

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 44

WCC No. 9601-7473

MICHELLE CHAPMAN

Claimant/Appellant

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

Insurer/Cross-Appellant.

ORDER ON APPEAL

Summary: A 27 year old laborer injured her right shoulder, neck, right hand, back and right foot when falling from cooling tower. After DOL hearing officer determined that claimant was capable of working as a self-service gas station attendant, and that the first appropriate return-to-work option under section 39-71-1012, MCA (1987), was return to a related occupation, claimant appealed, alleging the decision was not supported by substantial evidence. Insurer cross-appealed, regarding hearing officer's alleged failure to take notice of a deposition. Claimant contended, among other things, that hearing officer failed to give weight to letter from treating physician read by claimant at hearing.

Held: Substantial evidence supported hearing officer's findings and conclusions. Although claimant argues hearing officer did not give deference to treating physician's letter, a treating physician's opinion is not conclusive. Where the treating physician's letter contradicted his earlier opinions, which earlier opinions were consistent with other medical opinion and the results of a functional capacity evaluation, the hearing officer did not err in finding claimant could return to work under option (c). Given this conclusion, it is unnecessary to reach insurer's appeal.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-1012, MCA (1987). Substantial evidence supported hearing officer's conclusion claimant could return to work under option (c) of section 39-71-1012, MCA (1987). Although claimant argues hearing officer did not give deference to treating physician's letter, a treating physician's opinion is not conclusive. Where the treating physician's letter contradicted his earlier opinions, which earlier opinions

were consistent with other medical opinion and the results of a functional capacity evaluation, the hearing officer's conclusions would not be reversed on appeal.

Treating Physician: Weight of Opinions. Substantial evidence supported hearing officer's conclusion claimant could return to work under option (c) of section 39-71-1012, MCA (1987). Although claimant argues hearing officer did not give deference to treating physician's letter, a treating physician's opinion is not conclusive. Where the treating physician's letter contradicted his earlier opinions, which earlier opinions were consistent with other medical opinion and the results of a functional capacity evaluation, the hearing officer's conclusions would not be reversed on appeal.

Proof: Conflicting Evidence: Medical. Substantial evidence supported hearing officer's conclusion claimant could return to work under option (c) of section 39-71-1012, MCA (1987). Although claimant argues hearing officer did not give deference to treating physician's letter, a treating physician's opinion is not conclusive. Where the treating physician's letter contradicted his earlier opinions, which earlier opinions were consistent with other medical opinion and the results of a functional capacity evaluation, the hearing officer's conclusions would not be reversed on appeal.

Vocational -- Return to Work Matters: Evidence. Substantial evidence supported hearing officer's conclusion claimant could return to work under option (c) of section 39-71-1012, MCA (1987). Although claimant argues hearing officer did not give deference to treating physician's letter, a treating physician's opinion is not conclusive. Where the treating physician's letter contradicted his earlier opinions, which earlier opinions were consistent with other medical opinion and the results of a functional capacity evaluation, the hearing officer's conclusions would not be reversed on appeal.

This is an appeal and a cross-appeal from a decision of the Department of Labor and Industry that option (c) of section 39-71-1012, MCA (1987) -- return to a related occupation suited to claimant's education and marketable skills -- is the first appropriate rehabilitation option for Michelle Chapman, the claimant in this matter. Chapman appeals on the ground that the findings of fact issued by the Department's hearing officer are not supported by substantial evidence. (Notice of Appeal, 1/8/96.) The insurer/respondent, National Union Fire Insurance Company of Pittsburgh (National), cross-appeals. It alleges that the "findings of fact identified ⁽¹⁾do not comport with the evidence in the record. . . that the hearing officer was required and failed to take judicial notice of Ms. Chapman's prior deposition testimony as required by Mont. R. Evid. 201."(Amended Notice of Appeal, 1/24/96 at 2.)

Factual Background

Claimant is 27 years old. She is a high school graduate and has attended one year of college. She has worked as counter person, salad maker and cashier, a flagger, a laborer, and a hostess/cashier at JB's. Her last job was as a laborer with Research Cottrell. She was injured on that job on May 16, 1989, and has not worked since.

