APPLICATION FOR

WORKERS' COMPENSATION JUDGE

A. PERSONAL INFORMATION

1. Full name. Kelly Moran Wills

2. Birthdate. [redacted]

3. Current home address. [redacted]

4. Email address. [redacted]

5. Preferred phone number. [redacted]

6. Date you became a U.S. citizen, if different than birthdate. At birth.

7. Date you become a Montana resident. At birth – born and raised in Montana.

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.
   - Simms High School, Simms MT - Graduated spring 1979
   - Montana State University, Bozeman MT – fall 1979 through spring 1983. Graduated with a bachelor's degree in political science and a minor in economics.
   - University of Montana School of Law, Missoula MT – fall 1984 through spring 1987. Graduated with JD, with honors.

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.
   - I worked throughout undergraduate and law school to pay for school. I was selected to the law school Moot Court team where we were awarded the Best Brief award and advanced to the National Moot Court competition. I graduated from law school with honors.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or

governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

- October 1987 – May 1988. Associate attorney with Warden, Christensen, Johnson & Berg in Kalispell, MT (NKA Johnson, Berg & Saxby). 221 1st Ave E, Kalispell, MT 59901
- May 1988 – December 2012. Garlington, Lohn & Robinson, 350 Ryman Street, Missoula, MT 59802. I was hired as an associate and became a partner in December, 1996. I practiced with the firm as a partner until December 31, 2012.
- January 1, 2013 – January 31, 2023. Wills Law Firm P.C., Missoula Montana. I began Wills Law Firm, PC January 1, 2013. I was the sole owner of the firm. I discontinued actively representing clients January 31, 2023.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

- State Bar of Montana, admitted October, 1987 – active and in good standing.
- Montana Supreme Court, admitted October 1987 – active and in good standing.
- Montana Federal District Court, admitted October 1987 – active and in good standing.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., workers' compensation, administrative law other than workers' compensation, employment law, torts, property, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, alternative dispute resolution, etc).

- Throughout my entire career, my practice has been primarily in the area of workers' compensation.
- For the past 10 years, my practice has been 99% in the area of workers' compensation.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

- I have spoken frequently on workers' compensation topics.
- I taught workers' compensation at the University of Montana School of Law as an adjunct professor in 2013.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

- I have appeared before the Montana Workers' Compensation Court (hereafter "WCC") countless times in the past 10 years with numerous motions and orders.
- I litigated to judgment 6 cases before the WCC since January 2013.
- The WCC was created in 1975 and has had 5 judges in its 48 year history; Judge Hunt, Judge Reardon, Judge McCarter, Judge Shea and Judge Sandler. I have practiced before and tried cases before all but Judge Hunt.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

- *Neisinger v. New Hampshire Ins. Co*, 2019 MT 275

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

- The *Neisinger* appeal referenced in response to question #16 was a very important case. The issue before the workers' compensation court was whether the insurer (my client) was entitled to schedule an examination pursuant to §39-71-605 of the Workers' Compensation Act with an orthopedic surgeon and with a psychiatrist. Judge Sandler ruled the insurer was entitled to a §605 evaluation with the orthopedic surgeon. However, Judge Sandler denied the insurer's request for an evaluation with a psychiatrist, ruling instead the insurer must first authorize (and pay for) an evaluation and treatment by a psychologist or psychiatrist of Neisinger's choosing. This ruling was a significant departure from existing law. In essence, Judge Sandler had created an "equitable remedy" that was not provided for in the statutes. We appealed the decision and the Supreme Court reversed Judge Sandler, noting there was no basis within the framework of the statutes (the Workers' Compensation Act) to support his decision.
  The *Neisinger* decision can downloaded at
  http://wcc.dli.mt.gov/sccases/Neisinger_2019MT275.pdf
- *Ford v. Sentry Casualty Company*, 2012 MT 156. Shortly after his appointment, Judge Sandler (the current Workers' Compensation Court judge) described this decision as the most important workers' compensation case to come out of the Montana Supreme Court in the past 20 years (now nearly 30 years). The case involved a complicated issue of medical

causation – whether the workplace accident caused a temporary aggravation of a pre-existing cervical condition or a permanent worsening of the pre-existing condition. The case also involved the standard of proof for medical causation – whether medical causation must be established through medical expertise or opinion. With its decision, the Supreme Court expressly overruled a previous opinion where it had stated "claimants are not required to prove causation through medical expertise or opinion." The *Ford* court expressly applied the 1995 legislative amendments the Workers' Compensation Act which were intended to require that injuries be proven by objective medical findings, thereby overruling prior case law that allowed a claimant to prove causation without medical opinion evidence. The *Ford* case is now regularly cited by the Workers' Compensation Court in cases involving medical causation issues.
The *Ford* decision can downloaded at
http://wcc.dli.mt.gov/f/Ford_2012MT156.pdf

- *Morrish v. Amtrust Ins. Co. of Kansas*, 2018 MTWCC 8. (This case can be found on the WCC's website.) *Morrish* involved a question of whether Morrish had complied with his statutory obligation to provide notice to his employer of his alleged occupational disease. The law requires that a claimant give notice of an occupational disease within 1 year of the date s/he knew or should have known his/her condition resulted from an occupational disease. §39-71-601(3), MCA. Significant factual and legal issues involving the "knew or should have known" standard were involved. The case illustrates the type of proof that must be developed when the issue is notice pursuant to §39-71-601(3).
The *Morrish* decision can be downloaded at
http://wcc.dli.mt.gov/m/Morrish_2018MTWCC8.pdf

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

- None.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

- I taught workers' compensation as an adjunct professor at the University of Montana School of Law during spring semester, 2013.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

- My pro bono work has primarily been in the area of landlord/tenant and other property law. I have had cases referred to me through the local legal services. I do not have record of the number of hours I have reported the past 5 years.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.
    - I have not held any offices at the State Bar or local bar.
    - I have served on the Workers' Compensation Court rules committee.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.
    - None.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.
    - None.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a workers' compensation judge.
    - I come from a blue-collar family and worked many labor jobs prior to starting my legal career including farming (harvesting), lawn care, painting, construction, and furniture moving. I ran a small business. I understand the challenges that face both workers and employers.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.
    - None the last 10 years. I previously served on the Board of Directors for St. Patrick Hospital foundation and Missoula Manor Homes.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.
    - None.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

- No.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

- I have never been found guilty of contempt of court. To the best of my recollection, I have never been sanctioned by a court (although I believe an associate of Wills Law Firm was sanctioned/fined by the WCC over a discovery issue – despite an exhaustive search of WCC ruling, I have been unable to find the order).

