

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF)	Case No. 1901-2004
JODY BURTELL,)	
Petitioner,)	FINDINGS OF FACT,
vs.)	CONCLUSIONS OF LAW,
MONTANA STATE FUND,)	AND FINAL AGENCY DECISION
Respondent.)	

I. INTRODUCTION

On February 10, 2004, claimant Jody Burtell appealed the department's February 5, 2004, "Initial Order of Determination" that she was capable of return to work in a related occupation suited to her education and marketable skills. Hearing Officer Terry Spear conducted a telephone hearing in this matter on April 20, 2004. John C. Doubek, Doubek & Pyfer, represented Burtell. Thomas Martello, Special Assistant Attorney General, represented respondent Montana State Fund. Steve Scholl attended as the Fund's designated representative. Burtell, Karen Richardson, Sabina Enriquez and David Lyons testified. Exhibits 1 and A through K were admitted into evidence. Exhibit 2 was refused as hearsay.

At the commencement of hearing, the hearing officer denied the Fund's motion to dismiss, ruling that because of Burtell's intervening return to temporary total disability status and subsequent surgery, the prior 1992 final department determination that "option (c)" was appropriate for Burtell did not apply beyond the date the Workers' Compensation Court had found that the claimant again became totally disabled in 2000.

The Fund then objected to a telephonic hearing. The hearing examiner had ruled, on March 15, 2004, that the failure of the Fund to appear and participate in the original telephonic scheduling conference of March 15, which the Hearings Bureau had scheduled by a March 3, 2004, written notice properly mailed and received by the parties, waived its right either object to a telephonic hearing or to seek an in-person hearing.⁽¹⁾ The Fund did not file any objection or request for relief from that order. The hearing officer originally set the hearing for April 6, but then rescheduled it, by agreement of the parties, to April 20. The Fund did not object or request relief from the resetting of the telephone hearing. The objection at hearing was the first notice to the hearing officer and to Burtell that the Fund objected to the telephonic hearing. Burtell responded that she had arranged the availability of witnesses for the telephone hearing, that the objection was not timely and that delay in the hearing would be prejudicial. She declined the hearing officer's offer to reset an in-person hearing at a time when the witnesses could attend, asserting that further delay would still be prejudicial. The hearing officer overruled the Fund's objection at hearing to the telephonic testimony.

The parties argued their positions at the close of hearing, and submitted the case for decision. The hearing officer confirmed that the decision would issue on or before May 18, 2004. Mont. Code Ann. (1989) § 39-71-1018(2).⁽²⁾

II. ISSUE

Whether the preponderance of evidence establishes that "option (c)" is the first appropriate return to work option for Burtell, pursuant to the provisions of Mont. Code Ann. (1989) § 39-71-1012, as determined by the Rehabilitation Panel.

III. FINDINGS OF FACT

1. On December 31, 1990, Jody Burtell suffered an industrial injury in employment of West Mont, an employer insured by the Montana State Fund under the Montana Workers' Compensation Act. Burtell injured her lower back. The Fund accepted liability for Burtell's injury and paid medical and wage-loss benefits.

2. On November 25, 1992, a department Rehabilitation Panel entered a final "option (c)" determination that Burtell could return to work in a related occupation for which she was suited by education and marketable skills under the rehabilitation options effective on the date of her injury. Mont. Code Ann. (1989) § 39-71-1012. The panel found that the jobs of customer service representative, house parent, desk clerk and casino cashier were available to Burtell. Burtell did not appeal that decision, which became final by law upon the expiration of her appeal time.

3. On May 3, 2000, Burtell first saw Dr. B. Max Iverson, an orthopedic surgeon. At that point, the disk protrusion previously found as a result of her industrial injury had significantly worsened. Dr. Iverson performed a surgical microlaminotomy and disk excision on Burtell on September 15, 2000, on a ruptured disk at L5-S1 which had resulted from her industrial injury and progressed over time (Ex. F). Effective May 3, 2000, Burtell was again temporarily totally disabled-she was no longer as far restored medically as the permanent character of her work related injury permitted (Ex. D⁽³⁾).

