IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 21

WCC No. 2006-1599

NICHOLAS J. MARKOVICH

Petitioner

vs.

LIBERTY NORTHWEST

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: When Petitioner neared the completion of an 84-week vocational rehabilitation plan which allowed him to get a master's degree, he asked Respondent to pay for additional schooling so he could complete a thesis which would make him eligible for a Ph.D. program. Respondent refused. Petitioner petitioned this Court for additional vocational rehabilitation benefits, additional benefits under § 39-71-703, MCA, additional auxiliary benefits, and attorney fees and a penalty for Respondent's actions from the day of Petitioner's injury until the present.

Held: Petitioner has not suffered a wage loss that would entitle him to PPD benefits under § 39-71-703, MCA, because he is now qualified to earn more than he earned at his time of injury employment. Petitioner is not entitled to an additional vocational rehabilitation plan, nor is he entitled to auxiliary benefits for travel in excess of the $4,000 which Respondent has paid. Petitioner is not entitled to attorney fees or a penalty.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-703.** Petitioner is not entitled to benefits under § 39-71-703, MCA, where although he is currently making less money per hour than he did in his time-of-injury position, extensive research and job analyses prepared by a vocational rehabilitation counselor demonstrate that Petitioner is qualified to earn a higher wage.

Wages: Wage Loss. Petitioner has not suffered an "actual wage loss" where he alleges he has been unable to find a position which pays what a vocational rehabilitation counselor determined he is qualified to earn and where he has conducted his search by reading classified ads in the local newspaper and posting his résumé on the Internet, which his counselor asserts is not an adequate method for searching for a professional-level job. Furthermore, Petitioner has demonstrated a passion and desire to pursue a career in teaching which he has pursued much more aggressively than he has pursued job opportunities for which he is qualified in the higher-paying public relations field.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. Where job analyses clearly demonstrate that Petitioner is qualified to earn more than he was earning in his time-of-injury employment, even though Petitioner is actually earning less due to his taking a job in a lower-paying field, Petitioner has not suffered a "wage loss" as defined by § 39-71-116(1), MCA.

Benefits: Rehabilitation Benefits: Proof of Wage Loss. Where job analyses clearly demonstrate that Petitioner is qualified to earn more than he was earning in his time-of-injury employment, even though Petitioner is actually earning less due to his taking a job in a lower-paying field, Petitioner has not suffered a "wage loss" as defined by § 39-71-116(1), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-1025. Where Respondent paid for Petitioner's travel expenses and other expenses up to the $4,000 statutory limit, Petitioner is not entitled to receive additional travel expenses from Respondent.

Benefits: Rehabilitation Benefits: Travel. Where Petitioner's travel expenses to commute to school were paid as auxiliary benefits, and where Respondent paid for Petitioner's travel expenses and other expenses up to the $4,000 statutory limit set forth in § 39-71-1025, MCA, Petitioner is not entitled to receive additional travel expenses from Respondent.

Benefits: Auxiliary. As part of a vocational rehabilitation plan, Petitioner understood that he would receive auxiliary benefits in an amount not to exceed the $4,000 limit set forth in § 39-71-1025, MCA, and that these benefits would be used to purchase a computer and pay for reasonable relocation expenses. When Petitioner chose not to relocate, Respondent paid for the computer and Petitioner's travel expenses and the $4,000

statutory limit was reached. Petitioner is not entitled to receive additional travel expenses from Respondent.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-1006. On its face, § 39-71-1006, MCA, provides for *up to* 104 weeks of biweekly rehabilitation benefits. It does not create an entitlement to a full 104 weeks of benefits.

Benefits: Rehabilitation Benefits: Rehabilitation Plans. Petitioner is not entitled to further rehabilitation benefits beyond those which were enumerated in his signed vocational rehabilitation plan where the Court found that: Petitioner and Respondent developed a plan which they both found agreeable; Petitioner signed the plan and completed all the tasks to which he had agreed; and Respondent met the terms to which it had agreed.

Attorney Fees: Request For. Attorney fees and a penalty, when not addressed in a previous decision and not issues essential to that decision, may be brought in a later action. *Ware v. State Compensation Ins. Fund*, 1997 MTWCC 26. Therefore, although Petitioner ultimately failed to prove unreasonableness on the part of the insurer, the Court entertained Petitioner's argument that although acting pro sé in the present action, he is entitled to attorney fees for work previously done on his case by retained counsel.

