

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 29

WCC No. 2008-2201

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DAVID BAGLEY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** After Petitioner David Bagley suffered an industrial injury to his right arm, his employer assigned him to alternate job duties which consisted of completing coursework for an electrician's apprenticeship. Bagley asserted that he was unable to complete the hours to which his treating physician released him to return to work due to severe pain. Bagley's employer terminated his employment for failing to complete his work hours and for not reporting to work. Bagley argues he is entitled to temporary total disability benefits and that Respondent Montana State Fund has unreasonably refused to pay his benefits.

**Held:** The facts of this case unambiguously demonstrate that Bagley was terminated from his employment for disciplinary reasons. He refused to work the hours to which he had been released, and he then failed to report to work at all. Although Bagley's treating physicians disagree as to whether Bagley is restricted from using his right hand for writing as part of his job duties, they both agree that he is able to work in a sedentary position. Bagley's former employer made such a position available to him, and had Bagley not been fired for cause, he would have been able to continue in that position. Bagley's request for reinstatement of TTD benefits is denied. Since Bagley is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

**Topics:**

**Credibility.** The Court did not find Petitioner credible where the evidence demonstrated, among other findings, that: he misled his employer that he was receiving vocational help at a learning center when he was not attending

the center; he claimed medications affected his abilities when the medical evidence demonstrated he was no longer taking the medications; he wrote several pages of notes with his right hand while testifying that it was “impossible” for him to write with his right hand at all; he informed his counsel that his employer did not offer to make a transcriber available to him when his employer had done so in writing.

**Witnesses: Credibility.** The Court did not find Petitioner credible where the evidence demonstrated, among other findings, that: he misled his employer that he was receiving vocational help at a learning center when he was not attending the center; he claimed medications affected his abilities when the medical evidence demonstrated he was no longer taking the medications; he wrote several pages of notes with his right hand while testifying that it was “impossible” for him to write with his right hand at all; he informed his counsel that his employer did not offer to make a transcriber available to him when his employer had done so in writing.

**Employment: Termination of Employment: Generally.** The Court concluded that Petitioner was terminated from his employment for disciplinary reasons where the facts demonstrated that he refused to work the hours to which he had been released and failed to report to work, and the Court further found that the employer diligently attempted to accommodate Petitioner’s difficulties.

**Vocational and Return to Work Matters: Physical Restrictions.** The Court concluded that modified job duties which allowed Petitioner to work on his apprenticeship coursework fit within Petitioner’s physical restrictions where his medical providers agreed that he was able to work in a sedentary position, although they disagreed as to whether he could use his right hand for writing as part of his job duties. The coursework at issue contained both a reading and writing component and Petitioner presented no credible evidence to support his allegation that he would not have been allowed to complete only the reading component. Petitioner demonstrated an ability to write at least a minimal amount with his left hand, and his employer offered to provide him with a transcriber. Petitioner’s allegations that he was unable to participate in the sedentary job duties assigned to him are unconvincing.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701.** Petitioner was terminated from his employment for disciplinary reasons. He has not yet reached MMI and his medical providers agree he is able to work in a sedentary position. The evidence demonstrated that had he not been fired for cause, he would have been able to continue in

the modified job his employer provided. He is therefore not entitled to TTD benefits.

**Vocational and Return to Work Matters: Modified Employment.** A Petitioner who was released to return to work in a modified, sedentary job position and was terminated from his employment for disciplinary reasons is ineligible for TTD benefits where the evidence demonstrates that his employer has a modified, sedentary job position that would be available to him had he not been fired.

¶ 1 The trial in this matter was held on March 10, and March 20, 2009, at the Workers' Compensation Court in Helena, Montana. Petitioner David Bagley (Bagley) was present and was represented by Richard J. Pyfer. Respondent Montana State Fund (State Fund) was represented by Daniel B. McGregor.

¶ 2 Exhibits: Exhibits 1 through 20 were admitted without objection. The parties stipulated to the addition of Dr. Robert Blake's January 23, 2009, treatment note as page 42 of Exhibit 11. At trial, Bagley demonstrated writing while using his left hand, and the parties stipulated to the handwriting example being made Exhibit 21. Bagley later moved to withdraw his stipulation to the admission of Exhibit 21; his motion was denied.

¶ 3 Witnesses and Depositions: The depositions of Bagley, Ray Paul Richards (Richards), Dr. Robert B. Blake, and Dr. Michelle Cameron-Donaldson were taken and submitted to the Court, and can be considered part of the record. Dr. Donaldson's deposition was submitted with the stipulation that she have the opportunity to read and make corrections to the deposition within the time allowed by law; no corrections were submitted to the Court. State Fund's counsel submitted a one-page document that contained insertions of exhibit numbers which had been left blank in Bagley's deposition, and which was then attached to the cover page of Bagley's deposition. Bagley and Robin Miller (Miller) were sworn and testified at trial on March 10, 2009. Trial resumed on March 20, 2009, and Bagley completed his testimony. Richards was sworn and testified.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:<sup>1</sup>

¶ 4a Whether Bagley is unable to return to work and is entitled to temporary total disability (TTD) benefits retroactive to the time he discontinued employment with Tech Electric;

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<sup>1</sup> Pretrial Order, Statement of Issues to be Determined by the Court, at 2.

