IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 48

WCC No. 2008-2052

GAREY KRAMER

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner suffered an industrial injury to his left shoulder, which was ultimately diagnosed as a rotator cuff tear. Although Respondent initially refused to pay indemnity benefits and for surgical repair of the shoulder, it did so after obtaining a second medical opinion which supported the treating physician's diagnosis. Petitioner maintains that Respondent was unreasonable in its initial denial of indemnity and medical benefits and that it further has incorrectly calculated the rate for Petitioner's temporary total disability benefits.

Held: Since the evidence demonstrates that Petitioner's job is not seasonal, his average weekly wage should be calculated using the statutorily-preferred method found in § 39-71-123(3)(a), MCA. Petitioner is entitled to his costs. Respondent's actions in adjusting the claims, while imperfect, were not so unreasonable as to entitle Petitioner to a penalty award or attorney fees.

¶ 1 The trial in this matter was held on May 30, 2008, in Great Falls, Montana. Petitioner Garey Kramer was present and was represented by Thomas J. Murphy. Respondent was represented by Kelly M. Wills.

¶ 2 Exhibits: Exhibits 1 through 29 were admitted without objection. The parties stipulated to the addition of Exhibits 12-2 and 14-3. Petitioner submitted a two-page report for inclusion as an exhibit. Respondent objected to this proposed exhibit and its objection was sustained. The proposed exhibit was excluded but retained in the exhibit binder as an offer of proof.

¶ 3 Witnesses and Depositions: Petitioner, Mel Pozder, and Lindon Chagnon were sworn and testified at trial.

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

¶ 4a What is the correct TTD rate?

¶ 4b Is Petitioner entitled to attorney fees, costs, and/or a penalty?[1]

FINDINGS OF FACT

¶ 5 On September 20, 2007, Petitioner suffered an industrial injury to his left shoulder within the course and scope of his employment with Sletten Construction. Respondent accepted liability for Petitioner's industrial injury.[2]

¶ 6 A dispute arose between the parties regarding Petitioner's entitlement to temporary total disability (TTD) benefits and medical treatment in the form of shoulder surgery. However, those issues were resolved on May 5, 2008, when Respondent authorized Petitioner's shoulder surgery and agreed to pay TTD benefits. Although Petitioner is now receiving TTD benefits, a dispute remains between the parties concerning the proper calculation of his TTD rate. Respondent argues that Petitioner's TTD benefits should be $326.59 per week. Petitioner argues that his TTD benefits should be $430.50 per week.[3] Petitioner further argues that Respondent unreasonably delayed and denied his claim for TTD benefits and authorization for shoulder surgery.[4]

¶ 7 Petitioner testified at trial and I found him to be a credible witness. Petitioner became a laborer for Sletten Construction in March 2007. His job duties usually consisted of concrete work. When Petitioner began working for Sletten Construction, he resided in a prerelease center in Great Falls. Petitioner's starting wage was $13.25 per hour. In July 2007, Petitioner received a payment which retroactively adjusted his wages to $14.75 due to a change in the pay scale brought about by his union.[5]

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[1] Final Pretrial Order at 2.

[2] Final Pretrial Order, Uncontested Facts at 1.

[3] Final Pretrial Order, Uncontested Facts at 2.

[4] Final Pretrial Order, Uncontested Facts at 2-3.

[5] Trial Test.

¶ 8 Petitioner testified that he was terminated from his job on June 12, 2007, when he was sent to the State of Montana START Program due to a violation of his prerelease conditions. Petitioner did not call in to work when he left, and he assumed he did not have a job after missing five weeks of work.[6]

¶ 9 Lindon Chagnon is a superintendent for Sletten Construction. Chagnon testified at trial and I found him to be a credible witness. Chagnon testified that no hiring or firing decisions are made on a project for which he is a superintendent without his knowledge. He was the superintendent on the job site where Petitioner first came to work for Sletten Construction in March 2007 – the same job site where Petitioner injured his shoulder in September 2007.[7] Chagnon testified that in June 2007, Petitioner was not terminated when he failed to report to work because his prerelease director informed Sletten Construction that Petitioner would be unable to report to work for some time. Chagnon did not issue a termination notice because the company generally would not terminate an employee for a short-term absence. Chagnon explained that although he cannot state for certain that Petitioner would have had a job instantly upon returning, ultimately when Petitioner contacted Sletten Construction, he was hired back.[8]

