IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 18

WCC No. 2013-3093

APRIL DAVIDSON

Petitioner

vs.

BENEFIS

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner argued that her preexisting lower extremity impairment combined with her industrial injury resulted in an actual wage loss, entitling her to PPD benefits. Respondent countered that Petitioner resigned her CNA position, and that her preexisting permanent impairment was unrelated to her industrial accident, giving her no right to PPD benefits.

Held: Section 39-71-703(1), MCA (2009), did not require that a permanent impairment be a direct result of the industrial injury. Petitioner was forced to resign because she could not return to her time-of-injury job due to a combination of her preexisting permanent impairment and her industrial injury. Therefore, Petitioner had an actual wage loss under the pre-2011 PPD statutes, entitling her to PPD benefits.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-703. Sections 39-71-703(1), -703(2), MCA, address two scenarios: Section 39-71-703(1), MCA, applies if a claimant has an actual wage loss as a result of the injury and a permanent impairment. Section 39-71-703(2), MCA, applies if a claimant has an impairment as a result of the injury but no wage loss. Petitioner did not qualify for PPD benefits under § 39-71-703(2), MCA, because her impairment was not a result of the injury. She established that she could not return to her time-of-injury job

due to her injury, suffered an actual wage loss, and had a preexisting unpaid 3% permanent impairment rating. Petitioner is entitled to payment of the 3% impairment award and PPD benefits under § 39-71-703(1), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-116. Section 39-71-116(24), MCA, defines PPD as a condition in which a claimant, after reaching MMI, has a permanent impairment and is able to work but the impairment impairs the worker's ability to work and suffers an actual wage loss. Claimant could not return to her time-of-injury job due to her injury and suffered an actual wage loss, and had a preexisting unpaid permanent impairment rating of 3% established by objective medical findings. She is entitled to payment of the 3% impairment award and PPD benefits under § 39-71-703(1), MCA.

Wages: Wage Loss. Where Respondent did not identify any jobs that Petitioner could perform, or what she may otherwise be qualified to earn, and where Petitioner credibly testified that after a year and a half of unemployment, she was only able to find a job outside of her field making $8.50 an hour, the Court found that it was implausible that Petitioner chose to earn substantially less money than she would have in her time-of-injury field of employment. The Court concluded that Petitioner sustained an actual wage loss as a result of her injury and was entitled to benefits under § 39-71-703, MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Where Petitioner was able to perform the duties of a CNA prior to her injury despite a 3% impairment rating, but clearly could not perform her CNA duties post-injury with a 0% impairment rating, a legitimate factual dispute existed as to whether Petitioner suffered an actual wage loss as a result of her injury, precluding an award of attorney fees or a penalty. The Court distinguished *McAdam v. Nat'l Union Fire Ins. Co. of Pittsburg*, where the claimant also had a 0% impairment but his symptoms were the same pre-and post-injury whereas here, Petitioner's injury exacerbated her symptoms to the point she was unable to return to her time-of-injury job.

¶ 1 Prior to trial, I heard oral argument on cross-motions for summary judgment. I orally denied both motions at that time and explained my rationale for the denial on the record. A separate written Order on the cross-motions for summary judgment is issued contemporaneously with these Findings of Fact, Conclusions of Law, and Judgment.

¶ 2 Trial in this matter was held on October 8 and November 25, 2013, in the Workers' Compensation Court in Helena, Montana. Petitioner April Davidson was present and represented by Norman L. Newhall. Respondent Benefis was represented by G. Andrew Adamek. Barbara Panagopolous was also present on behalf of Brentwood Services Administrators, Inc. (Brentwood).

¶ 3 **Exhibits**: I admitted Exhibits 1 through 14 without objection.

¶ 4 **Witnesses and Depositions**: I admitted the depositions of April Davidson and Mark T. Stoebe, D.C., D.A.B.C.O., and they are considered part of the record. April Davidson, Barbara Panagopolous, Debbie Vance, Pamela Blackwell, Virginia Gewald, and Amber Brady were sworn and testified.

¶ 5 **Issues Presented**: The Pretrial Order sets forth the following issues:[1]

> Issue One: Whether Petitioner is entitled to payment of a 3% whole person impairment award for her January 5, 2011, work injury claim.
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> Issue Two: Whether Petitioner is entitled to payment of permanent partial disability benefits for her January 5, 2011, work injury claim.
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> Issue Three: Whether Respondent has acted unreasonably in its handling of the claim.
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> Issue Four: Whether Petitioner is entitled to reasonable costs, penalties, and attorney fees in accordance with § 39-71-611, MCA, and/or § 39-71-2907, MCA.