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

- No.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

- No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

- No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

- My wife and I are personally involved in 2 limited liability businesses that involve rental property: Wills Properties LLP and Whitaker Park Terraces, LLC. Both limited liability businesses are based in Missoula. I intend to continue to be affiliated with the businesses.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

- Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

- No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a workers' compensation judge.

- As noted, I have practiced in the workers' compensation field since 1987. Workers' compensation is an important area of the law that affects all Montanans both directly (as an injured worker/family member or as a business) and indirectly based on the personal and economic costs of work-related injuries. The system is very complicated because the law in effect at the time of injury controls the rights and obligations of the parties, and the law changes with every legislative session. Consequently, the Judge must have significant institutional knowledge to be effective. Very few practicing attorney's have the history and knowledge that I believe is crucial to being an effective workers' compensation judge. The system needs to be efficient and "user friendly" so the parties can have their grievances timely resolved. I believe I am uniquely qualified to fill this position, and I see this as my opportunity to "give back" to the profession and the State of Montana by serving in this important position.

36. What three qualities do you believe to be most important in a good workers' compensation judge?

- The judge must be fair – the scales of justice must be balanced, and the judge must be fair and impartial.
- The judge must have a thorough knowledge of the law and significant institutional knowledge of the workers' compensation system. I have experienced firsthand what happens when a person is appointed to this position who does not have sufficient knowledge of the law and the system; the parties are grossly misserved. The WCC Judge is a public servant, and the public deserves a judge that is extremely knowledgeable so fair results can be rendered. The Legislature has set forth objectives for the workers' compensation system and paramount among these is that injured workers should be able to speedily obtain benefits. Uncertainty weighs heavily on injured workers and their families, and they deserve a speedy resolution.

Consequently, the judge must be decisive, and to be decisive, the judge must both know the law and have institutional knowledge of the system.

- The judge must not be an activist. It is the judge's job to fairly interpret the evidence.then apply the law irrespective of whether s/he agrees with the law.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

- The workers' compensation system is a creature of statute, and the rights and liabilities of the parties are governed by the statutes. It is not common law and it is not tort law. The Legislature is responsible for enacting legislation that reflects the needs and wants of their constituents, and it is the responsibility of the WCC judge to apply the statutes/laws. Statutes are presumed to be constitutional, so only in extreme circumstances should statutes be deemed unconstitutional.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

- I have mentored/worked with associate attorneys throughout my career, and this often included involving the associate in brief writing. I involved associates in the briefing that was filed in the cases referenced in response to Question 17 - *Neisinger*, *Ford* and *Morrish*. I reviewed many pleadings and billing records and was unable to find any briefs that did not involve at least a review and edit by an associate. However, I was responsible for all briefs that were filed under my name and was the primary author. (I included the name of the associate in the caption if their contribution to the briefing was significant.) As a representative writing sample (that also meets the 20 page limit) I have attached the trail brief I filed in *Rutecki v. First Liberty Insurance Case*, 2016 MTWCC 6, which I litigated in August, 2015. The WCC's decision can be downloaded at http://wcc.dli.mt.gov/r/Rutecki_2016MTWCC6.pdf

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

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CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as Workers' Compensation Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

June 30, 2013 _____
(Date)

_____
(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, July 5, 2023

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

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Attorneys for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

BRENDA RUTECKI, Petitioner, v. FIRST LIBERTY INSURANCE CORPORATION, Respondent/Insurer.	WCC No. 2014-3435 **RESPONDENT'S TRIAL BRIEF**

COMES NOW Respondent, First Liberty Insurance Corporation, and presents the following Trial Brief addressing the issues to be determined by the Court.

INTRODUCTION

The primary issue before the Court is whether Petitioner can satisfy her burden of proving she suffers an actual wage loss as a result of her industrial injury and is entitled to permanent partial benefits ("PPD"). Petitioner, Brenda Rutecki ("Petitioner"), sustained an injury on December 17, 2011, while in the course of her employment with Rocky Mountain Care Center ("RMCC") in Helena, Montana. (Pet. Hr'g, ¶ 1, Docket 1). Petitioner was found to be at maximum medical improvement ("MMI") on June 17, 2013 and released to full, unrestricted work in her time-of-injury employment. (Trial Ex. 7-2). Petitioner thereafter filed a Petition for Hearing seeking PPD benefits, reimbursement for medical expenses, authorization for physician treatment in Kalispell, and penalty. Respondent has denied liability for PPD benefits on the basis that Petitioner has failed to satisfy her statutory burden of proving she suffers an actual wage loss. (Pretrial Order, Resp't's Cont. 1).

SUMMARY OF RESPONDENT'S POSITION

Petitioner is not entitled to wage loss benefits because she does not suffer from an actual wage loss as a result of her industrial accident. A close review of the medical and factual evidence makes it clear Petitioner does not suffer an actual wage loss because she is physically capable of returning to her time-of-injury employment as a certified nurse assistant ("CNA"). Petitioner bears the burden of proving, through objective medical findings, she is entitled to the PPD benefits she seeks. *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 34-41, 365 Mont. 405, 282 P.3d 687. The preponderance of the medical and factual evidence establishes Petitioner is able to return to work earning wages equal to or greater than her time-of-injury wage either as a CNA or in alternate occupations for which she is vocationally and physically qualified. Petitioner cannot satisfy her burden of proof, and she is not entitled to any PPD benefits under the laws of Montana for the injury she sustained.

ARGUMENT

The parties have supplied the Court with a complete copy of the medical records related to the care and treatment Petitioner has received for her industrial back injury. Because the primary issue before the Court is whether Petitioner is entitled to PPD benefits, the medical records that predate MMI are of secondary importance. However, an assessment of Petitioner's complete medical treatment history is necessary to fully understand both her medical condition and the opinions of the medical providers. As a result, a chronological summary of the medical records has been prepared as an addendum to this trial brief.

I. Petitioner has Failed to Satisfy her Burden of Proving, by a Preponderance of the Objective Medical Findings, that She Suffers an Actual Wage Loss as a Result of her Industrial Injury. Petitioner is not Entitled to an Award of PPD Benefits.

