

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 37

WCC No. 2007-1813

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DONALD BURNS

Petitioner

vs.

FLATHEAD COUNTY, MONTANA

Respondent.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner worked as a heavy equipment mechanic for the Flathead County Road and Bridge Department until he was injured in the course and scope of his employment. Before he returned to work, Petitioner's position as a mechanic was eliminated by the department. When the department posted the position of bridge equipment operator, Petitioner requested a hiring preference; however, Respondent did not hire Petitioner for this position. Petitioner petitioned the Court for a determination that he was entitled to a hiring preference pursuant to § 39-71-317, MCA, for the position of bridge equipment operator.

**Held:** Petitioner was not entitled to a hiring preference for the position of bridge equipment operator because the position is not consistent with his vocational abilities.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-317** Where Petitioner's professional career was spent working as a heavy equipment mechanic since 1981, and his ability to operate heavy equipment for the limited purposes of diagnosing and repairing mechanical problems does not necessarily translate into a vocational ability consistent with the specialized operation of this equipment in bridge construction, and where Petitioner possessed limited knowledge and experience working with concrete as required by the bridge equipment

operator position, the Court concludes he is not entitled to a hiring preference for this position pursuant to § 39-71-317(2), MCA.

**Employment: Rehire Preference.** Where Petitioner's professional career was spent working as a heavy equipment mechanic since 1981, and his ability to operate heavy equipment for the limited purposes of diagnosing and repairing mechanical problems does not necessarily translate into a vocational ability consistent with the specialized operation of this equipment in bridge construction, and where Petitioner possessed limited knowledge and experience working with concrete as required by the bridge equipment operator position, the Court concludes he is not entitled to a hiring preference for this position pursuant to § 39-71-317(2), MCA.

¶ 1 The trial in this matter was held on August 22, 2007, in Kalispell, Montana. Petitioner Donald Burns was present and represented by David M. Sandler. Respondent Flathead County, Montana, was represented by Norman H. Grosfield.

¶ 2 Exhibits: Exhibits 1 through 22 were admitted without objection.

¶ 3 Witnesses and Depositions: The depositions of Petitioner, Guy Foy, and Charlie Johnson were taken and submitted to the Court. Petitioner, Guy Foy, Charlie Johnson, and Larry Yerian were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issue of law:

¶ 4a Whether [Respondent] breached its duty under § 39-71-317(2), MCA, to give [Petitioner] a preference over all other applicants for the open Bridge Equipment Operator position.<sup>1</sup>

#### Uncontested Facts<sup>2</sup>

¶ 5 Petitioner worked as a mechanic in the shop that serves the Flathead County Road and Bridge Department.

¶ 6 On or about November 16, 2003, Petitioner suffered a compensable injury/occupational disease arising out of and in the course of his employment with Respondent. Petitioner was diagnosed with bilateral carpal tunnel syndrome and shoulder bursitis.

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<sup>1</sup> Pretrial Order at 4.

<sup>2</sup> Pretrial Order at 2-3.

¶ 7 At the time of Petitioner's claim, Respondent was insured by the Montana Association of Counties Workers' Compensation Trust (MACO).

¶ 8 On December 11, 2003, MACO accepted liability for Petitioner's injuries/occupational diseases, and paid various compensation and medical benefits.

¶ 9 In January 2004, Petitioner underwent carpal tunnel release surgeries.

¶ 10 On March 8, 2004, Dr. Michael Righetti released Petitioner to return to work with no restrictions. Shortly thereafter, Petitioner returned to his time-of-injury position.

¶ 11 Petitioner returned to Dr. Righetti on November 23, 2004, with pain in his right shoulder. An arthrogram did not show a torn rotator cuff. A subacromial injection improved his symptoms.

¶ 12 On July 29, 2005, Petitioner returned to his treating physician after reaggravating his right shoulder at work. Petitioner was diagnosed with a rotator cuff tear in his right shoulder.

¶ 13 MACO accepted liability for the rotator cuff tear under Petitioner's November 16, 2003, claim.

¶ 14 On January 18, 2006, Dr. Righetti surgically repaired Petitioner's rotator cuff tear.

¶ 15 On July 14, 2006, Dr. Righetti released Petitioner to return to his time-of-injury job.

¶ 16 Petitioner attempted to return to his time-of-injury position.

¶ 17 In a July 26, 2006, letter, Respondent informed Petitioner that it had eliminated his time-of-injury position. Respondent also advised, "Although your injury occurred in November 2003, [Respondent] will use the date of your surgery on your shoulder as the beginning point of the two year hiring preference for a position for which you are qualified."<sup>3</sup>

¶ 18 In September 2006, Respondent posted a Position Vacancy Announcement for the position of bridge equipment operator, which pays \$18.59 per hour. The position was full time, requiring 40 hours of work per week.

