IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2009 MTWCC 14

WCC No. 2007-2017

CHARLES LONG

Petitioner

vs.

NEW HAMPSHIRE INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

JUDGMENT VACATED AND WITHDRAWN PURSUANT TO STIPULATION OF PARTIES

Summary: Although he remained off work from his time-of-injury employment, Petitioner returned to work at his concurrent employment as a car salesman. He informed the claims adjuster assigned to his case that he was returning to his concurrent employment, and the adjuster consented to Petitioner's continued receipt of biweekly benefits while working as a car salesman. Petitioner's claim was then transferred to another claims adjuster, who denied that Petitioner had received consent to receive benefits while working. She terminated Petitioner's benefits and demanded repayment of the benefits he had received. Petitioner requested the adjuster notes from his claim, believing that the notes would substantiate his claim that he had consent to return to his concurrent employment. The new adjuster refused to provide them and informed Petitioner he would have to petition this Court to receive them. Petitioner then petitioned this Court, arguing that he is entitled to ongoing benefits and alleging that Respondent was unreasonable in its adjustment of his claim. Respondent moved to strike Petitioner's spreadsheet which was attached to his response brief regarding waiver defense.

Held: The adjuster's notes which authorized Petitioner to receive temporary total disability (TTD) benefits after he had returned to work at his alternate employment constitutes written consent. Respondent acted unreasonably in its adjustment of Petitioner's claim by attempting to conceal the existence of the adjuster's note which authorized Petitioner's TTD benefits, by threatening Petitioner with legal action if he failed to return benefits he was

rightfully paid, and by failing to maintain its claims file in accordance with § 39-71-107(3), MCA. Petitioner is entitled to ongoing and back-owing TTD benefits, his costs, attorney fees, and a 20% penalty. Although not identical, the spreadsheet attached to Petitioner's response brief regarding waiver defense was substantially similar to the exhibit which was withdrawn at trial and was not probative of the legal issue under consideration. Respondent's motion to strike is granted.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. A claimant who was not released to return to the employment in which he was engaged at the time of the injury or to employment with similar physical requirements may be eligible for TTD benefits under § 39-71-701(1)(b), MCA, but could alternately be eligible for TPD benefits because he had a physical restriction, was not at MMI, and was released to return to an alternate employment that he was able and qualified to perform while suffering an actual wage loss.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-712. A claimant who was not released to return to the employment in which he was engaged at the time of the injury or to employment with similar physical requirements may be eligible for TTD benefits under § 39-71-701(1)(b), MCA, but could alternately be eligible for TPD benefits because he had a physical restriction, was not at MMI, and was released to return to an alternate employment that he was able and qualified to perform while suffering an actual wage loss.

Benefits: Temporary Partial Disability Benefits. A claimant who was not released to return to the employment in which he was engaged at the time of the injury or to employment with similar physical requirements may be eligible for TTD benefits under § 39-71-701(1)(b), MCA, but could alternately be eligible for TPD benefits because he had a physical restriction, was not at MMI, and was released to return to an alternate employment that he was able and qualified to perform while suffering an actual wage loss.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. A claims adjuster's note which was typed into a computer which states that an injured worker is entitled to work at a second job without loss of benefits constitutes "written consent" within the meaning of § 39-71-701(7), MCA. The statute requires only that the consent be "written;" it does not require that the consent be "printed onto a sheet of

paper," nor does it require that the claimant be provided a copy for the consent to be valid.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. A claims adjuster's note which stated that a claimant would be entitled to work at his second job without loss of TTD benefits since his wages from that second job were not included in his average weekly wage calculation constitutes written consent under § 39-71-701(7), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-701. Where an insurer argued that it never gave a claimant written consent to continue working his second job while receiving TTD benefits, and the Court concluded that the insurer had given written consent under § 39-71-701(7), MCA, the Court further concluded that the insurer had never withdrawn its consent and therefore remained liable for the claimant's TTD benefits so long as he remained eligible under § 39-71-701(1), MCA.

Benefits: Temporary Total Disability Benefits. Where an insurer argued that it never gave a claimant written consent to continue working his second job while receiving TTD benefits, and the Court concluded that the insurer had given written consent under § 39-71-701(7), MCA, the Court further concluded that the insurer had never withdrawn its consent and therefore remained liable for the claimant's TTD benefits so long as he remained eligible under § 39-71-701(1), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-103. Where a claims adjuster's notes were not accessible by anyone in Montana for a period of time, the mandate of § 39-71-107(3), MCA, was violated.

Discovery: Claims File. Where a claims adjuster's notes are not accessible by anyone in Montana for a period of time, the mandate of § 39-71-107(3), MCA, is violated.

Insurers: Duties. Where a claims adjuster's notes are not accessible by anyone in Montana for a period of time, the mandate of § 39-71-107(3), MCA, is violated.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. Respondent's actions in denying liability were

unreasonable where a claims adjuster authorized Petitioner to receive ongoing TTD benefits after Petitioner returned to work at his alternate employment, and when another claims adjuster took over the claim, rather than reevaluating the previous adjuster's authorization, she simply denied that the authorization existed, and threatened Petitioner with garnishment of his wages to recoup the alleged overpayment. Additionally, the claims adjuster attempted to dissuade Petitioner's counsel from obtaining a complete copy of his claims file by answering her inquiries in a misleading fashion. Furthermore, the claims adjuster acknowledged that for a period of time, the previous adjuster's notes were not accessible by anyone in Montana, in violation of § 39-71-103(3), MCA.

Attorney Fees: Unreasonable Denial or Delay of Benefits. Respondent's actions in denying liability were unreasonable where a claims adjuster authorized Petitioner to receive ongoing TTD benefits after Petitioner returned to work at his alternate employment, and when another claims adjuster took over the claim, rather than reevaluating the previous adjuster's authorization, she simply denied that the authorization existed, and threatened Petitioner with garnishment of his wages to recoup the alleged overpayment. Additionally, the claims adjuster attempted to dissuade Petitioner's counsel from obtaining a complete copy of his claims file by answering her inquiries in a misleading fashion. Furthermore, the claims adjuster acknowledged that for a period of time, the previous adjuster's notes were not accessible by anyone in Montana, in violation of § 39-71-103(3), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. Respondent's actions in denying liability were unreasonable where a claims adjuster authorized Petitioner to receive ongoing TTD benefits after Petitioner returned to work at his alternate employment, and when another claims adjuster took over the claim, rather than reevaluating the previous adjuster's authorization, she simply denied that the authorization existed, and threatened Petitioner with garnishment of his wages to recoup the alleged overpayment. Additionally, the claims adjuster attempted to dissuade Petitioner's counsel from obtaining a complete copy of his claims file by answering her inquiries in a misleading fashion. Furthermore, the claims adjuster acknowledged that for a period of time, the previous adjuster's notes were not accessible by anyone in Montana, in violation of § 39-71-103(3), MCA.

