

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 62

WCC No. 9705-7753

PERRY BARTELS

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

PREWITT FEEDLOT, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: A 45-year old mill operator claimed permanent total disability. In 1992, at the age of 39, he suffered a closed head injury after being knocked unconscious by a group of cows and gate. He remained on temporary total disability benefits through December 14, 1995, when the insurer terminated benefits on the opinions of two neuropsychologists that claimant was capable of returning to his time of injury job. The record demonstrates claimant had limited intellectual and cognitive abilities as well as hysterical personality traits pre-injury. According to expert testimony, these traits makes it more difficult for him to overcome challenges and deficits following the head injury. He also displays somewhat strange behavior and statements in conflict with those of others.

Held: The Court finds claimant presently permanently, totally disabled. The Court is persuaded that claimant presently has no prospect of regular employment given the impact of his closed head injury on his pre-existing abilities and personality. The Court notes that claimant was able to obtain and keep employment prior to the injury, but since the injury has not worked, other than through an on the job training program, which was ultimately not successful. The Court rejects the insurer's contentions claimant is not credible and is deliberately malingering. No credible expert has rendered that opinion. The Court's own impression of claimant through observations of his testimony at trial and review of the record is that claimant's bizarre behavior and incredible statements are a product of his personality and circumstances, including the aftereffects of the injury, and are not premeditated. Despite the PTD finding, the Court believes that with significant

assistance, claimant could once more become employable, as suggested by his improvement during a 1993-1994 rehabilitation program.

Topics:

Benefits: Permanent Total Benefits: Generally. The Court finds PTD a 45-year old mill operator who suffered a closed head injury at the age of 39 and has not since worked. Given the impact of the head injury on claimant's pre-existing limited intellectual and cognitive abilities and hysterical personality tendencies, he presently has no prospect of regular employment. The Court notes that claimant was able to obtain and keep employment prior to the injury, but since the injury has not worked, other than through an on the job training program, which was ultimately not successful. The Court rejects the insurer's contentions claimant is not credible and is deliberately malingering. No credible expert has rendered that opinion. The Court's own impression of claimant through observations of his testimony at trial and review of the record is that claimant's bizarre behavior and incredible statements are a product of his personality and circumstances, including the aftereffects of the injury, and are not premeditated. Despite the PTD finding, the Court believes that with significant assistance, claimant could once more become employable, as suggested by his improvement during a 1993-1994 rehabilitation program.

Vocational – Return to Work Matters: Employability. The Court finds PTD a 45-year old mill operator who suffered a closed head injury at the age of 39 and has not since worked. Given the impact of the head injury on claimant's pre-existing limited intellectual and cognitive abilities and hysterical personality tendencies, he presently has no prospect of regular employment. The Court notes that claimant was able to obtain and keep employment prior to the injury, but since the injury has not worked, other than through an on the job training program, which was ultimately not successful. The Court rejects the insurer's contentions claimant is not credible and is deliberately malingering. No credible expert has rendered that opinion. The Court's own impression of claimant through observations of his testimony at trial and review of the record is that claimant's bizarre behavior and incredible statements are a product of his personality and circumstances, including the aftereffects of the injury, and are not premeditated. Despite the PTD finding, the Court believes that with significant assistance, claimant could once more become employable, as suggested by his improvement during a 1993-1994 rehabilitation program.

¶11 The trial in this matter was held on January 12 and 13, 1998, in Great Falls, Montana. Petitioner, Perry Bartels (claimant), was present and represented by Mr. Cameron Ferguson. The respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Charles G. Adams. A partial transcript, consisting of Dr. Marion Martin's testimony, has been prepared.

¶12 Witnesses: Claimant, Jo Ellen Bartels (claimant's wife), Betty Wilson (claimant's mother-in-law) and Marian Martin, Ph.D. were sworn and testified. By agreement of the parties, Hal Bowles testified by telephone. No depositions were submitted.

¶13 Exhibits: Exhibits 1 through 10 were admitted without objection.

¶14 Proposed Findings: The parties submitted post-trial proposed findings of fact and conclusions of law. The matter was deemed submitted for decision on February 9, 1998.

¶15 Issues: The parties have set forth three issues in the Pretrial Order, which the Court combines and restates as follows:

- Is claimant presently permanently totally disabled?

- Is claimant entitled to total disability benefits retroactive to December 1995?

FINDINGS OF FACT

¶16 Claimant is 45 years old. He is married and lives with his wife in or near Sidney, Montana.

