IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 8

WCC No. 2008-2099

GREGORY SKIFF

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Respondent accepted liability for Petitioner's industrial accident which caused Petitioner's paraplegia. Respondent currently pays Petitioner's wife $7.50 per hour for .75 hours of daily domiciliary care. Respondent converted Petitioner's benefits after Petitioner informed Respondent that he disagreed with Respondent's vocational rehabilitation proposal. Petitioner argues that he is entitled to 2.8 hours of daily domiciliary care at a rate of either $9.84 or $18.88 per hour. Petitioner further argues that Respondent's vocational proposal was unreasonable, that Respondent unreasonably converted his benefits, and that Respondent has been unreasonable in its adjustment of Petitioner's claim, and therefore the Court should award Petitioner his costs, attorney fees, and a penalty.

Held: Petitioner is entitled to have his wife provide .5 to 1 hour of daily domiciliary care at an hourly rate of $7.50 per hour until June 22, 2007, and $9.84 thereafter. Regarding the reasonableness of Respondent's vocational rehabilitation plan, after Petitioner rejected Respondent's initial proposal, Respondent requested Petitioner's input in developing an alternative plan and Petitioner failed to respond to Respondent's request. The Court therefore finds that Respondent has not failed to offer a reasonable vocational plan. Respondent properly converted Petitioner's benefits. Respondent did not act unreasonably and therefore Petitioner is not entitled to attorney fees or a penalty.

¶ 1 The trial in this matter began on September 4, 2008, at the law office of Linnell, Newhall, Martin & Schulke, in Great Falls, Montana. Petitioner Gregory Skiff was present and was represented by Norman L. Newhall. Respondent was represented by Daniel B. McGregor. Robin Miller, claims adjuster for Respondent, was also present. Trial

reconvened on September 12, 2008, at the same location and with the same parties present. Trial concluded on September 25, 2008, at the Workers' Compensation Court in Helena, Montana. Petitioner and his counsel participated by telephone. Respondent's counsel and claims adjuster appeared in person.

¶ 2 Exhibits: Exhibits 1 through 46 were admitted without objection. Page 162 of Exhibit 41 was withdrawn by Respondent and returned to its counsel. Respondent submitted the 2005 Federal Poverty Level Guidelines and Petitioner submitted the 2007 Federal Poverty Level Guidelines to the Court for judicial notice purposes. During the third part of trial, Petitioner's counsel asked the Court to take judicial notice of the website links one is given when conducting an electronic search for the prevailing wage of home care attendants through the Montana Job Service.

¶ 3 Witnesses and Depositions: The deposition of Dr. James D. Hinde was taken and submitted to the Court, and can be considered part of the record. On the first day of trial, Sheila Riesenberg testified, and Dr. James M. Gracey was sworn and testified by telephone. At the second part of trial, Dr. Gracey was recalled via telephone for limited testimony. Robin Miller, Katie Skiff, and Petitioner testified. At the third part of trial, Petitioner completed his testimony by telephone and Bridget McGregor testified.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:[1]

> ¶ 4a Whether Petitioner is entitled to an increase in the hourly rate and number of hours of domiciliary care.
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> ¶ 4b Whether Respondent has failed to offer or propose a reasonable plan for vocational retraining or rehabilitation.
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> ¶ 4c Whether Respondent has properly terminated or converted temporary total disability benefits.
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> ¶ 4d Whether Petitioner is entitled to reinstatement of temporary total disability benefits or to initiation of payment of permanent total disability benefits.
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> ¶ 4e Whether Respondent has acted unreasonably.
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> ¶ 4f Whether Petitioner is entitled to an award of attorney fees, costs, and penalty pursuant to § 39-71-611 and § 39-71-2907, MCA.

[1] Pretrial Order at 2.

¶ 5 After trial concluded, Respondent reinstated Petitioner's temporary total disability (TTD) benefits while the parties pursued Petitioner's vocational rehabilitation options.[2] Therefore the issue of whether Petitioner is entitled to reinstatement of his TTD benefits is moot.

FINDINGS OF FACT

¶ 6 Petitioner's industrial injury occurred on January 11, 2006, while he performed his duties as a laborer for Clausen and Son's in Havre, Montana. Petitioner fell off a roof and suffered an L1 burst fracture in his lower back, resulting in complete paraplegia.[3] Respondent accepted liability for Petitioner's industrial injury and has paid medical and wage-loss benefits.[4]

Domiciliary Care

¶ 7 Respondent currently pays Petitioner's wife $7.50 per hour for .75 hours of daily domiciliary care. Petitioner believes he is entitled to an increase in both the amount of hours of domiciliary care and the rate of pay.

¶ 8 Petitioner's wife Katie Skiff testified at trial. I found Mrs. Skiff to be a credible witness. Mrs. Skiff and Petitioner have been married since 2000 and they have three children. Mrs. Skiff has lived in Malta her entire life. At the time of Petitioner's industrial accident, she worked as an aide at a school in Malta. Mrs. Skiff did not return to work after Petitioner's injury.[5]

¶ 9 Mrs. Skiff's parents and other family members reside in Malta. Mrs. Skiff, Petitioner, and their children reside in a home in Malta that has been modified to accommodate Petitioner's disability. The home was purchased and modified with an advance Petitioner received against his impairment rating entitlement. Mrs. Skiff testified that some of the home remains inaccessible to Petitioner, including kitchen cupboards, some areas of the closets and built-in shelving, and storage areas in the garage. One bathroom is not accessible. Petitioner cannot turn on the water diverter in the shower without assistance. Also, Petitioner cannot navigate his wheelchair onto a portion of the lawn.[6]

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[2] See Minute Book Hearing No. 3998.

[3] Pretrial Order, Uncontested Facts at 1.

[4] Pretrial Order, Uncontested Facts at 2.

[5] Trial Test.

[6] Trial Test.

¶ 10 Mrs. Skiff testified that Petitioner cannot perform many household chores which were part of his regular routine prior to his injury. These include such tasks as changing light bulbs, hanging holiday lights and decorations, most outdoor maintenance tasks, moving furniture, and making repairs to the home. Petitioner also can no longer change the oil in his car or wash the vehicle. Mrs. Skiff noted that recently, they had a plugged drain in the home which she took apart and fixed, and this is the type of household task which Petitioner would have performed prior to his injury. A pipe froze and burst, and Mrs. Skiff's father repaired it.[7]

¶ 11 Mrs. Skiff testified that Petitioner can accomplish some tasks, such as going to the grocery store or post office, only with an extraordinary amount of time and effort. Petitioner expends a great deal of time and effort to get his wheelchair into and out of the car, and this makes it impractical for Petitioner to run errands. Petitioner also cannot put fuel in his car without a great deal of difficulty. Although Petitioner can dispose of the garbage, he has to traverse a gravel alley which is nearly impassable for his wheelchair in inclement weather. Because these tasks are so onerous for Petitioner to complete, Mrs. Skiff generally does them even though Petitioner can technically do them.[8]

¶ 12 Mrs. Skiff testified that prior to his injury, Petitioner prepared meals. Since Petitioner's injury, he has difficulty maneuvering around the kitchen and cannot reach items that are kept in higher cupboards. Petitioner has difficulty retrieving things from the floor and often asks Mrs. Skiff to retrieve things he has dropped. Petitioner also uses exercise equipment and Mrs. Skiff changes the settings for him because he cannot reach the mechanism.[9]

¶ 13 Mrs. Skiff accompanies Petitioner whenever he attends a medical appointment in Great Falls. Although Petitioner can drive himself, Petitioner would be unable to handle a roadside emergency without assistance, such as changing a flat tire. Mrs. Skiff noted that an appointment in Great Falls generally necessitates an overnight stay because of the travel distance.[10]

¶ 14 Bridget McGregor, Respondent's Medical Services Director, is a registered nurse and has a master's degree in health services administration. McGregor testified at trial and

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[7] Trial Test.

[8] Trial Test.

[9] Trial Test.

[10] Trial Test.

I found her to be a credible witness. McGregor's job duties include contracting with preferred providers for durable medical equipment, home health services, Medicare set-aside services, and independent medical examinations. McGregor is also in charge of Respondent's managed care organization and the pharmacy benefit manager program.[11]

¶ 15 McGregor testified that when she establishes a domiciliary care rate, she searches the State of Montana job postings for positions such as personal care attendants, home health aides, or certified nursing aides for the county where the injured worker resides. She also checks the job service website for similar job postings from private employers. In Petitioner's case, McGregor did not find any postings for Phillips County, so she searched contiguous counties. She found jobs listed in Cascade County. The pay rate was $7.50 to $8.50 per hour. McGregor determined that the appropriate rate for Petitioner's domiciliary care would be $7.50 an hour since the services typically offered through domiciliary care are of a nonskilled nature.[12]

¶ 16 James D. Hinde, M.D., is a board-certified physician. He is also certified by the American Board of Pain Medicine and the American Board of Rehabilitation. He works full time in physical medicine, rehabilitation, and pain management in Great Falls.[13] Dr. Hinde first treated Petitioner on January 16, 2006.[14]

¶ 17 On March 8, 2006, Petitioner's counsel wrote to Respondent's counsel in follow-up to a telephone conversation regarding the hourly rate for the domiciliary care provided by Mrs. Skiff. Petitioner's counsel noted that he contacted three employers and was quoted a rate of between $8.50 and $9.56 per hour to provide personal care services. Petitioner's counsel suggested that $9.00 per hour would be a fair rate for Mrs. Skiff's services.[15]

¶ 18 In March 2006 Patricia L. Boege, RN, CCM, Medical Case Manager for Respondent, wrote to Dr. Hinde and asked him to provide some information so that Petitioner could be referred for domiciliary care. Dr. Hinde returned Boege's letter in August 2006, adding a handwritten notation which referred Respondent to his medical records. Dr. Hinde further noted, "[It will] save some money for the State Fund if I don't have to fill out these forms!"[16]

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[11] Trial Test.

