set out in the Conclusions of Law which follow, the statute providing for rehabilitation benefits contemplates more than an abstract, theoretical analysis of pre- and post-earning capacity. The benefits are intended to reduce the loss of wages which a disabled claimant will experience absent further education, training, and/or employment assistance. That a claimant may be theoretically qualified to earn a million dollars a year is of no consequence if he or she has no realistic opportunity to obtain the job.

¶41 Gordon did no analysis of claimant's actual prospects for the higher paying jobs she identified as part of claimant's post-injury, pre-AA degree job market. Claimant's age and job experience are considerations which section 39-71-1006, MCA (1995), requires be taken into consideration, and are factors which, in this case, required specific consideration.

¶42 The pre-AA degree jobs with the highest potential wages were "office manager" positions. (Ex. 9 at 23-24.) However, Gordon's own report indicated that those jobs "usually require experience and familiarity with the organization's activities" and that the positions are often filled by internal promotion. (*Id*. at 24.) Claimant's own promotion to manager within Cenex is consistent with her report. As an outsider, claimant's opportunity for obtaining a high-paying managerial job were, and are, dim.

¶43 Gordon also identified "route sales" as part of claimant's post-injury, pre-AA degree labor market. However, the average entry wage for those jobs was $5.65 an hour and the average wage was $6.85 per hour. She identified some higher paying jobs state-wide (up to

$13.56 an hour), but again she did not analyze claimant's prospects of obtaining the higher paid positions.

¶44 She further identified "[s]ales [r]epresentative, [g]eneral" as another job available to claimant post-injury, pre-AA degree. (Ex. 9 at 27.) The average entry level position state-wide paid between $5.56 and $8.19 and the average wage was between $6.78 and $12.66 an hour.[(9)] Again she did not analyze claimant's prospects for the higher paying jobs. Moreover, Dr. Rizzolo's approval of this position was conditional. The position description prepared by Gordon classifies it as "light/medium" and states that the weight the sales representative is required to lift and carry "can range from 10 to 50 pounds." (Gordon Dep. Ex. 1 at 3.) The job description also indicated that extensive travel may be required. Dr. Rizzolo approved the job with the following qualifier: "[N]eed to limit lifting > 25 lbs [greater than 25 pounds] to rare [and] avoid long distance driving - 10 minute break E [every] 60-90 minutes." Gordon did not address how the limitations affected claimant's job prospects. (*Id.*)

¶45 Gordon also evaluated claimant's wage potential with an AA and BS degree in computer science. In her initial report of January 23, 1997 (Ex. 9 at 21), she reported average entry level wages for a microcomputer support specialist as $6.35 per hour and the average wage as $9.23. In her January 23, 1997 report, Gordon went on to say:

> Most employers require at least two years of training beyond high school. **Employers increasingly prefer a four year degree.**

In a subsequent report of October 27, 1997, she added computer programmer as a vocation accessible to claimant upon completion of his studies at George Fox University, stating that "he could expect to earn $10.70 per hour entry level in Montana." (Gordon Dep. Ex. 6 at 2.) She further noted that employers prefer programmers with a BS degree or equivalent experience.[(10)]

¶46 Gordon made a point of claimant's failure to identify a specific job he intended to seek upon graduation from George Fox University. She testified:

> My thought was, when I visited with him, was that he wasn't clear what direction he was going specifically. I felt uncomfortable with - and I felt that he wasn't really certain and really hadn't looked into it thoroughly to identify specifically what he wanted to do.

(Gordon Dep. at 28.) I mention this testimony only because Liberty makes a point of it in its proposed findings, specifically in proposed finding 44, which reads:

> During her conversations with the claimant, he never identified a strategy to break into the new occupations for which he claimed he was being trained; he did not explain or claim any special experience or education that would set him off from the

> persons with whom he would be competing in the computer field. Gordon dep. at p. 27-28. As described by the claimant, the training he is getting at George Fox College is available in Billings and Bozeman. Gordon dep. at pp. 36-37.