¶ 19 Petitioner applied for the bridge equipment operator position, and requested a preference under § 39-71-317, MCA, as well as the preference for being a veteran.

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<sup>3</sup> Pretrial Order at 3.

¶ 20 Respondent did not hire Petitioner for the bridge equipment operator position.

¶ 21 Respondent hired Stephen Johnson for the bridge equipment operator position.

¶ 22 In March 2007, Respondent hired Petitioner to fill the position of Landfill Laborer/Spotter, a position that pays \$14.10 per hour.

### FINDINGS OF FACT

¶ 23 Between 1981 and 1996, Petitioner worked as a heavy equipment mechanic for Long Machinery in Kalispell, Montana. In that position, Petitioner repaired Caterpillar heavy equipment – including completing machine overhauls – with a specialization in power train and undercarriage repairs.<sup>4</sup> Long Machinery had a three to five acre test pit where Petitioner repaired and tested its heavy equipment.<sup>5</sup>

¶ 24 Between 1997 and 1998, Petitioner was employed as a heavy equipment mechanic for Reddig Equipment in Kalispell. Petitioner worked on all types of heavy equipment used for logging, road construction, and building construction.<sup>6</sup> During Petitioner's employment at Reddig Equipment, he was required to operate heavy equipment for the purpose of properly diagnosing and repairing it. Reddig Equipment's test pit area was one acre in size.

¶ 25 Between 1998 and 2006, Petitioner was employed as a heavy equipment mechanic for the Flathead County Road and Bridge Department. Petitioner's work experience included repairing equipment used for construction of roads, bridges, buildings, and pavement.<sup>7</sup>

¶ 26 Petitioner testified at trial and I find his testimony to be credible.

¶ 27 Petitioner testified that while working as a heavy equipment mechanic, he was required to operate the heavy equipment in order to properly diagnose and fix problems. Operating the equipment allowed him to determine whether a piece of equipment was working properly after he repaired it.<sup>8</sup> At times, Petitioner would spend an hour to an hour

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<sup>4</sup> Ex. 21 at 3.

<sup>5</sup> Trial Test.

<sup>6</sup> Ex. 21 at 3.

<sup>7</sup> Ex. 21 at 3.

<sup>8</sup> Trial Test.

and a half operating a particular piece of heavy equipment to ensure a proper diagnosis and repair.<sup>9</sup>

¶ 28 Petitioner testified at trial that in 1973 or 1974, he worked as a laborer in Spokane, Washington. His job duties included removal, replacement, and cleaning of roads. At that time, he had the opportunity to pour cement and use a cement vibrator.<sup>10</sup>

¶ 29 Petitioner testified that his only recent experience working with concrete involved helping a friend pour a concrete pad for a church.<sup>11</sup>

¶ 30 In a July 26, 2006, letter to Petitioner, Raeann Campbell, Human Resource Officer for Respondent, advised Petitioner that when he was not able to return to work within six months after the date of his surgery, Respondent reevaluated the needs of the Road and Bridge Department and eliminated Petitioner's mechanic position.<sup>12</sup>

¶ 31 On September 7, 2006, Respondent began accepting applications for the open position of bridge equipment operator. The vacancy announcement listed the following qualifications for this position:

**Knowledge of:**

- The operation and capabilities of at least five pieces of maintenance and construction equipment;
- Methods, practices, and materials used in road and bridge construction and maintenance;
- The uses and purposes of hand tools;
- Use of wood, iron and concrete materials on bridge structures performing maintenance, repairs and construction projects;
- Concrete forming, pouring and finishing work;
- Safe driving practices and State and County laws pertaining to the operation of motor vehicles.

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<sup>9</sup> Trial Test.

<sup>10</sup> Trial Test.

<sup>11</sup> Trial Test.

<sup>12</sup> Ex. 4 at 1.

**Ability to:**

Operate safely and skillfully construction or maintenance equipment;  
Perform heavy and semi-skilled construction or maintenance work;  
Read survey grade stakes and blue prints;

**EXPERIENCE:**

One year of experience in road construction, in the previous five (5) years, involving the operation of automotive or heavy equipment;

Three years experience in bridge construction involving the use of appropriate hand tools and heavy equipment.<sup>13</sup>

¶ 32 On September 11, 2006, Petitioner submitted his application for the bridge equipment operator position, along with a letter to Campbell, requesting that Respondent offer him the hiring preference it had acknowledged he was entitled to in the July 26, 2006, letter from Campbell.<sup>14</sup>

¶ 33 Petitioner's application listed his relevant skills for the operator position, including personal computer skills, experience with tooling for automobile and heavy equipment repairs, and construction maintenance of loaders, motor graders, compactors, asphalt pavers, rollers, and cranes.<sup>15</sup> Each of these pieces of equipment is used by the Flathead County Road and Bridge Department.<sup>16</sup> Additionally, Petitioner listed his experience in welding, fabricating, and painting of heavy equipment, and work with cement and cement forms.<sup>17</sup>

¶ 34 Larry Yerian has worked as a bridge equipment operator for Flathead County.<sup>18</sup> Yerian was a credible witness and I find his testimony at trial to be credible.

