

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 49

WCC No. 9505-7294

SHIRLEY RANES

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY

Respondent/Insurer for

BUTTREY FOOD AND DRUG

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Bakery helper slipped and fell on back at work during July, 1994. Insurer accepted liability and paid temporary total disability benefits until November, 1994, when claimant returned to work. At that time, neither of two physicians treating claimant had released her to her time-of-injury job. Claimant suffered more pain and was again taken off work, but returned a few weeks later, after her doctor released her to modified work. The insurer had reinstated TTD, but again terminated benefits. Claimant's testimony she left work because modifications to the job were insufficient was not rebutted. In January 1995, a physical and rehabilitation medicine specialist who had been treating claimant following the injury diagnosed carpal tunnel syndrome, opining it was an occupational disease relating to the same employment. A panel physician agreed, finding no non-occupational factors. During June 1995, the rehabilitation specialist put her at maximum medical improvement, rated her at 5% whole person impairment, and released her to light duty work. The insurer began paying permanent partial disability benefits. Claimant testified she cannot return to bakery work because she drops things due to the CTS. Claimant seeks additional temporary total disability benefits as the result of either the injury or the OD, as well as attorneys fees and penalty.

Held: Claimant was entitled to TTD relating to her injury where she quit the modified job because she was unable to do the work. Under section 39-71-701(4), MCA, she requalified for TTD because a modified job was no longer available to her. Claimant was entitled to TTD on the basis of the injury only through June 5, 1995, when the rehabilitation specialist

placed her at MMI. However, she is entitled to TTD from June 5, 1995, through the present because of her carpal tunnel syndrome. This is because she has not yet been placed at MMI relating to that condition and it is not yet clear how that condition will affect her employment options. The insurer is entitled to credit for permanent partial disability benefits paid to her. Penalty and attorneys fees are denied.

Topics:

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

section 39-71-701(4), MCA (1993). Where a claimant quits a modified job she was performing prior to reaching MMI because she is unable to do the work due to her injury, she requalifies for temporary total disability benefits because the modified job is no longer available to her.

Benefits: Temporary Total Benefits. Where a claimant quits a modified job she was performing prior to reaching MMI because she is unable to do the work due to her injury, she requalifies for temporary total disability benefits under section 39-71-701(4), MCA (1993) because the modified job is no longer available to her.

Benefits: Temporary Total Benefits. Where the evidence indicates claimant has carpal tunnel syndrome as the result of employment, and her unrebutted testimony indicates she cannot perform her time-of-injury job due to the condition, she is entitled to temporary total disability benefits until she reaches MMI and evidence is developed regarding the impact of her condition on her employability.

Benefits: Termination of Benefits: Return to Work. Where a claimant quits a modified job she was performing prior to reaching MMI because she is unable to do the work due to her injury, she requalifies for temporary total disability benefits under section 39-71-701(4), MCA (1993) because the modified job is no longer available to her.

Maximum Medical Improvement. Where the evidence indicates claimant has carpal tunnel syndrome as the result of employment, and her unrebutted testimony indicates she cannot perform her time-of-injury job due to the condition, she is entitled to temporary total disability benefits until she reaches MMI and evidence is developed regarding the impact of her condition on her employability.

Vocational – Return to Work Matters: Employability. Where the evidence indicates claimant has carpal tunnel syndrome as the result of employment, and her unrebutted testimony indicates she cannot perform her time-of-injury job due to the condition, she is entitled to temporary total disability benefits until she reaches MMI and evidence is developed regarding the impact of her condition on her employability.

Vocational – Return to Work Matters: Modified Employment. Where a claimant quits a modified job she was performing prior to reaching MMI because she is unable to do the work due to her injury, she requalifies for temporary total disability benefits under section 39-71-701(4), MCA (1993) because the modified job is no longer available to her.

This case came on for trial on June 17, 1996, in Helena, Montana. Petitioner, Shirley Ranes (claimant), was present with her attorney, Mr. James G. Hunt. Respondent, Lumbermens Mutual Casualty Co. (Lumbermens), was represented by Mr. Roger T. Witt.

Claimant was the only witness. Exhibits 1 through 10 were stipulated into evidence.