This case arises out of claimant's May 16, 1989 injury. At the time of the injury claimant's employer was performing work at the Colstrip power plant. Claimant was working on a cooling tower at the plant when she fell. Initially, she fell approximately eight feet, grabbing a 2x4 cross member to stop her fall. She dangled momentarily, then fell another eight feet to a concrete floor, landing on her right shoulder and side. Claimant has provided conflicting reports as to which hand she used to catch onto the cross member. However, the fact that she injured her right shoulder, neck, right hand, back and right foot is not disputed.

At the time of claimant's injury Research Cottrell was insured by National, which accepted liability for the injury.

Since her injury claimant has been seen by numerous doctors and physical therapists. Her primary treating physician is Dr. Richard A. Nelson. She was also seen by Dr. William Anderson at the Colstrip Medical Clinic, three different emergency room doctors between the dates of May 18, 1989 and May 22, 1989, Dr. William Shaw in an IME requested by National, Dr. Thomas Johnson, Dr. John Cook, Dr. Donald See, Dr. Robert K. Snider, Dr. Joseph Rich (a psychiatrist), and Dr. Thomas L. Schumann in another IME requested by National. Claimant has also been treated by physical therapists Mary Mistal and Stacy Padden and by occupational therapist Susan Zimmerman.

Dr. Robert K. Snider, an orthopedic surgeon, treated claimant during 1990. On November 8, 1990, he assigned claimant a 15% whole person impairment rating.

Thereafter, claimant underwent a functional capacity evaluation (FCE) at St. Vincent Health and Fitness Center beginning on December 11, 1990. Stacy Padden, the physical therapist who supervised the evaluation summarized the results and her recommendations:

Summary

The Stress Index, which measures the Dynamometer testing of kyphosis versus lordosis lift was within normal range. The Lift-pull Index measuring static strength in dynamic movements relationship was also in normal range. She did display a good correlation between pain rating and observed behavior. Her observed body mechanics and material handling ability were excellent. She also displayed good gross coordination. The endurance projections do appear reliable. The results of this test appear valid. This client's physical demand characteristics of work would be

classified as light. Results would indicate back pain and shoulder weakness. She appears to have good cardiovascular fitness and pelvic control.

Recommendations:

- 1) Back education program.
- 2) Further strengthening exercise.
- 3) Employment in a light duty position at this time.
- 4) Instruction in conditioning program for low back and lower extremities with progression to an independent program.

(Ex. 15 at 11; underlining in original.) The FCE Form indicated the claimant was able to lift 10 pounds frequently and up to 24 pounds occasionally. She could carry up to 10 pounds frequently and up to a maximum of 25 pounds occasionally. On the basis of an eight-hour work day, with two fifteen minute breaks and a half-hour for lunch, the claimant could be expected to tolerate sitting for two to three hours-with rest, standing for five to six hours-with rest, and walking for five to six hours-with rest. (*Id.*)

In January of 1991, Crawford & Company Healthcare Management was retained by National to perform a rehabilitation assessment. Patricia Murray, a certified rehabilitation counselor, was assigned by Crawford to do the actual assessment. She identified three jobs that the claimant might be able to perform given her education, transferrable skills and physical restrictions. Job analyses for those jobs were submitted for review to Dr. Thomas Johnson, an orthopedic surgeon and associate or partner of Dr. Snider, who had treated the claimant beginning on October 25, 1989, through at least March 14, 1990. The job analyses were also provided to physical therapist Stacy Padden. On January 16, 1991, both Dr. Johnson and Ms. Padden approved the positions of host/hostess and cashier II (courtesy booth). They disapproved fast food worker.

On November 4, 1992, Dr. Nelson reviewed and without comment signed the Estimated Functional Capacity (EFC) Form. He also reviewed and **approved** the job analyses for the positions of hostess and courtesy booth cashier. In the comment portion of the job analyses forms he wrote "as per restrictions previously cited." Dr. Nelson's records prior to November 4, 1992, do not reveal any restrictions other than those set forth on the EFC Form which he had signed. As did Dr. Johnson and Ms. Padden, he disapproved fast food worker.

Over a year and a half later, in January of 1994, Dr. Nelson was again asked to review job analyses prepared by Crawford. Once more, he **approved** Ms. Chapman's return to work as a restaurant hostess and as a courtesy booth cashier. Additionally, he approved the job description for attendant in a self-service gas station. Finally, for a second time he reviewed and signed the EFC Form.

