IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 6

WCC No. 2014-3435

BRENDA RUTECKI

Petitioner

vs.

FIRST LIBERTY INSURANCE CORPORATION

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner contends she is entitled to PPD and vocational rehabilitation benefits because she suffered an actual wage loss as a result of her industrial injury. Respondent argues Petitioner has not proven that she suffered an actual wage loss and, consequently, that she is not entitled to PPD or vocational rehabilitation benefits.

Held: Petitioner has not proven she suffered an actual wage loss as a result of her industrial injury. Medical providers have approved alternative jobs which pay as much as her time-of-injury position. She is therefore not entitled to PPD or vocational rehabilitation benefits.

¶ 1 The trial in the above-entitled matter was held on August 26, 2015, in Kalispell. Petitioner Brenda Rutecki was present and represented by Garry D. Seaman. Kelly M. Wills represented Respondent First Liberty Insurance Corporation (Liberty).

¶ 2 Exhibits: The Court admitted Exhibits 1 through 20.

¶ 3 Witnesses: Rutecki and Lisa Kozeluh, CRC, were sworn and testified.

¶ 4 Issues Presented: The following issues are before this Court:

> Issue One: Has Rutecki proven that she suffered an actual wage loss as a result of her industrial injury and is therefore entitled to permanent partial disability (PPD) benefits?

Issue Two: Has Rutecki proven an entitlement to vocational rehabilitation benefits as a result of her industrial injury?

Issue Three: Has Rutecki proven that Liberty is liable for any outstanding medical bills?

Issue Four: Has Rutecki proven that Liberty has unreasonably denied the payment of PPD benefits, thereby entitling her to an award of attorney fees?

Issue Five: Is Rutecki entitled to an award of costs?

Since this Court has ruled against Rutecki on Issues One through Three, this Court does not reach Issues Four or Five.

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 On December 17, 2011, Rutecki suffered an industrial injury to her low back in the course of her employment at Rocky Mountain Care Center (RMCC) in Helena. Rutecki was a full-time Certified Nursing Assistant (CNA), earning $10.50 per hour.

¶ 7 On December 21, 2011, Rutecki sought treatment at the St. Peter's Hospital Emergency Department (St. Peter's), complaining of low-back pain radiating down her left leg from lifting a patient at work. Lumbar, sacral, and pelvic radiographs were unremarkable. Lena Phelps, PA-C, diagnosed Rutecki with an acute lumbosacral strain and sacroiliac dysfunction. She took Rutecki off work for three days, and restricted her from lifting more than 10 pounds upon return to work. Phelps referred Rutecki to Helena Orthopaedic Prompt Care for follow-up.

¶ 8 On December 29, 2011, Rutecki saw Lindsey Lyman, PA-C, at Helena Orthopaedic Prompt Care. Lyman found decreased range of motion and left-sided instability and pain, and noted that radiographs revealed sacroiliac arthritis and decreased joint space bilaterally at the hips. She diagnosed Rutecki with a low-back injury resulting in sciatica and sacroiliac instability and dysfunction. She recommended Rutecki undergo physical therapy and perform light-duty work until her strength improved.

¶ 9 On December 30, 2011, Rutecki filed a First Report of Injury. Liberty accepted her claim.

¶ 10 On February 11, 2012, Rutecki again went to St. Peter's complaining of lumbar radiculopathy down her left side from lifting a patient at work. The emergency room doctor opined that Rutecki had exacerbated her sciatica, and that the sciatica was likely due to lumbar nerve root impingement. The physician took Rutecki off work until she could follow up with additional care.

¶ 11 On February 14, 2012, Rutecki saw Lyman and complained of severe low-back pain. Lyman noted a positive seated straight leg raise on the left and suspected a herniated disk. Lyman recommended an MRI and took Rutecki off work for a week.

¶ 12 Rutecki's MRI showed an L5-S1 disk herniation affecting the left L5 nerve root. On February 20, 2012, Lyman recommended that Rutecki remain off work and continue physical therapy and anti-inflammatory medications.