¶ 10 Chagnon testified that Sletten Construction's policy is that a person who quits by not showing up for work or calling for three days may not be rehired for one year after the termination. Chagnon explained that since Petitioner had never been given a termination notice when he did not show up for work due to being sent to the START Program, he was not considered to have been terminated, and therefore, he was eligible to be rehired upon his return.[9]

¶ 11 When Petitioner returned from the START Program, he called the Sletten Construction office and left a message asking to be rehired. He then proceeded to look for other employment. Petitioner did not believe Sletten Construction "owed" him a job, but he was hoping they would rehire him. He left a few messages but he did not immediately hear back from the company. After a few weeks, Petitioner received word that Sletten Construction might have a job available and that he should report to the office. Petitioner was rehired on July 12, 2007, in the same type of position that he had previously held.[10]

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[6] Trial Test.

[7] Trial Test.

[8] Trial Test.

[9] Trial Test.

[10] Trial Test.

¶ 12 Chagnon testified that when Petitioner left to participate in the START Program, the company likely hired someone to replace him. Chagnon believes that after Petitioner returned, he was given a shift as soon as the company needed another worker. Chagnon added that Petitioner was a good worker and well-liked by his coworkers and he was virtually guaranteed a job on his return because of his favorable work history.[11]

¶ 13 Based on Petitioner's and Chagnon's testimony and the evidence in the record from Petitioner's employment file, I find that Petitioner was not terminated from his employment at Sletten Construction when he left to participate in the START Program, but rather was given a leave of absence.

¶ 14 Petitioner successfully performed his job duties until September 20, 2007. On that day, he was knocked to the ground while helping control a hose through which concrete was being pumped. Petitioner continued his shift, but he could feel something wrong in his left arm. His supervisor directed him to get medical treatment.[12]

¶ 15 Petitioner sought treatment for left shoulder pain with Dr. Gerald I. Geiszler. Dr. Geiszler performed a thorough examination of Petitioner's left arm and shoulder. An x-ray did not reveal a fracture or dislocation. Dr. Geiszler concluded that Petitioner had a rotator cuff tear which might require surgical repair, and referred him to an orthopedist.[13]

¶ 16 Petitioner returned to work with restrictions soon after his industrial injury. Petitioner exceeded those restrictions. He stated that it was the nature of working in construction to do so. He admitted that his foreman emphasized that he needed to work within his restrictions, but Petitioner testified that if he saw someone who needed help, he did not feel right refusing to help because of his restrictions. He also became bored with his light-duty tasks and sought more challenging work.[14]

¶ 17 Dr. Gregory S. Tierney saw Petitioner on October 3, 2007. Dr. Tierney noted that Dr. Geiszler's radiographs failed to reveal any osseous abnormalities, but Dr. Geiszler suspected a rotator cuff tear. Dr. Tierney performed a physical examination and reviewed the radiographs. He saw no osseous abnormalities and concluded that Petitioner probably had a rotator cuff tear of the left shoulder. Dr. Tierney recommended an MRI.[15]

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[11] Trial Test.

[12] Trial Test.

[13] Ex. 3 at 1-2.

[14] Trial Test.

[15] Ex. 1 at 3.

¶ 18 An MRI of Petitioner's left shoulder was performed on October 10, 2007. The radiologist found mild degenerative changes of the acromioclavicular joint with no evidence of a fracture or rotator cuff tear.[16]

¶ 19 Dr. Keith D. Bortnem saw Petitioner on October 18, 2007. Dr. Bortnem reviewed the October 10, 2007, MRI. Dr. Bortnem did not see a fracture or rotator cuff tear although some degenerative changes of the AC joint were visible on the MRI. After a physical examination of Petitioner, he injected Petitioner's shoulder and recommended physical therapy and a sleep aid while continuing with his work restrictions.[17]

¶ 20 At a follow-up examination on November 15, 2007, Dr. Bortnem noted that Petitioner continued to experience significant pain. Dr. Bortnem continued Petitioner's physical therapy prescription and his work restrictions.[18]

¶ 21 On November 30, 2007, Petitioner was holding up a piece of plywood which was being used as a chute to pour concrete.[19] Petitioner knew this had aggravated his shoulder in some manner, but he continued to work. Petitioner testified that he was holding the board for concrete and that there were no "falling boards" as reported by Dr. Bortnem. Petitioner did not report the injury because he did not think it was serious. He decided to rest his shoulder over the weekend to see if it healed itself.[20]

¶ 22 Chagnon stated that Petitioner did light-duty work for Sletten Construction following his September 2007 industrial injury until November 2007. He knows Petitioner exceeded his work restrictions a few times. Chagnon further stated that the injury which Petitioner testified occurred on November 30, 2007, is the type of incident which should be immediately reported to the superintendent per Sletten Construction's policy. Chagnon stated that even minor incidents which do not require medical attention are to be reported and documented.[21]

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[16] Ex. 4 at 1.