Attorney Fees: Cases Denied. Attorney fees and a penalty, when not addressed in a previous decision and not issues essential to that decision, may be brought in a later action. *Ware v. State Compensation Ins. Fund*, 1997 MTWCC 26. Therefore, although Petitioner ultimately failed to prove unreasonableness on the part of the insurer, the Court entertained Petitioner's argument that although acting pro sé in the present action, he is entitled to attorney fees for work previously done on his case by retained counsel.

¶ 1 The trial in this matter was held on Monday, October 16, 2006, in Billings, Montana. Petitioner Nicholas J. Markovich was present and represented himself. Respondent was represented by Michael P. Heringer.

¶ 2 Exhibits: Exhibits 1 through 59 and 68 through 146 were admitted without objection. Exhibits 60 through 65 were objected to by Respondent and were not admitted. Respondent's objections to Exhibits 66 and 67 were withdrawn and the exhibits were admitted.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. Michael Schabacker were submitted to the Court and can be considered part of the record. Petitioner and Travis Stortz were sworn and testified at trial.

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

¶ 4a Whether Petitioner is entitled to benefits under § 39-71-703, MCA.

¶ 4b Whether Petitioner is entitled to travel expenses above and beyond the $4,000.00 in auxiliary benefits paid by the insurer.

¶ 4c Whether Petitioner is entitled to further rehabilitation benefits, payment of further schooling, including insurance and travel benefits beyond the 84 weeks and the benefits previously paid by the insurer under the vocational rehabilitation plan.

¶ 4d Whether Petitioner is entitled to a 20% penalty and attorney's fees and costs.[1]

FINDINGS OF FACT

¶ 5 Petitioner suffered a compensable injury on or about September 22, 1999, while in the course of his employment with Cenex Harvest States Cooperative (Cenex) in Laurel, Yellowstone County, Montana.[2]

¶ 6 Respondent accepted liability for Petitioner's neck injury but denied liability for his low-back condition. This Court found Cenex's insurer liable for compensation and medical benefits for the low-back condition after a trial on that issue.[3]

¶ 7 Petitioner completed an undergraduate degree in interpersonal communications in 1987 or 1988.[4] He did not find employment in that field and went to work at Cenex in 1988.[5] He worked for Cenex until the time of his industrial injury.[6]

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[1] Pretrial Order at 2.

[2] Pretrial Order, Statement of Uncontested Facts at 1.

[3] *Markovich v. Helmsman Management Services, Inc.*, 2003 MTWCC 4.

[4] Petitioner's Dep. 12:15 - 13:6.

[5] Petitioner's Dep. 13:13-21.

[6] Petitioner's Dep. 14:10-12.

¶ 8 Petitioner's injury precluded him from returning to his time-of-injury employment.[7] At the time of his industrial injury, Petitioner was earning $12.50 per hour.[8]

¶ 9 Dr. John I. Moseley placed Petitioner at maximum medical improvement (MMI) on November 10, 2003.[9] Dr. Moseley referred Petitioner to Dr. Michael Schabacker, who gave Petitioner a combined impairment rating of 24%.[10]

¶ 10 Petitioner testified at trial. I find Petitioner to be a credible witness.

¶ 11 Vocational Consultant Travis Stortz (Stortz) testified at trial. I find Stortz to be a credible witness.

¶ 12 Respondent hired Stortz to provide vocational rehabilitation services to Petitioner and, specifically, to complete a vocational assessment to determine if Petitioner was employable and whether he would have a wage loss or qualify for vocational rehabilitation services.[11] On February 4, 2004, Stortz completed an Employability and Wage Loss Assessment of Petitioner.[12] Stortz noted that Petitioner's treating physician had precluded Petitioner from returning to work in his time-of-injury position at Cenex. Stortz also noted that Dr. Schabacker had reviewed job analyses and released Petitioner to return to work in several jobs. However, Stortz acknowledged that Petitioner would incur a significant wage loss if he were to return to work in the approved positions.[13]

¶ 13 Stortz learned that Petitioner wanted to pursue formal vocational retraining and obtain a master's degree in communications or public relations, and that Petitioner believed that with a master's degree, he would be able to secure employment earning wages greater than his time-of-injury position. In light of the significant wage loss Petitioner would likely incur in the approved job analyses positions, Stortz recommended a rehabilitation plan with formal vocational retraining.[14]

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[7] Ex. 91 at 2.

[8] *Id*.

[9] Ex. 85.

[10] Ex. 28 of Schabacker Dep.

[11] Trial Test.

[12] Ex. 91.

