

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 11

WCC No. 2004-1093

JONATHAN LION

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: The claimant successfully completed a rehabilitation plan calling for flight training leading to his certification as a flight instructor and air carrier pilot. When he could not find employment as a pilot, he petitioned the Court for further rehabilitation benefits amounting to approximately \$200,000 to allow him to gain more flying time so he could primarily seek flying contracts with the State of Montana and United States Forest Service.

Held: The request for additional benefits under section 39-71-2001, MCA (1991), is denied since (1) only one rehabilitation plan is allowed and the original plan was completed; (2) the additional benefits would exceed the 104-week limitation imposed by the section; (3) the new plan has not been certified as reasonable by any vocational provider; and (4) the claimant has not proven to the satisfaction of the Court that the new plan would result in a reasonable prospect of regular employment. Any one of the grounds is a sufficient basis for denial.

Topics:

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Under section 39-71-2001, MCA (1991), the claimant is entitled to only one rehabilitation plan. Where a plan has been adopted and completed, the claimant is not entitled to further rehabilitation benefits.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Under section 39-71-2001, MCA (1991), rehabilitation benefits and plans are limited to a total of 104 weeks in duration.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Under section 39-71-2001, MCA (1991), a prerequisite to rehabilitation benefits is certification by a vocational consultant that there is a reasonable prospect that the rehabilitation plan will lead to regular employment.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Where the claimant's request for a particular plan has been refused, upon a petition for a Court order approving the plan, the claimant must prove that the plan will result in a reasonable prospect of regular employment.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2001, MCA (1991). Under section 39-71-2001, MCA (1991), rehabilitation benefits and plans are limited to a total of 104 weeks in duration.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2001, MCA (1991). Under section 39-71-2001, MCA (1991), the claimant is entitled to only one rehabilitation plan. Where a plan has been adopted and completed, the claimant is not entitled to further rehabilitation benefits.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2001, MCA (1991). Under section 39-71-2001, MCA (1991), a prerequisite to rehabilitation benefits is certification by a vocational consultant that there is a reasonable prospect that the rehabilitation plan will lead to regular employment.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2001, MCA (1991). Where the claimant's request for a particular plan has been refused, upon a petition for a Court order approving the plan, the claimant must prove that the plan will result in a reasonable prospect of regular employment.

¶1 The trial in this matter was held in Missoula, Montana on October 28, 2004. The petitioner was present and represented by Ms. Laurie Wallace. The respondent was represented by Mr. Thomas E. Martello.

¶2 Exhibits: Exhibits 1 through 5 were admitted without objection.

¶3 Witnesses and Depositions: The petitioner and April Pulfrey testified. In addition, the parties submitted the depositions of Jonathan Lion (petitioner), Delbert Schwaderer, Wendy Ross Beye, Deborah Peterson, and Jerry Davis for the Court's consideration.

¶4 Issues Presented: The issues, as stated by the parties in the Pretrial Order are as follows:

¶4a Whether Petitioner is entitled to additional vocational rehabilitation benefits in compliance with the Vocational Rehabilitation Plan.

¶4b Whether Petitioner is entitled to payment of past due rehabilitation and auxiliary benefits.

¶4c Whether Petitioner is entitled to a 20% increase of award for unreasonable refusal to pay reasonable vocational rehabilitation benefits pursuant to section 39-71-2907, MCA.

¶4d Whether Petitioner is entitled to reasonable attorney fees and costs pursuant to section 39-71-611 and/or -612, MCA.

(Pretrial Order at 3-4.)

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 The petitioner, Jonathan Lion (hereinafter "claimant"), is 45 years old.

¶7 Prior to 1991, the claimant worked in California in the construction industry. From the mid-1980s until the early 1990s he held a license as a general contractor and worked as a general contractor and a plastering contractor. He also worked as a foreman for a masonry contractor.

¶8 In 1993 the claimant moved to Montana and went to work for Biggerstaff Construction (Biggerstaff) as a carpenter.

¶9 On June 14, 1993, the claimant injured his back while working for Biggerstaff. As a result of his injuries, the claimant suffered paraplegia and is confined to a wheelchair.

¶10 At the time of his injury, Biggerstaff was insured by the Montana State Fund (State Fund). The State Fund accepted liability for the claimant's injury.

¶11 The claimant has been determined to be permanently totally disabled. Since that determination, the State Fund has been paying either permanent total disability benefits or total rehabilitation benefits. It is currently paying permanent total disability benefits.