(Respondent's Reply Brief at 9-10.) Liberty's logic escapes this judge. Followed to its logical conclusion, parents should not send a child to college unless the child has identified a specific job he or she intends to seek upon graduation and identifies, before starting college, "special experience or education" which would "set" the child "off from the persons with whom" the child will be competing.

¶47 On March 20, 1997, Gordon prepared a rehabilitation plan calling for six months of job placement assistance upon claimant's graduation from DCC. (Ex. 9 at 4.) Noting that claimant was relocating to Newberg, Oregon, a community south of Portland, she listed computer information specialist and computer technician as the job goal. (*Id.* at 5.) She listed national labor market data for jobs which claimant might qualify. Those jobs ranged in **entry level** salaries from $21,000.00 ($10.96 per hour) to $35,000.00 ($16.82), significantly more than the near-minimum wage entry level jobs McLuskie determined that claimant could find without further education. However, although the plan was premised upon claimant completing his AA degree, it did not include any reimbursement for his year of schooling and did not include any analysis of jobs in the Northwestern United States or claimant's competitiveness for jobs without a BS degree.

¶48 Bob G. Zadow (Zadow) was hired by the claimant to evaluate his vocational status as it applies to his eligibility for retroactive temporary total disability benefits and to evaluate his potential rehabilitation plan and retraining efforts. (Ex. 7.)

¶49 Zadow's conclusions in part:

> A case can be made for this claimant's employability at entry level or on a semiskilled or unskilled level at wage levels characteristic for these positions. This is based on his vocational history, transferability of skills and his residual employability. If he were to restrict himself to the Glendive or the Eastern Montana labor market, his wage potential would be less than in other areas. Based on these restrictions, the specific factors involving this labor market must be considered including: the physical demands, numbers of available jobs and the prevailing wages.
>
> Due to these factors, it is my opinion that there exists a significant rationale for retraining this claimant. At a very minimum, his earning potential was enhanced by receipt of his associate degree. This made a difference between qualifying for entry level positions in business or the computer related industries or remaining in the unskilled or semiskilled positions at the prevailing wages for those vocations. Further study and receipt of a bachelor's degree will enhance the potential for

approaching or exceeding the time of injury wage. Certainly this rationale existed during the last year of his training on the associate degree level.

(Ex. 7 at 5.)

¶50 In his deposition Zadow testified that the AA degree enhanced claimant's wage potential but noted, as had Gordon, that many employers hiring for computer jobs prefer applicants with a bachelor's degree. (Zadow Dep. at 13.) He testified that a BS degree would increase claimant's job opportunities since his three years of post-injury schooling would impress employers as indicating claimant's initiative and perseverance. (*Id.* at 15-16.) A BS degree would also increase the jobs available and provide claimant with more opportunities in urban areas. (*Id.* at 17-18.) Ultimately, Zadow opined that with a BS degree and several years of experience, the claimant can equal or exceed his time-of-injury job.

¶51 Zadow's opinions make more sense to this judge than those of Gordon. Moreover, as noted in previous discussion of Gordon's testimony, a number of her conclusions support a plan for claimant to complete both an AA and BS degree. Both of her conclusions concerning claimant's post-injury earning potential, both with and without further education, are statistical generalities that do not take into consideration the individual claimant.

¶52 Claimant refused to sign onto Gordon's plan. He believed that completion of a BS degree would further narrow or eliminate his wage loss. He enrolled in George Fox University and began his studies in the fall of 1997. In his first, fall semester he achieved a solid "B" average (2.97 on a 4.0 scale). (D. Leastman 3/26/98 Dep. at 29.)

¶53 Claimant testified that he inquired into George Fox University's placement rates for its graduates and ascertained that the college placed 90% of its graduates. (D. Leastman 9/25/97 Dep. at 12.) One of his professors has told him that over the past four years 100% of George Fox University graduates have found a job and that the professor has more calls from prospective employers than he has students. (D. Leastman 3/26/98 Dep. at 40.) **Neither McLuskie nor Gordon did any research concerning placement rates and wages of George Fox University graduates.** It is difficult to see how they could have assessed claimant's prospects upon completing a BS degree without such research.

