

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 5

WCC No. 2010-2598

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GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Respondent ceased paying Petitioner TTD benefits when it came to believe she had returned to work, and additionally because her treating physician had placed her at MMI and approved job analyses. Respondent refused to pay Petitioner her impairment award because it alleged it had overpaid TTD benefits. Petitioner alleges that she is entitled to ongoing TTD benefits and her impairment award and that Respondent has unreasonably withheld these payments, thus entitling her to attorney fees and a penalty award.

**Held:** Petitioner does not receive wages in any form for the occasional labor she performs for her ex-husband's lawn care business. Therefore, she has not returned to work. The job analyses approved by Petitioner's treating physician are not for jobs in Petitioner's labor market and therefore Respondent did not comply with the *Coles* criteria prior to terminating Petitioner's TTD benefits. Respondent has not overpaid Petitioner's TTD benefits. Petitioner is entitled to reinstatement of her TTD benefits and payment of her impairment award. Respondent unreasonably withheld these payments. The Court will hear oral argument on the issue of whether Respondent can be ordered to pay Petitioner's attorney fees and a penalty.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules:** **Montana Code Annotated: 39-71-701.** An injured worker's eligibility for TTD benefits is determined not by whether the worker performs labor, but by whether the worker has suffered a "total loss of wages" as set forth in the statute.

**Wages: Wage Loss.** An injured worker's eligibility for TTD benefits is determined not by whether the worker performs labor, but by whether the worker has suffered a "total loss of wages" as set forth in § 39-71-701(1), MCA.

**Wages: Wages Defined.** Where the claimant contended she received no remuneration for the work she performed for a business owned by her ex-husband and where the UEF presented no evidence that the claimant received any sort of "wage" within the meaning of § 39-71-123, MCA, the Court concluded that no evidence supported a determination that the claimant received anything of value which would constitute "wages" in exchange for the work she performed for the business.

**Benefits: Temporary Total Disability Benefits.** Where the Court concluded that a claimant had not returned to work, the Court further concluded that the claimant was entitled to reinstatement of her TTD benefits retroactive to the date of their termination because the UEF had not fulfilled the *Coles* criteria. However, since the claimant admitted that on three occasions she received wages, the Court further concluded that she was not entitled to TTD benefits for the weeks in which she received those wages.

**Uninsured Employers' Fund: Reasonableness of Claims Handling.** The Court concluded that the UEF was unreasonable in handling a claim where it withheld the payment of an impairment award which was due in 2002 and later alleged that it was justified in withholding this payment after it suspected it had overpaid the claimant's TTD benefits over seven years later.

**Uninsured Employers' Fund: Reasonableness of Claims Handling.** The Court concluded that although the UEF reasonably terminated a claimant's TTD benefits after it had evidence that the claimant had returned to work, the UEF acted unreasonably when it failed to respond to or investigate the claimant's counsel's subsequent correspondence in which she alleged that the claimant had not returned to work and that the UEF had terminated the claimant's benefits in error.

¶ 1 The trial in this matter occurred on April 25-26, 2011, in Great Falls, Montana. Petitioner Ginger Dostal was present and was represented by J. Kim Schulke.

Leanora O. Coles represented Respondent Uninsured Employers' Fund (UEF). Bernadette Rice, claims examiner for the UEF, was also present.

¶ 2 Exhibits: I admitted Exhibits 1 through 33, 35, 36, 38, 39, 50, 53 through 56, and 60 through 62 without objection. I overruled Petitioner's relevancy objections to Exhibits 34, 37, 41 through 49, 51, 52, and 57, and admitted those exhibits. I sustained Petitioner's hearsay objections and excluded Exhibits 40 and 58. The parties did not offer Exhibit 59.

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Ginger Dostal, Stanley Dostal, Sherry Berg, Alan K. Dacre, M.D., and Bernadette Rice can be considered part of the record. I admitted the deposition of Ryan Zimmer over Petitioner's hearsay objection. I excluded Exhibits 1 through 3 to Zimmer's deposition. I excluded Dr. Lawrence Splitter's testimony. On April 25, 2011, Dostal and Stanley Dostal (Stanley) were sworn and testified at trial. Delane Hall testified via videoconferencing. On April 26, 2011, Stanley, Levi Dostal (Levi), Neil Schott, Dr. Amber Milburn, Nancy Danielson, Susan Davis, and Bernadette Rice were sworn and testified.

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

Issue One: Whether Petitioner is entitled to TTD benefits from January 1, 2010, and ongoing.

Issue Two: Whether Petitioner returned to work when she was receiving TTD benefits.

Issue Three: If Petitioner returned to work, what is the date of her return to work.