Issue: Claimant suffered an industrial injury of her back on July 9, 1994. She thereafter developed carpal tunnel syndrome (CTS), which has been accepted by Lumbermens as a compensable occupational disease. The principal issue in this case is whether claimant is entitled to reinstatement of her temporary total disability benefits retroactive to August 31, 1995. The Pre-Trial Order phrased the issue in terms of claimant's entitlement to temporary total disability benefits on account of her occupational disease, however, at trial the parties' attorneys agreed that the issue should relate to benefits which may be due her with respect to both the occupational disease and the industrial injury. Claimant also seeks attorney fees and a penalty. Another issue recited in the Pre-Trial Order -- whether a proper rehabilitation plan has been developed -- appears premature and is not considered herein.

Having considered the testimony of the claimant, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. On July 9, 1994, claimant suffered an industrial injury to her back while working as a bakery helper for Buttrey Foods in Helena, Montana. She was injured when she slipped and fell backwards onto her back.
2. At the time of the accident Buttrey was insured by Lumbermens, which accepted liability for her injury.
3. Following her fall claimant experienced back pain. On July 10, 1994, she sought treatment for her pain at the St. Peter's Hospital emergency room. The emergency room physician could find nothing objective but gave her a shot of Demerol for her pain, discharged her home for bed rest, and gave her prescriptions for Percocet and Flexeril. (Ex. 4 at 3.)
4. Claimant was then treated by Dr. Max Iverson, an orthopedic surgeon. He first saw her on July 21, 1994. At that time claimant was complaining of pain in her right arm, neck, and low back. Dr. Iverson's impression was cervical and thoraco-lumbar myofascial strain injury. He

kept her "off work presently," sent her to physical therapy, and prescribed various medications. (Ex. 2 at 1.)

5. Dr. Iverson reexamined claimant on July 26, August 4, August 24, and September 7, 1994. His records reflect that she continued to complain of low-back pain. (Ex. 2 at 3-5.) She also reported numbness and tingling in her hands. (*Id.*) On September 7, 1994, Dr. Iverson recommended she see Dr. Allen M. Weinert, who specializes in physical and rehabilitation medicine. (*Id.* at 5.)

6. Dr. Weinert examined claimant on September 30, 1994, and his report is found at Exhibit 1. At that time claimant was continuing to complain of continuous mid and low-back pain, as well as numbness and tingling in her arms. Dr. Weinert noted a deformity of the L5 vertebrae on x-ray films (Ex. 1 at 1) but indicated it was due to a remote traumatic event or a congenital limbus deformity and was, in any event, not in the region of claimant's discomfort. (*Id.* at 3.) His impression of her back condition was "[m]usculoligamentous mid and low back pain without evidence of neurologic compromise or significant structural abnormality as a result of the industrial accident of July 9, 1994." (*Id.*) Dr. Weinert was unable to determine the cause of claimant's sensory loss in her arms but recommended neurodiagnostic tests to rule out CTS should the symptoms persist. Finally, he recommended that she "return to work at the *light* duty physical demand level and *progress* back to her time-of-injury job." (*Id.*; italics added.)

7. On October 24, 1994, Dr. Iverson rechecked claimant and noted that she still had "diffuse [sic] tenderness" in the low back but that she moved with relative ease. He approved her return to *light-duty* work effective October 25, 1994. (Ex. 2 at 5.)

8. Claimant testified that as a bakery helper she baked bread, fried donuts, baked pies, and carried various bake goods, including bread pans with five loaves. The job is medium duty. (Ex. 6 at 5.) Although not specifically stated in their reports, it is nonetheless clear that as of October 24, 1994, neither Dr. Weinert nor Dr. Iverson had released claimant to return to work at her time-of-injury job.

9. According to the uncontested facts set out in the Pre-Trial Order, claimant returned to work at Buttrey on approximately November 8, 1994.

10. Lumbermens paid claimant temporary total disability benefits from July 21, through November 7, 1994. It terminated benefits effective November 8th on account of her return to work.

11. On November 17, 1994, claimant returned to Dr. Iverson complaining of pain in her mid and low back with occasional radiation into her left buttock region. She informed him that she had been working in a modified-duty capacity but had to stop working that day because of pain. Dr. Iverson concluded that an MRI was appropriate to rule out any significant pathology and took "her off work for the next few days in order to try and calm

her symptoms somewhat." (Ex. 2 at 7.) His work release stated, "Off work until seen on 11/23/94." (*Id.* at 6.)