¶12 The claimant has a long-standing interest in flying airplanes. Prior to his industrial injury, he had taken a couple of flying lessons.

¶13 In October 1996, the claimant began taking flying lessons, using a hand control for the plane in which he took lessons. (Lion Dep. at 18-19.) In December 1996, he traveled to California to take further flying lessons with Mike Smith (Smith), who owned a flight school in Big Bear, California. (*Id.*) The flight school – Aero Haven, Inc. (Aero Haven) – had planes with hand controls adapted for paraplegics. (*Id.* at 28.)

¶14 On January 14, 1997, the State Fund referred claimant to Crawford & Company for vocational services. Actual services were not provided until August of 1997, perhaps because the claimant was learning how to fly in California during the first part of 1997.

¶15 From the very beginning of the vocational process, the claimant voiced his desire to be a commercial pilot. He presented Jerry Davis (Davis), a vocational consultant for Crawford & Company, with a plan to undertake commercial flight training with Aero Haven. On August 27, 1997, Smith wrote Davis a letter stating that upon completion of commercial flight training, the claimant “will be offered a job at Aero Haven, as all of our students (that qualify for Commercial flying or teaching) are.” (Ex. 1 at 6.)

¶16 Davis was unable to identify a labor market in Montana for a commercial airplane pilot. As alternatives, he identified minimum wage, entry level positions for which claimant was qualified, as well as possible retraining to qualify him for jobs as an AutoCad drafter, motor vehicle dispatcher, or bookkeeper. The claimant, however, was not interested in the alternatives. With the approval of the State Fund, and based on the offer of employment with Aero Haven upon completion of commercial flight training, Davis developed a vocational rehabilitation plan calling for claimant to complete flight school at Aero Haven to obtain flight instructor and air carrier pilot certification so he could become employed by that firm. (Davis Dep. at 9, 11; Peterson Dep. at 16.) In effect, the claimant wrote his own rehabilitation plan and convinced Davis and the State Fund to go along with it.

¶17 The first vocational plan was dated November 21, 1997. (Ex. 1 at 11-15.) The plan called for the claimant to attend flight school at Aero Haven commencing January 12, 1998, and ending July 10, 1998, and for the claimant to obtain FAA certification as a flight instructor and air carrier pilot. The total cost of the plan was projected at \$20,450, and

included 500 hours of aircraft rental. (*Id.* at 12.) In addition, the plan called for payment of total rehabilitation benefits for a period of twenty-six weeks during the training period. (*Id.*)

¶18 The plan was justified based upon the offer of employment by Aero Haven. Paragraph 3 of the Plan Justification reads as follows:

3. Justification for proposes [sic] vocational rehabilitation retraining program.

The occupation of Certified Flight Instructor/Air Carrier Pilot was identified as a vocational goal as a result of vocational testing, labor market research, Mr. Lion's expressed interest, and a job offer guaranteed after completion of his training, provided by AeroHaven, Inc. This job offer was reported by Mr. Mike Smith, President of AeroHaven, Inc. on 8/27/97.

Prior to identification of this goal, a thorough exploration of retraining alternatives was undertaken with Mr. Lion's active involvement. Local on-the-job training possibilities were explored, and no training opportunity was identified which would meet Mr. Lion's restrictions and provide suitable post-training wages and employment opportunity. Vocational training goals and formal classroom training programs were also researched and reviewed. This process determined that Certified Flight Instructor/Air Carrier Pilot was the most appropriate vocational goal for Mr. Lion at this time. The most appropriate choice for a training site was AeroHaven, Inc., due to the employment offer for Mr. Lion after his completion of training at that site. As of 1997, 4,590 Pilots have been hired by major airlines and the need is expected to grow from 900 Pilots per month to 1200 Pilots per month, as reported by Air Incorporated Data Source.

(*Id.* at 13-14.)

¶19 On December 17, 1997, after the adoption of the first plan, Smith notified Davis that the plan overlooked the cost of training for a commercial and instrument rating which is required for certification as a flight instructor. (*Id.* at 17-18.) Davis prepared an amended plan dated January 6, 1998, which was signed by the claimant on January 19, 1998.¹ (*Id.* at 29-34.) The amended plan included the additional costs outlined by Smith. (*Id.* at 30-31.) With those additional costs, the plan called for payment of \$26,690 for the flight

¹The date next to the claimant's signature is 1-19-97, but the year is an obvious mistake.

training. (*Id.*) In addition, it increased the term of rehabilitation benefits to forty-seven weeks, thus extending the retraining period to December 18, 1998. (*Id.* at 30.)

