

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 50

WCC No. 9703-7728

DENNIS DesJARDINS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE

Respondent/Insurer for

WI FOREST PRODUCTS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 56-year old clean-up laborer, whose prior work included truck driving, labor, welding, and field work, claimed permanent total disability after injury to his knee, back, and shoulders. Claimant had a history of prior back and shoulder injury, including two surgeries.

Held: Claimant found presently permanently totally disabled. Credible testimony from claimant, his wife, and another individual convinced the Court claimant suffers constant, chronic back pain that severely limits his activities. While the insurer presented a videotape showing claimant engaged in shooting, riding a four-wheeler, and other activities at a Rendezvous outing, the video did not contradict or impeach claimant's testimony concerning his activities, but showed him to move slowly, stiffly, and gingerly. None of the physicians evaluating claimant questioned his reports of pain, although one opined he could work, albeit in only four-hour stints with time allowed for significant rest. Particularly when considered in light of vocational evidence, the medical evidence convinced the Court claimant had "no reasonable prospect of physically performing regular employment" in any work that would be available to him. §39-71-116(19), MCA (1993). While he did continue to engage in knife-making activities, and sold or traded some knives, the Court was persuaded claimant had no reasonable prospect of earning any regular income through knife-making.

Topics:

Benefits: Permanent Total Disability: Generally. 56-year old laborer found permanently totally disabled where both lay and medical witnesses convinced Court claimant suffers from chronic back pain severely limiting his activities. While the insurer presented a videotape showing claimant engaged in shooting, riding a four-wheeler, and other activities at a Rendezvous outing, the video showed him to move slowly, stiffly, and gingerly. None of the physicians questioned his reports of pain, although one opined he could work, albeit only in four-hour stints with time allowed for significant rest. Particularly when considered in light of vocational evidence, the medical evidence demonstrated claimant had "no reasonable prospect of physically performing regular employment" in any work that would be available to him. §39-71-116(19), MCA (1993). While he did continue to engage in knife-making activities, and sold or traded some knives, the Court was persuaded claimant had no reasonable prospect of earning any regular income through knife-making.

Medical Conditions (By Specific Condition): Pain. 56-year old laborer found permanently totally disabled where both lay and medical witnesses convinced Court claimant suffers from chronic back pain severely limiting his activities. While the insurer presented a videotape showing claimant engaged in shooting, riding a four-wheeler, and other activities at a Rendezvous outing, the video showed him to move slowly, stiffly, and gingerly. None of the physicians questioned his reports of pain, although one opined he could work, albeit only in four-hour stints with time allowed for significant rest. Particularly when considered in light of vocational evidence, the medical evidence demonstrated claimant had "no reasonable prospect of physically performing regular employment" in any work that would be available to him. §39-71-116(19), MCA (1993); *Killooy v. Reliance Nat'l Indem.*, 278 Mont. 88, 923 P.2d 531 (1996) (pain is a factor that must be considered in terminating PPD status).

Surveillance. 56-year old laborer found permanently totally disabled where both lay and medical witnesses convinced Court claimant suffers from chronic back pain severely limiting his activities. While the insurer presented a videotape showing claimant engaged in shooting, riding a four-wheeler, and other activities at a Rendezvous outing, the video did not contradict or impeach claimant's testimony concerning his activities, but showed him to move slowly, stiffly, and gingerly.

Vocational – Return to Work Matters: Employability. 56-year old laborer found permanently totally disabled where both lay and medical witnesses convinced Court claimant suffers from chronic back pain severely limiting his activities. None of the physicians questioned his reports of pain, although one opined he could work, albeit only in four-hour stints with time allowed for significant rest. Particularly when considered in light of vocational evidence, the medical evidence

demonstrated claimant had "no reasonable prospect of physically performing regular employment" in any work that would be available to him. §39-71-116(19), MCA (1993). While he did continue to engage in knife-making activities, and sold or traded some knives, the Court was persuaded claimant had no reasonable prospect of earning any regular income through knife-making.

The trial in this matter was held in Missoula, Montana, on July 1, 1997. Petitioner, Dennis DesJardins (claimant), was present and represented by Mr. Andrew F. Scott and Mr. Thomas C. Bulman. Respondent, Liberty Northwest Insurance (Liberty), was represented by Mr. Robert E. Sheridan. No transcript of the trial has been prepared.

