

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2008 MTWCC 25**

**WCC No. 2006-1695**

---

**APRIL VanVALLIS**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CORPORATION**

**Respondent/Insurer.**

---

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

**Summary:** Petitioner was injured in the course and scope of her employment as a full-time employee. She returned to her time-of-injury job on a part-time basis because of her physician-ordered work restrictions, but was unable to adequately perform the job duties of her time-of-injury job. Petitioner's employer placed her in an alternative part-time position which allowed her to work within her 25-hours-per-week restriction. Petitioner petitioned this Court for a determination of whether the 25-hours-per-week job constitutes regular employment within the meaning of § 39-71-116(24), MCA.

**Held:** The Court concludes that Petitioner's job, which employed her 25 hours per week, every week, is substantial and significant, and constitutes "regular employment" within the meaning of § 39-71-116(24), MCA.

**Topics:**

**Employment: Part-time.** Where Petitioner was released to return to work by her physician and Petitioner's post-injury employment provided 25 hours of work per week, and the employer can provide a job that guarantees nearly two-thirds the hours as Petitioner's time-of-injury employment, it is obvious to the Court that the employment is substantial and significant and therefore constitutes "regular employment."

**Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: 39-71-116.** Where Petitioner was released to return to work by

her physician and Petitioner's post-injury employment provided 25 hours of work per week, and the employer can provide a job that guarantees nearly two-thirds the hours as Petitioner's time-of-injury employment, it is obvious to the Court that this employment is substantial and significant and therefore constitutes "regular employment" within the meaning of § 39-71-116(24), MCA.

¶ 1 The trial in this matter was held on June 13, 2007, in Kalispell, Montana. Petitioner April VanVallis was present and represented by Rex Palmer. Respondent Liberty Northwest Insurance Corporation was represented by Larry W. Jones.

¶ 2 Exhibits: Exhibits 1 through 19 were admitted without objection. Page 40 was added to Exhibit 19 at the time of trial.

¶ 3 Witnesses and Depositions: The depositions of Petitioner and Dr. Susan M. Selbach were taken and submitted to the Court. Petitioner, Linda Pearson, and Stacey Bray were sworn and testified at trial.

¶ 4 Issues Presented: The Court restates the contested issue of law as set forth in the Pretrial Order and amended at trial by stipulation of the parties:

¶ 4a Whether the modified job Petitioner returned to following her back injury constitutes regular employment within the meaning of § 39-71-116(24), MCA.<sup>1</sup>

¶ 5 At the time of trial, the Court ruled that it would take judicial notice of the 2002 Federal Poverty Guidelines per Petitioner's request to do so.

¶ 6 Also at the time of trial, the parties stipulated to reserve Petitioner's disability status determination after maximum medical improvement (MMI) has been achieved for Petitioner's knee injury.

#### FINDINGS OF FACT

¶ 7 Petitioner was a credible witness and the Court finds her testimony at trial credible.

¶ 8 Petitioner was 58 years old at the time of trial. She lives in Florence, Montana.<sup>2</sup>

---

<sup>1</sup> See Minute Book Hearing No. 3856.

<sup>2</sup> Trial Test.

¶ 9 The last year of high school completed by Petitioner was 10<sup>th</sup> grade. She does not have a GED.<sup>3</sup>

¶ 10 After high school, Petitioner was married and had children. Petitioner was not in the formal labor market for approximately 20 years.<sup>4</sup>

¶ 11 Petitioner's first employment upon entering the labor market was as a housekeeper for the Holiday Inn in Missoula, Montana. She held this job for approximately 3 months before being encouraged by her supervisor to apply for an open position at Opportunity Resources, Inc.<sup>5</sup>

¶ 12 Petitioner began working for Opportunity Resources in approximately 1992. Her main job duty was supervising a crew of developmentally disabled people cleaning hotel rooms.<sup>6</sup>

¶ 13 On March 21, 2001, Petitioner suffered an industrial injury arising out of and in the course of her employment with Opportunity Resources in Missoula County, Montana. Petitioner injured her back while riding in a company van as a passenger when a vehicle collided with the van.<sup>7</sup>