Workers' Compensation Injuries

¶17 For a number of years, the claimant was employed by Prewitt Feedlot Incorporated (Prewitt). His job duties included operation of a mill at the feedlot and helping out with cattle.

¶18 On January 23, 1991, claimant fell on ice while at Prewitt and injured his left elbow.

¶19 On August 10, 1992, claimant was helping put cattle into a pen at Prewitt when he was struck by a gate. He was knocked unconscious.

¶110 After regaining consciousness claimant was taken to the emergency room at the Community Memorial Hospital in Sidney. He was hospitalized overnight.

¶111 During his hospitalization, claimant was treated by Dr. Donald A. Cooper. (Ex. 5a at 32.) Dr. Cooper is an internist and had treated claimant on two prior occasions in 1987 and 1991.

¶112 Dr. Cooper made the following contemporaneous note concerning claimant's physical examination on August 10:

He is quite stuporous. **He does not recognize me**, he does not answer questions but seems to think about the question for several minutes, then gradually act[s] on it.

(Ex. 5a at 30, emphasis added.) In his discharge note of August 11, 1992, Dr. Cooper wrote:

This 39 year old man was admitted to the hospital on 8/10/92 and discharged on 8/11/92. He had been seen in the emergency room after being hit by a group of cows and gate and knocked an indeterminate distance and knocked unconscious. When he came in he was awake but he was unaware and his thinking was extremely slow.

(Ex. 5a at 32.) The notes raise a significant question as to whether claimant's reported preinjury recollection, and his belief that he was unconscious only briefly, are accurate.⁽¹⁾

Workers' Compensation Claims and Benefits Paid

¶13 At the time of the claimant's injuries, Prewitt was insured by the State Compensation Insurance Fund.

¶14 Claimant submitted written claims for both injuries and the State Fund accepted liability for both.

¶15 The State Fund initiated temporary total disability benefits sometime after claimant's head injury, however, on December 14, 1995, it gave claimant a 14-day notice that it was terminating his temporary total disability benefits. The termination was based on the opinions of two neuropsychologists who opined that claimant was capable of returning to his time-of-injury job.

The Present Petition

¶16 Claimant disputes the State Fund's termination of benefits. He seeks reinstatement of his total disability benefits retroactive to December 28, 1995, the date they were terminated.

¶17 Claimant's request for reinstatement of total disability benefits is based on his closed-head injury. He does not contend that he is totally disabled on account of his elbow injury.

Initial Comments Concerning Factual Basis for Decision

¶18 The question presented in this case is whether claimant's closed-head injury disables him from returning to his time-of-injury employment and from any other regular employment. I have found it an extraordinarily difficult task to make that determination. Despite the large stake both sides have in the resolution of the issue, the evidence presented by both sides was less than the issue deserves.

¶19 Claimant presented his medical evidence solely through medical records. Exclusive reliance on medical records makes sense in a case where the medical opinions are not in dispute. But in this case there is a significant dispute concerning the extent and effect of any head injury.

¶20 On its part, the State Fund relied on opinions of two neuropsychologists, one of whom testified at trial, that the claimant's level of intellectual functioning was not significantly

affected by any head injury and that he should be able to return to his former work. However, neither neuropsychologist provided a full explanation as to why the claimant has not returned to employment. Is he deliberately exaggerating his symptoms and disability? While there is some evidence suggesting that possibility, neither neuropsychologist specifically argued it. While the State Fund attacked claimant's credibility it did so almost entirely based on his testimony and deportment at trial. That reliance might have been justified but for claimant's limited intelligence and his history, as documented in medical records, of bizarre and sometimes exaggerated perception and behavior.⁽²⁾

Claimant's Preinjury Mental Status

¶21 Preinjury psychological testing placed claimant in the borderline range of intelligence and intellectual functioning. An IQ test performed in July 1983 showed a full-scale IQ of 83, which falls "within the dull normal range." (Ex. 9 at 348.) Another psychological test performed in 1983 showed "evidence of distractibility, poor attention span, and the potential for affective⁽³⁾ instability." (*Id.*) An MMPI-1 administered in 1983 produced a profile which is consistent with individuals who "are often seen as introverted, unpredictable, and peculiar in action and thought." (*Id.*) The psychologist who evaluated claimant in 1983 commented that claimant "does appear to have some pervasive feelings of inadequacy regarding his intellectual abilities and past academic failures." (*Id.* at 349.)