Exhibits: Exhibits 1 through 23 were admitted without objection.

Witnesses and Depositions: Claimant, Maria DesJardins (claimant's wife), Wendell Larson, Dr. Dana Headapohl, William Goodrich and Richard Smith were sworn and testified. In addition the parties submitted the depositions of claimant, Dr. Carl Albertson and Dr. Mark Heppe to the Court for its consideration.

Issues Presented: Claimant asks that the Court determine him to be permanently totally disabled due to severe chronic pain caused by an industrial injury he suffered on October 8, 1993.

* * * * *

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 56 years old and resides in Plains, Montana, with his wife, Maria DesJardins.
2. Claimant did not graduate from high school but has a GED. He attended Clark Junior College in Vancouver, Washington, in the mid-1970s, where he received a certificate of proficiency in auto mechanics. He also attended a commercial driving school in Portland, Oregon, where he obtained his over-the-road driver's license. Claimant took machinist classes at Helena Vo-Tech in the early 1980s.
3. Claimant has worked as a truck driver, mechanic, general laborer, welder and fabricator, and as a laborer and a field manager at a nursery. He also worked at the Crown Zellerbach paper mill in Camas, Washington, for ten years.
4. In 1990 the claimant began working at the WI Forest Products lumber mill in Thompson Falls, Montana. During his tenure at the mill, he worked several different jobs, including the green chain, cleanup, and picking up wedges.

Prior Back and Shoulder Injuries

5. Claimant has a history of back and shoulder injuries. Those injuries are not at issue in this case as it is uncontested that claimant suffered new back and shoulder injuries while employed by WI Forest Products; however, they contribute to his overall physical ailments and the chronicity of those ailments. Therefore, they are catalogued in the following findings.

6. Claimant injured his back while working for the Crown Zellerbach Mill in the 1960s. As a result of that injury, he had a laminectomy and a discectomy. (DesJardins Dep. at 21.) Following surgery, he wore a full back brace for a year; however, he was not restricted in his activities. (*Id.* at 32.)

7. Claimant reinjured his back while working at Hydro Storage, Inc., in the 1980s. That injury was treated by physical therapy and chiropractic. (*Id.* at 21.)

8. Claimant injured his left shoulder in November of 1990 while working at WI Forest Products. (*Id.* at 22.) Dr. Carl Albertson diagnosed an impingement of the shoulder and a possible rotator cuff tear. (Ex. 1 at 1.) He performed a Mumford procedure, removing the end of the collarbone, on January 6, 1992. (Albertson Dep. at 7; Ex. 6 at 7.) Dr. Albertson restricted claimant from returning to work on the green chain at the mill, but released claimant to perform cleanup work. (Ex. 1 at 6.)

The October 8, 1993 Injury

9. Claimant was injured in the course and scope of his employment with WI Forest Products on October 8, 1993. He fell off a table while attempting to clear a jammed machine and sustained injuries to his knee, back, and both shoulders.

10. At the time of claimant's industrial injury, WI Forest Products was insured by Liberty. Liberty accepted liability for the injury and paid medical expenses and temporary wage-loss benefits. Liberty is currently paying permanent partial disability and medical benefits. It denies that claimant is permanently totally disabled.

Medical Treatment after the October 8, 1993 Industrial Injury

11. Claimant initially sought medical care for his October 8, 1993 injury from his family physician, Dr. Mark Heppe. Dr. Heppe diagnosed claimant as suffering from a rotator cuff tear and a soft tissue injury of the lower back. (Ex. 2 at 8.) He took claimant off work and prescribed rest and several medications: Ibuprofen, Soma (a muscle relaxant), and Vicodin (a narcotic analgesic). (*Id.*; Heppe Dep. at 10.) When claimant's right shoulder and back failed to improve, Dr. Heppe referred claimant to Dr. George Ingham, who is an orthopedic surgeon. (*Id.* at 9-10.)

12. Dr. Ingham evaluated claimant on November 5, 1993. His impressions were as follows:

IMPRESSION:

1. Grade 1-2 rotator cuff strain. RO cuff tear with subacute subdeltoid bursitis.
2. Status post-apparent laminectomy L5-S1 left.
3. Suspect S1 radiculopathy on the R, probably secondary to recurrent disc.

(Ex. 4 at 2.) Dr. Ingham suggested conservative treatment, including physical therapy and continuation of the medications prescribed by Dr. Heppe.