¶ 14 At the time Petitioner's injury occurred, Opportunity Resources was enrolled under Compensation II of the Workers' Compensation Act and was insured by Respondent.<sup>8</sup>

¶ 15 Respondent accepted both of Petitioner's claims and has paid certain wage-loss and medical benefits.<sup>9</sup>

¶ 16 Petitioner was examined by Susan M. Selbach, M.D., on March 28, 2001.<sup>10</sup> Dr. Selbach noted that Petitioner was having lower back pain and that x-rays revealed

---

<sup>3</sup> Trial Test.

<sup>4</sup> Trial Test.

<sup>5</sup> Trial Test.

<sup>6</sup> Trial Test.

<sup>7</sup> Pretrial Order, Stipulated Fact 1 at 1-2.

<sup>8</sup> Pretrial Order, Stipulated Fact 3 at 2.

<sup>9</sup> Pretrial Order, Stipulated Fact 4 at 2.

<sup>10</sup> Ex. 13 at 8.

sacralization at L5, degenerative changes at L2-L3, and some degenerative changes along the iliac surface of the right SI joint. Dr. Selbach prescribed physical therapy for Petitioner.<sup>11</sup>

¶ 17 After further examinations of Petitioner, Dr. Selbach restricted her from all bending, lifting, and twisting for three weeks on October 23, 2001.<sup>12</sup>

¶ 18 On January 24, 2002, Dr. Selbach opined that Petitioner may have reached maximum medical improvement (MMI) for her back injury and further opined that Petitioner was probably not a surgical candidate at that time.<sup>13</sup> At her deposition, Dr. Selbach reasserted the same opinion.<sup>14</sup>

¶ 19 Physical therapist Richard L. Smith performed a functional capacities evaluation of Petitioner on August 12 and 13, 2002.<sup>15</sup> Mr. Smith approved the light-duty job descriptions of hostess, server, and community support worker. He disapproved of the two housekeeping supervisor jobs, the child care aide position, and the hotel cleaning job.<sup>16</sup>

¶ 20 Based upon a referral by Dr. Selbach, Petitioner was examined by Michael Woods, M.D., on February 15, 2002. Dr. Woods placed Petitioner at MMI and assigned a 5% whole person impairment rating to Petitioner due to her low-back injury.<sup>17</sup>

¶ 21 Petitioner was limited to working no more than 25 hours per week or 5 hours per day and could not perform her time-of-injury job.<sup>18</sup> After Petitioner reached MMI for her back injury, she returned to work as a housekeeping supervisor at Opportunity Resources in a modified capacity.<sup>19</sup> Four months after returning to that position, an Opportunity Resources staff person informed Petitioner that she needed a full-time staff member to perform the

---

<sup>11</sup> *Id.*

<sup>12</sup> Ex. 13 at 15.

<sup>13</sup> Ex. 13 at 20.

<sup>14</sup> Selbach Dep. 24:15-24.

<sup>15</sup> Ex. 9 at 1.

<sup>16</sup> Ex. 9 at 14.

<sup>17</sup> Ex. 16 at 1.

<sup>18</sup> Pretrial Order, Stipulated Fact 5 at 2.

<sup>19</sup> Trial Test.

supervisor position. Because Petitioner was unable to perform the position on a full-time basis, she transferred to the position of community support worker.<sup>20</sup>

¶ 22 On approximately October 24, 2002, Petitioner began working in the position of community support worker.<sup>21</sup> The community support worker job involves assisting individuals with disabilities in their daily living.<sup>22</sup> Petitioner was paid \$8.40 per hour to perform this job.<sup>23</sup>

¶ 23 Based on Petitioner's qualifications and abilities, she was matched with at least two different clients at Opportunity Resources. Petitioner had a particularly close relationship with one client, K.B., and greatly enjoyed working with her.<sup>24</sup>