In November 1994, the insurer requested a rehabilitation panel be convened to determine the first appropriate return-to-work option for the claimant.⁽²⁾ The panel met on December 20, 1994. Claimant and her counsel telephonically participated in the meeting.

In anticipation of the panel meeting, the claimant's attorney sent claimant to be examined by Dr. Richard A. Nelson on December 14, 1994. (Appellant's Reply Brief at 3.) On December 16, 1994, Dr. Nelson wrote a letter addressed "To Whom It May Concern." Claimant's attorney mailed the letter to the Rehabilitation Panel for its consideration. The letter **did not** reach the Rehabilitation Panel members prior to its meeting on December 20, 1994. However, National states, and the claimant does not dispute, that claimant's counsel read Dr. Nelson's letter to the panel members during the meeting.

In his December 16th letter Dr. Nelson noted:

The patient's attorney has given me a copy of 39-71-1012(2) of the Montana Code, informed me of the Rehab Panel hearing scheduled for December 20, 1994, and asked that I provide any remarks I may care to make.

(Ex. 13 at 5.) Dr. Nelson went on to repudiate, without any explanation whatsoever, his prior approvals of two jobs and his concurrence in the prior FCE:

The patient has many residuals from her injury. For example, five years after her injury, she still walks with a limp, drags the right foot, squirms when sitting in a chair by having to frequently arch her back, still has to use her left hand to lift her right hand, still requires a great deal of time each day to use a heating pad, lay down to rest and take medications to name a few.

. . . .

Before discussing work activities, I believe the patient should have a Physical Capacities Evaluation (PCE) to determine what she can and cannot do. The emphasis at the PCE should be on duration for, again, I think she can do some sedentary types of activities, but I am quite certain she cannot do them 8 hours a day, 5 days a week, and I have strong reservations that she could even do them 4 hours a day, 5 days a week. Example: In my office, she has little in the way of grip in her right hand, the dominant hand. While she can lift a pencil, the real questions include how long she can hold it and write with it. She has tried to train herself to work with the left hand, but the product I have seen is, at best, a scrawl.

I understand that it has been suggested that she could return to work as a waitress, hostess or clerk. I totally disagree, even without a PCE. As a waitress, she could not do such things as write orders, lift or carry trays of dirty dishes or plates of food, serve coffee to customers, or hand menus to customers, with the right hand for any period of time. In addition, within a short time of being on her feet, she would be

limping and dragging the right foot. She could not operate a cash register or credit card machine for any length of time with the right hand.

I understand that the Rehab Panel will consider her return to a related occupation suited to her education and marketable skills. In my opinion, the best alternative under 39-71-1012(2) is "(g) self-employment," providing, as the lawyers' say, a PCE shows that she can physically function in self-employment. Of particular concern to me when speaking of self-employment is the fact that it has the advantage of permitting someone to work at their own pace and, for example, taking 10-12 hours to do what someone else would do in 8 hours. I do not believe it is fair to require her to expend 12 hours to do what others can accomplish in 8. And, I seriously doubt that she could physically put in that much time even with rest periods. Therefore, I believe a PCE will show that the only realistic option at [this] time is self-employment.

I have disregarded the possibility of a "retraining" program under 1012(2) unless retraining is deemed to include going to school (here, college). If it includes college, then I would still recommend a PCE because of the difficulties the patient has with sitting, standing walking, writing and the other physical activities required of a student in attending classes.

(Id. 5-7)

Notwithstanding Dr. Nelson's December 16th letter, on January 9, 1995, the Panel recommended "option (c), return to a related occupation suited to the claimant's education and marketable skills. . ." (Ex. 1 at 2, underlining in original.) On January 18, 1995, the Department then issued its Initial Order of Determination, adopting the Panel recommendation. (Ex. 2.) Two of the three members of the panel approved three positions as appropriate, those being hostess, hostess/cashier, and self-service gas station attendant. One member felt that the gas station attendant was not typically available because he identified only two current openings.

Claimant requested a hearing. A hearing was then held on May 24, 1995, in Billings, Montana. Twenty-two exhibits, primarily consisting of medical records, were admitted into evidence. The only witnesses were the claimant and Dr. Thomas L. Schumann. Dr. Nelson did not testify either by deposition or at the hearing.