¶ 13 On March 12, 2012, Lyman noted that Rutecki's low-back pain had decreased and her strength and mobility had improved with physical therapy. She released Rutecki to return to work with restrictions limiting lifting and bending.

¶ 14 In spite of her modified job duties, her continued physical therapy, and an at-home exercise program, Rutecki continued to report increasing back pain over the ensuing months and Lyman kept Rutecki on sedentary to light duty. On May 21, 2012, Lyman recommended that Rutecki obtain a second opinion to determine if she might benefit from an epidural steroid injection (ESI). At that time, Lyman continued Rutecki on modified job duties, but on June 4, 2012, Lyman took Rutecki off work due to worsening low-back pain with left radiculopathy.

¶ 15 On June 15, 2012, Rutecki saw Theresa M. Vonada, PA-C. Considering that Rutecki's low-back pain with left-leg radiculopathy had persisted in spite of the use of Lortab, Vonada decided to investigate if Rutecki was a candidate for ESI. Vonada gave Rutecki a work release for sedentary duties.

¶ 16 On June 26, 2012, Jeffrey A. Martin, MD, performed a left-sided L5-S1 ESI on Rutecki, followed by a second injection on July 10, 2012. Rutecki received good pain relief with the first injection, but the second was less effective.

¶ 17 Rutecki testified that on approximately July 23, 2012, she suffered another injury when she exceeded her restrictions while short-handed at work. On July 24, 2012, she saw Dr. Martin, complaining of pain higher in her back than her previous back pain. Dr. Martin's record makes no mention of a recent work incident, but notes that her new pain may be due to a urinary tract infection. Dr. Martin released Rutecki to return to work on light duty.

¶ 18 On August 30, 2012, Dr. Martin ordered another MRI. On the new films, he saw mild degenerative disk disease. Dr. Martin ordered Rutecki to continue physical therapy and remain on light-duty work restrictions.

¶ 19 On October 22, 2012, Rutecki told Vonada that she had injured her back a few days earlier while moving a patient. Vonada encouraged Rutecki to continue physical therapy. Vonada released Rutecki to return to work with restrictions.

¶ 20 On October 23, 2012, Rutecki saw physical therapist Donna Aline. Rutecki continued to attend physical therapy through the remainder of the year. On December 26, 2012, she reported increasing pain with radiation into her left leg with severe pain in the left buttocks and spasms in her left low back.

¶ 21 On February 8, 2013, Aline reported that Rutecki's condition had improved since she began using a heel lift, and that Rutecki intended to accept a different position at RMCC which would be less physically demanding.

¶ 22 On February 13, 2013, Vonada reported that, although Rutecki continued to have low-back pain, she was doing well and able to handle most of her job duties with a 50-pound lifting restriction. Vonada noted, "I think her lifting restrictions will be permanent 26 to 50 pounds frequently and no lifting over 50 pounds."

¶ 23 On March 22, 2013, Rutecki told Aline that her co-workers were not adequately assisting her in lifting patients and that she had been scheduled for too many consecutive days of work. Rutecki reported severe pain and an inability to stand erect, with tingling in her left leg and foot. Aline recommended that Rutecki seek emergency care if the pain worsened before she could see her treating physician.

¶ 24 On March 23, 2013, Rutecki sought care at St. Peter's, where she reported increasing back pain with radiation into both legs. Rutecki was treated with a Toradol and Dilaudid injection. She was taken off work for three days and instructed to follow up with Dr. Martin.

¶ 25 On March 27, 2013, Rutecki told Vonada that she reinjured her back at work. Vonada found Rutecki's paraspinal muscles in "full spasm." She took Rutecki off work for a week, followed by a period of sedentary to light-duty restrictions.

¶ 26 On April 5, 2013, Aline noted Rutecki had returned to light-duty work but had stiffness and pain in her neck in addition to her low back. Aline suspected either that Rutecki had strained her neck muscles when she had reinjured her low back, or that her neck stiffness was due to an inability to move freely because of her low-back spasms.

