

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

**2019 MTWCC 1**

**WCC No. 2016-3724**

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**JENNY YORK**

**Petitioner**

**vs.**

**MACO WORKERS COMP TRUST**

**Respondent/Insurer.**

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

**Summary:** Petitioner suffered a compensable right shoulder injury in 2007. In 2013, her treating physician, an orthopedic surgeon, diagnosed her with a torn rotator cuff and labrum in her left shoulder and opined that her left shoulder condition is an overuse syndrome caused by her inability to fully use her right shoulder for many years. Petitioner seeks medical benefits and TTD or PTD benefits. Respondent denied liability for Petitioner's left shoulder condition, relying on its IME physician, who opined that while Petitioner's left shoulder condition is degenerative, it likely cannot be attributed to compensatory overuse alone.

**Held:** Respondent is liable for Petitioner's left shoulder condition because it is an overuse syndrome caused by her inability to fully use her right shoulder after her compensable injury. This Court gives greater weight to Petitioner's treating physician because he has greater credentials to opine as to the cause of a shoulder condition. Respondent is liable for medical benefits. However, Respondent is not currently liable for TTD benefits because Petitioner has not suffered a total wage loss as a result of her injury, including her left shoulder condition, because she was released to return to work but has voluntarily refused to return. Respondent is not currently liable for PTD benefits because Petitioner is not at MMI and because there is insufficient evidence to find that she does not have a reasonable prospect of performing regular employment.

¶ 1 The trial in this matter was held on April 10, 2018, in Helena. John C. Doubek represented Petitioner Jenny York (York). Norman H. Grosfield represented Respondent MACo Workers' Compensation Trust (MACo).

¶ 2 Exhibits: This Court admitted Exhibits 1 through 15 without objection.

¶ 3 Witnesses and Depositions: This Court admitted the deposition Larry Stayner, MD. Jenny York was sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues in the Final Pretrial Order as follows:

Issue One: Is York entitled to medical benefits from MACo for her left shoulder condition?

Issue Two: Is York entitled to TTD or PTD benefits from MACo?

#### FINDINGS OF FACT

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

¶ 6 York was a credible witness.

¶ 7 In 2007, York worked as a Licensed Practical Nurse (LPN) for Lewis and Clark County at the Cooney Nursing Home. York provided direct nursing care to the residents, including assisting residents with bathing, administering IVs, and furnishing breathing treatments. The job was classified as heavy duty.

¶ 8 On July 16, 2007, York suffered a right shoulder injury while lifting a resident who had fallen.

¶ 9 At the time of her injury, MACo insured Lewis and Clark County. MACo accepted liability for York's right shoulder injury.

¶ 10 York underwent a course of physical therapy. However, the physical therapy did not help and York's pain from the injury persisted. Due to her ongoing right shoulder pain, York began using her left shoulder more extensively.

¶ 11 In 2009, York began working at the Veteran's Administration's (VA) Medical Center at Fort Harrison. York worked as an LPN on the surgical floor, where she frequently lifted and moved patients and pushed a 110-pound medication cart.

¶ 12 On December 15, 2008, York saw David B. Heetderks, MD, an orthopedic surgeon, complaining of an intermittent stabbing pain in her right shoulder.

¶ 13 On March 10, 2009, York underwent an MRI of her right shoulder, which showed impingement and rotator cuff tears. Dr. Heetderks recommended surgery. However, because York had just started working at the VA Medical Center, she was unable to schedule the surgery.

¶ 14 On July 22, 2009, York suffered a thoracic strain and a lumbar spine injury at the VA Medical Center. York filed a federal workers' compensation claim. The Office of Workers' Compensation Programs (OWCP) accepted liability.

¶ 15 On July 23, 2011, York suffered another lumbar spine injury while working as an LPN at the VA Medical Center. York filed another federal workers' compensation claim. The OWCP accepted liability and combined York's back injury claims.

¶ 16 On August 17, 2011, Dr. Heetderks operated on York's right shoulder, repairing her impingement and rotator cuff tears.

¶ 17 Following her surgery, York could not drive nor perform all her activities of daily living. Thus, she went to Texas to stay with her sister, who drove her to and from physical therapy and helped her with her daily activities.

