

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 29

WCC No. 2002-0704

RUBEN FELLEBERG

Petitioner

vs.

TRANSPORTATION INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 04/12/05

Fellenberg v. Transportation Ins. Co., 2005 MT 90

Summary: The claimant worked for W.R. Grace at its Libby mine until 1986 when he retired. In 1985 he was diagnosed with asbestosis and filed an occupational disease claim. At the time the disease did not preclude him from working and his subsequent retirement was not due to his disease but rather to his desire to simply retire. Over the years since his retirement, the claimant's asbestos lung disease has progressed such that he is now on occasional supplemental oxygen and limited to sedentary work. He is doing volunteer bookkeeping ten hours a week and he is able to drive, cook, shop, and do household chores even though he is short of breath. He now seeks an impairment award, permanent partial disability benefits and, in the alternative, permanent or temporary total disability benefits. Medical benefits are not at issue.

Held: The 1983 law governs the claimant's requests since that was the law in effect at the time he filed his claim. Under that law, he is not entitled to an impairment award since that award is part of permanent partial disability benefits and permanent partial disability benefits are not available under the 1983 Occupational Disease Act, at least until such time as the claimant becomes permanently totally disabled. Similarly, non-impairment permanent partial disability benefits are unavailable. Since the claimant's condition is degenerative and will never improve with any further treatment he has been at maximum medical improvement (MMI) virtually since he was diagnosed with asbestosis and is therefore not entitled to temporary total disability (TTD) benefits. As to his request for permanent total disability (PTD) benefits, he has not proven to the Court's satisfaction that he has a wage loss attributable to his disease (he voluntarily retired and removed himself

from the labor market) or that he has no reasonable prospect of obtaining even sedentary jobs if he decided to return to the labor market, therefore he is not entitled to PTD benefits.

Topics:

Benefits: Occupational Diseases. Under the 1983 Occupational Disease Act (ODA), claimants suffering from occupational diseases are entitled to temporary and permanent total disability benefits to the same extent as claimants who suffer injuries compensable under the 1983 Workers' Compensation Act. § 39-72-701, MCA (1981-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-72-701, MCA (1981-2003). Under the 1983 Occupational Disease Act (ODA), claimants suffering from occupational diseases are entitled to temporary and permanent total disability benefits to the same extent as claimants who suffer injuries compensable under the 1983 Workers' Compensation Act (WCA).

Maximum Medical Improvement: When Reached. Where the claimant suffers from a degenerative, progressive occupational disease that will never get better with any medical treatment, he is at maximum medical improvement (MMI).

Benefits: Temporary Total Benefits. Where the claimant suffers from a degenerative, progressive occupational disease that will never get better with any medical treatment, he is at maximum medical improvement (MMI) and is not entitled to temporary total disability benefits.

Benefits: Permanent Total Benefits. Under the 1983 law, where a claimant suffering from an occupational disease voluntarily retired and removed himself from the labor market long before the onset of alleged permanent total disability, he has not suffered a wage loss attributable to his occupational disease and is not entitled to permanent total disability benefits on that basis. He also failed to provide persuasive evidence that he has no reasonable prospect of employment should he decide to return to the labor market and is therefore not entitled to permanent total disability benefits on that basis. § 39-71-116(13), MCA (1981-1983).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-116(13), MCA (1981-1983). Under the 1983 law, where a claimant suffering from an occupational disease voluntarily retired and removed himself from the labor market long before the onset of alleged permanent total disability, he has not suffered a wage loss attributable to his occupational disease and is not entitled to permanent total disability benefits on that basis. He also failed to provide persuasive evidence that he has no reasonable prospect of employment should he decide to return to the labor market and is therefore not entitled to permanent total disability benefits on that basis.

Benefits: Impairment Awards. Under the 1983 law, impairment awards are permanent partial disability benefits. *Grimshaw v. L. Peter Larson Co.*, 213 Mont. 291, 691 P.2d 805 (1984).

Cases Discussed: *Grimshaw v. L. Peter Larson Co.*, 213 Mont. 291, 691 P.2d 805 (1984). Under the 1983 law, impairment awards are permanent partial disability benefits.

Benefits: Impairment Awards. Impairment awards are payable to permanently totally disabled claimants under the 1983 Workers' Compensation Act. *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986). Since the Occupational Disease Act (ODA) provides for payment of permanent total disability benefits, impairment awards may be available under 1983 law to claimants who suffer from occupational diseases which are permanently totally disabling.