[12] Trial Test.

[13] Hinde Dep. 4:17 - 5:7.

[14] Hinde Dep. 7:3-8.

[15] Ex. 5.

[16] Ex. 6.

¶ 19 Robin Miller is the claims examiner for Respondent who has handled Petitioner's claim since July 1, 2006. I found Miller to be a credible witness.

¶ 20 Respondent had ceased paying domiciliary care benefits on April 10, 2006. Miller stated that this occurred because the claims examiner had contacted Dr. Hinde and requested that he address the domiciliary care issue and Dr. Hinde refused to do so. Miller stated that Respondent needed objective medical information in order to pay domiciliary care benefits, and without that information from Dr. Hinde, Respondent was unable to provide the benefits.[17]

¶ 21 In an April 11, 2006, report, Dr. Hinde noted that he had questioned Mrs. Skiff about the extent of domiciliary care she provided for Petitioner and based on her response, he determined that Petitioner required 3.5 hours of daily domiciliary care at that time.[18] However, Dr. Hinde did not complete the Department of Labor and Industry's domiciliary care form which Respondent had sent him. Dr. Hinde again endorsed this amount on August 14, 2006, although he noted that he expected Petitioner's needs to decrease after completion of a rehabilitation program.[19]

¶ 22 In the claims file notes on April 24, 2006, Boege noted that she had contacted Dr. Hinde regarding his lack of response to Respondent's letter inquiring about Petitioner's need for domiciliary care. Dr. Hinde acknowledged receipt of the letter but informed Boege that he did not intend to make replying a priority. Boege explained that without objective medical evidence of its necessity, Respondent would not pay for Petitioner's domiciliary care.[20]

¶ 23 On May 8, 2006, Bridget Scevers, claims examiner for Respondent, wrote to Petitioner's counsel and informed him that Respondent would retroactively pay domiciliary care benefits to Petitioner for the period of March 2, 2006, through April 10, 2006, for 3.5 hours per day at a rate of $7.50 per hour.[21] Petitioner's counsel responded by letter on May 16, 2006, and requested Scevers provide the information she relied on in determining

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[17] Trial Test.

[18] Ex. 30 at 2.

[19] Ex. 30 at 6.

[20] Ex. 37 at 31-32.

[21] Ex. 7.

the rate. Petitioner's counsel further stated that Petitioner's need for domiciliary care was ongoing and requested that Respondent continue to pay domiciliary care benefits.[22]

¶ 24 Petitioner's counsel again wrote to Scevers on June 7, 2006, requesting that domiciliary care benefits be brought current.[23] Scevers responded on July 3, 2006. She enclosed the April 11, 2006, chart notes from Drs. John VanGilder and Hinde, and a note written to Respondent by Dr. Hinde on May 12, 2006, asserting that Respondent had relied on this information in determining Petitioner's entitlement to domiciliary care benefits. Scevers further noted that the $7.50 per hour rate was determined from research by Respondent's Claim Medical & Contract Specialist, Bridget McGregor. Scevers added that for Respondent to continue paying domiciliary care benefits, Dr. Hinde would have to complete the paperwork which had been requested from him.[24]

¶ 25 Petitioner's counsel responded to Scevers' letter on July 12, 2006, addressing his correspondence to Miller who had become the adjuster on Petitioner's claim. Petitioner's counsel disputed Respondent's assertion that it required information from Dr. Hinde to authorize continued domiciliary care payments and reasserted Petitioner's demand for coverage, alleging that Mrs. Skiff was providing approximately 3 hours of daily domiciliary care.[25]

¶ 26 On July 20, 2006, Boege noted that on May 12, 2006, Respondent received a note from Dr. Hinde stating that he was not responding to Respondent's request for domiciliary care information in order to save Respondent money. On August 3, 2006, Boege noted that additional attempts to get Dr. Hinde to respond had been unsuccessful and that Dr. Hinde had not seen Petitioner since April. A note from Miller on that same day noted that Respondent had assembled a team to address Petitioner's domiciliary care issues. Someone contacted Dr. Hinde's office and learned that Petitioner was scheduled for a follow-up appointment on August 11, 2006.[26]

¶ 27 Miller acknowledged that when she took over Petitioner's claims file, she did not review his file immediately. The parties participated in a mediation on August 4, 2006. After the mediation, Respondent resumed payment of the domiciliary care benefits at a rate

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[22] Ex. 8.

[23] Ex. 9.

[24] Ex. 11.

[25] Ex. 12.

[26] Ex. 37 at 42-43.

of 3.5 hours per day, with payments made retroactive to April 11, 2006, at a rate of $7.50 per hour.[27]

¶ 28 On August 6, 2006, Miller noted in the claims file that, although Respondent had refused to pay domiciliary care benefits because of Dr. Hinde's refusal to provide the information it had requested, Respondent reconsidered its decision and agreed to pay domiciliary care benefits from April 11 through August 14, 2006 – the date of Petitioner's next appointment with Dr. Hinde.[28] On August 17, 2006, Boege noted that Dr. Hinde had justified ongoing domiciliary care in his notes from Petitioner's August 14 appointment, and that Respondent would continue to pay for 3.5 hours of domiciliary care per day.[29]

¶ 29 On August 15, 2006, Dr. Hinde wrote a letter to Boege answering her inquiry regarding Petitioner's domiciliary care needs. Dr. Hinde noted that he had anticipated that Petitioner's need for domiciliary care services would diminish over time and he would eventually not require any. Dr. Hinde recommended that Petitioner be referred to Craig Hospital, where he would learn skills that would diminish his need for domiciliary care.[30]

¶ 30 On November 16, 2006, Dr. Hinde revised his recommendation and determined that Petitioner now needed 1 to 2 hours of daily domiciliary care.[31] He explained that this amount of time was needed for basic personal care and did not include difficulties navigating the environment or difficulties which a spouse or attendant would normally assist with, getting into and out of a vehicle, and shopping or visiting buildings with difficult access.[32] Dr. Hinde explained that he changed the estimated need for domiciliary care based on Petitioner's ability to manage his own bowel program, his increased ability to manage his own transfers, and that he no longer needed to wear a body jacket.[33]

¶ 31 From February 21 until March 21, 2007, Petitioner participated in rehabilitation and training at the Craig Hospital in Englewood, Colorado. Petitioner learned a variety of skills to gain independence and improve his ability to perform household tasks and transfer

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[27] Trial Test.

[28] Ex. 37 at 43.

[29] Ex. 37 at 44.

[30] Ex. 30 at 7-8.

[31] Ex. 30 at 18.

[32] Hinde Dep. 10:12-17.

[33] Hinde Dep.11:2-7.

himself into and out of his vehicle.[34] Petitioner testified that when he attended the rehabilitation program at Craig Hospital, he had access to adaptive equipment that he does not have at home which made it possible for him to perform more household tasks. For example, he learned how to use a broom and dustpan that had long handles that allowed him to sweep the floor, while at home he has a regular broom and dustpan which he cannot use. Petitioner stated that he has not requested that Respondent pay for any of these adaptive items because he does not want to be bothersome.[35]

¶ 32 On February 15, 2007, Miller noted that Petitioner had last received a domiciliary care reimbursement on December 25, 2006, and that Respondent owed domiciliary care payments from December 26, 2006. Miller noted that she would pay domiciliary care through February 19 "to make it an even week," and that Petitioner was about to enter Craig Hospital for his training program.[36] Miller admitted that at times domiciliary care payments were delayed because Respondent converted to a new computer system and Miller could not directly issue the payment checks while the conversion was in progress. Once the conversion was completed, Miller set up the domiciliary care payments to occur on a regular cycle, and she does not believe any delays in payment have occurred since that time.[37]

¶ 33 On July 5, 2007, Dr. Hinde noted that Petitioner had become almost completely independent in basic self-care and mobility since completing the program at Craig Hospital, although Mrs. Skiff helped him get his wheelchair into his vehicle and assisted with shopping and meal preparation.[38] While Petitioner no longer needed assistance with bathing, transfers, and skin checks, he still needed assistance with environmental challenges. Dr. Hinde determined that Petitioner's daily domiciliary care needs remained at approximately 1.5 hours as of July 5, 2007.[39] On August 16, 2007, Dr. Hinde determined that Petitioner required only .5 to 1 hour of daily domiciliary care as he found that Petitioner was capable of independent living.[40] Dr. Hinde clarified that although Petitioner could be

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[34] Ex. 36.

