

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 15

WCC No. 2005-1323

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BRAD VALLANCE

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner petitioned for temporary total disability benefits until he reaches maximum medical improvement although, while enrolled in a light-duty Return-to-Work Program, he refused to accept light-duty work assignments after he was suspended for refusing to perform tasks his supervisor believed were within the work restrictions set by Petitioner's treating physician.

**Held:** Because Petitioner voluntarily terminated his employment, he is not entitled to temporary total disability benefits.

**Topics:**

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-712, MCA.** Section 39-71-712, MCA, outlines the requirements for receiving temporary partial disability (TPD) benefits and the consequences for refusing work within one's restrictions prior to medical stability. Where Petitioner was released for work consistent with positions available to him with his time-of-injury employer and Petitioner chose not to accept the position, he is not eligible for TPD benefits so long as he is released to perform the duties available to him in the position offered. Until he reaches medical stability and is entitled to permanent partial disability benefits, he is not entitled to wage-loss benefits.

**Benefits: Temporary Partial Disability.** Section 39-71-712, MCA, outlines the requirements for receiving temporary partial disability (TPD) benefits and the consequences for refusing work within one's restrictions prior to medical stability. Where Petitioner was released for work consistent with positions available to him with his time-of-injury employer and Petitioner chose not to accept the position, he is not eligible for TPD benefits so long as he is released to perform the duties available to him in the position offered. Until he reaches medical stability and is entitled to permanent partial disability benefits, he is not entitled to wage-loss benefits.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-712, MCA.** Where Petitioner voluntarily resigned his position with his time-of-injury employer after he was disciplined for refusing to perform tasks which fell within those activities allowed within his doctor's restrictions, he is ineligible for TPD benefits pursuant to § 39-71-712(4)(c), MCA.

**Benefits: Temporary Partial Disability.** Where Petitioner voluntarily resigned his position with his time-of-injury employer after he was disciplined for refusing to perform tasks which fell within those activities allowed within his doctor's restrictions, he is ineligible for TPD benefits pursuant to § 39-71-712(4)(c), MCA.

**Benefits: Temporary Total Disability.** Where Petitioner, while participating in a return-to-work program which modified his duties to meet his pre-medical stability restrictions, voluntarily resigned his position with his time-of-injury employer, he is not entitled to TTD benefits so long as he is released to perform the duties available to him in the return-to-work program.

**Benefits: Termination of Benefits: Return to Work.** Where Petitioner, while participating in a return-to-work program which modified his duties to meet his pre-medical stability restrictions, voluntarily resigned his position with his time-of-injury employer, he is not entitled to TTD benefits so long as he is released to perform the duties available to him in the return-to-work program.

**Vocational – Return to Work Matters: Modified Employment.** Where Petitioner voluntarily resigned his position with his time-of-injury employer after he was disciplined for refusing to perform tasks as part of a return-to-work program which fell within those activities allowed within his doctor's restrictions, he is ineligible for TPD or TTD benefits so long as he is released to perform the duties available to him in the return-to-work program.

**Benefits: Termination of Benefits: Return to Work.** Where Petitioner voluntarily resigned his position with his time-of-injury employer after he was disciplined for refusing to perform tasks as part of a return-to-work program which fell within those activities allowed within his doctor's restrictions, he is ineligible for TPD or TTD benefits so long as he is released to perform the duties available to him in the return-to-work program.

¶ 1 The trial in this matter began on November 30, 2005, in the Workers' Compensation Court, Helena, Montana, and reconvened and concluded at that location on December 7, 2005. Petitioner Brad Vallance was present and represented by Mr. Norman H. Grosfield. Respondent was represented by Mr. Bradley J. Luck.

¶ 2 Exhibits: Exhibits 1 through 26 were admitted without objection.