The primary issue before the court is whether Petitioner has satisfied her burden of proving that she suffers an actual wage loss and is entitled to PPD benefits. The claimant's burden of proof was most recently expressly clarified by the Supreme Court in *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 34-41, 365 Mont. 405, 282 P.3d 687. The Court explained the claimant "bears the burden of proving by a preponderance of the evidence that he is entitled to the workers' compensation benefits sought." *Simms v. State Compen. Ins. Fund*, 2005 MT 175, ¶ 13, 327 Mont. 511, 116 P.3d 773. This includes establishing a "causal connection" between his injury and the right to benefits. *Fellenberg v. Transp. Ins. Co.*, 2005 MT 90, ¶ 16, 326 Mont. 467, 110 P.3d 464; *Narum*, ¶ 28. "'Causation is an essential element to an entitlement to benefits and the claimant has the burden of proving a causal connection by a preponderance of the evidence.'" *Fellenberg*, ¶ 16 (quoting *Grenz v. Fire & Cas. of Conn.*, 250 Mont. 373, 380, 820 P.2d

742, 746 (1991)). *Ford* at ¶ 34. *See* also *Haines v. Montana University System Self-Funded Workers' Compensation Program*, 2015 MTWCC 9, ¶71, "Causation is an essential element of an entitlement to workers' compensation benefits." Thus, Petitioner must prove by a preponderance of the evidence that the industrial injury has caused her to suffer an actual wage loss. MCA § 39-71-703(a); See also MCA § 39-71-116(27)(a)-(c). Further, where the entitlement is based on medical issues, the claimant is required to prove causation through medical expertise or opinion. *Haines*, 2015 MTWCC 9, ¶71, "A worker is required to prove causation through medical expertise or opinion".

Finally, a worker is not eligible for workers' compensation benefits unless the entitlement is established by objective medical findings that can be linked to the industrial injury. MCA § 39-71-407(10).

Because Petitioner is seeking PPD benefits, Petitioner must prove that she suffers an actual wage loss as a result of her industrial injury. MCA § 39-71-703(1)(a). As noted previously by this Court in *Campbell v. Montana Contractor Compen. Fund*, 2003 MTWCC 58, ¶ 47, the determination of whether a claimant suffers an actual wage loss caused by the industrial injury requires an assessment of the claimant's physical capabilities. In turn, the determination of physical restrictions is a medical determination that must be determined by a physician. MCA § 39-71-609(2)(b). As such, proof of physical restrictions must be based on the standard of medically more probable than not/medical probability and must be based on objective medical findings. See *Ford* at ¶ 49.

The assessment of whether Petitioner suffers an actual wage loss necessarily must start with an assessment of her physical capabilities/restrictions. This is the starting point because if the industrial injury has caused no significant physical restrictions, then Petitioner can return to her time-of-injury job and does not suffer an actual wage loss. Here, the preponderance of the evidence establishes Petitioner has not satisfied her burden of proving she suffers an actual wage loss because the objective medical findings do not support a determination that she is unable to return to her time-of-injury job as a CNA due to physical restrictions caused by the industrial injury.

As the medical exhibits show (and as outlined in the addendum), four medical providers have expressed an opinion on the issue of whether physical restrictions are required as a result of the industrial injury. (Trial Ex. 2; 6; 7; 16). The primary care givers in this case are Dr. Martin and PA-C Vonada who treated Petitioner for approximately one year before she moved to Kalispell. (*See* Trial Ex. 6). PA-C Vonada declared Petitioner to be at MMI on May 15, 2013 and released her to return to full-duty work with no restrictions. (Trial Ex. 6-48; 6-50). Thereafter, PA-C Vonada reviewed job analyses for Petitioner's time-of-injury job as a CNA and for alternate occupations. On

June 13, 2013, she approved the CNA job analysis without restriction. (Trial Ex. 13-20). Alternate jobs were also approved without restriction. (*See* Trial Ex. 13). The unqualified approval of Petitioner's time-of-injury job by PA-C Vonada is strong proof Petitioner is physically qualified to return to work as a CNA and she does not suffer an actual wage loss caused by her injury.

Petitioner was next seen by Dr. Weinert on referral from PA-C Vonada. Dr. Weinert examined Petitioner on June 17, 2013 for an impairment evaluation. (Trial Ex. 7-1). Dr. Weinert's physical examination findings are significant and revealing:

> Standing posture is normal with level iliac crest heights. She ambulates with a normal gait. She is able to stand on heels and toes. Neck range of motion demonstrates full lumbar flexion and extension without discomfort. Straight leg raise is to 90° bilaterally. Lasegue's test is negative. Hip range of motion is full and symmetric. Faber test is negative. On palpation, there is tenderness at the lumbosacral junction and bilateral lumbar paraspinal and gluteal regions. No muscle spasms.

(Trial Ex. 7-2).

The physical exam findings were completely normal with no objective medical findings of injury or disability noted. Petitioner's range of motion was full and she had no muscle spasms. (*Id*). Consistent with the normal physical exam and lack of objective medical findings of disability, Dr. Weinert assigned "a grade 0 modifier for physical examination" in calculating the impairment rating. (*Id.*). Dr. Weinert also confirmed Petitioner was at MMI and no additional medical care was warranted. (*Id.*). Further, and most significant to the issues before the Court, Dr. Weinert released Petitioner to full-duty work with no physical restrictions. (*Id.*).

Shortly after the evaluation by Dr. Weinert, Petitioner retained counsel and a few months later Petitioner filed her Petition for Trial seeking an award of PPD benefits. She also had recently moved to Kalispell and sought medical care from Kalispell provider, Greg Vanichkachorn, M.D. Petitioner was first seen by Dr. Vanichkachorn on March 13, 2015. (Trial Ex. 2-1). Dr. Vanichkachorn provided a brief summary of Petitioner's condition, noting that he had only "[m]inimal medical records." (*Id.*). He performed a physical examination and found Petitioner had full range of motion in flexion, extension, and lateral bending, but noted "she does report pain during range of motion maneuvers." (Trial Ex. 2-3). He noted Petitioner complained of pain on palpation of her lumbar paraspinal, lower spinous process, and SI joint. (*Id.*). She also complained of pain on straight leg raises. (*Id.*). Dr. Vanichkachorn's report includes a lengthy discussion regarding the medications Petitioner takes, Petitioner's history of amphetamine use, and the lengthy period in which Petitioner has been unemployed. (Trial Ex. 2-4). His report does not include an assessment of either the objective

medical findings, the legitimacy of Petitioner's pain, or of the cause of her pain complaints. (*See* Trial Ex. 2). Dr. Vanichkachorn restricted Petitioner to sedentary work. (Trial Ex. 2-4). However, he did not discuss the basis for the restrictions or identify the objective medical findings upon which he relied to justify the restriction. (*Id.*).

Petitioner visited Dr. Vanichkachorn again on May 8, 2015. (Trial Ex. 2-8). He again performed a physical examination of Petitioner with even less remarkable results. No significant complaints of pain on palpation of her lumbar paraspinal process and musculature, facet joints, or SI joints were noted. (Trial Ex. 2-9). She no longer complained of pain on straight leg raises. (*Id.*). Petitioner's knee extension and ankle plantar flexion were improved to 5/5. (*Id.*). Petitioner's only subjective complaint of pain was upon extension with resistance. (*Id.*). Despite the normal physical exam findings and lack of even subjective pain complaints, Dr. Vanichkachorn restricted Petitioner to lifting up to 25 pounds occasionally and 10 pounds frequently. (Trial Ex. 2-10). He also restricted her bending, assisting patients with ambulation or transition, and stated she should alternate positions regularly. (*Id.*). Dr. Vanichkachorn again failed to articulate the objective medical findings which he relied upon in restricting Petitioner. (*Id.*).