¶ 27 On April 9, 2013, Aline found that Rutecki continued to have difficulty with stiffness, pain, and low-back spasms. She noted:

> It is obvious that working 8 hours is not tolerable for her. She is very dedicated to her job and does not want to take time off because they are short handed. . . . [S]he will benefit from lying down for a few minutes every few hours and not to expect herself to be able to be on her feet all day and evening without increased pain. The numbness in the lateral L thigh and leg appears to be discogenic . . . but the spasms in the thoracolumbar region is consistent with muscle strain.

¶ 28 On April 16, 2013, Rutecki returned to Vonada, telling her that she felt better overall but had intermittent pain. Vonada continued Rutecki's light-duty restrictions and prescribed her a TENS unit and a muscle relaxant.

¶ 29 On April 25, 2013, Lisa Kozeluh, a certified rehabilitation counselor, met Rutecki to prepare a time-of-injury job analysis, an Initial Employability Assessment, and a determination of alternative jobs. Kozeluh credibly testified at trial. Rutecki informed Kozeluh that she had resigned her position at RMCC the previous day because she believed she was compromising the safety of the residents due to her lifting restrictions. Rutecki told Kozeluh that she hoped to return to work as a CNA, but she was also considering relocating to Kalispell to take a job cleaning apartments.

¶ 30 Kozeluh noted that aside from the CNA position at RMCC, Rutecki had previously worked as a CNA in Missoula, as a self-employed housekeeper, and as a bartender, keno cashier, casino manager, deli manager, restaurant manager, and waitress. Based on Rutecki's work history, Kozeluh determined that Rutecki had several transferable skills.

¶ 31 On April 26, 2013, Kozeluh completed an Initial Employability Assessment in which she noted that Rutecki had a light-duty lifting restriction of 20 pounds, but was not yet at maximum medical improvement (MMI). Since it was unknown if Rutecki would be released to her time-of-injury position, Kozeluh investigated Rutecki's potential of returning to work in alternative occupations. Kozeluh opined that, given Rutecki's work history, transferable skills, stated interests and abilities, education and training, projected physical ability, and the local and statewide labor market, Rutecki should be able to secure employment with direct job placement services following her medical treatment.

¶ 32 On May 15, 2013, Rutecki told Vonada that she quit her job because she "had a difficult time" with her light-duty restrictions. Vonada noted that Rutecki wanted to find another CNA position and she was considering moving to Kalispell. Vonada found Rutecki's back condition had improved, determined that she was at MMI, and recommended that she see Allen M. Weinert, MD, for an impairment rating. Vonada released Rutecki to full duty with no restrictions.

¶ 33 On June 13, 2013, Vonada approved job analyses from Kozeluh for positions in Helena, including: administrative/cash office clerk at Lowe's, bill collector at Credit Systems, waitress at Shoot the Moon, night auditor at Best Western, cashier at Safeway Stores, bingo caller at Best Bet Casino, and CNA at Rocky Mountain Healthcare. The jobs were rated sedentary or light-duty, except for the cashier position, which was medium-duty, and the CNA position, which was heavy-duty.

¶ 34 On June 17, 2013, Rutecki saw Dr. Weinert for an impairment rating. Dr. Weinert assigned Rutecki a Class I impairment of the lumbar spine with a 7% whole-person impairment rating. He released Rutecki to full duty and commented she needed no specific additional treatment.

¶ 35 Because Vonada and Dr. Weinert had released Rutecki to return to work at her time-of-injury employer with no restrictions, Kozeluh did not conduct an analysis as to whether Rutecki had a wage loss and closed her file.

¶ 36 On June 17, 2013, Rutecki attended her last physical therapy session with Aline, who noted that Rutecki had moved to Kalispell and hoped to find a CNA job there.

¶ 37 However, Rutecki did not apply for any CNA jobs in Kalispell. For the first year she lived in Kalispell, she worked on an intermittent basis for a friend's property management company, cleaning homes and businesses.