¶ 3 Witnesses and Depositions: The parties agreed that the deposition of Brad Vallance can be considered part of the record. Petitioner was sworn and testified on November 30, 2005, and testified again on December 7, 2005. Michelle Vallance, Mel Pozder, Robert Kruckenberg, and James D. Silvan were sworn and testified on November 30, 2005. Anthony Stonehouse was sworn and testified on December 7, 2005.

¶ 4 Issue Presented: The Pretrial Order states the following contested issue:  
¶ 4a Whether Petitioner is entitled to temporary total disability benefits for periods of time he has not been paid such benefits since February 15, 2005.<sup>1</sup>

#### Findings of Fact

¶ 5 Petitioner, Michelle Vallance, Mel Pozder, Robert Kruckenberg, James D. Silvan, and Anthony Stonehouse were sworn and testified at trial. The Court finds their testimony to be credible.

¶ 6 Petitioner is currently 39 years old and married. He and his wife have one daughter.<sup>2</sup>

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<sup>1</sup> Pretrial Order at 2.

<sup>2</sup> Trial Test.

¶ 7 Petitioner completed automotive technology training at both the Helena Vocational Technical Center and Northern Montana College.<sup>3</sup> He began working for Dick Anderson Construction (DAC) in Helena, Lewis and Clark County, Montana, in 1996.<sup>4</sup>

¶ 8 Petitioner worked as a yard laborer and as a diesel mechanic on heavy equipment.<sup>5</sup> Petitioner's job required a great deal of lifting, bending, squatting, climbing, and kneeling.<sup>6</sup>

¶ 9 On October 21, 2004, Petitioner suffered an industrial injury to his knees arising out of and in the course of his employment.<sup>7</sup>

¶ 10 At the time of the accident, DAC was self-insured and enrolled under Compensation Plan No. 1 of the Montana Workers' Compensation Act. Respondent accepted the claim and has paid various medical and compensation benefits.<sup>8</sup>

¶ 11 After a medical examination, Petitioner attended physical therapy.<sup>9</sup> Temporary total disability (TTD) benefits were paid from December 7, 2004, until December 28, 2004.<sup>10</sup>

¶ 12 On December 20, 2004, Petitioner was examined by Dr. Pete Hanson for bilateral knee pain.<sup>11</sup> Regarding Petitioner's left knee, Dr. Hanson diagnosed a potentially incomplete medial meniscus tear. Dr. Hanson acknowledged the possibility of an ACL tear, but asserted that Petitioner's clinical exam did not correlate with an ACL tear and none was visible on the MRI. Regarding Petitioner's right knee, Dr. Hanson diagnosed a small, stable

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Pretrial Order at 2, Uncontested Fact, ¶ 1.

<sup>5</sup> Trial Test.

<sup>6</sup> *Id.*

<sup>7</sup> Pretrial Order at 2, Uncontested Fact, ¶ 1.

<sup>8</sup> Pretrial Order at 2, Uncontested Fact, ¶ 2.

<sup>9</sup> Ex. 25.

<sup>10</sup> Pretrial Order at 2, Uncontested Fact, ¶ 4.

<sup>11</sup> Ex. 5 at 1.

OCD lesion and a medial meniscus tear.<sup>12</sup> Dr. Hanson further noted that Petitioner seemed “offended or surprised” that he did not recommend immediate surgery.<sup>13</sup>

¶ 13 Dr. Hanson prescribed anti-inflammatories and Ibuprofen.<sup>14</sup> He restricted Petitioner’s activities at work to light duty with a lifting restriction of twenty pounds.<sup>15</sup> He also placed limitations on Petitioner in regard to bending, kneeling, squatting, and climbing, and stated Petitioner should alternately sit or stand every two hours.<sup>16</sup>

¶ 14 On December 29, 2004, Petitioner enrolled in DAC’s Return-To-Work (RTW) Program. This program was created to provide temporary alternate work to injured employees that allows them to receive full pay and benefits while working within the limitations set by their treating physicians.<sup>17</sup>