FINDINGS OF FACT

¶ 6 Davidson filed a workers' compensation claim for an alleged injury to her right lower extremity she suffered on January 5, 2011, while performing her

[1] Pretrial Order, Docket Item No. 44, at 10

duties as a Certified Nursing Assistant (CNA) for Benefis, Great Falls, Cascade County, Montana.[2]

¶ 7 On January 27, 2011, Benefis began paying benefits under § 39-71-615, MCA.[3]

¶ 8 In correspondence dated August 3, 2012, Benefis denied payment of permanent partial disability (PPD) benefits.[4]

¶ 9 Barbara Panagopolous testified at trial. I found Panagopolous to be a credible witness. Panagopolous is a senior claims examiner for Brentwood, a third party administrator for workers' compensation claims. One of Brentwood's clients is Benefis, and Panagopolous was assigned to handle Davidson's claim for her January 5, 2011, injury.[5]

¶ 10 On January 27, 2011, Panagopolous contacted Davidson and inquired about her accident. Davidson explained that she got off work around 7:05 a.m. on January 5, 2011, and slipped on ice in the parking lot, falling onto her buttocks and right heel. Davidson told Panagopolous that her right foot and ankle had been painful since the accident. Davidson also advised that approximately six months previously she hurt her right foot and ankle at home when she hit a wall. Davidson explained that she missed two work shifts as a result of her most recent injury, which was verified by Davidson's manager, Debbie Vance.[6]

¶ 11 Panagopoulos wrote to Davidson, acknowledged receipt of her claim, and advised that medical bills would be paid under § 39-71-615, MCA.[7] Panagopoulos testified that she did not accept liability for the claim at that point because of Davidson's prior injury.[8]

¶ 12 Panagopolous was under the impression that Benefis initially provided Davidson modified duties and continued to pay her wages. Eventually, Panagopoulos did pay Davidson temporary partial disability and temporary total disability benefits for missed time from work, based on an average weekly wage

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[2] Pretrial Order at 1.

[3] Pretrial Order at 2.

[4] *Id*.

[5] Trial Test.

[6] Trial Test.; Ex. 13 at 2-3.

[7] Trial Test.; Ex. 3 at 2-3.

[8] Trial Test.

(AWW) of $546.76, and an hourly wage $13.67.[9] Davidson worked exclusively evening and night shifts, which included a premium over and above the base rate that Benefis paid its CNAs.[10]

¶ 13 Following her accident, Davidson was initially seen on January 12, 2011, by J. Eldon LaTray, PA-C, at Benefis Health System. At the time of this visit, Davidson had been wearing a Zimmer boot that she had from a previous ankle injury. LaTray limited Davidson to sedentary duty.[11]

¶ 14 Davidson continued to complain of foot and ankle pain, and LaTray eventually referred her to Patrick J. Thomas, M.D., who saw her on April 28, 2011.[12] Dr. Thomas diagnosed right sinus tarsi pain and degenerative arthritis of the lateral talar process, and recommended Davidson wear an orthotic insert in her shoe.[13] When Davidson returned to Dr. Thomas on May 24, 2011, complaining of "significant pain after a long work-shift," he injected her foot with Xylocaine, took her off work for a day and restricted her from standing more than two hours per work shift.[14]

¶ 15 On December 12, 2011, Virginia Gewald with Benefis' human resources department e-mailed Panagopoulos, asking her to state that her records showed Davidson was at maximum medical improvement (MMI) and could not return to her time-of-injury position.[15] Panagopoulos responded that Dr. Thomas had placed Davidson at MMI[16] with an impairment evaluation scheduled with Mark T. Stoebe, D.C., D.A.B.C.O., on December 23, 2011, and a functional capacity evaluation (FCE) set for December 20, 2011.[17]

¶ 16 On December 14, 2011, before Davidson had undergone her impairment evaluation and FCE, she was called to a meeting at Benefis. Panagopoulos testified that present at the meeting were Gewald, Vance, and Pamela Blackwell, who would be replacing the retiring Gewald. During the meeting, Davidson was advised that she was found to be at MMI and unable to return to her job as a

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[9] Trial Test.; Ex. 12 at 2.

[10] Trial Test.

[11] Ex. 6B at 1-2.

[12] Ex. 6B at 14; Ex. 6D at 2.

[13] Ex. 6D at 2.

[14] Ex. 6D at 4.

[15] Trial Test.; Ex. 11 at 1.

[16] Ex. 6D at 7 (Dr. Thomas Office Note of September 26, 2011).

[17] Trial Test.; Ex. 11 at 1.