¶ 4b Whether Bagley is entitled to a penalty for State Fund's failure to place him on benefits; and

¶ 4c Whether Bagley is entitled to an award of attorney fees and costs.

### FINDINGS OF FACT

¶ 5 On March 5, 2008, Bagley suffered an industrial injury within the course and scope of his employment as a laborer with Tech Electric, Inc., of Livingston, Montana. Bagley injured his right arm while carrying steel panels. State Fund accepted liability for the claim and has paid medical benefits.<sup>2</sup>

### Petitioner

¶ 6 Bagley testified at trial. For reasons set forth in these findings, I did not find him to be a credible witness.

¶ 7 Bagley currently resides in Dillon, Montana. At the time of his industrial injury, he resided in Livingston.<sup>3</sup> Bagley was hired by Tech Electric as a laborer on August 13, 2007. After he was hired, he learned he could apply for an electrician apprenticeship. However, he needed to obtain a GED.<sup>4</sup> Bagley admitted that when he applied for the Tech Electric laborer position, he misrepresented on his application that he had graduated from high school; however, he informed his supervisor of the misrepresentation when he learned that a high school diploma or GED was required for acceptance into the apprenticeship program.<sup>5</sup> He prepared for the GED on his own time, and received it on November 5, 2007. He then applied for the electrician apprenticeship program on November 9, 2007, and was subsequently accepted.<sup>6</sup>

¶ 8 As part of his apprenticeship program, Bagley was required to complete fifteen workbooks over the course of four years. In January 2008, he began completing the

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<sup>2</sup> Pretrial Order, Statement of Uncontested Facts, at 2.

<sup>3</sup> Trial Test.

<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.

<sup>6</sup> Trial Test.

workbooks on nights and weekends. Bagley completed four of them satisfactorily prior to his industrial injury.<sup>7</sup>

¶ 9 On the day of his industrial accident, Bagley finished his shift and then worked the following day as well. When his arm did not improve over the weekend, he saw Dr. Benjamin Flook. Dr. Flook restricted Bagley's use of his right arm. Bagley then returned to light-duty work, completing sorting tasks in the shop. Dr. Flook later referred Bagley to Dr. Donaldson, who restricted him to no use of his right arm. When Bagley returned to work with Dr. Donaldson's restrictions, Richards, his supervisor, sent him home while the company decided what tasks he could be assigned within his restrictions. Later that day, claims adjuster Miller called Bagley and informed him that he should report to work as usual and that he could complete his apprenticeship coursework on the clock.<sup>8</sup>

¶ 10 Bagley testified that by completing his coursework on the job, he received full-time wages from Tech Electric instead of workers' compensation benefits. He was very pleased with the arrangement. Bagley stated that under his new restrictions, he initially worked six hours per day and progressed on his workbooks although pain in his arm occasionally interfered.<sup>9</sup> Bagley stated that the coursework consisted of a textbook and a workbook, and he had to read the textbook and then answer mathematical problems in the workbook. Some of the mathematical problems required significant writing.<sup>10</sup> Bagley stated that he was motivated and eager to succeed in the apprenticeship.<sup>11</sup>

¶ 11 Bagley testified that while he was working these six-hour shifts completing coursework, he had difficulty with some of the mathematical calculations his coursework required and he could not find anyone at Tech Electric to help him. Bagley informed Richards that he wanted to go to the "learning center" to receive assistance with the mathematics instead of reporting to Tech Electric for his shift each day and Richards agreed to allow him to do so.<sup>12</sup> Bagley then reported to Tech Electric only briefly each Monday to submit his timecard. On cross-examination, Bagley admitted that he never went to either the learning center in Livingston or Bozeman. Bagley claimed that he tried to do the work at home and found it "impossible" to complete, and therefore he did not go to the

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<sup>7</sup> Trial Test.

<sup>8</sup> Trial Test.

<sup>9</sup> Trial Test.

<sup>10</sup> Trial Test.

<sup>11</sup> Trial Test.

<sup>12</sup> Trial Test.

learning centers. Bagley never informed Richards that he was not attending the learning centers.<sup>13</sup>

¶ 12 Bagley had surgery on his right arm on May 21, 2008.<sup>14</sup> Dr. Donaldson placed Bagley's arm in a splint and restricted him from any use of his right arm for seven to ten days.<sup>15</sup> Following the surgery, Bagley reported to Tech Electric every Monday and filled out his timecard to reflect a forty-hour work-week at his employer's direction. During this time, Tech Electric continued to pay his full-time wages.<sup>16</sup>