[35] Trial Test.

[36] Ex. 37 at 52.

[37] Trial Test.

[38] Ex. 30 at 20.

[39] Hinde Dep. 12:6 - 13:9.

[40] Hinde Dep. 13:19 - 14:6.

completely independent, he showed signs of acromioclavicular joint arthritis and so it was appropriate for him to have assistance with physically demanding tasks.[41]

¶ 34 On September 8, 2007, Dr. Hinde wrote to Barbara Ladd, RN, at Respondent's offices and updated his answers to her questions regarding Petitioner's need for domiciliary care and ability to return to work.[42] Dr. Hinde opined that although Mrs. Skiff was performing some tasks for Petitioner, Petitioner was capable of living independently. Dr. Hinde estimated that Mrs. Skiff was providing .5 to 1 hour of domiciliary care per day but, "The necessity of this . . . is open to discussion . . . ." At that time, Dr. Hinde found Petitioner to be at maximum medical improvement (MMI) and assigned him an 89% whole person impairment rating.[43]

¶ 35 Miller testified that from September 8, 2007, until the time of trial, Respondent paid Petitioner domiciliary care benefits for .75 hours of domiciliary care per day at a rate of $7.50 per hour.[44]

¶ 36 On March 11, 2008, the Colorado Institute for Injury Rehabilitation, Inc., issued a Life Care Plan and Rehabilitation Evaluation Report prepared by James M. Gracey, Ed.D., CRC, CLCP.[45] The plan was finalized with amendments on June 24, 2008.[46] Dr. Gracey testified at trial via telephone. Dr. Gracey has a doctorate in rehabilitation, a master's degree in counseling psychology with a major in rehabilitation, and a bachelor's degree in psychology and sociology. He is a certified rehabilitation counselor and a certified life care planner. Since 1970 he has worked in Denver, Colorado, and he has been in private practice since 1981. Since 1995 he and his wife have owned this business, which specializes in life care planning and the provision of direct care for severely injured people.[47]

¶ 37 Dr. Gracey has held teaching positions at Metro State College in Denver and at the University of Northern Colorado. Dr. Gracey also has other professional organization and

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[41] Hinde Dep. 15:4-12.

[42] Ex. 17; Ex. 30 at 22-23.

[43] *Id*.

[44] Trial Test.

[45] Ex. 23; Ex. 2 to Hinde Dep.

[46] Ex. 26.

[47] Trial Test.

publishing credits. He estimated that he testifies as an expert witness at trials 18 times per year.[48]

¶ 38 In researching his report, Dr. Gracey reviewed Petitioner's pertinent medical records.[49] Dr. Gracey and a rehabilitation consultant conducted preliminary phone interviews with Petitioner and Mrs. Skiff, and then traveled to Malta in September 2007 where they surveyed Petitioner's home and evaluated his need for in-home assistance. Dr. Gracey also met with several of Petitioner's extended family members who have been involved in his care, and with Dr. Medina, Petitioner's primary care physician in Malta. Dr. Gracey and the consultant completed vocational testing in Petitioner's home.[50]

¶ 39 In his report, Dr. Gracey summarized Petitioner's medical history and noted that at the time of the report, Petitioner was fairly independent in his activities of daily living, but had some limitations where his home was not accessible to him, and also was not able to perform most of the routine maintenance and light construction tasks which he previously would have done around the home. Dr. Gracey noted that Petitioner required frequent breaks while traveling long distances. Dr. Gracey also noted that Petitioner was more sensitive to heat and that he took daily naps because of chronic fatigue.[51]

¶ 40 Dr. Gracey testified that the key medical elements to Petitioner's physical limitations are that he has a complete loss of sensation and motor function from the T10 vertebrae down, and Petitioner's condition will not improve in the future. Dr. Gracey noted that Petitioner is very motivated and has an excellent support system, and Petitioner is independent with his bowel and bladder function except when he is ill. Dr. Gracey further noted that Petitioner has suffered from frequent urinary tract infections which cause him difficulties in managing his bladder functions. Since Petitioner has no sense of bladder function, he must catheterize himself periodically to empty his bladder. Urinary tract infections cause Petitioner to feel unwell and his bladder becomes unreliable.[52]

¶ 41 Dr. Gracey further noted that Petitioner has chronic pain in the region of his spinal cord injury which requires daily narcotic medication, and suffers from chronic fatigue which is commonly seen in people with spinal cord injuries. Dr. Gracey testified that these limitations affect Petitioner's ability to do things in his home, independently care for himself,

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[48] Trial Test.

[49] Trial Test.

[50] Trial Test.

[51] Ex. 23 at 5; Ex. 2 to Hinde Dep. at 5.

[52] Trial Test.

and assist with household tasks and childcare. Dr. Gracey further testified that Petitioner requires Mrs. Skiff's assistance for particular things which are not accessible to him – for instance changing the diverter on the shower so that he can bathe himself and changing the settings on his exercise equipment.[53]

¶ 42 Dr. Gracey stated that Petitioner has difficulty getting his wheelchair into his car. Petitioner needs 10 to 15 minutes to disassemble his wheelchair and place the pieces in the car. Petitioner then has to reassemble his wheelchair when he arrives at his destination. Therefore, running a routine errand takes Petitioner at least an hour to perform. Mrs. Skiff generally assists Petitioner in getting his wheelchair disassembled and placed in the car, and Dr. Gracey opined that this was a reasonable type of assistance that should be available to Petitioner. Dr. Gracey further noted that Petitioner performs weight-shifting exercises while in his wheelchair, and that it is difficult for Petitioner to perform such exercises while driving. Petitioner needs to take periodic breaks while driving to perform these exercises.[54]

¶ 43 Dr. Gracey explained that the assistance which Petitioner receives from Mrs. Skiff is more than what is expected in a typical husband-wife relationship. Mrs. Skiff provides Petitioner's home-care assistance. Home-care assistance includes activities such as house cleaning and laundry assistance, and assisting Petitioner with loading and unloading his wheelchair. Dr. Gracey opined that Petitioner requires approximately 2 hours of this type of assistance each day.[55] Dr. Gracey also opined that Petitioner requires home maintenance support for home and automotive repair and maintenance.[56]

¶ 44 Dr. Gracey explained that the Clinical Practice Guidelines from the Consortium for Spinal Cord Medicine recommends 2 hours of homemaker assistance for a person with a T10 spinal cord injury, and that this recommendation is based on extensive study conducted by the Consortium. Dr. Gracey believes 2 hours per day is a conservative estimate, but realistically reflects the amount of assistance which Petitioner receives from his family members.[57]

¶ 45 Dr. Gracey also recommended that Petitioner receive approximately 20 hours per month of home maintenance support. Dr. Gracey explained that the Department of

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[53] Trial Test.

[54] Trial Test.

[55] Trial Test.

[56] Ex. 23 at 11; Ex. 2 to Hinde Dep. at 11.

[57] Trial Test.

Commerce and several private organizations have studied the amount of time the average person spends performing home maintenance activities, and he used data from the American Time Use Studies to estimate an appropriate amount of services for Petitioner. Dr. Gracey pointed out that Petitioner is a motivated and active individual who intends to complete home maintenance projects that are within his ability, and that this estimate leaves room for Petitioner to do so.[58]

¶ 46 Dr. Gracey sent a copy of his report draft to Dr. Hinde and requested his input on April 21, 2008.[59] Dr. Hinde responded on May 16, 2008, and suggested some modifications to the plan.[60] Dr. Gracey made some changes to the report per Dr. Hinde's recommendations. The final report was issued on June 24, 2008.[61]

¶ 47 Dr. Hinde admitted that he did not consider items such as housecleaning and laundry which were delineated in Dr. Gracey's life care plan in his original domiciliary care calculations. Dr. Hinde opined that if these items were properly included as domiciliary care, then 2 hours of daily domiciliary care was a more appropriate estimate for Petitioner's case.[62] However, Dr. Hinde explained that this recommendation was based on the assumption that Dr. Gracey's more expansive definition of what constitutes "domiciliary care" is correct, and if Dr. Hinde considered only care necessary to prevent Petitioner from having to complete tasks which would increase his pain, then .5 to 1 hour of domiciliary care per day is sufficient.[63]

¶ 48 At trial, Mrs. Skiff agreed that 2.8 hours per day is a reasonable estimate of the amount of time that she spends providing additional home-care assistance and home maintenance than she would have had to provide if Petitioner had not been injured.[64]

¶ 49 Dr. Gracey testified that he estimated the cost of the home-care services Petitioner needs at $18.40 per hour by calling the Phillips County Hospital and Health Clinic and learning that this is the rate that facility charges to provide such services. Dr. Gracey added that Phillips County Hospital and Health Clinic has now raised its rate to $18.88 per

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[58] Trial Test.