¶ 15 The RTW form explains that the injured employee bears the responsibility to work within his physical limitations, and that an employee should report to his supervisor if a work assignment produces or aggravates symptoms.<sup>18</sup>

¶ 16 Petitioner returned to work on light duty on January 3, 2005. He spent his first days back performing a desk job.<sup>19</sup> Petitioner believed that other employees were angry with him for working in the office.<sup>20</sup>

¶ 17 Petitioner saw Dr. Hanson again on January 10, 2005, and Dr. Hanson recommended continued light duty.<sup>21</sup> On January 12, 2005, Dr. Hanson placed limitations

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<sup>12</sup> *Id.*

<sup>13</sup> Ex. 5 at 2.

<sup>14</sup> *Id.*

<sup>15</sup> Ex. 5 at 3.

<sup>16</sup> Ex. 26 at 1.

<sup>17</sup> Ex. 17.

<sup>18</sup> *Id.*

<sup>19</sup> Trial Test.; Ex. 23 at 1-2.

<sup>20</sup> Vallance Dep. at 69.

<sup>21</sup> Ex. 5 at 4-5.

on Petitioner in regards to bending, kneeling, squatting, and climbing.<sup>22</sup> He further stated Petitioner could stand or walk four hours and should limit his lifting to twenty pounds, occasionally.<sup>23</sup>

¶ 18 On January 13, 2005, Petitioner was assigned to clean the cab of a backhoe, install a license plate, and install new electrical cords on some hand tools.<sup>24</sup> On January 14, 2005, Petitioner repaired extension cords for three hours.<sup>25</sup> He then informed Robert Kruckenberg, Safety Director,<sup>26</sup> that he needed additional parts for the cords.<sup>27</sup> Mr. Kruckenberg instructed Petitioner to go to their supplier to get the parts.<sup>28</sup> Petitioner informed Mr. Kruckenberg that he did not think his knee was strong enough to walk from the parking lot to the store and back.<sup>29</sup> Mr. Kruckenberg then suggested that Petitioner could do a tool inventory of the tool trailers in the yard and Petitioner stated he would rather take the rest of the day off.<sup>30</sup>

¶ 19 Mr. Kruckenberg testified that his understanding of Petitioner's doctor's restrictions at that time was that Petitioner could walk up to four hours per day. Since Petitioner had been seated for three hours working on the extension cords, Mr. Kruckenberg believed that walking to and from the supplier's parking lot was well within the doctor's restrictions.<sup>31</sup> He told Petitioner to take the rest of the day off, and to tell him if he wanted more time off. Petitioner told Mr. Kruckenberg he would think about it and let him know.<sup>32</sup> Petitioner also informed Mr. Kruckenberg that he was thinking about quitting.<sup>33</sup>

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<sup>22</sup> Ex. 26 at 5.

<sup>23</sup> *Id.*

<sup>24</sup> Trial Test.; Ex. 23 at 2.

<sup>25</sup> Ex. 23 at 2.

<sup>26</sup> By the time of this trial, Mr. Kruckenberg no longer worked for DAC.

<sup>27</sup> Ex. 21 at 4.

<sup>28</sup> Trial Test.

<sup>29</sup> *Id.*

<sup>30</sup> Ex. 21 at 4; Trial Test.

<sup>31</sup> Trial Test.

<sup>32</sup> Trial Test.; Ex. 21 at 4.

<sup>33</sup> Vallance Dep. at 73.

