

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 3

WCC No. 2008-2149

LINDA CAREY

Petitioner

vs.

AMERICAN HOME ASSURANCE COMPANY

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner broke her left wrist while working as the front end manager at Sam's Club. Shortly after she returned to work, Petitioner's job position was eliminated at Sam's Club stores nationwide as part of a restructuring plan. Petitioner opted not to apply for other management positions at Sam's Club, but applied for hourly positions instead. The only position she was offered was as a part-time food demonstrator. Petitioner declined the position and accepted a severance package. She later filed this petition, arguing that she was terminated due to her industrial injury and that she is entitled to TTD and PPD benefits, as well as her costs, attorney fees, and a penalty.

Held: Petitioner lost her job at Sam's Club due to the elimination of her time-of-injury job position and due to the unavailability of any other position which Petitioner desired and for which she was qualified. Petitioner is not entitled to TTD or additional PPD benefits. Because Petitioner is not the prevailing party, she is not entitled to her costs, attorney fees, or a penalty.

Topics:

Employment: Termination of Employment: Elimination of Job Position.

Where the injured worker's full-time management-level job position was eliminated due to a nationwide restructuring of the company management, the Court found that the company's offer to keep the injured worker employed in a part-time, low-paying position was not a fair offer of employment. However, the Court further found that the injured worker chose not to apply for other, available management positions with her employer.

Employment: Termination of Employment: Elimination of Job Position.

Where the injured worker's job position was eliminated due to a nationwide restructuring of the company management, the Court found that the company was under no obligation to create a new position for an injured worker whose job position was eliminated due to reasons unrelated to the industrial injury.

Vocational and Return to Work Matters: Physical Restrictions.

Although the claimant argued that her employer should have given her a modified job because it "owed" her for the limitations her industrial injury imposed upon her, the claimant's treating physician did not place any permanent restrictions on the claimant and it was only the claimant's belief that she could not physically perform some of the job duties. Since the treating physician did not find the claimant to have any permanent physical restrictions, the Court could not conclude that she had permanent physical restrictions which precluded her from performing some job duties.

Constitutions, Statutes, Regulations, and Rules: Montana Code

Annotated: 39-71-609. Where the claimant never qualified for TTD benefits, there were no benefits for the insurer to terminate, and therefore the notice requirements of § 39-71-609(1), MCA, are not applicable.

Constitutions, Statutes, Regulations, and Rules: Montana Code

Annotated: 39-71-609. Where the claimant never qualified for TTD benefits, no conversion of TTD to PPD benefits occurred and therefore the insurer had no obligation to complete the pre-conversion steps found in § 39-71-609(2), MCA.

Benefits: Temporary Total Disability Benefits.

Where the claimant's industrial injury did not cause her wage loss, and where the Court concluded § 39-71-609, MCA, did not apply to her claim, the Court further concluded that the claimant was not entitled to TTD benefits.

Constitutions, Statutes, Regulations, and Rules: Montana Code

Annotated: 39-71-703. Although the Court found that the claimant's new job paid more than \$2 per hour less than her time-of-injury job, the Court concluded the claimant was not entitled to PPD benefits under § 39-71-703(5)(c), MCA, because she successfully returned to her unmodified time-of-injury position at the wage she was earning prior to her industrial accident and chose not to apply for similar positions which she was admittedly qualified for after her job position was eliminated for reasons unrelated to her industrial injury.

Wages: Qualified to Earn.

Although the Court found that the claimant's new job paid more than \$2 per hour less than her time-of-injury job, the Court concluded the claimant was not entitled to PPD benefits under § 39-71-703(5)(c), MCA, because she successfully returned to her

unmodified time-of-injury position at the wage she was earning prior to her industrial accident and chose not to apply for similar positions which she was admittedly qualified for after her job position was eliminated for reasons unrelated to her industrial injury.

¶ 1 The trial in this matter was held on March 26, 2009, in Great Falls, Montana. Petitioner Linda Carey (Carey) was present and represented by Richard J. Martin. Respondent American Home Assurance Company (American Home) was represented by Chad R. Vanisko.