[17] Ex. 1 at 4.

[18] Ex. 1 at 6.

[19] Trial Test.

[20] Trial Test.

[21] Trial Test.

¶ 23 Chagnon explained that on December 3, 2007, Petitioner met with Safety Director Mike Allison. This meeting was prompted by reports that Petitioner was exceeding his work restrictions and overexerting himself. Allison met with Petitioner to explain the importance of Petitioner not exceeding his work restrictions.[22] Petitioner testified that on December 4 and 5, 2007, his shoulder was bothering him severely and he was unable to sleep because of the pain. Each morning, he asked a coworker to relay a message to his supervisor that he was not coming to work because of his shoulder and lack of rest. The following day, he received a termination notice.[23]

¶ 24 Chagnon expected Petitioner to report for work on December 4, 2007, as usual. Petitioner did not report for work on December 4 or December 5, 2007. On December 6, 2007, when Petitioner again did not report for work, Chagnon consulted with the safety director to determine whether Petitioner's status as being on light-duty work for an industrial injury affected the attendance policy. Sletten Construction's attendance policy is that employees are terminated if they fail to show up for work for three days without contacting the company. Chagnon learned that an employee on light-duty work was treated like any other employee under the policy.[24] A "Termination Notice" was issued which indicated that Petitioner had quit his job as of December 6, 2007.[25] Chagnon issued the notice since Petitioner had failed to report to work for three consecutive days without notifying the company. Chagnon does not believe Petitioner was fired from his job at Sletten Construction. He believes Petitioner quit because Petitioner ceased showing up for work.[26]

¶ 25 Dr. Bortnem and PA-C Christopher S. Merchant saw Petitioner on December 13, 2007. In their treatment note, they stated:

> He had been going to therapy, doing quite well, and then on November 30, 2007, he was at work and some large boards were falling. He reached up with his left arm to try to prevent them from falling, but had severe onset of left shoulder pain. He was actually laid off from his job a few days later. He is not entirely sure why he was laid off, as the note given him indicated that he quit. . . .

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[22] Trial Test.

[23] Trial Test.

[24] Trial Test.

[25] Ex. 9.

[26] Trial Test.

> RADIOGRAPHS: MRI scan is reviewed again by Dr. Bortnem. He certainly has a degenerative AC joint along with a fairly large spur coming off the acromion that is impinging on his rotator cuff.
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> PLAN: Dr. Bortnem has recommended left shoulder arthroscopy with probable rotator cuff repair and distal clavicle resection. . . .[27]

¶ 26 On December 14, 2007, Respondent was sent an authorization request for Petitioner to receive a left shoulder arthroscopy, rotator cuff repair, and distal clavicle resection. On December 19, 2007, Respondent's claims adjuster denied the request, stating, "claim still being investigated w/ possible IME."[28] On December 20, 2007, Petitioner's counsel sent a demand letter to Respondent for TTD benefits and authorization for shoulder surgery with Dr. Bortnem.[29]

¶ 27 Mel Pozder is Respondent's only claims adjuster and makes all its adjusting decisions. Pozder testified at trial and I found her to be a credible witness. Pozder testified that she received the report from Dr. Bortnem's December 13, 2007, appointment on approximately December 21, 2007. From that report, she learned that Petitioner reported to Dr. Bortnem that he had been injured at work by falling boards on November 30, 2007. She called Allison to find out if the incident had been reported and if any investigation had occurred. She was unable to confirm that the incident had occurred because no accident had been reported. Pozder learned that Petitioner had been terminated when he failed to report for work for three consecutive days. Since this would be considered that Petitioner voluntarily quit his job, Pozder determined that Petitioner was no longer entitled to TTD benefits.[30]

¶ 28 On December 28, 2007, Pozder sent Petitioner's claims file to his counsel. She stated that Petitioner's request for TTD benefits was being denied because Sletten Construction had informed her that it had light-duty work available for Petitioner from September 21, 2007, when he was released to work in a light-duty position, until the present. Pozder further denied the shoulder surgery request. She stated, "Based upon the MRI and x-ray reports, there seems to be a lack of objective medical evidence as to the

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[27] Ex. 1 at 8.