¶ 38 On January 30, 2014, Rutecki saw Anna McCracken, NP, at Flathead Community Health Center in Kalispell to establish care and refill her medications. McCracken noted that Rutecki had stopped taking Ritalin. Rutecki reported that she had had two ruptured disks in her back, with occasional numbness and tingling in her hands and toes on the left side. Rutecki told McCracken that she wanted to obtain a follow-up MRI since she had suffered some work-related injuries since her previous MRI.

¶ 39 On September 15, 2014, Rutecki underwent a lumbar MRI on McCracken's referral which indicated degenerative disk changes, disk bulging at several levels, an annular tear at L4-5, and a subtle left foraminal and far lateral disk extrusion contacting the extraforaminal nerve root at L3-4.

¶ 40 On October 2, 2014, Rutecki went to the Kalispell Regional Medical Center (KRMC) complaining of hallucinations. Rutecki said she used methamphetamine about four days earlier, and that she had previously been admitted to Pathways Psychiatric Facility (Pathways) for amphetamine-induced psychosis. Rutecki declined an offer of admission to Pathways. Her toxicology tests were negative for opiates and illegal substances and she was discharged. Rutecki testified that the reference to methamphetamines in the KRMC report referred to Ritalin that a nurse practitioner in Helena had prescribed her.

¶ 41 On December 31, 2014, Rutecki asked McCracken for a referral for her chronic back pain. McCracken referred Rutecki to Greg Vanichkachorn, MD.

¶ 42 On March 13, 2015, Dr. Vanichkachorn treated Rutecki for the first time. He noted that he had received "minimal" medical records for review, including some of McCracken's treatment notes and the September 2014 MRI report. Dr. Vanichkachorn took a history from Rutecki, which included her 2011 industrial injury and reports of two subsequent work-related injuries, and her reports of pain and other symptoms. Dr. Vanichkachorn wrote that Rutecki "reports an extensive history of poly substance abuse, including methamphetamines. She states that she has been sober for approximately 1 week. She reports that the most recent illicit drug she used was a friend's pain medications." Although Rutecki testified that the "methamphetamines" referred to in the KRMC report were Ritalin, she told Dr. Vanichkachorn that she had abused methamphetamines. Dr. Vanichkachorn found that Rutecki exhibited an antalgic gait, and while she exhibited full range of motion, she reported pain during the maneuvers. Rutecki also reported tenderness to palpation. However, Dr. Vanichkachorn noted no objective medical findings from his examination. His diagnoses included chronic low-back pain, lumbar spondylosis, and lumbar degenerative disk disease.

¶ 43 Dr. Vanichkachorn's treatment plan included acupuncture for pain control and willow bark as an anti-inflammatory, since he "would not recommend opioids in an individual with such an extensive history of poly substance abuse." Dr. Vanichkachorn noted that Rutecki declined referral to a chronic pain specialist.

¶ 44 Regarding Rutecki's ability to work, Dr. Vanichkachorn wrote:

> Finally, in regards to work, Ms. Rutecki has been out of work for approximately three years. It is highly unlikely that she will be able to return to the workforce at this point without serious change in her symptoms and body conditioning. That being said, I do not have any objective indications that she would not be able to perform at least sedentary work in some form. . . . It should be noted that Ms. Rutecki's mental health conditions may limit her ability to work reliably.

¶ 45 This Court finds that Rutecki was not candid with Dr. Vanichkachorn regarding her work history. Although she led Dr. Vanichkachorn to believe that she had not worked in three years, Rutecki cleaned homes and businesses until nine months before this appointment, and she worked as a CNA less than two years before she saw him. This Court finds that Dr. Vanichkachorn's opinions about Rutecki's ability to return to work were partly based on inaccurate information.

¶ 46 On April 7, 2015, Rutecki began treating with acupuncturist Justin Green. Two days later, Rutecki reported she felt much better after her first treatment and could do light yard work for the first time in two years. On April 14, 2015, following the last of four acupuncture sessions, Rutecki reported she was "overall '50%' better and 'has her life back', she feels she could go back to light work."