[13] *Id*.

[14] *Id*.

¶ 14 Stortz completed a labor market analysis on April 5, 2004, the purpose of which was to address Petitioner's employability "by reviewing his time of injury labor market as well as his work history, education/training, transferable vocational skills, stated interests and abilities, and light to medium duty lifting restriction."[15] The job analyses developed by Stortz and approved by Dr. Schabacker included Community Relations Manager, with an entry wage of $16.00 per hour, and Public Relations/Marketing Director, with an entry wage of $18.21 per hour.[16] In his labor market analysis, Stortz concluded that both of these jobs required Petitioner to obtain additional education, which a master's degree in public relations would fulfill.[17] Stortz concluded that the approved job analyses, which would not require additional education or experience, would cause Petitioner to suffer a wage loss in excess of $2.00 per hour.[18]

¶ 15 Stortz noted that although Petitioner had obtained a bachelor's degree in communications, he had never obtained work in that field and given the passage of time, his degree was of limited value without further education.[19] Stortz investigated whether a master's degree in public relations would benefit Petitioner's employability. Based upon graduation statistics he obtained from Montana State University Billings (MSU-B), Stortz concluded that Petitioner would not incur a wage loss if he completed a master's degree in public relations through that program.[20]

¶ 16 Stortz recommended that Petitioner obtain a master's degree in public relations from MSU-B. Petitioner agreed.[21] Petitioner and Stortz worked well together as they developed a plan for Petitioner to pursue a master's degree.[22] They planned for Petitioner to start classes in the summer of 2004 with completion of the program by December 2005.[23]

¶ 17 On May 24, 2004, Petitioner's counsel sent a proposed curriculum to Stortz which had been developed by a member of the MSU-B faculty. It provided for 51 credits and did

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[15] Ex. 94 at 1.

[16] Ex. 94 at 3.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] Ex. 94 at 4.

[21] Petitioner's Dep. 46:1-4.

[22] Trial Test.

[23] Petitioner's Dep. 50:16-21.

not include a thesis.[24] Stortz created an updated Vocational Rehabilitation Plan on May 25, 2004, which Petitioner signed on June 2, 2004.[25] At the time he entered into the vocational rehabilitation plan, Petitioner was represented by counsel.[26] Petitioner's counsel was involved in developing the plan.[27]

¶ 18 Petitioner understood that the plan would run from May 10, 2004, until December 16, 2005, and that the plan was for him to complete the necessary course work at MSU-B to obtain a master's degree in public relations.[28] Petitioner understood that he would be provided up to 84 weeks of rehabilitation benefits at his temporary total disability (TTD) rate providing that he was compliant with the plan.[29] Petitioner further understood that he would receive auxiliary benefits in an amount not to exceed $4,000 and that the auxiliary benefits could be used to purchase a computer and to pay for reasonable relocation expenses to enable Petitioner to move from Laurel to Billings.[30] Petitioner understood that the purpose of the plan was to give him the opportunity to earn wages equal to or greater than the wages he earned at his time-of-injury employment.[31]

¶ 19 Petitioner agreed to attend his classes, to be responsible for registering for classes and completing all requirements necessary for attainment of his master's degree, to maintain a 2.0 grade point average, and to notify Stortz or the claims adjuster of any problems or barriers to completing the plan as scheduled.[32] Petitioner further agreed to be responsible for his own job placement following the training and to begin actively seeking employment during the last two months of training.[33]

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[24] Ex. 99.

[25] Ex. 101.

[26] Petitioner's Dep. 59:1-5.

[27] *See* Exhibits 95-97, 99, 101.

[28] Petitioner's Dep. 59:8-15.

[29] Petitioner's Dep. 59:16 - 60:1.

[30] Petitioner's Dep. 60:2-15.

[31] Petitioner's Dep. 61:17-23.

[32] Ex. 101 at 4.

[33] Ex. 101 at 5.

¶ 20 By the end of December 2005, Petitioner had earned 36 credits with a grade point average of 3.94.[34] Petitioner has completed all the credits he needs for his master's degree, but he has not technically graduated and received his degree because he has registered for a thesis.[35] Petitioner does not need a thesis to complete his master's degree, but he does need a thesis to get accepted into a Ph.D. program.[36] Petitioner's desire to obtain a Ph.D. is at the core of the current dispute.