Issue Four: Whether Petitioner earned any compensation for work during the period when she was receiving TTD benefits.

Issue Five: Whether Petitioner owes the UEF for an overpayment.

Issue Six: The Court has ruled that Petitioner was at MMI at the time the impairments of 3% for right fibular fracture and 1% for cervical spine were given and that Petitioner is entitled to payment of the impairments of 3% for right fibular fracture and 1% for cervical spine. The remaining issues

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<sup>1</sup> Pretrial Order at 9.

are whether there was an overpayment and if so, whether the impairments should be paid regardless of overpayment.

Issue Seven: Whether the UEF has acted reasonably in its handling of Petitioner's claim.

Issue Eight: Whether Petitioner is entitled to a penalty and attorney fees.

### FINDINGS OF FACT

¶ 5 On May 24, 1993, Dostal suffered an industrial injury to her left and right ankles and her back when she fell off a roof while performing her job duties as a roofer for Randy Crowley Construction in Harlowtown, Montana.<sup>2</sup>

¶ 6 Dostal's employer was uninsured at the time of her industrial injury and therefore the UEF administers her claim. The UEF accepted liability and has paid medical benefits relating to Dostal's right foot and ankle, left ankle, and lumbosacral spine.<sup>3</sup>

¶ 7 On December 21, 1994, Ronald D. Isackson, M.D., placed Dostal at maximum medical improvement (MMI) for her left ankle with a 3% whole person impairment rating. On March 24, 1997, Dostal was found at MMI for her lumbar spine and was assessed a 5% whole person impairment rating for that condition. On November 13, 2002, Dostal additionally received a 3% impairment rating for her right fibula fracture and a 1% impairment rating for her cervical spine, bringing Dostal to a whole person impairment rating of 12%. The UEF has not paid the November 13, 2002, impairment ratings.<sup>4</sup>

¶ 8 Dostal was later found not to be at MMI for her lumbar sacral spine. She underwent an anterior lumbar interbody fusion at L5-S1 on December 7, 2004, and surgery to correct a non-union at L5-S1 on July 18, 2006. On April 9, 2009, Dostal underwent an additional surgery for hardware removal and for exploration of her lumbar fusion. On February 1, 2010, Dostal was placed at MMI for the hardware removal and assessed permanent restrictions of lifting 20 pounds occasionally and limited bending and twisting.<sup>5</sup>

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<sup>2</sup> Pretrial Order, Uncontested Facts, Docket Item No. 70, at 1.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 2-3.

<sup>5</sup> *Id.* at 3-4.

¶ 9 The UEF has not paid Dostal any TTD benefits since December 2009, and it has refused to pay her 3% impairment rating for her right fibula fracture and her 1% impairment rating for her cervical spine.<sup>6</sup>

¶ 10 Dostal testified at trial. I found her to be a credible witness. Dostal resides in Stanford, Montana, with her former husband Stanley Dostal. Dostal and Stanley divorced in 1993 or 1994. In 2000, Dostal moved into Stanley's home to provide housekeeping and childcare for their two children. Dostal testified that she does not consider herself married. Dostal acknowledged that she sometimes refers to Stanley as her husband because it is easier than explaining that they share a residence but are no longer married.<sup>7</sup>

¶ 11 Dostal testified that she does not pay rent. Her only source of income is social security benefits. She uses those funds to pay for groceries and the water bill and sometimes also pays for garbage collection or insurance.<sup>8</sup>

¶ 12 Dostal testified that Stanley owns a business called Dostal's Lawn Care which he acquired in 2005 to create part-time jobs for their two children. Dostal testified that Stanley and the children performed most of the work for Dostal's Lawn Care. In the winter, the company had no other employees, but each summer, Stanley hired some of their children's friends. Dostal testified that since the children left home, Stanley has performed the majority of the work for the business.<sup>9</sup>

¶ 13 Dostal admitted that she has performed some activities relating to Dostal's Lawn Care, including operating the riding lawn mower and the weed eater, and she has redone areas when she felt the children did not do an adequate job. Dostal has also done some spraying. In the winter, Dostal's Lawn Care offers snow removal. Dostal testified that she has swept off sidewalks or put out salt, but she has never run any of the snow-removal equipment.<sup>10</sup>

¶ 14 Dostal testified that she prepares invoices for Dostal's Lawn Care every month. Dostal testified that she enjoys doing the invoices because it gives her something to do in the evenings. Dostal testified that since approximately April 2009, Dostal's Lawn Care invoices listed her personal cellular telephone number. Dostal testified that, since

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<sup>6</sup> *Id.* at 5.

<sup>7</sup> Trial Test.

