

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 31

WCC No. 2010-2453

KERRY POINDEXTER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner was off work after an industrial accident. Respondent informed Petitioner that his treating physician was releasing him to return to work with restrictions and that his employer had a modified job available. Petitioner alleges that he called his employer and was informed that no work was available. Petitioner's employer claims that he instructed Petitioner to report to work, but Petitioner did not report for work at the agreed-upon time. Petitioner alleges that Respondent incorrectly and unreasonably terminated his TTD benefits.

Held: Petitioner has not proven his entitlement to TTD benefits for the time period of September 23, 2009, through February 21, 2010. Respondent did not unreasonably terminate Petitioner's TTD benefits. Petitioner is not entitled to his costs, attorney fees, or a penalty.

Topics:

Proof: Burden of Proof: Preponderance. Petitioner did not meet his burden of proof where his case hinged on the content of an unwitnessed conversation with his employer in which Petitioner alleged his employer did not make modified work available to him. Petitioner alleged he made a follow-up call to his employer, but could not prove the call occurred; other witnesses testified that the employer always made modified work available; and Petitioner had other reasons for not accepting modified employment. The only evidence supporting Petitioner's version of events

is his word, and that is insufficient to overcome the evidence presented to the contrary.

Witnesses: Credibility. Where the employer, the claims adjuster, and a former employee all testified that the employer typically made modified work available to injured workers and where the employer described proposed job duties which would have fit within Petitioner's restrictions, I found their testimony more credible than Petitioner's.

Evidence: Conflicting. Where the employer, the claims adjuster, and a former employee all testified that the employer typically made modified work available to injured workers and where the employer described proposed job duties which would have fit within Petitioner's restrictions, I found their testimony more credible than Petitioner's.

Vocational – Return to Work Matters: Evidence. Based on the testimony of witnesses that the employer typically made modified work available to injured workers, and the employer's testimony regarding proposed job duties for the modified position which would have fit within Petitioner's work restrictions, the Court found that a modified position existed which Petitioner was able and qualified to perform at an equivalent wage to his time-of-injury position.

Vocational – Return to Work Matters: Modified Employment. Based on the testimony of witnesses that the employer typically made modified work available to injured workers, and the employer's testimony regarding proposed job duties for the modified position which would have fit within Petitioner's work restrictions, the Court found that a modified position existed which Petitioner was able and qualified to perform at an equivalent wage to his time-of-injury position.

¶ 1 The trial in this matter began on April 28, 2010, at the offices of Linnell, Newhall, Martin & Schulke, P.C., in Great Falls. The trial resumed and concluded on June 14, 2010, in the Commission Chambers of the Civic Center in Great Falls. Norman L. Newhall represented Petitioner Kerry Poindexter, who attended trial on April 28, 2010. Thomas E. Martello represented Respondent Montana State Fund. Claims examiner Cynthia Swandal was also present.

¶ 2 Exhibits: Exhibits 1 through 16 were admitted without objection. Poindexter moved for the admission of proposed Exhibits 17 and 18 at trial. The Court sustained State Fund's objection to their admission.

¶ 3 Witnesses and Depositions: The Court admitted the depositions of Poindexter and Shawna Diane Duncan with their respective correction pages. Tim Wilkinson, Bruce K. Jeffrey, M.S., C.R.C., Cynthia Swandal, Kerry Poindexter, and Branch Brady were sworn and testified at trial.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:¹

Issue 1: Whether Petitioner is entitled to temporary total disability benefits for the time period of September 23, 2009, through February 21, 2010.

Issue 2: Whether Respondent acted unreasonably.

Issue 3: Whether Petitioner is entitled to an award of attorney fees, costs, and penalty pursuant to §§ 39-71-611 and 39-71-2907, MCA.

