

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 51

WCC No. 2006-1511

ROBERT STANCIL

Petitioner

vs.

MHA WORKERS' COMPENSATION TRUST

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner petitioned the Court for permanent partial disability and rehabilitation benefits. Petitioner was precluded from returning to his time-of-injury job as an ICU nurse and performed transitional work until a nurse recruiter position was developed and subsequently offered to Petitioner. Petitioner was employed in that position for several weeks before he was terminated.

Held: Petitioner is not entitled to permanent partial disability and rehabilitation benefits because he did not suffer a wage loss as a result of his injury. The employer properly placed Petitioner in a transitional job. The nurse recruiter position was not specifically created for Petitioner. He was qualified to perform the nurse recruiter responsibilities because of his education, work experience, and personal and professional skills. Petitioner reviewed the job description and applied for the position. Petitioner was discharged from his employment because of behavioral issues, not as a result of his injury. Therefore, the Court concludes that Petitioner did not suffer an actual wage loss as a result of his injury and is not entitled to permanent partial disability or rehabilitation benefits.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. Where Petitioner's employer appropriately placed him in transitional employment following his post-injury return to the workplace, Petitioner demonstrated the ability to perform the essential job functions of the position and was personally and professionally qualified to

perform the position, and eventually accepted the position on a permanent basis, the Court held that Petitioner did not suffer an actual wage loss when he was discharged from his employment as a result of behavioral issues. Therefore, Petitioner is not entitled to PPD or rehabilitation benefits.

Benefits: Permanent Partial Disability: Wage Loss. Where Petitioner's employer appropriately placed him in transitional employment following his post-injury return to the workplace, Petitioner demonstrated the ability to perform the essential job functions of the position and was personally and professionally qualified to perform the position, and eventually accepted the position on a permanent basis, the Court held that Petitioner did not suffer an actual wage loss when he was discharged from his employment as a result of behavioral issues. Therefore, Petitioner is not entitled to PPD or rehabilitation benefits.

Benefits: Rehabilitation Benefits. Where Petitioner's employer appropriately placed him in transitional employment following his post-injury return to the workplace, Petitioner demonstrated the ability to perform the essential job functions of the position and was personally and professionally qualified to perform the position, and eventually accepted the position on a permanent basis, the Court held that Petitioner did not suffer an actual wage loss when he was discharged from his employment as a result of behavioral issues. Therefore, Petitioner is not entitled to PPD or rehabilitation benefits.

Benefits: Termination of Benefits: Return to Work. Where Petitioner's employer appropriately placed him in transitional employment following his post-injury return to the workplace, Petitioner demonstrated the ability to perform the essential job functions of the position and was personally and professionally qualified to perform the position, and eventually accepted the position on a permanent basis, the Court held that Petitioner did not suffer an actual wage loss when he was discharged from his employment as a result of behavioral issues. Therefore, Petitioner is not entitled to PPD or rehabilitation benefits.

¶ 1 The trial in this matter was held on September 26, 2006, in Missoula, Montana. Petitioner Robert Stancil was present and represented by Steve Fletcher. Respondent MHA Workers' Compensation Trust was represented by G. Andrew Adamek.

¶ 2 Exhibits: Exhibits 1 through 29 were admitted without objection. Exhibit 30 was introduced at trial and admitted without objection. The *vita* of Katherine G. Kleinkopf, CRC, CLCP, CCM, was added as pages 11-21 of Exhibit 15.

¶ 3 Witnesses and Depositions: The deposition of Petitioner was taken and submitted to the Court. Petitioner, Paula Vidrine, Jeff McMaster, Lia Weinreis, Michelle Aitken, Pamela Williams, Jan Perry, Janine Unruh, Betty Hilmo, and Katherine G. Kleinkopf were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the following contested issues found in the Pretrial Order:

¶ 4a Petitioner's entitlement to permanent partial disability and rehabilitation benefits.

¶ 4b When Petitioner was declared to be at maximum medical improvement and unable to return to his time-of-injury job, whether he was determined to have suffered a wage loss and, if so, who made that determination.

¶ 4c Whether the nurse recruiter training Petitioner received was a "rehabilitation plan" pursuant to the Montana Workers' Compensation Act.