12. An MRI was done on November 21, 1994. The radiologist read the MRI as indicating "mild to moderate osteoarthritis of the facets, most specifically at the L3-4, L4-5, and L5-S1 levels." (Ex. 4 at 9; all caps in original.)

13. Dr. Iverson reexamined claimant on November 23, 1994. Claimant was still complaining of persistent low-back pain. Commenting on the MRI, he noted the degenerative changes in the lumbar region but without evidence of any definite disk pathology. (Ex. 2 at 8.)

14. Dr. Iverson's office note of November 23, 1994, reflects a difference in claimant's and the doctor's views of claimant's condition. Claimant insisted she could not return to work because Buttrey would not honor a 20-pound weight restriction and insisted that something more was wrong with her than a strain of her muscles and ligaments. Dr. Iverson felt she could return to work despite her protestations:

I do feel that she can do modified work. The patient is not willing to accept this recommendation and wishes to have another opinion which I feel is appropriate.

(*Id.*) He expressly "released [her] back to *modified* work effective 11-28-94" and thereafter referred her back to Dr. Weinert. (*Id.*)

15. On November 28, 1994, claimant returned to work. She testified that she was unable to do the job and worked only a couple of days. The uncontested facts set forth in the Pre-Trial Order indicate that she worked from November 28, through December 9, 1994, and did not return to work thereafter.

16. Lumbermens reinstated her temporary total benefits effective November 17, 1994, following claimant's unsuccessful first return to work. After she returned to work the second time, it once more discontinued temporary total disability benefits as of December 12, 1994. (Pre-Trial Order at 2.) However, according to representations of counsel at the time of trial, Lumbermens has continued to pay claimant biweekly permanent partial disability benefits. Her permanent partial rate is the same as her total rate.

17. According to its counsel, Lumbermens had intended to call its Buttrey's manager to testify concerning the modified job which claimant performed upon her return to work and her ability to perform that job. According to Lumbermens' counsel, the insurer's case was that claimant "terminated herself." However, the manager left Buttrey's employ, is moving to Alaska, and was not available to testify. Claimant's testimony that she left work because the accommodations of the modified job were insufficient and she could not perform the modified position was therefore unrefuted. Moreover, a later vocational rehabilitation report, commissioned by Lumbermens, confirmed claimant's assertion. The vocational

consultant preparing the report explored the possibility of a modified or alternative position at Buttrey and concluded, "No modified/alternative position could be identified at Buttrey's Food & Drug." (Ex. 6 at 7.)

18. At the end of December 1994, Dr. Weinert became claimant's treating physician. He saw her on December 27, 1994, at which time she was complaining of continued back pain and numbness in her right hand. He scheduled a bone scan to rule out any structural abnormality of the spine and an EMG of her right arm. (Ex. 1 at 6.) With regard to her ability to work, he commented:

I discussed with Shirley that is doubtful that we will be able to eliminate her pain, but rather the goal of work hardening would be to rehabilitate her to a point where functionally she is able to do more and return her to work at a safe functional level.

(*Id.*) Thus, as of December 27, 1994, Dr. Weinert was contemplating work hardening, rather than any immediate return to work, as the next step in her care.

19. An EMG on January 4, 1995, indicated "mild to moderate right median neuropathy at the wrist (carpal tunnel syndrome)." (Ex. 1 at 9.) Dr. Weinert wrote to Dr. Iverson that day to advise him that claimant "may require right carpal tunnel release." (*Id.* at 7.)

20. On January 4, 1995, Dr. Weinert prescribed three weeks of limited physical therapy for claimant's back pain. (Ex. 1 at 7, 9.)

21. Dr. Weinert next saw claimant on February 14, 1995. His note of that date states that she had canceled 50% of her physical therapy appointments. Dr. Weinert depicted her as "very hostile and belligerent." (*Id.* at 12.) He added "medical non-compliance" as one of his impressions and prescribed additional physical therapy. (*Id.* at 13.) He urged claimant to comply with the program and to undertake a home exercise program. He also urged her to stop smoking and lose weight since smoking and obesity can aggravate back pain. He further observed:

She has performed very poorly in body mechanics evaluation and physical therapy and unless she makes efforts to address these problems, she will continue to have back pain and there is little more that anyone can do to help her. I have again recommended that she return to physical therapy and progress through an exercise program over the next month. I will plan on following up with her at that time. If she is not compliant with these recommendations, there is little more than [sic] can be done for Shirley and *I would recommend her release to return to work at an appropriate level.*

(*Id.*, emphasis added.)