¶ 2 Exhibits: Exhibits 1 through 17 were admitted without objection. The parties stipulated that Exhibits 7 and 17 remain under confidential seal.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Carey, John Cavill, Tana Kay Meyer, and Mark Johnson can be considered part of the record. Carey was sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues:¹

¶ 4a Whether Respondent terminated Petitioner due to her industrial injury or a reduction in force / restructuring.

¶ 4b Whether Petitioner is entitled to temporary total disability benefits.

¶ 4c Whether Petitioner is entitled to additional permanent partial disability benefits.

¶ 4d Whether Petitioner is entitled to attorney fees, costs, and penalty.

FINDINGS OF FACT

¶ 5 Carey was injured on December 7, 2006, when she slipped and fell on ice in the Sam's Club parking lot. American Home accepted the claim and paid medical benefits.² Carey broke her left wrist and required surgery. She was off work for eight weeks.³

¶ 6 Carey has resided in Great Falls for approximately 30 years. Carey is a high school graduate. All of the job positions Carey has held have been in retail sales. She began working as a part-time cashier at Sam's Club in 1999. She then transferred to a part-time cash office position and she was soon promoted to team lead in the cash office. A few

¹ Pretrial Order at 2.

² Pretrial Order at 2, Uncontested Facts.

³ Trial Test.

years later, she was offered and accepted the position of front end manager, which is the position she held at the time of her industrial injury. Carey held the front end manager position for approximately five years, until a Sam's Club restructuring eliminated the position.⁴

¶ 7 As front end manager, Carey's job duties included supervising the cashiers, checkout supervisors (COS), door greeters, and shopping cart personnel; scheduling front end workers; hiring, firing, evaluating, and coaching front end workers; and performing the COS's job duties during busy times in the store. Carey explained that if the front end of the store was busy, the COS would run a cash register and she would then perform the COS's duties, such as line rushing and overriding cash registers.⁵ Carey did not generally run a cash register, although she would occasionally redirect small orders to the registration desk or jewelry counter and ring up the purchases there.⁶

¶ 8 When Carey first returned to work after her industrial injury, her left wrist and arm were in a brace and she was limited in some of her duties. She could not lift heavy items or run a cash register. She reported to John Cavill (Cavill), who was the business manager and her supervisor. Cavill reported to Mark Johnson (Johnson), the club manager. Carey testified that Cavill supported her return to work and treated her well. Carey was allowed to perform whichever tasks she felt she could do, and she began assisting in the cash office when that department was short-handed.⁷ Carey's one regular duty she initially had difficulty with was line rushing. Carey's supervisors were understanding and did not push her into line rushing until she felt that her wrist could handle the task. When she began line rushing again, she deliberately sought out carts with light items so that she would not have to lift heavy items with her left wrist.⁸

¶ 9 Carey explained that "line rushing" helps speed up checkout lines when the store is busy. When the cash register lines are long, line rushers take a portable scanning gun and seek out customers with small orders who are waiting in checkout lines. Line rushers "pre-scan" the customer's merchandise and membership card and when the customer reaches the cashier, the pre-scanned order appears on the cash register. Carey testified that after her injury, she was selective when line rushing, choosing to pre-scan small orders with light items.⁹ On March 8, 2007, her treating physician, Alexander N. Chung, M.D., removed her

⁴ Trial Test.

⁵ Carey Dep. 10:1-18.

⁶ Carey Dep. 11:12-24.

⁷ Trial Test.

⁸ Carey Dep. 26:1-11.

⁹ Trial Test.

splint and indicated that Carey had no lifting restrictions; in fact, he noted that lifting would be beneficial for Carey's range of motion.¹⁰

¶ 10 A few weeks after Carey returned to work, Sam's Club announced that it was restructuring the staff in its stores nationwide. As part of the restructure, the company eliminated six manager positions and created three new assistant manager positions. Carey's front end manager position was one of the eliminated positions. Carey believed the only newly created assistant manager position which she had a chance of getting was the operations assistant manager position, which included front end management as part of the job duties. Carey did not want that position. She testified that the position had "something to do with the regulations" and that she had no knowledge or interest in that area.¹¹ Carey stated that she did not apply for the operations assistant manager position or the other newly created positions because she was uninterested in them and therefore did not believe she would do well in those positions.¹²