¶ 47 On May 8, 2015, Rutecki told Dr. Vanichkachorn that her symptoms and functioning had improved, which she attributed to the willow bark and acupuncture treatments. Dr. Vanichkachorn declared Rutecki at MMI. He restricted her from assisting patients with ambulation and transitioning due to safety risks. He also restricted her to lifting less than 20 pounds occasionally and 10 pounds frequently, with no repetitive bending. Dr. Vanichkachorn noted, "[I]t may be difficult for her to reinitiate employment after so many years off. She may also have difficulties tolerating prolonged work due to chronic pain. Finally, Ms. Rutecki's non work-related conditions, such as anxiety may also significantly limit her ability to be gainfully employed."

¶ 48 On July 10, 2015, Kozeluh filed a progress report in which she noted that Rutecki's attorney had requested job analyses for positions in the Kalispell area, and Dr. Vanichkachorn had found Rutecki at MMI and given her work restrictions. At Liberty's request, Kozeluh thereafter developed job analyses for cashier at Town Pump, crew member at Arby's, deburrer at Sonju Industrial, front desk clerk at Aero Inn, pinner/assembler at Connector Technologies, Inc., and sandwich maker at Subway. The cashier and crew member positions were rated medium-duty and the other positions were rated light-duty. Although Kozeluh believed Liberty intended to provide these job analyses to a physician for review, no approvals or disapprovals for these positions were submitted into evidence.

¶ 49 On July 19, 2015, Dr. Vanichkachorn responded to a request from Rutecki's attorney to review Kozeluh's Helena job analyses to determine if Rutecki could perform those positions within her restrictions. Dr. Vanichkachorn approved the positions of night auditor, administrative/cash office clerk, bingo caller, and bill collector. Dr. Vanichkachorn disapproved the jobs of CNA, cashier, and waitress. Regarding the waitress position, Dr. Vanichkachorn commented, "[I] do not recommend carrying trays of hot food over customers."

¶ 50 After Dr. Vanichkachorn disapproved the waitress position, Kozeluh contacted several establishments and asked whether their waitresses had to carry trays of food over customers. The answer she invariably received was "no." Kozeluh opined that Dr. Vanichkachorn's comment was insufficient to disqualify Rutecki from performing the waitress job.

¶ 51 Kozeluh testified that the positions Dr. Vanichkachorn approved, plus the waitress position, either paid more than Rutecki's time-of-injury wage of $10.50 per hour or were minimum wage positions which would pay more than Rutecki's time-of-injury wage when including tips. Kozeluh opined that a viable labor market for all of these positions exists in the Kalispell area. She further testified that these types of jobs were plentiful in the Kalispell area, with numerous openings in the past year, and she believed Rutecki would have no difficulty finding employment in one of those jobs. Consequently, Kozeluh opined that Rutecki suffered no wage loss as a result of her back injury even if she was unable to return to her time-of-injury job.

¶ 52 On July 24, 2015, Todd A. Fellars, MD, an orthopedic surgeon, performed an independent medical evaluation (IME) of Rutecki at Liberty's request. Dr. Fellars' impression of Rutecki's condition was: lumbar spondylosis with L5-S1 radiculopathy, resolved; ongoing pain complaints likely secondary to lumbar spondylosis, not work-related; and bilateral hip osteoarthritis, not work-related.

¶ 53 Dr. Fellars identified no objective findings which would explain Rutecki's pain complaints. He commented that while Rutecki reported "10/10 pain," he observed no physiological response correlating to that pain level and she had full range of motion upon examination. Dr. Fellars found no material change in Rutecki's condition since June 2013. He believed she had been at MMI since Dr. Weinert's June 17, 2013, determination and agreed with Dr. Weinert's determination of a Class I impairment and a 7% whole-person impairment rating. From an orthopedic standpoint, Dr. Fellars found Rutecki did not qualify for work restrictions and "there is no orthopaedic reason that this claimant cannot be gainfully employed." Dr. Fellars opined that the permanent restrictions Vonada issued were unnecessary and that Rutecki should be able to return to her time-of-injury employment. Dr. Fellars also noted: "It is essentially a self-fulfilling prophecy that she feels she cannot work and therefore likely will not work."