FINDINGS OF FACT

¶ 5 Petitioner Kerry Poindexter testified at trial. In light of the weight of the evidence to the contrary, I have not found Poindexter's testimony to be credible regarding the pertinent disputed facts in this case. Poindexter moved to Montana in 1999.² He began working for Wilkinson Construction in July 2006.³ Poindexter suffered an injury arising out of and in the course and scope of his employment with Wilkinson Construction on August 3, 2009.⁴ Poindexter injured his shoulder while lifting a heavy rock.⁵

¶ 6 James H. Asthalter, D.O., took Poindexter off work shortly after his industrial accident.⁶ Montana State Fund (State Fund) accepted liability for the injury and has paid benefits. State Fund has not paid temporary total disability (TTD) benefits for the period of September 23, 2009, through February 21, 2010.⁷

¶ 7 On September 21, 2009, State Fund's claims examiner Cynthia Swandal called Poindexter and informed him that his treating physician was releasing him to return to work and that he needed to contact his boss, Tim Wilkinson. Poindexter immediately called Wilkinson. Poindexter alleges that he informed Wilkinson that he was ready and

¹ Pretrial Order at 2.

² Poindexter Dep. 18:3-12.

³ Poindexter Dep. 29:2-5.

⁴ Pretrial Order, Uncontested Facts; Ex. 1.

⁵ Trial Test.; Ex. 1.

⁶ Ex. 12 at 22.

⁷ Pretrial Order, Uncontested Facts.

willing to return to work and that Wilkinson replied that he could not immediately think of a job for Poindexter and he asked Poindexter to call him the following day. Poindexter testified that he called Wilkinson again on September 22, 2009, and Wilkinson told Poindexter that he had no work available but that he would call Poindexter as soon as he had work available.⁸

¶ 8 Although Wilkinson's cellular phone records reflect Poindexter's September 21 call, the records do not indicate a call on September 22, 2009. Poindexter testified that he initially called Wilkinson's cell phone on September 22, 2009, but when Wilkinson did not answer, Poindexter called the office phone and spoke to Wilkinson there.⁹

¶ 9 Wilkinson testified at trial. I found Wilkinson to be a credible witness. Wilkinson runs Wilkinson Construction, which handles all phases of residential construction from excavation through completion. Wilkinson Construction usually employs 8 to 12 employees. At the time of trial, Wilkinson Construction employed 9 or 10 employees. Wilkinson testified that when his business is slow, he retains some of the work he would normally subcontract out in order to keep his workers busy.¹⁰

¶ 10 Wilkinson testified that business was slow in March 2009. One of his subcontractors wanted to hire a painter. Wilkinson recommended Poindexter. Wilkinson expected Poindexter to work for the subcontractor and then return to Wilkinson Construction in a month or two. In mid- to late-July 2009, Wilkinson told Poindexter that he foresaw some painting projects in the near future, and that if Poindexter wanted to return, Wilkinson could keep him busy doing other tasks until Wilkinson's residence was ready for painting. Shortly after Poindexter returned to work for Wilkinson, he suffered an industrial injury.¹¹

¶ 11 In August 2009, Wilkinson Construction's projects included finishing a garage, working on Wilkinson's personal residence, and remodeling the former residence of Wilkinson's parents. Wilkinson occasionally assigned workers to work on his parents' former home when business was slow. Wilkinson further testified that he often had employees perform tasks outside of their job descriptions in order to keep them busy.¹²

¶ 12 Wilkinson testified that he has occasionally had workers suffer industrial injuries and he has accommodated them with modified job duties. Wilkinson stated that he has

⁸ Trial Test.

⁹ Trial Test.

¹⁰ Trial Test.

¹¹ Trial Test.

¹² Trial Test.

continued to employ those workers even though in many cases they have not been able to return to their full duties.¹³

¶ 13 On September 18, 2009, Wilkinson talked with Swandal about the possibility of Poindexter returning to work. Wilkinson testified that construction on his residence was at a point where finish work was ready to be undertaken on moldings, cabinets, and trim, and he hoped to assign those tasks to Poindexter. On September 21, 2009, Wilkinson received a fax from Swandal which included a work capacity form that Poindexter's treating physician, Mark T. Stoebe, D.C., had completed.¹⁴

¶ 14 The first page of the fax said, in pertinent part:

Enclosed find a work status slip for Mr. Poindexter.