¶ 11 Carey admitted that she also informed Johnson that she did not want one of the newly created assistant manager positions because they required more hours per week than she was working as front end manager. However, Carey testified that she later learned that the hours would have been the same, but Johnson did not tell her that she misunderstood the hours requirements at the time.¹³

¶ 12 Although Carey did not want one of the newly created assistant manager positions, she wanted to obtain an hourly position with Sam's Club.¹⁴ Immediately after Johnson announced the restructuring, Carey informed him that she wanted to stay at Sam's Club in an hourly position. Carey testified that she applied for every hourly position that had anything to do with the front end, including the COS position. Tana Kay Meyer, Personnel Training Coordinator, assisted Carey with applying for these positions through the Sam's Club computer system. Carey was not granted an interview for any of the hourly positions for which she applied. She spoke to Johnson on several occasions and reiterated her desire to remain employed at Sam's Club. Carey stated that among the positions she applied for was a people-greeter position which was technically filled by someone who had been off work for months and was unlikely to return in the foreseeable future. Carey believed Sam's Club could have allowed her to fill that position. She also applied for a gas station attendant position which she believed was open. Carey also knew that a part-time COS position was going to be available because Carey knew a part-time COS was leaving.

¹⁰ Ex. 4 at 2.

¹¹ Trial Test.

¹² Trial Test.

¹³ Trial Test.

¹⁴ Trial Test.

Carey stated that although the position became available and she applied for it, she was not given the position.¹⁵

¶ 13 Carey explained that COS perform cash register overrides, take change orders to cashiers, oversee the cashiers, schedule cashiers, and run cash registers when the lines back up. Carey testified: “[T]he one part of the COS position that I knew I couldn’t do, was get on the front-end register. I just could not lift 50-pound bags of dog food and move cases of pop and beer from the bottom of one cart to the other. I knew I couldn’t do it.”¹⁶ At the time of her deposition, Carey believed she probably still could not perform cashier duties at Sam’s Club because she does not have the mobility or grip strength to move heavy merchandise.¹⁷ Carey believes she could have performed the remaining job duties, which include line rushing, ringing out small orders at the tobacco register, delivering change to cashiers, and filling in for the door greeter.¹⁸

¶ 14 Carey stated that her understanding of being released to return to work without restrictions means that she can do whatever she physically can, without reinjuring her wrist. However, she has permanent limitations in the use of her left wrist and hand.¹⁹ Carey testified that she has limitations in her left wrist which she did not have before her industrial accident.²⁰ She has lost range of motion and she has difficulty gripping and holding onto things.²¹ Her fingers are very stiff and her thumb does not bend properly.²²

¶ 15 Carey testified that to the best of her knowledge, no one ever complained about her job performance after her injury.²³ Carey knows she was not singled out to have her position eliminated, but she believes Sam’s Club should have given her an hourly position.²⁴ However, Carey believes the reason she was not given an hourly position must have been because of the injury since she was a good employee with good evaluations and

¹⁵ Trial Test.

¹⁶ Carey Dep. 33:15-24.

¹⁷ Carey Dep. 34:15-22.

¹⁸ Trial Test.

¹⁹ Carey Dep. 23:2-15.

²⁰ Carey Dep. 15:17-18.

²¹ Carey Dep. 17:2-13.

²² Carey Dep. 19:4-9.

²³ Trial Test.

²⁴ Carey Dep. 45:2-9.

good attendance, and she had received promotions.²⁵ Carey stated that in her last few weeks of work at Sam's Club, she went into Meyer's office every day and she would talk to Meyer and sometimes cry over the imminent loss of her job at Sam's Club.²⁶

¶ 16 Carey testified that from the time Johnson announced the restructuring until Carey left her employment at Sam's Club, the only position she was offered was as a part-time food demonstrator. She testified that Johnson called her into his office when she had only a short time remaining in her job and informed her that the food demonstrator position was the only position he could offer her. Carey testified that she was so upset by Johnson's offer that she asked to leave, and he allowed her to take the rest of the day off.²⁷ Carey testified that there were several reasons why she did not want the position: she does not like to cook; she did not believe she could lift and wash the heavy pans that the food demonstrators used; the position is very low on the store's pay scale; and she did not think she would be able to tolerate the hassles of the position.²⁸