CNA.[18] An employee termination report was completed the same day, indicating that the reason Davidson was terminating employment was because she was unable to return to her time-of-injury position.[19]

¶ 17 Panagopoulos testified that she referred Davidson to Dr. Stoebe for an impairment rating because the treating physician, Dr. Thomas, did not do them.[20]

¶ 18 Davidson saw Dr. Stoebe on December 23, 2011, who gave her a 0% whole person impairment rating for her January 5, 2011, injury and found her unable to return to work at her time-of-injury job without restrictions.[21] He recommended that Davidson's work activities be confined to the limitations of her FCE performed on December 20, 2011, by Dean Orvis, PT, OCS, which limited Davidson to light-duty employment.[22]

¶ 19 Panagopoulos testified that obtaining the FCE was important as it would help Benefis determine if it had positions available that would meet Davidson's restrictions. Panagopoulos testified that the permanent work restrictions Dr. Stoebe eventually gave Davidson were greater than any restrictions Davidson had prior to her January 5, 2011, injury.[23]

¶ 20 Panagopoulos believed that because Davidson resigned from her position, based on the information contained in the e-mail from Gewald,[24] and because she had a 0% impairment rating, Davidson was owed no further benefits.[25] Panagopoulos also believed that Benefis had a very good return-to-work program and that it would have found a position for Davidson at the same rate of pay as her time-of-injury job, but that Davidson chose to resign instead.[26]

¶ 21 Panagopoulos testified that she learned later that Ronald G. Ray, D.P.M., P.T., had assigned Davidson a 3% whole person impairment rating for the limited motion in her right ankle that preexisted her injury at Benefis.[27] She also learned

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[18] Ex. 9 at 1.

[19] Ex. 7 at 1.

[20] Trial Test.; Ex. 3 at 7.

[21] Ex. 6G at 3.

[22] Ex. 6G at 3; Ex. 6F at 2-3.

[23] Trial Test.

[24] Ex. 9.

[25] Trial Test.

[26] Trial Test.

[27] Trial Test.; Ex. 6A at 6.

that Dr. Stoebe agreed with the 3% rating, but she did not pay it because it was for a preexisting condition not related to the January 5, 2011, injury.[28]

¶ 22 Debbie Vance testified at trial. I found Vance to be a credible witness. Vance was manager of the medical unit where Davidson worked at the time of Davidson's injury.[29] One of Vance's responsibilities was to ensure that an injured employee completed an injury report if the employee was injured at work. Vance testified that she would then ensure the injured employee sought treatment, obtained a report on the employee's restrictions, and abided by those restrictions. Vance testified that she followed this protocol following Davidson's January 5, 2011, injury.[30]

¶ 23 Vance testified that Davidson did not immediately report her injury. Vance noticed Davidson wearing a boot on her foot one day at work and asked her about it. After Davidson explained that she fell in the parking lot, Vance assisted Davidson in filling out a First Report of Injury and Occupational Disease and then followed up with her to ensure she sought treatment.[31] Vance testified that Davidson's restrictions remained consistent; therefore, Benefis provided Davidson modified duties during most of 2011.[32]

¶ 24 Vance agreed that Gewald's e-mail of December 14, 2011, to Ann Graff, Director of Human Resources at Benefis, was an accurate recitation of what was discussed at the meeting that Davidson was called to when Davidson resigned from her position at Benefis.[33] The e-mail stated, in part, that Davidson was informed she was at MMI, that she could no longer be a CNA based on the "medical findings from her physicians," and, regarding other positions, that Davidson was available to work only certain days of the week and only nights.[34] The e-mail also recounted that Davidson stated "that it would be in her best interest to terminate her position her[e] and concentrate on school and caring for

[28] Trial Test.

[29] Trial Test.

[30] Trial Test.

[31] Trial Test.; Ex. 2 at 1-2.

[32] Trial Test.

[33] Trial Test.; Ex. 9 at 1.

[34] Ex. 9 at 1.

her mother."[35] Vance agreed that it was either during or shortly after the meeting that Davidson signed the Employee Termination Documentation form.[36]

¶ 25 Vance recalled that Davidson normally worked two 8-hour evening shifts per week and two 12-hour night shifts per week that included pay differentials. That broke down to four night shifts and one full evening shift per week.[37]

¶ 26 In October of 2011, Davidson sent an e-mail to Vance, requesting to go to a registry position after the first of the year. A "registry position" is when the employee calls in and indicates the hours and days the employee is available, rather than being assigned a regular work shift. Davidson then sent a follow-up request to go to registry status in December of 2011, but Vance was unable to accommodate Davidson's request because of a staffing shortage.[38]

¶ 27 In the December 14, 2011, meeting, Vance recalled that Gewald discussed with Davidson the available positions at Benefis. It was Vance's belief that Davidson could not return to work as a CNA because of all the stressors in her life and not because she was physically unable to perform the work.[39]

¶ 28 Pamela Blackwell testified at trial. I found Blackwell to be a credible witness. Blackwell testified that she was present at the December 14, 2011 meeting with Davidson merely as a witness, in training for her position in human resources at Benefis. Blackwell has now taken over Gewald's duties at Benefis as a benefits analyst.[40]

¶ 29 Blackwell testified that during the meeting on December 14, 2011, other positions were discussed with Davidson besides her CNA position. Blackwell recalled that all of the positions discussed with Davidson were registry positions, and that none were agreeable to Davidson. Blackwell concluded during the meeting that it was unlikely Davidson would be able to return to work as a CNA, and that Davidson had resigned her position during the meeting as there were no

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[35] *Id.*

[36] Trial Test.; Ex. 7 at 1.