[59] Ex. 24.

[60] Ex. 25.

[61] Trial Test.; Ex. 26.

[62] Hinde Dep. 27:1-15.

[63] Hinde Dep. 28:12-23.

[64] Trial Test.

hour. Dr. Gracey stated that he would value the services at the same rate if they were performed by a family member. Dr. Gracey acknowledged that the actual wages received by a personal care attendant in Malta – not what the agency charges for that attendant's services – was less than half the agency's service fee.[65]

Vocational Rehabilitation

¶ 50 Petitioner testified at trial and I found him to be a credible witness. Petitioner's family moved to Malta when he was a small child. Petitioner has resided in Malta or Glasgow since that time. Petitioner testified that prior to going to work for Clausen and Son's, his employment had been in Malta or the surrounding area. When he first started working for Clausen and Son's in October 2004, the company was working on a Border Patrol building which was located about a mile outside of Malta. That job lasted until October 2005. Afterward, Petitioner continued to work for Clausen and Son's, but most of the job sites he worked on were in or near Havre.[66]

¶ 51 When Petitioner worked in Havre, he drove to Havre on Monday morning and stayed overnight, then he worked Tuesday, stayed overnight again in Havre, worked Wednesday, and then drove home to Malta. He drove to Havre Thursday morning, worked that day and stayed overnight in Havre, worked Friday and then returned to Malta. He stayed in Malta over the weekend and returned to Havre on Monday morning. Petitioner worked and traveled on this schedule for most of the time from October 2005 until his industrial accident in January 2006.[67]

¶ 52 Petitioner testified that this commute was hard on his family. Petitioner began to look for work closer to home. He found a job as a miner with Stillwater Mining and gave notice to Clausen and Son's that he would be leaving that employment to take the Stillwater Mining job. At the time of his industrial accident, Petitioner only had three or four more days of work with Clausen and Son's.[68]

¶ 53 Petitioner's father, brother, and brother's family live in Malta. Both Petitioner's family and Mrs. Skiff's family have helped out in many ways since Petitioner's injury. Petitioner

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[65] Trial Test.

[66] Trial Test.

[67] Trial Test.

[68] Trial Test.

does not want to move away from Malta, and he does not believe his family would be able to afford equivalent housing in Havre.[69]

¶ 54 Petitioner takes narcotic medications and experiences increased heat sensitivity and daily drowsiness. Petitioner does not feel as comfortable driving a vehicle with hand controls as he did driving a nonmodified vehicle before his injury. Because of his drowsiness and fatigue, Petitioner has not driven the types of distances he drove prior to the injury. Petitioner stated that when he travels to Great Falls for medical appointments, Mrs. Skiff always accompanies him and usually he will drive there and she will drive the vehicle on the return trip while he naps.[70]

¶ 55 Sheila Riesenberg is a certified rehabilitation counselor with a master's degree in rehabilitation counseling. I found Riesenberg to be a credible witness. Riesenberg worked as an employment consultant from October 1995 until June 2003, and then worked as a practicum vocational counselor until December 2003. From January 2004 until July 2004, she worked as a vocational case manager intern. From July 2004 until the time of trial, Riesenberg worked as a vocational consultant, first with Crawford and Company, and then with Cascade Disability Management. Her services are based in Great Falls.[71]

¶ 56 The services Riesenberg provides as a vocational consultant include employability and wage-loss assessments, vocational counseling, vocational testing and interpretation of test results, transferable skills analysis, job analysis development, job and work-site modification, evaluation and recommendation of appropriate rehabilitation options, labor market research, job development and placement assistance, and rehabilitation plan monitoring. Riesenberg provided vocational rehabilitation services to Petitioner under a contract which her employer has with Respondent.[72]

¶ 57 Riesenberg received Petitioner's case on January 20, 2006.[73] In Respondent's adjuster's notes, claims examiner Scevers commented on January 23, 2006, that she informed the Skiffs that Riesenberg would contact them to discuss vocational rehabilitation.[74] On January 26, 2006, Riesenberg informed Scevers that she had

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[69] Trial Test.

[70] Trial Test.

[71] Trial Test.

[72] Trial Test.

[73] Trial Test.

[74] Ex. 37 at 10.

contacted Petitioner directly without knowing that he was represented by counsel. Riesenberg had scheduled an initial interview with Petitioner and Mrs. Skiff for January 27, 2006, but after learning he was represented, she contacted the office of Petitioner's counsel. Riesenberg believed the interview might be postponed so that a representative of Petitioner's counsel's office could also be present.[75]

¶ 58 During this same period, Petitioner discussed his vocational future with his medical providers. In a progress report written February 2, 2006, Dr. Hinde and Peter Stivers, Ph.D., noted, "We have discussed some of his thoughts about vocational transition. He has very interesting and I think appropriate ideas in this regard. It will only take time and of course his energy to make these things a reality."[76] However, on February 7, 2006, Petitioner's counsel wrote to Respondent and stated that it was too soon after Petitioner's accident to begin vocational rehabilitation and requested that Respondent tell Riesenberg to wait until a later date.[77]

¶ 59 Miller testified that Respondent's representatives try to begin vocational rehabilitation counseling as quickly as possible so that the employer, the injured worker, and his family know that Respondent is attempting to improve the situation. Miller further noted that two of Dr. Hinde's medical notes, which predate the February 7, 2006, letter, indicate that Petitioner was already considering what his post-injury vocational opportunities might be.[78]

¶ 60 On February 13, 2006, Scevers informed Petitioner's counsel that Riesenberg wished to meet with Petitioner to obtain an initial interview for employment history and education, and that Petitioner was not expected to make career decisions at that time.[79] In a February 16, 2006, progress report, Drs. Hinde and Stivers noted, "He is thinking in long-range terms about his change in occupation."[80] On February 24, 2006, Riesenberg asked Scevers if Petitioner's counsel had yet agreed to allow her to conduct an initial interview with Petitioner. Riesenberg explained that she needed the information she would obtain via the interview in order to assess Petitioner's skills and determine Petitioner's

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[75] Ex. 37 at 8-9.

[76] Ex. 27 at 51-52.

[77] Ex. 3.

[78] Trial Test.

[79] Ex. 37 at 18.

[80] Ex. 27 at 57.

training needs and whether there was the possibility of Petitioner returning to work with his time-of-injury employer in an alternate position.[81]

¶ 61 In a March 2, 2006, progress report, Dr. Hinde noted that vocational issues should be deferred until Petitioner was more mobile, "but certainly those involved in his case can begin planning with him on vocational re-entry . . . . [S]ome discussion would be appropriate for this and patient is interested in addressing [the] same."[82] On March 24, 2006, Dr. Hinde noted that although Petitioner would not be able to return to his former occupation as a construction laborer, Petitioner's time-of-injury employer was interested in working with him and wanted to help him remain with that employer. Dr. Hinde urged that alternative employment for Petitioner be addressed immediately.[83]

¶ 62 Riesenberg did some work on Petitioner's file, including contacting his time-of-injury employer to see if alternate job positions might be available to Petitioner.[84] On April 13, 2006, Riesenberg informed Scevers that Petitioner's counsel agreed that Riesenberg could contact Petitioner for an initial interview. Riesenberg requested permission from Scevers to travel to Malta to conduct an in-person interview. The meeting was arranged for April 18, 2006, with a representative of Petitioner's counsel to be present via telephone.[85]

¶ 63 During their initial meeting, Petitioner informed Riesenberg that he did not want to commute to Havre for employment. However, Riesenberg met with representatives of Clausen and Son's in Havre to discuss the possibility of Petitioner returning to work there. The employer was interested in having Petitioner return to work in a full-time cost estimator position. Petitioner would need formal training to be qualified for the position and the employer suggested programs at Montana State University-Northern which could fulfill the educational requirements for the position. Although Riesenberg knew that Petitioner was opposed to commuting from Malta to Havre, she believed Petitioner should be presented with return-to-work options so that he could decide if he wished to pursue employment with his time-of-injury employer.[86]

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[81] Ex. 37 at 21.

[82] Ex. 27 at 101.

[83] Ex. 27 at 104.

[84] Trial Test.

[85] Ex. 37 at 29. The meeting was rescheduled and ultimately occurred on April 21, 2006.

[86] Trial Test.