4. On November 2, 2000, the Fund designated Crawford & Company as the rehabilitation provider to Burtell.

5. On March 22, 2001, Dr. Iverson noted that Burtell, who was reporting increased problems since a slip and fall in early March, "has been offered a physical therapy regimen which she is going to possibly pursue" (Ex. F). Burtell did not pursue the physical therapy regimen.

6. On December 14, 2001, Dr. Iverson approved four job descriptions submitted by the rehabilitation provider, for the jobs of cashier, motel desk clerk and customer service representative. On December 28, 2001, the rehabilitation provider submitted a job analysis closure report for Burtell to the Fund, identifying the four jobs the physician had approved. According to the rehabilitation provider, the four jobs were suitable based upon work history, transferable skills and abilities, interests, the labor market and Burtell's physical restrictions. Dr.

Iverson had disapproved return to the job of injury, and the former employer did not offer any modified positions. (Ex. J)

7. In July 2003, Burtell saw Dr. John A. Vallin, M.D., who could not find any surgical avenues to address her problems. He recommended that she have "close psychological and psychiatric support." Burtell reported to him that she was receiving such support. He also discussed with her "a comprehensive pain program" and Burtell did not seem "entirely receptive to this." (Ex. 1 and Ex. G)

8. In July and August of 2003, Burtell saw Donna Porte, R.N., F.N.P., for documentation of a pain management history and a review of systems. At that time, Burtell reported that she had not followed up with prescribed physical therapy.⁽⁴⁾ She also said that she was "unable" to go to the Missoula pain treatment center. (Ex. 1)

9. On January 8, 2004, Dr. Michael A. Emerson, Ph.D., L.C.P.C., provided a report documenting his counseling of Burtell since February 2003. He stated that Burtell suffered from severe depression, with a significant contributor being chronic pain originating with her industrial injury. He also stated that her constant pain, from which she could only find temporary relief,⁽⁵⁾ "makes competitive employment impossible and her functioning level severely limited." (Ex. 1)

10. On January 28, 2004, a department Rehabilitation Panel issued a report again identifying "option (c)" as the first appropriate option for Burtell (Ex. A). The panel member from the Department of Labor and Industry found the motel desk clerk and customer service representative positions to be inappropriate for Burtell, but found the cashier position appropriate because "reasonable accommodations are easily obtainable for this type of work and usually not much heavy lifting." The panel chair found the motel desk clerk and customer service representative positions to be inappropriate, but found the cashier position appropriate as "within her marketable skills." The panel member from the Department of Public Health and Human Service accepted the doctor's approvals, despite noting that the functional capacity testing was outdated. This panel member also noted that "some physical activity with Customer Service Clerk (bag groceries, mop up spills) concerns me." This panel member further noted that Burtell's "skills have not been documented to the point where Customer Service Clerk and Motel Desk Clerk are adequately related to past work and/or marketable/transferable skills. Cashier, now, is becoming marginal with regard to marketable skills." The panel report overall noted that the job analyses the panel reviewed were two years old and that the (apparently) most recent medical reports of 7-22-03 and 7-31-03⁽⁶⁾ did not appear to add anything new. Two of the three panel members signed the report.⁽⁷⁾

11. On February 5, 2004, the panel issued an Initial Order of Determination (Ex. B). On March 1, 2004, the panel chair wrote to Burtell's attorney regarding additional medical information (Ex. C). This letter bears only the panel chair's signature and indicates that "the panel has reviewed the additional medical information from Dr. Emerson, L.C.P.C. and it is still the consensus of the panel that Option C is the appropriate option." The letter goes on to state: "It appears Dr. Emerson is qualified to comment on [Burtell's] level of function psychologically but [sic] do not know if he has enough background and training to say whether competitive

employment is possible or not." This letter is the only reference to the report of Dr. Emerson and the only evidence that the panel at any time considered that report.

12. Burtell, by her own report and by the observation of the people with whom she lives and has lived since her 2000 back surgery, is unable to engage in any sustained regular activity. On the basis of this evidence, she is unable to work any full-time job, or participate regularly in a scheduled part-time job. However, the old functional capacities test (Ex. K) and the medical doctors, including Dr. Emerson, considered her able to engage in the activities detailed in the approved job descriptions, in 2001 as well as in 1992.