¶ 18 After four to five months, York returned to Montana. She did not get complete relief from her right shoulder surgery. Starting on March 14, 2012, she underwent a series of corticosteroid injections. However, York continued to suffer from intense right shoulder pain.

¶ 19 On April 23, 2012, York had an MR arthrogram of her right shoulder which showed a torn labrum.

¶ 20 On May 6, 2012, York resumed working at the VA Medical Center. However, due to her restrictions from her right shoulder injury, the VA Medical Center reassigned her to a sedentary position in the outpatient department, where she worked as a Medical Support Assistant. York's duties included answering the telephone, checking patients into the office, helping patients with forms, taking histories, and checking vital signs. York's desk was behind a sliding window made of bullet proof glass, which she opened and closed whenever she needed to speak privately with someone in the lobby or exchange papers. Because of the pain in her right shoulder, York frequently opened and closed the window with her left hand.

¶ 21 During this time, York experienced an emerging and increasing pain in her left shoulder.

¶ 22 While working as a Medical Support Assistant, York had an incident in which her left shoulder pain increased. She reached for a stack of papers, with the intent of passing the papers through the window. As she reached, she felt a pulling and tearing sensation in her left shoulder. At the time, she thought it was a pulled muscle. Because she had

been suffering with left shoulder pain for some time, and because she thought she just had a pulled muscle, she did not file another federal workers' compensation claim.

¶ 23 In June 2012, York saw Larry Stayner, MD, an orthopedic surgeon, to obtain a second opinion on treatment options for her right shoulder. York informed Dr. Stayner that she was also experiencing left shoulder pain, which she attributed to overuse. However, since her main problem was with her right shoulder, Dr. Stayner did not address her left shoulder. Dr. Stayner's examination revealed multidirectional instability in York's right shoulder — i.e., due to laxity in her ligaments, her shoulder joint moved too far — and a recurrent rotator cuff tear. Dr. Stayner recommended a comprehensive surgery to repair her right shoulder.

¶ 24 On July 16, 2012, York underwent a surgical procedure in an attempt to relieve her ongoing back pain. Peter P. Wendt, MD, performed the surgery.

¶ 25 Due to symptoms from her back injuries York did not return to work after her shift on August 1, 2012.

¶ 26 On August 9, 2012, Dr. Wendt restricted York to lifting no more than 15 pounds and pushing and pulling no more than 25 pounds. Dr. Wendt restricted York from all climbing and restricted her from kneeling, bending, and stooping more than 10 minutes per day. He also stated that York needed to be able to frequently change from sitting to standing and walking, noting that "prolonged sitting or standing would not be helpful." Dr. Wendt deferred to Dr. Stayner for her reaching restrictions. Dr. Wendt also noted that York "will have some days where her back will flare up."

¶ 27 York was scheduled to return to work at the VA Medical Center on September 14, 2012, with a modified sit/stand work station to accommodate the restrictions from her back injury. However, York did not return to work because the medication she was taking for her back condition prevented her from doing so.

¶ 28 York returned to Dr. Stayner on September 17, 2012, for her right shoulder pain. Dr. Stayner again noted instability and recommended surgery.

¶ 29 On October 4, 2012, York underwent an MRI of her lumbar spine, which revealed acute stress fractures and nerve root impingement caused by a herniated disc at L4-5. Dr. Wendt recommended a lumbar fusion.

¶ 30 On January 10, 2013, Dr. Stayner operated on York's right shoulder, tightening her ligaments, repairing her recurrent rotator cuff tears, and repairing her torn labrum.

¶ 31 On February 5, 2013, B. Max Iverson, MD, examined York for purposes of offering a second opinion regarding whether she was a candidate for a lumbar fusion. Dr. Iverson noted that York still had residual symptoms from her back injuries but did not think York

was a surgical candidate. Dr. Iverson restricted York to “full time light duty capacity,” with a pushing, pulling, and lifting restriction of 20 pounds.

¶ 32 On March 6, 2013, York saw Dr. Stayner. He noted that she was “doing well” and “happy with her progress, having minimal to no pain.” Although York was not working, Dr. Stayner restricted her to “light duty and less than 10 pounds lifting below the waist. No lifting overhead.”