¶ 64 Riesenberg investigated Petitioner's educational and employment history and learned that Petitioner completed high school and attended one year at Glendive Community College. Riesenberg noted:

> At the time of injury, Mr. Skiff was employed by Pete Clausen & Sons, Inc. from October of 2004 until 1/11/06 as a Construction Worker earning $14.11 per hour. He reported he worked 12 months per year, 5 days a week, Monday through Friday from 7:00 a.m. until 6:00 or 6:30 p.m. He stated that he commuted to Havre every Monday morning. His employer providing overnight lodging in Havre on Monday and Tuesday nights. Mr. Skiff indicated he drove home to his family in Malta every Wednesday night and then back to Havre the following Thursday morning. He stayed overnight in Havre every Thursday night and returned to his home in Malta every Friday evening after work.[87]

Riesenberg further noted that prior to working for Clausen and Son's, Petitioner worked as a deli manager, disc jockey and radio advertising salesperson, and bartender. Petitioner had also worked as a construction worker, off-road dump truck driver, and as a laborer for an agriculture equipment business.[88]

¶ 65 Riesenberg completed her Initial Assessment Report of Petitioner on May 22, 2006.[89] Riesenberg analyzed Petitioner's transferable skills and noted that he was interested in obtaining additional computer skills. Riesenberg indicated that Petitioner could potentially be employed in a direct placement as a retail sales representative, public safety communications officer, radio disc jockey, or bank teller. As for retraining options, Riesenberg noted:

> Mr. Skiff was advised of his employer's willingness to offer him an alternative position following completion of appropriate formal retraining. Mr. Skiff indicated he did not want to commute to Havre for employment or retraining, and he expressed concerns with regard to this commute . . . . He expressed a willingness to consider on-line retraining programs, and he stated he would consider sedentary employment options in Malta within a wage range from $25,000 - $30,000 per year.[90]

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[87] Ex. 22 at 4.

[88] Ex. 22 at 4-5.

[89] Ex. 22 at 2.

[90] Ex. 22 at 6.

¶ 66 Riesenberg concluded that Petitioner would experience a significant wage loss in direct-placement job positions without retraining, and recommended that he undergo vocational testing since he had indicated an interest in being retrained.[91] Riesenberg completed that testing and issued a Vocational Testing Report on July 31, 2006. Riesenberg reported that Petitioner scored a high interest in skilled business and professional business occupations, and an above-average interest in clerical, skilled technology, and professional service occupations. He also scored average or higher for several other occupational groups. She also performed aptitude testing and found that Petitioner scored in the high-average range for word knowledge. However, he scored in the low-average range for mechanical reasoning, spacial relations, and numerical ability and scored low or very low for perceptual speed and accuracy, manual speed and dexterity, verbal reasoning, and language usage. On other tests, Petitioner scored in the low-average or average ranges for various abilities.[92]

¶ 67 Riesenberg researched the possibility of Petitioner completing an educational program at MSU-Northern. She discovered that the university would not allow Petitioner to complete course requirements online, and since Petitioner would require remediation and possibly need additional time to complete the program, Riesenberg concluded that Petitioner would not be able to complete the program within two years of commencement as required by statute.[93]

¶ 68 Riesenberg also noted that Petitioner's high school and community college transcripts indicated that his grades had been very low.[94] Based on the testing results and Petitioner's previous academic record, Riesenberg concluded that Petitioner's best occupational option would be in the skilled business occupational group, and that he would learn new skills best through hands-on training. Riesenberg concluded that Petitioner's best vocational options were either direct-placement jobs or retraining to work as a construction cost estimator.[95]

¶ 69 Riesenberg researched job possibilities for Petitioner in Malta. She identified three potential direct-placement jobs: radio announcer, 911 dispatcher, and bank secretary/receptionist. Riesenberg traveled to Malta and researched the local labor market to ensure that these jobs represented realistic employment opportunities in Petitioner's

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[91] Ex. 22 at 6-7.

[92] Ex. 22 at 10-11.

[93] Trial Test.

[94] Ex. 22 at 11.

[95] Ex. 22 at 11-12.

community. Riesenberg prepared job analyses for these positions, which she believed Petitioner could do with on-the-job training and no formal vocational retraining. Riesenberg acknowledged that Petitioner would experience a significant wage loss in these positions.[96]

¶ 70 Riesenberg knew that Petitioner worked for Clausen and Son's from October 2004 until January 11, 2006, but she was unaware that he initially did not commute to Havre but worked on a job site in Malta for the first year of his employment with Clausen and Son's. Riesenberg further testified that she was unaware that Petitioner had given notice to Clausen and Son's prior to his industrial accident because he had been offered a job at a higher wage which was located closer to his home in Malta.[97]

¶ 71 Dr. Hinde reviewed and approved several job analyses, including receptionist/loan secretary, 911 dispatcher, and radio announcer.[98] Dr. Hinde noted that Petitioner had expressed an interest in pursuing golf club repair or gunsmithing as self-employment options.[99] In his November 16, 2006, report, Dr. Hinde again noted that Petitioner was looking at his future vocational options, but that job opportunities were limited in Malta. Dr. Hinde stated, "He is looking at certain home based business[es] and perhaps one of these will prove to be a reasonable pursuit."[100]

¶ 72 Petitioner recalls the conversation with Dr. Hinde in which they discussed post-injury vocational options. Petitioner told Dr. Hinde that he would like to find a job repairing or building golf clubs. He also mentioned someone in Malta used to manufacture bullets and Petitioner thought he might like to do that. Petitioner did not mention those interests to Riesenberg because he had infrequent and limited communication with her. Petitioner stated that Riesenberg told him about jobs she thought he could do, but he could not recall Riesenberg ever asking him what his interests were. Petitioner told Riesenberg that he would like to be retrained because he did not think he could find a job without learning new skills.[101] Petitioner testified that he met with Riesenberg in person twice and spoke with her over the phone a few times. Petitioner testified that he suggested that he might like to receive some computer training, but Riesenberg has never offered any.[102]

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[96] Trial Test.

[97] Trial Test.

[98] Hinde Dep. 32:16 - 33:11.

[99] Hinde Dep. 34:19 - 35:3.

[100] Ex. 30 at 19.

[101] Trial Test.

[102] Trial Test.

¶ 73 Riesenberg stated that Petitioner was making $14.11 per hour at the time of his industrial injury.[103] For the three direct-placement jobs Dr. Hinde approved, Riesenberg determined that Petitioner's starting wage would be between $6.25 and $9.75 per hour.[104]

¶ 74 On August 29, 2007, Riesenberg contacted the Northwest Technical Institute in Portland, Oregon, to research its training program for cost estimating. Riesenberg learned that it had a five-month-long program and that the facility was wheelchair accessible and had had numerous wheelchair-bound students complete the program. Riesenberg also contacted Clausen and Son's to determine if Petitioner's reemployment there remained an option. Riesenberg learned that subsequent to her visit with the employer in April 2006, Petitioner filed a civil lawsuit against David Clausen, who was one of the owners of Clausen and Son's and was also one of the owners of the building where Petitioner's industrial accident occurred. Clausen informed Riesenberg that the cost estimator position had been held for Petitioner for several months, but when it appeared that Petitioner was not going to get the necessary training, the position was filled. Riesenberg informed Clausen about the five-month program in Portland. In late October, Clausen contacted Respondent and offered a modified alternate position to Petitioner upon successful completion of cost estimator training. Clausen informed Riesenberg that the employer would assist her in developing a job analysis for the cost estimator position. Riesenberg testified that this cost estimator position was a different position than the position which she had discussed with the employer in April 2006, and it required a new job analysis.[105]

¶ 75 The cost estimator job analysis indicates that, as part of his job duties, Petitioner would drive to job sites, the majority of which would be on the High Line, but could be other places in Montana and Wyoming. Petitioner would then meet with the customer for preliminary work, either at the customer's office or at the job site. Petitioner would have to determine wheelchair accessibility of the proposed meeting locations ahead of time and make alternate arrangements as necessary to accommodate his wheelchair. Riesenberg acknowledged that Petitioner needed to be able to spend time on job sites, and since his employer would have job sites which were not wheelchair accessible, someone else would have to do the work for those job sites.[106]

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[103] Ex. 18A at 3.

[104] Ex. 18A at 5.

[105] Trial Test.

[106] Trial Test.

¶ 76 On September 8, 2007, Dr. Hinde opined that Petitioner would at that time be able to work in a sedentary job position for 8 hours a day provided he could perform pressure-release exercises every 20 to 30 minutes and perform bladder and bowel programs as needed. Dr. Hinde opined that Petitioner's needs, while different, did not require much more time than the general population required for these activities and therefore Dr. Hinde concluded they would not interfere with Petitioner's workday.[107]

¶ 77 Riesenberg submitted the cost estimator job analysis to Dr. Hinde. Dr. Hinde signed and returned it on December 13, 2007, noting that Petitioner needed to complete pressure-relieving exercises whether he was in the office or in a vehicle, and that Petitioner would need to stop periodically while traveling. Dr. Hinde did not check either "approve" or "disapprove" on the approval form. Riesenberg interpreted Dr. Hinde's response to be an approval with modifications as indicated. She contacted Clausen and asked if Petitioner would be able to stop working or driving periodically to perform his exercises and Clausen stated that he could.[108]

¶ 78 In December 2007 Riesenberg discussed the Portland retraining program with Petitioner. Petitioner told Riesenberg that he was concerned about being away from his family, and expressed an interest in staying in Malta and improving his computer skills in the hope of obtaining a clerical position in Malta. Riesenberg testified that she was aware that Petitioner's preference was to remain in Malta for retraining and for future employment, but she believed the training program in Portland would provide Petitioner with the best opportunity to obtain employment and earn a better wage. When Riesenberg discussed this proposal with Petitioner, Petitioner informed her that he would consider the options she had presented and would contact her by January 15, 2008, through his attorney. However, Petitioner never contacted Riesenberg.[109] Riesenberg took no further action on Petitioner's vocational file, but waited to hear from the parties.[110]

¶ 79 On January 23, 2008, Petitioner's counsel wrote a letter to Miller, which stated in its entirety:

> We have been provided with a copy of the employability and wage loss analysis by Sheila Riesenberg. For a wide variety of circumstances, all of which arise from Greg's injury, the alternate jobs and the five-month

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[107] Ex. 30 at 22-23.