¶ 21 When Petitioner began to investigate employment opportunities, he explored his interest in teaching. He learned that to become a full professor, he would need to complete a Ph.D.; and in order to get into a Ph.D. program, he would have to complete a thesis.[37]

¶ 22 At the time Petitioner and Stortz investigated the possibility of Petitioner attending MSU-B for a master's degree, Petitioner did not discuss with Stortz the prospect of needing a thesis or the possibility of continuing on for a Ph.D.[38] In fact, the curriculum ***which Petitioner proposed*** did not include a thesis component.[39] Petitioner had almost completed his master's program when he began considering pursuing a Ph.D.[40] He discussed the possibility with Stortz in October or November of 2005, during the final semester of his master's program.[41] Petitioner admitted that at the time he and Stortz came up with his educational plan, he had not considered obtaining a Ph.D.[42] While Petitioner knew that completing a thesis was one option as part of his master's program, he did not understand that his failure to complete a thesis would affect whether he could continue on for a Ph.D.[43]

¶ 23 Petitioner believes that a career in teaching is his best employment option. He believes that it would be less physically demanding than a job in public relations, and it

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[34] Petitioner's Dep. 90:6-12.

[35] Petitioner's Dep. 8:21-25.

[36] Petitioner's Dep. 9:4-12.

[37] Trial Test.; Petitioner's dep. 9:9 - 11:25.

[38] Petitioner's Dep. 42:23 - 43:4.

[39] Ex. 99.

[40] Petitioner's Dep. 81:23 - 82:1.

[41] Petitioner's Dep. 53:21 - 54:3.

[42] Petitioner's Dep. 53:13-16.

[43] Petitioner's Dep. 53:4-7.

would allow him to work for more years prior to retirement. During his last semester at MSU-B, Petitioner taught one class. The following semester, he taught two classes. At the time of trial, Petitioner was teaching four classes. He believes he now has enough experience to qualify for an adjunct position.[44]

¶ 24 Petitioner currently earns $10.66 per hour. Petitioner asserts that his lack of practical experience in the public relations field precludes him from finding a job which pays in the $16.00 per-hour-and-up range which Stortz claims is his earning capacity with a master's degree in public relations. Petitioner testified that he regularly checks the classified ads in the Billings newspaper and has posted his résumé on the Internet, and the only jobs he has found are ones which pay approximately the same as he now earns.[45]

¶ 25 Stortz responds that the entire rationale for Petitioner to receive vocational rehabilitation benefits was so that Petitioner would not have a post-injury wage loss. Stortz conducted research into the labor market for a person with Petitioner's education and experience, including obtaining statistics from MSU-B and the Department of Labor and Industry, and calling local businesses which have job positions in the field.[46] Stortz asked the employers whether they would be willing to hire an applicant with no work experience, but with a 1987 bachelor's degree in communications and a 2005 master's degree in public relations. Employers indicated a willingness to hire an applicant with these qualifications based on the applicant's education, even with no previous work experience in the field. The employers also provided Stortz with entry-level wage information for a person with the requisite education but no prior experience, which ranged from $13.00 to $25.25 per hour.[47]

¶ 26 Stortz further investigated the information provided by MSU-B to ensure that the data was based upon their actual graduate placement.[48] Stortz conducted extensive research and put a great deal of time and effort into the vocational rehabilitation services he provided for Petitioner. Stortz testified that Petitioner has not conducted an appropriate job search for the type of professional public relations job for which he is now qualified.[49]

¶ 27 At the time Petitioner's rehabilitation plan was developed, 10 of the 11 graduates of MSU-B's program that year had secured work with an entry level wage of an average of

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[44] Trial Test.

[45] *Id*.

[46] *Id*.

[47] Ex. 146 at 4-5.

[48] Trial Test.

[49] *Id*.

$15.75 per hour.[50] In a more recent survey of newer graduates, 11 of 14 graduates responded to MSU-B's survey and 90% of those had obtained employment with average entry level wages of approximately $25.35 per hour.[51]

¶ 28 Also at issue is whether Petitioner is entitled to reimbursement of additional travel expenses beyond the $4,000 in auxiliary benefits which Respondent has already paid. At the time Petitioner and Stortz developed the vocational rehabilitation plan, Petitioner planned to purchase a computer and relocate to Billings.[52] On July 7, 2004, Petitioner's counsel submitted to Respondent a letter and product details regarding a computer and computer-related items. Respondent agreed to pay Petitioner $1,192 from his auxiliary benefits towards this purchase.[53] On September 20, 2004, Petitioner wrote a letter to Respondent explaining that he could not find an affordable place to live in Billings and requested Respondent reimburse him for his mileage to and from school out of the available auxiliary benefits.[54] Respondent responded with a letter on September 28, 2004, which stated that Petitioner would need to submit, on a monthly basis, a breakdown listing each day and the amount traveled. Respondent further stated that Petitioner's entitlement to auxiliary benefits would be available up to a maximum of $4,000.[55]