Cases Discussed: *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986). Impairment awards are payable to permanently totally disabled claimants under the 1983 Workers' Compensation Act (WCA). Since the Occupational Disease Act (ODA) provides for payment of permanent total disability benefits, impairment awards may be available under the 1983 law to claimants who suffer from occupational diseases which are permanently totally disabling.

Constitutional Law: Equal Protection. The Supreme Court rejected equal protection challenges to the Occupational Disease Act (ODA) in *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989). In its subsequent decision in *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, the Court held that lesser benefits provided in the ODA violated equal protection guarantees but that decision applies only to the post-1987 ODA; *Henry* did not overrule *Eastman* even though it may have undermined the rationale for that decision. A lower court cannot overrule a Supreme Court decision, therefore, the Workers' Compensation Court must follow *Eastman* in a case arising under the 1983 ODA.

Constitutional Law: Standing. Constitutional challenges to statutes which do not govern a claimant's request for benefits will not be considered.

¶1 The trial in this matter was held in Kalispell, Montana, on July 14, 2003. Petitioner, Ruben Fellenberg (claimant), was present and represented by Mr. Jon L. Heberling. Respondent, Transportation Insurance Company (Transportation), was represented by Mr. Todd A. Hammer.

¶2 Exhibits: Exhibits 1 through 5, 13, 17 through 32, 34 through 38, 40 through 60 (except 60-16 and 60-17 which were withdrawn), 61, and 64 were admitted with the proviso that

those exhibits with relevancy objections will only be considered if the Court deems them to be relevant. Exhibits 33 and 39 were withdrawn. Exhibit 62 was admitted as a demonstrative exhibit only. Exhibit 63 was refused. There are no exhibits 6 through 12, 14 through 16, or 56 through 59.

¶3 Witnesses and Depositions: Claimant, Dr. Alan C. Whitehouse, James Belknap, Norman Johnson, and Sandy Reichhoff testified at trial. In addition, the parties submitted the depositions of claimant, Dr. Dana Headapohl, Dr. C. Paul Loehnen, Dr. Alan C. Whitehouse, Sandy Reichhoff, and Norman Johnson for consideration by the Court.

¶4 Pending Motions: A motion for summary judgment was filed but a decision on the motion was deferred. The issues raised in the motion will be addressed in this decision.

¶5 Issues Presented: The issues as set forth in the Pretrial Order, filed July 9, 2003, are:

¶5a Is Petitioner entitled to the payment of temporary total and/or permanent total disability benefits and if so as of what date?

¶5b Is Petitioner entitled to the payment of permanent partial benefits and if so as of what date?

¶5c Is Petitioner entitled to a *Holton* disability award and is it a PTD benefit?

¶5d Are Occupational Disease Act § 39-72-703, MCA (1985) (no PPD in OD cases), § 39-72-405(2), MCA (1985) (\$10,000 limit on PPD), § 39-72-103, MCA (1985) (no vested rights), § 39-72-706, MCA (1985) (apportionment) unconstitutional as violative of equal protection of the laws?

¶5e Did Petitioner voluntarily retire and withdraw himself from the labor market, and if so, is there a causal connection between any claim for indemnity benefits and his condition or occupational disease?

¶5f Must the Court reach the constitutional issues of this case if it decides issue (e) in favor of Respondent?

¶5g Is Petitioner entitled to a penalty?

¶5h Is Petitioner entitled to attorney fees?

(Pretrial Order filed July 9, 2003.)

¶6 Having considered the Pretrial Order, filed July 9, 2003, 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

¶7 The claimant is presently seventy-nine years old. He suffers from restrictive lung disease due to tremolite asbestos exposure, commonly called asbestosis or asbestos lung disease. His primary symptom is severe shortness of breath.

¶8 The claimant worked for W.R. Grace and its predecessor, Zonolite Company, at a mine near Libby, Montana, from June 1958 until July 1986. (Uncontested Fact 1.) During his work at the mine he was exposed to tremolite asbestos.