[108] Trial Test.

[109] Trial Test.

[110] Trial Test.

> training program in Portland, Oregon, are not feasible for Greg. We therefore disagree with the report's conclusions.[111]

¶ 80 On January 30, 2008, Miller wrote to Petitioner and his counsel and advised them that Respondent would discontinue Petitioner's TTD benefits and initiate his PPD benefits in 14 days. Miller noted, "Should Mr. Skiff choose to participate in a vocational rehabilitation plan, the benefits are subject to revision based upon his post-rehabilitation plan earning capacity."[112] Miller further noted:

> I also received your January 23, 2007 [*sic*] letter indicating that you disagree with the vocational plan proposed by CRC Sheila Riesenberg. I am requesting your input as to what you think an appropriate rehabilitation plan and vocational goal is at this time. . . . To the extent that you disagree with the approved alternative positions, please set forth your position in detail.[113]

¶ 81 Miller testified that she thought Petitioner's counsel would call her when he received the letter.[114] However, when neither Petitioner nor his counsel were willing to discuss vocational options, Miller converted Petitioner's TTD benefits to PPD benefits since Dr. Hinde had opined that Petitioner was at MMI and had approved three job analyses. Miller did not request any further work on this case from Riesenberg.[115]

¶ 82 Petitioner's counsel wrote to Riesenberg on January 31, 2008, and requested a copy of all documents relating to the services Respondent provided to Petitioner or to Respondent on Petitioner's behalf.[116] Riesenberg did not provide her file to Petitioner's counsel until August 8, 2008, in response to a subpoena *duces tecum*.[117] Riesenberg admitted that she received the letter, but she did not respond to the request and did not provide a copy of her file until it was subpoenaed. Riesenberg stated that she "hadn't gotten around" to copying it prior to receiving the subpoena.[118]

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[111] Ex. 18B.

[112] Ex. 19 at 1.

[113] Ex. 19 at 2.

[114] Trial Test.

[115] Trial Test.

[116] Ex. 20.

[117] Ex. 38.

[118] Trial Test.

¶ 83 Miller believes Riesenberg's retraining proposal was reasonable. Miller knew that Petitioner objected to commuting from Malta to Havre, and that he also did not want to travel to Portland for a five-month retraining program, and Miller believed Petitioner's concerns were legitimate. However, Riesenberg's recommendation would give Petitioner a significantly greater earning potential after the retraining was completed. She stated that Respondent would have been willing to entertain any options Petitioner suggested after he rejected Riesenberg's proposal. However, Petitioner did not respond to Respondent's request for his input. Miller testified that Respondent could not develop a rehabilitation proposal for Petitioner's consideration without his input and involvement.[119]

¶ 84 Miller stated that the first time she learned that Petitioner had an interest in gunsmithing or golf club repair was August 22, 2008, when she received a copy of a July 2008 medical report in which it was mentioned.[120] Petitioner and his counsel never communicated this interest to her and never made any suggestions concerning Petitioner's vocational retraining after January 23, 2008. Miller asserted that Respondent would reinstate TTD benefits if Petitioner became an active participant in the rehabilitation process. Miller's practice is to continue claimants on TTD benefits if they are actively engaged in rehabilitation negotiations, even if they have reached MMI and have been approved for alternate jobs.[121]

¶ 85 Petitioner testified that he was never in agreement with Riesenberg's recommendation that he travel to Portland for the retraining program. At the time he rejected Riesenberg's proposal, Petitioner did not specifically request other rehabilitation services because he thought he would meet with Riesenberg again and that they would begin to work on another rehabilitation plan.[122] Petitioner is unsure if he has a reasonable prospect of physically performing regular work on a recurring basis. However, he asserted that he is willing to try to do so if he is first provided vocational rehabilitation services.[123]

¶ 86 Dr. Gracey considered the vocational options which Riesenberg had proposed and opined that five months of training would not be sufficient for Petitioner to be competitive

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[119] Trial Test.

[120] *See* Ex. 30 at 25; Dr. Hinde noted that Petitioner was learning how to re-shaft and re-handle golf clubs and that he was interested in gunsmithing. Dr. Hinde opined that while Petitioner was not ready to be competitively employed in these activities, he was motivated to try to make a successful business out of them in the future.

[121] Trial Test. After the trial in this case concluded, Petitioner and Respondent began to discuss a new vocational rehabilitation plan. The parties informed the Court that Petitioner's TTD benefits have been reinstated.

[122] Trial Test.

[123] Trial Test.

in that field. Dr. Gracey also stated that commuting to work in Havre was not a feasible option for Petitioner. He noted that Petitioner wished to seek retraining, possibly with an online occupational program for a sedentary career, but Petitioner was not certain of what specific type of career he wished to pursue. Dr. Gracey stated that Petitioner needed vocational counseling services to help him make that decision.[124]

¶ 87 Dr. Gracey further opined that, even with retraining, Petitioner was unlikely to be able to work full time, but with training would be more suited to a 20- to 30-hour work week. Dr. Gracey noted that Petitioner would have difficulty re-entering the workforce due to his age and disability, and that Petitioner's local job market is small.[125] Dr. Gracey further testified that the vast majority of people with spinal cord injuries who return to the workforce have great difficulty sustaining 40-hour-per-week employment. Based on statistics from the Department of Commerce and other studies, Dr. Gracey estimated that Petitioner had a 25%-35% chance of returning to work.[126]

¶ 88 Dr. Gracey reviewed Riesenberg's recommendation that Petitioner attend the five-month retraining program in Portland, and while he believed retraining is a good idea and this particular type of job might be a good fit for Petitioner's abilities and interests, he questioned whether a five-month retraining program would be of sufficient quality. Dr. Gracey noted that Petitioner would not likely be able to find employment in this field in Malta, and traveling for work would be problematic. Petitioner would have to spend three hours driving each day to work for his time-of-injury employer; the additional fatigue of spending that much time driving each day, plus the possibility of inclement weather affecting driving conditions, would make it difficult for Petitioner to perform the job. Dr. Gracey noted that vocational counseling support could help Petitioner determine an appropriate career which he could successfully perform in Malta.[127]

CONCLUSIONS OF LAW

¶ 89 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[128]

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[124] Ex. 23 at 9.

[125] *Id*.

[126] Trial Test.

[127] Trial Test.

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

¶ 90 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[129]

Issue One: Whether Petitioner is entitled to an increase in the hourly rate and number of hours of domiciliary care.

¶ 91 Respondent currently pays Mrs. Skiff $7.50 per hour for .75 hours per day of domiciliary care. As set forth above, Respondent chose this amount because Dr. Hinde opined that it was appropriate for Petitioner to receive some assistance with certain strenuous tasks which he estimated took about .5 to 1 hour per day to complete. However, Dr. Gracey opined that Petitioner's needs, which he describes as "homemaker assistance," are more extensive than the tasks which Dr. Hinde included in his domiciliary care estimate, and require approximately 2 hours per day to complete. Dr. Gracey further opined that Petitioner requires home maintenance assistance which averages an additional .8 hours per day. Dr. Hinde acknowledged that if Dr. Gracey's more expansive description of "homemaker assistance" were used, Mrs. Skiff is providing approximately 2 hours per day of that type of care.

¶ 92 This Court established factors to determine whether services provided in the home by a family member are compensable.[130] These factors were later codified in § 39-71-1107(1), MCA, which provides:

> Reasonable domiciliary care must be provided by the insurer:
>
> (a) from the date the insurer knows of the employee's need for home medical services that results from an industrial injury;
>
> (b) when the preponderance of credible medical evidence demonstrates that nursing care is necessary as a result of the accident and describes with a reasonable degree of particularity the nature and extent of duties to be performed;
>
> (c) when the services are performed under the direction of the treating physician who, following a nursing analysis, prescribes the care on a form provided by the department;
>
> (d) when the services rendered are of the type beyond the scope of normal household duties; and
>
> (e) when subject to subsections (3) and (4), there is a means to determine with reasonable certainty the value of the services performed.

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[129] *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).

[130] *Carlson v. Cain*, 216 Mont. 129, 140, 700 P.2d 607, 614 (1985).

¶ 93 In the present case, it is undisputed that Respondent knows of Petitioner's need for domiciliary care. It is also clear that while the rate of pay for Mrs. Skiff's services are disputed, there is a means to determine with reasonable certainty the value of those services. However, § 39-71-1107(1)(b)-(d), MCA, bear closer consideration.