¶ 17 Carey ultimately accepted a severance check when her employment ended at Sam's Club.²⁹ Carey's earnings were \$627.73 per week at the time of her severance agreement.³⁰

¶ 18 Carey testified that she was not yet at maximum medical improvement (MMI) on May 2, 2007 – her last day of work at Sam's Club.³¹ Her treating physician placed her at MMI on May 8, 2007, and reiterated that she was released to return to work without restrictions. He did not give her an impairment rating, but noted that it needed to be determined after an independent medical examination (IME).³² On June 5, 2007, Dr. K. Allan Ward performed an IME of Carey and assigned her a 10% whole person impairment rating. He indicated her work restrictions to be "as per Dr. Chung."³³ American Home paid the impairment award.³⁴

²⁵ Carey Dep. 46:22 - 47:4.

²⁶ Carey Dep. 59:24 - 60:4.

²⁷ Trial Test.

²⁸ Trial Test.

²⁹ Trial Test.

³⁰ Ex. 17 at 21.

³¹ Trial Test.

³² Ex. 4 at 2.

³³ Ex. 5 at 2-3.

³⁴ Ex. 11.

¶ 19 After Carey's employment at Sam's Club ended, she first concentrated her job-seeking efforts on getting rehired at Sam's Club. Carey testified that she was convinced that she would be rehired. Eventually, Carey began to seek other employment and she was hired as a teller at US Bank on January 28, 2008. At the time of trial, Carey continued to work at US Bank as a full-time teller at a rate of pay of \$11 per hour. Carey testified that her industrial injury does not hamper the performance of her current job duties.³⁵

¶ 20 Mark Johnson testified by deposition. Johnson was the general manager of the Great Fall's Sam's Club from July 2005 until November 2007, when he transferred to a Sam's Club in Utah.³⁶ He testified that during the restructure which affected Carey's position, four area manager positions, including the front end manager position, were eliminated.³⁷ Two new positions – operations manager and overnight manager – were created.³⁸ As explained by a memorandum which was distributed on March 19, 2007, Sam's Club employees who held the to-be-eliminated positions were informed that they could apply and be interviewed for open positions, and that their employment with Sam's Club would terminate May 2, 2007, if they were not hired into another position.³⁹ An employee in one of the eliminated positions could apply for another open position or accept a severance package.⁴⁰

¶ 21 Carey expressed an interest in remaining employed at Sam's Club after the restructure.⁴¹ Johnson knew Carey wanted to become a COS.⁴² Johnson knew that Carey's doctor had released her to return to work with no restrictions on March 8, 2007. However, Carey asserted that she could not lift heavy items as would be required of her to run a cash register, which is part of the COS's job duties.⁴³ Johnson asked the market manager and human resource manager if the COS position could be modified to accommodate Carey by providing assistance with lifting heavy items.⁴⁴ The market

³⁵ Trial Test.

³⁶ Johnson Dep. 4:3-8.

³⁷ Johnson Dep. 4:21-25.

³⁸ Johnson Dep. 5:14-15.

³⁹ Johnson Dep. 5:17 - 6:7.

⁴⁰ Johnson Dep. 6:22-25.

⁴¹ Johnson Dep. 8:5-8.

⁴² Johnson Dep. 8:15-17.

⁴³ Johnson Dep. 32:8-15.

⁴⁴ Johnson Dep. 8:17-24.

manager and human resource manager did not grant the accommodation.⁴⁵ Johnson then met with Carey and informed her that her requested accommodation for the COS position would not be granted. He told her that if she wanted to remain employed at Sam's Club, there was a part-time food demonstration position available for her.⁴⁶

¶ 22 Johnson testified that the front end manager position was eliminated at all Sam's Clubs nationwide and the elimination of the position in Great Falls had nothing to do with Carey's injury.⁴⁷ Johnson stated that Carey chose not to apply for any of the newly created assistant manager positions and that she told him that it was because she did not want to work more hours than she was working as the front end manager.⁴⁸ Johnson stated that Carey would have been qualified for those positions and would have been granted an interview along with the other qualified applicants.⁴⁹