¶54 I find that claimant's educational plans to complete both AA and BS degrees provide him with a more reasonable prospect of minimizing lost wages than the plan tendered by Gordon.

¶55 I further find that the insurer has acted unreasonably in delaying and refusing rehabilitation benefits. Its conduct became unreasonable after claimant refused to acquiesce to Gordon's six-month plan of assistance in finding employment. After claimant rejected the plan, Liberty hardened its position and sought to punish claimant by denying him rehabilitation benefits altogether. Its change of position is reflected in Liberty's

arguments to this Court. It has argued that claimant is due no benefits because he is able to earn as much post-injury without retraining than preinjury. That proposition is preposterous and I have already taken Liberty to task for tendering it. (Findings of Fact 20 and 21.) It has further attempted to defeat his claim by urging that claimant was required by law to follow Liberty's rehabilitation provider's recommendations and return to work as soon as possible.[(11)] As discussed in the Court's Conclusions of Law, its position ignores clear precedents to the contrary.

CONCLUSIONS OF LAW

¶56 Claimant's injury is governed by the 1995 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).

¶57 Claimant's request for rehabilitation benefits is governed by section 39-71-1006, MCA (1995), which provides:

> **39-71-1006. Rehabilitation benefits.** (1) A disabled worker as defined in 39-71-1011 is eligible for rehabilitation benefits if:
>
> (a) the worker has an actual wage loss as a result of the injury;
>
> (b) a rehabilitation provider, as designated by the insurer, certifies that the injured worker has reasonable vocational goals and reemployment opportunity and will have a reasonable reduction in the worker's actual wage loss with rehabilitation; and
>
> (c) a rehabilitation plan agreed upon by the injured worker and the insurer is filed with the department. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests. The plan must specify a beginning and completion date. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of public health and human services to use the funds.
>
> (2) After filing the rehabilitation plan with the department, the disabled worker is entitled to receive biweekly compensation 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. The rehabilitation plan must be completed within 26 weeks of the completion date specified in the plan. Rehabilitation benefits must be paid biweekly while the worker is satisfactorily progressing in the agreed-upon rehabilitation plan. Benefits under this section are not subject to the lump-sum provisions of 39-71-741.
>
> (3) A worker may not receive temporary total benefits and the benefits under subsection (2) during the same period of time.

(4) A rehabilitation provider authorized by the insurer shall continue to assist the injured worker until the rehabilitation plan is completed.

(5) To be eligible for benefits under this section, a worker is required to begin the rehabilitation plan within 78 weeks of reaching maximum medical healing.

(6) 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.

I.

¶58 As an initial matter, Liberty's suggestion that claimant was **required** to accept his rehabilitation provider's advice[12] is without merit. The Supreme Court has made it clear that insurers cannot unilaterally determine a claimant's benefits without an opportunity for judicial review.

¶59 In *Ingraham v. Champion International,* 243 Mont. 42, 793 P.2d 769 (1990), the Court struck down a lump-summing statute which provided that a claimant could not receive certain lump sums of benefits unless the insurer agreed and which further provided that the insurer's refusal to agree did not constitute a dispute over which a mediator and the Workers' Compensation Court had jurisdiction. In other words, if the insurer refused to agree to the lump-sum request, that was the end of it. The claimant could not appeal to any court.