¶ 13 After the surgery, Bagley experienced extreme pain and swelling in his right arm.<sup>17</sup> He also experienced new symptoms of numbness on the outside of his arm.<sup>18</sup> On June 26, 2008, Dr. Donaldson released Bagley to return to work for six hours per day "with breaks" and allowed him light use of his right arm for tasks such as writing and computer use.<sup>19</sup> Bagley asserted that after his surgery, he could not write with his right hand because of numbness, pain, and cramping. He also found it impossible to write with his left hand. Bagley explained that attempting to use his left hand for writing his workbook equations was problematic for multiple reasons: his writing was illegible; it took him a significantly longer time to work each problem; and trying to write with his left hand was "backward" and caused him to become confused while attempting to solve the equations. Bagley acknowledged that there were no time limits on completing the exercises.<sup>20</sup>

¶ 14 Bagley testified that on July 14, 2008, he ran into the president of Tech Electric, who asked how he was doing. Bagley testified that he informed the president that he had not been keeping up with his coursework because of the pain in his arm. Bagley stated that he suggested that the company might consider giving him workers' compensation benefits instead of paying him his wages because he did not believe he could work at that time.<sup>21</sup>

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<sup>13</sup> Trial Test.

<sup>14</sup> Ex. 8 at 13.

<sup>15</sup> Ex. 8 at 21.

<sup>16</sup> Trial Test.

<sup>17</sup> Bagley Dep. 53:10-14.

<sup>18</sup> Bagley Dep. 54:8-23.

<sup>19</sup> Ex. 8 at 25.

<sup>20</sup> Trial Test.

<sup>21</sup> Trial Test.

¶ 15 Bagley testified that on August 1, 2008, Richards contacted him and requested that he start reporting to work at Tech Electric on August 4, 2008, to work on his coursework for two hours each day. Bagley refused to do so. However, he began to report for work on August 18, 2008, on the advice of his counsel. Bagley stated that prior to that time, his counsel had advised him to ignore any phone calls from his employer. Bagley stated that his employer was harassing him because every Monday when he went to turn in his timecard, Richards would ask him how he was doing, what the doctor had said, and whether Bagley would be able to report to Tech Electric to continue his coursework.<sup>22</sup> Bagley further testified that he had found it difficult to complete his coursework while he was taking pain medication because the medication affected his ability to think clearly. Bagley admitted, however, that he had been completely weaned off the medication prior to August 18, 2008.<sup>23</sup>

¶ 16 Bagley agreed that his textbook was over 500 pages long and that he was expected to read or review the entire book as part of his apprenticeship studies. Bagley admitted that nothing about his industrial injury prevented him from reading, and he further admitted that it would have been possible for him to come to Tech Electric each workday and read for two hours. Bagley claimed, however, that Richards told him that he needed to bring in and complete the workbooks, and that it would not have been acceptable for Bagley to spend his two hours each day just reading. Bagley admitted that Richards never gave him any particular assignment or demanded that he complete a certain amount of the coursework within any particular time period and that he was always instructed, “[j]ust to do as much as I could.” In addition to the answers which appear in the workbooks, Bagley needed to use scratch paper to figure out the mathematical equations, and he needed to complete significantly more writing than the amount that appears in the workbook.<sup>24</sup>

¶ 17 Bagley agreed that from the time of his surgery with Dr. Donaldson on May 21, 2008, until his termination on September 5, 2008, he reported for work at Tech Electric a total of ten days.<sup>25</sup> Bagley stated that he was frustrated with Richards and felt like they were butting heads over Bagley’s schedule because Richards wanted Bagley to work the number of hours his treating physician had released him to work. Bagley believes Richards

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<sup>22</sup> Trial Test.

<sup>23</sup> Trial Test.

<sup>24</sup> Trial Test.

<sup>25</sup> Trial Test.

should have agreed to let Bagley work the number of hours Bagley believed he could work.<sup>26</sup>

¶ 18 On September 3, 2008, Richards gave Bagley a letter of reprimand which stated, among other things, that Bagley would be terminated from his employment at Tech Electric if he failed to work his specified number of hours again. Bagley left Tech Electric after two hours instead of staying for the four hours he had been released to work by Dr. Donaldson. Bagley then did not appear for work on September 4, 2008, because he assumed his failure to complete his shift on September 3 caused him to be terminated from his employment.<sup>27</sup>

¶ 19 Bagley wrote a four-page summary describing what occurred regarding his work releases and his relationship with Tech Electric.<sup>28</sup> At trial, Bagley admitted that this document was prepared by him in his own handwriting using his right hand after he was terminated from Tech Electric.<sup>29</sup> Bagley also prepared a two-page handwritten narrative account of difficulties with his work release and completing his coursework.<sup>30</sup> Bagley admitted that he prepared these documents using his right hand after his termination from Tech Electric, but prior to his most recent surgery.<sup>31</sup> He stated that he wrote the four-page summary the day before his January 14, 2009, deposition to help him prepare for the deposition.<sup>32</sup> Bagley further admitted that several other handwritten documents in evidence in this case<sup>33</sup> were written by him with his right hand after his industrial injury but prior to his recent surgery.<sup>34</sup> During Richards' deposition on January 14, 2009, Bagley also wrote approximately one and one-half pages of notes regarding Richards' testimony.<sup>35</sup> Bagley admitted that he wrote those notes using his right hand and that Richards' deposition lasted

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<sup>26</sup> Bagley Dep. 82:11-22.