¶ 23 Johnson testified that Carey had two options: to remain employed at Sam's Club in the part-time food demonstration position with the possibility of moving into another position if it became available in the future; or to accept a severance package.⁵⁰ Johnson stated that Carey never discussed the gas station attendant position with him, and there were no greeter, cash office, or membership desk positions available.⁵¹ As a general manager, Johnson did not have the flexibility to add a greeter position for Carey, and the restructure did not permit him to create a new position to assist one of the managers affected by the restructuring.⁵² Johnson stated that no openings occurred in the jobs Carey applied for between March 9 and May 2, 2007.⁵³

¶ 24 John Cavill is the operations manager at Sam's Club in Great Falls. He has held that position since March 2008.⁵⁴ Prior to the Sam's Club restructuring that is pertinent to the present case, Cavill was the Business Manager.⁵⁵ At that time, he was Carey's direct

⁴⁵ Johnson Dep. 9:2-14.

⁴⁶ Johnson Dep. 10:25 - 11:5.

⁴⁷ Johnson Dep. 30:20 - 31:5.

⁴⁸ Johnson Dep. 25:13-23.

⁴⁹ Johnson Dep. 26:4-8.

⁵⁰ Johnson Dep. 12:1-4.

⁵¹ Johnson Dep. 12:5 - 13:8.

⁵² Johnson Dep. 17:4-19.

⁵³ Johnson Dep. 24:6-10.

⁵⁴ Cavill Dep. 4:16 - 5:4.

⁵⁵ Cavill Dep. 6:19-25.

supervisor.⁵⁶ After the restructure, he became the Membership Assistant Manager and eventually became the Operations Assistant Manager.⁵⁷

¶ 25 Cavill testified that when Carey returned to work after her injury, he knew she had limited grip strength with her injured hand, she could not lift heavy items, and she sometimes complained of pain. He saw her perform line rushing after her injury and he does not believe that she had any restrictions in her ability to do so.⁵⁸ Cavill knew that Carey wanted to be back at work and that she was a loyal employee.⁵⁹

¶ 26 At the time of the restructure, Cavill knew Carey wanted to remain at Sam's Club as an hourly employee and that she particularly desired a COS position.⁶⁰ Cavill stated that there is little turnover in the gas station attendant, door greeter, and office supervisor positions.⁶¹ Cavill testified that he never heard anyone state that Carey's injury could impact her ability to do her job or that it would affect Carey's chances of being rehired after the restructuring.⁶² He does not believe Carey's injury had any impact on her termination from Sam's Club.⁶³ Cavill does not think there were any COS openings at the time of the restructuring.⁶⁴ Cavill does not know whether the door greeter or other positions were open or available to Carey, and it would have been Johnson's decision to make. Cavill explained that while he normally handled some hiring and firing of employees, during the restructure, only Johnson could determine what positions were open and which ones were available to Carey.⁶⁵

¶ 27 At the time of her deposition, Meyer had been the Personnel Training Coordinator at the Great Falls Sam's Club for over 15 years.⁶⁶ Meyer processes the paperwork for new hires, maintains the personnel files, and completes the paperwork related to payroll reports,

⁵⁶ Cavill Dep. 7:8-11.

⁵⁷ Cavill Dep. 7:12-24.

⁵⁸ Cavill Dep. 22:2 - 23:1.

⁵⁹ Cavill Dep. 24:20-25.

⁶⁰ Cavill Dep. 12:1-15.

⁶¹ Cavill Dep. 29:19 - 30:4.

⁶² Cavill Dep. 42:25 - 43:6.

⁶³ Cavill Dep. 44:1-4.

⁶⁴ Cavill Dep. 13:4-9.

⁶⁵ Cavill Dep. 13:23 - 14:25.