Penalties: Insurers. Respondent's actions in denying liability were unreasonable where a claims adjuster authorized Petitioner to receive

ongoing TTD benefits after Petitioner returned to work at his alternate employment, and when another claims adjuster took over the claim, rather than reevaluating the previous adjuster's authorization, she simply denied that the authorization existed, and threatened Petitioner with garnishment of his wages to recoup the alleged overpayment. Additionally, the claims adjuster attempted to dissuade Petitioner's counsel from obtaining a complete copy of his claims file by answering her inquiries in a misleading fashion. Furthermore, the claims adjuster acknowledged that for a period of time, the previous adjuster's notes were not accessible by anyone in Montana, in violation of § 39-71-103(3), MCA.

¶ 1 The trial in this matter was held on July 15, 2008, in Helena, Montana. Petitioner Charles Long was present and was represented by Stacy Tempel-St. John. Respondent was represented by Kelly M. Wills. Leslie Connell, senior claims examiner for Intermountain Claims, the third-party administrator for Respondent, was also present.

¶ 2 Exhibits: Exhibits 1 through 37 were admitted without objection. Exhibit 38 was submitted at the time of trial and admitted without objection. Screen shot copies of Exhibit 26 were reprinted by Respondent, submitted at the time of trial, and marked as Exhibit 39.

¶ 3 Witnesses and Depositions: The deposition of Tom Bleskin was taken and submitted to the Court, and is considered part of the record. It was admitted over Petitioner's objection to the question and answer portion of the deposition, which had been made on the grounds that the deposition was a records deposition.

¶ 4 Issues Presented: The Pretrial Order states the following contested issues of law:[1]

¶ 4a Whether Petitioner is entitled to back-owing and ongoing wage loss benefits.

¶ 4b Whether § 39-71-712(3), MCA, is constitutionally invalid.

¶ 4c Whether Petitioner is entitled to an award of attorney fees, costs, and penalty pursuant to §§ 39-71-611 and -2907, MCA.

[1] Pretrial Order at 2.

FINDINGS OF FACT

¶ 5 Petitioner was injured on August 31, 2006, while performing his duties as a laborer for J.J. Henderson Construction (Henderson) in Great Falls, Montana. Respondent accepted liability and paid some medical and indemnity benefits.[2]

¶ 6 Petitioner worked concurrent employment with Bleskin Motor Company (Bleskin).[3] He has not been released to return to his time-of-injury employment at Henderson.[4]

¶ 7 Petitioner testified at trial and I found him to be a credible witness. Petitioner stated that he was a laborer at Henderson at the time of his industrial injury. He was earning $13 per hour for a 40-hour workweek. Additionally, Petitioner worked 14 hours of overtime each week. Petitioner was also employed by Bleskin as a car salesman. At Bleskin, Petitioner was guaranteed minimum wage, but he never received a minimum-wage paycheck because he always earned commission which exceeded minimum wage.[5]

¶ 8 After his industrial accident, Petitioner was off work from both his employments for a period of time. Petitioner testified that when he was not released to either job, he received $545 per week in temporary total disability (TTD) benefits. He was eventually released to return to work at Bleskin, but at the time of trial, he had not been released to return to work to his time-of-injury position at Henderson and had not been found to be at maximum medical improvement (MMI).[6]

¶ 9 Petitioner testified that he has always been a hard worker and enjoys staying busy. After he was injured, he was unhappy being completely off work and he was anxious to return to work as soon as possible. When he learned from his doctors that he was unlikely to be released to return to his time-of-injury construction job in the near future, he urged them to release him to return to his car sales job at Bleskin.[7]

¶ 10 Rick Davenport was the initial claims adjuster on Petitioner's file and was assigned to work on it on September 11, 2006, while he was employed at Putman & Associates

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[2] Pretrial Order, Uncontested Facts at 1-2.

[3] Pretrial Order, Uncontested Facts at 2.

[4] *Id*.

[5] Trial Test.

[6] Trial Test.

[7] Trial Test.

(Putman). Putman was the Montana contractor for Cambridge, and Cambridge was a third-party administrator for Respondent in September 2006. Davenport testified at trial and I found him to be a credible witness. Davenport testified that he has worked in workers' compensation for over thirty years, and most of that time has been as a claims adjuster. He was employed by Putman for 12 or 13 years as vice president and as a claims examiner. Davenport is now a claims specialist at Montana State Fund.[8]

¶ 11 At trial, Davenport reviewed the adjuster's notes which were submitted in this case and included in Exhibit 27. He noted that, while the notes state the adjuster is Leslie Connell, her name is on the notes because she was the assigned adjuster at the time the notes were printed from the computer file. Any notes on the file dated prior to when Connell took over the claim were written by Davenport, even though the printed copy lists Connell as the adjuster.[9]

¶ 12 Davenport explained that when he worked on Petitioner's claim, he documented the claim's activities primarily through electronic claim notes. Davenport testified that the electronic system which he used for recording the claim notes in Petitioner's case was the system which was used by Cambridge, and not a system specific to Putman. All correspondence was also saved as part of Petitioner's claim file. The activities he documented included any contacts made with an injured worker, an employer, witnesses, defense counsel, or other insurers. Davenport tried to document every contact in the claim file, and to do so is a general business practice of most insurers, including Cambridge. Davenport noted that if he was working outside of the office and had contact with someone via his cellular phone, those contacts may not always have been documented as he could forget to enter the information in the electronic claim notes.[10]

¶ 13 Davenport's notes show that Petitioner began receiving TTD benefits around September 13, 2006. Davenport stated that Petitioner would have been entitled to these benefits because he was totally disabled from his job at Henderson. While Davenport could not recall Petitioner's pay rate, he recalled that it was a high rate of pay, and his TTD rate was at the maximum allowed rate.[11]

¶ 14 In approximately November 2006, Davenport learned that Petitioner was released to return to work at his concurrent employment at Bleskin. Davenport testified that he

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[8] Trial Test.

[9] Trial Test.

[10] Trial Test.

[11] Trial Test.

learned this through two sources – a work status report from Petitioner's treating physician, and a telephone conversation with Petitioner. Davenport frequently spoke to Petitioner on the telephone about his workers' compensation claim.[12]

¶ 15 Regarding Petitioner's concurrent employment at Bleskin, Davenport informed Petitioner that when he calculated Petitioner's average weekly wage and TTD rate, he did not include any of the wages from Bleskin, but only Petitioner's wages from Henderson. At trial, Davenport testified that he never requested Petitioner's pay stubs from Bleskin because he never considered the Bleskin wages in calculating Petitioner's benefits. Davenport explained that he was not concerned with the Bleskin wages because Petitioner was already receiving the maximum rate of TTD benefits from his job at Henderson.[13]

¶ 16 Davenport testified that he advised Petitioner that Petitioner was entitled to return to work at Bleskin and continue to receive TTD benefits. Davenport documented this conversation in his claim notes. At trial, Davenport reviewed his notes and confirmed that the notes indicated that Petitioner was released to light-duty work but continued to receive TTD benefits. Davenport asserted that he intended to pay Petitioner TTD benefits until Petitioner reached MMI or was released to his time-of-injury job. However, Davenport admitted that if he had known how much Petitioner was making as a car salesman, that information might have impacted his adjustment of the claim. Davenport further testified that he believed he was statutorily obligated to pay Petitioner TTD benefits and therefore he did not consider paying him temporary partial disability (TPD) benefits instead.[14]

¶ 17 When Petitioner returned to work at Bleskin, he believed he was supposed to give copies of his pay stubs to Davenport. When Petitioner received his first paycheck, he called Davenport, who informed him that he did not need to submit his pay stubs from Bleskin because his TTD benefits were based only on his wages from Henderson. Petitioner testified he understood from Davenport that his TTD benefit payments would continue even though he had returned to work at Bleskin, and during the time Davenport adjusted his claim, he continued to receive TTD benefits.[15]

¶ 18 Davenport testified that he did not recall ever sending Petitioner a letter or any other documentation which stated that Petitioner had Davenport's consent to receive benefits while working at Bleskin. Davenport did not send a letter because he saw no dispute that

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[12] Trial Test.