<sup>27</sup> Trial Test.

<sup>28</sup> Ex. 20 at 1-4.

<sup>29</sup> Trial Test.

<sup>30</sup> Ex. 20 at 5-6.

<sup>31</sup> Trial Test.

<sup>32</sup> Bagley Dep. 68:20 - 69:20.

<sup>33</sup> See Ex. 20 at 7-12.

<sup>34</sup> Trial Test.

<sup>35</sup> Bagley Dep. 70:2-9.



approximately three hours.<sup>36</sup> Bagley stated, however, that it was painful for him to do so and that he had to rest his arm several times during Richards' deposition.<sup>37</sup>

¶ 20 On December 16, 2008, Bagley's counsel wrote to State Fund's counsel and alleged:

You said the employer told you that all my client needed to do was sit and read manuals and that someone would transcribe answers into the books for him. I spoke with my client about this fact and he said at no time did the employer, who knew my client was having difficulty, offer such service or assistance of another person to do the transcription.<sup>38</sup>

Although Bagley may have informed his counsel that Tech Electric did not offer him a transcriber, it is indisputable that Richards did so in writing on August 13, 2008.<sup>39</sup> From the evidence presented and from the testimony at trial, it is clear to me that Bagley has not been truthful regarding his post-injury work at Tech Electric.

¶ 21 I find it difficult to believe Bagley's testimony, and frankly, to accept Bagley's excuses as to why he could not perform the alternative job duties assigned to him by Tech Electric. Bagley alleged that he was in so much pain, he could not write with his right hand, nor could he write legibly with his left hand. And yet the record contains several pages of documents which Bagley wrote with his right hand while his injury was at its worst. The record also contains a sample – scribbled, but legible – of Bagley printing with his left hand. Furthermore, during the depositions taken in this litigation, Bagley demonstrated that he could sit for three hours and write a page and a half of notes with his right hand. Richards also offered to provide Bagley with someone to transcribe his work. The transcription may or may not have been a successful solution, but Bagley never attempted to work with a transcriber. We also heard testimony that a significant portion of Bagley's coursework was reading a textbook. Bagley first tried to argue that he was unable to sit and read because his medications made it difficult to concentrate. However, Bagley was no longer taking these medications by August 18, 2008. Bagley also argued that he would not have been allowed to just sit and read, but there is no evidence to support this assertion. While Bagley was reprimanded by his employer on several occasions, those reprimands were for failing to report to work or failing to complete a shift. Bagley was never reprimanded for a

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<sup>36</sup> Bagley Dep. 70:21 - 71:20.

<sup>37</sup> Bagley Dep. 72:2-8.

<sup>38</sup> Ex. 4 at 15.

<sup>39</sup> Ex. 6 at 6.

lack of productivity or for failing to complete a particular amount of coursework, even during the period where Bagley pretended to attend the learning centers, when little, if any, coursework was completed at all.

¶ 22 What most undermines Bagley's credibility is that after he requested, and received, permission to spend his time at one of the learning centers instead of reporting to Tech Electric, Bagley never reported to a learning center for even a single session over the ensuing months, and yet he continued to go to Tech Electric every Monday and complete his timecard, allowing his employer to believe that he was upholding his part of the agreement. It was not until Richards confronted Bagley and informed him that Richards had called the learning centers that Bagley admitted that he was not attending. The evidence in this case has demonstrated to me that Bagley lacked truthfulness in dealing with his employer and with respect to his industrial injury.

Robin Miller

¶ 23 Miller, State Fund's claims examiner, testified at trial. I found Miller to be a credible witness. Miller explained that she understood Bagley's time-of-injury job position to be a heavy-duty laborer position for which Bagley was paid \$13.50 per hour. Miller knew that Bagley injured his right arm, and that he is right-hand dominant.<sup>40</sup>

¶ 24 After Bagley filed his claim, Miller investigated and State Fund accepted liability. State Fund has paid Bagley's medical benefits in a timely manner since accepting liability.<sup>41</sup> Bagley was never awarded TTD benefits because his employer chose to keep him on salary and he was therefore not eligible for those benefits. The only TTD benefits State Fund has paid to Bagley were after his March 2009 surgery.<sup>42</sup>

¶ 25 Miller explained that the employer decided to assign Bagley his coursework as a job duty after his restrictions changed.<sup>43</sup> Miller knew that Bagley's completion of the workbooks included some writing.<sup>44</sup> Miller understood that Bagley's job duties in completing his apprenticeship work involved both reading and writing, and she believed Bagley could

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<sup>40</sup> Trial Test.

<sup>41</sup> Trial Test.

<sup>42</sup> Trial Test.

<sup>43</sup> Trial Test.