Please review the restrictions; limited use of right shoulder, limit overhead lifting, 10-25 carry limit, no climbing [sic] or crawling.

Can you find a job for Mr. Poindexter with these restrictions?¹⁵

¶ 15 The second page of the fax was a work capacity report which detailed Poindexter's work restrictions. The restrictions included no climbing or crawling, and no repetitive reaching over shoulder level, with a restriction on overhead lifting for 2 to 4 weeks.¹⁶ Wilkinson reviewed the restrictions, and then signed and returned the form to Swandal, indicating that he could accommodate Poindexter's restrictions.¹⁷

¶ 16 Wilkinson testified that he was willing to accommodate whatever restrictions Poindexter had because Poindexter was a good employee and he needed him to return to work. He testified that Poindexter could take breaks, perform different job duties, or switch tasks to accommodate his arm. Wilkinson testified that he had several tasks in mind for Poindexter within these restrictions, including filling nail holes, staining window trim, varnishing baseboards, caulking, and sanding. He asserted that these tasks would keep Wilkinson busy for eight hours a day. Wilkinson intended to pay Poindexter his normal hourly wage.¹⁸

¹³ Trial Test.

¹⁴ Trial Test.; Ex. 4.

¹⁵ Ex. 4 at 1.

¹⁶ Ex. 4 at 2.

¹⁷ Trial Test.

¹⁸ Trial Test.

¶ 17 Wilkinson did not have another worker assigned to these tasks at that time. Wilkinson stated that the amount of woodwork finishing that needed to be done in his residence was too large of a job for Poindexter to complete on his own, even without restrictions. Wilkinson needed at least one other worker in addition to Poindexter to complete the tasks. Wilkinson believed that the other worker would be able to perform tasks that were beyond Poindexter's restrictions. Wilkinson testified that he hired his subcontractor Darvin Dahl as an employee and also hired Dahl's brother and assigned them the finish work he would have assigned to Poindexter. Wilkinson testified that he had initially planned to hire only Dahl and have Poindexter train him, and Dahl would have completed the tasks which Poindexter could not do because of his restrictions.¹⁹

¶ 18 After Wilkinson returned Swandal's fax, Poindexter called Wilkinson and told him that he had been released to return to work with restrictions. Wilkinson alleges that he told Poindexter that he had work available and that he wanted Poindexter to come back to work as soon as he could. Wilkinson testified that Poindexter told Wilkinson he would report to the job site at Wilkinson's residence on Wednesday, September 23, 2009, at 8:00 a.m. Wilkinson denies telling Poindexter that he did not have work immediately available. Wilkinson produced records for his cellular telephone and testified that Poindexter and he spoke for approximately 4 minutes on one call and 2 minutes on another call on September 21, 2009, and that both of these calls were initiated by Poindexter. Wilkinson could not recall why two calls took place, but he explained that cellular phone coverage is "sporadic" at his residence and this could account for it. Wilkinson stated that he asked Poindexter to return to work the following day, but Poindexter said that he had medical appointments scheduled. Wilkinson testified that in reviewing the records, he did not find any additional telephone contact with Poindexter. Wilkinson testified that his employees know that he is rarely in his office and he did not speak to Poindexter on his office phone on September 22, 2009.²⁰

¶ 19 Poindexter did not show up for work on September 23, 2009. Wilkinson initially assumed that Poindexter would show up for work the following day. When Poindexter did not show up for work on September 24, 2009, Wilkinson asked his employee Branch Brady to call Poindexter. Wilkinson never personally attempted to contact Poindexter again.²¹

¶ 20 Poindexter testified that many of the tasks which Wilkinson alleges he would have assigned to Poindexter if he had returned to modified duties would have exceeded his restrictions. Some of the staining, caulking, filling nail holes, and varnishing would

¹⁹ Trial Test.

²⁰ Trial Test.