[28] Ex. 10 at 2.

[29] Ex. 29.

[30] Trial Test.

causation of his degenerative AC joint and spur. [Respondent] will arrange an independent medical evaluation."[31]

¶ 29 On January 15, 2008, Pozder wrote to Dr. Bortnem about the requested shoulder surgery. She stated that the October 10, 2007, MRI did not report a rotator cuff tear or bone spur, and that based upon that report, she saw no objective medical evidence to support the requested surgery. Pozder requested repeat diagnostics and a new left shoulder MRI and x-rays.[32] Pozder explained that she did not request an IME at that point because she believed that if Dr. Bortnem repeated his testing, Pozder would get the information that she needed to determine whether to authorize Petitioner's shoulder surgery.[33]

¶ 30 On January 22, 2008, an addendum to the October 10, 2007, MRI report was issued by Tyler L. Will, M.D. Dr. Will stated:

> I have been asked to review the study on this patient which was performed on October 10, 2007. I believe the findings are suspicious for a full-thickness tear involving the supraspinatus tendon, near the level of the musculotendinous junction. The tendons of the infraspinatus and teres minor appear to be intact. The biceps tendon is also normally located. There is a mild degree of edema tracking along the supraspinatus muscle but no evidence of muscle atrophy.[34]

¶ 31 On January 29, 2008, Pozder wrote to Petitioner's counsel. She stated that the January 22, 2008, addendum to the left shoulder MRI had no "findings of a tear. The[y] report on a 'belief' that there may be a tear. This does not represent objective medical evidence." Pozder stated that a repeat MRI had been scheduled for February 6, 2008.[35]

¶ 32 On that same date, Pozder also wrote to Dr. Bortnem asking for "further clarification" of Petitioner's job restrictions. Pozder informed Dr. Bortnem that Petitioner was not fired or laid off, but quit by not showing up for work. Pozder informed Dr. Bortnem that Sletten Construction had modified work available for Petitioner, and that it had wanted to keep Petitioner working. Pozder also stated, "In addition, [Petitioner's] reports of lumber falling

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[31] Ex. 11.

[32] Ex. 12 at 1.

[33] Trial Test.

[34] Ex. 4 at 3.

[35] Ex. 13.

on him sometime in November was an un-witnessed incident and the employer reports that at that time there was not any loose lumber on the site."[36] Dr. Bortnem responded on January 30, 2008, stating that he did not know what Petitioner's present restrictions were as he had not seen him in approximately six weeks and was waiting for a report on the new MRI.[37]

¶ 33 On January 30, 2008, Petitioner's counsel wrote to Dr. Bortnem in response to Pozder's letter. Petitioner's counsel stated that Petitioner was reinjured on November 30, 2007, while performing his light-duty assignment and that after that event, Dr. Bortnem indicated Petitioner needed surgery. Petitioner's counsel requested that Dr. Bortnem state that Petitioner should not have worked after November 30, 2007, and that Petitioner cannot work until after he recovers from shoulder surgery.[38]

¶ 34 In an MRI report dated January 30, 2008, the radiologist found, "Mild distal left supraspinatus tendinopathy. No rotator cuff tear."[39] After an examination on February 7, 2008, Dr. Bortnem noted that Petitioner's shoulder pain continued to worsen and was constant and limiting Petitioner's ability to sleep. Dr. Bortnem stated that on his own review of the MRI, he saw extensive AC arthritis and a small full-thickness rotator cuff tear. Dr. Bortnem strongly recommended that Petitioner have an arthroscopy with repair of his rotator cuff and a distal clavicle excision. He further stated, "We are going to go ahead and get him on my schedule again. If work comp refuses this time, I am going to ask them to find him another care provider because I am not going to play games with them anymore."[40] Dr. Bortnem also issued work restrictions on that date which indicated that Petitioner could not work until he had arthroscopic surgery on his left shoulder.[41]

¶ 35 On February 8, 2008, another request for the surgery was made. Pozder denied the request on February 12, 2008, stating, "Denied at this time – we will seek a second opinion."[42] On February 13, 2008, Pozder wrote to Petitioner's counsel and stated that the January 30, 2008, MRI did not show a tear and did not support Dr. Bortnem's request for rotator cuff surgery. Pozder stated that Respondent would arrange for a second opinion

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[36] Ex. 14 at 1.

[37] Ex. 14 at 3.

[38] Ex. 15.

[39] Ex. 3 at 8.

[40] Ex. 1 at 12.