¶60 The Supreme Court declared the provision unconstitutional on two grounds:

The power of the legislature to fix the amounts, time and manner of payment of workers' compensation benefits is not doubted. The legislature could, we think, deny completely any authority to an insurer, a worker, or the department to apply for or to allow lump-sum conversion of workers' benefits. Here the legislature has chosen, however, to permit lump-sum conversions in some cases, but on conditions different from that applying to permanent partial impairment benefits. Had the legislature conferred the authority solely upon the administrative agency, the legislature would have been required to lay down the policy or reasons behind the statute and to prescribe standards and guides for the grant of the power to the agency. *Douglas v. Judge* (1977), 174 Mont. 32, 568 P.2d 530; *Bacus v. Lake County* (1960), 138 Mont. 69, 354 P.2d 1056. But in this sense the legislature has gone beyond that and has delegated an absolute discretion to the insurer (with whom a worker agrees) as to whether a lump-sum conversion of permanent partial wages settlement benefits will be converted. The legislature has improperly and unconstitutionally delegated its authority to private parties as to what terms, and under what circumstances, and in what amounts, a lump-sum conversion can occur. . . .

A further reason that subdivision (2), sec. 39-71-741, MCA, is constitutionally invalid is that the subsection purports to strip the courts of their judicial power over controversies regarding proposed lump-sum conversions.

. . . Our district courts have not been concerned with workers' compensation benefits since the establishment of the Workers' Compensation Court in 1975. Thus the effect of subdivision (2) of sec. 39-71-741 is to deprive the worker or the insurer of any right of access to the judicial department of this state, if the insurer and the worker do not agree.

Thus, the amended section abrogates the principle that the judicial power cannot be taken away by legislative action. State ex rel. *Bennett v. Bonner* (1950), 123 Mont. 414, 214 P.2d 747. The legislation completely negates the state constitutional mandate that "courts of justice shall be open to every person, and speedy remedy be afforded to every injury of person, property, or character ..." Article II, Section 16, Mont. Const. (1972).

243 Mont. at 48-49, 793 P.2d 772-73.

¶61 The fact that benefits may be determined by a rehabilitation provider rather than the insurer makes a statute no less pernicious than delegation of the authority to the insurer. In either case, the vice is the same: the delegation of power to make an unreviewable decision affecting a claimant's benefits.

¶62 Moreover, section 39-71-1006, MCA, does **not** preclude a claimant from contesting a rehabilitation provider's determination. Unlike the statute at issue in *Ingraham,* section 39-71-1006, MCA, contains no provision making the determination unreviewable through mediation and thereafter by this Court. Thus, general jurisdictional provisions providing that the Court has jurisdiction over disputes involving benefits applies. §§ 39-71-2401(1) and 39-71-2905, MCA, and *see Reeves v. Liberty Mutual Fire Ins. Co.,* 275 Mont. 152, 161, 911 P.2d 839, 344 (Nelson, J., specially concurring). Claimant was not required to accept the rehabilitation plan and is entitled to petition this Court for a determination of his entitlement to rehabilitation benefits.

II.

¶63 As set forth in subsection (1)(a), claimant is eligible for rehabilitation benefits only if he sustained "an actual wage loss as a result of the injury." He has satisfied that requirement.

III.

¶64 Since claimant sustained a wage loss, Liberty was required to designate a rehabilitation provider to develop a rehabilitation plan. § 39-71-1006(1)(b), MCA (1995). The section provides the rehabilitation provider with discretion in formulating a plan, however, the discretion is confined by the considerations set forth in the section. First, and foremost, the plan must attempt to achieve "a reasonable reduction in the worker's actual wage loss."

¶65 While returning an injured worker to work is one of the general objectives of the Workers' Compensation Act, § 39-71-105(2), MCA (1995), it is not the sole objective, otherwise rehabilitation benefits would be available only to workers who are permanently **totally** disabled. Permanent partially disabled workers by definition can return to work in some capacity, even if only at a minimum wage. § 39-71-116(22), MCA (1995). Section 39-71-1006, MCA, requires only some wage loss, not a total wage loss. It acknowledges a reduction in wage loss as one of the goals in rehabilitation. By requiring a continuation of total disability benefits during a period of retraining and reeducation, § 39-71-1006(2), MCA, it acknowledges that a rehabilitation plan may postpone employment.