[13] Trial Test.

[14] Trial Test.

[15] Trial Test.

Petitioner was entitled to receive the benefits. Davenport further testified that he did not recall having any e-mail communications independent of his adjusting notes on this claim. He explained that his practice was to copy and paste any e-mails he sent into the claim notes.[16]

¶ 19 While Davenport was assigned to Petitioner's claim, Putman ended its relationship with Cambridge. Petitioner's claims file was then transferred to Intermountain Claims, which became the Montana contractor for Cambridge. Davenport testified that when Petitioner's claim was transferred to Intermountain Claims, Connell would have had access to the claims file notes Davenport had made.[17]

¶ 20 In approximately March 2007, Petitioner received a letter which informed him that his claim had been transferred from Putman to Intermountain Claims. Petitioner testified that, at the time he received the letter, his TTD benefits were overdue and he had been unable to ascertain the reason for the delay in his payments because he was not provided with contact information until he received this letter. Petitioner called Intermountain Claims and learned that Connell was the adjuster assigned to his claim. Petitioner left several messages for Connell, but Connell did not return his calls. Petitioner testified that he spoke to Connell's assistant and informed her that he needed to talk to Connell urgently because he relied on his benefit check to pay certain debts and living expenses. Petitioner stated that whenever he called to speak to Connell, he was told that she was extremely busy and that she would return his call and issue his check as soon as she had time.

¶ 21 Petitioner eventually received a return telephone call from Connell. Petitioner stated that the conversation he had with Connell became "fairly heated." He testified that Connell was rude to him and accused him of working without reporting the job to Respondent. He informed Connell that Davenport knew that he had returned to work at Bleskin, and Connell stated that Davenport no longer worked on his claim and that it was now her decision to make and not Davenport's. According to Petitioner, Connell stated several times that Petitioner made $8,000 a month, which was more than she made, and that she was not going to give him "a dime" in benefits. Petitioner stated that Connell informed him that she could garnish his wages and sue him for "everything that I was worth." Connell then ordered Petitioner to report his current pay to her and stated that she intended to pursue the return of the TTD benefits which had been paid to him. Petitioner testified, "She said she could sue me and take everything I own."[18]

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[16] Trial Test.

[17] Trial Test.

[18] Trial Test.

¶ 22 After speaking with Connell, Petitioner contacted Davenport, who informed him that he could not advise him as he was no longer involved with Petitioner's claim. However, Davenport told him that Davenport's adjusting notes contained information about Petitioner returning to work at Bleskin, and that the notes stated that Petitioner's TTD benefits were not based on his work at Bleskin.[19]

¶ 23 Petitioner then contacted Connell and related what Davenport had said. According to Petitioner, Connell denied that these notes existed. When his benefits were terminated a short time later, the termination letter stated that he did not have written consent from his insurer to work at Bleskin. Petitioner was confused by that statement because he understood from Davenport that he had consent to work at Bleskin. Prior to receiving the termination letter, Petitioner, through his attorney, had requested a copy of his claims file, including the adjusting notes from Putman, but Connell did not provide them. After he received the termination letter, his counsel again requested a copy of the Putman notes, and Connell informed him that he had already received the information she had in her file. His counsel once again requested the Putman notes, and she refused to provide them, telling Petitioner that if he wanted the notes, he would need to file a petition in the Workers' Compensation Court.[20]

¶ 24 Petitioner testified that he informed Connell that he believed he could substantiate his claim that he had written permission to receive TTD benefits while working at Bleskin via Davenport's adjusting notes. However, he was never provided with Davenport's notes until he filed a Petition for Trial in this Court. In the interim, Connell sent him a letter demanding repayment of $16,297.21 which he had received in TTD benefits from Respondent. From Connell's correspondence, Petitioner believed that he was going to be forced to repay the funds, which caused him to be stressed and to worry that Connell would garnish his wages and take his possessions, as she had threatened to do during their previous telephone conversations.[21]

¶ 25 Petitioner testified that he is angry about the way his claim has been handled since Connell began adjusting it. He is also frustrated that his injury has prevented him from working multiple jobs and long hours as he had done prior to the industrial accident. Petitioner testified that on the day of Connell's initial call to him, the conversation was "very

[19] Trial Test.

[20] Trial Test.

[21] Trial Test.

angry" on both sides, and that multiple phone calls occurred. He admitted that he hung up on Connell and stated that she also hung up on him.[22]

¶ 26 Connell is a senior claims examiner for Intermountain Claims. Connell testified at trial. To state that I did not find Connell to be a credible witness would be a gross understatement. I found Connell's trial testimony to be at best incredible and at worst perjurious. Through her correspondence with Petitioner's attorney, which is detailed below, I believe Connell intentionally tried to mislead Petitioner and his attorney into believing that Davenport's claims file notes regarding Petitioner's return to work at Bleskin did not exist. I am further convinced that Connell knew that Davenport authorized Petitioner to return to work at Bleskin while continuing to receive TTD benefits at the time that she told Petitioner that his benefits had been overpaid and that he could be liable for their repayment. Having heard the testimony of Petitioner, Davenport, and Connell at trial, and in reviewing the record before the Court, I have no doubts regarding Petitioner's testimony that Connell treated him rudely; that she belittled his concern about his late TTD payments; that she threatened to sue him, garnish his wages, and take his property to force him to pay back the alleged TTD overpayment; and that she denied the legitimacy of Davenport's consent even after she knew that Davenport had authorized Petitioner's continuing receipt of TTD benefits upon his return to work at Bleskin. Connell's actions in adjusting this claim were unprofessional and deceptive, and her attempt to conceal Davenport's claims file notes is inexcusable.

¶ 27 At trial, Connell testified that she has worked in the workers' compensation arena for eight years, and has been a claims adjuster for approximately the last five years. She has worked for Intermountain Claims since September 2005. Connell testified that, at the time of trial, she had 134 claims assigned to her, which is a typical amount for a senior case manager at Intermountain Claims to maintain. Connell explained that Intermountain Claims is not an insurer, but a third-party administrator for insurers or self-insured companies. Respondent has its claims handled by a national company called Cambridge which in turn has contracted with Intermountain Claims to handle Respondent's workers' compensation claims adjusting within the state of Montana.[23]

¶ 28 In approximately March 2007, Connell was assigned to adjust Petitioner's claim. Connell testified that when Cambridge sent this claim to Intermountain Claims, it was part of a large number of claims and it took Connell some time to work on the claim because she could not access the electronic system until her credentials were processed by Cambridge. Connell testified that she could not recall how long she was unable to access Petitioner's electronic claims information, and testified it may have been as little as three

[22] Trial Test.