[37] Trial Test.

[38] Trial Test.; Davidson Dep. 49:11-14.

[39] Trial Test.

[40] Trial Test.

other positions she was able to perform. This meeting was the last time Blackwell was involved in Davidson's employment with Benefis.[41]

¶ 30 Virginia Gewald testified at trial. I found Gewald to be a credible witness. Gewald was formerly a benefits analyst at Benefis before she retired in January 2012. Her job duties included handling workers' compensation claims, and she was in charge of Davidson's claim.[42]

¶ 31 The December 14, 2011, meeting was the first time that Gewald had met Davidson. Gewald testified that she explained to Davidson during that meeting that Benefis no longer had transitional work available for Davidson, and that transitional work of up to four-hour shifts as a CNA was normally only available for three months following a work-related injury.[43]

¶ 32 At the time of the December 14, 2011, meeting, Gewald recalled that Davidson had recently undergone surgeries unrelated to her injury, so her working options were somewhat limited due to her health. Although Davidson expressed a desire to continue working under Vance on the medical floor in a registry position, Gewald explained that this was not feasible because the physical requirements of the CNA position were too strenuous for Davidson. Davidson agreed that some days, working just four hours as a CNA left her hurting.[44]

¶ 33 Gewald recalled that one position discussed with Davidson during the December 14, 2011, meeting was a patient accounts representative; however, Davidson wanted to work the evening or night shifts because she attended school during the day, and the patient accounts representative position was not available for evening or night shifts. Gewald also did not know on December 14, 2011, what Davidson's physical abilities and limitations were, since the FCE scheduled for December 20, 2011, had not yet been completed.[45]

¶ 34 Davidson testified at trial. I found Davidson to be a credible witness. Davidson's account of the meeting with Gewald, Vance, and Blackwell on December 14, 2011, is inconsistent with the testimony of the others present at that meeting in some respects. However, there is no dispute that the form which

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[41] Trial Test.

[42] Trial Test.

[43] Trial Test.

[44] Trial Test.; Ex. 9.

[45] Trial Test; Ex. 6F at 1-11.

terminated Davidson's employment and which was signed by Davidson states: "TERMINATION REASON: Unable to return to time of injury position."[46]

¶ 35 Davidson testified that she began employment at Benefis in October 2009.[47]

¶ 36 Prior to her right-ankle injury at work on January 5, 2011, Davidson testified that she had had prior injuries to the same ankle. Davidson recounted two ankle sprains in high school while playing volleyball,[48] and recalled two other times she injured it while working at Benefis.[49]

¶ 37 Davidson went to the emergency room at Benefis on December 13, 2009, for an injury to her right ankle and foot when she struck them against a door jamb at work.[50] Davidson had x-rays taken of her foot and ankle that were read as negative, and she was fitted with a splint and crutches. She was discharged with a diagnosis of right-foot and ankle sprain and was taken off work for two days.[51]

¶ 38 Davidson followed-up with Lyle J. Onstad, M.D., on December 21, 2009, during which visit she referenced another injury to her right ankle about three months previously. Davidson testified that this was an injury where she struck her lower right extremity on a bed railing.[52] Davidson was referred by Dr. Onstad to physical therapist M. Dirk Cappis, P.T.[53]

¶ 39 Davidson explained that she became frustrated with her continuing pain while undergoing physical therapy with Cappis. She complained that the pain and swelling in her ankle would increase at work during her shift.[54] Davidson testified that she attributed the continuing problems to her obesity.[55] Cappis eventually recommended that Davidson be seen by Dr. Ray.[56]

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[46] Ex. 7 at 1.

[47] Trial Test.

[48] Davidson Dep. 85:16 – 86:6.

[49] Trial Test.

[50] Trial Test.; Ex. 6K at 2.

[51] Trial Test; Ex. 6K at 3-4.

[52] Trial Test.; Ex. 6I at 1.

[53] *Id*.

[54] Trial Test.; Ex. 6J at 11.

[55] Trial Test.; Davidson Dep. 112:14 – 113:18.

[56] Ex. 6J at 12.