¶ 54 Since ceasing to clean properties for her friend's business, Rutecki has not looked for work but instead relies on her friends for support. She testified that they "supply work, if that's what you want to call it," and give her money for necessities. Rutecki had no explanation why she has not looked for work within the restrictions Dr. Vanichkachorn issued, despite having reported that she was feeling better and despite having told her acupuncturist that she was ready to return to "light work." This Court finds no rationale for Rutecki's reluctance to apply for employment in the sedentary to light-duty range for which she is vocationally qualified.

CONCLUSIONS OF LAW

¶ 55 This case is governed by the 2011 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Rutecki's industrial accident.[1]

¶ 56 Rutecki bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[2]

Issue One: Has Rutecki proven that she suffered an actual wage loss as a result of her industrial injury and is therefore entitled to PPD benefits?

¶ 57 Section 39-71-703, MCA, states, in pertinent part:

> (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:
>
> (a) has an actual wage loss as a result of the injury; and
>
> (b) has a permanent impairment rating . . . .

¶ 58 Section 39-71-116(1), MCA, states, "actual wage loss" occurs when "the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury."

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[1] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[2] *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

¶ 59 The "qualified to earn" standard applies in situations such as this where the injured worker does not seek work.[3] This Court applies four factors in considering which jobs to include in determining what an injured worker is qualified to earn.[4] First, the claimant must be physically capable of performing the job.[5] Second, the claimant must be vocationally qualified for the job.[6] Third, the job must be available in the claimant's geographical job market.[7] Fourth, the claimant must have a reasonable prospect of actually securing the job.[8]

¶ 60 As to whether Rutecki is physically capable of performing the jobs in question, after she reached MMI, Dr. Weinert released her to return to work without restrictions. Vonada approved job analyses for administrative/cash office clerk, bill collector, waitress, night auditor, cashier, bingo caller, and CNA. At that time, Rutecki had no actual wage loss as a result of her industrial injury and was therefore not entitled to PPD benefits. The fact that Rutecki subsequently moved to Kalispell, worked as a housekeeper intermittently for a year, and did not seek further employment does not change the fact that she had no actual wage loss as a result of her industrial injury. After moving to Kalispell, although she sought additional medical treatment, she remained at MMI. Nothing in the record leads this Court to conclude that Dr. Weinert's and Vonada's opinions no longer apply to Rutecki's condition.

¶ 61 Nonetheless, Rutecki saw Dr. Vanichkachorn on two occasions, nearly two years after she reached MMI. In addition to the fact that Rutecki remained at MMI and had been released to return to work without restrictions, some of the other facts in this case cause this Court to view Dr. Vanichkachorn's opinions with less weight than might otherwise be the case: specifically, the inaccurate work history Rutecki provided, and his lack of opportunity to review Rutecki's post-injury medical records. However, regardless of whether this Court finds Dr. Vanichkachorn underestimated Rutecki's work capability, Dr. Vanichkachorn nevertheless approved job analyses for night auditor, administrative/cash office clerk, bingo caller, and bill collector. Thus, even if this Court relies solely upon Dr. Vanichkachorn's opinions, under the first factor, this Court concludes that Rutecki is physically capable of performing, at a minimum, the night auditor, administrative/cash office clerk, bingo caller, and bill collector jobs. Rutecki has offered no medical evidence to the contrary.

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[3] *Ryckman v. Asarco, Inc.*, 2005 MTWCC 52, ¶ 7.

[4] *Campbell v. Montana Contractor Comp. Fund*, 2003 MTWCC 58, ¶ 47.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

¶ 62 As to the second factor, this Court concludes that Rutecki is vocationally qualified for the night auditor, administrative/cash office clerk, bingo caller, and bill collector jobs. Although Rutecki contends that she lacks transferable skills, she also acknowledges that her employment history includes housekeeper, bartender, deli manager, keno cashier, and waitress. Kozeluh convincingly testified that Rutecki has the necessary vocational qualifications for these positions.