<sup>8</sup> Trial Test.

<sup>9</sup> Trial Test.

<sup>10</sup> Trial Test.

she prepared the invoices, she believed it made more sense to list her contact number for customers to call if they had billing questions.<sup>11</sup>

¶ 15 Dostal testified that she has never gotten paid for the work she has performed for Dostal's Lawn Care and she has never received any form of compensation for this work. Dostal further testified that she has occasionally performed lawn care and snow removal services on her own initiative and without charging clients; for example, she swept snow from the sidewalks at the residence of one of the business clients of Dostal's Lawn Care because Dostal wanted to do something helpful while the client's wife was recovering from surgery.<sup>12</sup>

¶ 16 Dostal testified that Stanley also owns a business called Dostal's Auto Repair and Detailing, and that she occasionally runs errands for that business.<sup>13</sup>

¶ 17 Dostal further testified that on two occasions, she cleaned an apartment for Gary Angel. The first time was in approximately 2007, and the second time was in the summer of 2010. Dostal testified that in 2007, she and another woman cleaned the apartment together and split a fee of \$200 for the work. Dostal testified that she was hired to clean the apartment when Angel approached her and offered to pay her for the work. On the second occasion, she accepted a pick-up truck with a bad motor in trade as well as \$400 in cash.<sup>14</sup> Dostal noted that she was no longer receiving TTD benefits at the time that she cleaned Angel's apartment in 2010.<sup>15</sup>

¶ 18 Dostal testified that in the summer of 2010, after she was no longer receiving TTD benefits, she also received \$500 for steam cleaning a drilling rig.<sup>16</sup>

¶ 19 Stanley Dostal testified at trial. I found him to be a credible witness. Stanley works full time for Basin Shed, LLC, and Basin Grain, LLC. Stanley testified that he purchased Dostal's Lawn Care in June 2005 because he wanted a good job for his son to maintain as he was growing up. Stanley uses a separate checking account for the

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<sup>11</sup> Trial Test.

<sup>12</sup> Trial Test.

<sup>13</sup> Trial Test.

<sup>14</sup> Dostal testified that another woman helped her clean Angel's apartment, but from her testimony it is unclear how much the other woman received for the work and whether it was in addition to or part of the \$400 and pick-up truck which Angel paid to Dostal.

<sup>15</sup> Trial Test.

<sup>16</sup> Trial Test.

business and his name is the only name on the account. A certified public accountant prepares the business' tax returns.<sup>17</sup>

¶ 20 Stanley testified that when he first began to operate the business, his customers wanted to pay him in cash when he finished each job. Stanley preferred to have them pay by check to make accounting easier. Every payment he has received for the business has been deposited in the business' bank account. Stanley testified that he occasionally takes draws from the business' account and has generally drawn between \$1,500 and \$3,000 from the business annually.<sup>18</sup>

¶ 21 Stanley testified that he has not considered himself to be married to Dostal since September 1993. Stanley testified that in 2000, he allowed Dostal to move back into his residence because she was having financial difficulties and because her situation had not allowed her to spend enough time with the children. Stanley stated that Dostal does not pay rent, but pays the water, sewer, and garbage bills, as well as car insurance when she is able to. Stanley testified that he has typically paid Dostal's car insurance since 2003 and also usually pays for Dostal's cell phone, which is part of a group plan that includes his phone and a phone for each of the children. Stanley testified that he does not pay for any of Dostal's expenses in exchange for work that she does for Dostal's Lawn Care, and in fact he was paying all of these expenses prior to the inception of Dostal's Lawn Care.<sup>19</sup>

¶ 22 Stanley testified that he has never paid Dostal for any work she performed for Dostal's Lawn Care, nor has he provided her with any other type of compensation. Stanley testified that when his son lived at home, his son did the majority of the work for Dostal's Lawn Care. Stanley also hired his son's friend Neil Schott. Stanley's daughter occasionally worked for the business. He further testified that he has paid Schott and other people who have done occasional work for the business in cash and he never kept track of the dates or amounts he paid. Stanley stated that the work others performed was never full-time or year-round.<sup>20</sup>

¶ 23 Stanley testified that Dostal prepares and mails or delivers the business' invoices. Dostal also makes the bank deposits and she supervised the children when they worked for the business. Stanley testified that he discourages Dostal from doing physical labor for the business. Stanley testified that Dostal has mowed with the business' riding lawnmower on a few occasions and she did some weed-eating while

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<sup>17</sup> Trial Test.

<sup>18</sup> Trial Test.

<sup>19</sup> Trial Test.