¶ 40 Davidson explained that she began to improve when she started seeing Dr. Ray, who had her perform certain exercises to strengthen her ankle. Davidson continued to improve as she did her exercises through the end of the year. Davidson's visit with Dr. Ray on June 17, 2010, was the last time she was treated for her ankle until her injury in January 2011.[57]

¶ 41 In June 2010, Davidson received a warning for excessive time missed from work due to her ankle pain. Davidson explained that she asked to go to part-time registry employment in 2011 because of excessive demands placed on her and the stress it caused.[58] However, Davidson understood that part-time work was not available so she made sure the classes she signed up for were available during the day so she could sleep and work nights.[59]

¶ 42 Davidson testified that on the morning of January 5, 2011, it had snowed and the parking lot had not been shoveled. Davidson had just gotten off a 12-hour shift, and as she opened the door of her car, she slipped in the snow and struck the outside of her right ankle, just below the prominent ankle bone, on the door jamb. Davidson explained that she elevated her foot when she got home and applied ice.[60]

¶ 43 Davidson stated that during the shift following her ankle injury, she encountered Amber Brady, an LPN at Benefis. Because Vance was on vacation, Davidson told Brady about her slip and fall and Brady told her she should report it. However, Davidson responded that she would wait for Vance to come back from vacation. Davidson testified that she informed Vance of her injury towards the end of her next shift.[61] Davidson testified that she believed she reported her injury to Vance either on January 12 or 13, 2011.[62]

¶ 44 Davidson received physical therapy on her right ankle and then received an injection of Xylocaine in the ankle from Dr. Thomas on May 24, 2011, which completely relieved her pain. Davidson stated that was the first injection she had received in her ankle.[63]

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[57] Trial Test.; Ex. 6A at 5.

[58] Trial Test.; Davidson Dep. 46:13-21; 47:4-12.

[59] Davidson Dep. 33:21 – 34:9.

[60] Trial Test.; Davidson Dep. 68:18 – 69:10.

[61] Trial Test.

[62] Trial Test.; Davidson Dep. 71:16-22.

[63] Trial Test.; Ex. 6D at 4.

¶ 45 Davidson testified that she underwent gastric bypass surgery on June 27, 2011, and her weight dropped from 368 pounds to 150 pounds. Davidson stated that her weight loss has made a big difference to her joints as before her weight loss, she attributed her swollen joints to her excess weight. However, when she was released to return to full duty following her surgery, Davidson testified she was still on light duty because of her ankle injury.[64]

¶ 46 Davidson stated that she was called to the meeting on December 14, 2011, without knowing the reason for it. Davidson testified that she felt her job was secure because she was a good CNA, but external stressors in her life made her emotional state quite high going into the meeting.[65] The only person she knew in the meeting was Vance. Davidson testified that she was informed for the first time during the meeting that she was at MMI.[66]

¶ 47 Davidson testified that she was repeatedly asked during the meeting what her plans were. Davidson explained that she was not prepared to give an answer to the question because she did not know at the time. Davidson also testified that no one discussed an alternative position such as a patient accounts specialist with her, to see if she was interested in it.[67]

¶ 48 Davidson explained that the termination form had someone else's handwriting on it – Davidson filled out her address and phone number and signed the form, but someone else had completed the top of the form, which was not done in her presence.[68] Davidson testified that although she was informed in the meeting that she could not return to work as a CNA, she was not informed who had made that determination.[69]

¶ 49 Davidson testified that the light-duty work restrictions that physician's assistant LaTray assigned to her were the first work restrictions she received for her ankle condition. Davidson explained that Benefis accommodated her restrictions during the following months until her employment ended in December 2011.[70]

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[64] Trial Test.; Davidson Dep. 80:7 – 81:15; 82:4-12.

[65] Trial Test.; Davidson Dep. 8:9 – 9:3; 39:2-10.

[66] Trial Test.; Davidson Dep. 116:3-6.

[67] Trial Test.

[68] Trial Test.; Ex. 7 at 1.

[69] Trial Test.

[70] Trial Test.; Ex. 6C at 2.

¶ 50 Davidson testified that prior to the meeting with Vance and others on December 14, 2011, she was available to work only evening and night shifts and only certain days of the week because she was pursuing a teaching degree. Davidson testified that although nothing had changed by the day of the meeting regarding her availability to work, by the end of the meeting she had no doubt her employment had been terminated by Benefis.[71]

¶ 51 At trial, Davidson reviewed the limitations placed on her from the FCE of December 20, 2011, and explained that she did not believe her limitations were as severe as those reflected in the FCE.[72] The FCE reflected that Davidson could not return to work as a CNA due to her physical limitations, which placed her in the light category of physical work.[73]

¶ 52 Davidson explained that her ankle has not improved since she left work in December 2011. It throbs constantly, it swells up, and at times the pain shoots up her leg and is so severe that it drops her to her knees.[74] The pain has not improved since the injury. Despite losing approximately 225 pounds, her ankle does not function as well as it did prior to her injury and is more disabling than before her injury. Davidson testified that Benefis has not authorized further treatment with Dr. Thomas to relieve her ankle pain.[75]

¶ 53 Davidson testified that she has unsuccessfully sought employment in the medical field, including applying at Rocky Mountain Sleep Disorders and Rocky Mountain Treatment Center. Davidson testified that her physical limitations were her greatest impediment to finding employment, as none of the prospective employers wanted to take on the risk of her re-injuring herself. Davidson finally found work in July of 2013, working approximately 33 hours per week at Café Rio making tortillas for $8.50 an hour. This job allows her to sit while working and to rest her right foot and ankle.[76]

¶ 54 At the time of her injury in January 2011, Davidson testified that she planned to continue working as a CNA until she completed her student teaching

[71] Trial Test.; Davidson Dep. 116:25 – 117:2.