¶ 63 Regarding the third factor, although Kozeluh created these job analyses for particular jobs in Helena, Kozeluh credibly testified — and Rutecki did not dispute — that equivalent positions were readily available in the Kalispell area. A viable labor market for these positions exists and these types of jobs are available in both Helena and the Kalispell area.

¶ 64 Finally, under the fourth factor, this Court concludes that Rutecki has a reasonable prospect of obtaining these jobs. Kozeluh credibly testified that numerous openings in these job types occurred in the Kalispell area in the past year, and she opined that Rutecki would have no difficulty finding employment in one of those jobs. Rutecki testified that she has not applied for any of these jobs, nor has she made any attempt to find suitable employment.

¶ 65 Rutecki contends that her restriction to light-duty employment means she has suffered a wage loss and that in comparing the approved jobs to her time-of-injury job, this Court must also consider whether her wage would have increased in her time-of-injury position. However, Rutecki has neither refuted Kozeluh's testimony that the alternate job analyses approved by Dr. Vanichkachorn pay at least as much as her time-of-injury job position nor has she proven that her wages would have increased in her time-of-injury position or, the amount her wages would have increased.

¶ 66 Rutecki has failed to meet her burden of proving she has an actual wage loss under § 39-71-703(1)(a), MCA. Therefore, she is not entitled to PPD benefits.

Issue Two: Has Rutecki proven an entitlement to vocational rehabilitation benefits as a result of her industrial injury?

¶ 67 Under § 39-71-1006(1)(a)(i), MCA, an injured worker is entitled to rehabilitation benefits if the worker meets the definition of a disabled worker pursuant to § 39-71-1011, MCA. Section 39-71-1011(3), MCA, states:

> "Disabled worker" means a worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements ***and*** who has an actual wage loss as a result of the injury.[9]

¶ 68 Since Rutecki did not suffer an actual wage loss, she does not meet the definition of "disabled worker" in § 39-71-1011, MCA. Therefore, she is not entitled to rehabilitation benefits.[10]

¶ 69 Rutecki, however, argues that this Court should follow the "principle" of *Gates v. Liberty Northwest Ins. Co.*, in which this Court held that a worker is entitled to vocational rehabilitation services if he does not immediately return to work upon reaching MMI.[11] Rutecki acknowledges that under the 1993 WCA, which applied in *Gates*, the rehabilitation benefits statute[12] provided that an injured worker was entitled to vocational rehabilitation benefits and services if he could not return to his time-of-injury position prior to a determination of actual wage loss. This is no longer the case, and thus *Gates* is inapplicable to this matter.

Issue Three: Has Rutecki proven that Liberty is liable for any outstanding medical bills?

¶ 70 In her trial brief, Rutecki stated, "It is unclear at the time of this filing whether Petitioner's out of pocket medications and TENS/NMS supplies have been paid." Rutecki offered no evidence at trial of any outstanding medical bills and therefore she has not satisfied her burden of proof.

JUDGMENT

¶ 71 Rutecki has not proven that she suffered an actual wage loss as a result of her industrial injury and is therefore not entitled to PPD benefits.

¶ 72 Rutecki has not proven an entitlement to vocational rehabilitation benefits as a result of her industrial injury.

¶ 73 Rutecki has not proven that Liberty is liable for any outstanding medical bills.

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[9] Emphasis added.

[10] *See also Stancil v. MHA Workers' Comp. Trust*, 2007 MTWCC 51, ¶ 53 (citation omitted).

[11] 1995 MTWCC 114.

[12] § 39-71-2001, MCA, which since 1995 has been renumbered as § 39-71-1006, MCA.

¶ 74 Rutecki has not proven that Liberty has unreasonably denied the payment of PPD benefits, thereby entitling her to an award of attorney fees.

¶ 75 Rutecki is not entitled to an award of costs.

¶ 76 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 this 16th day of June, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Garry D. Seaman
Kelly M. Wills

Submitted: August 26, 2015