The final provider to assess whether Petitioner has any physical restrictions as a result of her industrial injury is orthopedic surgeon Todd Fellars, M.D. Petitioner was evaluated by Dr. Fellars pursuant to MCA § 39-71-605. Dr. Fellars was provided a complete copy of Petitioner's medical records which he reviewed as a part of his assessment. (Trial Ex. 16-6 to 16-19). He performed a clinical interview and examination of Petitioner. (Trial Ex. 16-18 to 16-20). Dr. Fellars was asked to assess whether, based on the objective medical findings, physical restrictions were warranted. (Trial Ex. 16-25). Based on his review of Petitioner's medical history/records, his examination and assessment, Dr. Fellars concluded that "from a true objective standpoint, [Petitioner] should be able to work her time of injury job." (*Id.*). He further opined that "no restrictions are required" and that "[o]n a purely objective standpoint, however, there would be no work restrictions as individuals who have had fusions of their lumbar spine can return to heavy-labor type positions and often do well." (*Id.*).

Dr. Fellars' opinion is fully supported by his examination findings. He noted, "the objective medical findings do not correlate with complaints and symptoms. The claimant has very mild spondylosis of her spine. Based on my experience as an orthopedic surgeon, there is no orthopedic reason that this claimant cannot be gainfully employed." (Trial Ex. 16-21). Dr. Fellars also noted "there were pain behaviors during my exam that markedly exaggerated the reports of pain, yet I could not correlate them with specific objective findings." (*Id.*). Dr. Fellars relied on the MRI imaging to support his opinion. He noted the lack of any objective, physiologic response to Petitioner's report of pain at 10/10 intensity, noting her heart rate was only 60 beats per minute. (*Id.*). He noted her reported ability to ride a Harley Davidson, yet her statement that she was unable to return to work. (*Id.*). He found full range of motion, no evidence of

radiculopathy, no evidence of spasm, and intact sensation to light touch and sharp dull despite her complaints of numbness. (Trial Ex. 16-18). He noted 5/5 strength throughout her hips and lower extremities bilaterally. (*Id.*). He noted nonorganic pain findings including exquisite tenderness to light touch in the lumbar spine across the lumbar paraspinals and a positive supine straight leg raise with exquisite back pain that was inconsistent with movements whereby she hyperextended her back placing significantly more stress on her lumbar spine than a supine straight leg test, as well as no pain on seated straight leg testing which also places more stress on the lumbar spine. (*Id.*).

As noted, Petitioner has the burden of proving, by a preponderance of the evidence, she suffers an actual wage loss as a result of her injury. She must further prove her entitlement to benefits through objective medical findings. As this review of the medical opinions and findings of the four primary medical providers reveals, Petitioner has failed to satisfy her burden of proof. Clearly the preponderance of the evidence in the form of the opinions of PA-C Vonada, Dr. Weinert and Dr. Fellers establishes Petitioner can return to her time-of-injury position as a CNA. Consequently, she does not suffer an actual wage loss.

Further, Petitioner has failed to satisfy her burden of proving, by a preponderance of the objective medical findings, that she is unable to work as a CNA and entitled to PPD benefits. As the above analysis illustrates, there is a lack of objective medical findings supporting Petitioner's claim for PPD benefits. The physical examination findings of all the providers have generally been normal. The physical exam findings have also been marked by inconsistencies. However, in the final analysis, no medical provider has opined Petitioner is physically restricted or unable to return to work as a CNA based on objective medical findings. (Trial Exs. 6; 7; 16). Only Dr. Vanichkachorn identified physical restrictions. However, he based the physical restrictions upon Petitioner's subjective pain complaints rather than the objective medical findings. (*See* Trial Ex. 2). In fact, a review of his final treatment note reveals Petitioner's physical examination was essentially normal. She exhibited full range of motion. (Trial Ex. 2-9). She had negative straight leg raise bilaterally. (*Id.*). Her knee extension and ankle plantar flexion/dorsiflection were 5/5 bilaterally. (*Id.*). Clearly there is an absence of objective medical findings to support the physical restrictions identified by Dr. Vanichkachorn. Equally clear is the undisputable fact that three other providers concluded physical restrictions were not warranted based on the objective medical findings. Petitioner has failed to satisfy her burden of proving, through a preponderance of the objective medical findings, she is physically precluded from working as a CNA and suffers an actual wage loss. Because she has failed to satisfy her burden of proof, her prayer for an award of PPD benefits must fail.

Further evidence that Petitioner does not suffer an actual wage loss will be presented at trial through the testimony of rehabilitation provider Lisa Kozeluh, MRC,

CRC. Ms. Kozeluh evaluated Petitioner's vocational background and transferable skills, and identified alternate occupations for which she is vocationally qualified. (*See* Trial Ex. 14). Job analyses for alternate occupations were submitted to and expressly approved by PA-C Vonada. (*See* Trial Ex. 13). It is important to note PA-C Vonada is the only medical provider to review and assess the alternate occupations. Alternate J/As were not submitted to Dr. Weinert. However, he opined Petitioner was released to full duty, thereby making a review of alternate J/As unnecessary. Alternate J/As were sent to Dr. Fellars which he reviewed. (Trial Ex. 16-25). However, Dr. Fellars did not expressly review the alternate J/As, noting instead Petitioner had no work restrictions. (*Id.*).

Ms. Kozeluh has evaluated Petitioner's employability and wages based on the approved alternate jobs. (*See* Trial Ex. 14). Ms. Kozeluh will testify, based on the approved alternate jobs, Petitioner is capable of returning to work in other occupations consistent with the alternate jobs approved by PA-C Vonada and earn wages equal to or greater than her time-of-injury occupation. For this additional reason, Petitioner does not suffer an actual wage loss and her prayer for PPD benefits should be denied.