22. Emergency room records, Dr. Iverson's notes, and Dr. Weinert's note for February 14, 1995, and other dates paint a picture of a hostile, histrionic, non-compliant patient. They

also indicate a patient prone to symptom exaggeration and overreaction. Relevant excerpts from the medical records are attached to this decision as an appendix.

23. On March 28, 1995, Dr. Weinert again saw claimant. She was still not complying with his recommendations for physical therapy or home exercise and reported her back pain as unchanged. The doctor scheduled claimant for an additional MRI to make sure that nothing had been missed. He also scheduled her for a functional capacities evaluation (FCE), commenting, "I will plan on following up with her after the FCE and at that time place her at maximum medical improvement and release her to an appropriate level of work." (Ex. 1 at 16.)

24. Dr. Weinert last saw claimant on June 5, 1995. In his office note of that date he reported the results of the FCE as follows:

Shirley underwent a functional capacity evaluation on 5/16/95 which was a valid test with 78% of validity criteria being passed. There was evidence of inappropriate illness behavior and symptom exaggeration during the test. The test results placed Ms. Ranes at the light physical demand level as defined by the Dictionary of Occupational Titles.

(Ex. 1 at 17.) Dr. Weinert concluded that claimant had reached maximum medical improvement, rated her at 5% impairment of the whole person on account of chronic soft tissue low-back pain, and "released [her] to return to work at the light physical demand level limiting lifting to 25 pounds." (Ex. 1 at 18.) He recommended no further treatment. (*Id.* at 17.)

25. Claimant has previously worked in several light-duty jobs, including manager of a cafe, a liquor store clerk, a cook/waitress, and a bartender. (Ex. 6 at 5-6.) Her last light-duty job was as a cafe manager in 1993, so her light-duty job experience is not remote, indeed all of it was within the ten years preceding her industrial injury. (*Id.*)

26. As set forth in Finding 19, on January 4, 1995, Dr. Weinert diagnosed claimant as suffering from right CTS. On January 17, 1995, the doctor wrote to Lumbermens' claims adjuster expressing his opinion that claimant's CTS was an occupational disease arising out of her work as a baker. (Ex. 1 at 10.)

27. Lumbermens thereafter requested an examination by an occupational disease panel. The Department of Labor and Industry designated Dr. James P. Murphy to examine claimant and he did so on May 15, 1995. As did Dr. Weinert, Dr. Murphy concluded that claimant "probably has a carpal tunnel syndrome which is, in my opinion, the result of her employment." He found no contributing non-occupational factors. (Ex. 5 at 1.)

28. Thereafter, on July 12, 1995, Lumbermens accepted liability for claimant's CTS under the Occupational Disease Act.

29. Although it accepted the occupational disease claim, Lumbermens has paid no temporary total disability benefits on account of claimant's CTS. As stated in Finding 16, claimant has not received temporary total disability benefits since December 12, 1994.

30. Dr. Murphy's report was ambiguous as to whether claimant's CTS precluded her from working as a baker's helper. He wrote:

I think the patient is only *temporarily unable* to perform her previous work. Maybe carpal tunnel release would solve her problem. I think the patient is suffering from an occupational disease but *can work temporarily* until she has symptoms. I do not think that her occupational disease is aggravated by anything nonoccupational.

(Ex. 5 at 1, emphasis added.)

31. On May 6, 1996, claimant returned to Dr. Iverson for evaluation of her CTS. His impression was bilateral CTS. He recommended conservative treatment with cock-up splints. (Ex. 2 at 10.)