[72] Trial Test.; Ex. 6F at 1-11.

[73] Ex. 6F at 2-3, 9, 11.

[74] Davidson Dep. 75:2-15.

[75] Trial Test.; Davidson Dep. 75:16 – 76:4; 76:9-18; 84: 21 – 85:3.

[76] Trial Test.

requirement following her degree because she enjoyed being a CNA. Davidson testified she had bills to pay so she had no plans to stop working.[77]

¶ 55 Davidson testified that she did not have the option to stop working in December 2011. Although she would have preferred to work part-time or accept a registry position, if faced with losing work completely, she would have preferred to work full-time rather than lose her job.[78] Davidson explained that she intended to work as a CNA until she became a teacher, but she would have taken the patient accounts representative position if it was offered to her.[79]

¶ 56 Amber Brady, LPN, testified at trial. I found Brady to be a credible witness. Brady worked with Davidson from 2009 through 2011 and knew about Davidson's injury in January 2011. She was also aware of Davidson's schooling and that Davidson was studying to become a teacher.[80]

¶ 57 Brady testified that, prior to Davidson's injury, Davidson told her that she would have to quit if she wanted to be a full-time student. After Davidson's injury, Brady testified that Davidson told her she wanted to quit work at Benefis to complete her education. When Brady noticed that Davidson was no longer showing up for work, she assumed Davidson had quit.[81]

¶ 58 Mark T. Stoebe, D.C., D.A.B.C.O., testified by deposition. Dr. Stoebe has been a licensed chiropractor in Montana for 30 years. After receiving his doctorate degree, he testified that he did over four years of post-graduate study in orthopedics, and is a diplomate of the American Board of Chiropractic Orthopedics.[82]

¶ 59 Dr. Stoebe's practice focuses on soft-tissue care and treatment of nerves, muscles, and fascia. He performs all of the impairment ratings for Great Falls Orthopedic Associates. Dr. Stoebe has had formal training in performing impairment ratings, including under the 6th Edition Guides,[83] and he is a member

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[77] Trial Test.

[78] Davidson Dep. 47:13 – 48:1.

[79] Trial Test.

[80] Trial Test.

[81] Trial Test.

[82] Stoebe Dep. 5:23 – 6:12.

[83] R. Rondinelli, M.D., Ph.D., *et al*. (eds.), *American Medical Association Guides to the Evaluation of Permanent Impairment*, 6th ed., AMA Press, 2008 (6th Edition Guides).

of the North American Academy of Impairment Evaluators.[84] Dr. Stoebe testified that he has been performing impairment ratings now for 30 years, and that he is currently averaging two a day and over 300 a year.[85]

¶ 60 Dr. Stoebe performed an impairment evaluation of Davidson on December 23, 2011, at the request of Panagopoulos.[86] In rendering his impairment rating, Dr. Stoebe testified that he relied on Dr. Ray's treatment notes of June 2010, showing that at the time, Davidson had limited dorsiflexion in her right ankle. That led Dr. Stoebe to conclude that seven months prior to her January 2011 injury, Davidson's right ankle already had a mild impairment based upon the 6th Edition Guides.[87] Dr. Stoebe testified that his examination did not reveal anything different than what Dr. Ray found.[88]

¶ 61 Dr. Stoebe explained that Dr. Ray found 9° dorsiflexion in Davidson's right ankle in June 2010, while he found 10° dorsiflexion in the same ankle when he examined Davidson in December 2011. The loss of dorsiflexion equates to a 7% lower extremity impairment. According to the 6th Edition Guides, there was no substantive loss of motion due to Davidson's January 2011, injury, therefore, she had no impairment for that injury.[89] Dr. Stoebe further explained that the 1° difference between his evaluation and Dr. Ray's is not considered a substantive difference, and that both evaluations were essentially the same.[90]

¶ 62 Dr. Stoebe described Davidson's injury from her January 5, 2011, slip and fall as a crush injury to the outside of her right ankle.[91] On examination, Dr. Stoebe found Davidson to have a mild limp favoring her right lower extremity, with ongoing pain.[92] Dr. Stoebe described Davidson as exquisitely tender to palpation in the area of her ankle that she hit in the accident in January 2011, and with his understanding of her other injuries to her right foot and ankle and

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[84] Stoebe Dep. 6:18 – 7:25.

[85] Stoebe Dep. 11:21 – 12:15.

[86] Stoebe Dep. 16:21-25; Ex. 3 at 7-8; Ex. 6G at 1.

[87] Stoebe Dep. 22:24 – 23:17.