II. Conflicting Medical Opinions

Even though Respondent believes the clear preponderance of the evidence establishes Petitioner does not suffer an actual wage loss and she is not entitled to the PPD benefits she seeks, Respondent recognizes conflicting medical opinions exist in the record and the Court may wish to evaluate the conflicting opinions. This Court has often wrestled with conflicting medical opinions and guidance for analyzing medical opinions and resolving conflicts in the medical opinions is found in its decisions. The starting point for analyzing medical opinions is the treating physician rule: "[A]s a general rule, the opinion of a treating physician is accorded greater weight than the opinions of other expert witnesses." *EBI/Orion Group v. Blythe*, 288 Mont. 357, ¶ 12, 957 P.2d 1334 (1998). This "general rule" is based on the principal the treating physician typically has a long-term relationship with the patient and is in a better position to assess the patient's condition and treatment needs. *See Kloepfer v. Lumbermens Mut. Cas. Co.*, 1994 MTWCC 5, Conclusions of Law ¶ 5. However, where the treating physician does not have a long-term relationship with the patient, the basis for the rule is lacking and no greater weight should be given the opinions of the treating physician. This Court has further held that "a treating physician's opinion is not conclusive. To presume otherwise would quash this Court's role as a fact-finder in questions of alleged injury." *Stewart v. Liberty Northwest Ins. Corp.*, 2007 MTWCC 41, ¶ 30. This Court has also given the opinions of a non-treating physician greater weight than those of the treating physician based on non-treating physician's experience, training, medical research, and logic. *Vercos v. Workers' Comp. Risk Retention Program*, 2004 MTWCC 53, ¶¶ 48, 53, 63. Finally, this Court has held where a treating medical provider forms an opinion of claimant's condition based on limited access to

previous medical records, this Court will give the opinion limited weight. *Dewey v. Montana Contractor Compensation Fund*, 2009 MTWCC 17, ¶¶ 42, 45.

By applying these principles to our case, it becomes evident the opinions of Dr. Fellars, Dr. Weinert, and PA-C Vonada should be given more weight by this Court than the opinions of Dr. Vanichkachorn. With regard to Dr. Vanichkachorn, it is important to recognize he has seen Petitioner on only two occasions. (*See* Trial Ex. 2). Consequently, although he was approved to become Petitioner's treating physician, he does not have the long history of treating Petitioner which would warrant giving his opinions greater weight. Further, Dr. Vanichkachorn did not obtain and did not review Petitioner's extensive medical records. As noted in his initial report, only "Minimal records were provided for my review including notes from Anna McCracken, clinical nurse practitioner." (Trial Ex. 2-1). Notably, Dr. Vanichkachorn did not reference the treatment notes of Dr. Martin and PA-C Vonada. (*See* Trial Ex. 2). He did not reference the impairment evaluation report by Dr. Weinert. (*Id.*). He did not reference the evaluation by Dr. Bishop and Dr. Bishop's finding that Petitioner was not a surgical candidate. (*Id*). Pursuant to this Court's holding in *Dewey*, there is little foundation for Dr. Vanichkachorn's opinions and very little weight should be given his opinions.

Further, even though Dr. Vanichkachorn had access to the notes of clinical nurse practitioner McCracken, McCracken's notes do not provide a summary of or insight into Petitioner's medical history. McCracken only saw Petitioner on four occasions. (*See* Trial Ex. 4). Her records do not reflect a review of the prior treatment records of PA-C Vonada or the impairment evaluation by Dr. Weinert. They simply document her limited treatment of Petitioner with no prior medical history.

However, it is notable at the time of Petitioner's final examination on December 31, 2014, McCracken's objective medical findings were completely normal – "L-S spine: no pain to palpation. . . .forward flexion to toes, extension to 15 degrees, full side bend to left and right, full rotation all of these done with no pain." (Trial Ex. 4-22). These normal objective medical findings were not noted by Dr. Vanichkachorn in his report. It is evident Dr. Vanichkachorn did not consider even the limited prior medical records he was provided. For this additional reason, his opinions should be given very little weight.

Dr. Vanichkachorn's opinions should be further discounted because his opinions are based exclusively on Petitioner's subjective complaints. Dr. Vanichkachorn did nothing to assess the validity of Petitioner's subjective complaints. (*See* Trial Ex. 2). He did not compare her subjective pain complaints with those noted by other providers. (*Id.*). He did not compare is physical exam findings with those of other providers. (*Id.*). He essentially took Petitioner's pain complaints at face value and imposed physical restrictions. However, because the physical restrictions are not supported by objective medical findings, they do not rise to the level of proof needed to establish Petitioner's entitlement to benefits and they should be given very little weight by the Court.

Although Dr. Vanichkachorn did not review prior medical records or compare his physical examination findings with those of the other providers, it is evident fact many of his examination findings are contradicted by or inconsistent with those of the other providers. His own medical findings from his first exam to his second are also markedly different.

- On April 22, 2013, PA-C Vonada reported Petitioner "does have a full active range of motion." (Trial Ex. 6-44).
- On June 17, 2013, Dr. Weinert noted Petitioner exhibited a full flexion, extension, and lateral bending range of motion without complaints of pain. (Trial Ex. 7-2). He reported Petitioner exhibited no tenderness to palpation of the lumbar region during his examination. (*Id.*). Dr. Weinert also noted negative straight leg raises with no complaints of pain. (*Id.*).
- On July 24, 2015, Dr. Fellars noted Petitioner exhibited a full flexion, extension, and bending range of motion. (Trial Ex. 16-18). Dr. Fellars noted Petitioner complained of sensitivity to palpation but did not find objective medical evidence to substantiate her claims. (*Id.*). Dr. Fellars also found Petitioner's straight leg raise was negative bilaterally. (*Id.*).
- On December 31, 2014, clinical nurse practitioner McCracken found no tenderness to palpation of Petitioner's cervical, lumbar, or thoracic spine. (Trial Ex. 4-22). Petitioner was able to forward flex to her toes, had extension of 15%, could perform a full side bend to the left and right, and had full rotation all with no pain. (*Id.*).

In contrast

- On March 13, 2015, Dr. Vanichkachorn noted full range of motion, but with complaints of pain during the motion testing. (Trial Ex. 2-3). At his second exam eight weeks later on May 8, 2015, Dr. Vanichkachorn reported Petitioner had no complaints of pain on testing range of motion except with resistance on extension testing. (Trial Ex. 2-9). Dr. Vanichkachorn initially reported Petitioner had tenderness to palpation over her lumbar region and lower spinous process. (Trial Ex. 2-3). However, on his second evaluation, Petitioner did not report pain on palpation. (Trial Ex. 2-9). It is obvious Petitioner is very inconsistent with her subjective complaints of pain in various examinations and Dr. Vanichkachorn would have noticed this had he reviewed or engaged in a comparative analysis of Petitioner's medical history.