⁶⁶ Meyer Dep. 5:4.

leaves of absence, vacation, sick and personal time, and evaluations.⁶⁷ Meyer testified that she does not have any specific recollection of helping Carey navigate the computer system to apply for jobs after the restructure was announced, but she is sure that if Carey requested her assistance, she would have done so.⁶⁸

¶ 28 At her deposition, Meyer was questioned about Carey's assertion that Meyer had commented that she did not understand why the company would not give Carey another job because she was a good employee. Meyer denied making the statement, asserting that she probably would have told Carey that she did a good job, but that she would not have stated that the company would not give Carey a position, nor that she did not understand why.⁶⁹

¶ 29 When Carey testified at trial, I found her to be a fairly credible witness. However, I find it odd that Carey's recollection of her relationship with Meyer differs so greatly from Meyer's testimony. Carey also gave conflicting explanations as to why she did not apply for another management position with Sam's Club; however, I do not believe these discrepancies affect the outcome of this case, as the pertinent facts are largely undisputed.

¶ 30 I find that it is undisputed that Carey's position was eliminated due to a nationwide restructuring of Sam's Club. Carey's industrial accident and resultant injury were likewise undisputed and not a matter of any underlying controversy. Both parties agree that Carey eagerly returned to work after her injury, and that she continued to perform her job as front end manager satisfactorily. The parties agree that when the restructuring was announced, Carey chose not to apply for another management position, but to pursue an hourly position with Sam's Club. Carey applied for several hourly positions, and she let it be known that she particularly wanted a COS position. Some of the hourly positions for which Carey applied had no openings. A COS position was available, but the job duties of this position included running a cash register, which Carey maintained she could not do. Although Carey was released to return to work without restrictions by her treating physician, Johnson believed Carey's self-reported limitations and inquired whether the COS position could be modified to allow Carey to perform the job with an assistant. Johnson was informed that such a modification could not be made, and he thereafter offered Carey a part-time position as a food demonstrator. Carey did not want that position, and she subsequently accepted a severance package.

⁶⁷ Meyer Dep. 5:9-16.

⁶⁸ Meyer Dep. 8:2-6.

⁶⁹ Meyer Dep. 26:7-21.

CONCLUSIONS OF LAW

¶ 31 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Carey's industrial accident.⁷⁰

¶ 32 Carey bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁷¹

Issue One: Whether Respondent terminated Petitioner due to her industrial injury or a reduction in force / restructuring.

¶ 33 Although the issue is presented as set forth above, I note that Resppondent American Home did not terminate Carey – American Home's insured did. However, I believe that while the parties erroneously referred to American Home in stating this issue for the Court, they nonetheless presented evidence and argued that Sam's Club, and not American Home, terminated Carey's employment. Therefore, the issue before the Court is: whether Sam's Club terminated Carey due to her industrial injury or a reduction in force / restructuring.

¶ 34 The evidence presented by the parties unequivocally demonstrates that Carey's job position was eliminated due to a nationwide restructuring of the management of Sam's Club stores. Carey lost her position as front end manager due to that restructuring, and the elimination of that position caused her termination from Sam's Club. However, I believe it is appropriate to look beyond Carey's specific job position and consider whether Carey did not receive another job position within Sam's Club due to her industrial injury.

¶ 35 American Home argues that Carey was offered a part-time food demonstration position which she declined. Carey admits that she was offered this position and declined it. I am not convinced that a part-time, low-paying position is a fair offer of employment considering that Carey had been working in a full-time management position. However, Carey admitted that she chose not to pursue another management position at Sam's Club and opted instead to seek an hourly position. Some of the jobs for which Carey applied were not open positions. While Carey suggests that Sam's Club could have and should have "created" a position for her, she does not cite any statutory or case law in support of the proposition that an employer is obligated to create a position for an injured worker whose job position is eliminated due to reasons unrelated to her industrial injury. Furthermore, Carey never asserted her preference entitlement under § 39-71-317, MCA.

⁷⁰ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁷¹ *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).

¶ 36 While Carey alleged that other hourly job positions may have been open in Sam's Club, she has provided this Court with evidence of two: the part-time food demonstration position, which she declined, and the COS position. The evidence demonstrates that Carey pursued the COS position; however, she informed Johnson that she would be unable to run a cash register, which was one of the COS's job duties. Johnson testified that although Carey's treating physician had released her to return to work without restrictions, he took Carey's word that she was physically unable to perform the cash register duties required of a COS, and he inquired of Sam's Club management as to whether the position could be modified to eliminate those duties or provide Carey with an assistant. The modification was denied and Carey was not offered the COS position.