¶ 29 From that time forward, Petitioner submitted monthly mileage claims which Respondent paid until Petitioner's mileage submission on May 8, 2005, reached the $4,000 limit.[56] On July 22, 2005, a case manager for Respondent wrote to Petitioner's counsel and explained that Petitioner had reached the $4,000 limit and that no additional funds would be made available. Respondent then refused to pay additional mileage reimbursement.[57]

¶ 30 Petitioner argues that it is unreasonable for Respondent to refuse to pay further auxiliary benefits when Petitioner has not completed his schooling. Petitioner argues that since Respondent paid his mileage for the first two semesters, it is unfair for Respondent

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[50] Ex. 140 at 2.

[51] Ex. 146 at 4.

[52] Trial Test.

[53] Ex. 106.

[54] Ex. 115.

[55] Ex. 117.

[56] Ex. 125.

[57] Ex. 131.

to refuse to pay for further semesters since Petitioner is required to travel to and from school in order to complete the vocational rehabilitation plan.[58]

¶ 31 Petitioner further seeks his costs, attorney fees, and a penalty. Although Petitioner acted pro sé in the present action, Petitioner argues that his plea for attorney fees and a penalty are not only for Respondent's behavior in the current controversy, but are for Respondent's behavior since the time of Petitioner's injury on September 22, 1999, until the present day.[59] Petitioner points out that in his previous petition, he did not ask for attorney fees and a penalty.[60] Petitioner claims that, since at the time his claim was not entirely resolved, he anticipated ongoing interactions with Respondent, and rather than file multiple claims for attorney fees and a penalty for what he categorizes as ongoing unreasonableness on the part of Respondent, he believed it made sense to wait until the end of his claim and ask for attorney fees and a penalty at that time.[61]

¶ 32 Respondent counters that Petitioner's argument for attorney fees and a penalty are outside the scope of the narrow issues before the Court under the present petition, and that many of the incidents which Petitioner alleges constitute unreasonable behavior on the part of Respondent occurred before the first decision was issued in this case, and which stem from occurrences unrelated to the issues in the present petition. Respondent argues that these issues were not presented for resolution in the Pretrial Order and are therefore outside the scope of the present matter.[62] At trial, I noted that part of Petitioner's contentions may also be barred under *res judicata*.

¶ 33 Pertinent to this issue, Petitioner's contentions in the Pretrial Order include:

> 9. The Insurer has systematically denied all reasonable claims requested by Petitioner since the day of the accident regardless of medical backing by Petitioner's doctors and the backing of their own IME.
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> 10. Insurer's pattern of denial and unreasonable behavior continued for the duration of this claim including demanding Petitioner "take or

[58] Trial Test.

[59] *Id*.

[60] *Markovich*, 2003 MTWCC 4, ¶ 4.

[61] Trial Test.

[62] *Id*

leave" an inferior rehab plan or face suspension of benefits if not total loss of such benefits.[63]

¶ 34 In the Pretrial Order, Petitioner, acting pro sé, raised the issue of Respondent's reasonableness in the handling of his claim, from that claim's inception. "The pretrial order should be liberally construed to permit any issues at trial that are 'embraced within its language.'"[64] Under these circumstances, I find that Petitioner's contention that he was seeking attorney fees and a penalty for Respondent's course of conduct throughout the entirety of his claim as well as in regard to the other issues in the present action, warrant consideration. Whether Petitioner is entitled to attorney fees and a penalty, however, are legal conclusions which are set forth below.

CONCLUSIONS OF LAW

¶ 35 This case is governed by the 1999 version of the Montana Workers' Compensation Act as that was the law in effect at the time of Petitioner's injury.[65]

¶ 36 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[66]

Issue 1: Whether Petitioner is entitled to benefits pursuant to § 39-71-703, MCA.

¶ 37 An injured worker who suffers a permanent partial disability (PPD) can receive PPD benefits if the worker has an actual wage loss as a result of the injury and has a permanent impairment rating. A worker who receives an impairment rating but has no wage loss is entitled to an impairment award only.[67]

¶ 38 It is undisputed that Petitioner has a permanent impairment rating of 24%. However, Petitioner further must demonstrate actual wage loss in order to receive PPD benefits under § 39-71-703, MCA. "Actual wage loss" is defined under the Workers' Compensation Act to mean that "the wages that a worker earns or is qualified to earn after the worker

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[63] Pretrial Order at 3, ¶¶ 9-10.