Dr. Vanichkachorn concluded physical restrictions were warranted. (Trial Ex. 2-10). However, in discussing the restrictions, he noted he did not have objective medical findings to support the restrictions: "I do not have any objective indications she would not be able to perform at least sedentary work in some form." (Trial Ex. 2-4). A close

review of his reports makes it clear Dr. Vanichkachorn also did not note any objective medical findings indicating Petitioner was unable to perform the work of a CNA. Dr. Vanichkachorn imposed physical restrictions based on his initial examination and without the benefit of knowing Petitioner's medical history or comparing his findings with those of the other providers who had treated and examined Petitioner. (*See* Trial Ex. 2). He based his physical restrictions solely on her subjective complaints of pain. The subjective complaints relied upon by Dr. Vanichkachorn contradicted the reports and findings of the medical providers who had previously treated and examined Petitioner and performed the same physical examination. (Trial Exs. 4-22; 6-44; 7-2). Dr. Vanichkachorn had no knowledge of contrary medical evidence because he did not review Petitioner's medical history. The only basis for the work restrictions he imposed were Petitioner's subjective complaints which were inconsistent with the last treatment notes of PA-C Vonada, Dr. Weinert, and clinical nurse practitioner McCracken.

As noted above, Dr. Vanichkachorn saw Petitioner for the second and final time only eight weeks after his initial examination. At that point, the objective medical findings showed little change. (Compare Trial Ex. 2-3; Trial Ex. 2-9). Petitioner still had full range of motion, but she now no longer reported pain except when attempting extension against resistance. (Trial Ex. 2-9). Dr. Vanichkachorn recorded negative straight leg raise bilaterally and no significant tenderness upon palpation. (*Id.*). Although Petitioner's objective medical findings were normal (full range of motion) and she no longer reported subjective pain complaints during range of motion, straight leg raise or palpation, Dr. Vanichkachorn elected to impose physical restrictions. (Trial Ex. 2-10). Dr. Vanichkachorn provided no medical justification for the restrictions. (*Id.*). He did not support his restrictions with objective medical findings. Under these circumstances, the Court should give no weight to his opinions. *See Kellegher v. MACO Workers' Compensation Trust*, 2015 MTWCC 16, ¶ 72; *See also Dewey*, 2009 MTWCC 17, ¶ 42.

In assessing the conflicting opinions, it is important to note Dr. Vanichkachorn formed his medical opinion regarding Petitioner and her physical restrictions after a single examination. (Trial Ex. 2-1; 2-2; 2-3). Consequently, he had no more of a long-term relationship with Petitioner than did Dr. Fellars and Dr. Weinert. They also formed their opinions regarding Petitioner after one examination. (Trial Exs. 7; 16). However, for reasons set forth below, the opinions of both Dr. Fellars and Dr. Weinert should be afforded much greater weight by the Court.

With regard to Dr. Weinert, it is evident Dr. Weinert was provided with prior medical records which he relied on in preparing the "History of Present Illness" section of his report. (Trial Ex. 7-1). Dr. Weinert clearly had knowledge of Petitioner's relevant medical history prior to preparing his report and forming his medical opinions. It is also important to note Dr. Weinert's physical examination findings were consistent with those of Petitioner's primary treating provider, PA-C Vonada. (Trial Exs. 6-44; 7-2). Thus,

even though he only saw Petitioner one time upon referral from PA-C Vonada, given that he reviewed the prior medical records and his physical examination findings were consistent with those of Petitioner's treating provider, it is evident his opinions are based on reliable, objective medical information and should be given great weight by the Court.

With regard to the opinions of Dr. Fellars, although he saw Petitioner on only one occasion, Dr. Fellars' opinion is based on a solid foundation of information and should be given great weight. Dr. Fellars was provided a complete copy of Petitioner's medical history. (Trial Ex. 16-6 to 16-19). He performed a detailed review of Petitioner's medical history, summarizing the medical records in his report. (*Id.*). Dr. Fellars noted and considered the findings of all medical providers including clinical nurse practitioner McCracken, PA-C Lyman, PA-C Vonada, Dr. Martin, Dr. Weinert, and FNPC Kenny and Dr. Vanichkachorn. (*Id.*). Dr. Fellars also considered all of Petitioner's imaging studies. (Trial Ex. 16-19). Dr. Fellars' medical opinion regarding Petitioner's condition and physical restrictions is more complete and reliable because he engaged in this detailed medical history review. *See Dewey*, 2009 MTWCC 17, ¶¶ 42, 45.

Further, Dr. Fellars was specifically asked to take into consideration the Petitioner's medical history and to outline the objective medical findings upon which his opinions were based. (*See* Trial Ex. 16-21 to 16-25). While Dr. Fellars based his opinion upon a complete understanding of Petitioner's medical history, Dr. Vanichkachorn based his opinion upon "minimal medical records" and a single evaluation. (Trial Ex. 2-1). In contrast to Dr. Vanichkachorn, Dr. Fellars was aware of the nature of the injury Petitioner sustained and the diagnosis of those who had previously treated Petitioner. He considered the prior records as an integral part of his evaluation and assessment of Petitioner's medical condition. (Trial Ex. 16-6 to 16-25). He focused his examination on objective medical findings and expressly assessed whether Petitioner's subjective complaints were consistent, whether her examination findings were consistent, and whether her subjective complaints were consistent with and supported by the objective medical findings. (Trial Ex. 16-18 to 16-25). Ultimately, his examination findings and opinions were substantially identical to those of PA-C Vonada, Dr. Weinert and clinical nurse practitioner McCracken (on her final exam). His findings and opinions are well founded and reliable.

In contrast to Dr. Fellars, Dr. Vanichkachorn's opinions are not based on a review and understanding of Petitioner's medical history and, pursuant to this Court's holding in *Dewey*, his opinions should be given little weight.

With regard to PA-C Vonada, her opinions placing Petitioner at MMI and releasing her to return to work without restrictions should be given great weight by the Court. PA-C Vonada is the only medical provider in this case that formed her opinions regarding Petitioner's ability to work after more than one examination. (*See* Trial Ex. 6).

PA-C Vonada had more exposure to Petitioner than any other medical provider who has expressed an opinion in this case. PA-C Vonada treated Petitioner for approximately one year. (*See* Trial Ex. 6 timeline). Consequently, her opinions are entitled to the additional weight given to a treating physician. At the time of her last exam and upon completion of her treatment and release of Petitioner from care, PA-C Vonada concluded Petitioner had no physical restrictions attributable to the industrial back injury and she could return to work in her time-of-injury occupation as a CNA. (Trial Ex. 6-48; 6-50). PA-C Vonada's opinion of Petitioner's condition and restrictions harmonizes with those of Dr. Fellars and Dr. Weinert. All three placed Petitioner at MMI and released her to full-duty work with no restrictions. PA-C Vonada and Dr. Fellars also expressly opined Petitioner could resume working in her time-of-injury employment as a CNA without restrictions. (Trial Exs. 6-50; 16-25).