¶ 37 Carey essentially argues that Sam's Club should have hired her into a modified COS position because they "owed" her for the limitations her industrial injury imposed upon her. Carey's treating physician did not place any permanent restrictions on Carey; it is only Carey's belief that she cannot physically perform certain COS duties. The opinion of Carey's treating physician, Dr. Chung, further endorsed by Dr. Ward, is that Carey has no permanent restrictions or limitations. Based on the evidence before the Court, I cannot conclude that Carey's industrial injury precluded her from performing some of the COS's duties.

¶ 38 I conclude that Sam's Club terminated Carey's employment due to a reduction in force / restructuring and not due to her industrial injury.

Issue Two: Whether Petitioner is entitled to temporary total disability benefits.

¶ 39 The pertinent statutory authority relating to Carey's claim of entitlement to temporary total disability (TTD) benefits is as follows: Under § 39-71-701(1), MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing, or until the worker has been released to return to the worker's time-of-injury employment. Section 39-71-701(4), MCA, provides that a worker is no longer eligible for TTD benefits if the worker's treating physician releases the worker to the same, a modified, or an alternative position that the worker is able and qualified to perform with the same employer at an equivalent or higher wage. However, a worker requalifies for TTD benefits if the modified or alternative position is no longer available for any reason other than the worker's incarceration, resignation, or termination for disciplinary reasons so long as the worker continues to be temporarily totally disabled as defined in § 39-71-116, MCA. Under § 39-71-116(35), MCA, temporary total disability means a physical condition resulting from an injury that results in a total loss of wages and exists until the injured worker reaches MMI.

¶ 40 Carey testified that her last day of employment was May 2, 2007. Her treating physician found her to be at MMI on May 8, 2007. Carey argues that under § 39-71-701(4), MCA, she is eligible for TTD benefits from the date of her termination until American Home complies with § 39-71-609, MCA.

¶ 41 Under § 39-71-609(1), MCA, an insurer may terminate biweekly compensation benefits only after 14 days' written notice to the claimant. In the present case, biweekly benefits were never awarded because Carey never established her entitlement to TTD benefits. Carey's employment was not terminated because of her injury, but rather because of her employer's reduction in force / restructuring. At the time of Carey's termination, her treating physician had released her to return to work without restriction, she was performing her time-of-injury job without modification, and she was qualified to perform other management positions for which she elected not to apply. Carey sustained no loss of wages due to her industrial injury. Since Carey had never qualified for TTD benefits, there were no benefits for the insurer to terminate. Thus, this section is not applicable to the present case.

¶ 42 Carey focuses on § 39-71-609(2), MCA. Under § 39-71-609(2), MCA, TTD benefits may be terminated on the date that a worker has been released to return to work in some capacity. Unless a worker is found at MMI to be without a permanent physical impairment from the injury, the insurer must complete certain steps prior to converting TTD benefits to permanent partial disability (PPD) benefits. Carey argues that she is entitled to ongoing TTD benefits because American Home has not completed the steps required under § 39-71-609(2), MCA. Carey's reliance on this statute is misplaced. Section 39-71-609(2), MCA, is inapplicable for the same reason that Carey has no entitlement under § 39-71-609(1), MCA. Carey never qualified for TTD benefits; therefore no conversion of TTD to PPD benefits occurred and American Home had no obligation to complete the pre-conversion steps found in § 39-71-609(2), MCA.

¶ 43 American Home argues that Carey is not entitled to any TTD benefits because she suffered no wage loss **as a result of her injury** as required by § 39-71-701(1), MCA. American Home further alleges that Carey was not working in a modified or alternative position at the time she was terminated from her employment, and therefore § 39-71-701(4), MCA, does not apply. Alternatively, American Home argues that after Carey was found to be at MMI on May 8, 2007, she no longer continued to be temporarily totally disabled as defined in § 39-71-116(35), MCA, and therefore she was no longer eligible for TTD benefits under § 39-71-701(4), MCA. American Home further asserts that § 39-71-116(35), MCA, requires that the physical condition resulting from an injury must be the **cause** of the wage loss for a claimant to be entitled to TTD benefits.