²¹ Trial Test.

have required him to crawl, to reach overhead, or would have required him to climb a ladder, which Dr. Stoebe had prohibited. Poindexter further testified that it did not seem feasible that he could have performed only part of each task and asked someone else to complete the portions which would have exceeded his restrictions. He explained that it would be impossible to match the staining if he stopped in the middle of a piece, and furthermore, when he worked at Wilkinson's residence, he was almost always alone on the job site and therefore he did not think there would be a co-worker present that he could ask for assistance.²²

¶ 21 Wilkinson testified that his employees cut and assembled cabinets and other woodworking projects in his shop. Wilkinson then moved the items to the job site prior to staining and varnishing because the shop was too dusty for finish work. At the job site, the woodwork would be placed on sawhorses. A finish worker would touch up rough spots with an orbital sander, stain the wood using a rag, and then apply two or three coats of varnish using a spray gun. The varnished pieces would be installed in the home. A finish worker would then fill nail holes with putty and apply a final coat of varnish. Wilkinson intended to have Poindexter complete this work while training Dahl and using Dahl as an assistant to complete any part of the finish work which Poindexter could not perform within his work restrictions. Wilkinson testified that the tasks he would have assigned to Poindexter would have been within the restrictions set forth by Dr. Stoebe. Wilkinson stated that some of the post-installation work would require a worker to be at the floor level and while workers might choose to be on their knees, they could sit on the floor or use a dolly and would not have to crawl.²³

¶ 22 Wilkinson stated that sometime in late September or early October, he informed Swandal that Poindexter had not returned to work. Later, Wilkinson learned that Poindexter moved to Idaho and he now believes that Poindexter did not want to return to work because he was busy fixing his house and moving. Wilkinson stated that he did not learn until mid- or late-October 2009 that Poindexter had been planning to move to Idaho, although he also learned that many of his employees had known for quite some time about Poindexter's plans.²⁴

¶ 23 Branch Brady testified at trial. I found Brady to be a credible witness. Brady has worked full-time as a painter and finisher for Wilkinson Construction since 2002. Prior to 2002, Brady had worked for Wilkinson Construction on a part-time basis. Brady testified that at least four workers either had industrial injuries or health problems which limited their abilities to perform their job duties during the time he has worked for

²² Trial Test.

²³ Trial Test.

²⁴ Trial Test.

Wilkinson Construction. Brady stated that Wilkinson always accommodated his employees' limitations and got them back to work as soon as possible. Brady testified that during the time he has worked for Wilkinson Construction, he cannot recall Wilkinson ever laying off an employee for lack of work. He stated that Wilkinson goes to "extraordinary lengths" to keep his crew working.²⁵

¶ 24 Brady testified that while Poindexter was off work after his injury, the construction work on Wilkinson's new home had reached the point where the crew needed to start the finish work. Wilkinson had kept his cabinet workers busy throughout the summer by having them build cabinets before the house was ready for cabinets. The construction had now reached a stage where the cabinets and trim could be moved from the shop to the residence. Dahl had been hired to help with the finish work, but he did not have much experience with wood finishing. Brady suggested to Wilkinson that Poindexter could train Dahl. With Wilkinson's approval, Brady called Poindexter and asked if he wanted to return to work. Poindexter was hesitant, stating that he had medical appointments. Brady urged Poindexter to return, but Poindexter did not commit to doing so. Brady testified that he did not know what Poindexter's restrictions were, but he was sure he could find ways to accommodate them because the company always found ways to accommodate work restrictions.²⁶

¶ 25 Poindexter denied speaking with Brady after September 21, 2009, until sometime in November, when Poindexter called Brady to speak with him about returning some personal items of Poindexter's. Poindexter stated that at that time, Brady told Poindexter they were busy at work and asked him when he was coming back and Poindexter told Brady that Wilkinson had never called him back to work.²⁷

¶ 26 Poindexter now resides in Rupert, Idaho. Poindexter testified that he began to move to Idaho near the end of October or beginning of November 2009. At around the same time, he put his Great Falls residence up for sale. Poindexter testified that he would have remained in Great Falls if Wilkinson had had work available for him.²⁸

¶ 27 Poindexter treated with Dr. Stoebe on October 2, 2009, at which time Dr. Stoebe noted that Poindexter had not returned to work but, "**PLAN** is to request another course of care for up to 2-3 weeks, at which time the patient is anticipating moving to Idaho."²⁹ At a follow-up appointment on October 20, 2009, Dr. Stoebe noted, "[Poindexter] is

²⁵ Trial Test.