¶22 Claimant completed highschool, however, he ranked 153rd in a class of 159 and his grade point average was 1.27. (Ex. 5e at 77.)

¶23 Claimant's medical records show that he has a long standing history of mental and emotional problems, some of which may be exacerbated by low intelligence and intellectual functioning. A December 14, 1978 medical note says:

25 year old white male with a history of mental problems over the past year or two. This young man was highly depressed to the point of psychosis, withdrawn and suicidal. He was unable to take care of daily needs in terms of living and unable to hold his job.

(Ex. 5u at 263.) In a psychological interview in 1983, claimant indicated that in 1978 he was going through a divorce and had a mental breakdown.

¶24 Other medical notes provide evidence of preexisting psychological and emotional pathology. In 1987 claimant was hospitalized for acute chest and abdominal pains. His behavior led the attending physician to diagnose an "anxiety attack" and to comment, "He really dramaticized [sic] his pains and I think was somewhat of a malingerer." (*Id.* at 259.) The attending physician further noted, "This patient has had numerous problems similar to this where he becomes quite anxious and develops different types of pains." (*Id.* at 258.)

¶25 Prior to his head injury, claimant was able to obtain and hold employment. After high school he served two years (1972-1974) in the United States Army as an infantryman.

Following his military service, claimant was employed as a service station attendant, truck driver, farm worker, and, finally, as a grain mill operator.

¶126 Claimant testified that at Prewitt he ran the mill and worked as an all around handyman, fixing water tanks, electrical problems and the mill. He made it sound like a responsible job requiring many difficult skills. He claimed that he received cash bonuses for his work. One of his supervisors, however, testified that claimant's job was repetitive and routine, but that he did not always remember to do things and that his work had to be checked. After reviewing all of the exhibits and testimony, it is my distinct impression, and I find, that claimant exaggerated his preinjury abilities and responsibilities. However, the fact remains that he was able to find and hold employment and work on a long-term, consistent basis prior to his head injury. His employment with Prewitt spanned several years.

Post-Head Injury Evaluation, Treatment and Retraining

¶127 Since his head injury the claimant has complained of sensitivity to light (photophobia), headache, memory loss, loss of concentration, extreme fatigue, difficulty following directions, dizziness, irritability, and sleep difficulty. He testified that he is unable to work.

¶128 Dr. Cooper's notes document claimant's symptoms immediately following the accident. On August 17, 1992, he recorded that claimant reported headache, dizziness, inability to be outside for more than 15 minutes, and trouble sleeping. (Ex. 5g at 116.)⁽⁵⁾ On August 19, 1992, Dr. Cooper recorded that claimant reported persistent headaches, photophobia, dizziness, and inability to sleep. He noted that claimant was unable to perform a Romberg test.⁽⁶⁾ (Ex. 5g at 114.) Dr. Cooper's note of September 1, 1992, reported similar complaints and claimant's continued inability to perform a Romberg test. He noted "there is no way he can work at this time" and referred him to Dr. Dale Peterson, a neurologist, for further evaluation. (*Id.*)

¶129 Dr. Peterson performed a number of neurological tests, all of which were negative. (Ex. 5g.) He concluded in a letter of January 19, 1993, "We can only conclude that Mr. Bartles has a posttraumatic difficulty with cognition." (*Id.* at 102.) He recommended further psychological and occupational evaluation. (*Id.*)

¶130 Dr. Peterson referred claimant to Robert E. Tompkins, Ed.D, a licensed psychologist and practicing neuropsychologist, for evaluation of possible brain damage which might not be detected by imaging and other neurological testing. On January 18, 1993, Dr. Tompkins interviewed claimant and administered a battery of psychological and neuropsychological tests.

¶131 In interviewing claimant, Dr. Tompkins noted slow thinking, speech difficulty, and "gait difficulties typified by balance problems." (Ex. 5e at 82.) Dr. Tompkins recorded that

claimant reported fatigue, sleep disturbance, irritability, memory difficulty, dizziness and difficulty concentrating.

¶132 Dr. Tompkins administered an IQ test which disclosed a full scale IQ of 78. (*Id.* at 82.) The other testing disclosed that claimant "appears to have a general impairment in most neurocognitive functions with severity ranging from mild to moderate." (*Id.* at 83.) Dr. Tompkins noted difficulties in memory (especially short-term memory), learning, speech and language, arithmetic, proverb interpretation, word association, executive and self-supervision functions, visual scanning, and certain motor skills. (*Id.* at 83-87.) His diagnostic impression was "[p]ost-concussion syndrome." (*Id.* At 87.) He recommended re-evaluation in one year.