¶ 33 On April 22, 2013, York returned to Dr. Stayner. He noted that she was doing “much better,” but still had weakness in her right rotator cuff and mild pain during strength testing. He also noted that she suffered a thoracic strain during a physical therapy session. Dr. Stayner also noted that York was not released to return to work.

¶ 34 On April 24, 2013, Dr. Stayner wrote a letter to MACo, stating that while he released York to light duty, the VA Medical Center would not let her return to work with such a restriction. Dr. Stayner stated that he anticipated releasing York to her “normal job.”

¶ 35 On May 20, 2013, York saw Dr. Stayner. Dr. Stayner wrote that York was “coming along great, per her account,” that her right shoulder was getting stronger and that her “pain level is down.”

¶ 36 On May 22, 2013, York applied for Social Security disability benefits, asserting she was disabled as a result of her 20-pound lifting restriction from her back injuries, and her right shoulder injury.

¶ 37 On May 29, 2013, Dr. Stayner reviewed five job analyses for York: (1) LPN, York’s time-of-injury job; (2) Medical Support Assistant, York’s then-current job at the VA Medical Center, although she was not working; (3) Medical Services Specialist, a sedentary job at New West Health Services; (4) Long Term Care Nurse Reviewer at Mountain Pacific Quality Health Foundation, a sedentary position at Mountain Pacific Quality Health Foundation; and (5) Patient Access Specialist, a sedentary position at St. Peter’s Hospital. Dr. Stayner disapproved all five of the positions listed, but indicated that he expected York to be able to resume her original LPN position in four to six months and that she could perform one of the alternative positions within two to three months.

¶ 38 On July 8, 2013, York returned to Dr. Stayner. Dr. Stayner found York’s right shoulder to be at maximum medical improvement (MMI). Dr. Stayner placed York on a permanent lifting restriction of no more than 20 pounds below the waist and no overhead lifting. Dr. Stayner also placed York on a 20-pound push/pull restriction. Dr. Stayner recommended that York not return to her LPN job or to her “front office job at the VA due to the fact that she has already had problems and flared up with that work, and I think there is a high chance that she would flare up again and be back at ground zero.”

¶ 39 Overall, Dr. Stayner opined that York made a “reasonable recovery” after her right shoulder surgery and had a right shoulder “she could live with.” Dr. Stayner noted that while York’s right shoulder was functional it was “not a hundred-percent shoulder” due to her ongoing weakness and pain.

¶ 40 On July 10, 2013, Dr. Stayner again reviewed the five job analyses for York. Dr. Stayner indicated that he did not expect York to be able to resume her original LPN position, or transition to any of the alternatives listed. Dr. Stayner disapproved all five positions.

¶ 41 On August 6, 2013, York underwent an MRI of her left shoulder which revealed degeneration, a torn rotator cuff, and a torn labrum.

¶ 42 On August 16, 2013, the Social Security Administration determined that York was disabled due to her back and right shoulder injuries, with an onset date of August 1, 2012.

¶ 43 From September 3, 2013, to September 7, 2013, York returned to work as a Medical Support Assistant at the VA Medical Center.

¶ 44 On September 9, 2013, York ended her employment at the VA Medical Center.

¶ 45 On September 9, 2013, York returned to see Dr. Stayner for her left shoulder. On the “History of Present Illness” form, York wrote that she had onset of symptoms at her home on August 5, 2013. Dr. Stayner noted that York told him she was reaching for something at work and felt a tear in her shoulder and that she suffered “an injury to her left shoulder at the beginning of August.” Moreover, Dr. Stayner documented that York had an MRI demonstrating the rotator cuff tear, and that she was in a great deal of pain. Dr. Stayner recommended surgery.

¶ 46 On September 19, 2013, John C. Schumpert, MD, evaluated York to establish an impairment rating for her right shoulder. Based on her reduced range of motion and pain, and the sequelae of a thoracic strain she suffered in physical therapy for her right shoulder, Dr. Schumpert assigned a 9% whole person impairment rating for the injuries York suffered on July 16, 2007.

¶ 47 Dr. Schumpert also reviewed the same five job analyses that MACo had sent to Dr. Stayner. Dr. Schumpert disapproved the LPN position but approved the others.