²⁶ Trial Test.

²⁷ Trial Test.

²⁸ Trial Test.

²⁹ Ex. 13 at 29-30.

moving to Rupert, Idaho in the next 1-2 weeks and he is in and out of town during that time as well. He had to fly his son up from TX to assist with the move, as he is unable to do most of the moving labor.”³⁰

¶ 28 Shawna Diane Duncan is Poindexter’s wife.³¹ Duncan testified that in 2008, she began looking for property in Idaho because she was unhappy in Great Falls.³² In June or July of 2009, Duncan began looking at jobs in the area around Rupert and Burley, Idaho.³³ Duncan worked with a realtor to locate properties for her to consider.³⁴ On approximately July 25, 2009, she put earnest money down on the property she ultimately purchased.³⁵

¶ 29 On September 1, 2009, Duncan notified her Great Falls employer that September 20, 2009, would be her last day of work.³⁶ The purchase of the Idaho property closed on September 25 2009.³⁷ Duncan testified that she and Poindexter had planned for her to move to Idaho ahead of him, and he would stay in Great Falls and work while fixing up their home so they could sell it for a higher price.³⁸ Duncan and Poindexter moved their household from Great Falls to Rupert over a period of 40 days.³⁹ Although Duncan and Poindexter completed the move to Idaho in December 2009, they owned a home in Great Falls until early April 2010. Duncan testified that the house was available for them to use if they chose up until the time of sale.⁴⁰

¶ 30 Swandal testified at trial. I found Swandal to be a credible witness. Swandal testified that she spoke to Wilkinson on September 18, 2009, and Wilkinson told her that he wanted Poindexter to return to work and that he could accommodate modified duty. Wilkinson asked Swandal to investigate whether Poindexter could return to work.⁴¹ On

³⁰ Ex. 13 at 35.

³¹ Duncan testified that she and Poindexter consider themselves married, but they did not obtain a marriage license in Montana and she is unsure whether they are legally considered common law spouses. (See Duncan Dep. 13:20 – 14:7.)

³² Duncan Dep. 6:1-20.

³³ Duncan Dep. 8:12-16.

³⁴ Duncan Dep. 11:6-17.

³⁵ Duncan Dep. 12:1-11. Duncan later quitclaimed her interest in the deed to a family trust. (See Duncan Dep. 14:12 – 15:18.) The specific details of the property’s ownership are not pertinent to the decision in this matter.

³⁶ Duncan Dep. 18:17 – 19:14.

³⁷ Duncan Dep. 12:24 – 13:1.

³⁸ Duncan Dep. 25:10-21.

³⁹ Duncan Dep. 10:1-9.

⁴⁰ Duncan Dep. 24:10-20.

⁴¹ Trial Test.

September 18, 2009, Swandal noted, "Faxed work capacity slip to Dr. Stoebe with request for re[s]trictions as the [employer] can accommodate modified duty. Talked to [Wilkinson], he can accommodate restrictions, am trying to retrieve from TPH."⁴² Swandal subsequently faxed a work capacity slip to Dr. Stoebe. Dr. Stoebe provided work restrictions on September 21, 2009. Swandal then faxed the slip to Wilkinson along with a cover letter asking if Wilkinson could accommodate the restrictions set forth by Dr. Stoebe.⁴³

¶ 31 When Wilkinson replied that he could accommodate Dr. Stoebe's restrictions, Swandal contacted Poindexter and asked him to contact Wilkinson about returning to work the following day. Swandal also terminated Poindexter's TTD benefits as of September 21, 2009, after concluding that he was no longer eligible since Wilkinson had a job available for Poindexter.⁴⁴