It is also important to note that both PA-C Vonada and Dr. Fellars were provided job analyses which they reviewed in assessing Petitioner's ability to return to work. Consequently, their approval of Petitioner to return to work in her time-of-injury position as a CNA should be given great weight by the Court. *See Kellegher*, 2015 MTWCC 16, ¶ 52. In contrast, there is no evidence on record to indicate Dr. Vanichkachorn actually reviewed the job analysis before he disapproved Petitioner from working as a CNA based on her subjective complaints. (*See* Trial Exs. 2; 17). The opinions of both Dr. Fellars and PA-C Vonada releasing Petitioner to her time-of-injury job should be given more weight because they both engaged in a thorough review of the job analysis, had access to complete facts, and in the case of PA-C Vonada, had treated Petitioner for a year.

Finally, it is important to note that only Dr. Weinert and PA-C Vonada examined and/or treated Petitioner prior to the initiation of litigation. The Petition for Hearing was filed on September 12, 2014 and it was not until after the litigation was initiated that Petitioner was first seen by Dr. Vanichkachorn. (*See* Trial Ex. 2; Pet. Trial, ¶ 1, Docket 1). At the time litigation was filed, both Dr. Weinert and PA-C Vonada had approved Petitioner to return to work without restriction. (Trial Exs. 6-50; 7-2). Even though no medical provider had restricted Petitioner from returning to work as a CNA, she nevertheless filed a Petition with this Court seeking PPD benefits. She subsequently was seen by Dr. Vanichkachorn to whom she reported subjective pain complaints which formed the basis for the physical restrictions identified by Dr. Vanichkachorn.

Both Dr. Weinert and PA-C Vonada formed their opinion prior to the time Petitioner filed her Petition for Trial seeking PPD benefits. It was only after Dr. Weinert completed his assessment of Petitioner and concluded she could return to full-duty work that she retained counsel and sought a medical opinion stating she had physical restrictions which would preclude her from returning to work as a CNA. The pre-litigation opinions of these providers and especially the opinions of PA-C Vonada who "treated the claimant for a longer amount of time [and] would generally be in a better

position to more fully understand the claimant's diagnosis, prognosis, and impairment than a physician who saw the claimant on only one occasion or for a brief period" should be given great weight by this Court. *Kloepfer*, 1994 MTWCC 5, Conclusions of Law ¶ 5. Clearly both the preponderance and the weight of the evidence establish Petitioner does not suffer an actual wage loss as a result of her industrial injury. She has failed to satisfy her burden of proving an entitlement to PPD benefits by a preponderance of objective medical findings, and her claim should be denied.

III. Petitioner is not Entitled to Vocational Rehabilitation Benefits

A worker may be eligible for vocational rehabilitation benefits only if the worker has an actual wage loss[1] or has an impairment rating greater than 15 percent. In this case, Petitioner has been assigned only a 7 percent whole person impairment rating by Dr. Weinert making her ineligible for rehabilitation benefits under the 15 percent impairment criteria. (Trial Ex. 7-2). Therefore, Petitioner can only be eligible if she can prove she suffers an actual wage loss as a result of her industrial injury. Because the criteria for rehabilitation benefits is the same as PPD disability benefits – that the claimant suffers an actual wage loss – the analysis here is identical to the analysis of Petitioner's entitlement to PPD benefits. It is Respondent's position that Petitioner does not suffer an actual wage loss either because she can return to work in her time-of-injury occupation as a CNA, or because she is physically and vocationally qualified to return to work in alternate occupations that pay wages equal to or greater than her time-of-injury wage. Petitioner's prayer for rehabilitation benefits should be denied.

Further, even if Petitioner were able to prove that she suffers an actual wage loss, any claim for rehabilitation benefits would be premature. To be eligible for biweekly rehabilitation benefits or auxiliary benefits, Petitioner has the burden of proving she would experience a reasonable reduction in her actual wage loss with rehabilitation. *See* MCA § 39-71-1106(1)(b). Here, Petitioner has presented no evidence she would experience a reduction in her actual wage loss with rehabilitation. For this additional reason, Petitioner's request for rehabilitation benefits should be denied by the Court.

IV. Respondent is not Liable for Medical Bills

It is unclear from the record which medical bills Petitioner alleges have not been paid by Respondent. Petitioner has not submitted any evidence or documentation proving any medical bills related to medical care properly compensable under her claim

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[1] The worker must actually meet the definition of a "disabled worker" which is defined as "worker who has a permanent impairment, established by objective medical findings, resulting from a work-related injury that precludes the worker from returning to the job the worker held at the time of the injury or to a job with similar physical requirements and who has an actual wage loss as a result of the injury." MCA § 39-71-1011(3).

have gone unpaid. No exhibits have been presented to the Court. Respondent is unaware of any out-of-pocket medical expenses incurred by Petitioner that were properly authorized. Petitioner has failed to satisfy her burden of proving any medical bills for properly authorized care related to her industrial injury have gone unpaid. Petitioner's prayer that Respondent be found liable for outstanding medical bills should be denied.

V. Petitioner is not Entitled to Fees or Penalty

An award for attorney's fees or penalty requires a factual finding the insurer unreasonably delayed or denied benefits to an injured employee entitled to such benefits. MCA § 39-71-611(a)-(c). The law has long recognized that "the penalty set forth in § 39-71-2907, MCA, was not intended to eliminate an insurer's assertion of a legitimate defense to liability." *Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 202, 911 P.2d 1129, 1132 (1996); (citing *Paulson v. Bozeman Deaconess Foundation Hosp.*, 207 Mont. 440, 444, 673 P.2d 1281, 1283 (1984)). The Supreme Court has further held that "the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments." *Marcott*, 275 Mont. 197, 205, 911 P.2d 1129, 1134.

> ¶ 47 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 adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. Section 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court.
>
> ¶ 48 As explained in *Marcott v. Louisiana Pac. Corp.*, the penalty statute "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 constitutes a legitimate excuse for denial of a claim or delay in making payments." In this case, even though Starkey explained that the pain in her foot that pre-dated her injury on Halloween 2012 was to a different part of her foot, the fact remains she did have a painful foot prior to her injury. Moreover, Starkey's late reporting of her injury may have contributed to the testimony of several witnesses who claim they saw Starkey wrapping her foot and limping prior to the incident involving the picnic table. Given the facts presented, ACE American had a reasonable basis to question whether Starkey had indeed suffered an on-the-job injury. Therefore, ACE American was not unreasonable in denying Starkey's claim and is not liable to Starkey for attorney fees or a penalty.

Starkey v. Ace American, 2014 MTWCC 6 (citations in footnotes omitted and emphasis in the original).