<sup>20</sup> Trial Test.

supervising their son and Schott. Dostal has also swept sidewalks after Stanley cleared the bulk of snow off of them and she has sprinkled salt. On one occasion, she did spraying with a spray tank to empty the tank out. Dostal also uses her cell phone number as the business contact number. Stanley testified that Dostal does not shovel snow, nor has she used the four-wheeler for snow removal.<sup>21</sup>

¶ 24 Stanley testified that he has performed the majority of work for Dostal's Lawn Care since his son and Schott have left home. Stanley testified that he does not intend to continue to operate Dostal's Lawn Care now that his children are grown and he is actively seeking to sell the business.<sup>22</sup>

¶ 25 Stanley testified that he also owns a business called Dostal's Auto Repair and Detailing which he operates as a sole proprietorship. Stanley stated that Dostal performs "very little" work for Dostal's Auto Repair and Detailing, although she might pick up parts for him if she is heading into town, or if he needs to push a non-running vehicle into the garage, she steers it.<sup>23</sup>

¶ 26 Levi Dostal testified at trial. I found him to be a credible witness. Levi is the son of Dostal and Stanley. He resides in Havre. Levi testified that Dostal was with him all the time when he worked for Dostal's Lawn Care. He stated that she did not help very often – she demonstrated how to use the weed-eater and on other occasions she inspected his work and made him redo anything she did not find satisfactory.<sup>24</sup>

¶ 27 Neil Schott testified at trial. I found him to be a credible witness. Schott worked for Dostal's Lawn Care from 2006 to 2008. Schott testified that Dostal directed his and Levi's work, telling them which lawn they were to work on and giving them other details about the job. Schott testified that sometimes he drove the four-wheeler while Dostal walked alongside spraying weeds. Schott further testified that Dostal typically used the weed-eater and did fertilizing.<sup>25</sup>

¶ 28 Dr. Amber Milburn testified at trial. I found her to be a credible witness. Dr. Milburn works as a chiropractor at Lone Tree Chiropractic and Wellness Center (Lone Tree) in Stanford. Dr. Milburn testified that Dostal's Lawn Care performs the summer yard work and winter snow removal for Lone Tree. Once in 2009 and once in

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<sup>21</sup> Trial Test.

<sup>22</sup> Trial Test.

<sup>23</sup> Trial Test.

<sup>24</sup> Trial Test.

<sup>25</sup> Trial Test.



2010, Dr. Milburn saw Dostal perform lawn work at Lone Tree. Dr. Milburn has never seen Dostal do snow removal.<sup>26</sup>

¶ 29 Nancy Danielson testified at trial. I found her to be a credible witness. Danielson testified that Dostal's Lawn Care has power raked at the Judith Basin Manor, where she works. Danielson testified that she does not know who specifically did the power raking. Danielson testified that she has seen Dostal mowing lawns and weed eating on a few occasions and she has seen her operate a four-wheeler.<sup>27</sup> Danielson did not testify as to whether she saw Dostal doing these tasks for Dostal's Lawn Care or whether Dostal was mowing her own lawn and driving the four-wheeler recreationally.

¶ 30 Susan Davis testified at trial. I found her to be a credible witness. Davis testified that she does not know if she has ever personally seen Dostal performing lawn care work although she has seen her with her children while the children performed lawn care work.<sup>28</sup>

¶ 31 Sherry Berg works at Central Montana Medical Center, Basin Physical Therapy, in Stanford as a physical therapist assistant.<sup>29</sup> Berg sees Dostal as a patient.<sup>30</sup> Berg testified that on October 28, 2010, Berg was present with physical therapist Karen Johnson to take a history of Dostal. Berg testified that Dostal reported that she was doing lawn care, but asked Johnson and Berg not to write that in her chart.<sup>31</sup> Berg further testified that she has personally witnessed Dostal "participate in lawn care." In particular, she has seen her drive the vehicle that Dostal's Lawn Care uses, and she once saw Dostal mowing a lawn.<sup>32</sup> Berg further testified that on a few other occasions, she has seen Dostal riding a lawn mower or operating a weed-eater.<sup>33</sup> Berg further testified that Dostal stated that she helps out with the lawn care business, but that she does not get paid for it.<sup>34</sup>

¶ 32 Bernadette Rice testified at trial. I found her to be a credible witness. Rice has worked as a workers' compensation claims examiner for the UEF since 1993. Rice's job duties include adjudicating workers' compensation claims, authorizing indemnity

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<sup>26</sup> Trial Test.

<sup>27</sup> Trial Test.

<sup>28</sup> Trial Test.

<sup>29</sup> Berg Dep. 5:10-19.

<sup>30</sup> Berg Dep. 6:19-20.

<sup>31</sup> Berg Dep. 8:6-17.