¶ 24 It is the policy of Opportunity Resources that community support workers obtain medication certification if the staff member is involved in assisting or supervising individuals in taking medication. Failure to obtain the certification may result in termination.<sup>25</sup> Petitioner failed the medication certification examination on nine separate occasions.<sup>26</sup> In order to pass the exam, an applicant must score 90%. Petitioner's scores ranged from 50% - 80%.<sup>27</sup>

¶ 25 On February 18, 2004, Petitioner was suspended without pay for failure to pass the mandatory medication certification exam.<sup>28</sup> After being contacted by one of Petitioner's client's foster parents, Stacey Bray, Supported Living Coordinator for Opportunity Resources, spoke to Petitioner on February 25, 2004, and informed her that she could return to work with K.B. because K.B. could receive her medication at a time when

---

<sup>20</sup> Trial Test.

<sup>21</sup> Trial Test.

<sup>22</sup> Trial Test.

<sup>23</sup> Trial Test.

<sup>24</sup> Trial Test.

<sup>25</sup> Ex. 17 at 2.

<sup>26</sup> Ex. 19 at 19-27.

<sup>27</sup> *Id.*

<sup>28</sup> Ex. 17 at 1.

Petitioner was not working. Petitioner would not be able to return to work with T.R., however, because of her failure to pass the medication exam.<sup>29</sup>

¶ 26 On June 12, 2003, and December 15, 2003, Petitioner suffered an industrial injury to her knee arising out of and in the course of her employment with Opportunity Resources.<sup>30</sup>

¶ 27 A job description for the community support worker position was submitted at trial. The job description lists essential job functions in bold print. These functions include:

1. Provides direct assistance and supervision to individuals.
2. Responds to individuals' changing needs.
3. Monitors the safety and cleanliness of home/apartment.
- . . . .
6. Assists individuals in the self-administration of medications and keeps documentation as assigned. . . .<sup>31</sup>

¶ 28 Under the qualifications portion of the community support worker job description it states, "High School diploma or equivalent and prior experience working with persons with disabilities is preferred." A separate section of the same document lists "Other Qualifications" as "Must have or obtain Medication and Epilepsy Certification within 30 days of hire."<sup>32</sup>

¶ 29 Stacey Bray is the supported living coordinator for Opportunity Resources.<sup>33</sup> Bray was a credible witness and I find her testimony at trial to be credible.

¶ 30 Bray has worked as a supported living coordinator for 5 years. Her job duties include hiring employees and matching them with clients, assisting employees with problem situations, and providing one-on-one care for clients. Bray was Petitioner's supervisor at Opportunity Resources.<sup>34</sup>

---

<sup>29</sup> Ex. 17 at 1; Trial Test.

<sup>30</sup> Pretrial Order, Stipulated Fact 2 at 2.

<sup>31</sup> Ex. 19 at 40.

<sup>32</sup> *Id.*

<sup>33</sup> Trial Test.

<sup>34</sup> Trial Test.

¶ 31 Bray testified that the general job description for the community support worker was accurate . However, the choice to hire and match a support worker and a client is dictated by the needs of the client. For example, even though Petitioner had not passed the medication certification exam, she was able to continue working with K.B. because medication was not dispensed during Petitioner’s work shift.<sup>35</sup>

¶ 32 Bray testified that Opportunity Resources develops a cost plan with the State of Montana to provide services to the clients it serves. K.B. was provided a 30-hour-per-week cost plan.<sup>36</sup> Bray further testified that Petitioner was never offered less than 20 hours per week to work with K.B.<sup>37</sup>

¶ 33 Linda Pearson is the director of human resources for Opportunity Resources.<sup>38</sup> Pearson was a credible witness and I find her testimony at trial to be credible.

¶ 34 Pearson testified that Petitioner was an excellent employee for Opportunity Resources.<sup>39</sup>

¶ 35 According to Pearson, Opportunity Resources has a significant amount of turnover with its employees.<sup>40</sup>

¶ 36 Pearson testified that the community support worker job description was not intended to be comprehensive, but only meant to be used as a guideline. Pearson further testified that it would be impossible to write a job description for every employee because the organization is client-driven and the needs of the individual clients vary greatly.<sup>41</sup>

---

<sup>35</sup> Trial Test.