¶9 On March 21, 1985, the claimant was diagnosed with asbestosis. (Ex. 43 at 10.) Dr. Alan C. Whitehouse, who is board certified in internal medicine and pulmonary diseases, made the diagnosis. (*Id.*) At that time, the effects of the disease were mild, consisting of mild shortness of breath. Dr. Whitehouse wrote at that time:

He is dyspneic on climbing stairs, but really is not severely short of breath otherwise. On examination his chest was entirely clear. His chest x-ray does show pleural thickening bilaterally and some interstitial disease at both bases. This is not appreciably changed since films taken in September of 1984. His pulmonary functions show some mild abnormalities. There is a mild restrictive defect and possibly some mild obstruction, but predominately a mild restrictive defect which is consistent with the degree of asbestosis that he has.

I think Mr. Fellenberg does have asbestosis. He has two of the major findings, that is, interstitial fibrosis and pleural thickening. I did not see any calcification on his x-ray though. There is a suggestion on the PA film, but I cannot be definite about that.

(*Id.*) Dr. Whitehouse did not believe the claimant was significantly disabled as a result of the disease. (*Id.* at 11.)

¶10 On March 25, 1985, the claimant filed a claim for compensation alleging that he was suffering from asbestos-related lung disease arising out of his employment at the Libby mine. (Ex. 1.)

¶11 At the time of the claim, W.R. Grace was insured by Transportation. In its responsive pleadings, Transportation initially denied liability for the claim. However, after a post-petition medical examination of the claimant by an occupational disease panel, Transportation accepted liability for the claim. (Court File: February 21, 2003 letter of Todd A. Hammer to Judge McCarter.)

¶12 The claimant retired from W.R. Grace in 1986 at age 62. He elected early social security retirement benefits, which he has been receiving since 1986. Since 1986 he has also been receiving a company pension from W.R. Grace.

¶13 The claimant has not actively sought employment since his retirement in 1986. He has done a few odd jobs and some woodworking as a hobby. It is clear to me, and I find, that upon retiring in 1986 he had no interest or intent to seek regular, gainful employment ever

again. This finding is a matter of fact for the Court to determine: it is not a matter of opinion requiring expert vocational testimony or opinion.

¶14 There is no evidence that at the time of his 1986 retirement that the claimant was disabled or precluded from employment, including the job at which he was working at the time of his retirement. He did **not** retire on account of his occupational asbestos disease.

¶15 Over the years since his retirement, the claimant's lung disease has become progressively worse, especially over the last five years. He has experienced increasing shortness of breath. At present he becomes breathless with even minimal activity. For example, he has to stop to catch his breath when walking one hundred fifty feet. He has to stop to catch his breath climbing thirteen stairs from the basement of his house. Nonetheless, he drives, does his own shopping, mows his lawn on a riding lawnmower, and uses a snow blower to clear snow. He also does volunteer bookkeeping for the VFW for three to three and a half hours a day three days a week.

¶16 In his testimony, Dr. Whitehouse described the insidious and progressive nature of the claimant's asbestos disease. The disease is caused by "tremolite" asbestos fibers. Tremolite fibers are needle like and penetrate the lung more deeply than other, more common types of asbestos fibers which have a serpentine structure. They are too small to be expelled, therefore they lodge in the inner surfaces of the lung and slowly migrate outward until they reach the pleura, which is the thin membrane which covers the outside of the lungs. Dr. Whitehouse described the pleura as an "expansible" membrane much like a balloon. As tremolite fibers penetrate and impregnate the pleura, the pleura thickens and takes on an orange-rind appearance. The thickening causes the pleura to be less elastic and expansive, thus limiting inspiration (inhaling).

¶17 Tremolite asbestos disease is primarily a "restrictive" airway disease, restrictive meaning that inspiration is compromised or diminished. An "obstructive" airway disease, for example "Chronic Obstructive Pulmonary Disease," is one in which the ability to exhale air from the lungs is compromised.⁽¹⁾ "Interstitial Lung Disease" involves inflammation and scarring of the interstitium, which is the tissue between the air sacs (alveoli) of the lungs. Dr. Whitehouse testified that tremolite asbestos disease is primarily a restrictive air disease caused by the thickening of the pleura, although some interstitial scarring and component may also be present.

¶18 As the disease progresses it becomes more difficult for individuals suffering from tremolite asbestos disease to sufficiently oxygenate their blood, especially when engaged in activity. The disease is irreversible and ultimately leads to respiratory failure and death. However, the disease has a long latency period, ranging from ten to twenty years. Once evident, it progresses slowly, thus the individuals with the disease may die of other causes rather than their tremolite asbestos disease.