<sup>32</sup> Berg Dep. 9:10-18.

<sup>33</sup> Berg Dep. 10:2-8.

<sup>34</sup> Berg Dep. 31:22 – 32:4.

payments, and testifying in court. Rice determines whether the UEF accepts or denies a claim.<sup>35</sup>

¶ 33 Rice testified that she learned that Dostal might be performing lawn care work from references in Dostal's medical records. Rice then hired a private investigator to investigate whether Dostal was working for a lawn care business. The private investigator found information which led Rice to believe that Dostal had returned to work.<sup>36</sup>

¶ 34 On February 4, 2010, Rice wrote to Dostal and stated that she was attaching four approved job analyses for the positions of Vehicle Washer, Telephone Answering Service Operator, Courtesy Van Driver, and Bartender which Rice stated had been approved by Dostal's treating physician without restriction. Rice contended that Dostal had reached MMI on June 17, 2009, and that she was no longer entitled to TTD benefits. Rice further noted:

Finally, pursuant to Section 39-71-609, MCA, you were not entitled to compensation benefits as of the date you returned to work and, therefore, your benefits have been terminated. Please send a written notice of when your first day of work was so that your overpayment can be computed.<sup>37</sup>

¶ 35 Rice testified that when she sent the February 4, 2010, letter, she believed Dostal had returned to work because Dostal's medical records reflected that she had told her providers she had returned to work, and the UEF had obtained surveillance videos and reports of Dostal performing work activities.<sup>38</sup> Rice testified that the UEF has no evidence that Dostal ever received any wages or compensation while she received TTD benefits.<sup>39</sup>

¶ 36 Rice admitted that at the time she terminated Dostal's TTD benefits for Dostal's alleged return to work, Rice had no evidence as to the date Dostal had allegedly returned to work or what hours Dostal was allegedly working. Rice acknowledged that she did not seek any information about Dostal's alleged return to work either from Dostal or from Dostal's alleged employer.<sup>40</sup>

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<sup>35</sup> Trial Test.

<sup>36</sup> Trial Test.

<sup>37</sup> Ex. 27.

<sup>38</sup> Rice Dep. 84:16 – 85:5.

<sup>39</sup> Rice Dep. 67:7-9.

<sup>40</sup> Trial Test.

¶ 37 Rice testified that, prior to litigation, she never asked for any records from Dostal's Lawn Care and she never asked Dostal for any records regarding any wages she may have earned from Dostal's Lawn Care. Rice admitted that when Dostal's counsel contacted her and asserted that Dostal had not returned to work, Rice did not respond to the letter.<sup>41</sup>

¶ 38 Rice acknowledged that she received a letter from Dostal's counsel dated June 11, 2010, in which counsel advised her that Dostal had not returned to work.<sup>42</sup> In the letter, Dostal's counsel also disputed the validity of the job analyses which Dr. Dacre had approved, denied that UEF had overpaid any TTD benefits, and requested that the UEF reinstate Dostal's TTD benefits retroactive to their termination.<sup>43</sup> However, Rice did not respond to the letter.<sup>44</sup>

¶ 39 Rice further admitted that at the time she received another letter from Dostal's counsel on September 7, 2010, she knew that Dostal was at MMI for all of her conditions per Dr. Dacre's determination in February 2010. However, she did not authorize the UEF to pay Dostal her impairment awards for her cervical spine and right fibula fractures, which had been calculated in January 2003. Rice also acknowledged that she did not schedule an impairment evaluation for Dostal's low back, as requested by Dostal's counsel, until November 2010 – after the petition for this case had been filed in this Court.<sup>45</sup>

¶ 40 Rice also justified the UEF's termination of Dostal's TTD benefits on the grounds that Dostal had reached MMI and her treating physician had approved jobs. However, Rice admitted that three of the four approved jobs were more than 150 miles from Dostal's home, and that the job analyses were eight or nine years old and had been prepared for Dostal in relation to a different workers' compensation claim. Rice acknowledged that she did not attempt to update the job analyses until after Dostal filed her petition in this Court.<sup>46</sup>

¶ 41 Ryan Zimmer is a licensed private investigator and works for Day and Associates.<sup>47</sup> In January 2011, Zimmer was asked to conduct surveillance of Dostal's activities and to interview neighbors and businesses who had hired Dostal's Lawn

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<sup>41</sup> Trial Test.

<sup>42</sup> Trial Test.

<sup>43</sup> Ex. 28.

<sup>44</sup> Trial Test.

<sup>45</sup> Trial Test.

<sup>46</sup> Trial Test.

<sup>47</sup> Zimmer Dep. 7:5-9.