13. As she was before her back surgery in 2000, Burtell is still unwilling to cooperate in treatment and therapy aimed at increasing her ability to engage in physical activity. Burtell's chronic pain problems show a clear and continuing psychological overlay. In her current condition, her ability to engage in sustained physical activity is less than the limited ability she had in 1992. Based upon the report of Dr. Emerson, Burtell is not currently capable of engaging in employment in the positions for which her surgeon approved her in 2001.

IV. DISCUSSION

The goal of rehabilitation services is to return Burtell to work, with a minimum of retraining, as soon as possible after an injury occurs. In furtherance of this goal, the first appropriate option among the seven statutory options is mandatory. Those options are: (a) return to same position; (b) return to a modified position; (c) return to a related occupation suited to Burtell's education and marketable skills; (d) on-the-job training; (e) short-term retraining program (less than 24 months); (f) long-term retraining program (48 months maximum) or, if all else fails, (g) self-employment. Mont. Code Ann. (1989) § 39-71-1012.

In order to find option "c" the first appropriate option, the evidence must show three things: (1) that Burtell has the physical abilities needed to perform the jobs; (2) that the occupations identified are adequately related to Burtell's past work and marketable or transferable skills; and (3) that the occupations are typically available in Burtell's local and statewide labor markets. *Dilling v. Buttrey Foods* (1992), 251 Mont. 286, 825 P.2d 1193; *Bird v. Lewistown*, 1995 MTWCC 89; *Roby v. Canavan* (1990), WCC No. 9001-5695.

The only job analysis which the panel members agreed was appropriate for Burtell was that of cashier. Although only one specific cashier position was identified (at a casino), the hearing officer agrees with the panel that cashier jobs are readily available in Montana. Thus, there is a job description for an occupation typically available in Burtell's local and statewide labor markets.

Regarding the cashier job analysis, one of the three panel members had questions about Burtell's marketable skills to perform such a job and another approved it based on the availability of reasonable accommodations. However, all three apparently approved "option (c)" in the panel report. Although reservations expressed in the report by one concurring panel members are not alone a sufficient basis for reversing, *cf. Bird, op. cit.*, in this case two of three concurring panel members expressed reservations about the only possible job - cashier. One of those two

concurring members did not sign the panel's report, at least not until after the fact. The actual signature of that panel member is nowhere in the record.

An even greater problem with the panel report is that it ignores entirely the opinions of Dr. Emerson. Clearly, the Workers' Compensation Court, in its 2002 decision, found Burtell's testimony about her pain and limitations incredible, based in part upon her demeanor and in part upon the medical evidence.⁽⁸⁾ However, in 2002, Burtell did not have a treating counselor or psychiatrist who verified in writing that she was unable to work because of her chronic pain problems. Of necessity, Dr. Emerson based his opinion on his view of the credibility of the claimant. As a health care professional treating her for emotional problems, he as a matter of course must distinguish between genuine psychological overlay and malingering. Thus, his views indicate that her problem, whether it be physical or mental, is real rather than fabricated. Nevertheless, the panel dismissed his opinions, purportedly on the grounds that at least one panel member could not see whether Dr. Emerson had sufficient expertise to address competitive employment.

Coupling this cavalier disregard for Dr. Emerson's opinion with the borderline propriety of the cashier job for Burtell, the preponderance of the evidence at hearing does not support option "c" as the first appropriate option. It is not an open question whether Burtell's chronic pain problems are a result of her industrial injury - no alternate cause of those problems has even been suggested, except fakery. With a qualified, licensed counselor vouching for the genuineness of those problems, and concluding that the claimant cannot work because of them, the evidence does not support the conclusion that the claimant can appropriately work as a cashier. There is no current medical evidence to rebut Dr. Emerson's opinions.