<sup>44</sup> Trial Test.

intersperse reading and writing so as to provide himself with adequate breaks from writing.<sup>45</sup>

¶ 26 Miller stated that from the medical records she obtained, although Bagley may have been precluded from using his right hand for writing, he remained released to work in a sedentary position. This allowed Bagley to continue completing the reading portions of his workbooks, and she believed for the minimal amount of writing required, Bagley could use his left hand. She also knew that Bagley's supervisor had offered to provide someone to transcribe the writing portion for Bagley. Therefore, she never considered him to be taken off work, because he remained released to a sedentary position and he had such a position available to him with his time-of-injury employer.<sup>46</sup>

#### Ray Paul Richards

¶ 27 Richards testified at trial. I found Richards to be a credible witness. Richards is currently the project manager for Tech Electric's out-of-state operations.<sup>47</sup> While Bagley worked at Tech Electric, Richards was the shop manager and his supervisor.<sup>48</sup> Richards also administrated Tech Electric's apprenticeship program.<sup>49</sup> Richards noted that Tech Electric has approximately fifty employees and that at the time Bagley worked for Tech Electric, there were nine electrician apprentices, including Bagley. Obtaining an apprenticeship is a competitive position, and employees are chosen due to their work habits during their initial hire period. Bagley was a good employee with a good work attitude who appeared to be qualified for the apprenticeship program.<sup>50</sup>

¶ 28 After Bagley's injury, Richards selected tasks for Bagley to perform within his restrictions. Richards initially asked Bagley to sort items in the shop, which are duties that have been assigned to other injured workers on previous occasions. However, Bagley had difficulty performing the work with one arm, so Richards decided to assign him to completing his apprenticeship coursework. Bagley was the first worker Richards assigned to complete apprenticeship coursework as part of his alternative job duties.<sup>51</sup> However,

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<sup>45</sup> Trial Test.

<sup>46</sup> Trial Test.

<sup>47</sup> Trial Test.

<sup>48</sup> Trial Test.; Richards Dep. 13:6-9.

<sup>49</sup> Richards Dep. 21:24 - 22:1.

<sup>50</sup> Trial Test.

<sup>51</sup> Trial Test.

Richards stated that other workers at Tech Electric have received full-time paychecks while off work for injuries. He explained that it helps maintain the company's workers' compensation insurance rates, and it allows the company to maintain a relationship with the employee.<sup>52</sup>

¶ 29 Richards testified that from the time of his industrial injury forward, Bagley consistently reported that he had pain in his right arm, and Bagley continued to complain of pain in his arm after the March 21, 2008, surgery.<sup>53</sup> Richards agreed that to complete the apprenticeship program, Bagley would have to successfully complete the coursework and would also have to be able to perform the physical part of the job.<sup>54</sup> Richards understood that Bagley's post-surgery prognosis was that he would be able to perform the physical requirements of the apprenticeship in the future.<sup>55</sup>

¶ 30 Richards testified that at Bagley's request, Richards allowed him to go to the learning centers for six hours each day per his physician's work release instead of reporting to Tech Electric. After several weeks, Richards learned that Bagley had not been attending the learning centers. On Monday, August 4, 2008, Bagley arrived to fill out his timecard and also gave Richards an updated work status which stated that he could only work two hours per day instead of six. Richards asked Bagley to report to Tech Electric for those hours, and Bagley told Richards that he would rather continue at the learning centers, because he found that more beneficial. Richards then informed Bagley that he knew Bagley had not been attending either learning center. Bagley admitted that this was true, and informed Richards that he had not gone to the learning centers because he had been in too much pain to complete the work.<sup>56</sup>

¶ 31 On August 7, 2008, Richards issued a letter of reprimand for Bagley's failure to report to work on that day.<sup>57</sup> He issued another letter of reprimand on August 8, 2008, when Bagley failed to report to work on that day.<sup>58</sup> On August 13, 2008, Richards issued a third letter of reprimand for Bagley's failure to report to work on August 11, 12, and 13, 2008. In that letter, Richards further noted that Bagley had not returned any of the phone

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<sup>52</sup> Richards Dep. 15:25 - 16:16.

<sup>53</sup> Richards Dep. 35:10 - 36:14.

<sup>54</sup> Richards Dep. 28:5-14.

<sup>55</sup> Richards Dep. 38:8-13.

<sup>56</sup> Trial Test.

<sup>57</sup> Ex. 6 at 3.

<sup>58</sup> Ex. 6 at 4.

messages which his employer had left for him over the last several days and that Bagley could face disciplinary action, including termination, if he failed to report to work for another day.<sup>59</sup>

¶ 32 On August 13, 2008, Richards wrote a lengthy letter to Bagley setting forth the employer's point of view regarding Bagley's failure to show up for work and complete his coursework. Richards noted, in part:

Yesterday I received a letter from your Attorney . . . and quite frankly I was perplexed. It states that "My client is unable to work the two hours at the apprenticeship Coursework because he cannot do so left-handed". At no time during our several conversations did you ever indicate to me that your left hand was giving you problems. . . . You did mention that writing with your left hand was messy and hard to read.