[41] Ex. 1 at 14.

[42] Ex. 10 at 3.

and would inform Petitioner of its scheduling. Pozder further stated that the objective medical evidence did not support Dr. Bortnem's assertion that Petitioner was totally unable to work, that Petitioner voluntarily quit his job, and that Respondent would not pay wage-loss benefits.[43]

¶ 36 Pozder explained that after Dr. Bortnem's interpretation of the second MRI differed with the radiologist's reading, she believed additional investigation was warranted prior to authorizing surgery. Pozder does not know why Dr. Bortnem disagreed with the radiologist who read the second MRI. Pozder testified that while she was investigating Petitioner's claim, she considered ordering an independent medical examination (IME). Instead, she ordered a second opinion. Pozder testified that she knew of two options for seeking additional medical information for a workers' compensation claim: an IME pursuant to § 39-71-605, MCA, and a second opinion as provided for under ARM 24.29.1519. Pozder explained that it is generally her practice to use an IME when determining causation, and to seek a second opinion when determining whether surgery is warranted. She further testified that in her experience, more doctors are willing to do second opinions than IMEs.[44]

¶ 37 Pozder testified that Dr. Bortnem's unwillingness to answer her questions about his diagnoses caused her to be unable to authorize the surgery. Pozder stated that she did not accept Dr. Bortnem's surgery recommendation because Dr. Bortnem only noted mild degeneration when he initially reviewed Petitioner's MRI. Later, Dr. Bortnem changed his diagnosis, but did not explain why he changed his mind about the MRI interpretation. Pozder also did not believe the diagnoses of Petitioner's specific shoulder condition were consistent from doctor to doctor, so she did not feel surgery was warranted without further information. Pozder testified that she frequently asks doctors for clarification when she finds something apparently inconsistent in their diagnoses and that doctors generally do not appreciate her questioning their recommendations. She noted that Dr. Bortnem suggested that Respondent obtain a second opinion, which it ultimately did.[45]

¶ 38 On February 16, 2008, Dr. Bortnem wrote to Petitioner's counsel and stated that Petitioner should not have worked after November 30, 2007, and that he should not work until he recovers from shoulder surgery. Dr. Bortnem further noted that Petitioner was in a great deal of pain from his shoulder injury and urged Petitioner's counsel to resolve the

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[43] Ex. 16.

[44] Trial Test.

[45] Trial Test.

matter with Respondent as quickly as possible so that Petitioner's shoulder could be surgically repaired.[46]

¶ 39 On February 19, 2008, Pozder notified Petitioner's counsel that she had scheduled Petitioner for a second opinion pursuant to ARM 24.29.1519 with Dr. Christopher Price in Missoula. The second opinion was set for March 3, 2008, and Respondent offered to reimburse Petitioner for his travel and meals.[47] Petitioner's counsel responded on February 21, 2008, stating that under § 39-71-605, MCA, an IME must be scheduled at a place as close to the employee's residence as practical, and that Missoula was not as close as practical given that Petitioner resided in Great Falls.[48]

¶ 40 Prior to this case, Pozder had never sought to have Dr. Price render a second opinion in one of her claims. She stated that the primary reason she chose Dr. Price was because he did not practice in the Great Falls area. She also knew he had a good reputation and that he worked on shoulders. Pozder sent Dr. Price Petitioner's medical records and requested that he review the records and determine whether he would be willing to offer a second opinion. After his review, Dr. Price agreed to examine Petitioner for the purpose of rendering a second opinion and Pozder contacted Petitioner's counsel. Pozder authorized Dr. Price to conduct any diagnostic testing he desired. However, Petitioner's counsel informed her that Petitioner would not attend the appointment.[49]

¶ 41 Pozder testified that she did not initially schedule Petitioner's second opinion exam for a Great Falls doctor because a limited number of orthopedic surgeons perform shoulder surgery in Great Falls.[50] Pozder admitted that she knew that this Court had issued several recent rulings requiring IMEs to be performed as close as practical to a claimant's residence as provided for in § 39-71-605, MCA. Pozder stated that she believed it was "appropriate" to look for a doctor in Missoula instead of Great Falls.[51]

¶ 42 On February 27, 2008, Pozder wrote to Petitioner's counsel and informed him that she had cancelled the appointment with Dr. Price. However, she disagreed that the

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[46] Ex. 18.

[47] Ex. 19 at 1.

[48] Ex. 20.

[49] Trial Test.

[50] Trial Test.

[51] Trial Test.