¶133 A year later, Dr. Tompkins reexamined claimant and repeated IQ and neuropsychological tests. (Ex. 5e at 76-80.) His findings were similar to those in January of 1993. Claimant's measured full scale IQ was 74. The testing disclosed deficits in memory, learning ability, speech and language, executive and self-supervision skills, and certain motor skills. (*Id.*) Again, Dr. Tompkins's impression was that claimant was suffering from "[p]ost-concussive syndrome," which he characterized as "moderate to severe." (*Id.* at 80.) He observed that claimant "shows clear signs of actual organic brain injury." (*Id.*)

¶134 Following his 1994 testing of claimant, Dr. Tompkins wrote a letter to the vocational consultant employed by the State Fund. He reiterated his diagnosis of "concussive syndrome, moderate to severe" but added that claimant was also suffering an "adjustment disorder with depressed mood." (*Id.* at 73.) Dr. Tompkins recommended that claimant enroll in a rehabilitation program and psychotherapy and that he increase his social contacts. (*Id.*) He ruled out any future employment involving "transactions involving money, making change or dealing with other than quite routine mechanical activities." (*Id.* at 74.)

¶135 In 1994, through its vocational rehabilitation provider, the State Fund obtained a further neuropsychological evaluation of the claimant by Debra Sheppard, Ph.D, who, like Dr. Tompkins, is a clinical neuropsychologist. (Ex. 5d at 66.) Dr. Sheppard interviewed claimant and performed some testing, however, her testing was not as comprehensive as that of Dr. Tompkins.⁽²⁾ (*Id.* at 71.) Nonetheless, her testing confirmed that claimant's ability to remember new information was "significantly impaired" and that he had difficulty concentrating. (*Id.*) She further observed that "Mr. Bartels is also evidencing significant problems with initiation and cognitive flexibility." (*Id.*)

¶136 Dr. Sheppard found that, "[t]he pattern of deficits observed [in claimant] is consistent with diffuse cerebral trauma, as well as an overlay of depressive symptoms." (*Id.*) She related the "dysfunction" to his closed-head injury and recommended attention training, applied cognitive rehabilitation therapy, and further speech assessment. (*Id.*)

¶137 Speech testing was done and disclosed that claimant had difficulty in speech fluency and with "auditory comprehension for complex, abstract, material." (Ex. 5d at 63.)

¶138 In the fall of 1994, an effort was begun to provide claimant with training and gradually reintegrate him into the work force.⁽⁸⁾ Claimant enrolled in a welding class and was placed in a non-paying, on-the-job training (OJT) position with Ken Damm Welding (Damm) in Sidney. (Ex. 5k at 128; 7 at 314-15.) The OJT placement with Damm ended in November 1994, when Damm was killed in an explosion. (Ex. 5k at 128.)

¶139 Claimant was then placed in non-paying, OJT with Big D Muffler Shop (Big D) in Sidney, where he worked from December 13, 1994 until sometime in March or April 1995. (Ex. 7 at 330; Ex. 5k at 126.) In March 1995, two reports were made concerning his work at Big D. One was by the occupational therapist supervising his program, the other by the State Fund's vocational consultant, who monitored claimant's progress.

¶140 In a March 14, 1995 report, the occupational therapist reported that claimant was working "at least 5 to 6 hours per day" and "at least one and one-half hour at a time before he requires a rest." (Ex. 5k at 126.) The therapist further reported, "Perry spends the majority of his work time standing and working overhead on suspended vehicles." (*Id.*) The therapist reported that claimant was increasing "his activity outside of his work environment" and that he spent "one and one-half to two and one-half hours of additional activity at least 4 out of 5 days per week." (*Id.*)

¶141 In a March 1, 1995 report, the rehabilitation consultant reported that claimant was "working between four and eight hours per day" and that claimant reported that he could work "four hours without any pain or headaches, but after a four hour period, he begins to experience these signs and symptoms." (Ex. 7 at 330.)

¶142 Not all was well, however. By March it appeared that the Big D job was not going to turn into paid employment. (Exs. 7 at 330; 5k at 126.) Moreover, claimant began to experience increasing difficulty with his elbow. The elbow problem brought the OJT to a halt and on May 8, 1995, claimant underwent elbow surgery. (Ex. 5f at 91.)