If the panel saw and considered the Porte comment that Burtell indicated that she was unable to attend the Missoula pain clinic, there is no record of. Thus, the record is devoid of current evidence regarding whether Burtell is capable, with her chronic pain, of attempting to pursue a pain clinic. Without evidence that she is capable, the preponderance of the evidence does not support the conclusion that Burtell is capable of working but for her unreasonable refusal to undergo treatment.

There remains a question of whether Burtell is refusing to pursue the pain clinic option or is unable to do so. Neither Porte's comment nor Dr. Emerson's report addresses this question. This clearly is important. Refusal to pursue a recommended option, without a medical reason for the refusal, may leave Burtell subject to a presumption that with pain clinic treatment she could work as a cashier. On the other hand, inability, due to chronic pain, to pursue that treatment may further rule out "option (c)".

The panel decision is in error as it stands, but the parties did not present sufficient evidence to address that medical question in this hearing. Rather than precluding "option (c)" on remand, the hearing officer will remand for consideration of the first appropriate option starting at "option (c)."

V. CONCLUSIONS OF LAW

1. The Montana Department of Labor and Industry, Hearings Bureau, has authority to hear this matter pursuant to Mont. Code Ann. (1989) § 39-71-1018.

2. There is insufficient evidence to support the Department's determination that "option (c)" (return to work as a cashier) is the first appropriate return to work option for Burtell pursuant to Mont. Code Ann. (1989) § 39-71-1012. In accord with *Kramlich v. State Fund*, 1994 MTWCC 89, this matter should now be remanded to the Employment Relations Division and the Rehabilitation Panel for further proceedings regarding "option (c)" and lower options.

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VI. ORDER

The Department's determination that "option (c)" (return to work as a cashier) is the first appropriate return to work option is reversed. This matter is remanded to the Employment Relations Division and the Rehabilitation Panel to take such steps as are necessary to determine which of the statutory options, beginning at "option (c)," is the first appropriate return to work option for Burtell.

DATED this _ day of May, 2004.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: Terry Spear
Hearing Officer

Notice: This is a final agency order, signed by the hearing officer of the Department of Labor and Industry under authority delegated by the Commissioner. Any party in interest may appeal this Order to the Workers' Compensation Court within ten (10) working days after the date of mailing of this Final Order as provided in § 39-71-1018, MCA (1989). The Court's address is:

Workers' Compensation Court
P.O. Box 537
Helena, MT 59624-0537
444-7794

* * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

John Doubek
Attorney at Law
PO Box 236
Helena, MT 59624

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental mail service.

Montana State Fund
ATTN: Thomas Martello, Legal Dept
PO Box 4759
Helena, MT 59604-4759

DATED this day of May, 2004

John Doubek
Attorney at Law
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Helena, MT 59624

¹ The notice of March 3, 2004, included the following provision, at page 2: "The purpose of the conference is to set the dates for the hearing and establish a schedule for hearing preparation. If a party does not attend the conference, the hearing schedule will be set without that party's participation." The scheduling order of March 15, 2004, included the following provision, at page 2, No. 3: "With the concurrence of the petitioner, the hearing will be held telephonically. By failing to participate in the scheduling conference, the Fund has waived any right it might otherwise have to seek an in-person hearing or object to a telephonic hearing."

² The 1991 Legislature repealed the rehabilitation panel procedures, which remain applicable to Burtell's claim because they were effective on the date of her injury.

³ Burtell did not appeal the Workers' Compensation Court decision that appears as Exhibit D, which resolved Burtell's prior disability status. 2002 MTWCC 18.

⁴ The 2002 decision of the Workers' Compensation Court documents at length the pattern of Burtell's prior failure and refusal to follow through with therapies and treatments her doctors had prescribed up to that time.

⁵ Burtell has a history of at least one suicide attempt, and her medical records include notes that suggest abuse of prescription pain-killers and possibly other substances. As a result, her doctors are understandably unwilling to prescribe narcotics.

⁶ The record is not clear about who authored these medical records.

⁷ Exhibit A includes an e-mail that suggests the third panel member also signed the report, but no report containing that signature is in evidence.

⁸ The Compensation Court cited and followed Mont. Code Ann. (1989) § 39-71-701(2), that temporary total disability status must be based on a preponderance of the medical evidence.