Missoula appointment was not as close as "practical." She explained that Great Falls had "only four" orthopedic surgeons who were not part of Dr. Bortnem's group. She stated:

> We are also concerned about the possible unconscious bias or prejudice on the part of any Great Falls physician. As you know, Great Falls is a small medical community. I suspect Dr. Bortnem socializes with the other orthopedic surgeons in town.[52]

Pozder urged Petitioner's counsel to reconsider his decision not to attend a second opinion evaluation with Dr. Price in Missoula.[53]

¶ 43 On that date, Pozder again wrote to Dr. Bortnem. She stated that Respondent continued to seek "clarification" of Petitioner's condition. Pozder pointed out that when Dr. Bortnem originally reviewed Petitioner's October 2007 MRI, Dr. Bortnem did not see a fracture or rotator cuff tear. Pozder further pointed out that when Dr. Bortnem reexamined the MRI in December 2007, he found a degenerative AC joint with a large spur off the acromion which impinged the rotator cuff. Pozder stated that when a subsequent MRI was taken on January 30, 2008, the radiologist did not see these type of findings, but Dr. Bortnem's February 7, 2008, report states that Petitioner has extensive AC arthritis and a small full-thickness rotator cuff tear.[54]

¶ 44 Pozder also questioned Dr. Bortnem's February 16, 2008, letter to Petitioner's counsel, in which he stated that Petitioner should not have worked after November 30, 2007. Pozder could not determine from Dr. Bortnem's records what had changed in Petitioner's condition between October 18 and November 30, 2007, to warrant the change in work status. Pozder reiterated that Petitioner's November 30, 2007, industrial accident was unwitnessed and not reported contemporaneously. Pozder also reiterated Respondent's contention that Petitioner quit his job voluntarily, was not laid off, and would have had continuing light-duty work at Sletten Construction. Pozder posed two questions to Dr. Bortnem:

> 1. As required by the law governing Montana's workers' compensation system, please provide a detailed outline of all objective medical evidence upon which you base your current diagnoses of extensive AC arthritis and rotator cuff tear, and your request for authorization for surgery.

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[52] Ex. 22.

[53] *Id*.

[54] Ex. 23.

. . .

> 2. Please provide a detailed outline of the **new** objective medical findings, which you identified after November 30, 2007. As a part of your answer, please compare the objective medical findings prior to November 30, 2007 with those after November 30, 2007. Also, please explain why [Petitioner] is no longer able to perform light duty work base[d] on the post November 30, 2007 objective medical findings.[55]

¶ 45 Dr. Bortnem responded to Pozder's letter on February 29, 2008. He noted that Pozder was aware that he strongly disagreed with the radiologist's interpretation of the January 2008 MRI, and further stated:

> **Here is my dilemma.** [Petitioner] was making progress with his original injury (9/20/2007) when he was injured again on November 30, 2008. Whether he was laid off or voluntarily self-terminated . . . is irrelevant to me.
>
> [Petitioner] continues to experience problems with his shoulder. On February 7, 2008, my physical examination revealed that [he] was "getting a frozen shoulder". He is unable to function because of his shoulder pain.
>
> I feel, very strongly, that [Petitioner] needs to have an arthroscopy with repair of his rotator cuff and a distal clavicle resection.
>
> If, in your opinion, [Petitioner] and [Respondent] would be better served by obtaining another care provider for [Petitioner], feel free to schedule a second surgical opinion with another orthopedist.
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> As an aside, I feel it is my professional responsibility to point out that claims adjusters should not be ordering diagnostic tests or making medical decisions.[56]

¶ 46 Ultimately, Pozder arranged for a second opinion with Dr. Gregg D. Pike in Great Falls. She explained that by that point, this case was set to go to trial and she could not move forward on authorizing the surgery without another medical opinion. She decided to schedule a second opinion with Dr. Pike to attempt to resolve the surgery issue.[57]

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[55] Ex. 23. (Emphasis in original.)

[56] Ex. 24. (Emphasis in original.)

[57] Trial Test.