¶143 Claimant's convalescence from elbow surgery did not end until November 7, 1995, at which time the claimant's surgeon found him at maximum healing with respect to the surgery. Shortly thereafter, on December 14, 1995, the State Fund sent its 14-day notice terminating his temporary total disability benefits with respect to his head injury.⁽⁹⁾

¶144 Apparently, the December 14, 1995 State Fund letter also ended any efforts to reintegrate claimant into the work force.

The State Fund's IME Evidence

¶145 In disputing liability for permanent total disability benefits, the State Fund relies on the opinions of two neuropsychologists heretofore not mentioned. The first is John Knippa,

Ph.D., a neuropsychologist practicing in California. The second is Marion F. Martin, Ph.D., a clinical psychologist practicing in Billings, Montana.

¶146 Dr. Knippa rendered an opinion based on a records review; he did not examine or test the claimant. (Ex. 5c at 55.) After reviewing approximately 200 pages of records furnished to him, he opined that there was no clear objective evidence of a brain injury resulting from the August 10, 1992 injury; that claimant's "current cognitive complaints have no relationship to that incident." (*id.* at 57.) He further concluded that the "overriding cause of Mr. Bartels' functional impairments appears to be long-standing reduced intellectual and cognitive ability, long-standing social adjustment and psychiatric-related problems and multiple prior injuries, as well as apparent subsequent injuries," (*id.* at 58) and that all of claimant's impairment was "related to chronic/preexisting complaints, and with expected deteriorations as part of the natural course of Mr. Bartels' pre-existing conditions" (*id.*). With respect to claimant's prior ability to work, Dr. Knippa commented:

Also, noted from the 9/1/94 correspondence from Prewitt Feed Lot is that prior to his injury, Mr. Bartels was apparently a marginal employee who required repeated instructions, showed poor task follow through and was reported to have "fabricated numerous injuries."

(*id.* at 58-59.) Immediately following this last observation, Dr. Knippa went on to say, parenthetically, "(Note. The latter appears to indicate preexisting impairment.)"

¶147 Many of Dr. Knippa's observations and opinions are out of line with the observations and opinions of all other medical professionals, including those of Dr. Martin. He did not examine claimant. He relied on hearsay information concerning claimant's job performance that was not furnished to the Court. That hearsay information flies in the face of testimony of a prior supervisor of the claimant and is belied by claimant's employment history. I give no weight to Dr. Knippa's opinions.

¶148 Dr. Martin's trial testimony provided a more substantial basis for the State Fund's position in this case. She did not dispute that claimant suffered a head injury. However, she testified that he still has sufficient skills and abilities to perform regular work, including farm labor such as he had done before.

¶149 Dr. Martin characterized claimant's head injury as mild. (Ex. 5b at 49; Tr. at 65.) Her characterization of the degree of injury is immaterial to the issue of disability. The law concerning disability is indifferent to whether an injury is characterized as mild, moderate or severe. The question that the Court must address is whether the head injury further diminished claimant's abilities and skills so as to preclude him from any reasonable expectation of regular employment in the labor market.

¶150 Dr. Martin testified that prior to his head injury the claimant's cognitive abilities were probably "quite limited." (Tr. at 45.) She administered another IQ test, which yielded a full scale IQ of 82. (Ex. 5b at 42.) She testified that the differences in the IQ scores recorded in

1983, 1993, 1994 and 1995 were consistent and that the range of scores (74 to 83) was not significant. (Tr. at 19.) She tested his reading and arithmetic skills and determined his skills to be in the first and third percentile respectively. (Tr. at 20.) She performed a battery of other tests. Without question her testing and examination were thorough and professional. Overall, she found his cognitive abilities impaired. (Tr. at 20.) She characterized his impairment in the range of moderate to severe, whereas only mild impairment would be expected based solely on his intelligence scores. (Tr. at 21.)

Resolution

¶51 While Dr. Martin ultimately concluded that claimant should be able to return to work as a farm worker, and that it will be beneficial for him to do so (tr. at 43-44), she provided a number of additional insights that I find helpful in resolving this case.

¶52 Dr. Martin testified that a person functioning at a lower intellectual level will have a more difficult time returning to work following a head injury:

Again, Mr. Bartels actually -- well, let me back up. In some of the research that's been done when they look at people who have had head injuries and who have then returned to work or not returned to work, they find that people who tend to have more pre-existing difficulties in functioning, such as possibly lower intellectual level or more difficulties in managing jobs, holding jobs, may be more difficulties in terms of personality or emotional functioning in those individuals, tend to have more difficulty in returning to work afterward; whereas people who are, say, more professional level will tend to have a very high return of returning to work which probably associated with some degree of higher intellectual function or maybe higher motivation.