¶ 48 On October 18, 2013, Dr. Stayner reviewed the job analyses again. This time, Dr. Stayner disapproved York’s time-of-injury LPN job, explaining in a letter to the medical case manager on October 14, 2013, “Both shoulders flare up @ her LPN job.” However, like Dr. Schumpert, Dr. Stayner approved the other positions, including her job as a Medical Support Assistant.

¶ 49 MACo determined that York suffered an actual wage loss and paid her permanent partial disability benefits under § 39-71-703, MCA, from November 17, 2013, to December 15, 2014.

¶ 50 In late 2013 or early 2014, York moved to Texas. Thereafter, York started employment at her local YMCA, working in the nursery three hours a week for \$8 an hour.

¶ 51 In the spring of 2015, MACo contacted Dr. Stayner, asking for his opinion regarding the cause of York's left shoulder condition. On March 2, 2015, Dr. Stayner wrote a "To Whom It May Concern" letter, explaining that in his opinion York's left shoulder condition was caused by overuse due to her right shoulder injury:

Because of the amount of instability and rotator cuff tearing that she had in her right shoulder, it is more than likely that the pain and problems she has had in her left shoulder have come about from the fact that she has had to use and overuse her left shoulder so aggressively. This comes from her history of having to overuse it through the years because her right shoulder was so painful.

¶ 52 On March 12, 2015, MACo sent a follow-up letter asking Dr. Stayner to state the basis for his opinion, asserting his September 9, 2013, notes did not contain any reasoning or support. In a handwritten notation, Dr. Stayner responded that his opinion "comes mainly from [York's] history describing overusing her left shoulder and having it become painful through the long process of 2 surgeries and rehab [on] her right shoulder . . . ."

¶ 53 At his deposition, Dr. Stayner explained that in his experience as an orthopedic surgeon, it is common for a person with a shoulder injury to have problems with the other shoulder due to overuse:

For the vast majority of the people, my opinion has been, taking the general population of my patients, that if you take an active person and, for any percentage decrease -- decrease their, in this case, right shoulder, they'll use their other shoulder to compensate. It makes sense and I see it in my own practice.

And I also see where this scenario plays out a lot, not just in workers' comp, but in normal cases where people have normal insurance and there's no question about gain or secondary issues, people will often flare up their other shoulder, it's extremely common.

It even happens with simple surgeries where they recover without a problem in three to six months, they'll often be seeing me for their opposite shoulder because it's flared up. So even in just a couple of months of moving their other shoulder, not even at work, just doing normal activities at home, pulling the groceries in with that arm, or carrying firewood in, people will use the other shoulder to compensate and it often flares up.

¶ 54 Dr. Stayner testified it was his opinion that York's left shoulder injury was "more of an exacerbation of a problem that had been going on rather than a solely new injury to her shoulder." When Dr. Stayner was specifically asked about the cause of York's left shoulder condition, he testified that he remembered York telling him that she was overusing her left shoulder and experiencing pain and explained that York suffered from an overuse syndrome:

[B]ased on her history, it seemed pretty clear that she was saying -- and I also had remembered it fit with -- the disability that she was telling me with her right shoulder was that she had to use her left shoulder so much in her daily life, and even when she had been working before, that she attributed it to overuse of the left shoulder, because she basically for so long hasn't been able to use her right shoulder, and based on the amount of years that her right shoulder had been a problem, I thought it was very plausible.

When asked if it was his opinion that York developed an overuse syndrome in her left shoulder due to the fact that she had a right shoulder injury, Dr. Stayner testified, "Yes, it fit in her case, it fit with the experience that I've seen before as a fairly common scenario."

¶ 55 Dr. Stayner also testified that York's left shoulder damage was what he would expect with overuse:

And the type of injury that she had to her left shoulder, those partial rotator cuff tears are the type of tears that can happen with repetitive injury, and they can also just slowly get larger over time, so I felt like that was reasonable, again, to explain what had been potentially going on there.