¶ 47 Dr. Pike examined Petitioner on May 1, 2008. Dr. Pike took a history, reviewed shoulder x-rays and Petitioner's January 30, 2008, MRI, and performed a physical examination. Dr. Pike concluded that Dr. Bortnem's diagnosis of a shoulder pathology was likely correct. Dr. Pike stated:

> [C]ommonly there is a large degree of shoulder pathology which does not show up on an MRI, particularly an MRI done without contrast. Based on my exam today, I feel that his symptoms are a combination of AC joint arthritis, biceps tendinitis, and rotator cuff pathology. These certainly could all be treated with a shoulder arthroscopy, and I agree that this is indicated in this case.[58]

¶ 48 Pozder wrote to Petitioner's counsel on May 8, 2008. Noting that Dr. Pike had opined that the surgery recommended by Dr. Bortnem was medically appropriate, Pozder informed Petitioner's counsel that Respondent would begin paying biweekly wage-loss benefits retroactive to December 19, 2007. Pozder calculated Petitioner's TTD rate at $326.59 per week.[59] Ultimately, the parties agreed that Petitioner's TTD benefits would be retroactively reinstated beginning four days after December 3, 2007.[60]

¶ 49 In calculating Petitioner's average weekly wage (AWW) for the purpose of determining Petitioner's weekly TTD rate, Pozder used the entire period from March through September of 2007.[61] With her May 8, 2008, letter, Pozder also included a chart which showed all of Petitioner's earnings from Sletten Construction from the pay period ending March 10, 2007, through the pay period ending September 15, 2007.[62] This period was 28 weeks long. Pozder took Petitioner's total earnings for these 28 weeks, which equaled $13,709.72, and divided that amount by 28, which equaled $489.63. She then multiplied that amount by .667, which equaled $326.59.[63] These 28 weeks included the

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[58] Ex. 5 at 2.

[59] Ex. 26 at 1-2. Pozder determined the start date for Petitioner's benefits because Dr. Bortnem restricted Petitioner from returning to work on December 13, 2007, and the four-day wait period under § 39-71-736, MCA, would cause the benefits to start on this date.

[60] Final Pretrial Order, Uncontested Facts at 2. Uncontested Fact ¶ 5 contains an obvious typographical error, stating the parties agree that TTD benefits shall be effective four workdays afer December 3, 200***8***.

[61] Trial Test.

[62] Ex. 26 at 3.

[63] *Id*.

period before Petitioner went to the START Program, and included the five weeks during which he earned no wages because of his participation in the START program.[64]

¶ 50 Pozder explained that she knew Petitioner was off work in June 2007, but she did not know why. Pozder believed Petitioner had not been terminated because she found no termination notice in his file. When Pozder reviewed Petitioner's wage history, she called Allison to determine why Petitioner did not have any wages during several weeks in June and July of 2007. She learned that Petitioner was not terminated but had taken personal leave. She was not aware that Petitioner left work to participate in the START Program.[65]

¶ 51 Pozder determined that Petitioner's rate should be $326.59 per week. She acknowledged that by using the statutorily-preferred calculation method of the average of a claimant's last four pay periods, Petitioner's rate would be $430.50.[66] Pozder testified that construction is seasonal and that most of the companies who are part of the group which form Respondent have fluctuations in their number of employees throughout the year. She explained that when she determines the average weekly wage for an injured worker, she looks at that employee's wages for the previous 52 weeks to see if their hours have changed. She stated that she would use the previous four pay periods if they truly reflect the worker's wages, but that it is an exceptionally rare circumstance when they do.[67]

¶ 52 Chagnon testified that the company's need for construction workers fluctuates. Workers are sometimes laid off when weather precludes outdoor work. At other times, the company may hire additional laborers for short-term jobs and then lay off those workers when they are no longer needed. Chagnon stated that the number of laborers needed by the company changes year-round.[68] Chagnon further testified that Petitioner was a good worker and that Sletten Construction tries to keep its good workers. He explained that when the company lays off good workers during slow times, they try to bring those workers back as soon as jobs are available. He asserted that layoffs are not based on seniority.[69]

¶ 53 Chagnon stated that the light-duty work which Petitioner performed was important and necessary work. He further stated that the company had light-duty work available from

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[64] *Id*.

[65] Trial Test.

[66] Trial Test.

[67] Trial Test.

[68] Trial Test.

[69] Trial Test.

December 2007 to the time of trial. He stated Petitioner also would have had regular employment available to him through the time of trial if he had not had work restrictions.[70]

CONCLUSIONS OF LAW

¶ 54 This case is governed by the 2007 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[71]

¶ 55 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[72] Petitioner has proven that he is entitled to the higher TTD rate for the reasons set forth below.