I told you that since much of your course work is multiple choice, you should be capable of filling in a box. Occasionally this work does require some writing on scratch paper to come up with an answer, but I would expect that you have the ability to jot down something legible enough that you can read yourself. Since these courses are book form, there is a considerable amount of material that must be read before you can even start on the chapter. This study of the course work is encouraged to be done during your 2 hour work period and requires no writing.

We are willing to make accommodations to transcribe your answers to the answer sheet if necessary. . . .

. . . I permitted you to perform your work day at the learning centers in Livingston and Bozeman so that their staff could give you that added help and support needed. After your surgery I spoke with you about returning to do your course work in our office . . . . You explained to me . . . that by going back to the [l]earning centers, you would gain more benefit. I conceded and told you to start going there for work, 5 days a week taking into consideration your limitations. You said you would. My understanding is that you never showed up at the learning centers . . . after that discussion.<sup>60</sup>

¶ 33 On August 15, 2008, Richards gave a letter to Bagley which stated that Tech Electric had received an August 13, 2008, note from his treating physician modifying his work release, and that Tech Electric would expect Bagley to work two hours per day for the week of August 11-17, 2008; four hours per day for the week of August 18-24, 2008; and six

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<sup>59</sup> Ex. 6 at 5.

<sup>60</sup> Ex. 6 at 6-7. (Emphasis in original.)

hours per day from August 25, 2008, forward.<sup>61</sup> On August 29, 2008, Richards gave Bagley a revised schedule which changed his workday to four hours per day beginning September 1, 2008, and six hours per day from September 8, 2008, forward. Richards noted that Tech Electric would be closed on September 1, and stated that Bagley would be expected to begin working four hours per day at Tech Electric on Tuesday, September 2, 2008, beginning at 8 a.m. each day.<sup>62</sup>

¶ 34 On September 3, 2008, Richards gave Bagley a letter of reprimand which stated that Bagley had reported to work at 7:15 a.m. and left at approximately 9 a.m., and did not return to finish his four-hour shift. Richards stated, “Another refusal to work the specified length of hours will result in termination.”<sup>63</sup>

¶ 35 On September 5, 2008, Richards sent Bagley a letter informing him that his employment with Tech Electric was terminated. In that letter, Richards stated that on September 2, 2008, Bagley left Tech Electric after working on his coursework for less than two hours, and that on September 3, 2008, Richards gave Bagley a letter of reprimand for failing to work his full shift on September 2. Richards stated, “Upon receipt of the reprimand letter, you picked up your books and decided to leave.”<sup>64</sup> Richards asserted that Bagley never returned to finish his shift on September 3, and that he did not report to work or call Tech Electric on September 4, 2008. Richards explained, “In light of the above (and given your poor personnel record) your position with Tech Electric Inc. is terminated.”<sup>65</sup>

Dr. Michelle Cameron-Donaldson

¶ 36 Dr. Donaldson is a board-certified orthopedic surgeon with a specialty in orthopedic sports medicine.<sup>66</sup> Dr. Donaldson has practiced general orthopedics in Livingston for the last six years.<sup>67</sup>

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<sup>61</sup> Ex. 6 at 9.

<sup>62</sup> Ex. 6 at 12.

<sup>63</sup> Ex. 6 at 13. (Emphasis in original.) A handwritten notation on the exhibit states that Bagley was given the original of this letter “at 9:45 A.M. 03 Sep 08.” From the content of the letter and the testimony of Bagley and Richards, I believe the letter refers to Bagley’s failure to work a full four hours on the previous day, September 2, 2008.

<sup>64</sup> Ex. 6 at 14.

<sup>65</sup> *Id.*

<sup>66</sup> Donaldson Dep. 5:18 - 6:3.

<sup>67</sup> Donaldson Dep. 6:14-18.

¶ 37 Dr. Donaldson first saw Bagley on March 27, 2008, on referral from Dr. Flook.<sup>68</sup> Based on Bagley's history, Dr. Donaldson's examination, and test results, she diagnosed Bagley with cubital tunnel syndrome.<sup>69</sup> Dr. Donaldson initially prescribed physical therapy and splinting, but Bagley's symptoms did not improve.<sup>70</sup> Dr. Donaldson also diagnosed Bagley with tendinitis. She ultimately recommended two surgical procedures to correct Bagley's arm conditions.<sup>71</sup>

¶ 38 Dr. Donaldson testified that Bagley's recovery from surgery was atypical. He complained of a great deal of pain and pain medications were ineffective in controlling it.<sup>72</sup> While Bagley consistently complained of very severe pain, Dr. Donaldson saw no outward signs of it; he appeared to be comfortable and relaxed and did not exhibit high blood pressure, an increased heart rate, or any other clinical signs often associated with extreme pain.<sup>73</sup> Dr. Donaldson believed that Bagley's pain was not as severe as he claimed.<sup>74</sup>