What you find I think with someone who is struggling to function prior to a head injury may then after the head injury find it easier to attribute their difficulties in functioning to the head injury and may tend to then attribute all of their problems after that to the head injury rather than to other existing situations.

(Tr. at 42.) Upon cross-examination, she expanded:

A. Well, I think it might have a greater impact because he would have fewer mechanisms for coping in the first place. He would have probably more difficulty compensating for any difficulties he had. Whereas a person with maybe above average intelligence would fairly quickly like figure out some ways of coping with memory problems or, you know, attention problems, they would come up with some compensating techniques. And another individual who has lower intellectual functioning would have more difficulty doing that.

Q. Do you feel that's what conceivably occurred in this case?

A. I think that could certainly be part of it, yeah.

(*Id.* at 69.) I find her testimony helpful. It focuses on the issue in this case, which is whether, given claimant's preinjury status, his head injury adversely affected his ability to return to work.

¶153 Dr. Martin's testing suggests that claimant suffers from an "attention/concentration problem and/or some emotional overlay that is affecting his test performance." (Tr. at 35, 37.) Her observation is consistent with other evaluations and indicates that claimant has a significant attention and concentration problem and that he suffers from preexisting emotional and psychological problems.

¶154 Dr. Martin observed that claimant's descriptions of physical problems were sometimes unusual and that his reactions during testing suggested an "hysterical personality." (Tr. at 15-16, 28-29.) However, she declined to label claimant a malingerer or to characterize his reactions as deliberate exaggeration. (Tr. at 41.) Her observations provide support for my own perception that claimant's bizarre reactions and exaggeration are a product of his personality, his underlying emotional and psychological problems, and his limited intelligence rather than any deliberate and calculated effort on his part to secure compensation by lying.

¶155 Dr. Martin conceded that claimant's fatigue may arise from his efforts to cope with his cognitive deficits and from his emotional reaction to his head injury. (Tr. at 66-68.) Regarding claimant's possible emotional reaction to the injury, she testified:

THE COURT: Could the emotional factors stem from the head injury?

THE WITNESS: There can be some of that. There is often some depression and some other kinds of things that go along, you know, some depression, sometimes some anxiety, that goes along with the head injury. I think, though, if you look at patterns of coping, you know, it seems that Mr. Bartels may have tended to cope with emotional stresses by maybe repressing and denying. That was one of the earlier reports. That kind of pattern leads to developing physical symptoms at times of stress.

So there again, you don't know how much some of these physical symptoms have to do with some subconscious emotional factors, and that would not have been attributable to the head injury. The hysterical kind of tendency to focus on symptoms and to develop those kind of symptoms at times of stress, that would be more of a pre-existing personality matter.

THE COURT: The method of coping with being the pre-existing pattern, but could that method of coping be invoked or potentially implied with a head injury?

THE WITNESS: Could be made worse, yes.

THE COURT: Is that what - - or at least invoked in the sense that he has a head injury and that he falls back on the pattern of cope that's already there?

THE WITNESS: I think so. And he - - I think he could have, if he had a mild head injury, it would have even in the ability to - - because he would have had - - he would have had more things to deal with than prior to the head injury. . . .

Since the injury claimant has been taking Trazedone as prescribed by Dr. Cooper. Trazedone is an antidepressant. Physician's Desk Reference (52nd ed. 1998).

¶156 Dr. Martin noted that an automobile accident that occurred on March 30, 1994, and the death of Mr. Damm in November 1994, may have affected claimant's emotional state and contributed to his present disability. (Tr. at 39-40.) I am unpersuaded for two reasons. First, claimant was unable to work prior to both incidents. Second, after both incidents he participated in OJT with Big D and was making significant progress in his rehabilitation efforts.

¶157 I find that Dr. Martin's discussion of the potential effect of even a mild head injury on persons of limited intelligence and abilities best fits what has happened in this case. I find that claimant is presently permanently totally disabled as a result of his August 10, 1992 head injury.

¶158 I am persuaded that preinjury the claimant had limited intellectual and cognitive abilities and had hysterical (over reactive) personality traits. I am also persuaded that prior to his injury he was generally able to obtain and keep a job. While he may never have been an employer's ideal employee, he worked and he was paid for his work. Since his head injury, claimant has not worked.