¶19 While there are several tests of lung function, the most easily understood and graphic measure of the claimant's declining lung function over the years is his "Total Lung Capacity," which is the "vital capacity" plus the "residual capacity" of the lungs. "Vital capacity" is "the breathing capacity of the lungs expressed as the number of cubic inches or cubic centimeters of air that can be forcibly **exhaled** after a full inspiration." Encyclopedia Britannica Dictionary (2003 Electronic Ed.). "Residual capacity" is the amount of air that **remains** after expiration, i.e., the amount of air that remains in the lung. Thus, "Total Lung Capacity" is simply the total amount of air the lungs will hold.

¶20 The claimant's total lung capacity has declined from ninety-one percent in 1991 to fifty-four percent in 2003. The percentages are based on predicted total lung capacity adjusted for the claimant's age, thus his 2003 lung capacity is only fifty-four percent of what is predicted or expected for individuals in his age group. (Headapohl Dep. at 78.)

¶21 In 2003, the claimant's blood oxygen saturation dropped to 86 percent upon walking on level ground for 200 to 250 feet. Normal saturation adjusted for altitude is 92 to 93 percent. Medicare reimbursement pays for supplemental oxygen at an 88 percent level, and in fact the claimant uses supplemental oxygen on a limited basis. In practical terms, the claimant's lowered saturation means that he is capable of only minimal activity.

¶22 In 2000, the claimant suffered from a pleural effusion, which is an accumulation of fluid in the chest cavity as a result of weeping from the pleura and lung capillaries. Untreated, the effusion would have solidified, further restricting his ability to breathe. The condition was successfully treated with surgery which involved draining of the fluid and stripping off a fair amount of the pleural thickening.

¶23 Based on the 5th Edition of the American Medical Association's Guides to Evaluation of Permanent Impairment ("AMA Guides")⁽²⁾, Dr. Whitehouse rated the claimant's respiratory impairment at fifty percent of the whole person. (Ex. 43 at 121.) If not confined by the AMA Guides, Dr. Whitehouse estimated the claimant's impairment for his lung disease at seventy percent. That figure was based on his "own judgment" rather than any published impairment scale. (Trial Test.)

¶24 However, as a result of the claimant's lung disease, the claimant also has secondary pulmonary hypertension, which is rated separately in the AMA Guides. Pulmonary hypertension is also called "cor pulmonale," which is "disease of the heart characterized by hypertrophy and dilatation of the right ventricle and secondary to disease of the lungs or their blood vessels." Encyclopedia Britannica Dictionary (2003 Electronic Ed.). Based on the 5th Edition AMA Guides, Dr. Whitehouse rated the claimant's impairment for that condition at seventy percent of the whole person. Combining the impairment ratings for lung disease and pulmonary hypertension, Dr. Whitehouse arrived at an eighty-five percent overall, whole person impairment rating for the claimant.

¶25 Based on the claimant's lung function tests, Dr. Whitehouse concluded that the claimant was unable to work and totally disabled as of 1998.

¶26 Two other physicians testified on behalf of the insurer by way of depositions. They were Dr. Dana Headapohl, who specializes in occupational and environmental medicine, and Dr. C. Paul Loehnen, who is board certified in internal medicine and pulmonary disease. Neither physician disagreed that the claimant is suffering from asbestos lung disease and that he has a serious impairment, however, they rated his impairment at forty percent for lung disease and testified that he could perform sedentary work even if he needed supplementary oxygen.

¶27 Dr. Headapohl testified that the claimant's lung function puts him into class three of respiratory disorders for purposes of the 5th Edition of the AMA Guides, and that the range of impairment for that class is twenty-six percent to fifty percent. (Headapohl Dep. at 53.)

¶28 There is also a dispute regarding the contribution of non-occupational factors to the claimant's lung disease. Dr. Loehnen ascribed ten percent of the claimant's lung disease to obesity while Dr. Whitehouse did not. Dr. Whitehouse's opinion was supported by a medical treatise recognized by Dr. Loehnen as authoritative and I find his opinion more persuasive.