¶ 39 On June 26, 2008, Dr. Donaldson released Bagley to work six hours per day, with use of his right hand allowed "with breaks." Dr. Donaldson noted that Bagley must wear a brace on his right arm, and may use it lightly for writing and computer use.<sup>75</sup> On July 11, 2008, with Bagley continuing to complain of post-surgical pain in his right arm, Dr. Donaldson noted that she was giving Bagley work restrictions which would allow him to do sedentary work up to 8 hours per day, but in light of his complaints of cramping, she restricted his writing to two hours per day with frequent breaks.<sup>76</sup> On August 2, 2008, Dr. Donaldson issued a work release which released Bagley to work two hours per day "working up to 6 hours a day over 3 weeks." Dr. Donaldson specifically noted that Bagley could not lift, pull, or carry, but could perform simple grasping and fine manipulation tasks with his right hand.<sup>77</sup> Consistent with the work releases she issued, Dr. Donaldson believed

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<sup>68</sup> Donaldson Dep. 7:24 - 8:7.

<sup>69</sup> Donaldson Dep. 17:6-8.

<sup>70</sup> Donaldson Dep. 19:10-15.

<sup>71</sup> Donaldson Dep. 22:21 - 23:20.

<sup>72</sup> Donaldson Dep. 31:15 -32:10.

<sup>73</sup> Donaldson Dep. 65:17-25.

<sup>74</sup> Donaldson Dep. 66:11-15.

<sup>75</sup> Ex. 8 at 25.

<sup>76</sup> Ex. 8 at 28.

<sup>77</sup> Ex. 8 at 32.

Bagley was capable of performing sedentary work, including writing with his right hand, for the hours she released him to return to work.<sup>78</sup>

¶ 40 Dr. Donaldson saw Bagley on August 12, 2008. She noted that he continued to complain of increasing pain and numbness in his right arm and hand. However, he had intact sensation when she tested the areas he stated were numb. She further noted:

I discussed with [Bagley] that his employer does have the right to request that he go back to work to do sedentary work and that his work release has been filled out for him to this extent. He says he only wants to go back to do electrical work. I have told him that he will need to work this out with his employer.<sup>79</sup>

¶ 41 On August 13, 2008, Dr. Donaldson amended Bagley's work release to allow a return to work for two hours per day, then four hours per day the following week and six hours per day the week after that.<sup>80</sup> On August 19, 2008, she again amended the work release to allow Bagley to continue working two hours per day for another week, then increasing to four hours per day the following week.<sup>81</sup>

Dr. Robert B. Blake

¶ 42 Dr. Blake is a member of Bridger Orthopedic Group and specializes in upper extremity problems.<sup>82</sup> He saw Bagley on a referral for a second opinion from Dr. Donaldson and State Fund.<sup>83</sup> On September 12, 2008, after reviewing Bagley's medical records and examining him, Dr. Blake diagnosed Bagley with radial tunnel syndrome and noted that Bagley had not been treated for that condition up to that point.<sup>84</sup> Dr. Blake suggested that

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<sup>78</sup> Donaldson Dep. 70:14 - 71:4.

<sup>79</sup> Ex. 8 at 33.

<sup>80</sup> Ex. 8 at 36.

<sup>81</sup> Ex. 8 at 38.

<sup>82</sup> Blake Dep. 5:8-24.

<sup>83</sup> Blake Dep. 6:15-21.

<sup>84</sup> Blake Dep. 12:17 - 13:6.



Bagley consider further surgery to alleviate the condition.<sup>85</sup> Dr. Blake opined that Bagley's pain is real and that Bagley is not overreacting to the pain in his arm.<sup>86</sup>

¶ 43 On October 23, 2008, Dr. Blake wrote a letter stating that as of September 12, 2008, Bagley was not capable of working because of his right arm problems.<sup>87</sup> On October 29, 2008, Miller wrote to Dr. Blake in response to Dr. Blake's September 12, 2008, evaluation and his October 23, 2008, modification to Bagley's work release. Miller noted that Dr. Blake had indicated that Bagley could perform sedentary work, and stated that Tech Electric had made modified work available to Bagley, explaining:

[Bagley] refused the modified work, which was to sit and read the required Electrician Apprentice coursework.

Your letter of October 23, 2008 does not indicate any new objective medical information supporting the need for altering [Bagley's] capacity. Does your opinion preclude the injured worker from sitting and reading, with postural changes as needed, at a table without having to use his injured extremity?<sup>88</sup>

¶ 44 Dr. Blake responded to Miller's October 29, 2008, letter the same day by fax, noting that "sitting and reading, with postural changes as needed, at a table without having to use his injured extremity" was acceptable within Bagley's restrictions.<sup>89</sup>

¶ 45 On November 7, 2008, Dr. Blake found Bagley unable to work as of that date.<sup>90</sup> After reviewing a surveillance video provided to him by State Fund, however, Dr. Blake wrote to Miller on November 18, 2008, stating:

I have had the opportunity to review the 30 minute video surveillance of [Bagley]. I do believe [Bagley] is capable of sedentary work however the work he was required to do at Tech Electric required a lot of writing with his right dominant hand, which was affected by surgery and therefore he was unable to comply with the position. If the job is indeed as you described in

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<sup>85</sup> Blake Dep. 13:12-20.