[64] *Ingbretson v. Louisiana-Pacific Corp.*, 272 Mont. 294, 298, 900 P.2d 912, 915 (1995) (citation omitted).

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

[66] *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).

[67] § 39-71-703, MCA.

reaches maximum healing are less than the actual wages the worker received at the time of the injury."[68] Petitioner argues that he is making less money per hour now than he did in his time-of-injury job, and he has therefore suffered an actual wage loss. Respondent counters that Petitioner may be making less money but his master's degree has qualified him to earn more than he is earning. Therefore, Respondent contends, Petitioner does not meet the statutory definition of "actual wage loss."

¶ 39 What a claimant is "qualified to earn" is determined by actual job opportunities, not a hypothetical highest wage, or even average wage, unless the claimant is competitive for the higher or average wage positions.[69] Nevertheless, a claimant's decision to take a lower-paying job does not mean that the claimant has met the statutory definition of "actual wage loss."[70]

¶ 40 In *Caplette v. Reliance National Indemnity Co.*, after an industrial injury, the claimant (Caplette) was restricted to medium-duty work and received a 10% whole-person impairment.[71] A vocational rehabilitation counselor concluded that Caplette could return to work as a heavy equipment operator and two jobs with Caplette's time-of-injury employer were identified.[72] The jobs paid $22.12 and $20.08 per hour, respectively, while Caplette's time-of-injury wage was $21.51 per hour. Caplette opted to take the lower-paying position.[73] This Court found that Caplette did not suffer a wage loss as a result of his injury, as required by § 39-71-703(2), MCA (1995),[74] because Caplette's lesser wage was due to his own choice to take the lower-paying job.[75]

¶ 41 In the situation at hand, Petitioner alleges that he has been unable to find a public relations position which pays wages in the range which Stortz's research shows Petitioner should be able to earn. Petitioner further testified that it is his belief that a public relations position would involve more physical demand than he is able to meet for a long-term career. Petitioner testified that he has searched for a public relations position by reading the classified ads in the local newspaper and posting his résumé on the Internet. Stortz

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[68] § 39-71-116(1), MCA.

[69] *Masters v. Liberty Northwest Ins. Corp.*, 2000 MTWCC 1, ¶ 38.

[70] *Caplette v. Reliance Nat'l Indem. Co.*, 1998 MTWCC 69, ¶ 33.

[71] *Caplette*, ¶¶ 14-15.

[72] *Caplette*, ¶¶ 17-18.

[73] *Caplette*, ¶¶ 20-21.

[74] *Caplette*, ¶ 24.

[75] *Caplette*, ¶ 33.

maintains that this is not an adequate method of conducting a job search for a professional-level job such as the public relations positions for which Petitioner should be competitive. From Petitioner's testimony, it is also clear to me that Petitioner wants to pursue a career in teaching, that Petitioner has a true passion and desire to teach, and that the evidence demonstrates that Petitioner is well-suited to his chosen career path. Indeed, it appears that Petitioner pursued the teaching opportunities much more aggressively and determinedly than he has pursued potential job opportunities in the public relations field. In light of these facts, I conclude that Petitioner has not met his burden of proving, pursuant to § 39-71-703, MCA, that he has a "wage loss," as defined by § 39-71-116(1), MCA, because the job analyses clearly demonstrate that Petitioner is qualified to earn more than he was earning in his time-of-injury employment.

Issue 2: Whether Petitioner is entitled to travel expenses above and beyond the $4,000 in auxiliary benefits paid by the insurer.

¶ 42 As discussed above, Petitioner asserts that Respondent should reimburse him for mileage expenditures incurred while traveling to and from school in excess of the $4,000 Respondent has already paid in auxiliary benefits. I disagree. In *Thompson v. Liberty Northwest Ins. Corp.*, a claimant (Thompson) who had previously completed over two years of college courses returned to college and finished a bachelor's degree in accordance with an agreed-upon vocational rehabilitation plan.[76] Thompson received $4,000 in auxiliary benefits from the insurer as reimbursement for his mileage driving to and from school. Among other claims, Thompson asked this Court to award him an additional $1,766 for mileage which the insurer refused to pay after he reached the $4,000 limit for auxiliary benefits.[77] This Court reasoned that § 39-71-1006, MCA, which generally provides for rehabilitation benefits, specifically excludes travel benefits which are encompassed under § 39-71-1025, MCA. Since Thompson was paid the full $4,000 allowed under § 39-71-1025, MCA, the Court concluded he was not entitled to additional travel expenses from the insurer.[78]