¶ 20 Petitioner reported for work on Monday, January 17, 2005.<sup>34</sup> He finished repairing the extension cords and then packed bearings, did an inspection on a truck, ran errands, and helped reorganize the shop.<sup>35</sup> For the rest of the week, he continued to work in the shop and completed tasks such as tool inventory and tool inspections.<sup>36</sup>

¶ 21 During the time he remained on light duty, Petitioner performed tasks such as washing vehicles with a pressure washer and changing truck batteries. Petitioner testified that, with the exception of the office work, the rest of the duties he was assigned while he was on light duty were within the duties that he had performed within his own normal job description.<sup>37</sup> When Petitioner needed to lift something which exceeded his lifting restrictions, such as a truck battery, he would get someone else to lift the item. For heavy items such as boxes of nails, Petitioner would break down the contents into smaller quantities.<sup>38</sup> During the course of his light-duty assignment, however, Petitioner believed his light-duty program entailed more than light duty tasks.<sup>39</sup>

¶ 22 Because Petitioner was dissatisfied with Dr. Hanson's diagnosis, on January 18, 2005, Petitioner went to get a second opinion from Dr. John D. Michelotti, an associate of Dr. Hanson.<sup>40</sup> Dr. Michelotti also ordered Petitioner to remain on light duty with limited lifting.<sup>41</sup> Thereafter, Petitioner continued to see Dr. Michelotti, and continued to have work restrictions.<sup>42</sup>

¶ 23 On January 24, 2005, Anthony Stonehouse, Resource Manager, met with Petitioner to discuss his work. Petitioner and Mr. Stonehouse differ as to their recollections about the substance of the conversation.

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<sup>34</sup> Ex. 21 at 4; Ex. 23 at 3.

<sup>35</sup> Ex. 23 at 3; Trial Test.

<sup>36</sup> Ex. 23 at 3; Trial Test.

<sup>37</sup> Trial Test.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Vallance Dep. at 63.

<sup>41</sup> Ex. 5 at 7-8.

<sup>42</sup> Ex. 5; Ex. 26.

¶ 24 Mr. Stonehouse testified that Petitioner initiated the meeting and wanted to discuss his belief that coworkers were upset with him about being on light-duty work, and that he believed Dick Anderson was making fun of him by imitating Petitioner's limp.<sup>43</sup> Mr. Stonehouse testified that he informed Petitioner that Mr. Anderson occasionally walks with a limp because he has a problem with his foot.<sup>44</sup> He further reassured Petitioner that people were satisfied with his work and that nobody was unhappy with him because of his participation in the RTW Program.<sup>45</sup>

¶ 25 Petitioner testified that when they met in Mr. Stonehouse's office on January 24, 2005, Mr. Stonehouse stated that he was concerned about Petitioner's productivity. Petitioner stated that he felt like he was being pressured to work harder and that Mr. Stonehouse wanted him to quit. Petitioner testified that he believed he would lose his job if he did not increase his productivity.<sup>46</sup>

¶ 26 On January 25, 2005, Messrs. Kruckenberg and Stonehouse met with Petitioner to get an update on Petitioner's knee. Petitioner had been using his pickup truck to drive the thirty-yard distance from the office to the shop, and Messrs. Kruckenberg and Stonehouse asked Petitioner to walk instead as long as the walking was within his doctor's restrictions.<sup>47</sup>

¶ 27 Petitioner testified that he believed that other employees were trying to "tempt" him to work beyond his restrictions.<sup>48</sup> Petitioner also believed that DAC should have relied on his word rather than the limitations set by his physicians when Petitioner felt he could not perform a task which fell within the limitations.<sup>49</sup>

¶ 28 On February 14, 2005, Mr. Stonehouse asked Petitioner to drive a truck for the Carroll College football players in a parade the following day. Petitioner refused, stating

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<sup>43</sup> Trial Test.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Ex. 21 at 4; Trial Test.

<sup>48</sup> Vallance Dep. at 73.