¶ 4d Petitioner's entitlement to attorney fees and costs pursuant to § 39-71-611, MCA.

¶ 4e Petitioner's entitlement to any additional relief the Court may deem just and equitable.¹

¶ 5 The Court must decide whether Petitioner suffered an actual wage loss as a result of his injury, thereby entitling him to permanent partial and rehabilitation benefits.² If the Court determines that Petitioner suffered no actual wage loss as a result of his injury, then he is not entitled to any permanent partial or rehabilitation benefits.

FINDINGS OF FACT

¶ 6 Petitioner was a credible witness and I find his testimony at trial credible.

¶ 7 On August 1, 2004, Petitioner suffered an injury arising out of and in the course of his employment with Community Medical Center (CMC) in Missoula County, Montana.³

¹ Pretrial Order at 2.

² See §§ 39-71-703(1), -1006(1), -1011(2).

³ Pretrial Order at 1, Uncontested Fact 1.

¶ 8 At the time of Petitioner's injury, CMC was enrolled under Compensation Plan 2 of the Workers' Compensation Act and insured by Respondent.⁴

¶ 9 Respondent accepted liability for Petitioner's claim and paid medical and wage loss benefits and an undisputed 5% impairment award.⁵

¶ 10 At the time of his injury, Petitioner was employed full-time as a registered nurse in the ICU of CMC and was earning \$20.90 per hour.⁶

¶ 11 Petitioner was declared to be at maximum medical improvement (MMI) by Dr. R.J. Vincent on February 1, 2005. Dr. Vincent issued permanent light-duty work restrictions.⁷ Petitioner was assigned a 5% whole person impairment by Dr. John C. Schumpert on May 16, 2005.⁸

¶ 12 Petitioner is precluded from returning to his time-of-injury position as a registered nurse due to the permanent physical restrictions resulting from his injury.⁹

¶ 13 Petitioner received a bachelor of science degree in nursing from Montana State University (MSU).¹⁰ After graduating from MSU, Petitioner went to work as a nurse for St. Patrick Hospital in Missoula, Montana. He was employed as a charge nurse on the cardiac floor between 1999 and 2002.¹¹ Petitioner left his position at St. Patrick Hospital and was then employed as a nurse at Biolife Plasma Services in Missoula for approximately one year.¹²

⁴ Pretrial Order at 1, Uncontested Fact 2.

⁵ Pretrial Order at 2, Uncontested Fact 4.

⁶ Ex. 2 at 1; Trial Test.

⁷ Ex. 4 at 1, 2.

⁸ Ex. 5 at 5.

⁹ Pretrial Order at 2, Uncontested Fact 5.

¹⁰ Trial Test.

¹¹ Trial Test., Ex. 6 at 2.

¹² Trial Test.

¶ 14 CMC hired Petitioner in May 2003 to work as a registered nurse in the ICU.¹³ Petitioner performed this job until the time of his injury.¹⁴

¶ 15 Petitioner returned to work part-time at CMC in a transitional work capacity following his injury in the fall of 2004.¹⁵ He helped with various projects identified by management as meeting his physical work restrictions, such as writing policies for a study in the ICU and working on a hospital-wide new employee badge project conducted by the human resources department.¹⁶

¶ 16 Pamela Williams (Williams) is the director of patient care services for CMC. Williams was a member of a recruitment and retention task force put together by CMC to develop ways to retain staff, particularly nursing staff. At the time the task force was developed, CMC was experiencing a shortage of registered nurses. Williams helped develop the nurse recruiter position to help resolve CMC's nurse shortage.¹⁷

¶ 17 Williams was a credible witness and I find her testimony at trial credible.

¶ 18 Lia Weinreis (Weinreis) was a recruitment specialist for CMC in 2004 and 2005. Weinreis testified that the human resources department began talking about the nurse recruiter position in the fall of 2004. At that time, Weinreis was a general recruitment specialist and she helped with nurse recruiting as part of her job.¹⁸

¶ 19 Weinreis was a credible witness and I find her testimony at trial credible.