The *Marcott* case illustrates the appropriate analysis of a claim for penalty and fees.

> **1. Does substantial evidence support the Workers' Compensation Court's finding that LP's denial of Marcott's claim was reasonable?**
> **a. Factual dispute**
> The Workers' Compensation Court determined that LP reasonably relied on the information in its possession when it initially denied ***204** Marcott's claim, and that LP's continued denial was reasonable because, by that time, a "legitimate factual dispute existed as to whether claimant was simply walking or walking rapidly and turning sharply to his left." The factual dispute related to Marcott's credibility.
> . . . .
>
> **b. Legal interpretation**
> LP's position was that a muscle rupture which occurred while a worker was merely walking at work did not arise out of his employment under § 39-71-407, MCA. The Workers' Compensation Court determined that LP's reliance on heart attack and other cases to defend against the compensability of a condition which arises spontaneously as a result of an ordinary activity people do on a daily basis ***205** irrespective of work raised a colorable issue within the bounds of legitimate legal advocacy. In essence, this determination constituted a finding by the court that LP's legal interpretation, based on the facts as originally reported, was not unreasonable.
>
> In *Hunter v. Gibson Products of Billings* (1986), 224 Mont. 481, 485, 730 P.2d 1139, 1142, we clarified that, with regard to an insurer's decision to contest compensability based on its interpretation of case law, the Workers' Compensation Court's reasonableness finding remains a question of fact subject to the substantial evidence standard of review. This clarification was consistent with our 1984 holding in *Paulson* that the statutory penalty contained in § 39-71-2907, MCA, was never intended to eliminate the assertion of a legitimate defense to liability. *Paulson,* 673 P.2d at 1283. It also was consistent with our conclusion in *Holton v. F.H. Stoltze Land & Lumber Co.* (1981), 195 Mont. 263, 269, 637 P.2d 10, 14, that the existence of a genuine doubt, from a legal standpoint, that any liability exists constitutes a legitimate excuse for denial of a claim or delay in making payments.

Marcott v. Louisiana Pacific Corp., 275 Mont. 197, 203-205, 911 P.2d 1129, 1133-1134 (1996).

The citation in *Marcott* to *Holton v. F.H. Stoltz Land & Lumber Co.*, 195 Mont 263, 269, 637 P.2d 10, 14 (1981) shows the legitimate doubt can be both from a medical or legal point of view.

> Once the claimant has shown there is a delay in payment of compensation, the insurer has the burden of justifying the delay. Berry, supra, 81 Cal.Rptr. at 67; Kerley, supra, 93 Cal.Rptr. at 195, 481 P.2d at 203. However, the only legitimate excuse for delay of compensation is the existence of genuine doubt, from a medical or legal standpoint, that any liability exists. Berry, supra, 81 Cal.Rptr. at 68; Kerley, supra, 93 Cal.Rptr. at 195, 481 P.2d at 203; Pascoe v. Workmen's Compensation Appeals Board (1975), 46 Cal.App.3d 146, 120 Cal.Rptr. 199, 206; Norgard v. Rawlinsons & New System Laundry (1977), 30 Or.App. 999, 569 P.2d 49, 52.

The evidentiary burden is on the Petitioner to identify the specific benefit denied or delayed. An insurer avoids a penalty and/or attorney fees by showing the basis for a legitimate doubt from a legal or medical standpoint that the liability existed. A colorable argument is sufficient to create a legitimate doubt. *Peters v. American Zurich,* 2013 MTWCC 16, ¶ 40. Once this is done, it becomes the burden of a claimant to show why the identified doubt could not have been legitimate.

Legitimate legal and factual disputes exist in this case. First, a legitimate dispute exists over whether Petitioner is physically precluded from working in her time-of-injury job as a CNA. A dispute also exists over whether Petitioner suffers an actual wage loss. These disputes have been thoroughly discussed throughout this brief. Clearly Respondent has a reasonable basis in law and fact to dispute Petitioner's claim for PPD benefits. A penalty or attorney's fees simply are not warranted based on these legitimate legal and factual disputes.

CONCLUSION

Petitioner must satisfy her burden of proof that she suffers an actual wage loss caused by her injury. This determination requires an assessment of Petitioner's physical capabilities and, necessarily, any existing physical restrictions. Under Montana law, the determination of physical restrictions is a medical determination and must be reached by a physician. As such, the determination of physical restrictions must be based on the standard of medically more probable than not and must be based upon objective medical findings.

Petitioner cannot satisfy her burden of proof because a preponderance of the objective medical findings do not support her contention she is unable to return to her time-of-injury job as a CNA. The record demonstrates the physical restrictions imposed by Dr. Vanichkachorn were done so without objective medical findings. Dr. Vanichkachorn's physical restrictions were imposed because of Petitioner's subjective complaints of pain. Petitioner was evaluated by three other medical providers. These medical providers all reached normal objective medical findings and opined Petitioner could return to her time-of-injury job as a CNA in full duty and without physical restrictions. The preponderance of the evidence in the form of the medical opinions of PA-C Vonada, Dr. Weinert, and Dr. Fellers establishes that Petitioner can return to her time-of-injury job as a CNA and does not suffer an actual wage loss caused by her injury.

Additionally, Dr. Vanichkachorn's medical opinion should be afforded limited weight by this Court. This Court generally gives greater weight to the opinion of the claimant's treating physician. The policy behind the general rule is the treating physician has treated the claimant for a greater period of time and is in a better position to assess the claimant's medical condition. However, the treating physician's opinion is not conclusive and this Court will give it limited weight where it is based on limited access to medical records. Dr. Vanichkachorn only evaluated Petitioner on two occasions, not long enough to establish a treating physician relationship. Dr. Vanichkachorn did not review Petitioner's medical records prior to rendering his opinion. He also did not base his medical opinion regarding Petitioner's condition on objective medical findings. Further, there is no evidence Dr. Vanichkachorn reviewed the job analysis of CNA before restricting Petitioner from returning to her time-of-injury job. The other opining medical providers, PA-C Vonada, Dr. Weinert, and Dr. Fellars, all reviewed Petitioner's medical history before rendering their opinions. These providers also based their opinions on objective medical findings. PA-C Vonada treated Petitioner for approximately one year for her injury. Dr. Vanichkachorn's opinion should be given limited weight because he based his medical opinion on Petitioner's subjective complaints, he did not review Petitioner's medical history, he did not review the job analysis for Petitioner, and he did not establish a treating physician relationship with Petitioner.

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DATED this 19th day of August, 2015.

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By_____
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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2015, a copy of Respondent's Trial Brief was served on the person(s) listed below by the following means:

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1 Mail
_____ Overnight Delivery Service
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