Care.<sup>48</sup> Zimmer knew that his investigation related to workers' compensation and he was asked to observe and record Dostal's physical activities to investigate whether Dostal might be capable of working.<sup>49</sup>

¶ 42 Zimmer testified that in the course of his investigation, he observed Dostal scatter salt or snow melt.<sup>50</sup> He also observed Dostal use a broom to brush snow off of sidewalks.<sup>51</sup> Zimmer also saw Dostal drive a four-wheeler and use a hand spray wand to spray grass at three residences.<sup>52</sup> Zimmer's investigation did not reveal whether Dostal earned wages from any of her activities.<sup>53</sup>

¶ 43 Delane Hall testified at trial via videoconferencing. I found him to be a credible witness. Hall is a certified vocational rehabilitation counselor who prepared an Employability and Wage Loss Assessment report regarding Dostal's case on February 4, 2011, at the UEF's request.<sup>54</sup>

¶ 44 Hall testified that the scope of his work on Dostal's case was to update labor market information for job positions which were in Dostal's file from an earlier vocational rehabilitation assessment. Hall did not perform any new vocational testing or assessment of Dostal.<sup>55</sup>

¶ 45 Hall testified that the "relevant labor market" is typically considered to either be a 50-mile radius from where the worker lives or the nearest job service. Hall stated that in Dostal's case, since she lives in Stanford, he looked "somewhat" at Lewistown, which is within the 50-mile radius, but also considered Great Falls, which is not within the 50-mile radius. Hall testified that Lewistown has a job service, but Lewistown's job market consists mostly of agricultural positions, and that Great Falls has "more selection." Hall testified that he asked Rice what he should use as Dostal's labor market and she told him to consider Great Falls as Dostal's labor market.<sup>56</sup>

¶ 46 In his report, Hall noted that Dostal lives in a rural area and that she would have to either relocate or commute for all of the approved jobs except possibly the bartender

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<sup>48</sup> Zimmer Dep. 9:14 – 10:6.

<sup>49</sup> Zimmer Dep. 12:2-16.

<sup>50</sup> Zimmer Dep. 26:2-4.

<sup>51</sup> Zimmer Dep. 18:9-12.

<sup>52</sup> Zimmer Dep. 21:21 – 22:8.

<sup>53</sup> Zimmer Dep. 17:3-6.

<sup>54</sup> Trial Test.

<sup>55</sup> Trial Test.

<sup>56</sup> Trial Test.

position. However, Hall noted that while a number of bars operate near Dostal's residence, he had no information as to whether these bars employed bartenders or if they were "mom and pop" businesses.<sup>57</sup>

¶ 47 Hall testified that the initial job analyses which he was asked to update included a bartender position in Jackson Hot Springs, which is over 300 miles from Stanford; a courtesy van driver position in Missoula, over 200 miles from Stanford; a vehicle washer position in Lewistown for a business which no longer exists; and a telephone service operator position in Billings, over 150 miles from Stanford. Hall testified that he identified a number of jobs in Great Falls in his Assessment, but no job analyses were prepared for these positions.<sup>58</sup>

¶ 48 Alan K. Dacre, M.D., is an orthopedic surgeon who primarily practices in Billings.<sup>59</sup> In August 2004, Dr. Dacre first saw Dostal in Lewistown, where he held "outreach clinics" at the time.<sup>60</sup> He continued to treat Dostal in the ensuing years, both in Lewistown and in Billings.<sup>61</sup> Dr. Dacre opined that Dostal did not reach MMI for her low back until February 2010.<sup>62</sup>

### CONCLUSIONS OF LAW

¶ 49 This case is governed by the 1991 version of the Workers' Compensation Act since that was the law in effect at the time of Dostal's industrial accident.<sup>63</sup>

¶ 50 Dostal bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>64</sup> Dostal has met her burden of proof.

**Issue One: Whether Petitioner is entitled to TTD benefits from January 1, 2010, and ongoing.**

**Issue Two: Whether Petitioner returned to work when she was receiving TTD benefits.**

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<sup>57</sup> Ex. 21 at 4.

<sup>58</sup> Trial Test.

<sup>59</sup> Dacre Dep. 7:7-11.

<sup>60</sup> Dacre Dep. 8:8-16.

<sup>61</sup> Dacre Dep., Ex. 7.

<sup>62</sup> Dacre Dep. 98:11-15.

<sup>63</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>64</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).