¶ 20 Janine Unruh (Unruh) was the human resources manager and eventually became Petitioner's direct supervisor in the human resources department. She developed the nurse recruiter job description.¹⁹ Unruh testified that during Petitioner's transitional job duties involving the human resources department, she recognized he would be a good candidate for the nurse recruiter position based on his education, employment experience, and personal traits. The past practice of CMC was to try to identify open positions for

¹³ Ex. 6 at 9, 10.

¹⁴ Trial Test.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

people in transitional jobs and match the right people with open positions. Unruh also testified that she did not develop the nurse recruiter position in order to move Petitioner out of transitional work and into permanent employment.²⁰

¶ 21 Unruh was a credible witness and I find her testimony at trial credible.

¶ 22 It was the consensus of the recruitment and retention task force that Petitioner was a good candidate for the open nurse recruiter position. He met the educational and employment qualifications and demonstrated the requisite personal and professional traits required of the nurse recruiter position.²¹

¶ 23 Unruh approached Petitioner regarding the nurse recruiter position sometime in February 2005. Petitioner testified that he was interested in the permanent position and was honored that he was asked about it. Petitioner reviewed the nurse recruiter job description and believed that the position was something that he could do. He eventually applied for it.²²

¶ 24 Prior to being officially hired in the nurse recruiter position, Petitioner represented CMC as the nurse recruiter at the Montana Student Nurse Association conference, despite not having any formal experience with nurse recruiting at that time. At the recruiting event, Shay Hamilton, Petitioner's supervisor in the ICU, and Jan Perry (Perry), vice president of patient care, had the opportunity to observe Petitioner's interactions with nursing students and nurses.²³

¶ 25 Perry was a credible witness and I find her testimony at trial credible.

¶ 26 Perry testified that she was impressed by how Petitioner interacted with potential nurse recruits at the recruiting event. Specifically, Perry was impressed with Petitioner's expression of CMC loyalty to potential nurse recruits.²⁴

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

¶ 27 Petitioner was offered the position of nurse recruiter and began working in that capacity on February 14, 2005.²⁵ Petitioner earned \$22.50 per hour.²⁶ Because of a lack of space at the time, Petitioner was given a desk across the hall from the human resources department. However, there were plans to move his desk into the human resources department in the near future.²⁷

¶ 28 Petitioner testified that he understood that the nurse recruiter position would be a learning experience for both the department and him, and that he would help develop the position. Petitioner discussed with his manager that he would attend some continuing education classes and other recruiting-oriented classes as he proceeded in the position.²⁸

¶ 29 Williams was interviewing nurses when Petitioner was hired as the nurse recruiter and she shared some interviewing tools with Petitioner, such as a listing of behavioral-based interview questions and competency self-assessment questions. Williams conducted a few interviews with Petitioner present and provided Petitioner with the contact names and numbers of program directors for some of the area nursing schools.²⁹

¶ 30 Near the end of February, Petitioner was present in the human resources office when a nurse leaving CMC's employment was asked to give an exit interview. Weinreis asked Petitioner if he would like to conduct the exit interview in her presence, since that was how Weinreis had been trained to conduct such interviews. Petitioner declined Weinreis' offer and, after reviewing the exit interview sheet, Petitioner determined he could conduct the interview on his own.³⁰

¶ 31 During the exit interview, Petitioner believed he could help the departing employee get her resume reviewed by a person he knew at Partners in Home Care. Petitioner proceeded to call his acquaintance at Partners in Home Care and relay the employee's situation.³¹

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

¶ 32 After interviewing the employee, Petitioner became concerned about how the employee had been treated by a manager at CMC. He counseled the employee and decided to share his concerns with the management team in the form of a memo attached to the interview sheet.³²

¶ 33 Upon learning of Petitioner's phone call to Partners in Home Care, Unruh expressed her concern to Petitioner that his call could be construed as a recommendation by CMC, and that was against hospital policy. Unruh asked Petitioner to attend a managers' meeting the following day to discuss the situation.³³ At the meeting, Petitioner argued with the managers about his job duties. A review of Petitioner's essential job functions took place the week of February 28, 2005.³⁴