13. Dr. Read Vaughan performed an MRI on claimant's low back on November 29, 1993.

(Ex. 5.) Dr. Vaughan noted:

Mild disc space narrowing and degenerative signal at L4-5 with a small amount of post surgical fibrosis dorsally around the sac. Minor annular bulge without evidence of disc herniation, spinal stenosis or specific site of nerve root encroachment.

(Ex. 5 at 1.)

14. Claimant returned to light-duty work on December 6, 1993. During the following week of work, he experienced increased low-back pain (ex. 2 at 13) and thereafter ceased working.

15. Claimant continued to experience low-back pain, which radiated into his right leg. He then submitted to an epidural steroid injection; however, the injection provided little relief. (*Id.* at 15.)

16. Upon Dr. Heppe's referral, the claimant was examined on March 22, 1994, and again on March 30, 1994, by Dr. Michael Lahey, an orthopedic surgeon. (Ex. 9 at 2-3.) Dr. Lahey offered claimant several treatment options, including bilateral surgical decompression foraminotomies at the L4-5 level. (*Id.* at 3.) Claimant elected to have surgery and in April 1994, Dr. Lahey performed laminectomies and foraminotomies at the L4-5 level. (*Id.* at 4.)

17. Dr. Lahey also treated claimant for his shoulder complaints. On June 15, 1994, he carried out subacromial injections of claimant's shoulders in an effort to relieve his shoulder pain. (*Id.* at 5.)

18. Despite surgery and the shoulder injections, claimant continued to suffer low-back pain, pain in his right thigh, and shoulder pain. (*Id.*)

19. When claimant did not improve, on July 25, 1994, Dr. Lahey referred him to Dr. Aaron Sable, a physiatrist specializing in chronic pain due to musculoskeletal conditions. (*Id.* at 6.) Dr. Lahey's referral note reads:

RECOMMENDATION: Dennis clearly represents a complicated pt who has had surgical procedures without demonstrable long-term benefit. At this point, I believe

that further work-ups or surgical treatment is not reasonable, and I believe he should be referred to Dr. Aaron Sable, physiatrist specializing in chronic painful musculoskeletal conditions. He may require medication, but certainly requires assistance in vocational assessment. Dennis is comfortable with this approach. If there is any further need for surgical treatment, then I would be happy to see him back. Otherwise his further care will be deferred to Dr. Sable.

(*Id.*)

20. Dr. Sable evaluated claimant on August 23, 1994. (Ex. 3 at 8.) He diagnosed claimant with chronic low-back and left shoulder pain. He prescribed Zostrix, an analgesic, and Baclofen, a muscle relaxant, as well as physical therapy and exercises. (*Id.* at 11.)

21. Dr. Sable saw claimant in follow-up on November 17, 1994. (*Id.* at 14.) He noted continued low-back pain with radiation into his left leg and left shoulder pain. (*Id.*)

22. Dr. Sable saw claimant a final time on February 8, 1995. At that time claimant was continuing to complain of low-back pain with radiation into his lower extremities and occasional leg cramps. (*Id.* at 16.) Dr. Sable modified his medications. (*Id.* at 16-17.) Aware of claimant's interest in knife making, Dr. Sable also encouraged claimant to pursue an educational program in knife forging. (*Id.*)

23. Claimant thereafter returned to his regular physician, Dr. Mark Heppe, for further care. Dr. Heppe saw claimant on March 2, 1995, primarily with respect to claimant's continuing shoulder pain but also to review his back complaints. (Ex. 2 at 16.) He modified claimant's medications, prescribed a trial of a TENS unit for his back, and recommended further injections of his shoulders. (*Id.*)

24. Since March 2, 1995, Dr. Heppe has continued to treat claimant, principally with medication. Dr. Heppe stated that claimant's general course of treatment was "frustrating" in that claimant "really [had] no functionally meaningful improvement over the course of the next two years." (Heppe Dep. at 13.) He said that claimant's functional level was "markedly limited, predominantly by low back pain and leg pain for physical -- limited for physical activity." (*Id.*) He believes that scar tissue from claimant's low-back surgeries is impinging on nerve roots, causing claimant's pain. (*Id.*) Dr. Heppe agrees with Dr. Lahey that claimant is not a candidate for further back surgery. (*Id.*) As of April 27, 1997, Dr. Heppe diagnosed claimant with "chronic low back pain, not significantly improved, persistent radiculopathy in [the] left leg, and exogenous obesity which was increasing." (*Id.*)