¶ 94 Section 39-71-1107(1)(b), MCA, requires that a preponderance of credible medical evidence demonstrates that nursing care is necessary as a result of the accident and describes with a reasonable degree of particularity the nature and extent of duties to be performed. As set forth in the findings above, Dr. Hinde, Petitioner's treating physician, opined that Petitioner requires some nursing care as a result of his industrial accident, including occasional assistance with his bowel and bladder functions, and further noted that Petitioner needed limited assistance with self-care, including changing the water diverter for bathing, adjusting his exercise equipment, and loading and unloading his wheelchair. I conclude this satisfies the criteria of § 39-71-1107(1)(b), MCA.

¶ 95 Section 39-71-1107(1)(c), MCA, requires that the services be performed under the direction of a treating physician who, following a nursing analysis, prescribes the care on a form provided by the department. Dr. Hinde acknowledged that Mrs. Skiff performed the homemaking activities described by Dr. Gracey, and agreed with Dr. Gracey's calculation that the addition of these activities, if properly included as domiciliary care, would mean that Mrs. Skiff was providing approximately 2 hours of homemaking assistance per day. However, Dr. Hinde has not directed that these additional services be provided, nor has he prescribed the care. While Dr. Gracey has recommended these additional services, Dr. Gracey is not Petitioner's treating physician. I therefore conclude that under § 39-71-1107(1)(c), MCA, Petitioner is entitled to .5 to 1 hour of domiciliary care per day.

¶ 96 Dr. Hinde has acknowledged that if Dr. Gracey's more expansive definition of domiciliary care is correct, Petitioner may be entitled to 2 hours of daily domiciliary care, as well as additional home maintenance assistance which averages .8 hours per day. Under § 39-71-1107(1)(d), MCA, for services to constitute reasonable domiciliary care, the services must be of a type beyond the scope of normal household duties. After studying the Skiffs' situation, Dr. Gracey opined that Petitioner receives assistance from Mrs. Skiff which is more than what is expected in a typical spousal relationship. However, to be compensable under the statute I must consider whether those services go beyond the scope of normal household duties. Clearly, the items considered by Dr. Hinde in his domiciliary care recommendation go beyond normal household duties. The assistance that Mrs. Skiff provides by assisting Petitioner with his bowel and bladder needs when he is ill, disassembling and reassembling his wheelchair, changing the settings on his exercise equipment, and changing the water diverter so that Petitioner can bathe himself are all beyond the scope of normal household duties. However, activities such as meal preparation, basic housekeeping, and taking out the garbage – which the Skiffs acknowledge Petitioner is able to perform with some inconvenience – are not beyond the

scope of normal household duties. The records from Craig Hospital indicate that Petitioner learned how to perform these tasks in light of his disability and that Petitioner was successful in doing so. While Petitioner's industrial injury has imposed severe limitations and it certainly makes sense for Petitioner to have Mrs. Skiff perform these tasks in light of these limitations, the domiciliary care statute only requires insurers to pay for services which meet the statutory criteria, and does not require insurers to pay for services which are within an injured worker's capabilities or which do not constitute services beyond normal household duties.

¶ 97 Petitioner further requests .8 hours per day of home maintenance services as identified by Dr. Gracey. The Skiffs and Dr. Gracey have amply demonstrated that Petitioner is no longer able to perform basic home maintenance tasks which he performed prior to his injury, including everyday activities such as moving furniture, hanging holiday decorations, and changing the oil in the family's vehicles. However, nothing in the Workers' Compensation Act compels an insurer to pay for such services. While this result may seem inequitable in a situation involving a catastrophic injury such as Petitioner's, the reality is that all injured workers who have a permanent impairment as a result of their industrial injury likely have some household chores which they performed prior to their industrial injury and which they are now unable to perform. In a situation such as Petitioner's, the lack of a statutory remedy may seem unjust, but this Court may provide only such relief as is provided for by statute. I therefore conclude Petitioner is not entitled to .8 hours of daily home maintenance services. Petitioner is entitled to .5 to 1 hour of domiciliary care per day, or as otherwise prescribed by his treating physician.

¶ 98 The parties further disagree about the appropriate rate of pay Mrs. Skiff should receive for her services. Petitioner argues that she is entitled either to $18.88 per hour, as Dr. Gracey determined, or to $9.84 per hour, which is the prevailing wage for home health aides in Phillips County according to a recent publication from the Department of Labor and Industry. Respondent argues that the correct rate of pay is $7.50 per hour, as determined by research conducted by its Medical Services Director.

¶ 99 Section 39-71-1107(4), MCA, states that domiciliary care provided by a family member for a period of less than 24 hours a day may not exceed the prevailing hourly wage, and an insurer is not liable for more than 8 hours of care per day.

¶ 100 Effective June 22, 2007, the Department of Labor and Industry began publishing "Montana Prevailing Wage Rates for Nonconstruction Services."[131] Although the 2005 version of the statute applies to this case, nothing in the statute precludes me from using the department's survey of prevailing hourly wages in determining what the "prevailing

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[131] *See* http://erd.dli.mt.gov/laborstandard/prevwage/documents/2007noncon.pdf

hourly wage" is under § 39-71-1107(4), MCA. In fact, a detailed department survey of prevailing hourly wages, categorized by occupation and geographic region, would seem to be the most logical source for such data. While McGregor's research led her to conclude that the prevailing wage for a home health aide in Petitioner's region is $7.50 per hour, the department's publication states that District 9, which includes Petitioner's residence of Phillips County, has a prevailing wage of $9.84 per hour for this profession.[132]

¶ 101 Although Petitioner urges this Court to use the rate of $18.88 as Dr. Gracey determined, I am not persuaded that the rate which an agency would charge for the services of one of its employees can be considered the "prevailing hourly wage," as the agency's fee is not the actual amount paid to a home health aide in wages. The statute provides for domiciliary care provided by a family member to be reimbursed at a rate not to exceed the prevailing hourly wage. It does not provide for reimbursement at a rate charged by an agency which provides employees to perform such services. Petitioner is not entitled to reimbursement at a rate of $18.88 per hour for Mrs. Skiff's domiciliary care services.

¶ 102 I conclude that Petitioner is entitled to domiciliary care of .5 to 1 hour per day at a rate of $7.50 per hour through June 21, 2007. From June 22, 2007,[133] forward, Petitioner is entitled to domiciliary care at a rate of $9.84, with adjustments made accordingly as the department updates its survey.

¶ 103 The department's survey also lists the benefits rate for the jobs surveyed. Petitioner urges that this should be included in the rate payable for domiciliary care. However, § 39-71-1107(4), MCA, states that domiciliary care provided by a family member may not exceed the prevailing hourly wage. I do not believe that benefits can reasonably be included within the definition of "prevailing hourly wage" and I am therefore not including that amount in my determination.

Issue Two: Whether Respondent has failed to offer or propose a reasonable plan for vocational retraining or rehabilitation.

¶ 104 Petitioner argues that the proposal Riesenberg prepared for Respondent was unreasonable and that Respondent has therefore failed to offer or propose a reasonable plan for his vocational retraining or rehabilitation. Respondent admits that Petitioner is entitled to vocational rehabilitation benefits under § 39-71-1006(1), MCA, and responds that Riesenberg's proposal was reasonable, but further argues Petitioner failed to cooperate

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[132] Montana Prevailing Wage Rates for Nonconstruction Services 2007 at 20.

[133] The effective date of the Department of Labor and Industry's publication of "Montana Prevailing Wage Rates for Nonconstruction Services."

with Respondent when he ignored Respondent's requests for input on developing a plan agreeable to Petitioner. Respondent argues that without meaningful input from Petitioner, it could not develop a plan which would have the possibility of meeting Petitioner's needs.

¶ 105 At trial, Respondent argued that this Court should consider Havre to be Petitioner's job market since Petitioner was working in Havre at the time of his industrial accident. While it is true that Petitioner was injured in Havre, Petitioner resides in Malta. The evidence in this case demonstrates that Petitioner's work in Havre was exceptional, and that for the vast majority of his employment history, he worked in or very near Malta, and he had given notice to his employer that he was leaving the Havre job in order to take a job closer to home. Petitioner had in fact begun his employment with this employer on a job site within a couple of miles of Malta, and he had only worked in Havre for a few months when the Malta job was finished. Therefore, I conclude that Petitioner's labor market is in or near Malta.

¶ 106 It is undisputed that Petitioner will likely suffer a wage loss without retraining. It is clear to the Court that Respondent has been and remains willing to work with Petitioner to develop a rehabilitation plan. Because Petitioner's counsel would not permit Riesenberg to meet with Petitioner for several months following his industrial accident, Riesenberg contacted Petitioner's time-of-injury employer and began investigating return-to-work options without the benefit of first ascertaining Petitioner's preferences. At the same time, the record indicates that Petitioner was discussing self-employment ideas with his medical providers, yet he never shared these ideas with Riesenberg. Riesenberg moved forward with developing a proposal for what she believed was Petitioner's best vocational option. At the outset, Petitioner informed Riesenberg that he did not want to commute to Havre for work. In spite of Petitioner's stated preference, Riesenberg chose to pursue the development of a job analysis and retraining for Petitioner to return to work with his time-of-injury employer in Havre. Given the apparent lack of opportunity for Petitioner to pursue a career in Malta which matches his aptitudes and interests, and given the fact that Petitioner had been commuting to Havre for his job, I do not think it was unreasonable for Riesenberg to investigate the possibility of Petitioner returning to work with his time-of-injury employer and presenting Petitioner with that possibility. I also do not think it was unreasonable for Petitioner to decide that this was not a vocational option he wished to pursue.