¶29 With respect to the impairment rating and apportionment, this is a case in which I apply the "treating physician rule." That rule provides that the opinions of a treating physician, though not conclusive, are entitled to greater weight, at least where the medical evidence is otherwise evenly balanced. *Key v. Liberty Northwest Insurance*, 2001 MTWCC 53, ¶ 30. All of the impairment ratings in this case were substantial. The ten percent difference (forty versus fifty percent) in the respiratory impairment rating appears to simply be a difference in medical judgment on the part of the physicians, and I find no good reason to prefer the forty percent rating given by the medical panel over that of Dr. Whitehouse, the treating physician. The additional impairment rating on account of cor pulmonale which was rendered by Dr. Whitehouse was not addressed by the medical panel and I find no good reason to disregard it. I therefore adopt Dr. Whitehouse's rating and find that the claimant's impairment on account of his tremolite asbestos disease is eighty-five percent of the whole person. I also adopt his one hundred percent attribution of the claimant's disabling lung disease to his occupation.

¶30 With regard to the claimant's physical ability to work, Dr. Headapohl testified that the claimant can physically perform sedentary work:

A. Given the fact that the patient was in a heavy-duty position for most of his life, I think it would be difficult for him to find a job that would be primary sedentary in nature but not impossible. If--this--I wouldn't consider him unemployable, but I would consider Mr. Fellenberg to have significant limitations in terms of what he

would be able to do vocationally, so I guess--I don't agree that he would be unable to perform any type of work. He's clearly driving around and vacationing and so forth. He can drive, he can do cognitive activities. He would have difficulty with any kind of activity that would require significant physical aerobic activity. So, for example, he would be compatible with jobs that would be primarily sedentary and not put any increased pulmonary demands on him.

(Headapohl Dep. at 36.) As an example of work the claimant might do, Dr. Headapohl testified that St. Patrick's Hospital in Missoula hires greeters and other sedentary employees who have physical restrictions equivalent to those of the claimant. (*Id.* at 38-39, 41.)

¶131 I agree with Dr. Headapohl's analysis that the claimant is not precluded from sedentary employment. His current activities indicate he can do sedentary work on a ten-hour-a-week basis and there is no indication that his ten-hour-a-week volunteer bookkeeping job unduly taxes him. In light of his other activities, I am unpersuaded that he could not do sedentary work on a full-time or at least on a substantial part-time basis if he were inclined to do so, at least at present. However, since the claimant's asbestos lung disease is progressive, his condition is likely to deteriorate in time, thus it is likely that he will ultimately be unable to do even sedentary work.

¶132 The claimant presented vocational testimony by Norman Johnson (Johnson), a certified vocational counselor. Johnson identified motel desk clerk and retail sales clerk as potential jobs for the claimant. Based on the wages for those occupations, he testified that the claimant has suffered a sixty percent loss of earning capacity. However, the jobs he identified were classified as light. Since the claimant is limited to sedentary positions, Johnson concluded that there are no jobs left in the claimant's job market and he has a loss of earning capacity of one hundred percent.

¶133 Transportation presented testimony by Sandy Reichhoff (Reichhoff), who is also a vocational rehabilitation counselor. She criticized Johnson's methodology in reaching his conclusions. I found her criticism persuasive in many respects.

¶134 But the main difficulty I had with Johnson's testimony was his failure to identify or even attempt to identify sedentary positions for which the claimant is qualified. The obvious example, within common experience, of a sedentary position commonly filled by workers over age sixty-five is that of a Wal-Mart greeter. Dr. Headapohl also testified as to a specific job as a hospital greeter at St. Patrick's Hospital in Missoula, a job she indicated the claimant can do. The Court, as the finder of fact, is not bound by any expert's opinion and is free to adopt any reasonable conclusion supported by the evidence. See *Tefft v. State*, 271 Mont. 82, 94, 894 P.2d 317, 325 (1995). I find Johnson's analysis unpersuasive to the extent that he finds there are no jobs the claimant can do. However, since his identification of light-duty jobs was uncontradicted, and there is no evidence of higher paying sedentary

jobs, I find Johnson's testimony that the claimant suffered a loss of earning capacity of sixty percent to be persuasive. This finding, however, assumes that he did not retire or withdraw from the labor market.

CONCLUSIONS OF LAW

¶135 The claim in this case was submitted on March 25, 1985, at which time the 1983 version of the Occupational Disease Act (ODA) was effective. The general rule in workers' compensation cases is that the law in effect at the time of the injury applies to any claim for benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Under that rule, the 1983 version of the ODA applies in this case.