¶ 56 On May 8, 2015, York returned to Dr. Schumpert for an independent medical examination (IME) on her left shoulder. York told Dr. Schumpert that she had been experiencing left shoulder pain for approximately 2½ years, and that she first felt pain while opening a drawer. In response to MACo's question of whether York injured her shoulder when she reached for papers at the VA Medical Center, or whether her left shoulder condition was a result of overusing her left shoulder due to her right shoulder injury, Dr. Schumpert responded as follows:

On a more likely than not basis, the individual's left shoulder condition is largely related to degeneration. I am not able to attribute her shoulder condition to her employment as a licensed practical nurse, nor do I believe the findings on the recent left shoulder MR scan represent an acute injury. Those findings are degenerative in nature, and are relatively severe in terms of the degree of degeneration. I doubt this much degenerative change, particularly with respect to the rotator cuff tendons and glenoid labrum, is attributable to compensatory 'overuse' of the left shoulder.



The individual is certainly a candidate for left shoulder arthroscopy; however, I do not believe the workers' compensation insurer is financially responsible for the surgery.

¶ 57 On August 20, 2015, MACo denied liability for York's left shoulder, relying upon Dr. Schumpert's opinion.

### Resolution

¶ 58 The factual dispute in this case is whether York's left shoulder condition was caused by overuse due to the pain she experienced in her right shoulder after her 2007 injury. York submits that this Court should give more weight to Dr. Stayner's opinion because he is her treating physician and a specialist. MACo maintains that this Court should give no weight to Dr. Stayner's opinion because it is based on an inaccurate history and because he was not credible; thus, MACo asserts that this Court should give more weight to Dr. Schumpert's opinion.

¶ 59 Although not conclusive, the opinion of a treating physician is generally afforded greater weight than the opinion of a competing expert.<sup>1</sup> In weighing medical opinions, this Court considers such factors as the relative credentials of the physicians and the quality of evidence upon which the physicians base their respective opinions.<sup>2</sup>

¶ 60 Although Dr. Stayner and Dr. Schumpert reviewed essentially the same evidence to reach their opinions — i.e., York's history and the MRI of her left shoulder — this Court gives greater weight to Dr. Stayner's opinions than Dr. Schumpert's because Dr. Stayner is a specialist and has superior credentials to opine as to the cause of a shoulder condition.<sup>3</sup> Dr. Stayner is an orthopedic surgeon who frequently treats shoulder injuries. He testified that in his experience, it is common to see a shoulder injury due to overuse after the opposite shoulder is injured. Dr. Stayner did not question that the amount of degeneration in York's left shoulder was caused by overuse; in fact, he testified that the partial tears he saw on the MRI of York's left shoulder were the type and kind of damage caused by overuse. MACo did nothing other than submit Dr. Schumpert's IME reports into evidence. Thus, while Dr. Schumpert doubts "this much degenerative change . . . is attributable to compensatory 'overuse' of the left shoulder," there is no evidence showing Dr. Schumpert's prior experience evaluating or treating shoulder injuries and, therefore,

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<sup>1</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 27, 365 Mont. 405, 282 P.3d 687 (citation omitted).

<sup>2</sup> See, e.g., *Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶ 47 (citation omitted).

<sup>3</sup> See, e.g., *Wright v. ACE Am. Ins. Co.*, 2010 MTWCC 11, ¶¶ 73-75 (giving more weight to an orthopedic surgeon's opinion over the treating physician's because the treating physician was a chronic pain specialist and the issue in case was whether orthopedic surgery was indicated); *Frisbie v. Champion Int'l Corp.*, 1995 MTWCC 13, ¶ 31 (resolving conflict in medical opinions in favor of IME physicians who specialized in treatment of low-back conditions over opinion of claimant's treating physician, who was family practitioner).

no evidence that Dr. Schumpert has any basis to testify as to the amount of degeneration that would normally be attributable to compensatory overuse.

¶ 61 MACo cites to *Cole v. Montana State Fund*, for the proposition that this Court can disregard the treating physician's opinion when it is based on an inaccurate history.<sup>4</sup> MACo points out that Dr. Stayner's records from 2012 and the first six months of 2013 do not document that York reported left shoulder pain. MACo also points out that Dr. Stayner's records after the January 10, 2013, right shoulder surgery demonstrate that York was "doing well," "doing much better," and "coming along great," which MACo asserts shows that York was able to use her right shoulder after her second right shoulder surgery. Finally, MACo points out that Dr. Stayner's record from September 9, 2013, states that York reported "an injury to her left shoulder at the beginning of August." MACo asserts that these records undercut Dr. Stayner's opinion of overuse syndrome because they show that York's history of overusing her left shoulder and years of left shoulder pain is inaccurate. Thus, MACo argues that this Court should not place any weight on Dr. Stayner's opinion.