32. Claimant has provided no explanation for the more than a year delay in seeing Dr. Iverson. Dr. Weinert's note of February 14, 1995, specifically notes, "I did explain to her that she does need to follow up with Dr. Iverson regarding her right carpal tunnel syndrome." (Ex. 1 at 13.) As I noted earlier in Finding 21, the medical records in this case are replete with descriptions of claimant's hostility and belligerence towards her medical providers and her non-compliance with their recommendations. Her failure to see Dr. Iverson for so long cannot be explained by Lumbermens' initial refusal to accept her OD claim because her claim was accepted on July 12, 1995, nearly 10 months prior to her seeing Dr. Iverson. I can only conclude that her failure to follow-up is but another instance of her non-compliance with medical advice.

33. Neither Dr. Weinert nor Dr. Iverson have said that claimant cannot work as a baker's helper on account of her CTS. On the other hand, they have not said that she can.

34. Claimant testified that her CTS prevented her from working as a baker's helper because she drops things. While I did not find claimant especially credible, her diagnosis supports her testimony and her testimony was unrefuted. I must therefore find that her CTS, as diagnosed in January 1994 and to present, precludes her from working as a baker's helper.

35. The parties agree that claimant has not reached maximum medical improvement with respect to her CTS.

CONCLUSIONS OF LAW

1. The industrial injury in this case occurred on July 9, 1994. The occupational disease first manifested itself in 1994 and was diagnosed in January 1995. Therefore, the 1993 versions of the Workers' Compensation Act (WCA) and the Occupational Disease Act (ODA) apply in

this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

2. Claimant is entitled to temporary total disability benefits on account of her industrial injury for the period of December 13, 1994 to June 5, 1995, the date on which Dr. Weinert determined her to be maximally healed from her injury. Temporary total disability benefits are payable only so long as a "worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing." § 39-71-701(1), MCA (1993). Section 39-71-701(4), MCA, covers the situation where the worker has not reached maximum healing but is released to return to work in a modified or alternative position at an equivalent wage. It provides:

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

In this case claimant tried a modified position but was unable to do the job. The "no longer available for any reason" language of the quoted section is broad and comprehensive. In this case the job became "unavailable" to claimant because she was unable to perform it.

Lumbermens' argument that claimant did not suffer a wage loss because she voluntarily left the modified job created for her in November and December 1994 is not supported by the evidence. Claimant's testimony that she could not perform the modified job was unrefuted. The vocational analysis done subsequently indicates that there were no modified or alternative jobs available at Buttrely in light of claimant's restriction to light duty.

Claimant's argument that she should be entitled to temporary total disability benefits until August 31, 1995, the date on which Dr. Weinert approved job descriptions for two specific jobs, is unpersuasive. Her argument is based on the *Coles* criteria.⁽¹⁾ However, application of the *Coles* criteria is limited to cases in which a claimant who has reached maximum healing demonstrates that she has no reasonable prospect of employment in her normal labor market. The limitation is clear from *Ness v. Anaconda Minerals Company*, 257 Mont. 335, 849 P.2d 1021 (1993), wherein the Supreme Court said:

In *Wood v. Consolidated Freightways, Inc.* (1991), 248 Mont. 26, 808 P.2d 502, we held that maximum healing does trigger a re-evaluation of the claimant's disability status, but that disability has nonmedical, as well as medical components. In other

words, Dr. Murphy's conclusion that claimant had reached maximum healing by October 19, 1982, and that he had sustained a 25 percent physical impairment, was not a sufficient basis for terminating claimant's total disability benefits.

We further held in *Wood* that:

Once a claimant presents evidence demonstrating that there is no reasonable prospect of employment in his normal labor market, the burden of proof then shifts to the employer to show that suitable work is available.

Wood, 808 P.2d at 504.

In this case, whether you accept the testimony of claimant that all of his prior work experience involved heavy labor, or the testimony of Anderson which sets forth the specific jobs claimant had previously performed, claimant demonstrated an inability to return to his prior occupations based on the testimony of Dr. Murphy which limited him to light-duty work and precluded activities such as heavy lifting, bending, stooping, or crawling. Since Dr. Murphy testified that claimant's condition had not changed since 1982, presumably that would have also been his opinion, if asked, at that time.

Therefore, it was necessary for the defendant to comply with the four-part test previously established by the Workers' Compensation Court prior to terminating claimant's disability benefits. That test was established in *Coles v. Seven Eleven Stores*, WCC No. 2000, decided November 20, 1984, *aff'd* 217 Mont. 343, 704 P.2d 1048 (1985), and was approved by this Court in *Wood* as a proper basis for determining whether the employer had provided the minimum information necessary to discharge its duty to investigate the extent of claimant's disability. [Emphasis added.]