¶136 The claimant, however, argues that the 1985 version should apply. He bases his argument on the fact that the claimant's last day of work was on July 27, 1986, when the 1985 version was in effect. He cites *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 39, 717 P.2d 21 (1986), in support of his argument. *Gidley*, however, dealt with a disease which was not discovered until **after** the claimant had ceased working, thus the claim was filed after his retirement. The statute of limitations in effect at the time required the claimant to file his claim within three years of his last day of work. Under those circumstances, the Court held that the applicable law was the law in effect on the last day of employment. This case is different: Here the disease was discovered prior to the claimant's retirement. Moreover, he filed a claim prior to retirement. Both events occurred while the 1983 version of the ODA was in effect, therefore, under *Buckman*, it is that version of the law that governs his right to benefits.⁽³⁾

¶137 The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *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).

¶138 With that said, I address each of the issues raised in the Pretrial Order, filed July 9, 2003, in the order they were raised.

I. Temporary Total and Permanent Total Disability Benefits Request

¶139 The first listed issue in this case is whether the claimant is entitled to either temporary total disability (TTD) benefits or permanent total disability (PTD) benefits. However, in his proposed findings of fact and conclusions of law the claimant appears to ask only for PTD commencing October 15, 1998. (Petitioner's Proposed Findings of Fact, Conclusions of Law and Judgment at 31-32.)

¶140 Total disability benefits are available under the ODA to the same extent as under the WCA. Section 39-72-701(1), MCA (1983),⁽⁴⁾ provides:

39-72-701. Compensation for total disability or death due to occupational disease other than pneumoconiosis. (1) The compensation to which an employee temporarily totally disabled or permanently totally disabled by an occupational disease other than pneumoconiosis, or the beneficiaries and dependents of the employee in the case of death caused by an occupational disease other than pneumoconiosis, are entitled under this chapter **shall be the same payments which are payable to an injured employee**, and such payments shall be made for the same period of time as is provided in cases of temporary total disability, permanent total disability, and in cases of injuries causing death under the Workers' Compensation Act. [Emphasis added.]

The payments to "injured" employees are those payments specified in the WCA.

"Temporary total disability" and "permanent total disability" are encompassed within the definition of "disablement" in the definitions section of the ODA. Section 39-72-102(3), MCA (1983), defines "disablement" in relevant part, as follows:

(3) "Disablement" means the event of becoming physically incapacitated by reason of an occupational disease from performing work in the normal labor market. . . .

"Disability", "total disability", and "totally disabled" are synonymous with "disablement", but they have no reference to "partial permanent disability".

From this definition, it is clear that claimants suffering from occupational diseases are entitled to the same temporary and permanent total disability benefits as injured workers under the WCA.

¶41 The amount of benefits payable for permanent and temporary total disability benefits is not in dispute as the statutes are clear. Section 39-71-701, MCA (1981-1985), governs TTD. Section 39-71-702, MCA (1981-1985), governs PTD. Under both sections, the amount of benefits shall be equal to two-thirds of the claimant's wages but no more than the state's average weekly wage at the time of injury.

¶42 Temporary and permanent total disability are not defined in the ODA, however, they are defined in the WCA. I therefore consider the WCA definitions in determining whether the claimant is entitled to either temporary or permanent total disability benefits.

¶43 Section 39-71-116(19), MCA (1983), defines TTD as follows:

(19) "Temporary total disability" means a condition resulting from an injury as defined in this chapter that results in total loss of wages and exists until the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence.

The section has two requirements. The first is that the claimant suffers total wage loss on account of his work-related condition. The second is that the claimant has not reached

MMI with respect to his work-related injury. Neither requirement is satisfied in the present case. The claimant has not suffered a wage loss as a result of his disease. He voluntarily retired while still capable of working and did not intend to work again. He also has reached MMI and indeed was at MMI at the time of his initial diagnosis in 1985 since his disease is a degenerative one and he will never get better no matter what medical treatment is afforded him. Thus, he is not entitled to TTD benefits.

¶44 Section 39-71-116(13), MCA (1983), defines permanent total disability. It provides:

(13) "Permanent total disability" means a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market. Disability shall be supported by a preponderance of medical evidence.