[23] Trial Test.

days or as much as two weeks. Connell stated that, during this time period, no one at Intermountain Claims was able to access the electronic files, although she could have requested a copy of the notes from Cambridge.[24]

¶ 29 When Connell received the physical file from Putman, Intermountain Claims notified Petitioner that his claim had been transferred. Connell stated that she read the entire physical file that she received from Putman, and it included Petitioner's first report of injury, medical reports, and medical work-status reports. Connell testified that she could not recall if she reviewed Davenport's notes at that time.[25]

¶ 30 Connell testified that she does not consider adjuster's notes to be part of the claims file. However, she does consider them to be "documents related to the claim." Connell explained that the adjuster's notes are not printed out and put in the physical claims file because of storage concerns. Connell stated that she had access to the physical claims file from the day she took over Petitioner's claim. However, the transfer of Cambridge's files from Putman to Intermountain Claims was abrupt and, due to difficulties in transferring Cambridge's electronic system to Intermountain Claims, she did not have access to the electronically stored information for approximately one month. Connell stated that no one in Montana had access to that information during that time.[26]

¶ 31 Connell denied that Petitioner's TTD benefit checks were ever issued late after Intermountain Claims began adjusting his claim. She further testified that she had no knowledge of Petitioner ever calling to inquire about a late benefit check, and she believes that if Petitioner had ever called Intermountain Claims to complain about a late check, her coworkers would have informed her. In examining the trial exhibits, Connell acknowledged that Intermountain Claims' payment history of Petitioner's TTD benefit checks which was provided to Petitioner's counsel only go back to May 8, 2007. Connell could not explain why records of payment checks from March 2007, when Intermountain Claims was assigned Petitioner's claim, through May 8, 2007, were not provided.[27]

¶ 32 Connell testified that she typically logs all of her telephone conversations with a claimant in the claims file. However, she acknowledged that there are no records of any telephone conversations in Petitioner's claims file from the date she took over the claim forward. Connell admitted that she spoke with Petitioner on the telephone, and admitted

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[24] Trial Test.

[25] Trial Test.

[26] Trial Test.

[27] Trial Test.

that she sometimes does not log every call. Connell stated that it is her standard practice to log every phone call on every claim; however, in Petitioner's case, she logged none of them.[28] The inconsistency in Connell's testimony – where she claims it is her practice to log all of her telephone calls, and the evidence in the file, which is that she did not log a single call in Petitioner's claims file – is one of the many reasons why I found Connell's testimony wholly incredible.

¶ 33 Connell testified that she recalls speaking to Petitioner on the telephone on two occasions. She stated that Petitioner informed her that he had been faxing his Bleskin pay stubs to Davenport. She denied telling Petitioner that he would have to return the TTD benefits he had been paid while simultaneously working for Bleskin. Connell stated that, although Petitioner insisted that Davenport had given him consent to work at Bleskin while receiving the TTD benefits, she found "nothing in the file" to corroborate that. Connell admitted that she saw Davenport's adjuster's notes, but she did not consider that to be corroborative of Petitioner's statement because, "In my eyes, that's not written consent."[29]

¶ 34 In considering the evidence in this case, Connell's testimony played a significant role in my determination of a lack of credibility on her part. Her testimony led me to believe that, whether or not she agreed with Davenport's decision to continue Petitioner's TTD benefits, she knew Davenport was aware of Petitioner's return to work at Bleskin, and she knew that Davenport authorized the continued payment of Petitioner's TTD benefits. Nonetheless, when Petitioner's counsel pressed the issue regarding whether Petitioner had permission from Davenport to receive TTD benefits concurrent with his employment, Connell attempted to conceal Davenport's claims note from Petitioner's counsel by playing semantic games with counsel's request for a copy of the adjuster's notes. Counsel's examination of Connell clearly illustrates how Connell attempted to keep Petitioner from receiving a complete copy of his file:

> Q. Let's look at Exhibit 15. In this exhibit Mr. Long again requested the adjuster's notes from Putman?
>
> A. No, I believe he requested insured notes from Putman.
>
> Q. I'm sorry, insurer notes. Do insurer notes mean something other than adjuster's notes?
>
> A. Adjuster's notes are adjuster's notes, and insurer notes are insurer notes.

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[28] Trial Test.

[29] Trial Test.

Q. What are insurer notes then?

A. An adjuster's notes would be the notes that I put in. And insurer notes would be, to me, something that the insurer would put in.

Q. So you're telling me when I made this request on June 15th, you didn't understand what I was asking for?

A. I'm not saying that. I'm saying there's a difference between adjuster's and you asked for insurer notes.

. . .

Q. So your understanding was that I was requesting what the insure[r] would have put in some notes?

A. I read exactly what you wrote, Stacy, that you were requesting insurer notes.

. . .

Q. But you're telling me now that insure[r] notes are different than adjuster's notes?

A. I'm telling you that my notes are categorized into adjuster's notes, and if there are insure[r] notes, then there are insure[r] notes. . . .

Q. But when I made this request, I used the wrong words? I didn't use the magic adjuster's notes words and so that's why I wasn't provided with the notes?

A. You were provided with what you asked for, Stacy.

. . .

Q. . . . What I want to know is did you understand from this letter that I was asking for a copy of the adjuster's or insurer's notes, the notes from the claim?

A. Apparently I did not.

. . .

Q. Let's look at Exhibit No. 16 then. The last sentence of the first paragraph is: "You indicated that you requested the notes from Putman; however, the information you received is the same information I have on file." So did you understand at this point in time that I was seeking adjuster's notes as opposed to insurer notes?

A. If you read the sentence above: "A complete copy of your file" -- I guess I should have been more explicit -- "a complete copy of the physical file that I had received from Putman was forwarded to your office per your initial request." Then you indicated that "you had requested the notes from Putman; however, the information you received is the same information I have." I was referring to the physical file.

. . .

Q. The adjuster's notes were not produced at this time?

A. You didn't ask for the adjuster's notes.

Q. Your sentence says: You indicated you requested the notes from Putman. What notes would I be referring to?

A. Again, what I just said when I refer to a complete copy, I meant a physical file. So I should have been more clear when I wrote that a complete copy of the physical file was sent.

. . .