25. Claimant has also received further treatment for his shoulder and knee pain from Dr. Carl Albertson. Dr. Albertson recommended and performed an acromioplasty (removal of bone under the acromion) on claimant's left shoulder on June 20, 1995. (Albertson Dep. at 10; Ex. 6 at 24.) He performed an acromioplasty on claimant's right shoulder in December of 1995. (Ex. 1 at 9; Ex. 6 at 27.) Post-surgery he rendered a 3% impairment rating with

respect to claimant's right shoulder and restricted claimant from repetitive, over-the-shoulder lifting. (Albertson Dep. at 20.) Dr. Albertson also performed arthroscopic surgery on claimant's left knee on February 13, 1996, removing a torn portion of claimant's meniscus. (Albertson Dep. at 16; Ex. 6 at 31.) After surgery Dr. Albertson rendered a 1% impairment rating with respect to the knee but released claimant to full activities with no restrictions with regard to the knee. (Ex. 1 at 10.) Claimant's shoulder and knee injuries are not the basis of his total disability claim.

Medical Panel Evaluation

26. At the request of Liberty, claimant was examined by a Missoula medical panel. Dr. Dana Headapohl coordinated the examination, which took place in August and September of 1995. The IME medical panel consisted of Dr. Martin Cheattle, Dr. E.B. Russo, Dr. Headapohl, Dr. Chris Mack, and Dr. Timothy Browne. (Exs. 12-14.)

27. The IME medical panel recommended decompressive surgery on the right shoulder and arthroscopic evaluation of his left knee. (Ex. 13 at 7.) This recommendation was made prior to Dr. Albertson's surgery on claimant's shoulders and knee. With respect to the claimant's back, the panel concluded that claimant has "[c]hronic low back pain with no neurologic compromise." (*Id.*) Dr. Headapohl's impression was "[c]hronic low back pain with radiation bilaterally into both thighs, radiation on the left into the left lower posterior calf, rule out radiculopathy." (*Id.* at 6.) Dr. Browne, the orthopedist, wrote, "Mechanical low back pain, status post multiple surgeries with radicular pain into the right leg." (Ex. 14 at 2.)

28. Dr. Headapohl performed a follow-up examination of claimant on June 20, 1996. (Ex. 13 at 9.) She found that claimant's condition had improved but that he still suffered chronic low-back pain. (*Id.* at 10.)

Disability -- Lay Testimony

29. Claimant presented testimony concerning his activities and his physical condition. In addition to claimant, claimant's wife and Wendell Larson described his activities and his limitations. The testimony showed the following, which are found as facts.,

30. Claimant suffers constant, chronic back pain, which is generally more severe in the evening. He has trouble sitting or standing for prolonged periods of time. His pain increases with the amount of his activities. For example, following a functional capacities evaluation he suffered increased pain and was unable to perform his normal activities for several days.

31. For the past ten or eleven years, the claimant has made knives as a hobby, selling and trading some of them. He has a knife making shop adjacent to his home. He is able to work at knife making on the average of two to three hours a day, usually starting at 11:00 a.m. He lays down or naps after his work, and on some days he does additional knife work or yard

work in the afternoon. He mows his lawn using a riding lawn mower. Mowing takes one to one and a half hours twice a week.

32. Claimant is unable to engage in full-time knife making or other productive activities on a continuous basis. He paces himself, and his activities are typically limited to two to four hours a day. When he exceeds that amount of activity, his pain becomes intense and he may then resort to Demoral, which is a narcotic drug prescribed by his physician. He may also be virtually bedridden for a couple of days after excessive activity.

33. In an attempt to establish his knife making as a paying vocation, the claimant attended a six-week school in knife making in the spring of 1995. The school was full time, but on several days the claimant was unable to complete a full day and had to return to his motel to rest. During the school he wore a TENS unit and regularly took pain medication. For a month after the school, he suffered increased pain and was unable to do his regular activities.

34. Claimant's pain has significantly interfered with his physical relations with his wife. He is also irritable, especially towards the end of the day and on days when he has been more active. He and his wife went dancing before his injury, now they do not. Claimant helped with household chores before his injury, now he does not.