Dr. Schumann specializes in occupational medicine. At the request of National, he conducted an independent medical examination (IME) of claimant on February 27, 1995. In addition to examining claimant he reviewed the medical records of Drs. Cook, Hart, Johnson, Nelson, See, Shaw, and Snider, and the records of chiropractor Howard Norris and physical therapist Mary Mistal. He also reviewed the notes of Sue Zimmerman,

occupational therapist, reports from Health Partners, and correspondence from Crawford & Co., including the EFC Form and the job analyses previously mentioned.

In his testimony at hearing, Dr. Schumann agreed that claimant had reached maximum medical improvement. He gave a total combined impairment rating of 10% of the whole person. The discrepancy between his rating and that of Dr. Snider was due to the difference in the edition of the AMA Guide used by the doctors. He reported that claimant had told him that she is unable to lift over 5-10 pounds and had to change position frequently. Finally, he reviewed and **approved** the job analysis for the car wash attendant. The position was actually for self-service gas station attendant, the same position previously approved by Dr. Nelson, but was based on a job audit of a position at Don's Car Wash. (Ex. 22 at 5.) Based on the claimant's report of "not feel[ing] that she could do the hostess/cashier job due to the requirement for waitressing at times," Dr. Shumann disapproved the job analysis for that position until further functional observations could be made. (Ex. 4 at 4.) However, at hearing he testified that she could perform the job of hostess/cashier, although he also felt that she should undergo a work-hardening program to determine if in fact she could carry plates. (Tr. at 16-17.)

On cross-examination the doctor was questioned closely about the basis of his opinion that claimant could do the job of a self-service gas station attendant, which is primarily a cashier position:

SCHUMANN: Umhuh. Right and based on my physical exam at that time and also talking to her, it was my opinion that she could do that.

BURRIS: Okay. But for eight hours?

SCHUMANN: Yes.

(Tr. at 25.)

Dr. Shumann's observations of claimant during his February 1995 examination differed significantly from what Dr. Nelson had reported in his December letter. In his letter Dr. Nelson described the limitations of claimant as follows:

walks with a limp, drags the right foot, squirms when sitting in a chair by having to frequently arch her back, still has to use her left hand to lift her right hand, still requires a great deal of time each day to use a heating pad, lay down to rest and take medications to name a few.

(Ex. 13 at 5.) Dr. Schumann observed and reported:

She sits for perhaps ½ hour at a time during the interview before changing positions. . . . She is able to get off and on the exam table and in and out of her chair without assistance, and she walks without apparent antalgic gait pattern. There is poor

reversal of lumbar lordosis with fairly limited forward flexion. Heel/toe walking is normal. . . . Examination of the upper extremities shows 16 kg of grip strength in the right hand and 33 kg on the left as a maximum. With rapid exchange, there's 15 mg [sic] on the right and 32 kg on the left. Two point discrimination is intact at 6 mm in all digits. She reports some tenderness over the right wrist with carpal compression but no radiation of paresthesia. Tinel's sign is negative at the wrists bilaterally. There is no tenderness to palpitation over either shoulder. There is, however, tenderness over the right trapezius muscle and right rhomboid muscle. She reports no paresthesia with pressure over the pronator area of the forearms bilaterally. There is report of mild tingling paresthesia with percussion over the ulnar nerve on the right. Adson's maneuver is negative for obliteration of pulse.

(Ex. 4 at 2-3.) At the time of the hearing the doctor explained the term "antalgic gait pattern."

SCHUMANN: Antalgic is a gait designed to decrease pain so another way of saying that would be there wasn't an apparent limp.

MAYNARD: I see, so the absence of an antalgic gait pattern --

SCHUMANN: Or she wasn't tilted to one side or, or holding her.

MAYNARD: The absence of antalgic gait pattern would number one indicate that there's no limp but would it also tend to indicate there was not significant low back pain occurring?

SCHUMANN: Well it would be possible to have low back pain and not limp, so.

MAYNARD: Did you observe the right foot dragging?

SCHUMANN: No.

MAYNARD: Would such finding be significant and be reported?

SCHUMANN: Yes.

MAYNARD: Did you observe constant squirming in the chair and frequent arching of the back?

SCHUMANN: Not constant, no.

MAYNARD: Did you observe Ms. Chapman to use her left hand to lift the right?

SCHUMANN: No.

MAYNARD: Did she seem to be able to use the right hand?