**Issue Three: If Petitioner returned to work, what is the date of her return to work.**

**Issue Four: Whether Petitioner earned any compensation for work during the period when she was receiving TTD benefits.**

**Issue Five: Whether Petitioner owes the UEF for an overpayment.**

¶ 51 Under § 39-71-701(1), MCA, an injured worker is eligible for TTD benefits when she suffers a total loss of wages as a result of an injury and until she reaches MMI. Section 39-71-123, MCA, defines wages in pertinent part as:

(1) “Wages” means the gross remuneration paid in money, or in a substitute for money, for services rendered by an employee. Wages include but are not limited to:

. . . .  
(b) board, lodging, rent, or housing if it constitutes a part of the employee’s remuneration and is based on its actual value . . . .

¶ 52 Dostal’s treating physician, Dr. Dacre, opined that Dostal reached MMI in February 2010. Although under § 39-71-701(1), MCA, an injured worker is no longer eligible for TTD benefits once she reaches MMI, Dostal argues that she remains entitled to TTD benefits because the UEF has not yet met the *Coles* criteria<sup>65</sup> for terminating those benefits. Under *Coles*, although an injured worker’s TTD benefits may be terminated on the date that the worker has been released to return to work in some capacity, prior to terminating those benefits, an insurer must have: a physician’s determination that the injured worker has reached MMI; a physician’s determination of the injured worker’s physical restrictions resulting from the industrial injury; a physician’s determination that the injured worker can return to work, with or without restrictions, to the time-of-injury job or another job for which the worker is fitted by age, education, work experience, and physical condition; and notice to the injured worker of receipt of the report attached to a copy of the report.<sup>66</sup>

¶ 53 The UEF concedes the *Coles* criteria have not been met in this case. However, the UEF argues that under § 39-71-609, MCA, it is not required to give notice prior to terminating TTD benefits because it has knowledge that Dostal returned to work.<sup>67</sup>

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<sup>65</sup> So called from their origin in *Coles v. Seven Eleven Stores*, 217 Mont. 343, 704 P.2d 1048 (1985).

<sup>66</sup> *Wood v. Consolidated Freightways, Inc.*, 248 Mont. 26, 30, 808 P.2d 502, 505 (1991).

<sup>67</sup> See *Purkey v. AIG*, 2005 MTWCC 2, ¶ 48.

¶ 54 Dostal has admitted that she performs some labor for Dostal's Lawn Care. However, as set forth in § 39-71-701(1), MCA, it is not whether an injured worker performs labor, but whether the injured worker suffers "a total loss of wages" which makes a worker eligible for TTD benefits.

¶ 55 Dostal contends that she receives no remuneration for the work she has performed for Dostal's Lawn Care. Stanley testified that prior to his purchase of the business, he provided the same financial support to Dostal that he continued to provide afterward. Both Dostal and Stanley testified that Dostal occasionally works for Dostal's Lawn Care without remuneration and Stanley allows Dostal to reside in his home and pays certain expenses regardless of whether Dostal performs any work for Dostal's Lawn Care. The UEF has presented no evidence to the contrary and has not proven that Dostal receives any sort of "wage" within the meaning of § 39-71-123, MCA, for any of the services she may perform for Dostal's Lawn Care. Dostal's case is readily distinguishable from cases such as *Hopkins v. UEF*, in which the putative employer contended that he did not pay the injured worker any wages, but simply gave him money on multiple occasions "out of [his] heart" and the fact that the injured worker also performed "favors" for his business was merely coincidental.<sup>68</sup> In the present case, there is no evidence that Dostal received money or anything else that correlated with "favors" she performed for Dostal's Lawn Care.

¶ 56 Since I have concluded that Dostal has not returned to work, I further conclude that she is entitled to TTD benefits retroactive to the date of their termination since the UEF has not fulfilled the *Coles* criteria. However, I further note that Dostal admitted to one instance prior to the termination of her TTD benefits and two instances subsequent to the termination of her TTD benefits in which she received wages – twice when cleaning an apartment, and once when steam-cleaning a drilling rig. I therefore hold that she is not entitled to TTD benefits for the three weeks in which she received wages, and the UEF shall not be liable for payment of benefits for those three weeks.

**Issue Six: The Court has ruled that Petitioner was at MMI at the time the impairments of 3% for right fibular fracture and 1% for cervical spine were given and that Petitioner is entitled to payment of the impairments of 3% for right fibular fracture and 1% for cervical spine. The remaining issues are whether there was an overpayment and if so, whether the impairments should be paid regardless of overpayment.**

¶ 57 In light of my holdings on Issues One through Five above, it is clear that the UEF owes Dostal more than any overpayment Dostal may have received for the week in

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<sup>68</sup> 2010 MTWCC 9, ¶ 25.

which she cleaned an apartment while receiving TTD benefits. Therefore, Issue Six is moot.