257 Mont. at 339, 849 P.2d at 1023-24 (1993).

In this case, claimant did not present any evidence to Lumbermens, or to this Court, that she had no reasonable prospect of employment in her normal labor market. The evidence is to the contrary. She was released to light-duty work and she has previously worked in light-duty jobs. Her relevant work history is not remote and most of her work history is light-duty work. (Ex. 6 at 5-6.) Under these circumstances it is sufficient that her treating physician found her maximally healed and released her for light-duty jobs.

3. While Dr. Murphy's statement concerning her ability to work was ambiguous and neither Dr. Weinert nor Dr. Iverson specifically stated that her CTS precludes her from working as a baker's helper, claimant's unrefuted testimony that she drops things, taken together with the nature of her condition, establishes that she has been unable to work as a baker's helper since at least June 5, 1995.

Under the ODA temporary total disability benefits are payable under the same circumstances and for the same period as temporary total disability benefits under the WCA. Section 39-72-701(1), MCA (1993), provides in relevant part:

(1) The compensation to which an employee temporarily totally disabled . . . by an occupational disease . . . shall be the same payments which are payable to an injured employee, and such payments shall be made for the same period of time as is provided in cases of temporary total disability . . . under the Workers' Compensation Act.

Thus, a claimant is entitled to temporary total disability benefits where she suffers a total loss of wages on account of her occupational disease, at least until she reaches maximum healing. In this case, claimant has established that as of June 5, 1995, and continuing to the present time, she cannot return to her job as a baker's helper and that she has not yet reached maximum healing.

4. Claimant is not entitled to temporary total disability benefits on account of her occupational disease for any time prior to June 5, 1995. She has argued that such benefits should be made retroactive to January 1995 when she was diagnosed with CTS, even though she would then receive double payment of temporary total disability benefits. Her attorney cites the Court to *Reeverts v. Sears, Roebuck & Company*, 266 Mont. 509, 881 P.2d 620 (1994), as supporting her double-dipping argument.

Reeverts concerned permanent partial disability benefits, not temporary total disability benefits, and is therefore inapposite. In that case the claimant suffered a back injury but was able to return to work in a modified position. Thereafter, she suffered a subsequent injury which was permanently totally disabling. Other than an impairment award, the insurer refused to pay permanent partial disability benefits on account of the prior injury, arguing that claimant suffered no actual diminution in earning capacity because she earned a higher wage after returning to work following the first injury. Citing cases holding that permanent partial disability entitlement must be based on earning capacity in the "open labor market," the Supreme Court held that she had proven her case for 500 weeks of benefits. It further ordered that those benefits be paid concurrently with the total disability benefits payable on account of the second injury. That holding, however, involved application of section 39-71-737, MCA (1983), which prohibited payment of different classes of benefits at the same time. The Court construed the prohibition to apply only to benefits payable for the same industrial injury.

In this case there is no controversy involving two classes of benefits. Moreover, in *Reeverts* the claimant's entitlement to 500 weeks permanent partial disability benefits had accrued prior to her second injury.

What is at issue is whether claimant may receive double temporary total disability benefits for successive injuries or diseases which disable her from performing the same job. On its face the argument is nonsensical. Temporary total disability is payable only for a total loss of wages that results from the injury. The purpose of temporary total disability benefits is to compensate claimant for her loss of wages. Claimant already had a total loss of wages on account of her industrial injury, and there was but a single loss.

5. Since claimant has not reached maximum medical improvement with regard to her CTS and it is yet unclear how that condition will affect her employment options, development of a rehabilitation plan is premature, however, nothing prevents an insurer from collecting information and commencing work on a plan prior to MMI.

6. The insurer's denial of benefits in this case was not unreasonable. Initially, the Court notes that benefits have continued. Although Lumbermens has been charging the benefits against claimant's permanent partial disability entitlement, the claimant has been receiving as much as she would have received had the benefits been characterized as temporary total disability benefits. Moreover, Lumbermens' conduct was reasonable for other reasons.