¶ 44 As discussed above at Issue One, I have determined that Carey's employment was not terminated because of her injury, but rather because of her employer's reduction in force / restructuring. At the time of Carey's termination, her treating physician had released her to return to work without restriction, she was performing her time-of-injury job without modification, and she was qualified to perform other management positions for which she elected not to apply. Therefore, Carey sustained no loss of wages due to her industrial injury. Since Carey's injury was not the cause of her wage loss, and § 39-71-609, MCA, is inapplicable to Carey's claim, Carey is not entitled to TTD benefits.

Issue Three: Whether Petitioner is entitled to additional permanent partial disability benefits.

¶ 45 Carey argues that she is entitled to additional PPD benefits because her current job at US Bank pays less than her time-of-injury job. Under § 39-71-703(5)(c), MCA, an injured worker is entitled to a PPD award if the worker has an actual wage loss as a result of her industrial injury. The statute explains, “Wage loss benefits must be based on the difference between the actual wages received at the time of injury and the wages that the worker earns or is qualified to earn after the worker reaches maximum healing.”

¶ 46 Carey’s current wages at US Bank are more than \$2 per hour less than she earned as the front end manager at Sam’s Club. However, under § 39-71-703(5)(c), MCA, a claimant is entitled to these benefits **only if** an actual wage loss occurs as a result of the industrial injury, and an actual wage loss only occurs if the wages the worker earns **or is qualified to earn** after the worker reaches maximum healing is less than the worker’s time-of-injury wage. The provision for post-injury wages based on what a claimant is “qualified to earn” takes into account the possibility that the claimant may not return to work immediately after reaching maximum healing or may be underemployed. What a claimant is “qualified to earn” is determined by actual job opportunities. “Qualified to earn” means that a claimant must be employable in fact, not only in theory.⁷²

¶ 47 After her industrial injury, Carey returned to her unmodified time-of-injury position and successfully performed her job duties at the wage she was earning prior to her industrial accident. Were it not for a subsequent restructuring of her employer which eliminated her position, she could still be earning the same wages as she earned prior to her industrial accident. Significantly, Carey chose not to apply for other management positions at Sam’s Club which both Carey and Johnson testified that she was qualified to perform. Therefore, Carey has not demonstrated that she is entitled to additional PPD benefits as the facts indicate she is qualified to earn the same wages as she earned prior to her industrial injury.

Issue Four: Whether Petitioner is entitled to attorney fees, costs, and penalty.

¶ 48 Pursuant to § 39-71-611, MCA, an insurer shall pay reasonable costs and attorney fees if the insurer denies liability for a claim for compensation or terminates compensation benefits; the claim is later adjudged compensable by this Court; and in the case of attorney fees, the Court determines that the insurer’s actions in denying liability or terminating benefits were unreasonable. In the present case, since this Court has not adjudged Carey’s claim to be compensable, she is not entitled to her costs or attorney fees.

⁷² *McCuin v. Montana State Fund*, 2006 MTWCC 41, ¶ 13.

¶ 49 Carey argues that she is entitled to a penalty under § 39-71-2907, MCA. In arguing that she is entitled to a penalty, Carey asserts that she was selected for the reduction in force because of her injury, and that it may reasonably be inferred that she was selected for termination because she had a workers' compensation claim.⁷³ Carey has not presented **any** evidence in support of these assertions. The evidence demonstrated, and Carey admitted, that her specific job position was being eliminated at all Sam's Club stores. While Carey argues that Sam's Club should have given her one of the other positions for which she applied, Sam's Club employees testified that there were no job openings in those other positions. While Carey alleged otherwise, she offered no evidence to refute the employees' testimony. In any event, there has been no delay or refusal to pay benefits for which Carey is entitled, and therefore there are no grounds upon which to award a penalty.

JUDGMENT

¶ 50 Sam's Club terminated Petitioner due to a reduction in force / restructuring.

¶ 51 Petitioner is not entitled to temporary total disability benefits.

¶ 52 Petitioner is not entitled to additional permanent partial disability benefits.

¶ 53 Petitioner is not entitled to her costs, attorney fees, and a penalty.

¶ 54 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 1st day of February, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Richard J. Martin
Chad R. Vanisko
Submitted: March 26, 2009

⁷³ Petitioner's Basis for Requesting Fees and Penalties, Docket Item No. 11.