<sup>36</sup> Trial Test.

<sup>37</sup> Trial Test.

<sup>38</sup> Trial Test.

<sup>39</sup> Trial Test.

<sup>40</sup> Trial Test.

<sup>41</sup> Trial Test.

## CONCLUSIONS OF LAW

¶ 37 This case is governed by the 1999 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.<sup>42</sup>

¶ 38 Petitioner bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>43</sup>

¶ 39 Section 39-71-116(24), MCA, defines "permanent total disability" as follows:

"Permanent total disability" means a physical condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.<sup>44</sup>

¶ 40 The issue before this Court is whether Petitioner's post-back injury employment with Opportunity Resources constitutes "regular employment" within the meaning of § 39-71-116(24), MCA. In *McFerran v. Consol. Freightways*,<sup>45</sup> this Court held that a pharmacy delivery driver position which provided up to 6 hours of work per day was substantial and significant, thereby constituting regular employment.<sup>46</sup> On appeal, the Montana Supreme Court held:

We conclude that the Workers' Compensation Court's analysis of what constitutes regular employment for purposes of the statutory definition of permanent total disability is correct. If a particular job is both substantial and significant, then that job would constitute regular employment, regardless of whether the position was part-time or full-time. However, we conclude that

---

<sup>42</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>43</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).

<sup>44</sup> § 39-71-116(24), MCA (1999).

<sup>45</sup> *McFerran*, 2000 MTWCC 31.

<sup>46</sup> *McFerran*, ¶ 47.



the Workers' Compensation Court erred when it concluded that the part-time pharmacy job is substantial and significant.<sup>47</sup>

¶ 41 The Supreme Court concluded this Court erred in holding that the pharmacy job was substantial and significant because it did not guarantee more than an hour of work per day. The Supreme Court determined that an assurance of no more than one hour of work per day was not substantial and significant and, therefore, did not amount to “regular employment.”<sup>48</sup>

¶ 42 In the present case, the position of community support worker allowed Petitioner to work as many hours as she was released by her physician to work. Petitioner was able to work 25 hours per week. Even though she was unable to pass the medication certification exam, the evidence presented at trial supports the conclusion that Opportunity Resources is a client-driven organization serving clients with varying needs. While the formal job description states that community support workers must pass the medication certification exam or face disciplinary action up to and including termination, the testimony at trial was that employee turnover was high and Petitioner was an excellent employee. Bray testified that K.B. was allowed up to 30 hours per week to utilize Opportunity Resources' employees. This alone would have sufficed to satisfy Petitioner's 25-hours-per-week restriction.

¶ 43 While *McFerran* stands for the obvious proposition that a job which guarantees only one hour per day is not substantial and significant, and therefore does **not** constitute “regular employment,” the Supreme Court did not establish an hourly threshold as to what **does**. In the present case, I need not determine precisely where that threshold lies because, just as it was obvious that a job which guaranteed only one hour per day was not substantial and significant, it is equally obvious that a job which guarantees nearly two-thirds the hours as Petitioner's time-of-injury employment is substantial and significant. I therefore conclude that Petitioner's post-injury job, which guaranteed 25 hours per week, constitutes regular employment within the meaning of § 39-71-116(24), MCA.

### JUDGMENT

¶ 44 Petitioner's post-injury job, which guaranteed 25 hours per week, constitutes regular employment within the meaning of § 39-71-116(24), MCA.

¶ 45 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.

---

<sup>47</sup> *McFerran*, 2000 MT 365, ¶ 14, 303 Mont. 393, 15 P.3d 935 (*McFerran Appeal*).

<sup>48</sup> *McFerran Appeal*, ¶ 17.

DATED in Helena, Montana, this 29th day of May, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Rex Palmer  
Larry W. Jones  
Submitted: June 13, 2007