[88] Stoebe Dep. 24:7-13.

[89] Stoebe Dep. 27:2 – 28:14; Ex. 6G at 1-3.

[90] Stoebe Dep. 28:15 – 29:10; 30:19-22.

[91] Stoebe Dep. 34:21 – 35:11.

[92] Stoebe Dep. 37:8-14.

Davidson's morbid obesity, he predicted that her pain would only increase over time.[93]

¶ 63 Regarding the CT scan of January 28, 2011, taken after Davidson's accident, Dr. Stoebe opined that the radiologist's findings of a chronic fracture in the right ankle more likely than not predated Davidson's January 5, 2011, accident.[94] Dr. Stoebe testified that the preexisting 7% right lower extremity impairment rating was equal to a 3% whole person impairment.[95] Dr. Stoebe's impairment rating mirrored that of Dr. Ray's, expressed in Dr. Ray's letter to Davidson's attorney dated May 14, 2012.[96]

¶ 64 Dr. Stoebe testified that the impairment rating was supported by objective evidence of loss of motion in the right ankle, and objective findings on Davidson's x-rays, CT scan, and MRI.[97] Dr. Stoebe also discussed Davidson's complaints of pain nearly a year post-injury when he saw her in December 2011. Davidson placed her ankle pain at 76 on a scale of 0 to 100, 0 being no pain and 100 being the worst pain. Dr. Stoebe believed Davidson's impression of her pain was very high, considering that her injury was a contusion. However, he also agreed that Davidson had no overt pain behaviors that would indicate she was faking.[98]

CONCLUSIONS OF LAW

¶ 65 This case is governed by the 2009 version of the Workers' Compensation Act since that was the law in effect at the time of Davidson's industrial accident.[99]

Issue One: Whether Petitioner is entitled to payment of a 3% whole person impairment award for her January 5, 2011, work injury claim; and

Issue Two: Whether Petitioner is entitled to payment of permanent partial disability benefits for her January 5, 2011, work injury claim.

¶ 66 Davidson bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[100]

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[93] Stoebe Dep. 39:3-6; 40:23 – 41:18.

[94] Stoebe Dep. 61:21 – 62:15.

[95] Stoebe Dep. 67:9-14.

[96] Stoebe Dep. 67:15-22; Ex. 6A at 6.

[97] Stoebe Dep. 68:8-18.

[98] Stoebe Dep. 78:18 – 80:1.

[99] *Ford v. Sentry Cas. Co.,* 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citing *Fleming v. International Paper Co.*, 2008 MT 327, ¶ 26, 346 Mont. 141, 194 P.3d 77); § 1-2-201, MCA.

¶ 67 Section 39-71-703, MCA, reads, in pertinent part, as follows:

> (1) 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; and
>
> (b) has a permanent impairment rating that:
>
> (i) is not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and
>
> (iii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.
>
> (2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

¶ 68 As I held in my Order denying the cross-motions for summary judgment in this case, §§ 39-71-703(1) and 39-71-703(2), MCA, address two separate situations. Section 39-71-703(1), MCA – specifically in subsection (a) – states that it applies to situations in which the claimant has an actual wage loss. Section 39-71-703(2), MCA, applies to situations in which a claimant does not experience an actual wage loss. There appears no dispute that Davidson would not qualify for PPD benefits under the criteria set forth in subsection (2). In order to be entitled to a PPD award under subsection (1), Davidson must establish:

> (a) she has sustained an actual wage loss as a result of the injury; and
>
> (b) she has a permanent impairment rating that:
>
> (i) is not based exclusively on complaints of pain;
>
> (ii) is established by objective medical findings; and
>
> (iii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

¶ 69 Section 39-71-116(24), MCA, defines PPD as:

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[100] *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).

> a physical condition in which a worker, after reaching maximum medical healing:
>
> (a) has a permanent impairment established by objective medical findings;
>
> (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability to work; and
>
> (c) has an actual wage loss as a result of the injury.

¶ 70 Dr. Stoebe testified to Davidson's impairment rating being supported by the objective medical findings of loss of dorsiflexion, and Dr. Thomas had found Davidson to be at MMI on September 26, 2011. Davidson is able to work, and indeed has found work, but her disability impairs her ability to work. Both Dr. Stoebe and PT Orvis who performed the FCE agreed that Davidson was not capable of performing her time-of-injury job of a CNA.

¶ 71 The accounts by those who attended the meeting of December 14, 2011, at Benefis differ as to what transpired. Those with Benefis believed Davidson tendered her resignation, while Davidson believed she was terminated. What is evident is that Davidson struggled to find work for the next year and a half, finally finding a job making tortillas where she could rest her foot and ankle.

¶ 72 Section 39-17-116(1), MCA, reads: "Actual wage loss means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury."