First, as to claimant's occupational disease entitlement, no physician ever clearly and unequivocally determined that claimant's CTS precluded claimant from working as a baker's assistant. In light of the medical record of claimant's histrionics, Lumbermens was not required to take claimant's word that she could not do the job.

Second, claimant has not cooperated in her medical care and has disregarded medical advice. The claimant has a duty to submit to reasonable medical care and follow reasonable medical advice. Intentional and unreasonable disregard of medical advice may break the chain of causation required to prove that claimant's condition is related to the original injury. *Giacoletto v. Silver Bow Pizza Parlor*, 231 Mont. 191, 196, 751 P.2d 1059, 1062 (1988). In this case there is substantial evidence that claimant intentionally and unreasonably disregarded her physicians' advice and thereby perpetuated and prolonged her low-back pain. There is further evidence that she disregarded the recommendations that she see Dr. Iverson with regard to her CTS, thus delaying her treatment for that condition by more than a year. Lumbermens has not specifically argued her lack of cooperation as a defense, thus the Court has not considered it in determining claimant's benefits. But Lumbermens could have argued this ground. That such a potentially meritorious ground existed, although, for whatever reason, not specifically advanced at trial, is sufficient to render its denial reasonable.

7. Since Lumbermens has not acted unreasonably, claimant is not entitled to a penalty or to attorney fees. §§ 39-71-611, -612, -2907, MCA (1993).

8. Since claimant has prevailed in this matter she is entitled to her costs in an amount to be determined by the Court. §§ 39-71-611, -612, MCA (1993).

JUDGMENT

1. Lumbermens shall pay claimant temporary total disability benefits retroactive to December 13, 1994 and continue those benefits until such time as claimant is no longer temporarily totally disabled from her CTS. It is entitled to a credit for the permanent partial disability benefits it has been paying her, and such payments shall not be charged against her permanent partial disability entitlement. Lumbermens shall also be entitled to a credit for temporary total disability benefits paid for those days claimant actually worked in November and December 1994.

2. Claimant is entitled to her costs in an amount to be determined by the Court. She shall file her memorandum of costs within 10 days of this decision. Lumbermens shall then have 10 days in which to file objections, if any. The Court will then assess costs.

3. Claimant is not entitled to attorney fees or a penalty.

4. Any party to this dispute may have 20 days in which to request a rehearing from this findings of fact, conclusions of law and judgment.

5. This JUDGMENT is certified as final for purposes of appeal.

Dated in Helena, Montana, this 5th day of July, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Hunt

Mr. Roger T. Witt

Appendix Attached

Submitted: June 17, 1996

APPENDIX

From Dr. Weinert's psychiatric consultation report dated 9/30/94:

Ms. Ranes was referred to Dr. Iverson. She was treated with various muscle relaxers and anti-inflammatory medications with limited benefit. She was referred to physical therapy which she did for one month's time, including flexibility and postural exercises as well as electric stimulation. She relates that the physical therapy was of no help and it was **discontinued after one month. This is despite the physical therapist's notes which indicate that Shirley made significant progress.**

(Ex. 1 at 1, emphasis added.)

In respect to additional medication, Ms. Ranes is quite adamant that medications are not beneficial for her despite her rather profound sleep dysfunction. I doubt she would be compliant with any additional medical regimen. She also is not inclined to pursue additional therapy.

(*Id.* at 3.)

From Dr. Weinert's physiatric follow-up appointment notes dated 2/14/95:

Shirley returns for followup [sic] of back pain. Shirley was referred for physical therapy for continued mid back pain after her EMG on 1-4-95. It has been more than a month since that referral and Shirley has only made three PT appointments. She has no showed or canceled for 50% of her physical therapy appointments. She is very hostile and belligerent today complaining of ongoing back pain that no one is doing anything about. She has previously contacted the office requesting narcotics which I don't feel are appropriate in her condition. She has not been performing home exercises. She continues to smoke and has gained weight.

(*Id.* at 12.)

I reassured her that there is no evidence of neurologic compromise with respect to her back. At this point I don't feel that any further diagnostic tests are indicated. She was not very receptive to this message and was quite abusive.

I explained to Shirley that there is little that we can do to help her unless she is willing to help herself. Specifically, I recommended that she be compliant with the physical therapy program as well as a home exercise program. She needs to make efforts towards losing weight and needs to stop smoking as all of these things can aggravate back pain. She has performed very poorly in body mechanics evaluation and physical therapy and unless she makes efforts to address these problems, she will continue to have back pain and there is little more that anyone can do to help her. I have again recommended that she return to physical therapy and progress through an exercise program over the next month.