The claimant has no "loss of actual earnings" since he retired in 1986 for reasons unrelated to his occupational disease and has neither desired nor sought further employment. He also has not satisfied me that he has a total loss of earning capability, i.e., that he has "no reasonable prospect of finding regular employment of any kind in the normal labor market," although he will undoubtedly reach that point sometime in the future as his lung function continues to diminish and he becomes unable to perform even sedentary jobs. Thus, he is not at present entitled to PTD benefits.

¶45 Moreover, even if the claimant were presently or in the future becomes PTD, he is still not eligible for PTD benefits. Section 39-71-710, MCA (1981-1985), specifically provides for termination of such benefits when a claimant receives social security retirement benefits. The section provides:

39-71-710. Termination of total disability benefits upon retirement. If a claimant is receiving total disability compensation benefits and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, the claimant is considered to be retired and no longer in the open labor market. When the claimant is considered retired, the liability of the insurer is ended for payment of such compensation benefits. This section does not apply to permanent partial disability benefits. Medical benefits are expressly reserved to the claimant.

Since the ODA provides that the benefits payable to disabled workers suffering from occupational diseases are the same as payable to injured workers, this section applies. It precludes PTD benefits since the claimant has been receiving social security retirement benefits since 1986.⁽⁵⁾

II. Permanent Partial Disability Benefits

¶46 The ODA expressly provides that permanent partial disability (PPD) benefits are not available to workers suffering from occupational diseases. Section 39-72-703, MCA (1979-2003), provides, "No compensation as provided in 39-72-701 is payable to an employee who is partially disabled from an occupational disease."

¶47 However, if the claimant meets the definition of permanent total disability he may be entitled to an award of permanent partial disability benefits based on that status. See *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986). In *Hunter*, the Supreme Court held that a permanently totally disabled worker is entitled to permanent partial disability benefits upon retiring. The ODA's preclusion of permanent partial disability benefits, § 39-72-703, MCA (1979-2003), would not appear to apply since under *Hunter* the benefit flows from permanent total disability status and is available to permanently totally disabled workers who suffer injuries. However, since the claimant has failed to persuade me that he is permanently totally disabled at present, I need not consider the applicability of *Hunter* in the present case.

III. Impairment Award

¶48 The claimant argues that he should be paid an impairment award immediately. He cites *Holton v. F. H. Stoltze Land and Lumber Co.*, 195 Mont. 263, 637 P.2d 10 (1981) and *Rausch v. State Compensation Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25 as authority for his request.

¶49 *Holton* held that an impairment rating is immediately payable. However, that determination was in a permanent partial disability case and the Court only held that the impairment award established the insurer's minimum liability for PPD benefits. 637 P.2d at 14. The claimant argues that this Court should extend the *Holton* award to permanently totally disabled claimants, pointing out that in *Rausch* the Supreme Court held that under 1991 and 1997 laws an impairment award is "for the loss of physical function of their body occasioned by a work-related injury," is not tied to PPD benefits, and is payable to PTD as well as PPD claimants. *Rausch* at ¶ 30.

¶50 The claimant's argument is alluring, however, it flies in the face of *Grimshaw v. L. Peter Larson Co.*, 213 Mont. 291, 691 P.2d 805 (1984), which expressly held that under pre-1985 statutes the *Holton* or impairment award is a PPD benefit and is not available to the claimants receiving PTD benefits.⁽⁶⁾

¶51 Discussing its *Holton* decision, the Court said in *Grimshaw*:

Holton did not address the issue of what to do with the impairment claim when total disability benefits were currently being paid. The context of the opinion, though, suggests that physical impairment is a component of partial disability benefits, and dependent thereupon for legal efficacy. **If the claimant is not presently entitled to receive partial disability benefits, *Holton* does not apply.**

213 Mont. at 296, 691 P.2d at 807 (emphasis added). At the time of the claimant's request, the claimant was receiving total rehabilitation benefits. The Court held that the claimant was not entitled to an impairment award based on an eighteen percent impairment rating until he had completed rehabilitation and became entitled to PPD benefits, at which time he would then become entitled to immediate payment of an eighteen percent impairment award.

¶52 Perhaps the analysis in *Rausch* presages a revisiting of *Grimshaw*. However, any revisit will have to be by the Supreme Court. This Court has no authority to overrule Supreme Court decisions.

¶53 If and when the claimant becomes entitled to an impairment award, he is entitled to a minimum 85 percent award, which amounts to 425 weeks of benefits at his permanent partial disability rate. I note, however, that in light of the progressive nature of his disease, his impairment may increase over time.