¶159 The State Fund strenuously challenges claimant's credibility. In its proposed finding of fact 3, it proposes that the Court adopt the following finding of fact:

It is very clear that the Claimant is exaggerating any problems that he may have at this point. At trial, he displayed very dramatic pain behaviors and responses that were only at points in the testimony when he was reminded of his problems. For instance, he was asked a question about an unrelated elbow injury by his counsel, responded with a very dramatic "ouch", grasped his elbow and moved very quickly in his chair. As well, upon inquiry concerning a supposed aversion to light, he moved his chair from the position that it had been in for over an hour and stated in very dramatic fashion that he was having a very severe reaction to the glare off either the court's computer screen or the window in the background. As well, the Court also notes that the Claimant displayed an inconsistent gait. He walked with a cane, and at times he was walking at a very slow fashion, but upon departing the witness chair was able to ambulate much more freely.

(State Fund's Proposed Findings of Fact and Conclusions at 2.) The Court does not disagree that the instances cited in the State Fund's Proposed Findings of Fact and Conclusions occurred, and finds that they in fact occurred. My own notes during the claimant's

testimony regarding his elbow problems at Big D, he "grabs elbow and cries ouch." Beside my note, I made the following comment, "WEIRD."

¶160 Certainly it is possible that claimant is malingering or deliberately exaggerating his disability. However, no medical or psychological practitioner has seriously urged that he is and I am persuaded that he is not. Claimant suffers from depression, as indicated by continuous prescription for Trazedone. He is embarrassed by his intellectual deficits, and his embarrassment is compounded by his perception that his August 10, 1992 injury further eroded his intellectual and cognitive functioning. Claimant's behavior since his injury has at times been bizarre but I am persuaded that his bizarre behavior is a product of his personality and is not premeditated.

¶161 Despite my finding that claimant is presently permanently totally disabled, I further find the claimant's improvement during the rehabilitation program in late 1993 and 1994 indicate a probability that *with significant assistance* he can once more become employable and employed.⁽¹⁰⁾

CONCLUSIONS OF LAW

I.

¶162 Claimant's benefits are governed by the 1991 Montana Workers' Compensation Act. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II.

¶163 In determining claimant's entitlement to disability benefits, the Court must apply the well recognized rule that the employer and insurer took claimant as he was, with all his physical and psychological infirmities and imperfections. *Satterlee v. Lumbermen's Mut. Cas. Co.*, 280 Mont. 85, 91, 929 P.2d 212, 215 (1996). Thus, aggravation of a preexisting emotional or psychological condition is compensable, *id.*, if it is a consequence of a physical injury, *Yarborough v. MMIA*, 282 Mont. 475, 938 P.2d 679 (1997).

III.

¶164 Entitlement to permanent total disability is governed by sections 39-71-702, and 39-71-116(16), MCA (1991). Section 39-71-702 provides in relevant part:

39-71-702. Compensation for permanent total disability. (1) If a worker is no longer temporarily totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for permanent total disability benefits. Permanent total disability benefits must be paid for the duration of the worker's permanent total disability, subject to 39-71-710.

(2) The determination of permanent total disability must be supported by a preponderance of medical evidence.

Section 39-71-116(16) provides:

"Permanent total disability" means a condition resulting from injury as defined in this chapter, after a worker reaches maximum healing, in which a worker has no reasonable prospect of physically performing regular employment. Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

¶165 Although section 39-71-703(2), MCA, requires that disability be *supported* by a preponderance of medical evidence, disability is not solely a medical question. *Coles v. Seven Eleven Stores*, 217 Mont. 343, 347, 704 P.2d 1048, 1051 (1985). Rather disability concerns the effect of a medical condition on a claimant's ability to work.

¶166 In the case of permanent total disability, the claimant must demonstrate (1) that he has reached maximum medical improvement and (2) that, as a consequence of his injury, he has no reasonable prospect of physically performing regular employment. The first prong is satisfied. There are several medical opinions in this case indicating that claimant reached MMI prior to the December 1995 termination of his benefits. Indeed, MMI is not raised as an issue in this case. "The only issue is whether claimant has reasonable prospect of physically performing regular employment."

¶167 The evidence in this case, while far from overwhelming, persuades me that without significant rehabilitation assistance the claimant has no reasonable prospect of regular employment. I am persuaded, by a preponderance of medical evidence that claimant's inability to work is due to his August 10, 1992 injury, which caused a small but significant decline in his intellectual and cognitive abilities and precipitated depression and a debilitating emotional reaction.