<sup>49</sup> Trial Test.



that he could not operate the clutch because of his knee.<sup>50</sup> At that time, Petitioner's work restrictions did not state that Petitioner could not drive a vehicle with a clutch.<sup>51</sup>

¶ 29 On February 15, 2005, Mr. Stonehouse suspended Petitioner for refusing to perform tasks which Mr. Stonehouse believed fell within Petitioner's light-duty restrictions.<sup>52</sup> Mr. Stonehouse presented Petitioner with a Disciplinary Action form, which Petitioner refused to sign.<sup>53</sup> Petitioner was very upset about being presented with the form.<sup>54</sup> The form stated that Petitioner's refusal to go to the supplier on January 14, 2005, repeatedly driving his truck to the shop instead of walking, and refusing to drive the truck for the football players on February 14, 2005, were all instances when Petitioner declined to undertake light-duty tasks which fell within his doctor's restrictions.<sup>55</sup> The form stated that Petitioner would be suspended until he was willing to meet the light-duty restrictions as determined by his doctors.<sup>56</sup> When Mr. Stonehouse spoke with Petitioner, he assured Petitioner that he was not being fired, but stated that Petitioner needed to get his restrictions clarified and that he needed to be able to perform within those restrictions in order to return to work.<sup>57</sup>

¶ 30 Mr. Stonehouse testified that, in his view, the three incidents listed on the form were, individually, fairly insignificant. However, when taken together, he felt the need to clarify Petitioner's work limitations.<sup>58</sup> Mr. Stonehouse stated that while Petitioner was "argumentative" about the suspension, he thought Petitioner understood it, and he expected Petitioner would go to the doctor and be back that same day with a clarification.<sup>59</sup>

¶ 31 Petitioner and his mother met with Mr. Stonehouse to discuss the suspension on February 16, 2005. Petitioner told Mr. Stonehouse that he would be willing to do a

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<sup>50</sup> Ex. 13.

<sup>51</sup> Vallance Dep. at 82.

<sup>52</sup> Ex. 13; Ex. 16.

<sup>53</sup> Vallance Dep. at 79.

<sup>54</sup> Trial Test.

<sup>55</sup> Ex. 16.

<sup>56</sup> *Id.*

<sup>57</sup> Ex. 13; Trial Test.

<sup>58</sup> Trial Test.

<sup>59</sup> *Id.*

temporary alternative work assignment on a job site if one became available. On February 18, 2005, Petitioner's doctor faxed new information regarding Petitioner's work restrictions to DAC,<sup>60</sup> after which Mr. Kruckenberg called Petitioner and left a message stating that an assignment within his clarified restrictions would be available on Monday, February 21, 2005. Petitioner left Mr. Kruckenberg a message over the weekend and called again on February 21, 2005, and informed Mr. Kruckenberg that he would not be coming to work. On February 23, 2005, Petitioner called Mr. Kruckenberg and informed him that he did not believe his leg would heal while working for DAC and that he planned to seek a new career. DAC considered this to be a voluntary termination of Petitioner's employment.<sup>61</sup> Mr. Kruckenberg testified that, at the time of Petitioner's suspension, he fully expected Petitioner to come back to work and that he wanted Petitioner to come back because he was a valuable employee.<sup>62</sup>

¶ 32 Petitioner believed he was being forced out of his job because of his health.<sup>63</sup> He stated that Mr. Stonehouse would have conversations with him in which Mr. Stonehouse would point out things that needed to be done in the yard. Petitioner testified that he believed that "by him [Mr. Stonehouse] openly telling me the things that he was expecting out of me, I could tell that I was no longer wanted there . . . ."<sup>64</sup> Petitioner testified that the Disciplinary Action form demonstrated that DAC did not show any real support or concern about his health but, rather, demonstrated a desire to have him "down the road."<sup>65</sup> Petitioner further testified that Messrs. Kruckenberg, Stonehouse, and Anderson were conspiring to "get" him.<sup>66</sup>

¶ 33 Mr. Kruckenberg testified that, in his experience, the RTW Program was a positive and successful program and that employees were not looked down upon for participating in it.<sup>67</sup> He stated that there were about twenty employees who participated in the RTW

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<sup>60</sup> On February 18, 2005, Petitioner went to Dr. Michelotti's office. He spoke with a nurse and explained that he did not feel he could drive a manual transmission vehicle because of his knee. The nurse spoke with Dr. Michelotti, who then faxed a work status report to Mr. Kruckenberg which stated that Petitioner was currently unable to use a manual transmission vehicle. (Trial Test.; Exs. 12 and 21 at 5.)