IV. Constitutional Challenges

¶54 The claimant attacks the constitutionality of sections 39-72-703, MCA (1983) (no PPD in OD cases), 39-72-405 (1983), (\$10,000 limit on benefits in lieu of PPD benefits), 39-72-103, MCA (1983), (no vested rights), and 39-72-706, MCA (1983), (apportionment).

¶55 I fail to see the basis for the challenge to section 39-72-103, MCA (1983). I have held that the 1983 law applies. The section therefore has no application to the present case.

¶56 With respect to section 39-72-405, MCA (1983), the claimant has no standing since he has not requested benefits under that section. The limitation therefore does not come into play. What he is really challenging is the constitutionality of section 39-72-703, MCA (1983), which denies him and other claimants who suffer from occupational diseases the PPD benefits which are available to injured workers.

¶57 I therefore consider only the challenges to sections 39-72-703 and 39-72-706, MCA. Those challenges are based on equal protection. However, the pre-1987 ODA has been held not to violate equal protection guarantees. *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989). While the rationale of *Eastman* may have been seriously undermined in *Henry v. State Compensation Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, the Supreme Court has not overruled *Eastman* and this Court does not have the authority to do so. I therefore decline the claimant's invitation to declare the sections unconstitutional.

V. Voluntary Retirement

¶58 I have found as a matter of fact that the claimant voluntarily retired and withdrew from the labor market in 1986. The legal ramifications of that retirement are addressed in connection with his various requests for benefits.

VI. Necessity of Deciding Constitutional Issues

¶159 I have already addressed the constitutional challenges. No further discussion is necessary.

VII. Penalty Request

¶160 A penalty must be assessed against the insurer if and only if the insurer has unreasonably denied benefits due the claimant. Section 39-71-2907, MCA (1983), provides:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. When payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant, between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits, may be increased by the workers' compensation judge by 20%. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein.

Since I have found that the claimant is not presently due the benefits he demands, there is no basis for a penalty.

¶161 Moreover, even if I were to find that some or all of the benefits he seeks are in fact due, the factual and legal challenges raised by the insurer are well within the pale of legitimate dispute and advocacy. Factually, there was conflicting testimony regarding the impairment award and substantial evidence undermining the opinions of the claimant's vocational consultant. Even if I am wrong in my legal analysis, the insurer's arguments are substantial and merit consideration. There is no basis for any penalty.

VIII. Attorney Fee Request

¶162 Under the 1983 law, if the claimant prevails he is entitled to attorney fees irrespective of the reasonableness of the insurer's defense. §§ 39-71-611, MCA (1979-1985), and 39-71-612, MCA (1975-1983). However, since the claimant has not prevailed, he is not entitled to attorney fees.

JUDGMENT

¶163 The claimant is not entitled to indemnity benefits of any sort at this time. His petition is therefore **dismissed**. However, since he may in the future become entitled to benefits, dismissal is **without prejudice**.

¶64 This JUDGMENT is certified as final for purposes of appeal.

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

DATED in Helena, Montana, this 19th day of March, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Jon L. Heberling

Mr. Todd A. Hammer

Submitted: July 25, 2003

1. Dr. Whitehouse testified that the claimant does not have an obstructive disease. Drs. Headapohl and Loehnen disagreed but their testimony indicated that any obstructive component is a minor component. I find that if there is an obstructive component it is negligible.

2. None of the physicians who rated the claimant's impairment used any earlier edition of the AMA Guides.

3. I have not attempted to compare the 1983 and 1985 versions of the ODA to determine if differences in those laws would make a difference in this case. I have focused entirely on the 1983 version.

4. The section was last amended in 1981. Thus, the current version is the same as in 1983.

5. However, see discussion of permanent partial disability benefits as a benefit available to permanently totally disabled workers, paragraphs 46-47.

6. The decision was based on section 39-71-737, MCA, which at that time precluded concurrent payment of different classes of benefits. Section 39-71-737, MCA, was amended in 1985 in light of *Grimshaw* so that impairment awards could be paid concurrently with total disability benefits. 1985 Mont. Laws, ch. 374, § 2; and see *Reeverts v. Sears, Roebuck & Co.*, 266 Mont. 509, 516, 881 P.2d 620, 624 (1994). The 1985 amendment was not effective at the time the claimant filed his claim and is therefore inapplicable.