¶20 Due to inclement weather, unavailability of aircraft, a delay in commencing actual training, and other factors, the claimant was unable to complete his flight training in forty-seven weeks. (*Id.* at 48-49, 54.) The time for completing the program was ultimately extended to February 28, 2000, or 104 weeks from its inception. (*Id.* at 50-52, 55-56, 63-64.)

¶21 Ultimately, the retraining program lasted for 109.14 weeks, during which the State Fund paid total rehabilitation benefits. (Ex. 5.) Upon completion of the program, the claimant was certified as a flight instructor and commercial air carrier pilot.

¶22 Due to financial difficulties of Aero Haven, employment with that company never materialized and the claimant has been unable to find a job as either a flight instructor or a commercial pilot. His employability is limited on account of his need for hand controls to operate aircraft and the limited number of aircraft that can be fitted with hand controls.

¶23 The claimant now proposes to extend his rehabilitation plan to allow him to obtain an additional 872 hours of flying time so that he can qualify to compete for seasonal contracts to fly fire surveillance and other missions for the State of Montana and the United States Forest Service. He proposes that he would supplement income from those contracts by giving flight lessons (Petitioner's Trial Brief at 5), even though he is already qualified as a certified flight instructor and has been unable to find any employment despite that certification.

¶24 To qualify for state and forest service contracts, claimant needs 1500 hours of flight time. (Schwaderer Dep. at 25; Beye Dep. at 17.) He presently has 628 hours of flying time, thus he needs the additional 872 hours of flying time to make him competitive for the contracts. To that end, the claimant has purchased a Cardinal 177 aircraft with hand controls. He proposes flying 600 hours in this plane at a cost of \$130 an hour and another 300 hours in a Skymaster aircraft to obtain a multi-engine rating. The total cost of the additional flying time, which he proposes be paid through rehabilitation benefits, is \$208,000, during which time he presumably would be receiving permanent total disability benefits.

¶25 The claimant failed to present persuasive evidence that he will have a reasonable prospect of obtaining regular employment even with 1500 hours of flight time. His opportunities in Montana are limited by the sort of aircraft he can fly due to his handicap. Many flight services have a variety of airplanes, some of which the claimant would be unable to fly. (Peterson Dep. at 25, 35-36.) The only prospective employer identified by claimant is Delbert Schwaderer (Schwaderer). He testified that he has four pilots, one of

whom has been with him for eleven years, another for six years, and two for three years each. (Schwaderer Dep. at 18, 28-29.) Schwaderer was asked if he would hire the claimant upon his completing 1500 hours of flying time. He testified that he would consider the claimant along with other applicants but would not guarantee him a job. (*Id.* at 30-31.) A self-employment venture involving contract work would provide no assurance that the claimant will in fact be able to secure contracts sufficient to provide him with regular work. Despite his belief that he would be able to secure contracts or work on a regular basis, he provided no vocational analysis to support his belief.

CONCLUSIONS OF LAW

¶26 This case is governed by the 1991 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶27 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶28 Rehabilitation benefits are governed by section 39-71-2001, MCA (1991), which provides in full:

39-71-2001. Rehabilitation benefits. (1) An injured worker is eligible for rehabilitation benefits if:

(a) the injury results in permanent partial disability or permanent total disability as defined in 39-71-116;

(b) a physician certifies that the injured worker is physically unable to work at the job the worker held at the time of the injury;

(c) a rehabilitation plan completed by a rehabilitation provider and designated by the insurer certifies that the injured worker has reasonable vocational goals and a reemployment and wage potential with rehabilitation. The plan must take into consideration the worker's age, education, training, work history, residual physical capacities, and vocational interests.

(d) a rehabilitation plan between the injured worker and the insurer is filed with the department. If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of social and rehabilitation services to use the funds.

(2) After filing the rehabilitation plan with the department, the injured worker is entitled to receive rehabilitation benefits at the injured worker's temporary total disability rate. The benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. Rehabilitation benefits must be paid during a reasonable period, not to exceed 10 weeks,

while the worker is waiting to begin the agreed-upon rehabilitation plan. Rehabilitation benefits must be paid while the worker is satisfactorily completing the agreed-upon rehabilitation plan.

(3) If the rehabilitation plan provides for job placement, a vocational rehabilitation provider shall assist the worker in obtaining other employment and the worker is entitled to weekly benefits for a period not to exceed 8 weeks at the worker's temporary total disability rate. If, after receiving benefits under this subsection, the worker decides to proceed with a rehabilitation plan, the weeks in which benefits were paid under this subsection may not be credited against the maximum of 104 weeks of rehabilitation benefits provided in this section.