Q. It said notes from Putman.

A. You said records from Putman.

Q. And it was -- just to make sure, on Exhibit 16, you did have adjuster's notes at the time you sent this letter to me?

A. I would assume I did.[30]

¶ 35 After further questioning, Connell asserted that the first time Petitioner's counsel used the words "adjuster's notes" and therefore the first time that Connell understood that

[30] Partial Hr'g Tr., July 15, 2008 (Examination of Connell) 158:25 - 164:1.

this was what Petitioner's counsel wanted when she requested "insurer's notes" and the "notes from Putman" was in her June 22, 2007, letter to Connell. However, Connell refused to provide the notes at that time, and informed Petitioner's counsel that Petitioner would have to file a petition in this Court to receive a copy of those notes.[31]

¶ 36 Connell admitted that on June 19, 2007, when she wrote to Petitioner's counsel, she stated that, although Petitioner's counsel had requested the Putman adjusting notes, Connell was not providing them because "the information you received is the same information I have on file."[32] At trial, Connell testified that she had the Putman adjusting notes in her possession, but chose not to provide those notes and did not consider them to be "information on file" because she had not printed a physical copy of them, but rather stored them electronically. Connell testified that her training as an adjuster taught her that when a claims file is requested, she should only provide information that is located in the physical file, and that she would not provide adjuster's notes until litigation had commenced and/or a defense attorney was assigned to the file and had reviewed the notes.[33]

¶ 37 Connell testified that she believed Petitioner was entitled to see Davenport's adjuster's notes. However, her training as a claims adjuster was that the adjuster's notes would need to be reviewed by a defense attorney prior to being released. Connell stated that she did not request an attorney review the notes because she did not think of it.[34]

¶ 38 Connell maintains that Petitioner never had written consent from Davenport to receive TTD benefits while concurrently working at Bleskin. Petitioner's counsel drew Connell's attention to Davenport's December 2, 2006, adjuster's note, and asked:

> Q. And it indicates: He has been released to return to car sales. "He has been earning the max rate based on his wages at Henderson, so there's no change in the TTD rate." It's your position that that is not written consent?
>
> A. Correct. I don't believe Mr. Davenport had all the information when he wrote that.[35]

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[31] Trial Test.

[32] Ex. 16 at 1.

[33] Trial Test.

[34] Trial Test.

[35] Examination of Connell 172:8-14.

¶ 39 Petitioner's counsel then drew Connell's attention to Davenport's December 29, 2006, adjuster's note, and asked:

> Q. . . . [The note reads,] "Since his car wages were not included in the average weekly wage, he is entitled to work at that job without loss of benefits." Is that written consent?
>
> A. I do not believe it is.
>
> . . .
>
> Q. But your testimony is that this note is not consent?
>
> A. My testimony is that it's not a yes or no answer, if that's what you're looking for. Because, again, I don't believe Mr. Davenport had all the information.
>
> Q. Do you know what information Mr. Davenport had when he wrote this note?
>
> A. He didn't have the information that Mr. Long was making $8,000 a month selling cars. I think had he had that information, there would not have been a note like that.[36]

¶ 40 Respondent's attorney stipulated that at the time Davenport wrote this adjuster's note, Davenport believed Petitioner was legally entitled to TTD benefits. However, while Connell conceded that Davenport's note was "written in the form of a computer," she claimed she did not consider that to be "written consent." She further testified that she would only consider "written consent" to be a letter sent to a claimant by an adjuster that was then made part of the physical claims file.[37]

¶ 41 Connell further testified that she had read Davenport's adjuster's notes prior to August 2, 2007, but on that date she alleged that Petitioner had received an overpayment of TTD benefits in the amount of $16,297.21 because she did not believe Davenport's adjuster's notes reflected permission for Petitioner to receive TTD benefits while he worked at Bleskin. Connell stated that she eventually considered Petitioner's benefits to have been converted from TTD to temporary partial disability (TPD) payments, and that he should have been paid TPD benefits once he went back to work at Bleskin. Connell then

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[36] Examination of Connell 172:22 - 173:25.

[37] Trial Test.

determined that more than 26 weeks had passed since Petitioner had gone to work at Bleskin, and therefore terminated his TPD benefits. Connell testified that she was aware that Davenport had considered Petitioner's benefit payments to be TTD benefits; however, she believed she was justified in considering them to be TPD benefits instead because that is how she interpreted his entitlement. If Petitioner's benefits were TPD benefits, then the applicable statute only provided for 26 weeks of payments and therefore Petitioner had received more payments than he was entitled to by law.[38]

The Claims File and Correspondence

¶ 42 The claims adjuster notes, written correspondence, and other documentation in this case are crucial to resolving the issues presented. Pertinent documents are thus summarized here, in chronological order.

¶ 43 On December 8, 2006, Davenport noted, "CALL FROM [PETITIONER]. HE HAS BEEN RELEASED TO RETURN TO CAR SALES. [PETITIONER] HAD BEEN EARNING THE MAX RATE BASED UPON HIS WAGES AT HENDERSON SO THERE IS NO CHANGE IN THE TTD RATE."[39] On December 29, 2006, Davenport noted:

> [PETITIONER] HAS NOW REC'D ALL OF HIS CHECKS AT HIS NEW LOCATION. HE HAS BEEN ABLE TO [RETURN TO WORK] AT CAR SALES, A JOB HE HAD BEFORE. SINCE HIS CAR WAGES WERE NOT INCLUDED IN THE AWW, HE IS ENTITLED TO WORK AT THAT JOB W/O LOSS OF BENEF[I]TS. HE IS DUE TO FU WITH MD AFTER THE FIRST, WE MAY HAVE TO CONSIDER THE POSSIBILITY HE WILL NOT RETURN TO [TIME-OF-INJURY] JOB BECAUSE OF HIS INJURY.[40]

¶ 44 Petitioner later underwent surgery for his industrial injury and was unable to work at either job. He was ultimately released to return to work at his car sales job, but not his time-of-injury job. Davenport's claims note of February 1, 2007, reports that Petitioner had returned to work at his car sales job.[41]

¶ 45 In his adjuster note of February 1, 2007, Davenport noted that Petitioner had not returned to his time-of-injury employment and further stated:

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[38] Trial Test.

[39] Ex. 25 at 8. (All adjuster's notes typed in capital letters, per original notes.)

[40] Ex. 25 at 9-10.

[41] Ex. 25 at 13.

> WE HAVE A WRINKLE IN THAT [PETITIONER] HAS CONCURRENT EMPLOYMENT AS A USED CAR SALESMAN. AT THE TIME OF THE INJURY, HE WAS PRECLUDED FROM EITHER WORKING AS A SALESMAN OR AT THE JOBSITE. HIS WAGES FOR HIS WORK AT HENDERSON QUALIFIED HIM FOR THE MAX TTD RATE WITHOUT TAKING INTO ACCOUNT HIS OTHER WAGES SO WE DID NOT CALCULATE HIS WAGE LOSS CAUSED BY HIS INABILITY TO WORK AS A CAR SALESMAN. HE HAS RETURNED TO WORK SELLING CARS WHICH IS GREAT BECAUSE IT PROVES HE IS CAPABLE OF SOME KIND OF WORK, AN ISSUE THAT IS CRITICAL IN MONTANA. THE DOWN SIDE IS THAT YOU CAN'T OFFSET THE TTD RATE BECAUSE HE STILL HAS A MAX WAGE LOSS FROM HIS JOB AT HENDERSON.[42]

¶ 46 On March 21, 2007, Petitioner was informed by letter that his claim had been transferred to Intermountain Claims and assigned to Connell.[43]

¶ 47 On May 17, 2007, Petitioner's counsel wrote to Connell, advising her that Petitioner was now represented regarding his workers' compensation claim. Petitioner's counsel stated:

> (1) [P]lease provide our office with a complete copy of your claims file; (2) all benefit payment histories including average weekly wage (AWW) calculation; and dates and amounts of temporary total (TTD), temporary partial (TPD), and permanent partial (PPD) disability benefits issued to date.[44]

Petitioner's counsel followed up with an additional request on May 24, 2007:

> [Petitioner] reports that in a telephone conversation with you, you advised that there has been an overpayment regarding his temporary total disability benefits. Please provide me with your calculations and legal basis for your assertion of an overpayment. In addition to our request for a copy of the file, please ensure that all of Putman's records are provided including the case chronology. . . .[45]

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[42] Ex. 25 at 40.