¶ 62 MACo is correct that this Court has given no weight to a treating physician's opinion when it has been based on an inaccurate history.<sup>5</sup> However, MACo's argument misses the mark because Dr. Stayner's opinion is based upon an accurate history. This Court found York credible, and believes her testimony that she overused her left shoulder and had left shoulder pain. This Court also found that York told Dr. Stayner in 2012 that she had been overusing her left shoulder and had left shoulder pain. Furthermore, Dr. Stayner credibly corroborated York's testimony. And, when asked about his records stating that York was "doing well" after her surgery, Dr. Stayner explained that he did not mean that York was fully recovered and using her right shoulder without limitation. He testified, "It doesn't mean she's doing perfectly or a hundred percent, to me, it just means that she's making a positive trend in her recovery, getting better each time I see her, making improvements, albeit small, but it's more of an idea of how a person's trending when I say they're doing well." It is apparent that Dr. Stayner was using phrases such as "doing well" in the relative sense, i.e., comparing her condition to how it was before the surgery to afterwards, and was not saying that York's right shoulder was fully healed.

¶ 63 As a final point, the medical evidence does not support MACo's argument that York suffered a new injury to her left shoulder when she reached for papers while working as a Medical Support Assistant. Neither Dr. Stayner nor Dr. Schumpert thought that York suffered an acute injury. Dr. Stayner explained that York's left shoulder condition was caused by overuse and that he did not think York independently tore her rotator cuff when

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<sup>4</sup> 2015 MTWCC 4.

<sup>5</sup> *Id.*, ¶ 17 (ruling that an insurer does not have to accept a treating physician's opinion "when there is reliable and credible evidence indicating that the treating physician does not have all the relevant facts or is relying upon information that is false"); see also *Warburton v. Liberty Northwest Ins. Corp.*, 2016 MTWCC 1, ¶ 47 (assigning no weight to a treating physician's opinion because the physician based his opinion largely on claimant's history, which was inaccurate).

she reached for the papers. And Dr. Schumpert stated that the MRI of York's shoulder revealed degenerative changes and not an acute injury. Thus, there is no basis for this Court to find that York suffered an acute left shoulder injury.

¶ 64 Therefore, this Court finds that York's left shoulder condition was directly caused by overuse, necessitated by her compensable right shoulder injury. This Court also finds that York is not at MMI, as Dr. Stayner recommends left shoulder surgery to provide material functional improvement.

### CONCLUSIONS OF LAW

¶ 65 This case is governed by the 2005 version of the Workers' Compensation Act since that was the law in effect at the time of York's industrial injury.<sup>6</sup>

#### **Issue One: Is York entitled to medical benefits from MACo for her left shoulder condition?**

¶ 66 It is well settled that an insurer that is "liable for a work-related injury is also liable for 'a subsequent injury . . . if it is the direct and natural result of a compensable primary injury, and not the result of an independent intervening cause.'"<sup>7</sup> In other words, "when the sequelae of an industrial injury causes an injury or disease to another body part, the insurer is liable for the injury or disease to the other body part."<sup>8</sup>

¶ 67 Here, this Court has found that York's left shoulder condition was directly caused by compensatory overuse since she was unable to fully use her right shoulder due to her compensable injury. Accordingly, pursuant to § 39-71-704, MCA, MACo is liable for medical benefits for York's left shoulder condition.

#### **Issue Two: Is York entitled to TTD or PTD benefits from MACo?**

¶ 68 York asserts she is entitled to temporary total disability (TTD) benefits, presumably from when she quit working at the VA Medical Center to present. In the alternative, York asserts she is entitled to permanent total disability (PTD) benefits. MACo argues York is neither entitled to TTD nor PTD benefits.

¶ 69 Section 39-71-701, MCA, provides, in relevant part:

**Compensation for temporary total disability — exception.** (1) Subject to the limitation in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

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<sup>6</sup> Ford, ¶ 32 (citation omitted); § 1-2-201, MCA.