<sup>86</sup> Blake Dep. 34:7-20.

<sup>87</sup> Ex. 11 at 24.

<sup>88</sup> Ex. 3 at 41.

<sup>89</sup> Ex. 3 at 48.

<sup>90</sup> Ex. 11 at 27.

your October 29, 2008 letter, where [Bagley] was only required to sit and read with postural changes as needed at a table without having to use the right upper extremity, then I believe he is capable of that position.

Certainly after observing the video surveillance, it appears [Bagley] is capable of transporting himself to and from work so this should not be an issue. His right arm is fully capable of reaching into his pockets and performing light activities such as lighting a cigarette and opening a car door. It is my continued opinion however, that any repetitive activity such as writing, is simply beyond his capability at this time.<sup>91</sup>

¶ 46 On December 10, 2008, Dr. Blake again noted that Bagley was unable to work at that time.<sup>92</sup> On January 23, 2009, Dr. Blake noted that Bagley was “not capable of working at this time other than a sedentary left hand position only.”<sup>93</sup> At his deposition on February 18, 2009, Dr. Blake confirmed that he continued to believe that Bagley was capable of sedentary duty with no use of his right arm.<sup>94</sup> While Dr. Blake’s opinion as to whether Bagley was capable of working at various times from September 2008 through February 2009 has been occasionally unclear or even contradictory, I find that Dr. Blake’s opinion has always been that while Bagley is precluded from using his right arm for writing, he was always released to work in a sedentary position using his left arm only.

### CONCLUSIONS OF LAW

¶ 47 This case is governed by the 2007 version of the Montana Workers’ Compensation Act since that was the law in effect at the time of Bagley’s industrial accident.<sup>95</sup>

¶ 48 Bagley bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.<sup>96</sup>

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<sup>91</sup> Ex. 11 at 29.

<sup>92</sup> Ex. 11 at 33.

<sup>93</sup> Ex. 11 at 42.

<sup>94</sup> Blake Dep. 16:18-25.

<sup>95</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>96</sup> *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶ 49 Under § 39-71-701(4), MCA, if an injured worker who has not reached MMI is released to return at an equivalent wage to a position with the worker's time-of-injury employer that the worker is able and qualified to perform, the worker is no longer eligible for TTD benefits. The statute further states:

A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available to the worker for any reason except for the worker's incarceration as provided for in 39-71-744, resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled, as defined in 39-71-116.

¶ 50 The facts of this case unambiguously demonstrate that Bagley was terminated from his employment for disciplinary reasons. He refused to work the hours to which he had been released, and he then failed to report to work at all. While Bagley argues that his job duties required him to write with his right hand, the record is clear that Bagley's employer diligently attempted to accommodate the difficulties Bagley complained of. I find it remarkable that Tech Electric continued to try to work with Bagley even after learning that Bagley had misrepresented attending the learning centers for weeks while continuing to draw his full-time wages. The evidence demonstrates that Bagley's coursework contained both a reading and a writing component. While Bagley alleges that it would not have been acceptable for him to complete only the reading component during his daily shift at Tech Electric, Bagley put forth no credible evidence to support this allegation. Furthermore, there is no evidence to indicate that Bagley was pressured to complete a given amount of work nor were any deadlines imposed upon his completion of the workbooks. The evidence in the record further demonstrates both that Bagley was able to write at least a minimal amount with his left hand, and that he was able to take pages of notes with his right hand when it was in his interest to do so. Finally, Richards offered Bagley the use of a transcriber to assist him in completing the written portion of the coursework. Not only did Bagley refuse Richards' offer, but he later denied that the offer had been made. Bagley's allegations that he was unable to participate in the sedentary job duties assigned to him after his surgery are wholly unconvincing.

¶ 51 Also, although Dr. Donaldson and Dr. Blake disagree as to whether Bagley is restricted from using his right hand for writing as part of his job duties, they both agree that he is able to work in a sedentary position. Bagley's former employer made such a position available to him, and had Bagley not been fired for cause, he would have been able to continue in that position. Bagley's request for reinstatement of TTD benefits is denied.

¶ 52 Since Bagley is not the prevailing party, he is not entitled to his costs or attorney fees.<sup>97</sup> Similarly, pursuant to § 39-71-2907, MCA, Bagley is not entitled to a penalty as he has not prevailed in his claim.

### JUDGMENT

¶ 53 Bagley is not entitled to TTD benefits retroactive to the time he discontinued employment.

¶ 54 Bagley is not entitled to his costs.

¶ 55 Bagley is not entitled to his attorney fees pursuant to § 39-71-611, MCA.

¶ 56 Bagley is not entitled to a 20% penalty pursuant to § 39-71-2907, MCA.

¶ 57 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 18<sup>th</sup> day of August, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Richard J. Pyfer  
Daniel B. McGregor

Submitted: March 20, 2009

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<sup>97</sup> § 39-71-611, MCA.