¶ 34 Weinreis testified at trial about an uncomfortable office interaction she had with Petitioner. Weinreis and another employee paged Petitioner at the hospital so he could help them with a project. Petitioner became upset because he was paged for a non-emergency situation. Petitioner raised his voice in the human resources office in front of a few new employees. Weinreis became upset at the situation and Petitioner's behavior. She removed herself from the office and walked outside to the "smokers hut." Petitioner proceeded to the smokers hut as well and approached Weinreis close to her face, telling her he still loved her like a sister, and then walked away while thrusting his fist in the air and telling her to "keep the faith."³⁵

¶ 35 On another occasion, Petitioner overheard Weinreis on the phone with her insurance company discussing the need for preapproval for medication she was taking. Petitioner inquired about Weinreis' medical issues and obtained prescription medication samples for Weinreis from a family member and left the samples on Weinreis' desk. Weinreis was appreciative of Petitioner's gesture, but did not take the medication.³⁶

¶ 36 On April 5, 2005, Petitioner was given a verbal warning by Unruh for erratic, disruptive behavior, lack of professional etiquette, and continued failure to focus on job duties.³⁷ The following day, the police arrived at CMC after Petitioner called them and

³² *Id.*

³³ *Id.*

³⁴ Ex. 11 at 2.

³⁵ Trial Test.

³⁶ *Id.*

³⁷ Trial Test.; Ex. 11 at 4.

complained that he was being harassed. Perry suspended Petitioner with pay for two weeks so that an investigation of Petitioner's complaint could be conducted.³⁸ At trial, Petitioner admitted that calling the police was an overreaction to the situation.

¶ 37 Jeff McMaster (McMaster) is a pharmacist at CMC. McMaster testified that in the early part of 2005, Petitioner approached him at the pharmacy to obtain medication without a prescription. Although he was not entirely sure, McMaster believed Petitioner requested some type of painkiller medication. Petitioner testified that he asked the pharmacist for an anti-nausea suppository for his wife who was sick at home.³⁹

¶ 38 McMaster was a credible witness and I find his testimony at trial credible.

¶ 39 On April 15, 2005, Petitioner was terminated from his employment at CMC.⁴⁰ Perry testified that Petitioner was fired because of a trend of erratic behavior and the multiple problems with Petitioner's behavior that she discovered in her investigation. The Notice of Counseling/Disciplinary Action report states:

Termination of employment due to the severity and continuous nature of the display of unprofessional conduct violating the basic standards of behavior every employer has the right to expect of its employees . . .

- Failure to accept authority or direction/comply with managers requests or instruction
- Complete non-cooperation at the HR meeting; refused to discuss the issue or listen to other persons' viewpoints; refused to engage as part of a team process; indicated a refusal to accept process and procedures at CMC with which he did not agree; left directors and managers with the concern that he would continue to disregard policies and procedures at CMC as he unilaterally deemed appropriate and not engage in collaboration; also indicated a refusal to acknowledge the scope of his job responsibilities as they relate to the HR department
- Unprofessional conduct...confrontational, demeaning behavior exhibited toward co-worker(s)
- Over-reaction to verbal counseling
- Lack of critical thinking/judgment essential to the position
- Provision of medication samples [prescription RX] to co-worker without physician knowledge or authorization;

³⁸ Trial Test.

³⁹ *Id.*

⁴⁰ Ex. 11 at 4-7.

Attempt to procure a medication requiring a prescription from Pharmacy without physician script; It is important to note that [Petitioner] is currently a participant of the NAP program and as such is already on notice that violation of policies, especially involving prescription medications could result in immediate termination from employment⁴¹

¶ 40 Following his termination from CMC, Petitioner was temporarily employed as a school nurse, a travel nurse, and a cosmetic nurse.⁴² Petitioner voluntarily chose to leave the nursing profession to pursue a career that allowed him to work more with his hands.⁴³

¶ 41 Since March 2006, Petitioner has worked at Revelation Industries in Bozeman, Montana, assembling computer parts. Petitioner's wage is \$10 per hour. Petitioner discontinued searching for other employment once he began working at Revelation Industries because he was interested in working with his hands.⁴⁴

¶ 42 Katherine G. Kleinkopf (Kleinkopf) is a certified vocational rehabilitation counselor.⁴⁵ I find Kleinkopf to be a credible witness and her testimony at trial was credible. Kleinkopf conducted a review of Petitioner's records and contacted various employers regarding nurse recruiter positions. She concluded that Petitioner was properly trained in the nurse recruiter position and completed the transitional return-to-work program in the position of nurse recruiter in a satisfactory fashion. She testified that Petitioner was qualified to compete for nurse recruiting positions with other employers.