[43] Ex. 38.

[44] Ex. 12.

[45] Ex. 13.

¶ 48 On May 23, 2007, Connell noted in the claims file, "DR. WARD DID RELEASE [PETITIONER] TO LIGHT SEDENTARY WORK AND [PETITIONER] RETURNED TO WORK AS A CAR SALESMAN. HOWEVER, [PETITIONER] HAS NOT BEEN TURNING IN HIS PAY STUBS FROM THE CAR DEALERSHIP SO THAT AN OFFSET CAN BE TAKEN AGAINST HIS TTD BENEFITS."[46] On July 10, 2007, she noted, "[PETITIONER] INDICATED THAT IN ONE MONTH HE MADE $8000.00 SELLING CARS AND IF THAT IS THE CASE THEN THAT WOULD OFFSET HIS TTD RATE. . . . SINCE STACEY TEMPEL ST. JOHN WILL NOT TURN OVER THE PAY STUBS [PETITIONER'S] TTD BENEFITS WILL BE SUSPENDED [WITH] NOTICE UNTIL WE RECEIVE THAT INFORMATION TO DETERMINE IF THERE IS ANY TYPE OF OFFSET."[47]

¶ 49 Connell responded to Petitioner's counsel on May 25, 2007, stating:

> [Petitioner's] file was copied and will be sent to your office once payment is received for copy work.
>
> I discussed [Petitioner's] claim with him prior to retaining you as an attorney. At that time, I was advised that [Petitioner] has been working as a car salesman for sometime and has been receiving temporary total disability benefits at the same time. I do not have any copies of [Petitioner's] pay stubs from hi[s] position as a car salesman, therefore, I did not have any specific information in regards to an overpayment. I advised [Petitioner] that I needed copies of his pay stubs so that I could compare those to his AWW/TTD rate and **determine** if there was any type of overpayment. To date, I have not received any copies of his paystubs.[48]

¶ 50 On June 15, 2007, Petitioner's counsel again wrote to Connell, stating:

> Thank you for providing records regarding [Petitioner's] claim. Please be advised that I did request the insurer notes from Putman, however these are not included. Please provide those as soon as possible.[49]

¶ 51 Connell responded on June 19, 2007, stating:

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[46] Ex. 25 at 20-22.

[47] Ex. 25 at 24.

[48] Ex. 14 (emphasis in original).

[49] Ex. 15.

> A complete copy of the file that we received from Putman was forwarded to your office per your initial request. You indicated that you requested the notes from Putman, however, the information you received is the same information I have on file.[50]

¶ 52 On June 22, 2007, Petitioner's counsel responded to Connell's letter, stating:

> [Y]ou indicate that I received a complete copy of the information that you have received from Putman. As you note, I requested the adjuster's notes regarding this claim. The fact that you may not have this information, does not mean that it does not exist. As such, please get the information from Putman and forward to me as requested.[51]

¶ 53 On June 26, 2007, Connell responded to Petitioner's counsel's request, stating, "As you know you can file a petition before the workers' compensation court if you wish to obtain copies of the adjuster's notes."[52]

¶ 54 On June 29, 2007, Petitioner completed a psychological independent medical examination (IME) with William D. Stratford, M.D., at Connell's request. Among other findings, Dr. Stratford noted, "[Petitioner] was very irritable today about the change 'from Putman to Intermountain Claims,' and it has now been alleged that he owes them about $20,000. He claimed he was told that he could continue to work as a car salesman, and now he finds he is ostensibly being penalized for that."[53] I find this note significant because it substantiates Petitioner's allegation that Connell demanded repayment of his benefits during their earlier telephone conversation, whereas Connell denied demanding repayment of the benefits until the demand letter was sent. However, this letter was sent *after* Petitioner's appointment with Dr. Stratford.

¶ 55 Connell again wrote to Petitioner's counsel on July 13, 2007. She continued to request Petitioner's pay stubs from Bleskin, which had not been provided in response to Connell's requests. Connell stated:

> On two separate occasions I sent written requests for [Petitioner's] pay stubs from his employment selling cars. I also requested that information directly

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[50] Ex. 16.

[51] Ex. 17.

[52] Ex. 18.

[53] Ex. 8 at 2. (Emphasis in original.)

> from [Petitioner] prior to your involvement with this case. To date, I have had no response from your office or received copies of his pay stubs. At one point, [Petitioner] noted that he has made up to $8,000.00 per month selling cars so you can see the need to review his wages when he continues to review [*sic*] time loss benefits.
>
> Please be advised that [Petitioner's] temporary total disability benefits will be suspended with in 14-day [*sic*] from the date of this letter for non-compliance. Subject to 39-71-701 (7) it appears that [Petitioner] would no longer be eligible for time loss benefits as he is receiving both wages and time loss benefits at the same time. **With no written consent from the insurer**, [Petitioner's] benefits will be suspended on July 27th, 2007.[54]

¶ 56 Petitioner's counsel supplied a copy of Petitioner's payroll records on July 19, 2007. She further noted in her response letter that Connell had not yet provided the average weekly wage calculations and payment history as requested.[55]

¶ 57 After she received and reviewed Petitioner's payroll records, Connell wrote to Petitioner's counsel on August 2, 2007. Connell explained that by her calculation, Petitioner's average weekly wage was now $2079.59 with the Bleskin wages added in, and that Petitioner's maximum TTD was $545.00 per week. Connell stated that since Petitioner continued to work at Bleskin while receiving TTD benefits, he had been overpaid by Respondent in the amount of $16,297.21. Connell enclosed a spreadsheet detailing her calculations and requested that Petitioner's counsel contact her to discuss overpayment options.[56]

¶ 58 Petitioner's counsel responded on August 8, 2007. Enclosing her own spreadsheet explaining her calculations, she informed Connell that she believed Connell miscalculated the average weekly wage, and argued that Petitioner actually received Temporary Partial Disability (TPD) benefits, and not TTD benefits. Petitioner's counsel stated that, based on her calculations, the TPD benefits had been underpaid.[57]

¶ 59 On August 27, 2007, Connell responded to the letter from Petitioner's counsel. Connell explained that, while she agreed with Petitioner's counsel's calculations,

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[54] Ex. 19. (Emphasis added.)

[55] Ex. 20.

[56] Ex. 21.

[57] Ex. 22.