35. Claimant has difficulty putting on his shoes and his wife helps him put them on.

36. Claimant's sleep is disrupted by his pain. He tosses and turns and wakens during the night.

37. As a result of his pain, claimant has had to severely curtail his recreational activities. While he still hunts, he does so only for very short periods of time and walks short distances. He occasionally fishes but for short periods. He occasionally plays horseshoes, but only two games. He also continues to attend Rendezvous, which he attended prior to his injury. He camps out during the Rendezvous, but others put up his tent and he sleeps on a large air mattress on a bed frame. (Prior to his injury he slept on the ground in a tepee.) He continues to participate in black powder shoots at the Rendezvous. A video surveillance tape (exhibit 19) taken of claimant at the July 1995 Rendezvous shows that the shooting events are short, lasting minutes. The video tape shows claimant riding a four-wheeler for a few minutes, but at slow speeds, to check targets. The tape further shows claimant moving slowly, with deliberation and a hint of a limp, movements which are compatible with his reports of pain during his activities.⁽¹⁾

38. Claimant testified that he does as much he can. He testified that despite his injury and pain he is "not dead" and intends to continue to engage in as many activities as he can.

39. Claimant and his witnesses were credible. I find that claimant is doing as much as his pain allows him to do and that at present he can do no more.

Other Verification of Claimant's Pain

40. Dr. Albertson did not doubt claimant's complaints of pain. (Albertson Dep. at 25.) Dr. Heppe did not doubt claimant's complaints of pain other than for the fact that he had recently participated in a Rendezvous. (Ex. 2 at 15, 28.) Dr. Headapohl testified that she did not have any reason to doubt claimant's complaints of pain. (Trial Test.)

41. Richard Smith, a physical therapist, performed a functional capacities evaluation (FCE) on June 17 and 18, 1997 (ex. 16) and noted "**Mr. DesJardins [claimant] demonstrated a significantly high degree of pain behavior, but it seemed to be appropriate and legitimate.**" (*Id.* at 4, emphasis added.) Moreover, Mr. Smith stated that claimant's Waddell signs were "negative" indicating that claimant was not exaggerating his pain. (Trial Test.)

42. I observed claimant carefully during trial. I was impressed by unconscious behavior indicating that claimant was attempting to control his pain. During his testimony, while he was fully concentrating on listening to and answering questions, I noted claimant rubbed one or the other of his legs with his hands, in a soothing sort of motion. I also noted that he attempted to sit stoically during the trial, but I saw that he was in discomfort. His discomfort was not exaggerated or contrived, if anything it was suppressed.

Expert Opinions Concerning Disability

43. Physical therapist, Jay G. Shaver, performed a FCE on November 1 and 2, 1994. (Ex. 10 at 4.) He approved the job positions for knife maker (*id.* at 8), electrical assembler (*id.* at 11), service writer (*id.* at 13), and gunsmith (*id.* at 15).

44. On November 17, 1994, Dr. Sable reviewed several job analyses submitted to him by Liberty's adjuster. He approved some and disapproved others:

Have reviewed [the] job analysis. Would approve of gunsmith position. Does not appear that he can do the clean-up position. However, I would continue to restrict him to light-duty clean-up position two hours a day until something else can be found. Would approve service writer. Disapprove of security guard. Approve of electrical assembler. Disapprove of auto parts, counter clerk. Disapprove of assembler, small products. Approve of knife maker.

(Ex. 3 at 15.)

45. At Liberty's request, Dr. Albertson reviewed the job analyses for service writer, knife maker, electrical assembler, auto parts counter clerk, and security guard/night watchman and approved all of them. (Albertson Dep. at 18; Dep. Exs. 1 and 2.) However, Dr. Albertson did not treat claimant for his low-back injury and was unable to comment on the cumulative effect of claimant's injuries. (Albertson Dep. at 21 and 25.)

46. Dr. Headapohl approved the knife making position and the service writer position *if it could be modified*. She did not approve the electrical assembler, the auto parts counter clerk, or the security guard/night watchman position. (Trial Test.) Dr. Headapohl testified that the knife making position was particularly appropriate for claimant because he could make his own hours. She opined that claimant should be able to work eight hours a day if he takes rest breaks.