**Issue Seven: Whether the UEF has acted reasonably in its handling of Petitioner's claim.**

¶ 58 Dostal argues that the UEF has been unreasonable in handling her claim. Specifically, she contends that the UEF has unreasonably refused to pay wage-loss benefits, pay impairment awards, schedule an impairment evaluation, pay travel expenses, and authorize prescribed medication.<sup>69</sup> The UEF responds that it properly terminated Dostal's TTD benefits based on its belief that Dostal had returned to work; it reasonably refused to tender Dostal's impairment ratings at first because she had not yet reached MMI and later because it needed this Court to determine the amount of overpayment; it reasonably scheduled an impairment evaluation of Dostal's low back; and that Dostal is not entitled to travel reimbursement.<sup>70</sup> Although the UEF did not address Dostal's contention that it unreasonably failed to authorize prescribed medication, Dostal did not present any evidence in support of this contention, and therefore I do not consider this contention in my consideration of this issue.

¶ 59 Although Dostal contends the UEF unreasonably denied reimbursement of certain travel expenses, the issue of her entitlement to those travel expenses is not before the Court. Since the Court is not in a position to determine whether Dostal is even entitled to reimbursement of those travel expenses, I cannot determine whether or not the UEF unreasonably refused to reimburse her for those expenses.

¶ 60 Dostal also contends that the UEF unreasonably delayed scheduling an impairment evaluation. However, any allegedly unreasonable delay in scheduling an impairment evaluation is immaterial in light of the fact that the UEF made it clear it had no intention of paying any resulting impairment rating because it believed it had overpaid Dostal TTD benefits.

¶ 61 Dostal contends that the UEF unreasonably refused to pay her impairment awards. The UEF responds that it is withholding the payment of the impairment award because it believes Dostal received an overpayment of TTD benefits. However, Dostal was at MMI and entitled to the payment of this impairment award long before UEF came to believe she had returned to work. As set forth above, the UEF has not paid Dostal an impairment award for impairment ratings which were assessed on November 13, 2002. The impairment award was due and payable at that time. The fact that *over seven years later*, the UEF came to believe that it had overpaid Dostal's TTD benefits does not

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<sup>69</sup> Pretrial Order at 7.

<sup>70</sup> Pretrial Order at 7-8.



change the fact that the impairment award inexplicably – and unreasonably – remained unpaid from November 13, 2002.

¶ 62 Finally, Dostal contends that the UEF has also unreasonably refused to pay her wage-loss benefits. “Reasonableness” is inherently fact-driven. Based on the facts above, I conclude that the UEF had a reasonable belief that Dostal had returned to work from her medical records and from the information gathered by Zimmer, and therefore the UEF did not act unreasonably when it terminated her wage-loss benefits on the grounds that she had returned to work. However, when Dostal’s attorney contacted the UEF via her June 11, 2010, letter and disputed the UEF’s conclusion that Dostal had returned to work, the UEF did not respond to the letter, nor did it apparently undertake additional investigation. When the UEF failed to respond to Dostal’s counsel’s letter within a reasonable time period, nor investigate Dostal’s counsel’s assertion that Dostal had not returned to work, the UEF acted unreasonably in its adjustment of Dostal’s claim. The UEF had an obligation to respond to Dostal’s counsel’s correspondence and the contentions contained therein.

**Issue Eight: Whether Petitioner is entitled to a penalty and attorney fees.**

¶ 63 Having concluded that the UEF acted unreasonably in its adjustment of Dostal’s claim, I next consider whether Dostal is entitled to a penalty and attorney fees. Given the significant potential impact of this determination on a number of claims, I have determined that it is appropriate to hear oral argument on this issue.

**JUDGMENT**

¶ 64 Petitioner is entitled to TTD benefits from January 1, 2010, and ongoing.

¶ 65 Except for one instance when she was paid to clean an apartment, Petitioner did not return to work when she was receiving TTD benefits.

¶ 66 Petitioner performed work on two other occasions – once to clean an apartment and once to steam-clean a drilling rig – after the UEF ceased to pay her TTD benefits.

¶ 67 Petitioner does not owe the UEF for an overpayment; however the UEF does not owe Petitioner TTD benefits for the three weeks in which she performed work.

¶ 68 Since Petitioner does not owe the UEF for an overpayment, the issue of whether the UEF must pay her impairment award regardless of an overpayment is moot.

¶ 69 The UEF has acted unreasonably in its handling of Petitioner’s claim.

¶ 70 The Court will hear oral argument on the issue of Petitioner's entitlement to a penalty and attorney fees.

DATED in Helena, Montana, this 16<sup>th</sup> day of February, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: J. Kim Schulke  
Leanora O. Coles  
Submitted: April 26, 2011