Petitioner's counsel did not take into account that when calculating TPD benefits, the wage loss cannot exceed the TTD rate. Connell further stated:

> [Petitioner] continued to receive time loss benefits from 9/1/2006-6/1/2007 and as you can see grossed more in wages than his temporary total disability rate. . . . [Petitioner] has also exceeded the twenty six weeks allowed for temporary partial disability benefits. Under 39-712 (3) [*sic*] [t]emporary partial disability benefits are limited to a total of 26 weeks. . . .[58]

Connell again asked Petitioner's counsel to contact her to discuss repayment options.[59]

¶ 60 On August 27, 2007, Connell noted, "[PETITIONER] HAS BEEN ON TPD BENEFITS LONGER THAN THE STAT[U]TORY 26 WEEKS PROVIDED IN THE CODE. HE WAS ADVISED HE IS NO LONGER ELIGIBLE FOR TPD BENEFITS. I AM STILL WORKING THROUGH THE OVERPAYMENT."[60] On September 21, 2007, she noted:

> [PETITIONER] IS CURRENTLY OFF WORK FROM TIME OF INJURY AT THIS TIME, HOWEVER, WE ARE NOT PAYING BENEFITS AS IT IS OUR POSITION THAT [PETITIONER] WAS OVERPAID TPD BENEFITS FOR OVER A YEAR FROM PREVIOUS ADJUSTER. THE OVERPAYMENT IS AROUND $17K, THEREFORE, THE TPD BENEFITS WERE SUSPENDED. [PETITIONER] ALSO EXCEEDED THE NUMBER OF WEEKS ALLOWED FOR TPD UNDER CURRENT LAW, 26 WEEKS.[61]

Respondent's Motion to Strike

¶ 61 At trial, Respondent submitted a point brief in which it argues that Petitioner untimely raised the issue of whether Respondent waived its right to challenge TTD benefits.[62] When Respondent submitted its brief, Petitioner requested and was granted time in which to submit a response to the brief.[63] Petitioner filed his response brief on July 28, 2008.[64]

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[58] Ex. 23.

[59] *Id*.

[60] Ex. 25 at 29.

[61] Ex. 25 at 32-33.

[62] Point Brief Regarding Waiver Defense, Docket Item No. 33.

[63] *See* Minute Book Hearing No. 3951, Docket Item No. 35.

[64] Petitioner's Response to Respondent's Point Brief Regarding Waiver Defense, Docket Item No. 36.

Attached to his brief was an exhibit consisting of a spreadsheet which purported to show wage loss which Petitioner alleges he suffered as a result of his injury. Respondent filed a motion to strike this exhibit, arguing that Petitioner attempted to introduce this spreadsheet, or a substantially similar spreadsheet, at trial, and that the exhibit was withdrawn because Petitioner was unable to lay adequate foundation for its admittance. Respondent argued that the exhibit should be stricken from Petitioner's response brief because Petitioner's attempt to reintroduce it violates a ruling of this Court.[65]

¶ 62 Petitioner responded to Respondent's motion to strike and asserted that the spreadsheet attached to his response brief is not the same exhibit as the one offered at trial, and that it is a "breakdown" of evidence already admitted by the Court.[66]

¶ 63 Although not identical, the spreadsheet attached to Petitioner's response brief was substantially similar to the exhibit which was withdrawn at trial. Moreover, although the contents of the spreadsheet were tangentially related to the issue of whether Respondent waived its right to challenge TTD benefits, it was not probative of the legal issue under consideration. Respondent's motion to strike is **granted**.

CONCLUSIONS OF LAW

¶ 64 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident.[67]

¶ 65 Petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[68]

¶ 66 The first issue presented is whether Petitioner is entitled to back-owing and ongoing wage-loss benefits. The evidence in this case has established that Davenport paid Petitioner TTD benefits pursuant to § 39-71-701, MCA. Section 39-71-701(1), MCA, provides that a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing, or 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. Pertinent to

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[65] Respondent's Motion to Strike, Docket Item No. 38.

[66] Petitioner's Response in Opposition to Respondent's Motion to Strike, Docket Item No. 39.

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

[68] *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).

the present case, § 39-71-701(7), MCA, provides that a worker may not receive both wages and temporary total disability benefits without the written consent of the insurer.

¶ 67 There is some question as to whether the benefits Petitioner received were TTD or TPD benefits as provided for in § 39-71-712, MCA. At trial, Davenport testified that he believed he was statutorily obligated to pay Petitioner TTD benefits and he therefore did so. Davenport stated that he did not consider paying Petitioner TPD benefits instead. However, Connell testified that when she reviewed Petitioner's file, she determined that he was receiving TPD benefits and not TTD benefits. She therefore retroactively "converted" his TTD benefits to TPD benefits and terminated them because he had been receiving these benefits for more than 26 weeks, and § 39-71-712(3), MCA, only obligates insurers to pay TPD benefits for 26 weeks.

¶ 68 Having reviewed §§ 39-71-701, -712, MCA, I am convinced that Petitioner was potentially eligible for either type of benefit. Petitioner was eligible for TTD benefits under § 39-71-701(1)(b), MCA, because he had not been released to return to the employment in which he was engaged at the time of the injury or to employment with similar physical requirements. Although Petitioner did return to concurrent employment, he was allowed to do so without loss of benefits under § 39-71-701(7), MCA, if he had the written consent of the insurer. Alternatively, Petitioner was also potentially eligible for TPD, as he had a physical restriction, was not at MMI, and was released to return to an alternative employment that he was able and qualified to perform while suffering an actual wage loss.

¶ 69 Given Petitioner's potential eligibility for either TTD or TPD benefits, I first note that Davenport testified that he considered the benefits he paid to Petitioner to be TTD benefits. As I noted at trial, if Petitioner is entitled to TTD, it would be because he had the written consent of the insurer, within the meaning of § 39-71-701(7), MCA. If Petitioner did not have the written consent of the insurer, then the benefits paid would be properly classified as TPD benefits.

¶ 70 Therefore, the threshold issue in this case is whether Petitioner had written consent of the insurer to return to concurrent employment without the loss of his TTD benefits. Both parties have clearly set forth their respective positions as to whether Davenport's adjuster's notes constitute "written consent" within the meaning of § 39-71-701(7), MCA. Petitioner argues that Davenport typed his note on a computer and it is therefore "written." Respondent argues that the information needed to be transmitted in the form of a letter, or at the very least, printed out as part of the physical file of the case. I find nothing in the statute that requires more than that the consent be "written." The statute does not require that it be "printed onto a sheet of paper" nor does it require that Petitioner be provided a copy for the consent to be valid. However, I note that were it not for Connell's deliberate and deceptive refusal to provide Petitioner with a copy of the adjuster's notes, the note

would have indeed been printed onto a sheet of paper, and Petitioner would have had a copy of it.

¶ 71 I further consider Davenport's note – which read, "SINCE HIS CAR WAGES WERE NOT INCLUDED IN THE [AVERAGE WEEKLY WAGE], HE IS ENTITLED TO WORK AT THAT JOB [WITHOUT] LOSS OF BENEFITS"[69] – to constitute consent. Davenport clearly was aware that Petitioner had returned to work at Bleskin, he discussed the situation with Petitioner, and he made the decision to continue to pay Petitioner TTD benefits pursuant to § 39-71-701(7), MCA. Davenport testified that he considered Petitioner's benefits to be TTD and not TPD benefits. Therefore, I conclude that the benefits which Petitioner received were TTD benefits, and Petitioner had the written consent of the insurer to receive those benefits.