CONCLUSIONS OF LAW

¶ 43 This case is governed by the 2003 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.⁴⁶

⁴¹ Ex. 11 at 5.

⁴² Trial Test.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 44 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.⁴⁷

¶ 45 Petitioner contends that he is entitled to permanent partial disability benefits and rehabilitation benefits.

¶ 46 Section 39-71-703(1), MCA, states, in pertinent part:

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

¶ 47 Section 39-71-1006(1), MCA, states, in pertinent part:

A worker is eligible for rehabilitation benefits if:

(a) (i) the worker meets the definition of a disabled worker as provided in 39-71-1011

¶ 48 “Disabled worker” is defined as 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.⁴⁸

¶ 49 For Petitioner to be eligible for permanent partial disability benefits and rehabilitation benefits, he must prove he suffered an actual wage loss as a result of his injury. “Actual wage loss” means that the wages a worker earns or is qualified to earn after the worker reaches maximum healing are less than the wages the worker received at the time of his injury.⁴⁹

¶ 50 In the present case, Petitioner was actually employed in the nurse recruiter position and the Court need not address the question of what Petitioner was “qualified to earn.” However, based on the evidence presented, Petitioner was qualified to earn \$22.50 because that was the wage being paid for a position that was not specifically developed for

⁴⁷ *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).

⁴⁸ § 39-71-1011(2), MCA.

⁴⁹ § 39-71-116(1), MCA.

Petitioner, and was a position for which Petitioner was minimally qualified, according to both the human resources department at CMC and a certified rehabilitation counselor.

¶ 51 I conclude that Petitioner did not suffer an actual wage loss as a result of his injury. CMC appropriately placed Petitioner in transitional employment following his post-injury return to the workplace. During this time period, Petitioner demonstrated the ability to perform the essential job functions of the newly-created nurse recruiter position. As Unruh testified at trial, she anticipated that this was going to be a “win-win” situation for both the hospital and Petitioner in that the hospital could fill the newly created position and Petitioner could return to work in a higher paying position.

¶ 52 Petitioner demonstrated the necessary personal and professional skills to perform the essential job duties of the nurse recruiter position. Petitioner reviewed the job description, chose to apply, and was hired for the position. The nurse recruiter position was within Petitioner’s physical restrictions and paid \$22.50 per hour, as opposed to \$20.90 per hour he made at the time of his injury. Petitioner was discharged from his employment at CMC because of behavioral issues, not as a result of his injury. Therefore, I conclude that Petitioner did not suffer an actual wage loss and is not entitled to permanent partial disability or rehabilitation benefits.

¶ 53 A claimant must suffer an actual wage loss before he is entitled to rehabilitation benefits and a rehabilitation plan.⁵⁰ Because I have determined that Petitioner did not suffer an actual wage loss, there is no need to reach a conclusion as to the issue set forth in ¶ 4c above regarding whether the nurse recruiter training Petitioner received was a “rehabilitation plan” pursuant to the Montana Workers’ Compensation Act.

¶ 54 Because Petitioner has not met his burden of proof in this case, he is not entitled to attorney fees or costs.

JUDGMENT

¶ 55 Petitioner is not entitled to permanent partial disability or rehabilitation benefits.

¶ 56 Petitioner is not entitled to attorney fees or costs.

¶ 57 Petitioner’s Petition for Trial is **DISMISSED WITH PREJUDICE**.

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

⁵⁰ *Kemp v. Montana Contractor Compensation Fund*, 1998 MTWCC 63.

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

DATED in Helena, Montana, this 6th day of December, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Steve Fletcher
G. Andrew Adamek
Submitted: September 26, 2006