Petitioner's TTD Rate

¶ 56 The parties disagree as to the appropriate method for determining Petitioner's TTD rate. Petitioner argues that the correct method to use is the standard calculation method found in § 39-71-123(3)(a), MCA, which states:

> Except as provided in subsection (3)(b), for compensation benefit purposes, the average actual earnings for the four pay periods immediately preceding the injury are the employee's wages, except that if the term of employment for the same employer is less than four pay periods, the employee's wages are the hourly rate times the number of hours in a week for which the employee was hired to work.

Using this calculation method, Petitioner's TTD rate would be $430.50 per week.

¶ 57 Respondent, however, argues that a more appropriate calculation method for Petitioner's circumstances is found in § 39-71-123(3)(b), MCA, which states:

> For good cause shown, if the use of the last four pay periods does not accurately reflect the claimant's employment history with the employer, the wage may be calculated by dividing the total earnings for an additional period of time, not to exceed 1 year prior to the date of injury, by the number of weeks in that period, including periods of idleness or seasonal fluctuations.

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[70] Trial Test.

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

[72] *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).

Using this calculation method, Respondent determined Petitioner's TTD rate at $326.59 per week.

¶ 58 Respondent argues that the alternate calculation method is more appropriate because construction employment is seasonal. Pozder testified that she looks at an injured worker's previous 52 weeks of employment in calculating the worker's average weekly wage because of seasonal fluctuations in work availability. Pozder testified that most of the companies which are part of Respondent's group have seasonal fluctuations. However, Chagnon testified that for Sletten Construction, while the company's need for workers fluctuates, the fluctuations are not necessarily seasonal and lay-offs are not by seniority. Instead, the company tries to keep good workers such as Petitioner. Chagnon further testified that had Petitioner not left his employment with Sletten Construction, he would have had work available to him, whether he had restrictions or not, from December 2007 through the trial on May 30, 2008.

¶ 59 The evidence demonstrates that Petitioner had a full-time, year-round job and not seasonal employment. Therefore, the correct calculation method for Petitioner's average weekly wage is the statutorily-preferred method found in § 39-71-123(3)(a), MCA, and Petitioner's correct TTD rate is $430.50.

Costs, Attorney Fees, and Penalty

¶ 60 As the prevailing party, Petitioner is entitled to his costs.[73] As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. In the present case, I do not believe Respondent's claims handling was unreasonable. However, Pozder's one-size-fits-all approach to § 39-71-123, MCA, does not comply with the statute's requirements. Section 39-71-123(b), MCA, provides that a method for calculating the employee's wages other than using the four pay periods immediately preceding the injury may be used "for good cause shown." Pozder cannot simply "decide" that all construction jobs are seasonal as many, such as the job Petitioner held in this case, are not. However, a superficial review of Petitioner's paystubs would arguably support the alternate calculation method Pozder employed even though the evidence presented at trial made it clear that Petitioner was not a seasonal employee. Therefore, while I have ultimately determined that Petitioner is entitled to the benefits he seeks, Petitioner is not entitled to attorney fees.

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[73] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

¶ 61 Regarding Petitioner's claim for a penalty, § 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay when an insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments; or when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court. Petitioner has argued that Respondent's delay in authorizing his shoulder surgery and in agreeing to pay wage-loss benefits was unreasonable given the facts of this case. From the evidence presented, I believe that Respondent could have handled some aspects of Petitioner's claim better. Specifically, I am troubled by some of Pozder's communications with Petitioner's treating physician. In a letter that was ostensibly for the purpose of clarifying Petitioner's physical restrictions, Pozder emphasized to Petitioner's treating physician that Petitioner's alleged industrial accident was unwitnessed.[74] I questioned Pozder as to how the fact that Petitioner's industrial accident was unwitnessed bore any relevance to his physical restrictions. Pozder offered no satisfactory explanation on this matter and I am left to conclude that the reason for including this information in the letter was to call Petitioner's credibility into question with his treating physician. I find this behavior to be inappropriate and caution Respondent that I do not find such actions to be consistent with reasonable claims handling. However, in the present case, Respondent ultimately approved Petitioner's surgery and although Pozder's contact with the treating physician was questionable, that contact did not result in an unreasonable delay or denial of benefits. Therefore, Petitioner is not entitled to a penalty.

JUDGMENT

¶ 62 The correct TTD rate is $430.50 per week.

¶ 63 Petitioner is entitled to his costs.

¶ 64 Petitioner is not entitled to his attorney fees.

¶ 65 Petitioner is not entitled to a penalty.

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[74] Exhibit 14.

¶ 66 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 27th day of October, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Thomas J. Murphy
Kelly M. Wills
Submitted: May 30, 2008