¶ 43 Section 39-71-1025, MCA, provides, in pertinent part:

> In addition to benefits otherwise provided in this chapter, separate benefits not exceeding a total of $4,000 may be paid by the insurer for reasonable travel and relocation expenses used to:
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> . . . .
>
> (3) implement a rehabilitation plan . . . .

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[76] *Thompson v. Liberty Northwest Ins. Corp.,* 2002 MTWCC 34, ¶ 17.

[77] *Thompson*, ¶ 4.

[78] *Thompson*, ¶ 38.

¶ 44 As enumerated in the Findings above, Respondent paid for Petitioner's travel expenses for his commute to and from his classes up until the $4,000 limit was reached. Consistent with this Court's decision in *Thompson*, I conclude that Petitioner was paid the full $4,000 allowed under § 39-71-1025, MCA, and is not entitled to receive additional travel expenses from Respondent.

Issue 3: Whether Petitioner is entitled to further rehabilitation benefits, payment for further schooling, including insurance, travel benefits beyond the 84 weeks, and the benefits previously paid by the insurer under the vocational rehabilitation plan.

¶ 45 Under § 39-71-1006(2), MCA, a disabled worker is entitled to receive biweekly rehabilitation benefits at the worker's TTD rate. The statute provides that the benefits must be paid for the period specified in the rehabilitation plan, not to exceed 104 weeks. Petitioner argues that his rehabilitation plan was for 84 weeks, thus leaving an additional 20 weeks available under § 39-71-1006(2), MCA, and Respondent should therefore pay for Petitioner to complete a thesis as part of his master's degree.

¶ 46 On its face, § 39-71-1006(2), MCA, provides for *up to* 104 weeks of biweekly rehabilitation benefits. It does not create an entitlement to a full 104 weeks of benefits as Petitioner argues here.

¶ 47 In *Lion v. Montana State Fund*, this Court held that, under the applicable statutes, an injured worker is entitled to a single rehabilitation plan, not a series of plans.[79] Although *Lion* involved the 1991 version of the Workers' Compensation Act, the relevant portions of former § 39-71-2001, MCA, now codified as § 39-71-1006, MCA, contain identical language with respect to rehabilitation plans.

¶ 48 In the case before this Court, Petitioner and Respondent developed a vocational rehabilitation plan which they both found agreeable. Petitioner signed the plan and completed all the tasks to which he had agreed. Respondent met the terms to which it had agreed. As the plan neared its completion, Petitioner chose a different career path than he had originally contemplated, and also decided to pursue additional education beyond the master's degree which the plan covered. Petitioner certainly has the right to do so. However, Respondent is under no obligation to pay for it. Therefore, I hold that Petitioner is not entitled to further rehabilitation benefits beyond those which were enumerated in his signed vocational rehabilitation plan.

[79] *Lion v. Montana State Fund*, 2005 MTWCC 11, ¶ 31.

Issue 4: Whether Petitioner is entitled to a 20% penalty and attorney fees and costs.

¶ 49 Petitioner has not prevailed in the present action and therefore is not entitled to his costs. However, Petitioner argues that he is entitled to attorney fees and a penalty not only for Respondent's actions regarding the issues in the present litigation, but for all Respondent's actions since the day Petitioner was injured.

¶ 50 It is well-established that there is no basis on which to award attorney fees to a pro sé party for that party's work on his own behalf.[80] However, in this case, Petitioner was represented by counsel throughout most of his claim, including through the development and completion of the vocational rehabilitation plan which is the subject of the current petition. Petitioner does not ask for attorney fees for the work Petitioner did on his own behalf. Rather, he requests attorney fees for the work done by counsel on Petitioner's case.

¶ 51 Petitioner points out that in his previous petition before this Court, the sole issue was whether his low-back injury was causally related to his industrial injury. Petitioner did not ask for attorney fees and a penalty at that time. Petitioner testified that he believes Respondent treated him in an unreasonable manner from the very beginning of his claim, and that he decided rather than come to this Court to ask for attorney fees and a penalty at every step of the way, he would come to the Court once at the conclusion and set forth his claim for attorney fees and a penalty at that time.