SCHUMANN: Yes.

MAYNARD: Was she able to use the right hand independently to do a grip test?

SCHUMANN: Yes.

(Tr. at 12-13.) In a similar vein when questioned about how the Adson's maneuver was performed, the doctor explained:

Holding the arm up, extending it back and turning the head the opposite direction, taking a deep breath and seeing if the, if the radial pulse is obliterated.

(/d. at 14.) The claimant was able to perform this maneuver.

In her testimony the claimant testified she has good and bad days, that she now uses her left hand when writing, and that she frequently lies down and uses the heating pad. She testified that if she does too much on one day, the next day she will have to take extra rest and use a heating pad. At the time of the hearing claimant was in her third trimester of a pregnancy, a fact, as noted by Dr. Shumann, which could affect her back pain and make her uncomfortable. Nonetheless, claimant testified that although her symptoms remain the same, she feels that she is currently managing her pain better than she was at the time of the FCE in 1990. (Tr. at 42.) She also indicated that her capacities have remained about the same since 1990. (Tr. at 52.) Finally, she acknowledged that she was uncertain about her ability to do certain tasks and stated "I guess I could try."

The hearing officer issued his Findings of Fact, Conclusions of Law, and Order on December 29, 1995. In his decision the hearing officer found that option (c) is the first appropriate option under the 1987 rehabilitation provisions. He discounted Dr. Nelson's December 1994 opinions, pointing out that they sharply contrasted with his prior opinions and his approval of three jobs. The hearing officer further noted that claimant by her own testimony stated that her limitations are essentially the same now as at the time of the 1990 FCE, which indicates that the FCE is a valid measure of her current abilities. Finally, although he observed that "claimant certainly does not appear to be the type to exaggerate her symptoms in order to avoid returning to work," he went on to point out that her responses to many questions suggested that she is not truly sure of her functional limitations. (Findings of Fact, Conclusions of Law, and Order at 16.)

Following the hearing officer's decision, the claimant appealed to this Court, alleging that the hearing officer's findings of fact are not supported by substantial evidence. National then filed a cross-appeal concerning certain evidentiary matters and the omission of findings which it believes the hearing officer should have made.

Applicable Statutes

The claimant was injured on May 16, 1989. Under the general rule that the law in effect at the time of injury must be applied in determining a claimant's entitlement to benefits, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986),

the 1987 version of the Montana Workers' Compensation Act applies to this case. Under the 1987 laws, a procedure for determining a claimant's ability to return to work was established.

Initially, section 39-71-1012, MCA (1987), set forth the purpose of the provisions and a prioritized list of options, as follows:

Rehabilitation goal and options. (1) The goal of rehabilitation services is to return a disabled worker to work, with a minimum of retraining, as soon as possible after an injury occurs.

(2) The first appropriate option among the following must be chosen for the worker:

(a) return to the same position;

(b) return to a modified position;

(c) return to a related occupation suited to the claimant's education and marketable skills;

(d) on-the-job training;

(e) short-term retraining program (less than 24 months);

(f) long-term retraining program (48 months maximum); or

(g) self-employment.

Where the injured worker has not returned to work, the matter must be referred to a rehabilitation panel for it to recommend a first appropriate option. § 39-71-1-15(3), MCA. The Department of Labor and Industry must then review the panel recommendation and issue an initial order of determination. § 39-71-1018, MCA. It may reject the panel's recommendation, but if it does so it must state reasons for the rejection. § 39-71-1018(1), MCA. Then if either the injured worker or the insurer disagree with the initial determination, a hearing may be requested, section 39-71-1018(2), MCA, as was done in this case. After the hearing officer issues the Department's final decision, either party may appeal to the Workers' Compensation Court. § 39-71-1018(4), MCA.

Standard of Review

Section 39-71-1018, MCA (1987), provides for an appeal to the Workers' Compensation Court from the Department's final order. Review of that Order is governed by section 2-4-704 (2), MCA. As relevant to the present appeal, it provides:

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the

agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

....

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

....

As a general rule, when reviewing a decision under the clearly erroneous standard of review, the hearing officer's findings of fact may be overturned only where they are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85, 88 (1992). The Court will not reweigh the evidence; the findings will be upheld if they are supported by substantial credible evidence in the record. *Nelson v. Semitool, Inc.*, 252 Mont. 286, 289, 829 P.2d 1, 3 (1992).