¶ 72 Respondent has never withdrawn its consent for Petitioner to receive TTD benefits while he continues to work at Bleskin although not released to his time-of-injury employment. Respondent has instead denied that Petitioner ever received written consent pursuant to § 39-71-701(7), MCA. I therefore conclude that so long as this remains the case, Petitioner is owed TTD benefits retroactive to the date of their termination and remains entitled to TTD benefits so long as he is eligible under § 39-71-701(1), MCA.

Montana Mun. Ins. Auth. v. Roche

¶ 73 Although not directly bearing on my decision in this case, at trial it became apparent that some confusion exists as to the impact of my decision in *Montana Mun. Ins. Auth. v. Roche*[70] on how § 39-71-701(7), MCA, is applied. At trial, Davenport testified that he believed the *Roche* decision precludes a claimant from receiving TTD benefits if that worker receives any remuneration from a second job. Respondent's counsel likewise summarized the *Roche* holding as disallowing an injured worker from receiving TTD benefits if that worker also received wages of any kind. In the hope of clarifying my own interpretation of *Roche*, I reiterate here the language of § 39-71-701(7), MCA:

> A worker may not receive both wages and temporary total disability benefits without the written consent of the insurer. . . .

¶ 74 Section 39-71-701(7), MCA, does ***not*** state that the worker may not receive both wages and TTD benefits. Rather, the statute states that the worker may not do so ***without the written consent of the insurer***. In *Roche*, the insurer did not give the claimant written consent; the insurer was in fact not aware that the worker was receiving wages while

[69] Ex. 25 at 10.

[70] *Roche*, 2007 MTWCC 47.

receiving TTD benefits. Accordingly, I held that the worker had to repay the TTD benefits he received during the time he was receiving wages. *Roche* is distinguishable from the case at hand, in which Respondent was aware that Petitioner was receiving wages and TTD benefits concurrently, and Davenport authorized this occurrence, as allowed by § 39-71-107(7), MCA. *Roche* in no way disallows an injured worker from receiving both wages and TTD benefits ***if*** the worker has the written consent of the insurer.

Constitutionality of § 39-71-712(3), MCA

¶ 75 Since I have determined that Petitioner did not receive TPD benefits, he has no standing to challenge the constitutionality of § 39-71-712(3), MCA, and that issue is therefore moot.

Costs and Attorney Fees

¶ 76 As the prevailing party, Petitioner is entitled to his costs.[71] As to the issue of attorney fees, pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later judged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. I have concluded that Petitioner is entitled to the ongoing TTD benefits which were denied by Respondent. I further conclude that Respondent's actions in denying liability were unreasonable. As set forth in the facts above, Davenport authorized Petitioner to receive ongoing TTD benefits after Petitioner returned to work at his alternate employment with Bleskin. When Connell took over Petitioner's claim, rather than reevaluating Davenport's authorization, she simply denied that the authorization existed, even going so far as to threaten Petitioner with garnishment of his wages to recoup the alleged overpayment. Connell then attempted to dissuade Petitioner's counsel from obtaining a complete copy of his claims file by answering her inquiries in a misleading fashion, the only conceivable purpose of which was to prevent Petitioner from receiving a copy of Davenport's note which authorized Petitioner's receipt of TTD benefits under § 39-71-701(7), MCA.

¶ 77 In *Porter v. Liberty Northwest Ins. Corp.*,[72] Petitioner moved this Court for an order declaring that a workers' compensation insurer has an affirmative obligation to produce a claimant's file in a timely manner upon request by a claimant or a claimant's counsel. I held that in that particular case, since no petition had yet been filed in this Court, this Court had no jurisdiction upon which to order the production of a claims file. I cautioned, however, that if a claimant is forced to file a petition in this Court simply to receive a copy of his

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[71] *Marcott v. Louisiana Pac. Corp.*, 1994 MTWCC 109 (*aff'd after remand at* 1996 MTWCC 33).

[72] *Porter*, 2007 MTWCC 42, ¶¶ 47-53.

claims file, this fact would be taken into consideration when determining whether an insurer acted reasonably in the adjustment of the claim. While in the present case, Petitioner was instructed by Respondent that he would need to file a petition in this Court in order to receive a copy of his claims file, I noted that Connell stated this via letter on June 26, 2007. *Porter* was not issued by this Court until October 19, 2007. Therefore, I have not taken *Porter's* caution into account in the present case, and specifically note that Connell's statement that Petitioner would need to file a petition to receive a copy of the adjuster's notes in his file was not a factor which I considered in concluding that Respondent was unreasonable in its adjustment of Petitioner's claim.

¶ 78 However, I took into consideration Connell's testimony that, for a period of time, Petitioner's claims file was not accessible in Montana. Section 39-71-107(3), MCA, provides:

> An insurer shall maintain the documents related to each claim filed with the insurer under the Workers' Compensation Act at the Montana office of the claims examiner examining the claim in Montana until the claim is settled. The documents may be either original documents or duplicates of the original documents and must be maintained in a manner that allows the documents to be retrieved from that office and copied at the request of the claimant or the department. Settled claim files stored outside of the claims examiner's office must be made available within 48 hours of a request for the file. Electronic or optically imaged documents are permitted.

At trial, Connell conceded that Davenport's adjuster's notes were "documents related to the claim." She further acknowledged her inability to retrieve those documents, and asserted that, for a period of time, those documents were not accessible by anyone in Montana. This situation clearly violates the mandate of § 39-71-107(3), MCA, and further supports my determination that the insurer handled Petitioner's claim in an unreasonable manner.

Penalty

¶ 79 Pursuant to § 39-71-2907, MCA, I may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay if the insurer's delay or refusal to pay is unreasonable. For the same reasons I find attorney fees are owed, I further award a penalty amounting to 20% the full amount of benefits due Petitioner.

¶ 80 Because I have determined the handling of this claim was unreasonable and there were two claims adjusters associated with this claim, I believe a clarification is warranted. Having reviewed all of the evidence presented and having had the opportunity to hear testimony at trial from both Davenport and Connell, I conclude that Davenport's handling of this claim was entirely appropriate. All of the actions which give rise to the imposition

of a penalty and an award of attorney fees are due to the claims handling after the file had been transferred to Connell.

JUDGMENT

¶ 81 Respondent's Motion to Strike is **granted**.

¶ 82 Petitioner is entitled to back-owing and ongoing wage-loss benefits.

¶ 83 The issue of whether § 39-71-712(3), MCA, is constitutionally invalid is moot.

¶ 84 Petitioner is entitled to an award of attorney fees, costs, and penalty pursuant to §§ 39-71-611, -2907, MCA.

¶ 85 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 in Helena, Montana, this 10th day of April, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Stacy Tempel-St. John
Kelly M. Wills
Submitted: August 8, 2008