¶ 52 Respondent argues that Petitioner cannot bring forth an argument for attorney fees and a penalty because these issues were outside the scope of the Pretrial Order. As I noted above at ¶ 34, however, I find that the contentions made by Petitioner in the Pretrial Order warrant consideration of this issue. At trial, I speculated that Petitioner's prayer for attorney fees and a penalty for Respondent's past actions might be barred by *res judicata*. However, this Court previously held that attorney fees and a penalty, when not addressed in a previous decision and not issues essential to that decision, may be brought in a later action. This Court noted that its statutes and rules contain no requirement that requests for attorney fees and penalties be joined with substantive claims for benefits; and therefore, a claim for attorney fees and a penalty as a stand-alone action would not be barred by *res judicata*.[81]

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[80] *See, e.g., Watts and Associates, Inc. v. Parsons*, 1999 MT 56, ¶ 30, 293 Mont. 464, 976 P.2d 984.

[81] *Ware v. State Compensation Ins. Fund*, 1997 MTWCC 26. See also *Riley v. W.R. Grace & Co.*, 1999 MTWCC 19, ¶ 13 (where claimant raised issue of attorney fees but did not argue it and this Court overlooked the issue, no determination was made and therefore the issue was not barred by *res judicata*).

¶ 53 This Court is limited by statute in the instances in which it may award attorney fees to a few specific scenarios. Under § 39-71-612, MCA, attorney fees may be assessed against an insurer if an insurer offers payment of compensation, the case is brought before the Court for adjudication, and the Court's award exceeds the amount offered. This statute clearly does not apply to the case at hand, as no offer of payment has been made and then adjudicated at a greater amount. The Court may also award attorney fees pursuant to § 39-71-611, MCA, which states in pertinent part:

> (1) The insurer shall pay reasonable costs and attorney fees . . . if:
>
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
>
> (b) the claim is later adjudged compensable by the workers' compensation court; and
>
> (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

¶ 54 Only one claim for compensation has been denied by the insurer and later adjudged compensable by this Court, and that is Petitioner's low-back condition which this Court determined was causally related to Petitioner's industrial injury.[82] However, to receive attorney fees, Petitioner must further prove that the insurer's actions in denying liability were unreasonable. Petitioner has not done so in this case.

¶ 55 The trial on the issue of Petitioner's low-back condition took place on October 17, 2002. The most recent action was tried on October 16, 2006, almost four years to the day. At trial, Petitioner testified about the medical treatment he received subsequent to his industrial injury and further placed his extensive medical records into evidence. Although Petitioner's perception was that Respondent caused unreasonable delay in Petitioner's medical treatment, the Court has nothing in the record before it to prove that Petitioner's medical treatment was delayed by any unreasonable behavior on the part of Respondent. Without a finding of unreasonableness on the part of Respondent, Petitioner has no claim for attorney fees. His claim for fees is therefore denied.

¶ 56 Petitioner further asks for a penalty pursuant to § 39-71-2907, MCA. However, this Court may award a penalty only when it finds that an insurer unreasonably delayed or refused to pay benefits. For the reasons already set forth, I do not conclude that Petitioner met his burden of proving that Respondent acted unreasonably in regards to his claim. Therefore, Petitioner is not entitled to a penalty.

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[82] *Markovich*, 2003 MTWCC 4, ¶ 32.

JUDGMENT

¶ 57 Petitioner is not entitled to additional benefits pursuant to § 39-71-703, MCA.

¶ 58 Petitioner is not entitled to travel expenses above and beyond the $4,000 in auxiliary benefits already paid.

¶ 59 Petitioner is not entitled to further rehabilitation benefits, payment of further schooling, including insurance, travel benefits beyond the 84 weeks, and the benefits previously paid by the insurer under the vocational rehabilitation plan.

¶ 60 Petitioner is not entitled to his costs.

¶ 61 Petitioner is not entitled to attorney fees pursuant to §§ 39-71-611, -612, MCA.

¶ 62 Petitioner is not entitled to a penalty pursuant to § 39-71-2907, MCA.

¶ 63 Petitioner's Petition for Hearing is **DISMISSED WITH PREJUDICE**.

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

¶ 65 Any party to this dispute may have twenty days in which to request reconsideration from these FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

DATED in Helena, Montana, this 14th day of June, 2007.

(SEAL)

James Jeremiah Shea
JUDGE

c: Nicholas J. Markovich
Michael P. Heringer
Submitted: October 16, 2006