¶ 32 On September 21, 2009, Swandal noted that she had received the work capacity slip from Dr. Stoebe and she had faxed it to Wilkinson "to review and advise if modified duty is available."⁴⁵ Later that day, she noted that Wilkinson had responded that he could accommodate the restrictions, and that Swandal had called Poindexter who "will call [Wilkinson] and go to work tomorrow modified duty."⁴⁶

¶ 33 After September 21, 2009, Swandal had no further contact with Poindexter until mid-October 2009. Swandal noted that Poindexter had always been good about contacting her regarding claim matters prior to September 21, 2009, and she expected him to contact her if a problem arose regarding his return to work. Swandal further testified that she had dealt with Wilkinson on previous claims and that he was always easy to work with and willing to accommodate work restrictions, so she does not believe Wilkinson would have agreed to take Poindexter back to work in a modified job position and then not do so.⁴⁷

¶ 34 On October 16, 2009, Swandal noted that Poindexter was offered a modified-duty position with Wilkinson and that Poindexter had committed to returning to Wilkinson's employ for that modified position, but that Wilkinson had advised Swandal that Poindexter never showed up to work. Swandal noted, "He is moving to Idaho and has advised his supervisor that he was busy getting his places fixed up, to move into

⁴² Ex. 15 at 12.

⁴³ Trial Test.

⁴⁴ Trial Test.

⁴⁵ Ex. 15 at 12.

⁴⁶ Ex. 15 at 11.

⁴⁷ Trial Test.

and out of.”⁴⁸ Swandal added that her review of Poindexter’s medical records indicated that he had cancelled three physical therapy appointments on account of being in Idaho.⁴⁹

¶ 35 On October 16, 2009, Swandal sent a letter to Poindexter in which she stated, in pertinent part:

My records document that I spoke with you on the 21st of September; at that time you confirmed your intent to return to work in the modified duty position with Wilkinson Construction the next day. I have spoke[n] with Mr. Wilkinson . . . and he reports you did not return to work. He did indicate he had a conversation with you regarding the modified position available and you had committed to him that you were going to return on September 22, 2009.

Your decision not to accept this position does not change your eligibility for future temporary total disability benefits. However, because a position is available . . . wage loss benefits are not payable. . . .

. . . .

I have been notified by your physical therapy provider that you have cancelled appointments due to your moving to Idaho. . . . Please detail if you are moving to accept new employment.⁵⁰

¶ 36 On October 20, 2009, Poindexter’s counsel responded to Swandal’s letter via e-mail. He advised Swandal that Poindexter had been willing to return to modified job duties and had called Wilkinson to see if Wilkinson had work available within Poindexter’s restrictions. Poindexter told his counsel that Wilkinson did not have work available, but agreed to call Poindexter if work became available. When Wilkinson never called back, Poindexter moved to Idaho.⁵¹ On November 4, 2009, Poindexter’s attorney faxed a letter to Swandal in which he stated that Poindexter had moved to Idaho and advised Swandal that Poindexter had an upcoming medical appointment in Burley, Idaho.⁵²

⁴⁸ Ex. 15 at 10.

⁴⁹ Ex. 15 at 10-11.

⁵⁰ Ex. 6.

⁵¹ Ex. 7.

⁵² Ex. 9.

¶ 37 Bruce K. Jeffrey, M.S., C.R.C., testified at trial. I found Jeffrey to be a credible witness. Jeffrey is a vocational consultant. Jeffrey testified that State Fund initially contracted him to develop a time-of-injury job analysis and a modified time-of-injury job analysis and he did so. Jeffrey testified that he believed Wilkinson when Wilkinson stated that he could accommodate Poindexter's restrictions and offer him a modified job position, and that his past experience with Wilkinson was that Wilkinson generally made modified work available to his injured employees.⁵³

CONCLUSIONS OF LAW

¶ 38 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Poindexter's industrial accident.⁵⁴

¶ 39 Poindexter bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁵⁵ The Court concludes Poindexter has not met his burden.