47. Richard L. Smith, who performed the FCE on June 17 and 18, 1997, concluded that claimant's "significant abilities" included good hand grip strength and coordination bilaterally, good ability to sit, and good ability to lift and carry 10 pounds. (Ex. 16 at 5.) He approved the job analysis of knife maker for claimant despite the fact that the job would require claimant to sit for long periods of time. Smith testified that he extrapolated from claimant's ability to sit for 45 minutes during the FCE that claimant could sit for six to eight hours a day. He testified that claimant's difficulty in performing knife making activities for more than three hours a day may be due to his working in a sub-ergonomic workplace. Smith also approved the position of keno caller. He disapproved the positions of motel desk clerk, casino cashier, bus driver, airline security specialist, and parking lot cashier as they were originally presented to him. (Trial Test.)

48. Dr. Albertson questioned the FCE in terms of how well it tests repetitive functions. (Albertson Dep. at 26-27.) He stated that "[i]t's pretty good for testing strength and range of motion in a specific skill, but it doesn't spend time at a repetitive post, doing a repetitive motion. There may be an error in those areas." (*Id.*)

49. Dr. Heppe reviewed the positions that Dr. Albertson approved (Heppe dep., ex. 1) and did not approve any of the positions for claimant full-time. (Heppe Dep. at 14.) Dr. Heppe explained as follows:

I don't think that he [claimant] would have the endurance to tolerate the pain that would be incurred with the amount of sitting, standing and walking. In other words, he is -- As I understand it, he gets through a day by interrupting the weight-bearing activities, which all three of those are, for his back by getting down, laying down and getting the weight off. And so I don't think at the moment he could handle that many hours a day of weight-bearing activity.

(*Id.* at 14-15.) Dr. Heppe further testified that he believed that claimant can perform only two to three hours of weight-bearing activity due to his chronic pain. (*Id.*)

50. Dr. Catherine C. Capps examined claimant on August 20, 1996, at the request of claimant's attorney. (Ex. 15.) Dr. Capps indicated that she evaluated claimant in order to form an opinion on whether he could return to work. In that regard, she wrote:

Certainly between the shoulder condition and the low back area, **it would be difficult to find gainful employment with the numerous restrictions he would**

require for each body part. For the shoulder condition he could not do a lot of at or above shoulder reaching and lifting. For the low back area he should avoid repetitive bending, twisting, stooping, as well as any lifting in excess of 25 pounds. He would also need to alternate sitting and standing.

(*Id.* at 4, emphasis added.)

51. William Goodrich, a vocational counselor employed by Liberty, conceded that there are barriers to claimant obtaining employment. Those barriers include claimant's age and his physical condition, potential absenteeism, and claimant's long absence from employment.

Knife Making as a Vocation

52. Claimant's knife making hobby has produced meager income. It is doubtful that the income exceeds expenses, more likely the expenses exceed the income. He makes twenty to thirty knives a year, selling them for between \$50 and \$400, and sometimes trading them. The costs of his material per knife range from \$6 for a low-priced knife to \$125. These amounts do not include the cost of equipment or the cost of heating and electricity.

53. William Goodrich testified, and I find, that the knife maker position is not available to claimant in the competitive labor market.

54. Claimant testified credibly, and I find, that it takes years for an independent knife maker to build up a reputation and profitable business. I therefore find that even if claimant were able to engage in full-time knife making, self-employment is unrealistic.

Maximum Healing

55. The parties have stipulated that claimant has reached MMI (uncontested fact 3) and the medical evidence supports that conclusion.

Resolution

56. After considering all the evidence presented in this case, I find that claimant is presently permanently totally disabled.

57. The evidence that claimant suffers continual pain is overwhelming. His pain was evident in the courtroom. It was verified by the medical witnesses.

58. It was also apparent to me that claimant would genuinely like to engage in full-time employment if he could, and he made a good faith effort to obtain training with a view to becoming a full-time knife maker. He is no slacker.

59. Claimant's treating physician, Dr. Heppe, testified that on account of pain the claimant can engage in only three hours of productive, weight bearing activity (sitting, standing, and walking). Dr. Heppe treated claimant over a long period of time and is most familiar with his conditions. His testimony closely correlates with claimant's actual activities.