(4) If there is a dispute as to whether an injured worker can return to the job the worker held at the time of injury, the insurer shall designate a rehabilitation provider to evaluate and determine whether the worker can return to the job held at the time of injury. If it is determined that he cannot, the worker is entitled to rehabilitation benefits and services as provided in subsection (2).

(5) A worker may not receive temporary total or biweekly permanent partial disability benefits and rehabilitation benefits during the same period of time.

(6) The rehabilitation provider, as authorized by the insurer, shall continue to work with and assist the injured worker until the rehabilitation plan is completed.

¶29 The claimant argues that he is entitled to now amend the plan to provide more flight hours because the flight hours allowed by the original and amended plans were insufficient to make him employable in Montana. (Petitioner's Trial Brief at 7.) The claimant's arguments are unavailing for numerous reasons.

¶30 First, the original and amended plans provided for a specific number of hours of flight training leading to the claimant's certification as a flight instructor and air carrier pilot. That plan was completed. As I noted in paragraph 16, in effect, the claimant wrote his own rehabilitation plan and convinced the rehabilitation provider and the State Fund to go along with it even though the rehabilitation provider was unable to identify Montana employment opportunities upon obtaining the proposed training. The claimant's assertion that the goal of the plan was unfulfilled is untenable: the goal never was employment in Montana.

¶31 Second, section 39-71-2001, MCA (1991), contemplates a single rehabilitation plan, not a series of plans. The claimant successfully completed the training and certifications which were specified in the original plan. He is not entitled to a second plan.

¶32 Third, the total duration of any plan or, if indeed the statute permitted multiple plans, is 104 weeks. Subsection (2) of section 39-71-2001, MCA (1991), requires that rehabilitation benefits “must be paid for the period specified in the rehabilitation plan,” then limits the total period of such benefits to 104 weeks. By necessary implication, the subsection imposes a 104-week limitation on the plan itself since rehabilitation benefits must be paid for the duration of the plan.

¶33 Fourth, subsection (1)(c) of section 39-71-2001, MCA (1991), requires that a rehabilitation provider “certifies that the injured worker has reasonable vocational goals and a reemployment and wage potential with rehabilitation.” No vocational provider has so certified.

¶34 Fifth, again pursuant to subsection (1)(c) of section 39-71-2001, MCA (1991), the plan must be reasonable and provide a reasonable prospect of reemployment and wages. The claimant has failed to submit persuasive evidence that his proposed plan for obtaining 1500 hours of flying time provides a reasonable prospect of his obtaining regular employment. He submitted no vocational testimony showing that he would have a reasonable prospect of securing regular employment as a pilot upon completion of the additional flying time.

¶35 While the claimant’s vocational interest must be taken into consideration in constructing any rehabilitation plan, § 39-71-2001(1)(c), MCA (1991), that interest is only one of many factors that must be considered. In this case, it appears that the claimant’s vocational interest has overwhelmed other considerations. Initially, at the claimant’s urging, the original plan was driven by his interest in flying and the promise of a single job rather than consideration of his employability in the open labor market. Other alternative retraining programs which might have provided regular employment were shoved aside. Now, at an extraordinary cost, he proposes to continue down the path he started, with no greater assurance that upon completion of another 872 hours of flying time he will have a reasonable prospect of regular employment and without any analysis of retraining for alternative jobs which could provide such prospect.

¶36 Ultimately, the claimant has simply failed to provide substantial, persuasive evidence supporting his request for additional rehabilitation benefits. Accordingly, his request is denied.

¶37 As to his request for attorney fees and a penalty, the State Fund’s refusal of his request was reasonable. The State Fund tendered many of the legal arguments I have found persuasive in denying the request. Even if those arguments were ultimately to be rejected on appeal, they are reasonable arguments. Since an award of attorney fees and a penalty both require a finding of unreasonableness, §§ 39-71-612 and -2907, MCA (1991), the claimant is entitled to neither.

¶38 The claimant's requests for auxiliary benefits and reimbursement for some expenses incurred in the original retraining plan were resolved by agreement at trial and are therefore not addressed here.

JUDGMENT

¶39 The claimant is not entitled to further rehabilitation benefits, attorney fees, a penalty, or costs. His petition is **dismissed with prejudice**.

¶40 This JUDGMENT is certified as final for purposes of appeal.

¶41 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 2nd day of March, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Thomas E. Martello
Submitted: October 28, 2004