¶ 40 In *Somerville v. Montana Assoc. of Counties Workers' Comp. Trust*, this Court noted that in a "toss-up" case, the petitioner would not prevail because of the burden of proof he must meet.⁵⁶ In the present case, only Poindexter and Wilkinson know for certain the substance of their conversation on September 21, 2009. Although Poindexter alleges he spoke to Wilkinson on September 22, 2009, no evidence of that conversation exists and I am not wholly persuaded by Poindexter's assertion that he chose to call Wilkinson's office number on that day. Regardless, the testimony of Swandal, Brady, and Jeffrey are all consistent with Wilkinson's version of events. These witnesses all testified that in their experience, Wilkinson made modified work available to his injured workers whenever possible. No one has offered any explanation as to why Poindexter would have been the exception to this practice. On the other hand, the evidence suggests that accepting a modified job position with Wilkinson Construction would have been an impediment to Poindexter's plans to relocate to Idaho where his wife had recently purchased a new residence.

¶ 41 The only evidence which supports Poindexter's version of events is his word. In light of the evidence to the contrary, Poindexter's word is not enough to meet his burden of proof.

⁵³ Trial Test.

⁵⁴ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

⁵⁵ *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).

⁵⁶ 2007 MTWCC 20, ¶ 29 (reconsideration denied 2007 MTWCC 36).

¶ 42 However, Poindexter further argues that even if he were to have returned to work, the modified position which Wilkinson had allegedly created would not have fit within his work restrictions. Under § 39-71-701(4), MCA, a worker is no longer eligible for TTD benefits if his treating physician releases him to a modified or alternative position that the worker is able and qualified to perform with the same employer at an equivalent or higher wage than his time-of-injury position. A worker requalifies for TTD benefits if the modified or alternative position is no longer available to the worker for any reason except incarceration, resignation, or termination for disciplinary reasons.

¶ 43 I found Wilkinson, Swandal, and Brady more credible than Poindexter regarding the availability of a modified position with Wilkinson Construction which Wilkinson testified would pay the same wages as Poindexter's time-of-injury job position. Both Wilkinson and Brady testified that Wilkinson readily accommodated the restrictions of his injured workers, and both Swandal and Jeffrey testified that their past experience with Wilkinson was that he made modified work available to his injured employees. The proposed job duties Wilkinson described appear to fit within the restrictions set forth by Dr. Stoebe, especially since Poindexter would have had an assistant and would have been able to take breaks or switch tasks as needed. I am persuaded by Wilkinson's and Brady's testimony that Wilkinson intended to hire Dahl as Poindexter's assistant, that Poindexter would have been working with Dahl and training him to do finish work, and that Dahl would have been able to complete the tasks which exceeded Poindexter's work restrictions. The testimony in this case provides ample evidence that Wilkinson is a flexible employer who allowed his workers the opportunity to return to work while remaining within their work restrictions.

¶ 44 I conclude that a modified position which Poindexter was able and qualified to perform at an equivalent wage to his time-of-injury position existed as of September 21, 2009. It was Poindexter's decision not to accept the modified position; he instead failed to report for work and ultimately moved out of the area, thereby resigning his position with Wilkinson Construction. He therefore did not requalify for TTD benefits within the time period at issue in this case.

¶ 45 I further conclude that Respondent was not unreasonable in terminating Poindexter's benefits after Wilkinson spoke with Swandal and signed and returned the fax which indicated that he had modified work available for Poindexter within his work restrictions. Since Poindexter has not prevailed in his claim for TTD benefits, he is not entitled to his costs, attorney fees, or a penalty.⁵⁷

⁵⁷ §§ 39-71-611, -2907, MCA.

JUDGMENT

¶ 46 Petitioner is not entitled to TTD benefits for the time period of September 23, 2009, through February 21, 2010.

¶ 47 Respondent did not act unreasonably.

¶ 48 Petitioner is not entitled to an award of attorney fees, costs, and penalty pursuant to §§ 39-71-611 and 39-71-2907, MCA.

¶ 49 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 19th day of November, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
Thomas E. Martello
Submitted: June 14, 2010