¶ 35 Yerian testified that bridge equipment operators must operate a grade-all, excavator, roller, roller CAT, whacker, crane, dump truck, and water machine.

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<sup>13</sup> Ex. 12 at 2-3.

<sup>14</sup> Ex. 21 at 1-5.

<sup>15</sup> Ex. 21 at 2.

<sup>16</sup> Trial Test.

<sup>17</sup> Ex. 21 at 4.

<sup>18</sup> Trial Test.

¶ 36 The duties of a bridge equipment operator include cutting, filling, grading, mixing and compacting subgrade slopes and surfaces; maintaining, repairing, replacing, and construction of bridges, culverts, and cattle passes.<sup>19</sup> Also, the bridge equipment operators help assemble approximately two to four bridges per year.<sup>20</sup> They lay out the bridge based upon the design done by an engineer, build the forms, and pour the concrete.<sup>21</sup>

¶ 37 Guy Foy is the superintendent for Respondent's Road and Bridge Department.<sup>22</sup> Foy testified at trial and I find him to be a credible witness.

¶ 38 Foy testified that he talked to someone in Respondent's human resources department prior to receiving applications for the bridge equipment operator position posted in September 2006. Because of this conversation, when Foy reviewed applications for the open position, he was aware that Petitioner might be entitled to a hiring preference.<sup>23</sup> Therefore, once he received the applications for the bridge equipment operator position, Foy testified that he removed Petitioner's application and reviewed it first.<sup>24</sup> After careful review, Foy concluded that Petitioner's vocational experience did not meet the job requirements for the bridge equipment operator position.<sup>25</sup>

¶ 39 In an October 11, 2006, e-mail to Campbell, Foy stated that he did not believe Petitioner qualified for the position of bridge equipment operator. Specifically, Foy determined that Petitioner did not possess the necessary experience operating maintenance and construction equipment, was not experienced working with wood, iron, and concrete materials on bridge construction and maintenance, lacked experience pouring concrete into forms, and finishing concrete.<sup>26</sup> Additionally, Foy determined that Petitioner did not possess one year of road construction experience in the past five years, nor did he

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<sup>19</sup> Ex. 12 at 2.

<sup>20</sup> Foy Dep. 23:21-25.

<sup>21</sup> Johnson Dep. 19:10 - 21:20.

<sup>22</sup> Trial Test.

<sup>23</sup> Trial Test.

<sup>24</sup> Trial Test.

<sup>25</sup> Trial Test.

<sup>26</sup> Ex. 8 at 1.

have three years' experience in bridge construction involving the use of appropriate hand tools and heavy equipment.<sup>27</sup> Foy went on to state:

All of the experience in [Petitioner's] job application is directly related to being a heavy equipment mechanic, trouble shooting heavy equipment repairs and being a substitute for the service manager and shop foreman. We find no job experience that would adequately qualify [Petitioner] to be a bridge operator.<sup>28</sup>

### CONCLUSIONS OF LAW

¶ 40 The sole issue in the present case is Petitioner's entitlement to a hiring preference for the bridge equipment operator position pursuant to § 39-71-317(2), MCA. This statute provides as follows:

When an injured worker is capable of returning to work within 2 years from the date of injury and has received a medical release to return to work, the worker must be given a preference over other applicants for a comparable position that becomes vacant if the position is consistent with the workers' physical condition and vocational abilities.

¶ 41 The evidence before me establishes that Petitioner's vocational abilities are not consistent with the position of bridge equipment operator. Since 1981, Petitioner's professional career has been spent working as a heavy equipment mechanic. His vocational abilities are in the area of heavy equipment repair. Although the evidence certainly persuades me that Petitioner was a good heavy equipment mechanic, his ability to operate heavy equipment for the limited purpose of diagnosing and repairing mechanical problems does not necessarily translate into a vocational ability consistent with the specialized operation of this equipment in bridge construction. Moreover, this position also requires knowledge and experience working with concrete. Petitioner's experience working with concrete is limited to his work as a laborer in Spokane more than thirty years ago and, more recently, assisting a friend with pouring a concrete pad.

### JUDGMENT

¶ 42 Petitioner is not entitled to a hiring preference for the bridge equipment operator position pursuant to § 39-71-317, MCA.

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<sup>27</sup> Ex. 8 at 1-2.

<sup>28</sup> Ex. 8 at 2.



¶ 43 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 11th day of July, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: David M. Sandler  
Norman H. Grosfield  
Submitted: August 22, 2007