¶168 The State Fund is therefore liable for permanent total disability benefits retroactive to the date they were cut-off and continuing until such time as the claimant is no longer PTD. The parties have not asked the Court to determine the amount due.

IV.

¶169 The Court has noted the significant progress claimant made towards employment during an OJT program in the fall of 1994 and winter of 1995. I have found as a matter of fact that there is a significant prospect that claimant can become reemployed on a regular basis if significant rehabilitation assistance is provided to him. Whether the State Fund chooses to offer that assistance is up to it. However, should it do so, the claimant must cooperate and make a genuine effort to return to employment.

JUDGMENT

¶70 1. Claimant is presently permanently totally disabled.

¶71 2. The State Fund is liable for permanent total disability benefits retroactive to the date total disability benefits were terminated. The parties have not requested the Court to determine the amount of benefits due and the information provided to the Court is insufficient for it to do so. If the parties are unable to agree on the amounts due, they shall inform the Court and a further hearing shall be held. The Court retains jurisdiction for that limited purpose.

¶72 3. Should the State Fund offer further rehabilitation assistance, including OJT, the claimant shall cooperate and make a genuine attempt to return to gainful employment.

¶73 4. Pursuant to ARM 24.5.348, this JUDGMENT is certified as final for purposes of appeal.

¶74 5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 17th day of August, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Charles G. Adams

Date Submitted: February 9, 1998

1. There is substantial and credible evidence that at times claimant tries to put himself in the best light, thus his reports concerning his amnesia and period of consciousness may understate the true facts.

2. The only witness presented by the State Fund to suggest that claimant is in fact functioning at a higher level than he claims was claimant's former supervisor, who on one occasion saw claimant at a gas station with a boat, apparently preparing to go fishing.

3. "Affective" means "relating to, arising from, or influencing feelings or emotions." Merriam-Webster Medical Dictionary (1997) found online at www.medscape.com.

4. No footnote.

5. The cited note is found in Dr. Peterson's section of the exhibits. However, this note and the one next cited (Ex. 5g at 114) appear to be from Dr. Cooper's office notes. A footer indicates that the forms on which the notes appear were from a print job entitled

"24Cooper." More importantly, the note of September 1, 1992, which is at page 114, indicates that the physician making the note was going to "set up an appointment for him [claimant] to see a neurologist." Dr. Peterson is the neurologist to whom Dr. Cooper referred claimant, thus the note is more likely Dr. Cooper's note than Dr. Peterson's. In any event, whoever recorded the information, the notes document claimant's complaints immediately following the August 10, 1992 accident.

6. The Romberg test involves the placing of the feet together and closing the eyes. It is a sign of some neurological diseases. Dorland's Illustrated Medical Dictionary, Twenty-fifth ed.

7. Dr. Sheppard's report characterized the testing as "a brief screening to observed [sic] the process used in obtaining the results of the more complete battery [of Dr. Tompkins]." (Ex. 5d at 71.)

8. Vocational rehabilitation assistance was initially obtained in 1992. (Ex. 7 at 282.) The rehabilitation file was closed or pended, then reopened in the fall of 1993. At that time, Dr. Cooper wrote that claimant was not released to return to work and Dr. Peterson indicated that he would want a functional capacities examination before considering a release. (Id. at 303-304.) The report prepared at that time reflected recommendations by Drs. Peterson and Tompkins that claimant be enrolled in a rehabilitation program. (Id. at 309.) Dr. Tompkins was contacted by the provider. He disapproved the jobs for which descriptions had been sent him but thought that claimant "possibly could perform" a job as a dishwasher, cautioning that claimant's "fatiguability" [sic] could interfere with even that job. (Id. at 322.)

9. The notice indicated that the State Fund would continue TTD benefits with respect to claimant's elbow injury, at least until it received information from claimant's elbow surgeon as to whether claimant could return to his time-of-injury job based on his elbow injury. (Ex. 8.) I am unable to determine when TTD benefits with respect to the elbow injury were discontinued.

10. My judgment of claimant's credibility leads me to find that claimant was doing more at Big D than he claims but less than what he reported to his occupational therapist and vocational counselor. I am persuaded that in fact he was making substantial and significant progress in performing productive work for several hours a day and that he was increasing his outside activities. I am persuaded that there is a significant possibility that had his work trial not been interrupted by his elbow surgery and the fact that his work at Big D was a dead end with respect to a paid position, he might have ultimately been able to perform the work required of a paid employee.