Discussion

Relying heavily on Dr. Nelson's December 1994 letter, the claimant argues on appeal that the hearing officer's option (c) finding is not supported by substantial evidence. (Notice of Appeal, January 8, 1996; Appellant's Opening Brief.) As noted in the previous paragraph, this Court may not reweigh the evidence or substitute its own view of the facts for those of the hearing officer. The findings must be upheld "if they are supported by substantial credible evidence in the record."

Claimant argues that the hearing officer improperly disregarded the opinions of her physician, Dr. Nelson, and in particular Dr. Nelson's December 16, 1994 letter. The Supreme Court in its recent decision in *Kloepfer v. Lumbermens's Mutual Casualty Co.*, 53 St. Rep. 486, 487 (Mont. 1996), discussed the evidentiary weight of a treating physician's testimony.

As a general rule we have held that the testimony of a treating physician is entitled to greater evidentiary weight. *Pepion v. Blackfeet Tribal Industries* (1993), 257 Mont. 485, 489, 850 P.2d 299, 302. Nevertheless, a treating physician's opinion is not conclusive. To presume otherwise would quash the role of the fact finder in questions of an alleged injury.

In this case the evidence from Dr. Nelson is contradictory. Dr. Nelson's office notes and his **approval** of the three positions support the hearing officer's determination and are inconsistent with the doctor's letter of December 16th. Dr. Nelson did not testify and claimant offered no explanation for the contradictions. The hearing

officer specifically addressed the contradictions and assigned little weight to Dr. Nelson's December opinions.

The medical opinions contained in the record are generally very supportive of the claimant returning to work under Option (c); however, Dr. Nelson's 12/16/94 letter shows a 180° shift from his position of less than one year earlier. In the meantime, his office notes do not reveal any marked change in the claimant's condition. This contradiction is a dilemma, particularly due to the fact Dr. Nelson is the treating physician. All other medical documentation in the record, **including that generated by Dr. Nelson**, is consistent in demonstrating the claimant is now capable of returning to work in the positions identified.

It is concluded Dr. Nelson's 12/16/94 letter can be given little weight. Never had he previously mentioned such extreme limitations with regard to the claimant's abilities and endurance. His comment that he totally disagrees with the suggestion she return to work as a waitress, hostess, or clerk would essentially convert all previous research, tests and expert opinions in this regard to mere gibberish. Within the context of the record as a whole, to give full weight to this aberration would result in an incorrect conclusion.

(Finding of Fact, Conclusions of Law, and Order at 16-17; emphasis added.)

On the other hand, the hearing officer heard testimony from Dr. Schumann, who testified as to claimant's ability to perform at least one of the jobs approved by the panel. Under the circumstances of this case, the hearing officer was justified in rejecting Dr. Nelson's December 16th opinions.

Moreover, other medical evidence supported his determination. Dr. Nelson, as noted, had previously approved the job of self-service gas station attendant. The 1990 FCE also supported a conclusion that claimant has residual physical abilities which are compatible with the position, and claimant herself testified that her physical condition is little different now than at the time of the 1990 FCE. She also indicated that she manages her pain better now than in 1990 and expressed uncertainty as to what she can truly do.

The hearing officer's finding that claimant is capable of working as a self-service gas station attendant, and his corollary conclusion that option (c) is the first appropriate option, are supported by substantial evidence and are not clearly erroneous.

Since National does not argue that option (a) or (b) is appropriate in this case, it is unnecessary to address its assignments of error.

ORDER

1. The December 29, 1995 decision of the hearing officer is **affirmed**.

2. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

3. This ORDER is certified as final for purposes of appeal pursuant to ARM 24.5.348.

Dated in Helena, Montana, this 25th day of June, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Don Edgar Burris

Mr. William J. Mattix

Ms. Christine L. Noland

Mr. Brian McCullough - Zip Mail

Submitted: March 22, 1996

1. Respondent does not specifically identify the findings of fact to which it objects. Apparently they include #2 and #27, but the reference to claimant's credibility is not found in the findings. There is a reference in the conclusions of law which is merely an observation that she "certainly does not appear to be the type to exaggerate her symptoms in order to avoid returning to work."

2. There is no explanation why it took so long to request rehabilitation panel review.