60. Dr. Capps astutely observed that claimant would have difficulty obtaining employment. (Ex. 15.)

61. While opining that claimant can work, Dr. Headapohl nonetheless provided persuasive testimony supporting claimant's claim of disability. She approved only two positions, knife maker and service writer, but approved the latter position only if it can be modified. She also identified two other positions that might be suitable but only if modified. One of those positions was keno caller, but she said that claimant could work at that position only if broken into two four-hour shifts so that he could rest in between the shifts. She testified as to claimant's need to take rest breaks and that self-employment as a knife maker presents the best prospect of employment for claimant since it allows him to take breaks and work at his own pace. Her testimony persuaded me that claimant's only realistic opportunity for work is self-employment as a knife maker.

62. Claimant is working at knife making but his pain limits him to working two to three hours a day on the average. Tolerance of pain is individual, and the evidence persuades me that claimant is working at the limits of his tolerance.

63. There is credible evidence, principally from Richard Smith, that changes in the physical setup of claimant's knife making shop, for example a better chair, would make his shop more ergonomic, which in turn would put less stress on his back and enable him to work up to eight hours a day. There is also medical evidence that claimant would benefit from weight loss, which would result in less strain on his back, and medication changes. I am persuaded that such changes would benefit claimant and that they **may** enable him to work longer hours, but I am not persuaded that they **will** enable him to regularly work eight hours a day even in his home shop. Moreover, as I have previously found, self-employment as a knife maker does not provide a realistic income opportunity.

Reasonableness of Insurer's Conduct

64. The insurer has not acted unreasonably in contesting claimant's entitlement to permanent total disability benefits. While I have found against the insurer, it mustered credible medical evidence which would support a finding that claimant is not permanently totally disabled.

CONCLUSIONS OF LAW

1. Claimant's injury is governed by the 1993 version of the Workers' Compensation Act. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 319, 321, 730 P.2d 380, 382 (1986).

2. Claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

3. Permanent total disability is defined under the Montana Workers' Compensation Act as:

. . . a condition resulting from injury as defined in this chapter, after a worker reaches maximum medical healing, in which a worker does not have a **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.

§ 39-71-116(19), MCA (1993) (emphasis added). Section 39-71-702(2), MCA (1993), provides that a "determination of permanent total disability must be supported by a preponderance of medical evidence."

Pain is a factor the Court must consider in determining whether claimant is permanently totally disabled. *Killooy v. Reliance Nat'l Indem.*, 278 Mont. 88, 923 P.2d 531 (1996). Section 39-71-116(19), MCA, as quoted above, requires claimant to prove that he has no "reasonable prospect of **physically performing regular employment**." Pain, however, may be so severe for some individuals that it renders them physically incapable of performing their job duties, so it must be considered.

4. A preponderance of medical evidence verified claimant's reported levels of pain and that his pain interferes with his physical ability to work at regular employment. Claimant's treating physician, who knows claimant best, verified claimant's inability to engage in even sedentary type activities for more than three hours a day. I am satisfied that claimant has "no reasonable prospect of physically performing regular employment" and that he is, and has been since reaching maximum medical improvement, permanently totally disabled.

JUDGMENT

1. Claimant is presently permanently totally disabled and has been since he reached maximum medical improvement. Respondent shall therefore institute permanent total disability benefits forthwith and shall pay claimant, in a lump sum, retroactive permanent total disability benefits to the date it ceased paying temporary total disability benefits, subject to an offset for the amounts paid as permanent partial disability benefits. I make no determination concerning the claimant's proper permanent total disability rate. I retain continuing jurisdiction to determine the actual amount due in the event the parties are unable to agree as to the amount.

2. Claimant is not entitled to attorney fees since the insurer's conduct was not unreasonable, § 39-71-612, MCA, in accordance with ARM 24.5.343.

3. Claimant is entitled to costs in an amount to be determined by the Court.

4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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 12th day of September, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Andrew F. Scott

Mr. Robert E. Sheridan

Date Submitted: July 1, 1997

1. After reviewing the surveillance video, I made the following notes, which I reproduce here:

I have reviewed the video of claimant attending a Rendezvous in late July 1995 and playing horseshoes in early August 1995. The video does not contradict or impeach claimant's testimony concerning his activities. In the sequences where claimant is clearly in view, he moves slowly, stiffly and gingerly, with the hint of a limp when walking. He engages in no strenuous activity. His stint on a four-wheeler is at slow speed and lasts only a few minutes. Mostly, claimant is standing around. The shooting events consisted of five shots, lasting a minute each.