<sup>7</sup> *Romero v. Liberty Mut. Fire Ins. Co.*, 2001 MTWCC 5, ¶ 56, *aff'd* 2001 MT 303N, 308 Mont. 394, 43 P.3d 983 (quoting *Rightnour v. Kare-Mor, Inc.*, 225 Mont. 187, 189, 732 P.2d 829, 831 (1987)).

<sup>8</sup> *Suzor v. Int'l Paper Co.*, 2017 MTWCC 17, ¶ 23.

(a) when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing; or

(b) until the worker has been released to return to the employment in which the worker was engaged at the time of the injury or to employment with similar physical requirements.

....

(7) A worker may not receive both wages and temporary total disability benefits without the written consent of the insurer. A worker who receives both wages and temporary total disability benefits without written consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.

¶ 70 Although York is no longer at MMI for her 2007 injury, she is not entitled to TTD benefits under § 39-71-701(1)(a), MCA, because she did not suffer a total loss of wages as a result of her right shoulder injury and resulting left shoulder condition. In September and October 2013, Dr. Stayner and Dr. Schumpert released York to return to work in her position at the VA Medical Center as a Medical Support Assistant, the job she had until September 9, 2013, when she quit her employment with the VA Medical Center. At the time, both physicians knew the condition of her shoulders, including that she had a torn rotator cuff and labrum in her left shoulder. A claimant cannot unilaterally quit work to which she has been released and thereby qualify for TTD benefits.<sup>9</sup> Thus, York was and remains ineligible for TTD benefits because she was cleared to return to modified employment in the fall of 2013 and no physician has restricted her from working as a result of her left shoulder condition.

¶ 71 Moreover, under § 39-71-701(7), MCA, York is not entitled to TTD benefits for the time in which she has been working at the YMCA in Texas because this statute plainly states that a worker may not receive TTD benefits and wages without the written consent of the insurer. York suggests that because she works only three hours a week at only \$8 an hour, her work at the YMCA is insufficient to disqualify her from receiving TTD benefits. However, this Court rejected a similar argument in *Montana Municipal Ins. Authority v. Roche*, wherein this Court ruled that a claimant had to pay back all TTD benefits he had received while receiving a relatively small amount of wages because, “The language of the statute leaves no room for apportionment. It states plainly and simply that a worker **may not** receive both wages and TTD benefits.”<sup>10</sup>

¶ 72 York is not currently entitled to PTD benefits. Section 39-71-702(1), MCA, states, in relevant part: “If a worker is no longer temporarily totally disabled and is permanently

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<sup>9</sup> See, e.g., *Pugh v. Charter Oak Fire Ins. Co.*, 2010 MTWCC 1, ¶¶ 33-34 (ruling that because claimant voluntarily quit her employment and moved to Colorado to be closer to her daughter and because her injury did not limit her from obtaining other employment, she was not entitled to TTD benefits because did not suffer a loss of wages as a result of her injury).

<sup>10</sup> 2007 MTWCC 47, ¶ 54 (emphasis in original), *aff’d*, *Montana Mun. Ins. Auth. v. Roche*, 2009 MT 205N, 214 P.3d 790.

totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits.” In turn, § 39-71-116(25), MCA, defines “permanent total disability” as a “physical condition resulting from injury . . . after a worker reaches maximum medical healing, in which a worker does not have a reasonable prospect of physically performing regular employment.” Here, no physician has opined that York’s left shoulder is at maximum medical healing. And, there is insufficient evidence for this Court to find that York does not have a reasonable prospect of performing regular employment in Montana. Again, Dr. Stayner and Dr. Schumpert released her to return to her Medical Support Assistant position at the VA Medical Center, and approved other jobs in Montana. Therefore, she does not currently meet the definition of having a permanent total disability and is not currently eligible for PTD benefits.

### JUDGMENT

¶ 73 MACo is liable for York’s left shoulder injury.

¶ 74 York is not currently entitled to TTD benefits.

¶ 75 York is not currently entitled to PTD benefits.

¶ 76 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 15th day of January, 2019.

/S/ DAVID M. SANDLER  
JUDGE

c: John C. Doubek  
Norman H. Grosfield

Submitted: April 10, 2018