<sup>61</sup> Ex. 19; Ex. 21 at 5.

<sup>62</sup> Trial Test.

<sup>63</sup> Vallance Dep. at 88.

<sup>64</sup> *Id.*

<sup>65</sup> Trial Test.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Program in 2004-05 and, aside from Petitioner's complaints, he had never heard complaints that employees were being asked to work beyond their physicians' restrictions.<sup>68</sup>

¶ 34 Mr. Stonehouse also testified that employees were not looked down upon for participating in the RTW Program, and he never heard of anyone being harassed for participating in the program.<sup>69</sup> Mr. Stonehouse testified that Petitioner was a good employee and that they got along well prior to the suspension.<sup>70</sup>

¶ 35 Mr. Kruckenberg testified that it was his practice to review new work restrictions with an employee whenever he received them. Mr. Kruckenberg testified that if an injured employee felt he could not perform duties that were within the work restrictions set by his physician, he would send them back to the doctor for clarification. Mr. Kruckenberg stated that on about five occasions, he reminded Petitioner that he needed to stay within his work restrictions, and Petitioner never complained to Mr. Kruckenberg that he was being ridiculed or pressured to work beyond his restrictions.<sup>71</sup>

¶ 36 Mr. Kruckenberg testified that Mr. Stonehouse never came to him to discuss Petitioner's productivity. He further testified that the RTW Program is not intended to be a high productivity job, but is intended to provide meaningful work to injured employees with the goal of eventually returning those employees to their regular job duties.<sup>72</sup>

¶ 37 James D. Silvan, DAC Shop Manager, had been Petitioner's supervisor since Petitioner began to work for DAC in 1996. Mr. Silvan regularly worked in the shop with Petitioner. Mr. Silvan testified that he was aware of Petitioner's work limitations and that he did not observe Petitioner exceed those limitations. Mr. Silvan further testified that he never asked Petitioner to exceed his work limitations and was not aware of anyone else asking Petitioner to do so.<sup>73</sup> Mr. Silvan testified that prior to Petitioner's injury, Petitioner was a very good worker who received good evaluations.<sup>74</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

¶ 38 On April 6, 2005, Petitioner underwent a meniscectomy on his left knee. Benefits were reinstated for surgery between April 6, 2005, and April 22, 2005.<sup>75</sup>

¶ 39 Contrary to Petitioner's assertion that he was asked to work beyond his restrictions, the Court finds no credible evidence to that effect. Petitioner himself testified that he would ask for help when he needed something lifted that was heavier than his lifting restrictions allowed.<sup>76</sup> The duties performed by Petitioner as evidenced on his time cards likewise appear to fall within Petitioner's restrictions.<sup>77</sup> Mr. Silvan, who frequently worked with Petitioner, testified that he never saw Petitioner exceed his work restrictions and that Petitioner was willing to ask for help when needed.<sup>78</sup> Likewise, Messrs. Kruckenberg and Stonehouse both testified that they frequently reminded Petitioner to stay within his work restrictions.<sup>79</sup>

¶ 40 At trial, while Petitioner expressed dissatisfaction with many of the duties he was asked to perform, and while some of those duties appear to have caused him discomfort with his knees, Petitioner did not cite a single duty which exceeded the work restrictions set by his physicians. After Petitioner refused to undertake tasks which fell within his doctor's restrictions, Petitioner's supervisors ordered Petitioner to get his restrictions clarified.<sup>80</sup> Instead, Petitioner chose not to return to work. It is clear from Petitioner's testimony that his unresolved knee problems were both painful and frustrating. However, as both Messrs. Stonehouse and Kruckenberg explained in their testimony, the work restrictions provided by an injured employee's doctor provides DAC with guidelines to assign appropriate light-duty tasks. The RTW Program would have little value if employees were not given meaningful work assignments, where possible, which allow them to be productive within their limitations.<sup>81</sup>