(*Id.* at 13.)

From Dr. Weinert's physiatric follow-up appointment notes, dated 3/28/95:

Shirley returns for followup [sic] of back pain. She relates that she made two additional physical therapy appointments since she was last seen on February 14, 1995. She relates that she is not performing any home exercises in respect to her back.

....

I had a long discussion with Shirley regarding medical compliance issues. She has been consistently noncompliant with prescriptions, therapies, etc.

(*Id.* at 15-16.)

From Dr. Weinert's physiatric follow-up appointment notes dated 6/5/95:

Shirley underwent a functional capacity evaluation on 5/16/95 which was a valid test with 78% of validity criteria being passed. There was evidence of inappropriate illness behavior and symptom exaggeration during the test.

(*Id.* at 17.)

From Dr. Iverson's medical records:

The patient states the "I am not doing any better.["] This is contrary [sic] to Mike Arnold['s,] the physical therapist[,] assessment which there [sic] has been mentioned that she [sic] been doing somewhat better.

(Ex. 2 at 4.)

From Dr. Iverson's medical records for 11/23/94:

I had a long discussion with the patient and her mother. She is adamant that, with respect to work, they will not honor a 20 lb. weight restriction at work. She states "that there has got to be something wrong other than muscles and ligaments and that the arthritis in her back was not there before the fall as she has never had back problems in the past". I tried to re-assure the patient that the arthritic changes have obviously been going on for quite some time and that the fall obviously aggravated the symptoms somewhat. In view of no definite disc or nerve root pathology in the low back, I don't feel that she is a surgical candidate. I do feel that she can do modified work. The patient is not willing to accept this recommendation and wishes to have another opinion which I feel is appropriate. She is being sent for another opinion regarding her musculoskeletal problems. She is being released back to modified work effective 11-28-94.

(*Id.* at 8.)

From St. Peter's Hospital Emergency Room record of Dr. Winer for 7/10/94:

BACK: The back is first examined. Interestingly enough, I watched this patient ambulate in and did not detect a defect. She rolled over extremely slowly and I was virtually unable to touch anywhere in her thoracic or lumbar spine without her wincing and crying out in pain. There was no cervical pain but wherever I touched her on her back she had an immediate wincing reaction. There is no evidence of any significant muscular spasm anywhere in the thoracic and lumbar spine.

(Ex. 4 at 2.)

The patient, because of her complaints of pain, was given Demerol 100 mgs., Vistaril 75 mgs, and was observed for an hour and taken to X-ray. She stated that the pain shot did not offer her any relief.

....

This patient's complaints are totally out of proportion to her physical and x-ray findings. I am, therefore, confused. Her boyfriend came out and was very upset with me that I had not relieved her pain.

It should be noted at this time that this patient came here on Sunday night at an elective hour and at a time when the Emergency Room was backed up for at least three hours in seeing patients as we were that busy and they were quite upset that relief was not immediate and that attention was not immediate. I explained to this boyfriend in no uncertain terms that I was working just as fast as I possibly could and there was no possible way I could have worked any faster and that she had no life threatening situation and she had been given a maximal dose of Demerol and Vistaril as far as I was concerned that as soon as I could get around to seeing her x-rays and re-evaluating her I would. It was within ten minutes that I looked at her x-rays and was unable to identify anything other than the findings that I stated that I went back and re-evaluated her. She told me that the Demerol had not worked and I explained to her that nothing short of a general anesthetic would completely relieve her of the pain.

(*Id.* at 3.)

1. The test requires:

- (1) a physician's determination that the claimant is as far restored as the permanent character of his injuries will permit;
- (2) a physician's determination of claimant's physical restrictions resulting from an industrial accident;
- (3) *a physician's determination, based on his knowledge of the claimant's former employment duties, that he can return to work, with or without restrictions, on the job on which he was injured or another job for which he is fitted by age, education, work experience, and physical condition;*
- (4) notice to the claimant of receipt of the report attached to a copy of the report.

Ness, 257 Mont. at 339-40 (emphasis in original).