¶ 73 Benefis has not identified any jobs that Davidson could physically perform that are within her capabilities or what she may otherwise be qualified to earn. Therefore, I am left with Davidson's testimony, which I found to be credible, regarding her job search and the efforts she made to secure employment after leaving Benefis. Davidson testified that she unsuccessfully sought employment in the medical field, including applying at Rocky Mountain Sleep Disorders and Rocky Mountain Treatment Center. Davidson testified that her physical limitations were her greatest impediment to finding employment, and that she finally found work in July of 2013, working approximately 33 hours per week at Café Rio making tortillas for $8.50 an hour. This is substantially less than her time-of-injury AWW of $546.76.

¶ 74 As to whether Davidson has sustained an actual wage loss which would entitle her to PPD benefits under § 39-71-703(1), MCA, the proof is in the proverbial pudding. Having heard the testimony in this case and viewing the evidence in its totality, I simply do not find it plausible that Davidson would

choose to earn substantially less money as a tortilla maker than she made in a field for which she had specifically trained. Therefore, I conclude that Davidson has sustained an actual wage loss as a result of her injury and she is entitled to payment of the 3% impairment award and PPD benefits under § 39-71-703, MCA.

Issue Three: Whether Respondent has acted unreasonably in its handling of the claim.

¶ 75 Davidson maintains that it was unreasonable for Benefis to continue to deny liability for PPD benefits in light of the holding in *Swan v. Pacific Employers Ins. Co.*,[101] and that even with a 0% impairment rating attributable to the current work-related injury, Davidson was clearly able to perform the duties of a CNA prior to her January 2011 injury, and just as clearly incapable of doing the job post-injury.[102]

¶ 76 Benefis counters that *Swan* can be distinguished from the present case, as Swan had a permanent impairment as a result of her work-related injury whereas here, Davidson had a 0% impairment. Therefore, Respondent argues, this case is more analogous to *McAdam v. Nat'l Union Fire Ins. Co. of Pittsburgh*,[103] where the claimant also had a 0% impairment.[104]

¶ 77 The difference between *McAdam* and the present case is that McAdam's back symptoms were the same before and after his work-related injury. That is clearly not the case here, where Davidson was able to perform the duties of a CNA until her injury of January 5, 2011.

¶ 78 However, that is not to say that Benefis was unreasonable in the handling of Davidson's claim. As explained in *Marcott v. Louisiana Pacific. Corp.*, the penalty statute,[105] which requires a finding of unreasonableness, "was never intended to eliminate the assertion of a legitimate defense to liability," and "the existence of a genuine doubt, from a legal standpoint, that any liability exists

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[101] 2004 MTWCC 68 (a claimant who suffers an industrial injury to a part of the body previously injured, and the impairment rating is a singular rating, the claimant is entitled to the full amount of the award without a deduction for an estimate of the preexisting impairment).

[102] Petitioner' Trial Brief and Proposed Findings of Fact, Conclusions of Law and Judgment, Docket Item No. 36, at 16.

[103] 1998 MTWCC 28

[104] Respondent's Trial Brief, Docket Item No. 37, at 5-6.

[105] § 39-71-2907, MCA.

constitutes a legitimate excuse for denial of a claim or delay in making payments."[106]

¶ 79 In my Order denying the cross-motions for summary judgment, I noted that a question of fact exists as to whether Davidson had sustained an actual wage loss which would entitle her to PPD benefits under § 39-71-703(1), MCA. Although I have concluded that she has, in fact, sustained an actual wage loss, this remained a legitimate factual dispute for trial and, accordingly, a legitimate defense that Benefis was entitled to assert. Therefore, I conclude that Benefis did not act unreasonably in the handling of Davidson's claim.

Issue Four: Whether Petitioner is entitled to reasonable costs, penalties, and attorney fees in accordance with § 39-71-611, MCA, and/or § 39-71-2907, MCA.

¶ 80 To award attorney fees or a penalty, this Court must first find that the insurer's actions in denying liability or terminating benefits were unreasonable. Having concluded that Benefis did not act unreasonably in denying Davidson's claim for PPD benefits, Davidson is not entitled to an award of attorney fees or an increased award pursuant to §§ 39-71-611 and -2907, MCA.

¶ 81 As the prevailing party, Davidson is entitled to her costs.

JUDGMENT

¶ 82 Petitioner is entitled to payment of a 3% whole person impairment award for her January 5, 2011, work injury claim.

¶ 83 Petitioner is entitled to payment of PPD benefits for her January 5, 2011, work injury claim.

¶ 84 Respondent has not acted unreasonably in its handling of Petitioner's claim. Therefore, Petitioner is not entitled to a penalty or her attorney fees.

¶ 85 As the prevailing party, Petitioner is entitled to her reasonable costs.

¶ 86 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.

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[106] *Marcott*, 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996). (Citations omitted.)

DATED in Helena, Montana, this 30th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Norman L. Newhall
G. Andrew Adamek

Submitted: November 25, 2013