¶66 The section also requires consideration of the individual worker, taking into account the "worker's age, education, training, work history, residual physical capacities and vocational interest." § 39-71-1006(1)(c), MCA. The section is intended as more than a theoretical exercise. It requires more than tabulating high, low and average wages for positions for which the worker might theoretically be qualified. Rather, it requires careful assessment of the worker's realistic and reasonable prospects for obtaining employment and a further assessment of the realistic wages he or she is likely to earn. That assessment must compare realistic job prospects and wages without further education or retraining with realistic job prospects and wages if the worker participates in retraining and/or further education which is consistent with his or her "age, education, training, work history, residual physical capacities and vocational interest." If there is a reasonable prospect that training or further education will result in significantly higher wages than without such training or education, then the plan must provide for the training or education.

¶67 In this case, the analyses performed by both McLuskie and Gordon were inadequate. McLuskie compiled wage information concerning an expected range of wages post-injury, both with and without an AA degree. The information he compiled showed that the mean of those ranges was $1.375 an hour and $2860.00 per year higher post-AA degree on an entry level basis in the Glendive area. His analysis was further flawed because he assumed, apparently based on claimant's rejection of a $5.00 an hour job offer in Sidney, that claimant was unwilling to look for work outside of Glendive and despite the fact that by the fall of 1996 the claimant indicated he intended to seek a BS degree, which would require him to leave Glendive. Finally, he rejected out-of-hand claimant's proposal to get a BS degree, indicating it was inconsistent with a goal of prompt reemployment.

¶68 Gordon, on her part, posted a wide range of wages for claimant without consideration as to where claimant would realistically fit in that range. She included high paying managerial jobs in her analysis despite her acknowledgment that such jobs were often filled by internal promotions and required special organizational knowledge. She too dismissed claimant's desire to obtain a BA degree. Even when she learned that he would attend George Fox University, she did not attempt to obtain information concerning placements and wages of its graduating students.

¶69 Rehabilitation benefits payable under section 39-71-1006, MCA, are limited to 104 weeks, however, there is nothing in the section which precludes approval of a plan exceeding 104 weeks where that plan will significantly lessen the claimant's wage loss. Indeed, claimant's willingness to absorb a third year of education out of his own savings indicates he was strongly motivated to succeed in his schooling and to obtain a higher paying job. It also indicated the strength of his vocational interest. As Zadow testified, claimant's initiative and perseverance will likely impress prospective employers.

¶70 While the evidence concerning post-BS degree wages is not as neat as it might be, there is ample evidence to find that a BS degree in computer science will expand claimant's job market and significantly increase his wages in comparison to what he could earn without any degree or with an AA degree. The case for his continuing his education to obtain both AA and BS degrees is far more compelling than the case against it. The plan as prepared by Gordon and tendered by Liberty was insufficient and claimant should be allowed to proceed with the plan he has developed and embarked upon.

IV.

¶71 Since Liberty has unreasonably denied rehabilitation benefits, claimant is entitled to attorney fees, costs and a penalty. § 39-71-612, 2909, MCA (1995).

JUDGMENT

¶72 1. Pursuant to section 39-71-1006(2), MCA (1995), Liberty shall pay claimant 104 weeks of rehabilitation benefits. Amounts accrued to date, commencing with clamant's commencement of school in August 1996, and continuing during the weeks claimant has been in school shall be paid in a lump sum. The balance shall be paid on a bi-weekly basis for weeks the claimant continues to be in school.

¶73 2. Petitioner is entitled to attorney fees and costs in an amount to be determined by the Court.

¶74 3. Liberty shall pay claimant a penalty of 20% on all rehabilitation benefits.

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

¶76 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 6th day of January, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. Larry W. Jones
Date Submitted: June 22, 1998

1. It is unclear whether the "12 pack" limitation was inserted by the physical therapist who performed the FCE or by Dr. Rizzolo. Both signed the job analysis. The physical therapist signed it on April 26, 1996, and Dr. Rizzolo signed it on May 1, 1996. Thus, if the limitation was inserted by the physical therapist, Dr. Rizzolo implicitly embraced it. On the day after signing the job analysis, Dr. Rizzolo examined claimant and wrote:

> I do not believe he can return to his job of previous employment, and his Functional Capacity Evaluation in my opinion documents that he should work within the light category.