¶ 107 However, the issue is not whether Riesenberg's proposal was suitable for Petitioner, but whether Respondent has failed to present Petitioner with a reasonable vocational plan. Since Petitioner rejected Riesenberg's initial proposal, and then failed to respond to Respondent's request for input, no vocational plan has been developed. At trial, Miller testified that no further work was done on Petitioner's vocational rehabilitation after he rejected Riesenberg's proposal because Petitioner did not give Respondent any input as to specifically why he was rejecting the proposal or what vocational alternatives he wished

to pursue. Petitioner's counsel argues that asking Petitioner for "input" is tantamount to demanding that he develop his own vocational rehabilitation plan, and that it is Respondent's responsibility to develop a plan, not Petitioner's.

¶ 108 When Petitioner rejected Riesenberg's proposal, he offered Respondent no insight into whether any adjustments would make the proposal acceptable. While Respondent knew that Petitioner did not want to work in Havre, based on Petitioner's response, Respondent had no way of knowing whether it was worth trying to find a similar position for Petitioner in Malta. Respondent could only guess as to whether Petitioner would possibly consider leaving Malta temporarily for retraining, or whether Petitioner would be interested in working as a cost estimator if all or part of the training could be completed online. Petitioner's argument that being asked for "input" meant that Respondent was demanding that he research, draft, and implement his own vocational rehabilitation plan is a mischaracterization of, and overreaction to, Respondent's request.

¶ 109 Without some sort of participation, feedback, or input from Petitioner as to why he rejected Riesenberg's proposal, whether any part of Riesenberg's proposal was potentially acceptable to him, or what type of vocational retraining and future career options he might be willing to consider, Respondent was at a loss as to what direction to take in attempting to develop a vocational rehabilitation plan for Petitioner. At trial, Petitioner's counsel argued that Respondent failed to offer Petitioner the type of vocational rehabilitation counseling which Dr. Gracey suggested; however, Petitioner never requested such services. Simply put, Respondent cannot be found unreasonable for Petitioner's failure to engage in the development of his own vocational rehabilitation plan.

Issue Three: Whether Respondent has properly terminated or converted temporary total disability benefits.

¶ 110 Under § 39-71-1032, MCA, if an insurer believes that a worker is refusing unreasonably to cooperate with the rehabilitation provider, the insurer, with 14-days' written notice, may terminate benefits. In the present case, Respondent proposed a vocational rehabilitation option to Petitioner, who rejected the proposal for not being "feasible." In an effort to attempt to develop a proposal which might be acceptable to Petitioner, Respondent then requested his input. While the proposal Riesenberg developed was not a perfect proposal, and I believe Petitioner was not unreasonable in rejecting the proposal, I do not believe Respondent is then required to attempt to read Petitioner's mind in order to formulate an acceptable proposal. Respondent actively solicited Petitioner's input and involvement in formulating an acceptable rehabilitation plan and when Petitioner chose not to actively participate in the rehabilitation process – and since Petitioner was at MMI and his treating physician had released him to return to work with approved job analyses – Respondent was within its statutory rights to convert Petitioner's TTD benefits.

¶ 111 At trial, Miller testified that when she sent the termination letter to Petitioner and his counsel, she fully expected Petitioner's counsel to contact her and offer input regarding Petitioner's vocational rehabilitation. The record in this case demonstrates that from the beginning Respondent tried to fulfill its statutory obligations for vocational rehabilitation services. Petitioner's counsel argues that by asking for Petitioner's input, Respondent was demanding that Petitioner undertake his own vocational rehabilitation and develop a vocational rehabilitation plan on his own. The record does not support Petitioner's argument. Asking Petitioner to voice an opinion as to what type of retraining he might like to undertake does not equate to asking him to take on the role of being his own vocational rehabilitation counselor. Respondent has a statutory obligation to undertake the development of a vocational rehabilitation plan. That does not mean that it is required to perform futile acts of developing a plan doomed to failure when a claimant is not willing to participate in developing that plan to any meaningful extent.

Issue Four: Whether Petitioner is entitled to reinstatement of temporary total disability benefits or to initiation of payment of permanent total disability benefits.

¶ 112 As explained in ¶ 5 above, this issue is moot.

Issue Five: Whether Respondent has acted unreasonably.

¶ 113 The evidence in this case demonstrates that Respondent did not handle every aspect of Petitioner's claim perfectly. In particular, Miller admitted she did not immediately review Petitioner's file when it was assigned to her, that domiciliary care checks were occasionally late while Respondent changed computer systems, and Riesenberg did not provide Petitioner a copy of her vocational rehabilitation file when he requested it but instead delayed production until Petitioner subpoenaed her file. I do not find Riesenberg's failure to provide a copy of her file to be consistent with good claims handling, and as she was working under the direction of Respondent, Riesenberg's actions are properly imputed to it. However, it alone is insufficient for me to label the handling of the entire claim as unreasonable. Furthermore, although Petitioner repeatedly informed Riesenberg that he did not want to commute to Havre for employment, Riesenberg concentrated her efforts on developing a plan which would require Petitioner to commute to Havre. From the record in this case and Riesenberg's testimony at trial, I believe her efforts were well-intentioned in that she genuinely believed that, when faced with the choice of a challenging job which paid as well or better than his time-of-injury employment, or an entry-level job which paid a significantly lower wage, Petitioner would opt for the retraining program with the prospect of employment in Havre. The evidence further indicates that while Petitioner had some ideas for pursuing a new vocation which would allow him to work at home, Riesenberg was unaware of Petitioner's ideas and interests.

¶ 114 While I believe Riesenberg could have handled Petitioner's vocational rehabilitation better – and I am very troubled by her failure to produce her file as requested – it is difficult for me to conclude that she should be given the entire blame for the failed vocational proposal. As discussed at length above, a fair share of the blame must rest with Petitioner's failure to actively engage in the development of his own vocational rehabilitation plan.

¶ 115 As for Respondent's other actions in handling Petitioner's claim, the record demonstrates that, on numerous occasions, Respondent contacted Dr. Hinde to attempt to get information from him regarding Petitioner's domiciliary care needs, and Respondent, while having some difficulties in paying Petitioner's domiciliary care benefits in a timely manner, addressed and resolved the problem. While Petitioner argues that Respondent should have paid domiciliary care benefits and did not "need" Dr. Hinde to fill out a specific form, § 39-71-1107(1)(c), MCA, expressly requires a treating physician to prescribe domiciliary care and fill out the department form. Moreover, this was not a situation in which Respondent simply sent the form to Dr. Hinde and then forgot about it. The evidence demonstrates that Respondent made repeated attempts to get Dr. Hinde to fill out the required form. While I understand Dr. Hinde's impatience for the bureaucracy of the system, Respondent was not obligated to pay domiciliary care benefits until receiving Dr. Hinde's response as required by the statute.

¶ 116 Ultimately, although I find instances where errors were made in the handling of Petitioner's claim, I do not conclude that these errors rise to a level of "unreasonableness." I therefore conclude Respondent did not act unreasonably in adjusting Petitioner's claim.

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

¶ 117 As the prevailing party, Petitioner is entitled to his costs.[134] As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. In Petitioner's case, since I have determined that Respondent did not act unreasonably in adjusting his claim, I conclude Petitioner is not entitled to attorney fees.

¶ 118 Similarly, pursuant to § 39-71-2907, MCA, I may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay

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

or refusal to pay is unreasonable. Since I have not determined any unreasonable delay or refusal to pay benefits in Petitioner's case, I conclude Petitioner is not entitled to a penalty under § 39-71-2907, MCA.

JUDGMENT

¶ 119 Petitioner is entitled to an increase in the hourly rate for domiciliary care from June 22, 2007, forward, consistent with the rate set forth in the Montana Prevailing Wage Rates for Nonconstruction Services. Petitioner is not entitled to an increase in the number of hours of domiciliary care.

¶ 120 Respondent has not failed to offer or propose a reasonable plan for vocational retraining or rehabilitation.

¶ 121 Respondent properly converted Petitioner's temporary total disability benefits.

¶ 122 Respondent has reinstated Petitioner's temporary total disability benefits and this issue is therefore moot.

¶ 123 Respondent has not acted unreasonably.

¶ 124 Petitioner is entitled to his costs pertaining to those issues upon which he has prevailed.

¶ 125 Petitioner is not entitled to an award of attorney fees pursuant to § 39-71-611, MCA.

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

¶ 127 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 6th day of March, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
Daniel B. McGregor
Submitted: October 10, 2008