¶ 41 Petitioner also claims that people were mad at him, that he was made to feel uncomfortable about being in the RTW Program, and that he perceived himself the target of a conspiracy of managers who were out to get him. Petitioner's subjective beliefs are not supported by the record. In fact, the trial testimony and the exhibits demonstrate that

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<sup>75</sup> Pretrial Order at 2, Uncontested Fact, ¶ 5.

<sup>76</sup> Trial Test.

<sup>77</sup> Ex. 23.

<sup>78</sup> Trial Test.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Petitioner was a well-liked and valued employee.<sup>82</sup> Most notably, Petitioner described Mr. Silvan, his immediate supervisor, as a good friend.<sup>83</sup>

¶ 42 This is, indeed, an unfortunate situation. From Petitioner's testimony, the Court does not doubt that Petitioner is sincere in his belief that, notwithstanding his supervisor's admonishments to work within his restrictions, he felt that his need to be productive meant working beyond those restrictions. However, Respondent cannot be held responsible for Petitioner's misapprehensions. The Court finds that Petitioner was provided the opportunity to perform light-duty work within his doctor's work restrictions and Petitioner chose not to do so. By refusing to perform the duties offered to Petitioner that fell within Petitioner's work restrictions, Petitioner voluntarily terminated his employment.

### 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.<sup>84</sup>

¶ 44 The claimant bears the burden of proving by the preponderance of the evidence that he is entitled to the benefits he seeks.<sup>85</sup>

¶ 45 Section 39-71-712, MCA, outlines the requirements for receiving temporary partial disability (TPD) benefits and the consequences for refusing work within one's restrictions prior to medical stability. Section 39-71-712(4), MCA, states that a worker is not eligible for TPD or TTD benefits if he refuses to accept work in a modified or alternative position with the same employer which he is released to by his treating physician if he is able and qualified to perform the duties of the position. The RTW Program provides an injured claimant an opportunity to return to light-duty work consistent with the restrictions imposed by the treating physician, and Petitioner was released for work consistent with positions available to him with DAC. He chose not to accept the position and is not eligible for TTD benefits so long as he is released to perform the duties available to him in the RTW Program. Until he reaches medical stability and is entitled to permanent partial disability benefits, he is not entitled to wage-loss benefits.

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<sup>82</sup> Exs. 8-10; Trial Test.

<sup>83</sup> Trial Test.

<sup>84</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Any reference to statutes cited from the Montana Code will employ the language from the 2003 version.

<sup>85</sup> *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).

¶ 46 Pursuant to § 39-71-712(4)(c), MCA, a worker who has declined an appropriate modified or alternative position may only requalify for TPD or TTD benefits if the position is no longer available for reasons *other than* the employee's resignation, termination for disciplinary reasons, or incarceration. Petitioner voluntarily resigned his position with DAC after he was disciplined for refusing to perform tasks which fell within those activities allowed within his doctor's restrictions. Petitioner was asked to, and indeed did, clarify his restrictions. DAC then offered him another RTW assignment within those restrictions which Petitioner declined. He is thus ineligible for TPD or TTD benefits.

### JUDGMENT

¶ 47 Petitioner is not entitled to temporary total disability benefits for periods of time he has not been paid such benefits since February 15, 2005.

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

¶ 49 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 11<sup>th</sup> day of April, 2006.

(SEAL)

/s/ James Jeremiah Shea

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JUDGE

c: Mr. Norman H. Grosfield  
Mr. Bradley J. Luck  
Submitted: December 7, 2005