(Ex. 1 at A5.)

2. See Footnote 1.

3. The wage loss range is based on pre-injury wages of $13.40 to $14.06 per hour.

4. The calculations are based on a 2,080 hour work year.

5. *Gates v. Liberty NW Ins. Co.,* WCC No. 9508-7362, Findings of Fact, Conclusions of Law and Judgment (12/29/95) and Order Clarifying Decision (2/13/96).

6. McLuskie Dep. Ex. 2 at 189 and *see* Finding of Fact 28.

7. McLuskie's note indicates that claimant was "not home." (McLuskie Dep. Ex. 2 at 186.) On June 27, 1996, when claimant's wife answered the telephone, McLuskie made a specific note of their conversation. (*Id.* at 188.) I therefore infer that "not home" meant there was no answer.

8. At $10 an hour, the discrepancy is even more pronounced.

9. Gordon quoted monthly wages. (Ex. 9 at 27.) The Court has multiplied those wages by 12 and divided the results by 2080 hours.

10. Gordon wrote:

> **The number and quality of applicants for programmer jobs have increased, so employers have become more selective. Graduates of 2 ear programs in data processing, and people with less than a 2 year Degree or its equivalent in work experience, are facing especially strong competition for programming jobs. Competition for entry level positions even affects applicants with a bachelor's degree.** Prospects should be good for college graduates with knowledge of a variety of programming languages, particularly C++ and other object oriented languages, as

> well a[s] newer languages that apply to computer networking, data base management, and artificial intelligence. . . .

(Gordon Dep. Ex. 6 at 5; emphasis added.)

11. Liberty argues at page 11 of Respondent's Reply Brief:

> This case is a good example of exactly the type of conduct by a claimant the Act was intended to prohibit. The clear legislative intent of these statues [sic] is to require claimant to cooperate with rehabilitation specialists to accomplish the purpose of the Act - returning an injured worker back to work as soon as possible. The claimant did not cooperate with McLuskie and has ignored Gordon's professionally developed rehabilitation plan.

12. See footnote 11.

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 2A

WCC No. 9708-7810

DAVID LEASTMAN

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

CENEX

Employer.

ORDER NUNC PRO TUNC FOR ENTRY OF JUDGMENT AND DISMISSAL WITH PREJUDICE

¶1 On January 6, 1999, the Court entered its Findings of Fact, Conclusions of Law and Judgment. On this 4th day of February, 1999, the parties notified the Court per a telephone call of Mr. Larry W. Jones, attorney for respondent, that to avoid an appeal by respondent and finally resolve this case they have entered into a final agreement for settlement which is to supercede this Court's original judgment. Thereafter, on this day, the Court received a signed Stipulation for Entry of Judgment which incorporates the agreement. Finding good

cause, and consideration in the fact that an appeal will be avoided, the Court adopts the parties' Stipulation for Entry of Judgment and hereby orders, decrees and adjudges, nunc pro tunc, that the prior judgment of January 6, 1999, is void and that the petition in this matter is dismissed with prejudice upon the following terms, which shall constitute the Court's final judgment in this matter:

¶2 1. That Liberty did not unreasonable delay or refuse payment of any benefitsv to Leastman.

¶3 2. That Liberty will pay the amount of $53,300 on a disputed liability basis in full settlement of all of the claimant's claims related to his claim of injury on July 25, 1995, with medicals reserved.

¶4 3. That each party is responsible for his/its payment of attorney fees and costs to his/its attorney.

¶5 4. That this case shall be dismissed **with prejudice**.

DATED in Helena, Montana, this 4th day of February, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Marvin L. Howe
Mr. Larry W. Jones